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FULL BENCH—Appeals against decision of Commission—

2026 WAIRC 00872

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 34 OF 2025 GIVEN ON 25 MARCH 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2026 WAIRC 00872
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG
HEARD	:	FRIDAY, 14 AUGUST 2026
DELIVERED	:	THURSDAY, 17 SEPTEMBER 2026
FILE NO.	:	FBA 9 OF 2026
BETWEEN	:	MATTHEW TRAN Appellant AND EAST METROPOLITAN HEALTH SERVICE Respondent

ON APPEAL FROM:

Jurisdiction	:	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	:	**COMMISSIONER T EMMANUEL**
Citation	:	**[2026] WAIRC 00175**
File No	:	**U 34 OF 2025**

Catchwords	:	Industrial Law (WA) – Appeal against decision of the Commission – Applications to adduce fresh evidence – Relevant principles applied – Documents were available or obtainable with reasonable diligence at first instance – Documents not relevant to matters in issue – Documents would not have led to a different outcome – Applications dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) s 49(4)(a)
Result	:	Interlocutory applications dismissed
Representation:		
Appellant	:	In person
Respondent	:	Ms S Walsh of counsel

Case(s) referred to in reasons:

Underdown v Dowford Investments Pty Ltd [2005] WAIRC 01243; (2005) 85 WAIG 1437

Reasons for Decision

THE FULL BENCH:

Brief background

1 The appellant has an appeal to the Full Bench on foot against a decision of the Commission, dismissing his unfair dismissal claim. The background to the proceedings at first instance is set out in the reasons for decision of the learned Commissioner at [9]-[15] (see AB251-252) as follows:

> **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.

2 The matter was heard before the Commission. The appellant gave evidence on his own behalf, along with expert medical evidence adduced on behalf of the respondent. To the extent the evidence of the appellant was inconsistent with evidence adduced on behalf of the respondent, the learned Commissioner preferred the expert evidence of Dr Sevar in the Sevar Report. On the basis of the evidence adduced and the submissions made at first instance, the Commission found and concluded at [32]-[36] as follows (see AB257-258):

> [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.

3 In terms of her conclusions, the learned Commissioner came to the view, based on the evidence and submissions before her, that the respondent's decision to dismiss the appellant was not in the circumstances, harsh oppressive or unfair. At [43]-[45] the learned Commissioned observed (see AB260-261) as follows:

[43] … 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.

4 Accordingly, the application was dismissed.

Applications

5 The appellant has filed four interlocutory applications for leave to introduce new evidence with those applications being filed on 8, 16, 28, and 30 July 2026. A fifth application was filed on 6 August 2026.

6 The applications were listed for hearing before the Full Bench. At the hearing, the appellant informed the Full Bench that his application for the tender of new evidence filed on 6 August 2026 is a composite of his earlier applications, and was the application pressed in the proceedings. In support of the application to tender new evidence, the appellant filed a document entitled 'Appellant's Response to Respondent's Response filed 3 August 2026'.

7 At the hearing of the application, Mr Tran relied upon his written response. In it, the appellant set out the various categories of documents he sought leave to tender and why he considered that the material should be admitted. We will deal with each of the documents sought to be tendered in evidence in the order dealt with in the appellant's written submissions. Each is marked with a distinguishing 'MT…'

Relevant principles

8 An appeal is to be heard and determined on the evidence and matters raised in the proceedings before the Commission at first instance: s 49(4)(a) *Act*. There is a limited exception to this, where evidence is sought to be adduced on appeal that is 'fresh'. The relevant principles were explained by the Full Bench in ***Underdown v Dowford Investments Pty Ltd*** [2005] WAIRC 01243; (2005) 85 WAIG 1437. In that case, Sharkey P and Kenner C (as he then was) (with Scott C agreeing) said at [8]-[9] as follows:

[8] The evidence is fresh evidence and can only be admitted if certain conditions are complied with (see *FCU v George Moss Limited* 70 WAIG 3040 (FB) and see *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694 (FB)). The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not "available to the appellant at the time of the trial" and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached.

[9] We would add that, in *FCU v George Moss Limited* (FB) (op cit), we put the effect of this last condition too low by saying that the evidence sought to be admitted is required to be such that it would have had an important influence on the result of the hearing at first instance, and we wish to retract what we said in that case and substitute what we have said about the almost certain opposite result being likely to be achieved.

Documents sought to be tendered

6 January 2025 email (MT01)

9 This email and its attachments comprising a WorkCover WA progress certificate dated 6 January 2025, were said to be supportive of the appellant's assertion that he had some capacity for work from 6 January 2025 to 3 February 2025. It was submitted that the purpose of the tender of this document was to illustrate that the learned Commissioner and the respondent failed to understand how salary continuance insurance operates. Furthermore, the appellant asserted that the documents establish that his claim for salary continuance insurance was assessed periodically and in this case, as of 6 January 2025, show that he had some capacity for work.

10 The relevance of these documents is unclear. There was reference in the learned Commissioner's findings that the appellant was in receipt of salary continuance insurance from September 2023 until about September 2025, on the basis that he was fully unfit for work (see AB231). Furthermore, as noted by the respondent, the appellant admitted in his evidence that he received salary continuance insurance on the basis that he was fully unfit for work (see transcript at first instance p 31).

11 It is difficult to see therefore, how the 6 January 2025 email with the attached WorkCover WA progress certificate, could have any bearing on the matter, and certainly could not have led to a different outcome. More problematic for the appellant, is that this material was plainly in his possession as at 6 January 2025, well before the matter was heard before the Commission on 4 February 2026. The material was therefore available to the appellant at the time of the hearing, or could have been made available to him with reasonable diligence. These documents will not be admitted.

Bundle of seven sealed WorkCover WA progress certificates (MT02)

12 These documents are WorkCover WA progress certificates bearing the seal of the WorkCover WA arbitration service, over various dates from 4 July 2024 up to and including 6 January 2025. Whilst the unsealed copies were contained in the appellant's last application to tender new evidence dated 6 August 2026, we take it that those documents stamped 'MT02' were intended to be the sealed version. Again, the appellant asserted that these WorkCover progress certificates substantiated his contention that as at 6 January 2025, he had some capacity for work.

13 The appellant also submitted that as a result of an exchange between counsel for the respondent and the learned Commissioner (see transcript at first instance p 47), there may have been some clerical error on the WorkCover progress certificate forms in relation to both 'some capacity' and 'no capacity' boxes being ticked on the same form. The submission was also that the learned Commissioner failed to consider the evidence regarding the respondent's alleged failure to consult with the appellant prior to the termination of his employment.

14 The difficulty with these documents is that the unsealed versions of the WorkCover progress certificates now sought to be tendered, were in evidence before the Commission at first instance. They were scattered throughout the 643 page bundle of documents tendered by the appellant as exhibit A1. The fact that the documents now sought to be tendered, although identical, bear the stamp of the WorkCover Arbitration Service, is irrelevant. It adds nothing to the veracity of the material and is not evidence that WorkCover WA undertook its own independent assessment of the appellant's capacity for work. The WorkCover progress certificates merely record the assessment of the appellant's medical practitioner as to the appellant's state of health and capacity for work at the time of the certificate.

15 In any event, irrespective of these matters, it is clear from the dates of the WorkCover WA progress certificates now sought to be tendered, that they were either in the possession of the appellant, or could have been obtained by him with reasonable diligence. For all of these reasons the material should not be admitted.

28 January 2025 email – Volunteering (MT03)

16 The appellant contended that this email, from a volunteering organisation to the appellant dated 28 January 2025, is evidence of the appellant's capacity for work. It was submitted that as the respondent was aware of the appellant intending to do voluntary work, this document is supportive of the appellant having some capacity for work prior to the termination of his employment.

17 There are a number of difficulties with this document. First, on its face, it is dated 28 January 2025 and the appellant was the recipient. It was clearly a document in the appellant's possession, control or power, such that it must have been reasonably available to the appellant to be used in the hearing at first instance. Second, the fact that the appellant may have expressed an interest in undertaking volunteering work, laudable though that may be, it is not relevant to his capacity to perform the inherent duties of his former position with the respondent. Accordingly, for the above reasons, this evidence will not be admitted.

30 January 2025 email – AIA Australia (MT04)

18 It was submitted that this email, from AIA Income Protection, in the form of a payment advice, supports his contention that he had some capacity for work as of 6 January 2025. As we understood the appellant's argument, it was to the effect that the payslip from AIA contradicts the respondent's contention that from September 2023 to about September 2025, the appellant was either claiming his salary continuance insurance payments on the footing that he was totally incapacitated for work, or that the appellant had misled AIA in relation to this capacity for work.

19 The issue with this document falls into the same category of documents as referred to above in relation to MT01. Furthermore, the fact is the appellant still continued to receive his full monthly salary continuance payment, despite his assertion that he had some capacity for work. The AIA payslip does not contradict the respondent's position as asserted by the appellant, because, as noted above, the appellant's claim was made on the basis that he was totally incapacitated for work, which he admitted in his evidence. This document does not take the matter further.

20 In any event, given that the document is dated 30 January 2025 and it was sent to the appellant, means the appellant had the document in his possession or alternatively, he could have obtained it with reasonable diligence. There is no basis to conclude that even had it been adduced, it would be almost certain that an opposite result would have been achieved. The tender of this

document is refused.

3 February 2025 email – WorkCover WA progress certificate (MT05)

21 The appellant submitted that this document enclosing the WorkCover WA progress certificate dated 3 February 2025, demonstrates his continuing capacity for work. It was submitted that this again contradicts the respondent's contention that the appellant claimed his salary continuance insurance on the basis that he was totally incapacitated, or that the appellant had misrepresented the position to AIA.

22 It was contended that the document demonstrates that the learned Commissioner's finding that the appellant's salary continuance insurance claim from September 2023 to September 2025, based on the appellant having no capacity for work, was in error.

23 Again, there are several difficulties with the tender of this document. First and foremost, it was already tendered in evidence before the Commission at first instance in exhibit A1, the appellant's bundle of documents. Second, as with the other WorkCover WA progress certificates sought to be tendered, they do not establish that the appellant had capacity for work, in the sense of performing his substantive duties for the respondent at the material time. Third, given that the email is dated 3 February 2025 from the appellant to the addressees, it is clear that the documents were either in the possession of the appellant or could have been obtained by him with reasonable diligence.

24 The tender of these documents is refused.

6 February 2025 email – AIA Australia (MT06)

25 For the same reasons in relation to the tender of documents in relation to MT01 and MT04, the tender of these documents is refused.

10 February 2025 email – Re online induction (MT07)

26 This document relates to the appellant's proposed volunteering work and to him passing an online quiz to undertake dog training. As with the documents above sought to be tendered in relation to volunteering work in relation to MT03, they are not relevant to matters in issue in the proceedings at first instance and their tender is refused.

28 February 2025 email – Welcome Aboard (MT08)

27 This document again relates to the appellant's expression of interest in volunteering work. They confirm the appellant's acceptance for such work. There are the same difficulties with this document, as for the other documents of the same nature. First, it is dated 28 February 2025 and it was received by the appellant. Therefore, it was in the appellant's possession or could have been obtained with reasonable diligence.

28 Second, it is not apparent how such a document is relevant to the issues to be determined on the appeal, and the appellant has not established how, even if they are admitted, it would have led to a different outcome at first instance. Third, an ability to undertake volunteering work is not evidence of the appellant's capacity at the material time, to undertake the essential requirements of his former position with the respondent. Accordingly, the tender of these documents is refused.

9 April 2025 sealed WorkCover WA progress certificate (MT09)

29 This document is a WorkCover WA progress certificate dated 17 March 2025. Whilst the appellant described it as 'sealed', the copy sought to be tendered was not sealed. Even if it was, the document is not fresh evidence as it was contained in the appellant's bundle of documents at first instance, tendered as exhibit A1. In any event, even if it were new evidence, as with the other WorkCover WA progress certificates referred to above, it was either in the possession of or available to the appellant, or could have been obtained by him with reasonable diligence.

30 Furthermore, in any event, the document does not establish the appellant's contention that the learned Commissioner erred in finding that as at 2 February 2025, the appellant was claiming salary continuance insurance on the basis that he was completely unfit for work. The document, as with previous WorkCover WA progress certificates, on its face, refers to both 'some capacity for work' and also 'no capacity for work'. However, as we have noted immediately above, the document was in evidence before the Commission and is not fresh evidence. The tender of the document is refused.

Emails dated 12 May 2025 and 9 July 2025 – Work trials and return to work plans for the appellant (MT10 – MT11)

31 The appellant again contended that these documents refer to his having partial capacity for work from at least 12 May 2025, a date which we pause to add, postdates the date of the termination of his employment on 7 March 2025. The appellant, despite this, asserted that they contradicted the learned Commissioner's finding that the appellant would have had no capacity for work for the foreseeable future.

32 As with the other documents referred to above regarding volunteering work, given the dates of them, they were either copied to the appellant or plainly could have been obtained by him with reasonable diligence. Accordingly, they could not be regarded as fresh evidence. In any event, as with the above, the documents are not relevant to the issues which arise on the appeal. More particularly, there is no basis on which it could be contended that even if the material were adduced in evidence, the result at first instance would have been different. Accordingly, the tender of these documents is refused.

11 July 2025 email – Appellant to Chambers of Commissioner Emmanuel (MT12)

33 This correspondence referred to prospective listing dates for a directions hearing, which the appellant contended was relevant to him starting a return to work plan in July 2025. It was submitted that this demonstrates that the learned Commissioner failed to consider the appellant's evidence that he had capacity for work within the foreseeable future. Communications between a party and Chambers is not evidence for the purposes of the proceedings at first instance and for the purposes of this appeal. The document accordingly cannot be tendered.

15 April 2026 letter AIA Australia (MT13)

34 These documents are an email and a letter from AIA to the appellant dated 16 April 2026. The email describes the letter as a 'bank letter'. It confirms that the appellant was in receipt of income protection benefits, the period over which it applied, and the gross monthly benefit received. The letter referred to medical information AIA received which stated the appellant had partial capacity for work.

35 These documents fall into the same category as documents MT01, MT04 and MT06. In any event, the letter was written after the proceedings before the Commission concluded, and the decision of the Commission was handed down. Therefore, the documents could not possibly have led to a different outcome. The tender of these documents is refused.

Other matters

36 Finally, as to the appellant's submissions that his psychological injuries impacted on his capacity to identify, organise and communicate relevant material during the proceedings at first instance, this does not assist the appellant in these applications. The appellant referred to material, some of which was in evidence at first instance, in relation to his state of mental health at the time of the proceedings below.

37 Whilst this material was generalised and related to various issues as set out in the WorkCover WA progress certificates and various medical opinions, they do not in and of themselves in our view, bear upon the issues arising on these interlocutory applications for the tender of fresh evidence. The documents themselves simply do not satisfy the criteria for the tender of fresh evidence, irrespective of the appellant's state of mind at the material times.

38 More importantly, in terms of an attempt to explain why he may not have been diligent in obtaining and using the documents he sought to have tendered as fresh evidence above, none of them, even if they were to be permitted to be tendered, would have led to a different outcome before the Commission in the appellant's unfair dismissal claim.

Conclusion

39 For the foregoing reasons, the appellant's application to tender fresh evidence filed on 6 August 2026, and the earlier four applications to tender fresh evidence, must be dismissed.

2026 WAIRC 00873

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 34 OF 2025 GIVEN ON 25 MARCH 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW TRAN
	APPELLANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T B WALKINGTON
	COMMISSIONER C TSANG
DATE	THURSDAY, 17 SEPTEMBER 2026
FILE NO/S	FBA 9 OF 2026
CITATION NO.	2026 WAIRC 00873

Result	Interlocutory applications dismissed
Representation	
Appellant	In person
Respondent	Ms S Walsh of counsel

Order

HAVING heard Mr M Tran on his own behalf and Ms S Walsh of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appellant's applications dated 8 July, 16 July, 28 July, 30 July, and 6 August 2026 for the tender of fresh evidence be and are hereby dismissed.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2026 WAIRC 00867

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 17 OF 2024 GIVEN ON 23 JANUARY 2026 AND 15 APRIL 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2026 WAIRC 00867
CORAM	:	CHIEF COMMISSIONER S J KENNER
		COMMISSIONER C TSANG
		COMMISSIONER T KUCERA
HEARD	:	ON THE PAPERS
DELIVERED	:	THURSDAY, 17 SEPTEMBER 2026
FILE NO.	:	FBA 3 OF 2026
BETWEEN	:	DELIA GAVRIL
		Appellant
		AND
		STATE OF WESTERN AUSTRALIA
		Respondent
FILE NO.	:	FBA 14 OF 2026
BETWEEN	:	DELIA GAVRIL
		Appellant
		AND
		STATE OF WA
		Respondent

Catchwords	:	Industrial Law (WA) – Appeal against decision of Industrial Magistrate – Application for adjournment of hearing of appeals – Medical grounds – Relevant principles applied – Adjournment refused – Appeals to proceed based on filed written submissions
Legislation	:	*Industrial Relations Act 1979* (WA) s 22B, s 26(1)(a), s 26(1)(c), s 97A
Result	:	Order issued
Representation:		
Appellant	:	In person
Respondent	:	Mr J Carroll of counsel

Case(s) referred to in reasons:

Gavril v State of Western Australia [2026] WAIRC 00031

Gavril v State of Western Australia [2026] WAIRC 00217

Myers v Myers [1969] WAR 19

Reasons for Decision

THE FULL BENCH:

Brief background

1 The Full Bench has before it two appeals in FBA 3 of 2026 and FBA 14 of 2026 which by order dated 22 June 2026, were joined and are to be heard and determined together. Both appeals arise from decisions of the Industrial Magistrates Court, which dismissed the appellant's claim of damaging action under s 97A of the *Industrial Relations Act 1979* (WA), and made an order for costs in those proceedings: ***Gavril v State of Western Australia*** [2026] WAIRC 00031; [2026] WAIRC 00217).

2 The appeals were listed for hearing before the Full Bench on Wednesday, 16 September 2026.

3 Late in the afternoon of Monday, 14 September 2026, the appellant emailed Chambers that due to an acute medical episode, she attended her general practitioner for an assessment. As a result of that assessment, a medical certificate was issued declaring the appellant unfit for a period of one month from 14 September 2026 to 12 October 2026 inclusive. The appellant

maintained that in the circumstances, she was not medically fit to continue to prepare for, or to participate in the appeal proceedings on 16 September 2026. Accordingly, the appellant sought an adjournment of the hearing until a date after the expiry of her medical certificate, subject to further order of the Full Bench, and that the hearing listed for 16 September 2026 be vacated.

4 The respondent opposed the appellant's request for an adjournment. It noted that the appeal in FBA 3 of 2026 has been on foot since 13 February 2026. Furthermore, that the appellant, for medical reasons, could not participate in the Full Bench proceedings for a period from 28 April 2026 to 28 July 2026 as she contended that she would be unfit to undertake any work related to the appeals over that period.

5 However, it was noted by the respondent that despite this, the appellant filed a second appeal against the costs decision, the subject of the appeal in FBA 14 of 2026. The respondent further noted that the grounds of appeal in appeal FBA 14 of 2026 against the costs order are lengthy, running to some 20 pages. Additionally, the appellant filed and relied upon, a detailed statutory declaration made on 4 May 2026, in support of an application to stay the costs order in PRES 13 of 2026, filed on 6 May 2026. The inference from all of this being that the appellant, despite her assertion that she was unfit to undertake any work related to her court cases over the period of 28 April to 28 July 2026, undertook significant work.

6 Accordingly, the respondent first submitted that without further medical evidence, the Full Bench could not be satisfied that the medical certificate provided to Chambers truly states her present fitness to conduct her appeals. Second, that the substantive appeal in FBA 3 of 2026 has already been significantly delayed and a further delay, to mid-October 2026, would constitute a delay of approximately nine months since the commencement of the appeal. The respondent submitted that it would suffer prejudice if ultimately, the substantive appeal in FBA 3 of 2026 is upheld and the matter is remitted for further hearing and determination. This is so given the impact of delay on witness' memories, especially in light of the reverse onus of proof in s 97A(2) of the *Act*, and that the first instance proceedings were civil penalty proceedings.

7 Third, the respondent contended that it was unclear whether the appellant's present unfitness was related to the effect of stress and anxiety arising from her conduct of the appeals and if so, this is a matter unlikely to be remedied by any further adjournment.

8 As a consequence of all of these matters, the Full Bench requested the appellant to furnish more detailed medical advice. In a further medical certificate from her general practitioner provided to Chambers on 15 September 2026, there was some elaboration, but in the respondent's view, it did not take matters much further. The respondent maintained its objection to the adjournment application.

9 Accordingly, the Full Bench informed the parties that it would hear the appellant's application to adjourn as a preliminary matter at the hearing on 16 September 2026. At 8.30 am on the morning of 16 September 2026, Chambers was sent an email from the appellant advising that over the morning she had developed acute symptoms and was seeking urgent emergency assistance and would not be able to appear at the hearing at 10.30 am. Despite this, the appellant maintained her application for an adjournment and that it be determined on the basis of her correspondence. The appellant advised that she was not abandoning her appeals.

10 Furthermore, the appellant submitted that should the Full Bench decline to adjourn the appeals, that she be given an opportunity of responding to any further submissions by the respondent, based on a transcript of the proceedings, with written submissions to be filed after 12 October 2026, subject to her health at that time.

Consideration

11 The grant or refusal of an adjournment is a discretionary decision, to be determined based on the principles outlined in the well-known decision of ***Myers v Myers*** [1969] WAR 19 per Jackson J at 21-22. The discretionary decision involves a balancing of the interests of the parties. In ***Myers*** at 21, Jackson J observed:

> 'To grant or refuse an adjournment is a matter for the discretion of the court to whom the application is made. But where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party.'

12 Additionally too, of course, the Commission needs to have regard to the equity and good conscience of the matter, in accordance with s 26(1)(a) and the interests of the persons immediately concerned in accordance with s 26(1)(c) of the *Act*. Also, by s 22B of the *Act*, the Commission, in the performance of its functions is required to act with as much speed as the requirements of the *Act* and a proper consideration of the matter before it permit.

13 There has already been a significant delay at the initiative of the appellant in the prosecution of these appeals. We note too, that the respondent has undertaken, pending the hearing and determination of the appeals, to not seek to enforce the costs order against the appellant.

14 The above are matters that the Full Bench must take into account in balancing the parties' respective interests.

15 Shortly before the time of the hearing listed on 16 September 2026, the Associate to the Full Bench enquired of the respondent whether it would consent to proceed with the appeals being determined on the written submissions already filed. The respondent advised that it would.

Conclusion

16 In all of the circumstances, the Full Bench is not prepared to adjourn the appeals to an indefinite time in the future, having regard to the legitimate interests of the respondent, and delay that has already occurred. However, acknowledging the difficulties experienced by the appellant, the Full Bench considers that a balanced course, taking account of the interests of both parties, is for the appeal to proceed to be heard and determined based on the written submissions filed by the parties, which are comprehensive. We do not consider either party will be disadvantaged by this approach.

17 The appellant will be given a right of reply to the respondent's application for costs to be awarded to it, in respect of both FBA 3 of 2026 and FBA 14 of 2026.

18 Orders giving effect to the above now issue.

2026 WAIRC 00869

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 17 OF 2024 GIVEN ON 23 JANUARY 2026 AND 15 APRIL 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELIA GAVRIL
	APPELLANT
	-v-
	STATE OF WESTERN AUSTRALIA
	RESPONDENT
FILE NO/S	FBA 3 OF 2026
PARTIES	DELIA GAVRIL
	APPELLANT
	-v-
	STATE OF WA
	RESPONDENT
FILE NO/S	FBA 14 OF 2026
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER C TSANG COMMISSIONER T KUCERA
DATE	THURSDAY, 17 SEPTEMBER 2026
CITATION NO.	2026 WAIRC 00869

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr J Carroll of counsel

Order

HAVING heard Ms D Gavril on her own behalf and Mr J Carroll of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

(1) THAT the hearing date of 16 September 2026 listed to hear the herein appeals be and is hereby vacated.

(2) THAT the appeals be heard and determined on the written submissions filed by the parties.

(3) THAT the appellant file any written submissions in reply to the respondent's application for costs of the herein appeals, as set out at [455] to [465] of the respondent's written submissions, by no later than 9 November 2026.

(4) THAT the appellant provide to the Full Bench further written medical evidence of her inability to attend the proceedings on 16 September 2026 by no later than 4.00 pm 21 September 2026.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

COMMISSION IN COURT SESSION—Unions—Application for Alteration of Rules—

2026 WAIRC 00892

APPLICATION FOR ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	:	2026 WAIRC 00892
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 14 APRIL 2026
DELIVERED	:	THURSDAY, 24 SEPTEMBER 2026
FILE NO.	:	CICS 14 OF 2025
BETWEEN	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) – Application under s 62(2) to vary union rules – Alteration of registered rules to change qualification of persons for membership, and matters relating to ss 71(2) and 71(5) of the *Industrial Relations Act 1979* – Application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 6, s 6(ab), s 49(I), s 55, s 55(3), s 55(4)(b), s 55(4)(c)(i), s 55(5), s 56A, s 58(3), s 62(2), s 62(4), s 71, s 71(2), s 71(5), s 72A *Industrial Relations Act 1988* (Cth) s 118A *Work Health and Safety Act 2020* (WA) *Industrial Relations Commission Regulations 2005* (WA)
Result	:	Order issued
Representation:		
Counsel:		
Applicant	:	Mr C Fogliani of counsel
Solicitors:		
Applicant	:	Fogliani Lawyers

Case(s) referred to in reasons:

State Energy Commission of Western Australia v Australian Electrical, Electronics, Foundry and Engineering Union – Western Australian Branch & Others (1995) 75 WAIG 376

The Automotive, Food, Metals, Engineering, Printing and & Kindred Industries Union of Workers – Western Australian Branch v (Not Applicable) [2024] WAIRC 00713; (2024) 104 WAIG 1593

Reasons for Decision

THE COMMISSION IN COURT SESSION:

The application

1 The present application is made under s 62(2) of the *Industrial Relations Act 1979* (WA) to seek authorisation for the Registrar to register alterations to the applicant's Rules that relate to qualification of persons for membership, and matters relating to ss 71(2) and 71(5) of the *Act*. The terms of s 62(4) of the *Act* specify that ss 55, 56A and 58(3) apply with necessary modifications, to the application.

2 The alterations sought by the applicant to its rules relate to r 5 – Eligibility for Membership and rr 14 and 28 in relation to the holding of office in the applicant by persons holding the corresponding office in the applicant's federal counterpart body the WA Branch of the Australian Municipal, Administrative, Clerical and Services Union. Additionally, an alteration is sought to r 3 – Definitions, which is relate to the eligibility for membership rule.

3 The grounds of the application are set out in the applicant's 'Statement Outlining Grounds' which are in the following terms:

1. The Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU**) has undertaken a review and update of its rules. The purpose of the update is to achieve the following:
    a. modernising the headings, numbering, formatting, and language of the rules to reflect contemporary drafting standards (including the use of gender neutral language);
    b. aligning the rules of the WASU with the rules of its federal counterpart and how the WASU operates in practice;
    c. updating the eligibility rules to:
        i. ensure that everyone who can join the federal counterpart can also join the WASU;
        ii. update the name of WAGR to reflect that the business of that entity has shifted to the Public Transport Authority of Western Australia;
        iii. remove references to 'full time' and 'part time' employment in a number of eligibility rules to make clear that casual employees may also join the WASU under those rules;
        iv. remove eligibility limitations based on gender.
    d. expanding the eligibility rules to cover certain callings in the legal industry in Western Australia – but not including anyone who is eligible to join the Civil Service Association of Western Australia Incorporated under its state rules as at 1 April 2025;
    e. updating the WASU's election rules to better align with the requirements of the *Industrial Relations Act 1979* (WA) and the *Industrial Relations (Union Elections) Regulations 1980* (WA).
2. This is the first of two counterpart applications to the Commission to update the rules.
    a. This first counterpart application is made to the Commission in Court Session pursuant to section 62(2) of the *Industrial Relations Act 1979* (WA) for authorisation to be given to the Registrar to make amendments to the WASU's rules relating to eligibility for membership and joint elections with the WASU's federal counterpart.
    b. The second counterpart application will be made to the Registrar to deal with other changes to the WASU's rules.

4 Notice of the application to alter the applicant's Rules was given by the Registrar by way of a Notice published on 17 December 2025, with the proposed Rule alterations being available to be viewed at the Commission's Registry. Any objection to the proposed alterations to the Rules was to be filed within 21 days of the notice: [2026] WAIRC 00002; (2026) 106 WAIG 197. Additionally, on 17 December 2025, the particulars of the applicant's application and proposed Rule changes were published on the Commission's website. No objections were received by the Registrar.

5 In accordance with the requirements of s 55(3) of the *Act*, the matter was listed for an initial hearing before the Commission in Court Session, after the expiry of 30 days from the date of publication of the Notice by the Registrar on 14 April 2026. At the hearing of the application, the applicant made detailed submissions, both in writing and orally, in relation to the alterations to its Rules as sought, in particular, those relating to the incorporation of the eligibility for membership rule of the WA Branch of the ASU into r 5 of the applicant's Rules.

6 For reasons which will be set out further below, the proceedings before the Commission in Court Session were adjourned to enable the applicant to make further alterations to r 5 – Membership in relation to the incorporation of the ASU WA Branch eligibility for membership rule, in light of issues raised by the Commission in Court Session in those proceedings.

The evidence

7 Evidence in support of the application was in the form of two statutory declarations made by the Secretary of the applicant, Mr Wood. His first statutory declaration was made on 8 December 2025 (exhibit A1). In it, Mr Wood declared that the Committee of Management of the applicant met on 5 May 2025 and passed a resolution to the effect that various amendments to the applicant's Rules were authorised. The minutes of the Committee of Management Meetings held on that day were annexed to Mr Wood's statutory declarations. As set out at 5:

5. I have attached and labelled as **WW-1** a redacted copy of the Committee of Management's minutes for the meeting held on 5 May 2025. Those minutes accurately record:
    a. the members of the Committee of Management who were present at the meeting;
    b. the wording of the resolution, as well as confirmation that the resolution was carried;
    c. Attachment 1, which was the copy of the current WASU rules that was presented to the Committee of Management at the meeting;
    d. Attachment 2, which sets out the tracked change amendments to the rules that were presented to and authorised by the Committee of Management; and
    e. That each member of the Committee of Management has signed off to confirm the accuracy of the minutes.

8 Mr Wood further declared that following the meeting of the Committee of Management authorising the proposed alterations to the Rules, on 9 June 2025, the proposed alterations to the Rules were sent to members of the applicant by email, along with an explanation for the proposed alterations. For those members not having an email address, the proposed alterations to the Rules and the explanation were sent by post. The notice to members informed them that they had the right to object to the proposed alterations to the Rules in writing to the Registrar within 21 days of the date of the notice.

9 Mr Wood declared that the Registrar notified the applicant's solicitors in writing on 2 July 2025, that no objections had been received to the proposed Rule alterations.

10 By way of a further declaration made by Mr Wood on 4 August 2026, and filed on 7 August 2026, Mr Wood referred to the hearing before the Commission in Court Session on 14 April 2026. He referred to the issue arising in relation to proposed r 5.7, to the effect that the applicant's Rules be altered to incorporate the ASU WA Branch eligibility for membership rule. Mr Wood referred to the suggestion by the Commission in Court Session that the relevant parts of the WA Branch eligibility rule be set out in full, and that if the applicant adopted this course, that it could be dealt with within the present proceedings.

11 Mr Wood said the applicant has taken that approach. On 20 May 2026, a written resolution was circulated to the Committee of Management of the applicant, proposing further alterations to the applicant's eligibility rule. Mr Wood's evidence was that between 20 and 21 May 2026, the members of the Committee of Management endorsed the resolution in accordance with r 29(b) of the applicant's Rules, a copy of which resolution was annexed to Mr Wood's statutory declaration.

12 Shortly after, Mr Wood caused a notice to be circulated to the applicant's members in relation to the further proposed alterations. They incorporated the further alterations to r 5.7, along with all of the previously circulated proposed alterations to the applicant's Rules. A notice to members explained the reasons for the alterations and, consistent with the earlier notice to members, that members could object in writing to the Registrar within 21 days of the date of the notice.

13 The proposed alterations and the explanation for them were emailed to members on 22 June 2026, a copy of which was annexed to Mr Wood's statutory declaration. Further, on 24 June 2026, again, for those members without an email address, a hard copy of the proposed alterations and the explanatory document was posted to those members. Mr Wood further declared that by email dated 3 August 2026, the Registrar informed the applicant's solicitors that no objections had been received by the Registrar to the proposed alterations.

Applicant's submissions in support of the application

14 The applicant referred to its existing s 71 certificate with its federal counterpart, the ASU WA Branch. It was contended that in the event that the present application is successful, and the alterations to the applicant's Rules are authorised by the Commission in Court Session, then an application for a fresh s 71 certificate will be made in due course.

15 The applicant contended that its application has been made in the appropriate form, has been published as required by the *Industrial Relations Commission Regulations 2005* (WA), both in the Western Australian Industrial Gazette and on the Commission's website. No objections to the proposed alterations have been received by the Registrar.

16 In connection with compliance with the applicant's Rules, it was submitted that r 29 – Alteration, Repeal and Making of New Rules, has been complied with in this case. As contained in Mr Wood's statutory declaration made on 8 December 2025, a member of the applicant's Committee of Management moved a motion on 5 May 2025, that the Committee resolve to vary the applicant's Rules. That motion was put and carried and the proposed alterations are annexed to Mr Wood's declaration. Accordingly, rr 29(c) and 29(b) have been complied with. The Committee of Management meeting minutes containing the resolution authorising the alteration to the Rules, was approved and was signed by each member of the Committee. Next, in accordance with r 29(d), as set out in Mr Wood's declaration, the proposed alterations to the Rules were sent to members on 9 June 2025, members were informed that they could object and if they wished to do so, written notice to the Registrar was required within 21 days.

17 On the basis of the above, the applicant submitted that r 29 has been complied with. As noted above, the further statutory declaration of Mr Wood of 4 August 2026, similarly complies with the requirements of r 29. Furthermore, the applicant has complied with ss 55(4)(b) and 55(4)(c)(i) of the *Act*.

18 The question of overlapping coverage for the purposes of s 55(5) of the *Act* was the subject of extensive submissions by the applicant. Section 55(5) requires the Commission in Court Session to refuse the authorisation of an alteration to a union's eligibility for membership rule, if some or all of the employees eligible for membership as a result of the alteration, are also eligible for membership of another registered organisation under the *Act*. This is subject to the proviso that the Commission in Court Session may still authorise such an alteration, if it is of the view that there is good reason to do so, consistent with the objects of the *Act* in s 6.

19 Before dealing with this issue however, which relates to proposed r 5.7, submissions were made in relation to other proposed alterations to the eligibility for membership rule. First, a number of amendments to the rule relate to restructuring of the rule by inserting subheadings and subrule numbering, grammatical changes, and updating references to legislation. These are matters of formatting.

20 Second, in relation to proposed r 5.1, the alteration relates to updating reference to the Western Australian Government Railways to the Public Transport Authority of Western Australia. It was submitted that this does not lead to any substantive change, as the applicant has represented salaried officers of the PTA for many years since 2003. Additionally, there is an existing overlapping of coverage between the applicant and the Australian Rail, Tram and Bus Industry Union of Employees, Western Australia Branch, in relation to this area. There is no change to the status quo in this regard.

21 Third, in relation to proposed r 5.2 dealing with employees in any clerical capacity, the alteration seeks to make the rule gender neutral. Fourth, in relation to proposed rr 5.4 and 5.5 in relation to the industry of professional social work or other social welfare work, the proposed alterations seek to remove the employment classification of 'full or part-time basis' in order that casual employees employed in such work are eligible to be members. It was submitted that there is no overlapping coverage as a result of the alteration and no objection has been made. It was also submitted that if there was any overlapping coverage, as yet unidentified, then there would be good reason for the Commission in Court Session to authorise the alteration, given the applicant's history in representing employees employed in these industries.

22 As to the proposed new r 5.6, this seeks to extend the applicant's eligibility to the legal industry in Western Australia. It was submitted that the existing ASU WA Branch eligibility for membership rule extends to the legal profession in this State, but

only in respect of employees employed by law firms based in Victoria. It was submitted that this is as a result of a feature of the ASU WA Branch eligibility rule, which is restricted to law firms situated in Victoria only, but the location of their employees is not so limited. It was accepted that another organisation, the Civil Service Association of Western Australia, has membership coverage of persons employed in the legal industry who are employed by the State Government and the Commonwealth. The proposed alteration will not affect this. An exclusion in the proposed r 5.6 makes this clear.

23 The next matter, referred to above, relates to the proposed new r 5.7, incorporating the eligibility for membership rule of the ASU WA Branch. Following observations made by the Commission in Court Session noted above, at the initial hearing of the application, the applicant, as set out in Mr Wood's second statutory declaration, made further alterations to r 5.7 to expressly include material parts of the ASU WA Branch eligibility for membership rule, excluding those either plainly not relevant, or relating to industries or employment in other States or Territories of the Commonwealth. The approach taken in this regard, was similar to that adopted by the applicant in ***The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch v (Not Applicable)*** [2024] WAIRC 00713; (2024) 104 WAIG 1593.

24 As noted above, this was the subject of detailed and helpful oral submissions by counsel for the applicant at the hearing, where the applicant traced through the coverage of the ASU WA Branch eligibility rule; the express exclusions contained within that eligibility for membership rule to prevent overlapping of coverage; and particular provisions relevant to the history of coverage applying to employees of the former State Electricity Commission of Western Australia. Coverage in relation to the latter, was the subject of consideration by the Full Bench of the Commission, in making a consent s 72A demarcation order in ***State Energy Commission of Western Australia v Australian Electrical, Electronics, Foundry and Engineering Union – Western Australian Branch & Others*** (1995) 75 WAIG 376. The application was made following the restructuring of the State Energy Commission into new Gas and Electricity Corporations in January 1995, which was also the subject of a demarcation proceeding under s 118A of the then *Industrial Relations Act 1988* (Cth).

25 In short, the applicant submitted that the effect of the demarcation order, and the Attachment A, being a Memorandum of Agreement between relevant federal organisations, while complex on its face, is that there will be no practical effect. The applicant's submission was that it would maintain the same agreed demarcation lines as reflected in the agreement reached in January 1995, and there would be no change.

26 As to any overlapping coverage generally, a number of submissions were made by the applicant as to why, consistent with the objects of the *Act* in s 6, that there are good reasons for the Commission in Court Session to approve the alterations. First, it was contended that the alignment of eligibility for membership between the ASU WA Branch and the applicant will enable all holders of office in the applicant to be members of the applicant, whilst simultaneously being members of the ASU WA Branch. It was submitted that this would enable all members of the ASU WA Branch to fully participate in the affairs of the applicant. It was contended that this is consistent with the principles of freedom of association and the right to organise in s 6(ab) and also, encourages the democratic control of organisations and the participation by members in the organisation's affairs.

27 Second, it was contended that the alteration would facilitate the exercise by the applicant of right of entry powers under s 49(I) of the *Act* to investigate certain breaches, especially any suspected breach of the *Work Health and Safety Act 2020* (WA), which is important. This is so.

28 Third, there is already existing overlapping coverage in relation to the ASU WA Branch eligibility for membership rule and other federal organisations, and the alterations will not impact on this.

29 Fourth, in the case of any such overlap, a significant majority of employees affected will be employed in the federal industrial relations system, and any involvement in the State industrial relations system would be limited.

30 Fifth, the proposed alterations if authorised, will assist the applicant in obtaining a fresh s 71 certificate under the *Act*, if there is alignment between the eligibility for membership rules between the applicant and the ASU WA Branch.

31 Finally, it was submitted that in any event, no other organisation registered under the *Act,* has objected to the proposed alterations to the applicant's Rules in relation to eligibility for membership. Accordingly, it was submitted that it should be taken to be the case that the proposed alterations are not seen as being controversial by any other registered organisation.

32 Submissions were made in relation to the proposed alterations to rr 14 and 28 concerning elections for office, and especially, the ability for those elected to office in the ASU WA Branch, to hold the corresponding office in the applicant. It was submitted that there arises no infringement of the provisions of the *Act* in respect of these proposed alterations to the Rules.

Conclusions

33 We are satisfied that the proposed alterations have been made in accordance with the terms of r 29 of the applicant's Rules dealing with rules alterations. We are also satisfied that the requirements of the *Act* and the *Regulations* in relation to proposed rules alterations have been met. As to the proposed alterations to rr 3, 5, 14 and 28 of the applicant's Rules, apart from r 5.7 dealt with immediately below, we are satisfied that approval should be given to the Registrar to register the alterations.

34 We refer to the expanded incorporation of the ASU WA Branch eligibility rules in proposed r 5.7, and s 55(5) of the *Act*, dealing with the potential for overlapping coverage. In light of existing overlapping coverage between the ASU WA Branch and other federal organisations, the objects of the *Act* in s 6, and the absence of any objections from any other registered organisations, we are satisfied that an order should be made by the Commission in Court Session to also authorise the Registrar to register the alteration to r 5.7, in accordance with the Notice dated 17 December 2025, and as varied by request of the Commission in Court Session.

2026 WAIRC 00894

APPLICATION FOR ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	CHIEF COMMISSIONER S J KENNER
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 24 SEPTEMBER 2026
FILE NO/S	CICS 14 OF 2025
CITATION NO.	2026 WAIRC 00894

Result	Order issued
Representation	
Applicant	Mr C Fogliani of counsel

Order

HAVING heard from Mr C Fogliani of counsel on behalf of the applicant, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the Registrar is hereby authorised to register the alterations to the rules of the applicant in rules 3, 5, 14 and 28 as published in the Western Australian Industrial Gazette on 17 December 2025 [2026] WAIRC 00002; (2026) 106 WAIG 197 and as further altered at the request of the Commission in Court Session.

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2026 WAIRC 00916

CITY OF ALBANY INDUSTRIAL AGREEMENT 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF ALBANY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES (WASU)
	FIRST RESPONDENT
	THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	SECOND RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 5 OCTOBER 2026
FILE NO/S	APPL 63 OF 2026
CITATION NO.	2026 WAIRC 00916

Result	Agreement varied

Representation	
Applicant	City of Albany
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Second Respondent	Local Government, Racing and Cemeteries Employees Union (WA)

Order

WHEREAS on 9 September 2026 the City of Albany filed an application seeking to vary the *City of Albany Industrial* ***Agreement*** *2026* pursuant to s 43 of the *Industrial Relations* ***Act*** *1979* (WA);

AND WHEREAS the application sought to vary the Agreement to reflect the agreement reached by the parties;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the *Industrial Relations Commission Regulations 2005* (WA);

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

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

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

THAT the *City of Albany Industrial Agreement 2026* be varied by substituting the agreement attached hereto, with effect from the date of this order.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00919

CITY OF KWINANA INDUSTRIAL AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF KWINANA
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	FIRST RESPONDENT
	THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	SECOND RESPONDENT
	THE CONSTRUCTION FORESTRY, MINING, ENERGY UNION OF WORKERS (WA)
	THIRD RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 5 OCTOBER 2026
FILE NO/S	APPL 70 OF 2026
CITATION NO.	2026 WAIRC 00919

Result	Agreement varied
Representation	(on the papers)
Applicant	City of Kwinana
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Second Respondent	Local Government, Racing and Cemeteries Employees Union (WA)
Third Respondent	The Construction Forestry, Mining, Energy Union of Workers (WA)

Order

WHEREAS on 22 September 2026 the City of Kwinana filed an application seeking to vary the *City of Kwinana Industrial Agreement 2025* pursuant to s 43 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the application sought to vary the Agreement to contain provisions relating to engaging potential employees with a disability on a supported wage system who are unable to perform the range of duties to the competence level required by the role because of the effects of a disability on their productive capacity;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the Industrial Relations Commission Regulations 2005 (WA);

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

AND WHEREAS all the parties to the Agreement consent to its variation in accordance with the application;

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

THAT the *City of Kwinana Industrial Agreement 2025* be varied by substituting the agreement attached hereto, with effect from the date of this order.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00918

CITY OF KWINANA INDUSTRIAL AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF KWINANA
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	FIRST RESPONDENT
	THE LOCAL GOVERNMENT, RACING AND CEMETRIES EMPLOYEES UNION (WA)
	SECOND RESPONDENT
	THE CONSTRUCTION FORESTRY, MINING, ENERGY UNION OF WORKERS (WA)
	THIRD RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 5 OCTOBER 2026
FILE NO/S	APPL 70 OF 2026
CITATION NO.	2026 WAIRC 00918

Result	Order issued
Representation	(on the papers)
Applicant	City of Kwinana
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Second Respondent	Local Government, Racing and Cemetries Employees Union (WA)
Third Respondent	The Construction Forestry, Mining, Energy Union of Workers (WA)

Order

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

THAT the name of the second respondent be amended to Local Government, Racing and Cemeteries Employees Union (WA).

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00926

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	MONDAY, 12 OCTOBER 2026
FILE NO/S	APPL 67 OF 2026
CITATION NO.	2026 WAIRC 00926

Result	Award Varied
Representation	On the papers

Order

WHEREAS the Public Transport Authority of Western Australia (**PTA**) applied on 15 September 2026 to vary the *Public Transport Authority (Transwa) Award 2006* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule B of the application sets out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2026 State Wage Case ([2026] WAIRC 00381);

AND WHEREAS the variations were not opposed by the respondent;

AND BEING satisfied that:

(a) The amendments proposed do not effect 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 *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

SCHEDULE A

1. Clause 5.1 – Shift Work:

A. At subclause 5.1.1, delete this subclause and insert in lieu thereof the following:

On afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of **$3.72** an hour on all time paid at ordinary rate.

B. At subclause 5.1.2, delete this subclause and insert in lieu thereof the following:

On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of **$4.28** an hour on all time paid at ordinary rate.

C. At subclause 5.1.3, delete this subclause and insert in lieu thereof the following:

On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of **$3.72** an hour on all time paid at ordinary rate.

D. At subclause 5.1.4, delete this subclause and insert in lieu thereof the following:

In addition to the hourly shift work allowance, an employee will be paid an allowance of **$4.28** for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

2. Clause 5.2 – Temporary Transfer Allowance:

A. At subclause 5.2.1, delete paragraph (b) and insert in lieu thereof the following:

(b) When the period of relief is for one week or less the allowance of **$10.20** per shift shall be paid in recognition of the disruption to the employee's normal roster.

3. Clause 5.3 – On Call Allowance:

A. **At subclause 5.3.1, delete this subclause and insert in lieu thereof the following:**

Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of **$6.16** per hour for all time on call.

That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 – Away from Home and Meal Allowance:

A. At subclause 5.5.2, delete this subclause and insert in lieu thereof the following:

Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of **$40.70** for each 8 hour period and, where less than 8 hours is worked, at the rate of **$10.10** for each 2 hour period or part thereof worked

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2026 WAIRC 00925

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	MONDAY, 12 OCTOBER 2026
FILE NO/S	APPL 65 OF 2026
CITATION NO.	2026 WAIRC 00925

Result	Award Varied
Representation	On the papers

Order

WHEREAS the Public Transport Authority of Western Australia (**PTA**) applied on 15 September 2026 to vary the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule B of the application sets out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2026 State Wage Case ([2026] WAIRC 00381), that is an increase of 4.75%, or by the relevant Consumer Price Index (**CPI**) rates from June 2025 to June 2026;

AND WHEREAS the variations were not opposed by the respondent;

AND BEING satisfied that:

(a) The amendments proposed do not effect 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 *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

SCHEDULE A

1. Clause 3 – Meal and Rest Breaks:

A. At subclause 3.3.2, delete paragraph (b) of subclause (3) of this Clause and insert in lieu thereof the following:

The employer shall provide such employee a meal allowance of **$16.60** to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics

2. Clause 4 – Suburban Electric Railcar Allowance:

A. At subclause 4.3.1, delete paragraph (a), subparagraphs (1), (2) and (3) of this Clause and insert in lieu thereof the following:

An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	**$55.60**
(2)	Thereafter	**$56.00**
(3)	Special Case	**$57.00**

3. Clause 5 – Shift Work:

A. At subclause 5.1.1, delete paragraph (a) of this Clause and insert in lieu thereof the following:

On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of **$3.82** an hour on all time paid at ordinary rate.

B. At subclause 5.1.1, delete paragraph (b) of this Clause and insert in lieu thereof the following:

On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of **$4.43** an hour on all time paid at ordinary rate.

C. At subclause 5.1.1, delete paragraph (c) of this Clause and insert in lieu thereof the following:

On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of **$3.82** an hour on all time paid at ordinary rate.

D. At subclause 5.1.1, delete paragraph (d) of this Clause and insert in lieu thereof the following:

In addition to the hourly shift work allowance, an employee will be paid an allowance of **$4.43** for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

4. Clause 5 – Temporary Transfer Allowance:

A. At subclause 5.2.1, delete paragraph (b) of this Clause and insert in lieu thereof the following:

When the period of relief is for one week or less the allowance of **$10.20** per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5 – On Call Allowance:

A. At subclause 5.3.1, delete this Clause and insert in lieu thereof the following:

Employees on call outside the ordinary hours of duty will be paid an allowance of **$5.67** per hour for all time on call.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2026 WAIRC 00931

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRIAL UNION WESTERN AUSTRALIA BRANCH, ELECTRICAL TRADES UNION OF WESTERN AUSTRALIA, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS – WESTERN AUSTRALIAN BRANCH
	RESPONDENTS
CORAM	COMMISSIONER T KUCERA
DATE	WEDNESDAY, 14 OCTOBER 2026
FILE NO/S	APPL 66 OF 2026
CITATION NO.	2026 WAIRC 00931

Result	Award Varied
Representation	On the papers

Order

WHEREAS the Public Transport Authority of Western Australia (**PTA**) applied on 15 September 2026 to vary the *Railway Employees' Award No. 18 of 1969* (**Award**) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule B of the application sets out the grounds upon which it is made, indicating the application is to increase the allowances in the Award by the percentage increase ordered in the 2026 State Wage Case ([2026] WAIRC 00381), that is an increase of 4.75%, or by the Consumer Price Index (**CPI**) rates from June 2025 to June 2026;

AND WHEREAS the variations were not opposed by the respondents;

AND BEING satisfied that:

(a) The amendments proposed do not effect 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 *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

SCHEDULE A

1. Clause 4.3 – Experience Allowance:

A. At clause 4.3, delete this clause and insert in lieu thereof the following:

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - **$ 8.80**

After 24 months service with the employer - **$ 18.40**

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance:

A. At subclause 4.4.1, delete paragraph (a) of this clause and insert in lieu thereof the following:

Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of **$22.40** per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 – Leading Hands:

A. At clause 4.5, delete paragraphs (a), (b) and (c) of this clause and insert in lieu thereof the following:

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid **$41.80** extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid **$62.60** extra per week

(c) Class 1

When in charge of more than twenty others, paid **$81.00** extra per week

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6 – Electrical Licence Allowance:

A. At clause 4.6, delete this clause and insert in lieu thereof the following:

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of **$29.50** per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 - On Call Allowance:

A. At subclause 5.1.2, delete this subclause and insert in lieu thereof the following:

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of **$6.17** per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3.1 – Meal Breaks:

A. At clause 5.3.1, delete paragraph (a) and insert in lieu thereof the following:

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of **$14.40** as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. Clause 5.4 - Away from Home Allowance:

A. At subclause 5.4.2, delete this clause and insert in lieu thereof the following:

Where sub clause 5.4.1. applies, the employee shall be paid an allowance of **$67.15** per day except when the accommodation includes dining facilities and meals, in which case an allowance of **$50.45** per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. At subclause 5.4.5, delete this clause and insert in lieu thereof the following:

When employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of **$17.70** per day.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6 – Travelling Time – Traffic:

A. At subclause 5.6.3, delete this clause and insert in lieu thereof the following:

When the period of relief is for one week or less an allowance of **$10.20** per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502)

9. Clause 5.7.1 – Refreshment Allowance:

A. At subclause 5.7.1, delete this clause and insert in lieu thereof the following:

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of **$7.25** where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(b) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.7.2 – Meal Allowance:

A. At subclause 5.7.2, delete this clause and insert in lieu thereof the following:

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid **$14.40** in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after

1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

11. Clause 5.8 – Shifts and/or Night Work Allowance – (Six – Day Shit Work):

A. At clause 5.8, delete paragraphs (a), (b), (c), (d) and (e) and insert in lieu thereof the following:

The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of **$3.72** an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of **$4.28** an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of **$3.72** an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of **$4.28** for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of **$4.43** per hour.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2026 WAIRC 00917

SHIRE OF SERPENTINE JARRAHDALE OPERATIONS TEAM INDUSTRIAL AGREEMENT 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRE OF SERPENTINE JARRAHDALE
	FIRST APPLICANT
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	SECOND APPLICANT
	THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
	THIRD APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 5 OCTOBER 2026
FILE NO/S	APPL 68 OF 2026
CITATION NO.	2026 WAIRC 00917

Result	Agreement varied
Representation	(on the papers)
First Applicant	Shire of Serpentine Jarrahdale
Second Applicant	Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Third Applicant	Local Government, Racing and Cemeteries Employees Union (WA)

Order

WHEREAS on 18 September 2026 the applicants filed an application seeking to vary the *Shire of Serpentine Jarrahdale*

*Operations Team Industrial **Agreement** 2024* pursuant to s 43 of the *Industrial Relations **Act** 1979* (WA);

AND WHEREAS the application sought to vary the Agreement to provide for wage increases commencing from the first full pay period on or after 1 July 2026 and extend the nominal expiry date to 26 February 2027;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the *Industrial Relations Commission Regulations 2005* (WA);

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

AND WHEREAS all the parties to the Agreement consent to its variation in accordance with the application;

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

THAT the *Shire of Serpentine Jarrahdale Operations Team Industrial Agreement 2024* be varied by substituting the agreement attached hereto, with effect from the date of this order.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00929

SHIRE OF WYNDHAM EAST KIMBERLEY INDUSTRIAL AGREEMENT 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRE OF WYNDHAM EAST KIMBERLEY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	TUESDAY, 13 OCTOBER 2026
FILE NO/S	APPL 72 OF 2026
CITATION NO.	2026 WAIRC 00929

Result	Agreement varied
Representation	(on the papers)
Applicant	Shire of Wyndham East Kimberley
Respondent	Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Order

WHEREAS on 29 September 2026 the Shire of Wyndham East Kimberley filed an application seeking to vary the *Shire of Wyndham East Kimberley Industrial **Agreement** 2025* pursuant to s 43 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the application sought to vary the Agreement to ensure the pay rates the parties have agreed on are reflected in the Agreement;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the *Industrial Relations Commission Regulations 2005* (WA);

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

AND WHEREAS all the parties to the Agreement consent to its variation in accordance with the application;

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

THAT the *Shire of Wyndham East Kimberley Industrial Agreement 2025* be varied by substituting the agreement attached hereto, with effect from the date of this order.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

NOTICES—Application for General Order—

2026 WAIRC 00923

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 7 OF 2026

APPLICATION FOR GENERAL ORDER - CASUAL LOADING RATE AWARD VARIATIONS

NOTICE is given that an application for a General Order has been initiated by the Commission of its own motion under section 50(3)(a) of the *Industrial Relations Act 1979* (WA). The proposed General Order is to be limited to employees who are employed under and subject to the awards specified in **Schedule A** and is to vary those awards which provide for casual loading rates below 25%.

Pursuant to the Commission's General Order for Minimum Casual Loading Rates for Specified Awards CICS 7 of 2024 (***UnionsWA Incorporated v (not applicable)*** [2025] WAIRC 00136), a 25% minimum casual loading now applies to employees covered by the awards listed in Schedule A, but the awards themselves do not reflect this.

The purpose of the General Order is to make amendments to:

1. lift casual loadings that are below 25% to 25%;
2. insert a standard definition of 'casual employee' or 'casual worker' in line with the definition in s 7B of the *Industrial Relations Act 1979* (WA) and remove provisions that are inconsistent with the definition of casual employment; and
3. make other minor miscellaneous and incidental amendments to casual provisions.

An *initial hearing* will take place on **THURSDAY 3 DECEMBER 2026 at 10:00 a.m.** on Level 18, 111 St Georges Terrace, Perth.

The Commission invites interested persons and organisations to attend the initial hearing at which directions will be made to ensure interested persons and organisations have an opportunity to be heard in relation to the proposed General Order.

Persons intending to participate in the initial hearing are asked to contact the Senior Commissioner's chambers on chambers.cosentino@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]
7 OCTOBER 2026

Schedule A

List of Awards the Subject of Proposed General Order

No.	Award Title
1	*Aboriginal Communities and Organisations Western Australian Interim Award 2011*
2	*Aboriginal Medical Service Employees' Award*
3	*Aerated Water and Cordial Manufacturing Industry Award 1975*
4	*Aged and Disabled Persons Hostels Award, 1987*
5	*Ambulance Service Employees' Award, 1969*
6	*Animal Welfare Industry Award*
7	*Artworkers Award*
8	*Bag, Sack and Textile Award*
9	*Bespoke Bootmakers' and Repairers' Award No. 4 of 1946*
10	*Brick Manufacturing Award 1979*
11	*Brushmakers' Award No. 30 of 1959*
12	*Building and Engineering Trades (Nickel Mining and Processing) Award, 1968*
13	*Building Trades and Labourers (Construction) Award*
14	*Building Trades and Labourers (General) Award*
15	*Child Care (Out of School Care - Playleaders) Award*
16	*Child Care (Subsidised Centres) Award*
17	*Children's Services (Private) Award 2006*
18	*Cleaners and Caretakers (Car and Caravan Parks) Award 1975*
19	*Cleaners and Caretakers Award, 1969*
20	*Clerks' (Hotels, Motels and Clubs) Award 1979*
21	*Contract Cleaners Award, 1986*
22	*Contract Cleaners (Ministry of Education) Award 1990*
23	*Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011*
24	*Dairy Factory Workers' Award 1982*
25	*Deckhands (Passenger Ferries, Launches and Barges) Award*
26	*Dental Technicians' and Attendant/Receptionists' Award, 1982*
27	*Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979, The*
28	*Dried Vine Fruits Industry Award, 1951, The*
29	*Drum Reclaiming Award*
30	*Dry Cleaning and Laundry Award 1979*
31	*Earth Moving and Construction Award*
32	*Egg Processing Award 1978*

No.	Award Title
33	*Electrical Contracting Industry Award R 22 of 1978*
34	*Electrical Trades (Security Alarms Industry) Award 1980*
35	*Electronics Industry Award No. A 22 of 1985*
36	*Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973*
37	*Engine Drivers' (General) Award*
38	*Engine Drivers' (Gold Mining) Consolidated Award, 1979*
39	*Engine Drivers' (Nickel Mining) Award 1968*
40	*Engine Drivers' Minerals Production (Salt) Industry Award, 1970*
41	*Family Day Care Co-Ordinators' and Assistants' Award, 1985*
42	*Farm Employees' Award*
43	*Food Industry (Food Manufacturing or Processing) Award*
44	*Fruit and Produce Market Employees Award No. 50 of 1955*
45	*Fruit Growing and Fruit Packing Industry Award, The*
46	*Funeral Directors' Assistants' Award No. 18 of 1962*
47	*Furniture Trades Industry Award*
48	*Hair and Beauty Industry (WA) Award*
49	*Health Attendants Award, 1979*
50	*Horticultural (Nursery) Industry Award No. 30 of 1980, The*
51	*Hospital Salaried Officers (Dental Therapists) Award, 1980*
52	*Industrial Spraypainting and Sandblasting Award*
53	*Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006*
54	*Iron Ore Production & Processing (Locomotive Drivers) Award 2006, The*
55	*Landscape Gardening Industry Award*
56	*Laundry Workers' Award, 1981*
57	*Licensed Establishments (Retail and Wholesale) Award 1979*
58	*Local Government Officers' (Western Australia) Award 2021*
59	*Marine Stores Award*
60	*Masters, Mates and Engineers Passenger Ferries Award*
61	*Mineral Sands Industry Award 1991*
62	*Miscellaneous Workers' (Activ Foundation) Award*
63	*Monumental Masonry Industry Award, 1989*
64	*Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980*
65	*Municipal Employees (Western Australia) Award 2021*
66	*Musicians' General (State) Award 1985*
67	*Nurses' (Aboriginal Medical Services) Award No. A 23 of 1987*
68	*Nurses (Child Care Centres) Award 1984*
69	*Nurses' (Day Care Centres) Award*
70	*Nurses' (Independent Schools) Award*
71	*Optical Mechanics' Award, 1971*
72	*Pest Control Industry Award*
73	*Photographic Industry Award, 1980*
74	*Pipe, Tile and Pottery Manufacturing Industry Award*
75	*Poultry Breeding Farm & Hatchery Workers' Award 1976*
76	*Printing Award*
77	*Prospector and AvonLink on Train Customer Service Officers Award*
78	*Quarry Workers' Award, 1969*
79	*Radio and Television Employees' Award*
80	*Retail Pharmacists' Award, 2004*
81	*Rock Lobster and Prawn Processing Award 1978, The*
82	*Rope and Twine Workers' Award*
83	*Saddlers and Leatherworkers' Award*
84	*Security Officers' Award*
85	*Show Grounds Maintenance Worker's Award*
86	*Soap and Allied Products Manufacturing Award*
87	*Social and Community Services (Western Australia) Interim Award 2011*
88	*Social Trainers and Assistant Supervisors' (Activ Foundation) Award*
89	*Soft Furnishings Award*
90	*Teachers' Aides' (Independent Schools) Award 1988*
91	*Training Assistants' and Community Support Staff (Cerebral Palsy Association) Award 1987*
92	*Transport Workers (General) Award No. 10 of 1961*
93	*Transport Workers' (Passenger Vehicles) Award*
94	*Transport Workers' (North West Passenger Vehicles) Award, 1988*

No.	Award Title
95	*Watchmakers' and Jewellers' Award, 1970*
96	*Western Australian Professional Engineers (General Industries) Award 2004, The*
97	*Wine Industry (WA) Award 2005*
98	*Wool, Hide and Skin Store Employees' Award No. 8 of 1966*

INDUSTRIAL MAGISTRATE—Claims before—

2026 WAIRC 00901

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00901
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 3 SEPTEMBER 2026
DELIVERED	**:**	FRIDAY, 2 OCTOBER 2026
FILE NO.	**:**	M 79 OF 2026
BETWEEN	**:**	ANTONIO NAHUM ESQUIVEL MURILLO
		CLAIMANT
		AND
		KARDAN AUSTRALIA PTY LTD (ABN 40 636 258 207)
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – Small claims procedure under the *Fair Work Act 2009* (Cth) – Alleged failure to pay in full for the performance of work under s 323 of the *Fair Work Act 2009* (Cth) – Whether it was necessary for the requirement to work additional hours be expressly given – Whether it was sufficient for the requirement to work additional hours to be impliedly given – Whether the claimant worked the additional hours claimed – Turns on own facts
Legislation	**:**	*Fair Work Act 2009* (Cth) *Fair Work Regulations 2009* (Cth) *Superannuation Guarantee Charge Act 1992* (Cth) *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) *Civil Judgments Enforcement Act 2004* (WA) *Civil Judgments Enforcement Regulations 2005* (WA)
Instrument	**:**	*Building and Construction General On-Site Award 2020* [MA000020]
Cases referred to in reasons:	**:**	***Australian Salaried Medical Officers' Federation v Peninsula Health*** [2023] FCA 939; (2023) 325 IR 26 ***Logan v Otis Elevator Company Pty Ltd***; [2001] IRCA 1; (2001) 107 IR 253 ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; 97 WAIG 1595 ***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	**:**	Claim proven
Representation:		
Claimant	:	Self-represented
Respondent	:	Mr K. Bohan (General Manager)

REASONS FOR DECISION

1 Antonio Nahum Esquivel Murillo (the **claimant**) was employed by Kardan Australia Pty Ltd (**Kardan**) for approximately four weeks from 7 April 2026 to about 5 May 2026 as a casual lead estimator, primarily working on a tender for a Western Australian Government project (the **Tender**).

2 The claimant alleges that Kardan failed to pay him the required hourly rate for 34 hours of work undertaken by him across two pay periods from 20 April to 3 May 2026, which he calculates at $3,822.

The Claim and the Response

3 On 28 May 2026, the claimant lodged an originating claim, electing to apply the small claims procedure. The claimant alleges the respondent contravened the *Fair Work Act 2009* (Cth) (**FWA**) by failing to pay him in full for hours worked for the period from 20 April to 3 May 2026.

4 The claimant alleges that he was employed on an agreed contractual rate of $78 per hour and that his employment was 'governed' by the FWA and the *Building and Construction General On-Site Award 2020* [MA000020] (the **Award**).

5 The claimant alleges that for the pay period ending:

(a) 26 April 2026, he worked 60 hours in the week and was paid for 40 hours. He calculates the alleged underpayment for the week as $2,730; and

(b) 3 May 2026, he worked 40 hours in the week and was paid for 26 hours. He calculates the alleged underpayment for the week as $1,092.

6 The claimant seeks an order for the payment of $3,822 being the payment in full for all hours worked.[1] The claimant also seeks an order for the payment of the 'applicable superannuation contribution' to his nominated superannuation fund[2] and pre-judgment interest (the **Claim**).

7 Kardan admits that the claimant was employed as a casual lead estimator at a rate of $78 per hour; that the FWA and the Award covers both the claimant and Kardan and applies to the claimant's employment.[3]

8 Kardan says that the claimant's employment ceased by way of a letter of termination dated 5 May 2026.

9 Otherwise, Kardan accepts the claimant submitted a time sheet claiming 60 hours of work undertaken for the week ending 26 April 2026 but says that it adjusted the claimed hours worked by reducing it to 40 hours in the exercise of its management right to review and approve time sheet submissions. For the week ending 26 April 2026, the claimant was paid for the adjusted and approved hours.

10 Kardan alleges that it gave no direction or requirement for the claimant to work additional hours over 40 hours for the week ending 26 April 2026.

11 Kardan accepts the claimant submitted a time sheet claiming 40 hours of work undertaken for the week ending 3 May 2026, but again it says it adjusted the claimed hours worked reducing it to 26 hours in the exercise of its management right to review and approve time sheet submissions. For the week ending 3 May 2026, the claimant was paid for the adjusted and approved hours.

12 Kardan alleges that it gave no direction or requirement for the claimant to work additional hours over 26 hours for the week ending 3 May 2026, and that the claimant had been expressly provided written notice that prior approval was required before the pay period commenced to work additional hours.

13 Further, Kardan alleges the claimant did not record his hours by clocking in and clocking out of its recording system, called 'time2u', but instead made manual retrospective entries, which Kardan cannot substantiate as time worked by the claimant.

14 Therefore, Kardan submits the claimant cannot substantiate the additional time worked as claimed and any alleged additional time worked was not authorised by Kardan.

15 Schedule I to these reasons is the jurisdiction, practice and procedure in the Industrial Magistrates Court of Western Australia (the **Court**).

Issues for Determination

16 The legal issues for determination are:

(a) whether it was necessary for Kardan to request or require the claimant to undertake additional hours of work before any entitlement to payment arose;

(b) if a request or requirement was necessary, whether it had to be express or whether it could be implied; and

(c) the nature and extent of any payment obligation arising from the performance of those additional hours (if any).

17 The factual issues for determination are:

(a) whether the claimant worked additional hours on the Tender; and

(b) if so, what additional hours did he work.

18 In part, determination of the legal issues involves construction of terms of the Award and consideration of the terms of the Offer Letter.

19 Schedule II to these reasons are the relevant principles to be applied when interpreting an industrial instrument.

Evidence Not in Dispute

20 The claimant relied upon his witness statement signed on 16 July 2026 with various annexures. The claimant also gave oral evidence and was cross-examined on his evidence.

21 Kardan relied upon the witness statement of Ken Bohan (**Mr Bohan**) signed on 21 August 2026 with various annexures referred to therein[4] and Roberto Soriano (**Mr Soriano**) signed on 21 August 2026 with various annexures referred to therein.[5] Mr Bohan and Mr Soriano gave oral evidence and were cross-examined on their evidence.

22 Mr Bohan is Kardan's General Manager responsible for Kardan's business operations.[6]

23 Mr Soriano is Kardan's Project Director and was the claimant's manager.[7]

24 Kardan also tendered a number of documents into evidence via Mr Bohan.[8]

25 Further to the agreed facts referred to above, it is not in dispute that Kardan employed the claimant pursuant to a letter of offer dated 2 April 2026, which was signed by the claimant (the **Offer Letter**). The claimant commenced employment on 7 April 2026.

26 The terms of the Offer Letter included that the conditions of the claimant's employment were set out in the Offer Letter, the Award and applicable legislation such as the National Employment Standards (**NES**) under the FWA.[9]

27 Relevant to the claim, the Offer Letter stated the following in respect of the claimant's hours of duty:

> Normal operational hours are between 6:00am to 6:00pm Monday to Friday (Excluding Public Holidays).
>
> The business generally schedules work to commence at 7:00am, however this may be changed as each project needs are addressed. Any hours worked outside of the normal operational hours of 6:00am to 6:00pm will be at penalty rates.
>
> Your hours will total 40 hours per week (30 mins unpaid lunch break per day); plus, you may be required to work *reasonable additional hours as required by the business*, taking into account operational requirements, your personal circumstances, and applicable legislation. (emphasis added)[10]

28 The claimant's role included working on the Western Australian Government Tender with a deadline of 2.30 pm AWST on 1 May 2026 (this deadline may have been extended on 23 April 2026 to 1 May 2026).[11]

29 The claimant is located in New Zealand and worked remotely during the time he was employed by Kardan.[12] There is a five-hour time difference between Western Australia and New Zealand.

30 The claimant submitted a time sheet for the first week of employment for the period from 7 to 12 April 2026. He did so by submitting manual time sheets at the end of each period, rather than by using Kardan's daily time recording system.[13] He submitted a time sheet for 48 hours worked in this period and was paid 48 hours by Kardan, which included being paid 16 hours at the relevant overtime rates.[14]

31 The claimant similarly submitted a manual time sheet for the second week of employment for the period from 13 to 19 April 2026. He submitted a time sheet for 60 hours worked in this period and was paid 60 hours by Kardan, which included being paid 20 hours at the relevant overtime rates.[15]

32 The claimant again submitted a manual time sheet for the third week of employment for the period from 20 to 26 April 2026. He submitted a time sheet for 60 hours worked in this period and was paid 40 hours by Kardan at the rate of $78 per hour on or around 28 April 2026 (the **Third Payment**).[16]

33 The claimant again submitted a manual time sheet for the fourth week of employment from 27 April to 3 May 2026. He submitted a time sheet for 40 hours worked in this period and was paid 26 hours by Kardan at the rate of $78 per hour on or around 5 May 2026 (the **Fourth Payment**).[17]

34 Kardan agrees that the claimant submitted the manual time sheets at the end of the third and fourth weeks of employment in the hours he sought to be paid and Kardan agrees that it made the Third and Fourth Payments, which were for less hours than claimed by the claimant.

35 On 29 April 2026, the claimant raised a query by email about the Third Payment.[18] Mr Soriano responded on the same day stating:

> Any overtime needs to be approved prior is [sic] done.
>
> We passed the first two weeks due to the start firing the RFQ and doing the take off.
>
> We will have a review of the hours after the submission with a review of the submission.[19]

36 The claimant responded to this email stating:

> Please notice that I was NOT aware that Overtime above 40 hrs needed to be approved (as I'm on hourly rate, not on fix salary, hence it's assumed I get paid for the hours needed to complete the job)
>
> otherwise I don't have benefit of a 1 week notice period as a Full time.
>
> Please CONFIRM if this week you need more than 40 hrs, otherwise I can see we will need it as its final review/submission. You need to approve BEFORE, not deciding after.
>
> Just to be fair, as I'm on Casual, not on Full Time.
>
> as long as I know how many hours, then to stop… but Tenders like this one are high demand hours unfortunately.
>
> This week is basically been 2 days already working 12 hrs (one to complete the full breakdowns requested for easier review and yesterday for the last day of many quotes arriving at the same time)
>
> I will slow down to 8 hrs only starting today.[20]

37 Between 30 April 2026 and 1 May 2026, a number of email communications were sent between the claimant, Mr Soriano and Mr Bohan about the Tender. This also included a Microsoft Teams meeting between the claimant, Mr Soriano and Mr Bohan on 30 April 2026 at 12.44 pm AWST.[21]

38 The Tender was submitted on 1 May 2026.

39 On 5 May 2026, Kardan terminated the claimant's employment by written notice.[22]

40 Following the Fourth Payment, the claimant informed Kardan that he had made a complaint to the Fair Work Ombudsman, which resulted in email communication between the claimant and Mr Bohan on 6 May 2026 highlighting the issues in dispute between the parties.[23]

Evidence in Dispute

41 The disputed evidence is directed primarily to Kardan's contention that the claimant:

(a) cannot substantiate he worked an additional 34 hours to meet urgent deadlines for the Tender;

(b) used an unauthorised model to complete the Tender, which was not part of any management direction and therefore does not give rise to an entitlement to 'additional pay'; and

(c) was neither approved nor required to work additional hours in the third and fourth employment periods.

42 It was common ground during the hearing that the claimant did not keep his own records of any time he worked on the Tender. At the conclusion of the third and fourth employment weeks, the claimant submitted time sheets recording the hours he says he worked on the Tender. How he recorded those hours remains unclear, given the claimant's vague evidence on the issue.[24]

43 Kardan relies on its policy requiring employees, including the claimant, to use its time recording system. It was common ground the claimant did not do this and instead made manual time sheets.

44 Both parties rely upon Tender documents[25] to establish their respective position:

(a) from the claimant's perspective, the Tender was complex and had to be completed within a relatively short period of time, where he commenced work on it one week after submissions opened; and

(b) from the respondent's perspective, the claimant did not fully comply with its tender submission model and, as a consequence, it was required to raise various issues regarding the claimant's estimates that it contends would otherwise have been unnecessary.

45 The difficulty for the Court is that the Tender documents do not permit an assessment of whether the claimant spent too much time, sufficient time, or an otherwise reasonable amount of time working on the Tender. Nor do they enable an assessment of whether the time spent was necessary or unnecessary, or what amount of time was reasonably required for a tender of this kind.

46 In the absence of independent expert evidence undertaking a forensic assessment of the time spent working on the Tender, compared with what would be considered reasonable or consistent with industry standards for a tender of this type, the Court is left with a collection of documents and the parties' differing, firmly held, opinions on the work required to complete the Tender.

47 In summary, in respect of any approval given or a requirement to undertake hours of work in excess of 40 hours:

(a) the claimant's evidence is that no one ever informed him that he required authorisation to work more than 40 hours per week. He relies on the Offer Letter, which states that he may be required to work reasonable hours in excess of 40 hours per week. He also says that he was asked to continue working and that Kardan had established a precedent by paying him for additional hours worked during the first and second weeks of his employment. From the claimant's perspective, Kardan could have directed him to cease working additional hours but did not do so. Instead, Mr Soriano generated further work by asking numerous questions. The claimant's position is that, if he was required to continue working, he should be paid for the additional hours worked. The claimant denied that he was required to seek approval to work 60 hours per week, having regard to the terms of the Offer Letter and what he says was the precedent established by Kardan. By way of example, he referred to an email sent by Mr Soriano at 6.17 pm AWST on the day before the Tender was due (30 April 2026), requesting numerous changes to the estimates;[26] and

(b) Kardan's evidence is that it never approved the claimant working additional hours during the third and fourth weeks of his employment. Kardan's position is that, where an employee works additional hours without prior approval, the employee is required to justify those hours, and Kardan is entitled to adjust the hours claimed if the justification is not accepted.[27] It is then a matter for the employee to challenge any adjustment. Mr Bohan said that this was the process applied to the claimant's time sheets for the third and fourth weeks of his employment and that the claimant did not provide adequate justification for the additional hours claimed.[28]

48 Mr Bohan and Mr Soriano gave evidence that Kardan accepted the additional hours submitted by the claimant during the first and second weeks of his employment because they accepted that some additional time was required for onboarding.[29]

49 Mr Soriano agreed he did not discuss with the claimant any adjustment to his claimed hours of work before reducing the hours paid in the third and fourth weeks of his employment.[30]

Consideration of Terms in the Award

50 As provided for in the Offer Letter, cl 3 of the Award provides that the NES contains the minimum conditions of employment for employees covered by the Award, which includes the claimant.

51 Clause 8 of the Award provides that employees will be employed in one of four categories of employees, and relevant to the claimant, at cl 8.1(d), this includes as a casual employee.

52 Unlike that for full-time and part-time employees, the Award does not expressly provide for the ordinary hours of work per week, but, relevant to the claimant, at cl 12.5, states:

> A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 29—Overtime and 30—Penalty rates, provided that:
>
> (a) where the relevant penalty rate is **150%**, the employee must be paid **175%** of the **ordinary hourly rate** prescribed for the employee's classification; and
>
> (b) where the relevant penalty rate is **200%**, the employee must be paid **225%** of the **ordinary hourly rate** prescribed for the employee's classification.

53 Clause 29 of the Award provides for overtime, as follows:

(a) clause 29.1(a) states that subject to s 62 of the FWA and cl 29.1, an employer may require an employee to work

reasonable overtime hours at overtime rates;

(b) clause 29.1(b) states that an employee may refuse to work overtime hours if they are unreasonable; and

(c) clause 29.1(c) outlines the factors to be taken into account in determining where overtime hours are reasonable or unreasonable for the purpose of cl 29.1; that is for the purpose of determining the reasonableness or unreasonableness of the requirement to work overtime hours.

54 Pursuant to cl 29.4(b) of the Award, a casual employee must be paid in accordance with the overtime rates in cl 12.5.

55 Therefore, when read together there is clear provision in the Award for the payment of overtime to casual employees. The question is when does overtime apply in respect of hours of work by casual employees?

56 Section 62 of the FWA states:

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 lessor of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

57 The maximum number of weekly hours is a minimum condition of employment under the NES and cannot be displaced.[31]

58 For the purposes of Part 2-2 of the FWA (the NES), the term *employee* means a 'national system employee' and the term *employer* means a 'national system employer'.[32]

59 The claimant is a national system employee employed by a national system employer.[33]

60 Therefore, the maximum number of weekly hours of work to be worked by the claimant, even as a casual employee, was 38 hours per week in accordance with s 62(1)(b)(i) of the FWA.

61 Thereafter, pursuant to s 62(2) of the FWA, an employee, including the claimant, may refuse to work additional hours if they are unreasonable, and in determining whether the additional hours were reasonable or unreasonable, s 62(3) outlines the factors to be taken into account.

62 The factors outlined cl 29.1(c) of the Award mirror the factors outlined in s 62(3) of the FWA.

63 Accordingly, if and where the maximum number of weekly hours of work for a casual employee is 38 hours pursuant to the NES, the maximum number of weekly hours of work for a causal employee covered by the Award is also 38 hours per week. The result being that under the terms of the Award any hours of work required to be worked over 38 hours per week by a casual employee are overtime hours.

Whether it was Necessary for Kardan to Request or Require the Claimant to Undertake Additional Hours of Work?

64 Having regard to the terms of the Award, and consistent with authorities on a similar issue,[34] cl 29.1(a) contemplates there will be a request or requirement made by the employer. Absent such a request or requirement, there can be neither a refusal by the employee nor consideration of whether the requirement or refusal is reasonable or unreasonable. If the employee does not refuse a request or requirement and works the overtime hours, the employer is then required to pay the employee at the relevant overtime rate.

65 Further, and again consistent with the authorities, that construction makes industrial sense. It balances the employee's entitlement to be paid for work requested or required by the employer with the employer's entitlement not to pay overtime rates for work that it neither requested, required, nor otherwise directed to be performed.

66 The Offer Letter employs similar language to that used in the Award. It provides that the claimant may be required to work reasonable additional hours beyond 40 hours per week, as required by Kardan, having regard to operational requirements; the claimant's personal circumstances; and applicable legislation. Applicable legislation includes s 62 of the FWA.

67 The claimant contended that the terms of the Offer Letter meant that he was not required to obtain Kardan's authorisation or permission before undertaking additional work over 40 hours per week. His position was that if Kardan asked for work to be done and that work required him to work more than 40 hours, Kardan is obliged to pay him for those additional hours.

68 I do not wholly accept the claimant's contention. The claimant's reliance on the Offer Letter focuses on the performance of reasonable additional hours, rather than on whether those additional hours were in fact requested or required by Kardan.

69 When the 'Hours of Duty' clause in the Offer Letter is read as a whole, it is apparent that any requirement to work additional hours is predicated upon Kardan having an actual need for additional work to be performed. Once such a requirement exists, the terms of the Offer Letter engage cl 29.1(c) of the Award and s 62(3) of the FWA.

70 Similar to the construction of cl 29.1(a), this construction of the 'Hours of Duty' clause makes commercial sense. Otherwise, employees might conclude that they are entitled to work additional hours performing duties that could reasonably be completed within their ordinary hours and thereby incur an entitlement to overtime payments.

71 I accept that the terms of the Offer Letter could have been expressed more clearly. However, I do not accept that the Offer Letter permitted the type of unrestricted arrangement suggested by the claimant.

If a Request or Requirement was Necessary, Whether it Needed to be Express or Whether it Could be Implied

72 While the claimant did not use the word *implied* when referring to any requirement or authorisation by Kardan to perform

work in excess of 40 hours per week, that contention was implicit in both his written contentions and oral evidence. The claimant's evidence was that he had never been informed that he required authorisation to work additional hours. He said that Kardan continued to ask him to undertake work, that he was paid for additional hours worked during the first and second employment periods, and that the Offer Letter contemplated that he may be required to work additional hours.

73 Kardan contended that any overtime work was required to be approved or authorised in advance. However, from Kardan's evidence it appears that employees submitted claims for overtime which were then subject to review and adjustment, either upwards or downwards, by Kardan.[35] There was no formal process governing the obtaining of prior approval for overtime work.[36]

74 In considering whether a request or requirement by Kardan to perform additional hours of work, thereby engaging an obligation to pay overtime, was required to be express and made in accordance with a process adopted by the employer, or whether such a request or requirement could be implied, the observations of Bromberg J in ***Peninsula Health***, at [78], are apposite:

> It is well to commence that assessment by considering context. The context here is the practical field of the allocation of additional work by an employer to its employees in the midst of an ongoing employment relationship. In such a relationship, some of what the employer requires of the employee, in terms of how, when and where the employee should provide his or her services in the conduct of the employer's business, may be expressly set out in the employee's contract of employment, position description or verbally by the employer upon the employee commencing employment. However, the practicalities of a working relationship are not ordinarily conducive of formalism or prescriptive instructional processes as there are a myriad of circumstances and tasks that are part of an employee's job that cannot, and need not, be foreshadowed in advance. As such, much of what is required of an employee must necessarily be left to be implied and, when what is required by the employer is the subject of a specific request, instruction or direction, that will almost always be done informally. Employees will necessarily be required to infer, from generalised expectations set by an employer, the custom and practice of the workplace, ongoing general arrangements, the nature of the work and the nature of their duties and skills (amongst other surrounding circumstances), what it is that their employer specifically requires of them in any given circumstance and therefore what it is they are authorised to do in a given and specific situation.

75 His Honour then discussed examples demonstrating that an employer's authorisation for overtime to be worked may be inferred from the circumstances of the case, including in ***Logan v Otis Elevator Company Pty Ltd*** [2001] IRCA 1; (2001) 107 IR 253 (***Logan***) where Moore J:

> [C]onstrued an award provision that provided that an employer 'may require' an employee to work reasonable overtime as at least implicitly providing that the overtime work performed pursuant to such a requirement had to be expressly or impliedly authorised by the employer in order to attract payment.[37]

76 As further observed by Bromberg J in ***Peninsula Health***, at [82], Moore J in ***Logan*** held that:

> [A]uthorisation for the performance of overtime impliedly flowed from the expectation that the employee would work 40 hours per week to complete his duties, even though neither the employer nor the employee were aware that an award applied to the employee's employment which provided that work beyond the prescribed 38 hour week had to be paid for at overtime rates.

77 There are obvious parallels between the claimant's case and ***Logan***. In the present case, neither the claimant nor Kardan appeared to appreciate that the claimant's ordinary hours of work were limited to 38 hours per week and that hours worked beyond that limit attracted overtime rates.

78 The clause concerning reasonable overtime considered in ***Logan*** (cl 14(b)) is similar in substance to cl 29.1(a) of the Award. In that context, Moore J observed that it was at least implicit that work attracting overtime rates had to be either expressly or *impliedly* authorised.[38]

79 Similarly in ***Peninsula Health***, at [89], Bromberg J concluded that, under the terms of the relevant enterprise agreement, an *authorisation* impliedly given to an employee for that employee to perform work in excess of rostered hours would require the payment of overtime for that work.

80 Based on Mr Bohan's evidence, there was no formal process for approving or authorising overtime work. At most, there may have been a discussion with employees at the commencement of their employment. Thereafter, at least some claims for overtime payment appear to have been assessed retrospectively.

81 Accordingly, having regard to the terms of both the Offer Letter and the Award, I am satisfied that a requirement or authorisation, whether express or implied, for an employee to work beyond their ordinary hours gives rise to an obligation to remunerate that employee in accordance with cl 29.1(a) of the Award, provided that the additional hours are worked.

Were the Additional Hours Claimed by the Claimant Authorised by Kardan?

82 In considering the correct approach in assessing whether implied authorisation was given by the employer (under the terms of the relevant award), Bromberg J in ***Peninsular Health*** discussed a number of matters relevant to that assessment. In summary:

(a) the content of any communication said to constitute the requirement or authorisation, and what that communication would reasonably convey to the recipient;

(b) an assessment of the content of any communication in light of the surrounding facts, circumstances, and the conduct of the parties viewed as a whole; and

(c) an assessment of any inconsistent or contrary messages, including any express communications.

83 The conduct and circumstances relied upon by the claimant to establish that Kardan impliedly authorised the additional work undertaken by him include:

(a) the terms of the Offer Letter;

(b) Kardan's payment for additional hours worked during the first and second employment weeks set a precedent for the third and fourth employment weeks;

(c) Mr Soriano continuing to require work to be undertaken and continuing to ask questions about the estimates, including numerous questions raised on the day before the Tender was due;

(d) no one directed him to cease undertaking additional work after Kardan had paid him for additional hours worked during the first and second employment periods;

(e) commencing work on the Tender after it had been open for submissions for approximately one week, thereby leaving him with four weeks rather than five weeks to complete it; and

(f) the size and complexity of the Tender.

84 Kardan relies upon the following matters in support of its contention that it neither required nor authorised the additional work said to have been undertaken by the claimant during the third and fourth weeks of his employment:

(a) the terms of the Offer Letter;

(b) the additional hours paid to the claimant during the first and second weeks of his employment were accepted because Kardan considered those hours were reasonably attributable to onboarding requirements associated with the Tender;

(c) the payment of additional hours during the first and second weeks of employment did not mean that additional hours claimed in the future would necessarily be approved or paid;

(d) there was no requirement for the claimant to undertake additional work during the third and fourth weeks of his employment. Any additional work said to have been undertaken arose because the claimant did not comply with Kardan's estimating procedures and was therefore required to undertake further work to address issues with his estimates;

(e) contrary to his assertions, the claimant was never instructed to be 'on standby';[39] and

(f) the claimant's email dated 29 April 2026, in which he stated that he would 'slow down to 8 hrs only starting today', was understood by Kardan to mean that he would work eight hours per day from that time onwards.

85 As already determined, the terms of the Offer Letter do not support the claimant's contention that Kardan's obligation to pay for additional hours worked was unrestricted. At most, the Offer Letter is consistent with cl 29.1(a) of the Award, which permits consideration of whether a requirement or authorisation to perform additional work may be implied.

86 Kardan did not have a formal process for authorising the payment of overtime. While Mr Bohan gave evidence that the requirement for prior approval for the payment for additional hours worked was discussed with an employee at the commencement of their employment, there was no evidence that any such discussion occurred with the claimant when he commenced employment. This is consistent with the claimant's evidence that the need to obtain authorisation before working additional hours was never raised with him.

87 It is also difficult to reconcile Mr Bohan's evidence regarding the retrospective justification of overtime claims with Kardan's contention that prior approval was required before any overtime could be worked. The evidence instead suggests that Kardan's practice was to assess overtime claims retrospectively and determine whether they should be paid based on whether the employee could satisfactorily justify the additional hours worked. That practice is inconsistent with a strictly enforced requirement for prior approval.

88 Further, this overlooks the requirement under regulation 3.34 of the *Fair Work Regulations 2009* (Cth) as it relates to record keeping by employers for overtime hours worked by employees.

89 It was not until part way through the fourth employment period, on 29 April 2026, that Kardan first raised an issue with the claimant regarding his hours of work. This occurred only after the claimant had raised concerns about his payslip for the third week of employment (20 to 26 April 2026), which recorded payment for 40 hours of work rather than the 60 hours he had claimed on his submitted time sheet.[40]

90 Kardan accepts that the claimant submitted a time sheet claiming payment for 60 hours of work for that period. However, Mr Soriano adjusted the hours to be paid from 60 hours to 40 hours. There is no evidence that Mr Soriano spoke with the claimant before making that adjustment. That conclusion is consistent with the contents of the claimant's email to Ms Hannah Parslow, who was an administrative assistant with Kardan (**Ms Parslow**), dated 29 April 2026.[41]

91 Ms Parslow subsequently copied Mr Soriano into the email correspondence.

92 Later, on 29 April 2026, Mr Soriano responded that any overtime was required to be approved before it was worked. He explained why Kardan had approved the overtime claimed during the first two weeks of the claimant's employment and advised that the hours submitted by the claimant would be reviewed following an assessment of the Tender.

93 The claimant's response was, consistent with his earlier evidence, that he was unaware that hours worked in excess of 40 hours per week required prior approval.

94 The claimant then requested that Kardan confirm whether it required more than 40 hours of work to be undertaken. It was in that context that he stated that, if he knew the number of hours Kardan required him to work, he would, in effect, limit his hours. However, he informed Kardan that the Tender involved 'high demand hours'. He also advised that, during the first two days of the fourth week of his employment, he had already worked 12 hours per day and briefly explained why. It was in that context that the claimant then stated that he would 'slow down to 8 hrs only starting today'.[42]

95 There was no further response on this issue from Kardan, until the claimant made enquiries with the Fair Work Ombudsman on or around 6 May 2026.

96 However, on 30 April 2026 at 12.08 pm AWST, Mr Soriano engaged in further email correspondence with the claimant about the Tender asking to do a review of the price. As already stated, the claimant was located in New Zealand which is five hours ahead of Western Australia. Therefore, it was 5.08 pm in New Zealand.[43]

97 In addition, Mr Soriano and Mr Bohan had a Teams meeting with the claimant for about 90 minutes. Mr Soriano's issue with the Teams meeting appears to be related to the claimant giving unsatisfactory answers during the meeting.[44]

98 This was the day before the Tender was due to be submitted.

99 Prior to the submission of the Tender, Mr Soriano requested that the claimant amend certain prices. The claimant did not do so because he considered that he lacked the necessary authority to make those changes. Instead, the claimant responded that it was open to Mr Soriano to use the document provided and reduce the estimated prices if he chose to do so. Mr Soriano's evidence appears to be that the claimant failed to complete the work he had been directed to undertake that day. However, it is not clear from the evidence whether any other work had been instructed or was required to be completed by the claimant on that occasion.[45]

100 There were a number of emails back and forth between the claimant and Kardan with the last being sent by the claimant on 1 May 2026 at 1.20 am New Zealand time.[46] In none of these emails, do Kardan suggest that the claimant should stop work or stop responding to the emails.

101 The real gravamen of Kardan's issue with the claimant, as agreed by Mr Bohan, is that it was dissatisfied with the claimant's work and, retrospectively, complains about the claimant failing to adhere to some of Kardan's processes and procedures.

102 Notwithstanding this, the Tender was submitted on time, and it included the claimant's work product.

103 Comments by Bromberg J in ***Peninsula Health***, at [121] and [132], are, again, apposite to the circumstances of this case:

> It is, I think, of particular importance in a case such as this to focus upon the work expectations set by the employer in considering whether or not a request or a direction that work be performed in a particular way or at a particular time was made by the employer. In most employment arrangements, it is simply not practicable for employees to be closely supervised and directed and, accordingly, what an employer will do is communicate the outcome it expects to employees rather than provide a series of specific directions as to how, when and in what order the tasks necessary to obtain that outcome are to be performed. In those circumstances, the requirements made of the employee will be mainly implicit rather than express and will often arise out of the expectations set by the employer. Further, expectations set by the employer will often not be set expressly but will themselves be implicit from the circumstances, including the nature of the employee's duties and the way in which, or the pattern in which, work is ordinarily performed to the apparent satisfaction of the employer.
>
> …
>
> Where an employer has clearly and unequivocally communicated to its employees that it will hereafter only authorise the working of overtime through a particular process, and uniformly only authorises overtime work through that process, there will likely be little room to imply from other conduct and relevant circumstances that the employer has requested, required or otherwise approved the working of overtime which has not been authorised under that process. However, the greater the ambiguity of the process itself or the communication regarding the significance and application of the process, the greater the room for such an implication. Likewise, the further from uniformity the actual practice or application of the communicated intent of the employer to only authorise overtime through the process, the greater the room for an implication that, from other conduct and circumstances, the employer has requested, required or otherwise approved the working of overtime which has not been authorised under the process. That is because a process that is unclear, uncommunicated or rarely applied is unlikely to have much force in conveying the employer's intent in any assessment made against countervailing conduct or circumstances which support an implied authorisation given by the employer otherwise than under the process. Such a policy is therefore unlikely to diminish or negate an authorisation implied from other conduct or circumstances.

104 In the claimant's circumstances, he worked remotely and, during the first two weeks of his employment, appears to have had very little direct supervision from Mr Soriano. Mr Soriano's evidence was that he also had very little contact with the claimant during the third week of the claimant's employment, although there was some email correspondence between them.[47] However, that evidence says little about what work the claimant was, or was not, undertaking during that period. Rather, it establishes only that there was limited contact between the claimant and Mr Soriano.

105 For the fourth week of the claimant's employment, Mr Soriano said that there was no expectation that the claimant would work over the long weekend. In support of that proposition, Mr Soriano referred to an email he sent to the claimant on 24 April 2026 stating that he would review everything with the claimant on the following Tuesday morning (being 28 April 2026).[48]

106 However, this evidence says little about what work the claimant was, or was not, expected to undertake, whether over the long weekend or otherwise. The email does not direct the claimant to cease work, nor does it indicate that no further work was required to be undertaken before Tuesday. Rather, it establishes only that Mr Soriano intended to review the work with the claimant on the following Tuesday morning. It may also suggest that Mr Soriano did not intend to work during the long weekend, but it does not necessarily assist in determining what work the claimant was expected to or not expected to undertake during that period.

107 There was no written policy for the working of, or payment for, overtime. To the extent that any policy existed, it appears to have been oral, informal and ad hoc, with employees being required to justify additional hours after those hours had been worked.

108 To the extent that the claimant was informed that overtime required prior approval, this did not occur until midway through the fourth week of his employment, after he had already submitted a manual time sheet claiming the hours he says he worked during the third week of employment. Further, Kardan had already paid overtime hours claimed by the claimant through the same manual time sheet process used during the first and second weeks of his employment.

109 Kardan did not provide an unequivocal response to the claimant's email regarding any process for obtaining approval to work overtime, stating only that overtime was required to be approved beforehand. However, by that stage, according to the claimant, he had already worked 24 hours during the fourth week of his employment, and the Tender was due for submission within approximately two days. Notwithstanding that position, Kardan continued to correspond with the claimant regarding issues arising from the Tender.

110 I find that Kardan did not impose any clear or effective limits on the claimant's working hours during the third and fourth weeks of his employment. Kardan took little, if any, action to monitor the claimant's hours of work. To the extent that Kardan now relies upon the claimant's failure to use its time-recording system, that was a matter that remained substantially within Kardan's control.

111 I further find that Kardan expected the claimant to continue working on the Tender so that it could be submitted by the required deadline and to respond to queries raised by Kardan as and when those queries arose. The fact that the Award prescribed ordinary hours of 38 hours per week did not alter Kardan's expectation that the work required for the Tender be completed in at least 40 hours per week.

112 In those circumstances, I find that Kardan impliedly required, or alternatively impliedly authorised, the claimant to work additional hours in excess of the 40 hours per week referred to in the Offer Letter.

What, If Any, Additional Hours Are Kardan Liable to Pay?

113 Kardan does not accept the claimant worked the additional hours claimed in the third and fourth weeks of his employment.

114 There is no dispute that the claimant submitted manual time sheets at the end of each week recording, in total, the hours he says he worked.

115 The claimant did not keep a daily record of the hours he worked. Rather, the only record he maintained was the manual time sheet submitted at the end of each week. In its response to the claim, Kardan contends that those time sheets do not constitute reliable contemporaneous evidence of the hours actually worked during the third and fourth weeks of employment.

116 Accordingly, I infer from Kardan's response that it contends the claimant has failed to discharge the onus of proving that he worked the hours said to give rise to an entitlement to overtime payments.

117 In summary, the claimant accepts that he is unable to provide a detailed account of the hours he worked during the third and fourth weeks of his employment. He says this is, in part, because the work product associated with those hours is now held by Kardan. However, the claimant also accepts that he kept no contemporaneous record of the hours he worked each day.

118 The claimant relies upon the time pressures associated with completing the Tender by the required deadline and the numerous queries raised by Kardan, particularly as the Tender approached completion.

119 A further consideration is that the Offer Letter contemplated the claimant working hours in excess of the statutory and Award maximum of 38 ordinary hours per week. Accordingly, and perhaps unwittingly, the claimant was already working hours beyond the statutory and Award maximum with Kardan's knowledge and approval.

120 In relation to the third week of employment, I accept the claimant's evidence that he worked 60 hours during that week notwithstanding the absence of records kept by either party. I do so for the following reasons:

(a) Kardan had no formal policy for recording and paying overtime hours worked;

(b) Kardan paid the claimant for additional hours worked during the first and second weeks of his employment without requiring any justification for those hours by the claimant;

(c) following the submission of the manual time sheets for the first and second weeks of employment, there was no discussion with the claimant suggesting that he was claiming unnecessary or unreasonable additional hours. The issue was only raised after the claimant queried the Third Payment, at which point the hours claimed had already been worked and submitted;

(d) the claimant commenced employment approximately one week after the Tender had opened for submissions, thereby reducing the time available to complete the Tender;

(e) no person at Kardan exercised any meaningful oversight of the claimant's work or working hours. The claimant was largely left to work on the Tender and respond to queries as they arose;

(f) there is no reliable evidence that the claimant worked additional hours for the purpose of improperly increasing overtime payments, nor is there reliable evidence that the work required of him could reasonably have been completed within 38 ordinary hours per week; and

(g) Kardan expected the claimant to work at least some hours in excess of 38 ordinary hours per week and, at a minimum, contemplated that he would work hours beyond his standard working week.

121 In relation to the fourth week of employment, I accept the claimant's evidence that he worked 40 hours during that week notwithstanding the absence of detailed records kept by either party. I reach that conclusion for substantially the same reasons as those applying to the third week of employment. In addition, on 29 April 2026, the claimant informed Kardan that he had already worked 24 hours during that week and Kardan did not clarify what work had been undertaken.

122 Further, immediately prior to the Tender being submitted, Kardan raised numerous queries concerning the Tender and expected

the claimant to respond to those queries. That circumstance is consistent with the claimant continuing to undertake work on the Tender during the remaining part of the fourth week of his employment. The Tender was submitted on time using the claimant's work product.

123 In relation to both the third and fourth weeks of employment, Kardan provided no explanation to the claimant as to why the hours claimed by him were reduced for payment purposes. Further, the evidence before the Court does not disclose any substantive basis for the reduction beyond Kardan's dissatisfaction with the quality of the claimant's work and its contention that he failed to comply with its policies and procedures. As the claimant submitted, if Kardan considered his performance to be unsatisfactory, it was open for it to terminate his employment, which it ultimately did.

Outcome

124 I am satisfied and I find that the claimant has proven on the balance of probabilities he worked:

(a) 60 hours in the third week of employment (20 to 26 April 2026); and

(b) 40 hours in the fourth week of employment (27 April to 3 May 2026).

125 I am also satisfied and I find that the claimant has proven on the balance of probabilities Kardan impliedly required or authorised any additional hours of work undertaken by the claimant in the third and fourth weeks of employment. I note that the hours of work claimed in the fourth week of employment are consistent with the weekly hours of work provided in the Offer Letter.

126 In making the Third and Fourth Payments, Kardan has failed to pay the claimant in full for work performed by him in the third and fourth weeks of employment.

127 For the third week of employment, the claimant claims:

(a) 10 hours at $117 per hour (or at a penalty rate of 1.5); and

(b) 10 hours at $156 per hour (or at a penalty rate of 2.0).

128 These rates are based on the rates applied by Kardan when paying the claimant for additional hours worked during the second week of his employment. I note that the Award prescribes a different method for calculating overtime payments for casual employees. However, these are the amounts claimed by the claimant and, in the circumstances, Kardan suffers no prejudice from those amounts being adopted.

129 For the fourth week of employment, the claimant claims 14 hours at $78 per hour (the rate referred to in the Offer Letter). For the same reasons, this is the amount claimed by the claimant and, in the circumstances, Kardan suffers no prejudice from this amount being adopted.

130 Accordingly, I am satisfied and I find that the following underpayments have been proven by the claimant on the balance of probabilities:

(a) for the third week of employment - $2,730; and

(b) for the fourth week of employment - $1,092.

131 I further find that in failing to pay these amounts to the claimant that it was required to pay in full for the performance of work, Kardan has contravened s 323 of the FWA, a civil remedy provision.

132 Therefore, pursuant to s 545(3) of the FWA, when read with s 548(1A)(a)(i) of the FWA, Kardan is required to pay to the claimant the amount of $3,822.

133 The claimant seeks an order that Kardan make the equivalent superannuation contribution to a superannuation fund for his benefit.

134 Section 116B of the FWA requires an employer to make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* (Cth). The payment of superannuation contributions is a NES pursuant to s 61(2)(ha) of the FWA. Pursuant to s 44 of the FWA, an employer must not contravene a provision of the NES. Section 44 of the FWA is a civil remedy provision.

135 Having found that Kardan failed to pay the claimant the full amount owing for the performance of work, namely $3,822, I am also satisfied that Kardan failed to make the corresponding superannuation contribution for the claimant's benefit in respect of that amount. The relevant amount of superannuation is to be calculated in accordance with the applicable superannuation guarantee rate operating at the time the entitlement arose. Applying the applicable Superannuation Guarantee rate of 12%, the unpaid superannuation contribution is $458.64.

136 Therefore, pursuant to s 545(3) of the FWA, when read with s 548(1A)(a)(i) of the FWA, Kardan is required to pay to a superannuation fund for the benefit of the claimant the amount of $458.64.

137 The claimant also seeks an order for pre-judgment interest.

138 Section 547(2) of the FWA provides that the Court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

139 Pre-judgment interest in the Court is awarded pursuant to regulation 12 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (**IMC Regulations**). Sub-regulation (1) states that the Court may order a party to pay interest 'from the date when the cause of case arose to the date when the order is made'[49] and at the rate prescribed by s 8(1)(a) of the *Civil Judgments Enforcement Act 2004* (WA).[50]

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

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

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

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

143 I am satisfied that interest should be awarded on the judgment sum of $3,822 for the period 5 May 2026 to 2 October 2026 in the amount of $84.19.

Orders

(1) Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), and pursuant to s 545(3) and s 548(1A) of the FWA, Kardan is to pay to the claimant:

(a) the amount of $3,822; and

(b) pre-judgment interest fixed at $84.19.

(2) Kardan is to pay to a superannuation fund for the benefit of the claimant the amount of $458.64.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] I infer from the words used, that the claimant refers to s 323 of the FWA.

[2] I infer from the words used, that the claimant refers to s 116B of the FWA.

[3] See Exhibit 1 – Witness Statement of Antonio Nahum Esquivel Murillo signed on 16 July 2026 at Annexure A, which was not disputed by Kardan.

[4] Exhibit 2 – Witness Statement of Ken Bohan signed on 21 August 2026.

[5] Exhibit 7 – Witness Statement of Roberto Soriano signed on 21 August 2026.

[6] Exhibit 2 [1].

[7] Exhibit 7 [1].

[8] Exhibits 3 to 6.

[9] Exhibit 1, Annexure A.

[10] Exhibit 1, Annexure A.

[11] Exhibit 1 [5].

[12] Exhibit 1, see also Exhibit 7 [5].

[13] ts 14.

[14] Exhibit 1 [4], Annexure E.

[15] Exhibit 1 [4], Annexure E.

[16] Exhibit 1 [4], Annexure E.

[17] Exhibit 1 [4], Annexure E.

[18] Exhibit 1, Annexure C.

[19] Exhibit 7 [32], Annexure C (email from Mr Soriano sent 29 April 2026 at 10:57 am AWST).

[20] Exhibit 1, Annexure C (email from the claimant sent 29 April 2026 at 3.14 pm NZST (or, 11.14 am AWST)).

[21] Exhibit 2 [6].

[22] Exhibit 2, Annexure J.

[23] Exhibit 1, Annexure D; Exhibit 2, Annexure K.

[24] See ts 13 - 14.

[25] Referred to in Exhibit 1 at Annexure F and G; see also Exhibit 2 and documents referred to in the Respondent's Bundle of Documents.

[26] Exhibit 1, Annexure H.

[27] ts 49.

[28] ts 49 - 50

[29] Exhibit 7 [15] - [16].

[30] ts 56 - 57.

[31] Section 61(2)(a) of the FWA.

[32] Section 60 of the FWA.

[33] Section 13 and s 14(1) of the FWA where Kardan is a Constitutional Corporation and where it employs an individual.

[34] ***Australian Salaried Medical Officers' Federation v Peninsula Health*** [2023] FCA 939 (***Peninsula Health***) [74] - [75].

[35] Exhibit 2 [19].

[36] ts 41 - 42.

[37] ***Peninsula Health*** [82] referring to ***Logan*** [40].

[38] ***Logan*** [40].

[39] Exhibit 7 [30].

[40] Exhibit 1, Annexure C.

[41] Exhibit 1, Annexure C.
[42] Exhibit 1, Annexure C.
[43] Exhibit 1, Annexure H.
[44] Exhibit 7 [27].
[45] Exhibit 7 [29].
[46] Exhibit 1, Annexure H.
[47] Exhibit 7 [17] - [21].
[48] Exhibit 7 [24].
[49] IMC Regulations reg 12(1)(a).
[50] IMC Regulations reg 12(1)(b).

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 Court, 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 Court must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.

[4] The jurisdiction of the Court under the FWA is primarily defined by three provisions:

(1) Section 539 of the FWA identifies the civil remedy provisions of the FWA which may be the subject of an application to an eligible state or territory court;

(2) Section 545(3) of the FWA describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of a civil remedy provision; and

(3) Section 546(1) of the FWA provides for the making of a pecuniary penalty order upon the court being satisfied of a contravention of a civil remedy provision.

[5] Section 539 of the FWA identifies, from among the several civil remedy provisions of the FWA, the particular civil remedy provisions for which application may be made to an eligible state or territory court 'for orders in relation to a contravention or proposed contravention of the provision'. The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.

[6] The civil penalty provisions identified in s 539 of the FWA include:

- Section 323 – failing to pay in full an amount on account of performance of work; and
- Section 44 – contravening a provision of the NES.

[7] 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].

[8] 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 [the 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].

[9] Section 12 of the FWA defines '*fair work instrument*' to, relevantly, mean at (a) a modern award.

[10] 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

[11] Where the Court 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 or a fair work instrument (emphasis added): FWA s 545(3)(a).

[12] The civil penalty provisions identified in s 539 of the FWA includes the provisions set out in pt 2 - 9 of the FWA: FWA s44, s 323(1), s 539.

[13] Relevant to the small claim procedure, 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).

[14] 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 Court 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

[15] Relevant to the claim, 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.

[16] 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].

[17] 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

[18] Subject to the provisions of the FWA, the procedure of the Court 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.

[19] 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: Construction of Industrial Instruments

[20] The relevant principles to be applied when interpreting an industrial instrument are well known and are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; 97 WAIG 1595 [21] - [23] (amongst many other decision).

[21] In summary (omitting citations), the Full Bench stated:

> The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement;
>
> (1) The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
>
> (4) The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';
>
> (6) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation; and
>
> (7) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

[22] The following is also relevant:

- Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813; (2006) 153 IR 426 at [53] - [57] (French J).
- Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. ***City of Wanneroo*** [53] - [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

2026 WAIRC 00875

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00875
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 5 AUGUST 2026
DELIVERED	**:**	WEDNESDAY, 5 AUGUST 2026
FILE NO.	**:**	CP 3 OF 2026
BETWEEN	**:**	DEPARTMENT OF THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
		PROSECUTOR
		AND
		SINAMON PTY LTD (ACN 649 108 556)
		OFFENDER
CatchWords	**:**	INDUSTRIAL LAW – Offence under section 33A(5)(c) of the *Industrial Relations Act 1979* – Publishing of offensive posts on social media about the Western Australian Industrial Relations Commission – Principles of personal and general deterrence – Penalty imposed
Legislation	**:**	*Sentencing Act 1995* (WA) *Industrial Relations Act 1979* (WA)
Result	**:**	Conviction entered; penalties imposed
Representation:		
Claimant	:	Mr A. Gibson (of counsel)
Respondent	:	No appearance

SENTENCING REMARKS

Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by her Honour.

1 The offence arises from the publishing of two Instagram posts on an Instagram account that is identified with and held by the accused company, Sinamon Pty Ltd. The statements that form the basis of the offence include that Chief Commissioner Stephen Kenner of the Western Australian Industrial Relations Commission (the **Commission**) is a 'corrupt racist liar', and secondly, that he is '[n]othing but a lying puppet, the Pinocchio of Perth'.

2 There was a second post that is attributable again to the accused company. I note both posts are dated 8 October 2025, but the second post is:

> Indeed, they are horrible people, evidently racist and corrupted. They have been bullying my business for the past five years. I hope to expose them and make them an example for the public.

3 Notably, in terms relevant for sentencing, the Industrial Magistrates Court (the **Court**) needs to consider the overall seriousness of the offence. The maximum penalty for a person is $10,000. This is subject to the *Sentencing Act 1995* (WA) multiplier of five,[1] so the maximum penalty is $50,000 for a corporation. That does give an indication of the seriousness of the offence as viewed by Parliament.

4 In terms of factors that are mitigating, it is difficult to identify any mitigating factors beyond what I can only assume is that the corporation has not been subject to prosecutions of this type in the past.

5 In terms of aggravating factors, I am informed that there are principally two aggravating factors. Firstly, there is a public reach with the posts where the accused company has about 26,000 followers.

6 But, irrespective of whether it has followers or not, one assumes that it is publicly available information, and could be viewed by any member of the public.

7 And the other is the duration from 8 October 2025 to at least up until 5 August 2026. That is, for approximately some

10 months.

8 The posts have remained on the accused company's Instagram account, attributable to the accused, and members of the Commission have requested that those posts be removed on at least three occasions before commencing the prosecution.

9 It cannot be said that the accused company has not had an opportunity to remove the posts having been informed on more than one occasion to do so. I reasonably infer it is likely that in being requested to do so, the accused company was informed that it could be subject to a prosecution of this type.

10 In terms of the offence itself, it is using words in writing or spoken with the intention of damaging public confidence in the Commission or a Commissioner contrary to section 33A(5)(c) of the *Industrial Relations Act 1979* (WA).

11 The nature of the words used seek to impugn an individual who sits as a Commissioner within the Commission. It does so by using strong language in the context of that person's role within the Commission. Further, the second post indicates that the accused company is prepared to continue to use this platform or an analogous platform to continue to damage either the individual or more broadly the Commission's reputation by use of the words:

> I hope to expose them and make them an example to the public.

12 This, in my view, indicates an intention of what the accused company, or the mind behind the accused company, is seeking to do.

13 It seeks to enact its own type of justice by undermining the important work carried out by the Commission – for those who may have little experience and have an axe to grind. It does not demonstrate a view of the world, rather, it is just a fairly harsh and pointed remark towards the Commission generally. With these types of commentaries, there ought to be, if not personal, then certainly general deterrence in preventing people from undermining the administration of justice in this way.

14 I also note that the comments made on the Instagram post are personal to an individual – they name that individual – and obviously have the reputational damage not only to the individual per se but to the Commission more broadly.

15 There is also a further need for personal deterrence. The accused company has been requested on at least three occasions to remove the post and they have not done so. One can only assume that they do not consider that there is any basis upon which it can meaningfully be removed.

16 That brings into play the fact that there needs to be a penalty that reflects not just the seriousness of the offence, but also brings home to the accused company, the implications of what they are saying. This penalty also needs to deter others from engaging in this type of behaviour.

17 I accept the characterisation as being low to moderate and that in the absence of any other mitigating factors beyond that there has been no other prosecutions that have been brought to the Court's attention, I intend to a impose a fine of $7,000 and award the prosecution costs in the sum of $625.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] *Sentencing Act 1995* (WA) s 40(5).

2026 WAIRC 00903

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00903
CORAM	**:**	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	**:**	WEDNESDAY, 12 AUGUST 2026
DELIVERED	**:**	WEDNESDAY, 13 AUGUST 2026
FILE NO.	**:**	M 171 OF 2025
BETWEEN	**:**	GEORGINA GAYE GEARD
		CLAIMANT
		AND
		GREG WHEELER CONTRACTING PTY LTD
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – Alleged contraventions of *Hospitality Industry Award 2020* – small claim – classification – whether claimant classified at Level 5 classification – Sunday penalty rates -claim upheld in part
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Instrument	**:**	*Hospitality Industry Award 2020*
Result	**:**	Claim partly upheld
Representation:		
Claimant	:	In person

Respondent : Mr G Wheeler (director)

REASONS FOR DECISION

Given extemporaneously at the conclusion of the hearing, edited from transcript by her Honour for clarity and to provide complete references.

1 The claimant, Ms Georgina **Geard**, was employed by the respondent, Greg Wheeler Contracting Pty Ltd (**the company**) at its business, then known as Inner City Apartments, located at 875 Wellington Street, West Perth.

2 Ms Geard commenced this claim seeking payment of $11,085.59 for the company's alleged contravention of the *Hospitality Industry **Award** 2020*. She elected for the proceedings to be dealt with under the small claims procedure set out in s 548 of the *Fair Work Act 2009* (Cth) (**FWA)**.

3 There are three components to Ms Geard's claim. First, she claims she was underpaid from 4 April 2024, when she says she was promoted to office manager, as she was paid at the Level 3 classification rate of pay rather than the Level 5 classification rate of pay under the award (**wage underpayment claim**).

4 Second, Ms Geard claims the payment of Sunday penalty rates under cl 29.2B of the Award. She says no Sunday penalty rates were paid to her throughout the employment, although she worked Sundays in each week that she was employed (**Sunday penalty claim**).

5 Third, Ms Geard claims superannuation on the amounts claimed by way of the wage underpayment claim and the Sunday penalty claim under cl 27.2 of the award (**superannuation claim**).

6 While the company accepts that the Award applies to Ms Geard, it denies Ms Geard was employed at the Award's Level 5. The company says that Ms Geard was not employed to perform the duties of a Level 5 classification and was, at all times, correctly classified as Level 3.

7 The company admits Ms Geard worked on 12 Sundays, attracting the Sunday penalty rate, but denies she worked every Sunday. During the hearing, Ms Geard agreed with the company's list of Sundays when she did and did not work. Accordingly, Ms Geard agreed that her claim is limited to those 12 occasions, and the company agrees that it owes Ms Geard $1,125.38, plus superannuation for those dates. I calculated the superannuation component as $123.80.

8 The wage underpayment claim turns on two factual issues:

(a) whether Ms Geard had the appropriate level of training to be classified at Level 5; and

(b) whether Ms Geard had responsibility for supervision, training and coordination of front office employees.

9 Ms Geard has not established, on the balance of probabilities, the facts necessary to support the wage underpayment claim. That claim must therefore be dismissed. These are my reasons for so finding.

The Industrial Magistrates Court's Jurisdiction

10 Under s 539 and s 540 of the FWA, an employee may apply to an eligible State or Territory court for orders in relation to a contravention of s 45 of the FWA, that is, the prohibition against a contravening a term of a modern award if the employee is affected by the contravention. Such application must be made within six years after the day the contravention occurred.[1]

11 The Industrial Magistrates Court of Western Australia is an eligible State or Territory court.[2] The Court may order that an employer pay an amount to an employee if the Court is satisfied that the employer was required to pay the amount under the FWA or a Fair Work instrument, and the employer has contravened a civil remedy provision by failing to pay the amount.[3]

12 Ms Geard is an employee affected by the alleged contravention of s 45 and the Award. The Award is a modern award under the FWA and is a Fair Work instrument. As the claimant, Ms Geard bears the onus of proving her claim on the balance of probabilities.

Background and Uncontentious Evidence

13 The company employed Ms Geard from 18 November 2023 until 26 November 2024, when she resigned. During the period of the employment, Ms Geard resided onsite in a room of the hotel with another person who also worked for the company.

14 Although Ms Geard suggested that she understood she was being employed for full-time employment, she and the company agree, for the purposes of these proceedings, that the employment was casual.

15 Mr Greg Wheeler is the company's managing director. Ms Heidi Wheeler was the company's front desk manager. Mr William **Carter** was formerly employed as the manager or building manager, and Mr Dan **O'Sullivan** was, from late March 2024, the building manager.

16 From the commencement of the employment until April 2024, Ms Geard was employed as a front office receptionist. The company paid Ms Geard $29.50 per hour. She worked under the supervision of another employee who, in turn, reported to Ms Wheeler.

17 From around 4 April 2024, following the departure of a staff member and the return of Mr O'Sullivan to the role of building manager, the company increased Ms Geard's hourly rate to $31.50 per hour. This increase followed a meeting between Mr Wheeler and Ms Geard, during which Mr Wheeler told her he was happy with her work and proposed the pay increase, to which Ms Geard agreed. The agreement was not documented in a written employment contract.

18 Ms Geard's hours during the time she was employed varied from 9.5 hours to 46.5 hours per week.

19 From November 2023 to 30 June 2024, the hourly casual rate of pay under the Award for a Level 3 – front office grade 2 was $31.09 and $43.52 with Sunday penalties. From November 2023 to 30 June 2024, the casual rate of pay under the Award for a Level 5 – front officer supervisor was $34.79 and $48.70 with Sunday penalties.

20 From 1 July 2023 to 26 November 2024, the hourly casual rate of pay under the Award for a Level 3 – front office grade 2 was $32.25 and $45.15 with Sunday penalties. From 1 July 2024 to 26 November 2024, the casual rate of pay under the Award for a Level 5 – front office supervisor was $36.09 and $50.52 with Sunday penalties.

What was Ms Geard's correct classification between April and November 2024?

21 Clause 14 of the Award provides:

> 14. Classifications
>
> An employer must classify an employee covered by this award in accordance with Schedule A – Classification Structure and Definitions

22 The relevant parts of Schedule A are set out below:

> **A.2.3 Guest services stream**
>
> …
>
> **(g) Front office grade 2 (wage level 3)** means an employee who has the appropriate level of training and is in the front office engaged in performing duties including as a telephonist, receptionist or cashier, providing information services or making reservations.
>
> **(h) Front office grade 3 (wage level 4)** means an employee who has the appropriate level of training and is in the front office engaged in duties including assisting in training and supervising front office employees of a lower classification.
>
> **(i) Front office supervisor (wage level 5)** means an employee who has the appropriate level of training, including a supervisory course, and has responsibility for the supervision, training and co-ordination of front office employees.

23 As the classifications for each of the front office grades 2 through to supervisor refer to the employee having the 'appropriate level of training', it is necessary to also have regard to the definition of this phrase, which is in cl 2 of the Award:

> **2. Definitions**
>
> **…**
>
> **appropriate level of training** in relation to an employee, other than a casino gaming employee, means that the employee:
>
> (a) has completed an appropriate training program that meets the training and assessment requirements of a qualification or one or more appropriate units of competency forming part of a training package; or
>
> (b) has been assessed by a qualified skills assessor as having skills at least equivalent to those attained in an appropriate training program; or
>
> (c) as at 30 June 2010, had been doing the work of a particular classification for a period of at least 3 months.

24 In order for Ms Geard to succeed in her wage underpayment claim, the first thing she must demonstrate is that she has had the appropriate level of training, including a supervisory course. Ms Geard initially advanced her claim on the basis that she had a Diploma of Hospitality Business Management, which qualified as an appropriate level of training. She also, in the alternative, said that she had ample prior experience at Level 5.

25 I will deal first with the alternative claim based on experience. Experience does not count under the definition of 'appropriate level of training' unless paragraph (c) of the definition applies. Paragraph (c) is a transitional provision to ensure that any employee who was employed in a Level 5 position when the Award first came into effect is not worse off, provided that they had been in the classification for a period of at least three months. It applies at a point in time, that is, as at 30 June 2010.

26 According to Ms Geard's résumé, as at 30 June 2010, Ms Geard was working as a receptionist at Great Eastern Motor Lodge.[4] Ms Geard was not employed by the company at that point in time, so paragraph (c) does not apply.

27 Therefore, the only pathway for Ms Geard to succeed in her claim is for her to demonstrate that she had completed an appropriate training program that meets the training and assessment requirement of a qualification of one or more appropriate units of competency forming part of a training package.

28 To prove that she had completed a Diploma in Business Management Hospitality, Ms Geard relied on a copy of a document dated 20 November 2003, which is Exhibit C2. As I indicated during the hearing, there are several reasons to doubt the authenticity of this document:[5]

> (a) It refers to the 'Palmerston Hospitality Collage [sic]'
>
> (b) The signatory's title and position is not stated.
>
> (c) The document is inexplicably dated in two places.
>
> (d) There is nothing on the document resembling a business logo.
>
> (e) There is no reference in the document to the units of competency forming part of the qualification.
>
> (f) There is no reference in the document to a course number or training package number.
>
> (g) The seal on the document is blurry and indecipherable.

29 As to the spelling error identified in [28(a)] above, Ms Geard attached to her originating claim an email from her to Mr Wheeler dated 23 December 2024 in which she says that she had:

> Done a hospitality business management diploma in 2003 at Palmerston Hospitality Collage [sic].[6]

30 In the email, Ms Geard indicates that she had contacted the 'collage', who had sent information on how to obtain a copy of her

certification, but it may take longer than 14 days for her to get it. She said she had also asked her mum if she has a copy and that her mum is having a look. Ms Geard commits the same spelling error in her email as then appears on the document that I have referred to.

31 Ms Geard's résumé refers to Ms Geard having a:

> **Diploma of Hospitality Business Management** from Palmerston Collage [sic]
>
> Finished 2003
>
> CIRT [sic] 3 – Diploma of Hospitality Buisness [sic] Management[7]

32 Another curiosity arises from the résumé's reference to 'CIRT 3'. If this is intended to represent the qualification as a Certificate III, then under the Australian Qualifications Framework, the qualification is not the equivalent of a diploma.

33 No registered training organisation with a name including 'Palmerston Hospitality' is listed on the National Training Register, either as current, non-current, cancelled or withdrawn, although Charles Darwin University has a Palmerston campus.

34 I advised Ms Geard that I suspected Exhibit C2 was a forgery. She denied this. She said the original was given to her by a manager whose name she could not recall, who worked for the employer she was working for at the time that she completed the course. She also said that she received a different document with course details and grades directly from the training provider. She said her parents have the original of the other document.[8] I find it difficult to accept her account as to why her manager would provide Exhibit C2 when another document was issued by the training provider. If the training provider supplied course documentation, there is no reason for her manager to have produced Exhibit C2.

35 It is unnecessary for me to make any finding as to whether or not Ms Geard has forged Exhibit C2 or, for that matter, misrepresented her qualifications in her résumé. The deficiencies in Exhibit C2 and the absence of other credible evidence mean that I am not satisfied that Ms Geard completed an appropriate training program meeting the Award's requirements.

36 I reject Exhibit C2 as being reliable evidence of Ms Geard having completed recognised training or a qualification in hospitality business management. There was no other evidence before me which was capable of satisfying me that Ms Geard had the appropriate training.

37 This is fatal to the wage underpayment claim, which can be dismissed on this basis alone.

38 However, even if Ms Geard had completed appropriate training, the evidence does not establish that she had *responsibility* for the supervision, training and coordination of front office employees either. In this regard, in her originating claim, Ms Geard says:

> 2. *Acting* Managerial Duties: The Complainant was frequently left to manage the front office *during the absence* of the official manager on three *separate occasions*:
>
> - When the Manager left without notice.
> - When the Manager needed to attend rehabilitation.
> - Pending the arrival of a replacement Manager.
>
> 3. Duration of Managerial Duties: The Complainant estimates having performed acting managerial duties for *approximately eight weeks in total*. The Complainant asserts that their ability to successfully fill in for the Manager contradicts the claim of being unqualified for the position. (my emphasis)[9]

39 Ms Geard herself uses, 'acting', 'separate occasions', 'during the absence', and a duration of 'approximately eight weeks in total'.

40 The performance of higher duties on a temporary or occasional basis does not, of itself, determine an employee's substantive classification. Indeed, it reinforces that Ms Geard's position was classified at the lower level and that other people had the substantive responsibilities for the duties that would have formed part of a higher classification.

41 The evidence overwhelmingly demonstrates that others did have responsibility for supervision, training and coordination of front office employees, namely Ms Wheeler and Mr O'Sullivan. Ms Geard did not challenge Ms Wheeler's evidence to the effect that, whether Ms Wheeler was onsite or not, she was in constant communication with the front desk and supervised reception activities, namely, guest check-ins, payments, housekeeping allocations, supply requirements and guest services, that she trains new and established staff, that she checks and oversees cash handling and supply orders, bank account reconciliations and so on.

42 While Ms Geard accepted that Ms Wheeler had these responsibilities and fulfilled them both onsite and remotely, she appeared to view remote supervision or anything less than having a continual physical presence as negating supervision. This was a mistaken view.

43 Ms Geard emphasised that Ms Wheeler could not do everything remotely, that she could not cut guests' keys, for example, or handle cash. Ms Wheeler readily accepted that to be the case. This concession does not advance Ms Geard's case. The handling of cash and cutting of keys are not Level 5 duties.

44 Mr O'Sullivan's unchallenged evidence was that Ms Geard did not have responsibility for managing shift operations, staff training, or front desk coordination, as he and Ms Wheeler had those responsibilities. Mr O'Sullivan and Ms Wheeler were in daily contact around things like staffing hours. Mr O'Sullivan ensured that staff signed on and off their timesheets, created front desk staff standard operating procedure, checked the front desk quotas, managed the front desk time-off and holiday requests, checked front desk staff timesheets and monitored front desk for adherence to standard operating procedures. Ms Wheeler received the daily reports from front office staff on reception diaries, daily transaction reports, the cash book and so on.[10]

45 In her evidence-in-chief, Ms Geard's case appeared to change, as she stated that her 'daily duties' as Front Office Manager included:

- [responsibilities for] supervising, coordinating and training junior reception staff;
- handling cash reconciliations, financial reports, and administrative systems;
- managing venue security and responding to 24/7 guest emergencies; and
- exercising total operational autonomy onsite.[11]

46 The evidence did not establish that Ms Geard had responsibility for all those things. The highest the evidence went was that Ms Geard assisted in the training of other staff, dealt with guest emergencies out of hours, and handled cash.

47 In her oral evidence Ms Geard suggested that there was an express oral agreement that she was promoted to the position of Front Office Manager. This was the first time in the course of the proceedings that her case was put on the basis of an express oral agreement.

48 In cross-examination, she asserted that this agreement was made with Mr O'Sullivan, but she gave no account herself of the discussion or conversation said to constitute the agreement.[12] Ms Geard did not provide the Court with her version of any conversation with Mr O'Sullivan. Instead, Ms Geard tried to elicit evidence from Mr O'Sullivan in cross-examination, asking him whether he gave her the title of Front Office Manager. Mr O'Sullivan denied this.

49 He gave an account of returning to the hotel in late March or early April 2024, finding the front desk was not running the way he would like it to, and telling Ms Geard that he wanted her to be his single point of contact for the front desk. He was firm in his denial of conferring or agreeing to any form of promotion or change to Ms Geard's responsibilities and duties or to her title, noting that he was not authorised to do so, nor did he have any authority in relation to or knowledge of Ms Geard's pay arrangements.[13] I found Mr O'Sullivan's evidence to be clear, internally consistent and reliable, and I accept it.

50 Ms Geard relied on evidence from a number of co-workers and people involved in the Perth City Apartment Hotel who observed Ms Geard's work. They confirm that Ms Geard resided at the hotel and was observed to attend to property matters outside of normal business hours.

51 Mr Eddie Kamil said that, during normal business hours, Ms Geard was stationed at the front reception desk performing supervisory, administrative and operational duties. Mr Kamil said that when the hotel's designated manager was absent, Ms Geard appeared to be the person responsible for the day-to-day operation of the hotel and the primary point of authorisation at reception. Mr Kamill rarely observed Ms Wheeler personally working regular reception or front desk shifts, and he said that Ms Wheeler spent considerable periods of time travelling.[14] However, Ms Wheeler's physical presence at reception is not proof that she was or was not working as the office manager and the reception supervisor.

52 Ms Leonarda Nancy Withers' evidence was that Ms Geard provided direct training, guidance and support to herself, allocated daily tasks, managed reception handovers, oversaw the front desk workload and was the primary point of escalation and contact for issues that arose with guests. Ms Withers' evidence in this regard was not challenged, nor was she challenged on her evidence that someone she described as 'management', but did not identify, had informed her that Ms Geard's title will be office manager, and that she was to report to Ms Geard as her supervisor.[15]

53 I accept her unchallenged evidence, but it does not prove that there was an agreement between Ms Geard and the company that Ms Geard's title was to change. I note, incidentally, that the title Ms Withers described is different to the title Ms Geard put to Mr O'Sullivan.

54 In any event, Ms Withers' evidence does tend to prove something about the scope of Ms Geard's role, responsibilities and the reporting relationships. Ms Withers also confirmed that Ms Geard worked closely with management, and she confirmed that Ms Geard reported to any of Mr Carter, Mr O'Sullivan, Mr Wheeler and Mrs Wheeler. While Ms Withers' evidence is relevant to and elucidating in respect of Ms Geard's duties, it did not go so far as to satisfy me that those duties were such that Ms Geard had responsibility for supervision.

55 Ms Sanela Muzaferovic was a cleaner at the apartments. Her unchallenged evidence was that she saw Ms Geard as the primary individual responsible for running the hotel front desk during daytime business hours. According to Ms Muzaferovic, Ms Geard performed administrative and 'supervisor-level duties' independently.[16] Her evidence in relation to performing supervisor-level duties was effectively the expression of an opinion which, in the absence of a factual basis, I cannot act upon.

56 Although several of the witnesses refer to Ms Geard as performing 'supervisory duties', there was little substance in the evidence that provided a picture of what that meant or how she had supervisory responsibilities. There was no suggestion that she rostered staff, checked timesheets, checked that other staff were complying with the operating procedures, or dealt with staff leave requests. The unchallenged evidence was that Mr O'Sullivan did all these things at the relevant time.

57 I accept that other staff reported to Ms Geard and that she was a primary point of contact for front office when she was working. However, this falls short of establishing that she had responsibility for coordinating the front office employees or supervisory responsibilities as that is commonly understood. Ms Geard has not satisfied me that her position should be substantively classified at Level 5 and has failed to prove her wage underpayment claim.

Conclusion and Disposition

58 For these reasons, I am not satisfied that Ms Geard's position was properly classified as Level 5 under the Award. The evidence establishes that she performed work consistent with a Level 3 - front office employee and that the supervisory and coordination responsibilities required for Level 5 remained vested in other employees.

59 The parties ultimately agree that Ms Geard worked on 12 Sundays during her employment and was not paid the applicable Sunday penalty rate. She is therefore entitled to payment of those penalties, together with the associated superannuation entitlement.

60 I am satisfied that the company was required to pay Ms Geard a total of $1,249.18 under the Award for Sunday penalty rates,

and contravened s 45 of the FWA by failing to do so. I will order payment of that amount to Ms Geard pursuant to s 545(3) of the FWA.

Costs Application

61 Ms Geard sought an order for payment of her court costs 'because they underpaid me and I had to come to court'. The respondent did not oppose the application.[17]

62 I decline to make an order for costs, notwithstanding the fact that the company did not oppose the order being made.

63 Ms Geard advanced claims that substantially exceeded what reasonably could have been supported by the evidence that was available to her.

64 Ms Geard put in issue matters that ought never have been pursued, which caused the respondent and the Court to have to deal with those matters unnecessarily. For example, Ms Geard claimed penalty rates for every Sunday in the period that she was employed, and only conceded that she did not, in fact, work every Sunday, during the hearing.

65 Ms Geard also filed a witness statement which she had written for an intended witness, knowing that the witness had not adopted or agreed to the contents of the witness statement. While Ms Geard ultimately did not rely on that witness statement, the filing of the witness statement meant that the respondent was required to deal with and respond to it. The witness was also unnecessarily inconvenienced.

66 Ms Geard's conduct was inconsistent with a party's obligation to responsibly, reasonably and efficiently conduct themselves in proceedings. This weighs against the exercise of the discretion to award costs under s 548(10) of the FWA.

R. COSENTINO

INDUSTRIAL MAGISTRATE

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[1] *Fair Work Act 2009* (Cth) (**FWA)** s 544.

[2] FWA s 12 (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

[3] FWA s 545(3).

[4] Exhibit C3 – Resume of Georgina Geard lodged 18 December 2025 (Originating Claim, 30-32); see also Exhibit R1 - Witness Statement of Greg Wheeler lodged 10 August 2025 Annexure GWC-05.

[5] ts, 12 August 2026, 5.

[6] Exhibit R1 – Witness Statement of Greg Wheeler lodged 10 August 2025 Annexure GWC-05.

[7] Exhibit C3 – Resume of Georgina Geard lodged 18 December 2025 (Originating Claim, 30-32)

[8] ts, 12 August 2026, 15.

[9] Exhibit R1 – Witness Statement of Greg Wheeler lodged 10 August 2025 Annexure GWC-05.

[10] Exhibit R4 – Witness Statement of Dan O'Sullivan lodged 7 August 2026.

[11] Exhibit C1 – Witness Statement of Georgina Gaye Geard lodged 30 July 2026 and annexure GG-3.

[12] ts, 12 August 2026, 16 – 39

[13] ts 12, August 2026, 74 -82.

[14] Exhibit C6 – Witness Statement of Eddie Kamil lodged 30 July 2026.

[15] Exhibit C4 – Witness Statement of Leonarda Catharina Alinda Winders (name amended) lodged 30 July 2026.

[16] Exhibit C5 – Witness Statement of Sanela Muzaferovic lodged 30 July 2026.

[17] ts, 13 August 2026, 104 – 105.

2026 WAIRC 00930

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00930
CORAM	**:**	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	**:**	WEDNESDAY, 19 AUGUST 2026
DELIVERED	**:**	WEDNESDAY, 14 OCTOBER 2026
FILE NO.	**:**	M 40 OF 2026
BETWEEN	**:**	ISABEL JAI MENZIES
		CLAIMANT
		AND
		CARDAV GROUP PTY LTD
		RESPONDENT
CatchWords	**:**	INDUSTRIAL LAW – Alleged contraventions of s00A045 of the *Fair Work Act 2009 (Cth)* – Small Claim – *Hair and Beauty Industry Award 2020* – apprenticeship – public holidays –

		whether training days are days worked for the purpose of public holiday entitlements – claim for underpayment for hours worked treated as unpaid meal breaks – whether employer liable to make payment in lieu of notice where employee resigned and gave notice – whether employer liable to reimburse TAFE fees – claims upheld in part
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Relations Act 1979 (WA)
		Vocational Education and Training (General) Regulations 2009 (WA)
		Public and Bank Holidays Act 1972 (WA)
Instrument	**:**	*Hair and Beauty Industry Award 2020*
Cases referred to in reasons:	**:**	***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*** [2022] HCA 1; (2022) 275 CLR 165
		Seo v Bindaree Food Group Pty Ltd [2021] FWCFB 2691; (2021) 306 IR 408
		Minister for Police v WA Police Force Union of Workers (1969) 49 WAIG 993
		Hospital Employees' Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home (1977) 57 WAIG 455
		Warramunda Village Inc v Pryde [2002] FCA 250; (2002) 116 FCR 58
		Australian Salaried Medical Officers' Federation v Peninsula Health [2023] FCA 939; (2023) 325 IR 26
		Moore v Bytewise Pty Ltd [2026] FWCFB 217
		Terex Australia Pty Ltd v Cameron [2025] FWCFB 205
Result	**:**	Claim upheld in part
Representation:		
Claimant	:	In person
Respondent	:	Mr D. Lee (director)

REASONS FOR DECISION

1 The claimant, Ms Isabel Menzies, was employed by the respondent, Cardav Group Pty Ltd (**the Company**) as an apprentice hairdresser from 11 February 2024 until she resigned on 29 August 2025.

2 Ms Menzies commenced this claim seeking payment of $9,992.12 for the Company's alleged contraventions of the *Hair and Beauty Industry **Award** 2020*. She has elected for the proceedings to be dealt with under the small claims procedure set out in s 548 of the *Fair Work Act 2009* (Cth) (**FWA**).

3 There are six components to Ms Menzies' claim:

a. that she was not paid for four public holidays (**Public Holiday Claim**).

b. that she was not paid for all hours she was rostered to work, because deductions were made for paid breaks (**Time Deducted Claim**).

c. payment for Saturday meal breaks which she says she worked through (**Meal Breaks Claim**).

d. payment for time not worked, and unpaid, because she was sent home from work before the rostered finish time (**Hours Shortfall Claim**)

e. two-weeks' pay in lieu of notice of termination (**Termination Pay Claim**)

f. payment for TAFE fees (**TAFE Fees Claim**).

4 The Company accepts that the Award applies to Ms Menzies. It denies it has underpaid her. In relation to the Public Holiday Claim, it says that Mondays were not a day that Ms Menzies was ordinarily rostered to work, as the salon was closed on those days. It therefore does not consider Ms Menzies was entitled to be paid for public holidays that fell on a Monday, unless she was attending TAFE. It says it otherwise paid her for all public holidays that fell on days that Ms Menzies would have worked.

5 In relation to the Meal Breaks Claim, the Company says Ms Menzies was able to, and did, take her meal breaks and so is not entitled to any further payment. In relation to the Time Deducted Claim and Hours Shortfall Claim, the Company says that when Ms Menzies was not paid in full for all her ordinary hours, it was because she had requested, and the Company had permitted her, to take unpaid leave.

6 As to the Termination Pay Claim, the Company says Ms Menzies resigned without giving notice, so that it is not obliged to pay notice in lieu.

7 Finally, in relation to the TAFE Fees Claim, the Company says that it was not provided with a claim for, or proof of payment of, Ms Menzies' TAFE fees paid during the employment and in any event, it was not satisfied as to Ms Menzies' progress so as to entitle her to reimbursement of TAFE fees.

The Industrial Magistrates Court's Jurisdiction

8 Under s 539 and s 540 of the FWA, an employee may apply to an eligible State or Territory court for orders in relation to a

contravention of s 45 of the FWA, that is, the prohibition against contravening a term of a modern award, if the employee is affected by the contravention. Such application must be made within six years after the day the contravention occurred.[1]

9 The Industrial Magistrates Court of Western Australia (**IMC**) is 'an eligible State or Territory court'.[2]

10 The IMC may order that an employer pay an amount to an employee if the IMC is satisfied the employer was required to pay the amount under the FWA or a fair work instrument, and the employer has contravened a civil remedy provision by failing to pay the amount.[3]

11 Ms Menzies is an employee affected by the alleged contraventions of s 45 and the Award. The Award is a modern award under the FWA and is a 'fair work instrument'. Section 45 is a civil penalty provision.

12 As the claimant, Ms Menzies, bears the onus of proving each of her claims on the balance of probabilities.

Evidence

13 Ms Menzies lodged witness statements for her current employer, her grandmother and someone with whom she is or was in a romantic relationship during her employment with the Company. I disallowed these witnesses to give evidence, because their evidence was not relevant, or of only marginal relevance, to the issues to be decided by me, and contained inadmissible opinions and speculation.

The Claimant

14 Ms Menzies gave evidence by way of a written witness statement. Substantial parts of her written witness statement were submissions, assertions, responses to matters raised in the Company's Response and references to the Award, rather than evidence of relevant facts.

15 Much of the witness statement is Ms Menzies' explanations of the process she undertook, and the documents she referred to, in calculating her claimed unpaid entitlements. These calculations changed a number of times after the Originating Claim was lodged, with the most recent version provided on the day of the hearing.[4]

16 To the extent that the witness statement dealt with facts, Ms Menzies was not cross-examined or challenged on it.

17 I have set out Ms Menzies' evidence of the facts relevant to the six individual claims below under the individual claim headings.

18 Ms Menzies' evidence of the background matters relevant to the issues in these proceedings, was:

a. That she commenced employment with the Company on 11 February 2024;

b. Her rostered hours varied depending on whether she had TAFE or not.

c. When she did not have TAFE, her rostered hours were 10:00 am to 9:00 pm on Wednesdays and Thursdays, 10:00 am to 5:30 pm on Fridays and 8:15 am to 5:00 pm on Saturdays.

d. When she did have TAFE, she attended TAFE on Monday from 8:30 am to 4:00 pm,

e. She did not attend TAFE on public holidays.

f. On Wednesday 27 August 2025 she asked the Company's director, David Lee, about her pay as she considered she had been underpaid. He said that this must have been due to a computer error. He showed her a spreadsheet on his computer screen, which was his record of her usual weekly and fortnightly hours. She noted that it showed 1.5 hours of unpaid breaks on Wednesdays and Thursdays. She took a screenshot of the screen, with Mr Lee's permission:[5]

19 In answer to my questions during the hearing, Ms Menzies said that that there was a written training contract between her and the Company. This was not produced to the Court.

Esther De Salis

20 Ms Menzies relied on a written witness statement of a former co-worker, Esther De Salis. Ms De Salis worked for the Company from 11 February 2024 until 12 August 2025. Ms De Salis states:

5. On Saturdays, we were rostered to attend to clients throughout the day, as clients could book appointments at any time. We were instructed to eat lunch in the back area of the salon while remaining available for work and then return to the salon floor immediately. We were not provided with a one-hour lunch break during which we were free to leave the premises. Despite this, one hour was deducted from our Saturday hours for a lunch break.

6. When there were no clients booked on some afternoons, staff were commonly directed to finish work early and leave the salon. This occurred, on average, approximately once or twice per week.[6]

21 Ms De Salis was not cross-examined or challenged on her evidence.

Paxton Wilkinson

22 Ms Menzies relied on evidence by a written witness statement of a former co-worker, Paxton Wilkinson. Ms Wilkinson worked for the Company for around nine and a half weeks from 15 January 2025 to 23 March 2025. Ms Wilkinson states:

4. On Saturdays, staff were rostered to attend to clients throughout the entire trading day. Staff were not provided with a formal uninterrupted one-hour meal break during which they were free to leave the premises. Instead, staff were generally expected to quickly eat lunch in the back area of the salon, often food prepared by the employers, Dave and Carmel, and then immediately return to the salon floor to continue servicing clients. Clients were able to and did book appointments throughout lunch periods.

5. There were occasions where staff were directed to leave work early when there were no clients booked for the

afternoon and/or evening. From my recollection, this occurred approximately at least once per week, if not on both late-night trading shifts. It was my understanding that these reduced hours were deducted from staff pay.[7]

23 In cross-examination, Ms Wilkinson confirmed that her observations were confined to the period she was employed.[8]

Jason Menzies

24 Jason Menzies is Ms Menzies' father. His evidence, by written witness statement, was that he and Ms Menzies' mother convinced Ms Menzies to resign from her employment with the Company. He had lunch with her on the day that she resigned, 29 August 2025. During lunch, Ms Menzies told her that she was going back to the salon to resign and give her two weeks' notice. He said he was confused about why she was giving two weeks' notice before leaving. He asked her 'why she wasn't just quitting and getting out of there straight away'. Her response was that she did not want to leave the Company 'in the lurch.'[9]

25 Mr Menzies provided screen shots of his messages exchanged with Ms Menzies on 29 August 2025.[10]

Nicole Menzies

26 Nicole Menzies is Ms Menzies' mother. She gave evidence, by a written witness statement, about a telephone discussion she had with Mr Lee about the payment of TAFE fees.[11] Her evidence about this was not challenged in cross-examination, although in his evidence, Mr Lee gave a different version of the conversation.

Chloe Menzies

27 Chloe Menzies is Ms Menzies' sister. Her evidence, by her written witness statement, dealt with Ms Menzies' out-of-work commitments, and whether those commitments were likely to have required her to take time off from her work with the Company.[12] Her evidence was not challenged.

David Lee

28 The Company's evidence-in-chief was comprised of Mr David Lee's written witness statement.

29 Mr Lee and his wife Carmel Lee own the Company.

30 Mr Lee's evidence about Ms Menzies' hours of work was consistent with Ms Menzies' evidence.

31 The salon is closed on Sunday, Monday and Tuesday.

32 Mr Lee said that Ms Menzies was provided lunch breaks throughout her employment, having access to the staff area and nearby shops. On Saturdays, meals were provided by the Company, and sometimes Ms Menzies brought food from her second job at a pizza restaurant to share amongst the staff. He said that one meal break was provided per shift and was taken by Ms Menzies at her discretion either in the staff room, or outside the salon.[13]

33 Mr Lee emphasised that Ms Menzies did not ever raise any complaints or concerns about her pay until two days prior to her resignation.

34 In cross-examination by Ms Menzies, Mr Lee conceded that he was not always present at the salon and could not state that he observed Ms Menzies taking a full lunch break on every shift she worked.

35 In cross-examination, Mr Lee conceded that the Company was inconsistent in its provision of payslips to Ms Menzies. He accepted that of 41 fortnights of employment, payslips were only given to Ms Menzies on 18 occasions, that he may have forgotten to send payslips some weeks, sent her incorrect payslips some weeks, or sent her payslips to the wrong email address in error.[14]

36 Mr Lee said that he undertook a thorough review of payroll records for Ms Menzies with the Company's bookkeeper. This review identified an underpayment of 5.5 hours but it also identified an overpayment of 33.5 hours, because a week of annual leave that was taken in the second week of the fortnight ending 19 April 2025 was paid as ordinary pay, and accrued annual leave was paid out at the end of the employment. This resulted in an overpayment of $541.78.

37 Mr Lee said that the Company did its best to accommodate Ms Menzies' various requests to take time off work. In cross-examination he said that he and Carmel Lee were not 'clock watches.' They had a flexible approach and would grant Ms Menzies an hour or so off work every now and again for her to take driving lessons, leave work early to coach a basketball game, and such. If she was unwell and left twenty minutes early, that was not recorded anywhere and was not deducted from her pay. But if she was unwell for a day, it was paid as sick leave. If she wanted an hour or more for other purposes, it was recorded as 'unpaid leave.'[15]

What were Ms Menzies' Hours of Work?

38 Under the Award, a full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week over a period of no more than 4 weeks.[16] A part-time employee is one who works less than 38 ordinary hours per week, and has reasonably predictable hours of work.[17]

39 Both parties referred to Ms Menzies as a full-time employee. The payslips that are in evidence also refer to Ms Menzies as a full-time employee. However, both parties also agreed that Ms Menzies ordinary rostered hours at work were–[18]

In 2024:

Wednesday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Thursday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Friday: 10:00 am – 5:30 pm with a one hour unpaid meal break (6.5 hours)

Saturday: 8:15 am – 5:00 pm with a one hour unpaid meal break (7.75 hours)

Total = 34.25 hours

In 2025 outside TAFE Semesters:

Wednesday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Thursday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Friday: 10:00 am – 5:00 pm with a one hour unpaid meal break (6 hours)

Saturday: 8:15 am – 5:00 pm with a one hour unpaid meal break (7.75 hours)

Total = 33.75 hours

In 2025 during TAFE semesters until 23 March 2025:

Wednesday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Thursday: 2:30 pm – 9:00 pm with a one hour unpaid meal break (5.5 hours)

Friday: 10:00 am – 5:30 pm with a one hour unpaid meal break (6.5 hours)

Saturday: 8:15 am – 5:00 pm with a one hour unpaid meal break (7.75 hours)

Total = 29.75 hours

In 2025 from 23 March 2025 onwards:

Wednesday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Thursday: 10:00 am – 9:00 pm with a one hour unpaid meal break (10 hours)

Friday: 10:00 am – 5:30 pm with a one hour unpaid meal break (6.5 hours)

Saturday: 8:15 am – 5:00 pm with a one hour unpaid meal break (7.75 hours)

Total = 34.25 hours

40 During TAFE semesters Ms Menzies attended TAFE on Mondays. When Ms Menzies attended TAFE, she attended from 8:30 am to 4:00 pm on Mondays, with a one hour break.

41 According to Mr Lee's unchallenged evidence, Ms Menzies had the option of maintaining the same work hours during TAFE semesters or reducing her hours. In 2025, prior to 23 March, she elected to reduce her hours, explaining why her hours on Thursdays were fewer during that period.

42 It was not in dispute that Ms Menzies was entitled to be paid for 6.5 hours on the days she attended at TAFE. This is consistent with cl 12.5(b) of the Award which says:

> Subject to Schedule E—School-based Apprentices, time spent by an apprentice in attending training or any assessment in accordance with their training agreement is to be regarded as time worked for the employer *for the purpose of calculating the apprentice's wages and determining the apprentice's employment conditions*. (emphasis added)

43 This means that, whilst Ms Menzies was spending time at TAFE, she was entitled to wages for that time.

44 Although the parties labelled the employment as full-time, that description does not mean that the employment was, as a matter of law, full-time. The legal character of the relationship must be determined by the rights and obligations established by their contract. As Kiefel CJ, Keane and Edelman JJ said in ***Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd***,[19] the opinion of the parties on a matter of law is irrelevant. While the descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract, their description of the status or relationship will rarely assist a court to determine the rights and duties under the contract.

45 To my knowledge there is no prohibition on an apprentice being engaged on a part-time basis. The Schedule 1 Training contract in the *Vocational Education and Training (General) Regulations 2009* (WA), at question 39, requires the contract to expressly specify the number of hours of work and training per week.

46 In relation to question 39, the Schedule 1 Training contract's notes state:

> *Apprenticeships/traineeships may be undertaken full-time or part-time*. A full-time apprentice/trainee is one whose ordinary hours of employment, including the training component, are not less than the usual hours of employment for a full-time employee in that occupation. Part-time provisions vary across Australia and across occupations. For more information contact an Australian Apprenticeships Centre in your region or State/Territory Training Authority. See the Contacts for Further Information and Assistance section for further contact details. (emphasis added)

47 Despite the parties' labelling the employment as full-time, the evidence is that they agreed to hours of work, including the training component, that are less than 38 hours per week for much of the time that Ms Menzies was employed.

48 Under the Award's definitions, Ms Menzies would not be categorised as a full-time employee throughout the employment, as her rostered hours of work averaged over 4 weeks was not an average of 38 hours.

49 The Company contended that Ms Menzies weekly roster involved her working 66.5 hours a fortnight, or 33.25 hours a week. In computing these hours, Mr Lee counted 9.5 hours on Wednesday and Thursdays, when Ms Menzies worked from 10:00 am until 9:00 pm. Rather than deducting one hour for an unpaid meal break, he deducted 1.5 hours. At the hearing of this matter, Mr Lee suggested, for the first time, that one hour was allowed for lunch around midday and a further break of half an hour was allowed in the evening. However, he did not put to Ms Menzies any suggestion that she took a second break on these days. Aside from asserting that there was the ability to take a second break, the Company led no evidence that was capable of establishing that Ms Menzies in fact took 1.5 hours of breaks on any particular day.

50 For full-time, part-time and casual employees, cl 16.1 of the Award provides for one unpaid meal break of between 45 minutes to 60 minutes after five hours of work. As it is agreed that a lunch break was allowed to Ms Menzies of 60 minutes, she was only entitled to one meal break in an 11-hour shift. There was no entitlement to a second unpaid meal break.

51 Accordingly, Ms Menzies ordinary hours of work were as specified in paragraph [40] above, plus a further 6.5 hours in the weeks she attended TAFE. This is represented in the following table:

Period	Number of weeks (approx.)	Rostered hours of work	Training Hours	Total hours regarded as 'time worked'
11 February 2024 – 20 July 2024	23	34.25	Nil	34.25
21 July 2024 – 21 September 2024	9	34.25	6.5	40.75
22 September 2024 – 6 October 2024	2	34.25	Nil	34.25
7 October 2024 – 18 December 2024	11	34.25	6.5	40.75
19 December 2024 – 8 February 2025	7	34.25	Nil	34.25
9 February 2025 – 22 March 2025	6	29.75	6.5	36.25
23 March 2025 – 11 April 2025	3	34.25	6.5	40.75
12 April 2025 – 27 April 2025	2	34.25	Nil	34.25
28 April 2025 – 28 June 2025	9	34.25	6.5	40.75
29 June 2025 – 26 July 2025	4	34.25	Nil	34.25
27 July 2025 – 29 August 2025	4.5	34.25	6.5	40.75
Total	80.5			

52 Ms Menzies was entitled to be paid for the number of hours listed in the table during the weeks listed, unless she was absent from work on leave without pay or an unauthorised absence.

Public Holiday Claim

53 Clause 29.1 of the Award says that public holiday entitlements are provided for in the National Employment Standards (**NES**).

54 The relevant NES is s 116 of the FWA. It says:

> **116 Payment for absence of public holiday**
>
> If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.
>
> Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs

55 In relation to the public holidays claim, Mr Lee's evidence was:

a. TAFE did not conduct classes on public holidays; and

b. If a public holiday fell on a Monday, the Company did not pay Ms Menzies for that day, as it was not an ordinary working day.

c. The Company otherwise paid Ms Menzies for all other public holidays that fell on Wednesday, Thursday, Friday or Saturday even if the day was not worked. He relied on payslips issued to Ms Menzies to establish this.

56 There are four public holidays that Ms Menzies claims she was entitled to be paid for, but was not paid:

57 Labour Day Monday 3 March 2025: The Monday on or first Monday following 1 March in each year is declared to be the Labour Day public holiday under the Second Schedule of the *Public and Bank Holidays Act 1972* (WA). It is therefore a public holiday for the purpose of s 115(1)(b) of the FWA.

58 In 2025, the Labour Day public holiday was Monday 3 March 2025.

59 Ms Menzies agrees that she was not rostered to work this day, nor did she attend TAFE.

60 As discussed at [43] above, under cl 12.5(b) of the Award, time spent training is to be regarded as time worked for the employer for the purpose of calculating the apprentice's wages and determining the apprentice's employment conditions. However, that clause does not have the effect of deeming time spent training as ordinary hours of work. Ms Menzies' ordinary hours of work did not include any hours of working on Mondays. Accordingly, she was not entitled to payment for this public holiday.

61 Good Friday 18 April 2025 – Good Friday is a public holiday listed in s 115(1)(a) of the FWA. Fridays were part of Ms Menzies ordinary hours of work. It is not suggested that Ms Menzies worked on this day.

62 According to the payslip for the period from 6 April 2025 to 19 April 2025, Ms Menzies was paid for a total of 76 hours of work:[20]

Cardav Group Pty Ltd (ABN: 54102341855)

Pay Advice

Cardav Group Pty Ltd
ABN 54102341855

PAID TO: **Menzies, Isabel Jai**
Address:

Pay period starting: 06/04/2025
Pay period ending: 19/04/2025
Processing date: 21/04/2025

Status: Full-time Permanent
Holiday leave accrued: 45.87 hours

Earnings

	Units	Rate	This Pay	YTD
Ordinary Time	60.50 hours	$17.66	$1,068.43	$15,263.41
1st Yr M-F rate				$410.85
1st Yr Saturday hourly rate				$153.99
Saturday Hourly Rate	15.50 hours	$23.49	$364.10	$5,940.36
Leave				
Holiday Leave Pay				$1,720.85
Sick Leave Pay				$477.47
Unpaid Leave Pay				$0.00
Leave Loading				$301.14
Allowances				
Tool Allowance	1	$21.04	$21.04	$441.84
Gross Pay			$1,453.57	$24,709.91
Tax			$146.00	$1,852.00
Net Pay			$1,307.57	$22,857.91

A superannuation payment of $167.16 has been noted for payment to your account (2117609) with AustralianSuper.

63 The payslip makes no mention of public holidays or leave. Ms Menzies was not attending training in this period. Her ordinary hours of work were 34.25 hours per week. It appears that Ms Menzies was overpaid by 7.5 hours in this fortnight. She is not entitled to any additional payment for Good Friday.

64 Anzac Day Friday 25 April 2025 – 25 April (Anzac Day) is a day listed as a public holiday in s 115(1)(a) of the FWA. In 2025, 25 April was a Friday. Fridays were part of Ms Menzies ordinary hours of work. Ms Menzies did not attend work on this day.

65 According to the payslip produced for the relevant pay period, Ms Menzies was paid for a total of 66.5 hours for the fortnight and a further 6.5 hours is recorded as unpaid leave:[21] A total of 73 hours are accounted for:

Cardav Group Pty Ltd (ABN: 54102341855)

Pay Advice

Cardav Group Pty Ltd
ABN 54102341855

PAID TO: **Menzies, Isabel Jai**
Address:

Pay period starting: 20/04/2025
Pay period ending: 03/05/2025
Processing date: 04/05/2025

Status: Full-time Permanent
Holiday leave accrued: 50.98 hours

Earnings

	Units	Rate	This Pay	YTD
Ordinary Time	51.00 hours	$17.66	$900.66	$16,164.07
1st Yr M-F rate				$410.85
1st Yr Saturday hourly rate				$153.99
Saturday Hourly Rate	15.50 hours	$23.49	$364.10	$6,304.46
Leave				
Holiday Leave Pay				$1,720.85
Sick Leave Pay				$477.47
Unpaid Leave Pay	6.50 hours	$0.00	$0.00	$0.00
Leave Loading				$301.14
Allowances				
Tool Allowance	1	$21.04	$21.04	$462.88
Gross Pay			$1,285.80	$25,995.71
Tax			$116.00	$1,968.00
Net Pay			$1,169.80	$24,027.71

A superannuation payment of $147.87 has been noted for payment to your account (2117609) with AustralianSuper.

66 Easter Monday fell on 21 April 2025 and there was no TAFE on that day. However, in the ordinary course of events, Ms Menzies would have attended TAFE on Monday 28 April 2025. Had Ms Menzies attended work for all of her ordinary hours of work and attended one day of TAFE in the fortnight, she would have been entitled to be paid for 34.25 for the first week, and 40.75 hours for the second week being 75 hours in total.

67 Mr Lee's evidence was that when the payslip refers to 'unpaid leave,' that is because Ms Menzies had sought permission to be absent from work for short periods for specific purposes to which the Company agreed. Mr Lee gave attending a driving lesson, or a medical appointment as examples. The payslips in evidence contain several instances of unpaid leave being recorded for periods of 1 to 3.5 hours, consistent with this explanation. However, in this instance, the unpaid leave is 6.5 hours. This is not consistent with a short absence of the type Mr Lee gave evidence about. Mr Lee did not identify which day or days the 6.5 hours of unpaid leave related to. He did not give an account of Ms Menzies seeking to take leave of 6.5 hours. He did not put to Ms Menzies by way of cross-examination that she took 6.5 hours off work in this pay period.

68 It is apparent on the face of the payslip for this pay period that Ms Menzies had annual leave accrued. Had she sought to be absent from work for 6.5 hours in a single block, it would ordinarily have been taken as annual leave.

69 I doubt that it is coincidental that the hours Ms Menzies would ordinarily have worked on a Friday at that time was also 6.5 hours.

70 I therefore infer that the 6.5 hours recorded in the payslip as unpaid leave relates to the public holiday. I further infer that Ms Menzies worked her ordinary hours in this pay period, other than the public holiday. The result is that she has been underpaid for this pay period.

71 Ms Menzies is entitled to be paid 6.5 hours as ordinary time for the Anzac Day public holiday. This equates to $114.79.

72 WA Day Monday 2 June 2025: for the same reasons that Ms Menzies was not entitled to be paid for the Labour Day public holiday, she is not entitled to payment for the WA Day public holiday.

Time Deducted Claim

73 As noted at paragraphs [49] to [50] above, Mr Lee counted 1.5 hours as an unpaid meal break on each day that Ms Menzies was rostered to work from 10:00 am to 9:00 pm. There was no legal or factual basis to do so. Accordingly, Ms Menzies has been underpaid either 0.5 hours or one hour for each week that she worked, depending on whether she worked one or two 11-hour shifts. Her ordinary hours have been understated by the same amount for leave accrual purposes.

74 Clause 18.1 of the Award requires an employer to pay an apprentice the minimum hourly rates of pay for all time worked. The company has failed to pay Ms Menzies for all time she worked. By my calculations, a total of 67.5 hours was not paid, resulting in an underpayment of $1,072.28 as follows:

a. From 11 February 2024 to 29 June 2024: 20 hours at $14.40 per hour = $288.00

b. From 30 June 2024 to 8 February 2025: 22 hours at $14.94 per hour = $328.68

c. From 9 February 2025 to 28 June 2025: 17 hours at $17.66 per hour = $300.22

d. From 29 June 2025 to 29 August 2025: 8.5 hours at $18.28 per hour = $155.38

Meal Breaks Claim

75 It is not in dispute that cl 16.1 of the Award entitles employees to an unpaid meal break of between 45 and 60 minutes after 5 hours of work. Clause 16.1 says:

16.1 Employees are entitled to meal and rest breaks in the following circumstances:

Table 3 – Entitlements to meal and rest breaks

Type of break	**Length of break (Monday to Sunday inclusive)**
Unpaid meal break	
Full-time, part-time and casual employees – after 5 hours of work	One unpaid meal break of between 45 and 60 minutes The meal break can be shortened to 30 minutes by agreement between the employee and employer
Type of break	**Length of break (Monday to Sunday inclusive)**
Paid Rest Break	
Full-time employees – per shift	Two 10-minute paid rest breaks (one before and one after the unpaid meal break)
Part-time employees – shifts of 4 or more hours but less than 7 hours	One 10-minute paid rest break If a meal break is included in the work period then the paid rest break is to be taken in the longer work period or, if the work periods are of equal length, at a time agreed between the employer and employee
Part-time and casual employees – shifts of 7 or more hours	Two 10-minute paid rest breaks (one taken before the unpaid meal break and one after

Note: Rest breaks count as time worked. Meal breaks do not count as time worked.

76 The Award does not make provision for an employee to be called on to work during their meal break.

77 It is not in dispute that the Company paid Ms Menzies on the basis that she took a one-hour meal break during each Saturday shift. Ms Menzies claims however, that she was not in fact permitted to and did not take breaks on Saturdays.

78 Ms Menzies claims payment for one hour on each of the Saturdays she worked during the employment.

79 The Company's defence to the Meal Breaks Claim is that Ms Menzies was allowed and did take the meal breaks. If it is correct that Ms Menzies had a break of one hours' duration each day, then the Company did not underpay her.

80 The evidence about this aspect of the claim was sparce and incomplete on both sides.

81 Ms Menzies said that she was not allowed to take a break and was instructed to 'quickly eat the meal they cooked out the back and then get back on the floor to service clients that were booked in during the middle of the day- this was when we were usually rostered off for lunch breaks during weekdays...I was not given an uninterrupted break, as required in the Award, and wasn't able to leave the salon- even going on my phone during this "break" was frowned upon.'[22]

82 I asked Ms Menzies to elaborate on the circumstances surrounding Saturday meal breaks. It emerged that on days other than Saturday, a meal break was 'rostered' for staff by way of time being blocked out for client appointments in the appointments book. However, on Saturday, clients were booked in throughout the day, including the middle of the day, with no time blocked out for a lunch break. Staff would stop work 'when you can, when you have a second.' For example, if a client was at a basin with a mask in, Ms Menzies would take a break. She said 'it was not a designated uninterrupted break that was booked off on the books for clients.'

83 On Saturdays, the Company supplied meals for staff. Ms Menzies would eat the supplied meal, but said she did so quickly, taking at most 10 minutes and eating at the back of the salon.

84 When I asked Ms Menzies who instructed her about the breaks, she said that there was no express instruction as such, but that it was 'an unspoken rule reinforced by the other girls that had been there prior to me.' They told her to eat when she could.[23]

85 The effect of Ms Menzies' evidence was that a break was taken, but it was much less than a full hour and was taken at her own discretion.

86 Mr Lee's evidence was that Ms Menzies was never instructed not to take breaks. According to Mr Lee, staff were able to book out time in the online client booking system to ensure that they had a lunch break. He explained that the reason the salon provided meals for staff on Saturdays was because there were no cafes or restaurants open in the surrounding neighbourhood on Saturdays. His evidence was that the Company wanted staff to take lunch breaks. The effect of his evidence was that staff were responsible for ensuring that they organised their day so that they could take the lunch break. If Ms Menzies did not take a break, he was not aware of this and she did not raise this as an issue at any time during the employment, even though she knew, from her payslips, that she was being paid on the basis that breaks were taken.

87 Mr Lee conceded that he was not always present at the salon on Saturdays, and so could not vouch for the time or duration of Ms Menzies' breaks. He said he had observed her sitting at the back of the salon eating, chatting, or having a laugh, but it was unclear whether his observations were made on Saturdays.[24]

88 The Company did not produce any direct evidence to show Ms Menzies had a one-hour break on Saturdays. There was no suggestion that the salon was shut for any period on Saturdays in between the opening and closing times. It did not produce appointment books which might have shown time when no clients were booked, or fewer clients were booked than stylists. It did not produce evidence from Ms Menzies' supervisor about arrangements that were made to allow staff to take a meal break. Ms Menzies and her witnesses were not challenged on their evidence that that the only breaks that were taken were short breaks of 10 or so minutes, sufficient to consume a meal.

89 I find that Ms Menzies was not expressly directed to work without taking a meal break on Saturdays. Ms Menzies would have assumed that she was entitled to a meal break, because:

a. she took meal breaks on every other day she worked;

b. her payslips showed she was paid on the basis she had an unpaid meal break on Saturday; and

c. the Company provided her with a meal to consume at work.

90 I accept Ms Menzies' evidence that Saturdays were busier than other days of the week, and that customers were booked in during the middle of the day. Further, I find that the reality of customer demands meant that structured breaks could not be taken routinely at a set time. However, the evidence does not establish that the booking schedule precluded breaks being taken at all.

91 The purpose of a provision such as cl 16.1 of the Award is to provide an employee with a period of time in which the employee is able to engage in a meal related activity or an activity of the employee's choice: ***Seo v Bindaree Food Group Pty Ltd (Seo)***.[25] If an employee can be called on to work during the meal break, the entitlement in the clause is not met.[26]:

92 Whether Ms Menzies could be called on to work during her meal break is not answered by reference to whether she worked during what ought to have been a break from work. Rather, the question is whether she had a duty to work at that time because she was instructed to do so by management or was obliged to do so under her contract of employment. In ***Minister for Police v WA Police Force Union of Workers,*** a decision of the Western Australian Industrial Appeal Court, Neville J said:

> It seems to me that if a worker is instructed by a superior, whom it is his duty to obey, that he must do certain things and must not do certain other things, during a certain period he must, during that period, be on duty and, in the terms of this award, therefore, that time must be time worked.[27]

93 An instruction to work may be implied. In ***Australian Salaried Medical Officers' Federation v Peninsula Health***, Bromberg J said:

> In [an ongoing employment relationship], some of what the employer requires of the employee, in terms of how, when

> and where the employee should provide his or her services in the conduct of the employer's business, may be expressly set out in the employee's contract of employment, position description or verbally by the employer upon the employee commencing employment. However, the practicalities of a working relationship are not ordinarily conducive of formalism or prescriptive instructional processes as there are a myriad of circumstances and tasks that are part of an employee's job that cannot, and need not, be foreshadowed in advance. As such, much of what is required of an employee must necessarily be left to be implied and, when what is required by the employer is the subject of a specific request, instruction or direction, that will almost always be done informally. Employees will necessarily be required to infer, from generalised expectations set by an employer, the custom and practice of the workplace, ongoing general arrangements, the nature of the work and the nature of their duties and skills (amongst other surrounding circumstances), what it is that their employer specifically requires of them in any given circumstance and therefore what it is they are authorised to do in a given and specific situation.[28]

94 The combined effect of Ms Menzies,' Ms De Salis's and Ms Wilkinson's evidence was that staff were not 'free to leave' the salon, were expected to be on call to return to work during any break if required, and the break was not uninterrupted. The break was of a relatively short duration sufficient to consume a meal. This was a known expectation and a consistent practice on Saturdays throughout the employment.

95 This evidence, as I have said, was not challenged and Mr Lee's evidence did not contradict it. He merely asserted that Ms Menzies was allowed to and did take breaks.

96 I am therefore satisfied on the balance of probabilities that the Company authorised and required Ms Menzies to work during what ought to have been her Saturday meal breaks. The Company contravened cl 16.1 by depriving her of the entitlement in cl 16.1.

97 This is not the end of the Meal Breaks Claim though. Ms Menzies is entitled to be paid for the time she spent working. As I accept that Ms Menzies was not allowed a 60-minute meal break on each Saturday, but the Company paid her as if she was, this means that that the Company has not paid her for all time that she worked, and there is an underpayment.

98 The evidence does not establish that Ms Menzies worked an extra hour over and above what she was paid for, as she accepts she took some time as a break to eat a meal. Her evidence was that her breaks were 10 minutes 'at the most'. Ms De Salis and Ms Wilkinson did not specify how much time was taken as breaks, other than to say breaks were taken when they could be taken. It is likely that the duration of Ms Menzies' breaks varied from week to week.

99 Under s 545(3) of the FWA, the Court may order the Company to pay an amount to Ms Menzies only of the Court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount.

100 Ms Menzies bears the onus of proving her claim on the balance of probabilities. She has not satisfied me to the requisite standard that the Company was required to pay her the amount she claims she is owed for working on Saturdays. However, I am satisfied that at least 30 minutes was worked by Ms Menzies on each Saturday she worked, for which she has not been paid.

101 Accordingly, by my calculations, a total of 37.5 hours was not paid, resulting in an underpayment of $782.82 as follows:

a. From 11 February 2024 to 29 June 2024: 10.5 hours at $19.15 per hour = $201.08

b. From 30 June 2024 to 15 February 2025: 14.5 hours at $19.87 per hour = $288.12

c. From 16 February 2025 to 29 August 2025: 12.5 hours at $23.49 per hour = $293.62

Hours Shortfall Claim

102 In addition to the 6.5 hours unpaid leave recorded in the payslip for the period that ended 3 May 2025, the payslips record a total of 23.75 hours unpaid leave across various pay periods. The unpaid leave was in fortnightly amounts of between 0.5 and 3.5 hours:[29]

103 Ms Menzies claims that these amounts represent times when the salon shut early, and she was sent home. She claims she is entitled to be paid for these hours, as they were part of her rostered hours of work, and she was ready, willing and able to work.

104 Ms Menzies did not give evidence of the actual circumstances when she was 'sent' home early, such as the days she was sent home, who gave her the direction to stop working, the content of the direction or the time she finished work on those days.

105 In cross-examination, Mr Lee denied that Ms Menzies was ever sent home from work early. He said the unpaid leave recorded in the payslips relates to times when Ms Menzies sought, and was permitted, to leave work for her own personal reasons.[30]

106 Ms Menzies, Ms De Salis and Ms Wilkinson were all consistent in their evidence that when no clients were booked on some afternoons, staff were directed to finish work early. According to Ms De Salis, this occurred once or twice a week and according to Ms Wilkinson it occurred at least once a week. This evidence was not challenged and I accept it.

107 However, finding that the salon closed early, and that staff were directed to stop work early, does not lead to a finding that Ms Menzies was not paid for her rostered hours. If these early closures were being treated by the Company as a reduction in hours, then every one of Ms Menzies' fortnightly payslips would involve payment for reduced hours. Less than half of the fortnightly payslips involved reduced hours.

108 The more plausible explanation for the 'unpaid leave' amounts in the payslips is Mr Lee's explanation that they relate to ad hoc times when Ms Menzies did not work at her own request.

109 Ms Menzies has not satisfied me to the requisite standard that the Company has underpaid her on the occasions when the

payslips refer to unpaid leave.

Termination Pay Claim

110 Ms Menzies resigned from her employment with the Company on 29 August 2025. She claims that she gave two weeks' notice of the termination, but that Mr Lee told her that she was not required to give notice and instructed her not to return to work after 29 August 2025.

111 There is a conflict between Ms Menzies' evidence and Mr Lee's evidence about the sequence of events on 29 August 2025.

112 According to Ms Menzies, she had lunch with her father, then on her return from lunch she verbally told Mr Lee that she was resigning from her employment, giving two weeks' notice. Mr Lee responded that he was not surprised and asked her to put something in writing to make it official.

113 Ms Menzies continued with her work, at one point sending a text message to her father to confirm that she had resigned.

114 At 2:20 pm, Ms Menzies sent Mr Lee an email saying:

> This is my official resignation of this job.
>
> Thank you for everything.[31]

115 At or after 5:00 pm, Mr Lee told her that she was not required to give two weeks' notice, and that she should pack up her tools, go home and not return to work the following day.

116 According to Mr Lee, the only conversation that occurred between him and Ms Menzies about her resignation was after he had received her email resignation. He did not give a full account of any discussion between him and Ms Menzies, but denied that she gave two weeks' notice and said he was blindsided by her resignation.

117 In text messages between Ms Menzies and her father on 29 August 2025 from 1:45 pm to 1:53 pm, Ms Menzies informs her father that she has resigned. In answer to her father's question, she said that she has to work tomorrow.

118 At 4:25 pm, Ms Menzies tells her father that 'they haven't decided when they want me to leave.'

119 Mr Menzies' evidence, and in particular her account of the sequence of events, is consistent with these documents. The email's reference to the resignation being 'official' is consistent with Ms Menzies being asked by Mr Lee to put something in writing to make the resignation official. The text messages' references to working for another two weeks are consistent with Ms Menzies having verbally given two weeks' notice. The timing of communications is consistent with Ms Menzies having resigned verbally, then emailing a written resignation, before having a further discussion about her last day of work.

120 Mr Lee's recollection is inconsistent with the documentary evidence. Accordingly, I prefer and accept Ms Menzies' evidence.

121 Specifically, I accept that Ms Menzies verbally gave two weeks' notice of her resignation, before confirming her resignation in an email. I accept that at around 5:00 pm on 29 August 2025, Mr Lee told Ms Menzies she need not return to work the following day.

122 When an employee has given notice of their resignation, an employer's unilateral decision to end the employment during the notice period constitutes a termination on the employer's initiative, requiring written notice of payment in lieu of notice. Resignation on notice brings the employment to an end upon the expiry of the notice. If the employer ends the employment on an earlier day, the employment is terminated on that day on the initiative of the employer: ***Moore v Bytewise Pty Ltd,***[32] citing ***Terex Australia Pty Ltd v Cameron*** **(*Terex)*** and the authorities referred to therein. In ***Terex*** the Full Bench held that:

> A resignation on notice that ends on the employee's nominated termination date is a termination of employment on the employee's initiative. In that situation, the contract of employment and the employment relationship continues until the expiry of the period of notice in the absence of agreement that the termination date is to be brought forward. But if the employer then imposes an earlier termination date, the employment ends on its initiative.[33]

123 It is clear from Ms Menzies' text messages with her father that she was keen to finish work sooner rather than later. Her father refers to her having to work '2 more weeks at worst' and advises her that she can take annual leave and sick leave if she does not want to go back. Had the Company sought Ms Menzies' agreement to end the employment early she was likely to have given it. However, Mr Lee's evidence was not that there was a mutual agreement about the end date for the employment. He simply denied Ms Menzies' version.

124 I find that the Company terminated the employment during the notice period given by Ms Menzies when Mr Lee told Ms Menzies not to return to work. Accordingly, the Company is obliged to pay out the notice period pursuant to cl 33 of the Award and s 117 of the FWA. Two weeks' pay is $1,583.29.

TAFE Fees Claim

125 Clause 12.5 of the Award says:

> (c) An employer must either:
>
> (i) reimburse an apprentice for all fees paid by the apprentice themselves to a registered training organisation (RTO) for courses that the apprentice is required to attend, and all costs incurred by the apprentice in purchasing textbooks (not provided or otherwise made available by the employer) that the apprentice is required to study, for the purposes of the apprenticeship; or
>
> (ii) pay any training course fees and/or textbook costs directly to the RTO.
>
> (d) The employer must make any reimbursement required under clause 12.5(c)(i) by whichever of the following is the later:
>
> (i) within 6 months after starting the apprenticeship; or

(ii) within 6 months after the relevant stage of the apprenticeship; or

(iii) within 3 months after starting the training provided by the RTO.

(e) Reimbursement under clause 12.5(c)(i) is subject to the employer being satisfied that the apprentice is making satisfactory progress in the apprenticeship.

126 Ms Menzies provided documentary evidence of the TAFE studies she undertook during the employment, and the fees she paid to TAFE for them. She confirmed that the receipts were not provided to the Company during her employment or before the commencement of these proceedings.

127 Ms Menzies established that she paid the following fees to a registered training organisation for courses she was required to attend for a Certificate III in Hairdressing:

a. $603.75 on 4 July 2024 (Semester 2, 2024- Stage 1 units)

b. $1137.50 on 17 January 2025 (Semester 1, 2025- Stage 2 units)

c. $816 on 14 July 2025 (Semester 2, 2025- Stage 2 and Stage 3 units).

128 The Company's defence of this claim is that it was not satisfied, at the relevant time, that Ms Menzies was making satisfactory progress in the apprenticeship. The Company also says that no claim for payment was made, and it had no proof of Ms Menzies' payments, until these proceedings were commenced.

129 It appears from the TAFE Coursework Summary that as at 29 August 2025, Ms Menzies had not yet completed or passed all Stage 2 units and was enrolled in Stage 3 units. Several stage 2 units were not passed until 15 December 2025.[34]

130 The Company was not required to reimburse Ms Menzies until the latest of the times referred to in cl 12.5(d). As at 29 August 2025, when the employment ended, the time at which the Company was required to reimburse Ms Menzies for Stage 2 and Stage 3 fees had not arrived. That is, it was not yet six months after Stage 2 or Stage 3. Accordingly, the Company was not liable to make reimbursement to Ms Menzies for Stage 2 or Stage 3. By the time six months had passed after the relevant stage of the apprenticeship, the Company was no longer Ms Menzies' employer and therefore it was not bound by cl 12.5 in respect of Ms Menzies.

131 Of the fees claimed, $603.75 relate to Stage 1. Ms Menzies had passed all units in Stage 1 by 25 November 2024. If the conditions for reimbursement were met, the Company was required to make reimbursement no later than within 6 months after 25 November 2024, that is, by 25 May 2025.

132 To establish the Company's lack of satisfaction as to Ms Menzies' progress, Mr Lee said that Ms Menzies was 'behind on multiple items' and that tasks were outstanding. He also referred to Ms Menzies being absent from, or late to, TAFE classes on six occasions. Of those six occasions, four occurred during Semester 2 of 2024, that is, during Stage 1. On one occasion she was one hour late to TAFE. On the other three occasions she was on annual leave and was overseas. Her absences do not objectively establish a basis for the Company to have concluded Ms Menzies was not making satisfactory progress in Stage 1 of the apprenticeship.

133 Otherwise, the Company produced no other evidence which would tend to show Ms Menzies was not progressing through Stage 1 satisfactorily. It produced no evidence of communications it had either with Ms Menzies or TAFE raising concerns about Ms Menzies' progress. It produced no evidence of performance or conduct on the part of Ms Menzies which would rationally lead to it lacking satisfaction as to her progress.

134 On the other hand, the TAFE Coursework Summary showed that on 25 November 2024, Ms Menzies passed all Semester 2 units she enrolled in for Stage 1 of the apprenticeship. Between 21 July 2025 and 29 August 2025, she passed a further two Stage 2 units. All were passed on a first or second attempt.

135 Accordingly, I find that the Company did not lack satisfaction as to Ms Menzies' progress concerning Stage 1 of the training at relevant times during the employment. Accordingly, the conditions for reimbursement of Stage 1 fees paid for by Ms Menzies are met and the Company is liable to reimburse Ms Menzies $603.75.

Conclusion and Disposition

136 For the above reasons, Ms Menzies has proven on the balance of probabilities that the Company was required to pay her:

a. $114.79 in respect of the 2025 Anzac Day public holiday.

b. $1,072.28 in respect of time worked by her each week, which was treated as an unpaid meal breaks;

c. $782.82 in respect of time worked on Saturdays, which was treated as unpaid meal breaks;

d. $1,583.29 in respect of pay in lieu of notice of termination; and

e. $603.75 in reimbursement of fees Ms Menzies paid to TAFE as required by her apprenticeship.

Total $4,156.93

137 The Company failed to pay the above amounts in contravention of cls 29.1, 18.1, 33 and 12.5 respectively of the Award, and s 45 of the FWA, being a civil penalty provision.

138 Ms Menzies agreed that the Company had overpaid her for accrued annual leave on termination in the amount of $566.62.[35] This is to be deducted from the amounts the Company has underpaid.

139 I will order that the company pay Ms Menzies $3,590.31 within 14 days from the date of my orders.

R. COSENTINO

INDUSTRIAL MAGISTRATE

[1] *Fair Work Act 2009* (Cth) (**FWA**) s 544.
[2] FWA s 12; *Industrial Relations Act 1979* (WA) s 81, s 81B.
[3] FWA s 545(3).
[4] Exhibit C2 – Amended Supporting Document – Attachment A – (2024 and 2025 Payslip Reconciliation)
[5] Exhibit C3 – Witness Statement of Isabel Menzies dated 1 June 2026 – Attachment C
[6] Exhibit C9 – Witness Statement of Esther Fane De Salis dated 31 May 2026.
[7] Exhibit C13 – Witness Statement of Paxton Wilkinson dated 25 May 2026.
[8] ts 26.
[9] Exhibit C10 – Witness Statement of Jason Menzies dated 30 May 2026 [6].
[10] Exhibit C10 – Witness Statement of Jason Menzies dated 30 May 2026 with Annexure A
[11] Exhibit C11 – Witness Statement of Nicole Menzies dated 26 May 2026.
[12] Exhibit C12 – Witness Statement of Chloe Menzies dated 29 May 2026.
[13] Exhibit R1 – Witness Statement of Dave Lee dated 15 June 2026 with Annexures.
[14] Exhibit C15 – Table of Payslips.
[15] ts 33 - 104.
[16] *Hair and Beauty Industry Award 2020* cl 9.
[17] *Hair and Beauty Industry Award 2020* cl 10.1.
[18] Exhibit C1 – Witness Statement of Isabel Menzies dated 24/6/ June 2026; Exhibit R1 – Witness Statement of David David Lee dated 15/6/ June 2026 with Annexures.
[19] [2022] HCA 1; (2022) 275 CLR 165 [63] - [66].
[20] Exhibit R1 – Witness Statement of Dave Lee dated 15 June 2026 with Annexures, 43.
[21] Exhibit R1 – Witness Statement of Dave Lee dated 15 June 2026 with Annexures, 44.
[22] Exhibit C1 – Witness Statement of Isabel Menzies dated 24 June 2026, [19].
[23] ts 14 - 15.
[24] ts 53.
[25] [2021] FWCFB 2691 [44], [51]
[26] [2021] FWCFB 2691 [46].
[27] (1969) 49 WAIG 993; see also ***Hospital Employees' Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home*** (1977) 57 WAIG 455, 456 per Burt CJ and ***Warramunda Village Inc v Pryde*** [2002] FCA 250; (2002) 116 FCR 58, [17] - [18] per Lee J and [37] per Finkelstein J.
[28] [2023] FCA 939; (2023) 325 IR 26 [78].
[29] Exhibit C1 – Amended Witness Statement of Isabel Menzies dated 24 June 2026, [23].
[30] ts 58 - 76.
[31] Exhibit R3 – Form 2 – Response – Resignation Email from Isabel Menzies to Dave Lee dated 29 August 2025.
[32] [2026] FWCFB 217 [25].
[33] [2025] FWCFB 205 [11].
[34] Exhibit C6 – Witness Statement of Isabel Menzies dated 1 June 2026 – North Metropolitan TAFE Coursework Summary.
[35] Exhibit C1 – Amended Witness Statement of Isabel Menzies dated 24 June 2026, [17]; Exhibit C2 – Amended Supporting Document – Attachment A – (2024 and 2025 Payslip Reconciliation).

2026 WAIRC 00891

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00891
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 17 SEPTEMBER 2026, FRIDAY, 18 SEPTEMBER 2026
DELIVERED	**:**	FRIDAY, 18 SEPTEMBER 2026
FILE NO.	**:**	M 122 OF 2026
BETWEEN	**:**	UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA **CLAIMANT** AND FIRE AND EMERGENCY SERVICES COMMISSIONER OF THE DEPARTMENT OF FIRE AND EMERGENCY SERVICES **RESPONDENT**
CatchWords	**:**	INDUSTRIAL LAW – Application for interim orders pursuant to s 83(5) and s 83(7) of the *Industrial Relations Act 1979* (WA) – Whether there is a serious issue to be tried – Whether

		there is a prima facie case of a contravention of cl 11(5) of the *Western Australian Fire Services Enterprise Bargaining Agreement 2023* – Whether there is a prima facie case that the interim orders sought are for the purpose of preventing any further contravention or failure to comply with cl 11(5) – Power to make the interim orders sought – Balance of convenience – Turns on own facts
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Instrument	**:**	*Western Australian Fire Services Enterprise Bargaining Agreement 2023*
Cases referred		
to in reasons:	**:**	***The Governing Council of North Metropolitan Tafe v State School Teachers' Union of WA*** [2018] WAIRC 00746; (2018) 98 WAIG 1209
		Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services [2013] WAIRC 01064; (2014) 94 WAIG 563
Result	**:**	Application for interim orders dismissed
Representation:		
Claimant	:	Mr C. Fogliani (of counsel) and with him, Ms J. Skyner (of counsel)
Respondent	:	Mr J. Carroll (of counsel)

REASONS FOR DECISION

Given extemporaneously at the conclusion of the hearing, edited by her Honour for clarity of expression and to provide complete references.

1 This is an application made by the United Professional Firefighters Union of Western Australia (the **claimant**, or **UFPU**) for interim orders pursuant to s 83(5) and s 83(7) of the *Industrial Relations Act 1979* (the **Act**) lodged in the Industrial Magistrates Court (**Court**) on 25 August 2026.

2 Specifically, the claimant seeks that until the hearing and determination of the claimant's originating claim or until further order, the Fire and Emergency Services Commissioner of the Department of Fire and Emergency Services (the **respondent**) be:

(a) required to revert the structure of its Built Environment Branch (**BEB**) back to as it was immediately prior to the claimant raising its dispute about the restructure on 2 April 2026; and

(b) restrained from making any changes to the structure of the BEB (the **Application**).

3 The Application is supported by an affidavit of John Marsh (**Mr Marsh**) affirmed 19 August 2026 with annexures referred to therein.

4 The Application was served on the respondent, who opposes the orders sought in the Application. The respondent relies upon an affidavit of Teresa Anna Kurtis (**Ms Kurtis**) sworn on 10 September 2026 with annexures referred to therein.

5 Mr Marsh is the Secretary of the claimant.

6 Ms Kurtis is employed by the respondent as the Director of Legal Policy Compliance and Built Environment Branch.

7 The parties agree the *Western Australian Fire Services Enterprise Bargaining Agreement 2023* (the **EA**) was registered in the Western Australian Industrial Relations Commission (**WAIRC**) on 6 December 2023 and was in operation at all material times in relation to the matters contained in the claimant's originating claim.

Originating Claim

8 The originating claim was lodged in the Court on 13 August 2026 alleging the respondent failed to comply with the EA and sought orders that the respondent pay a penalty and to 'revert the structure of the BEB back to as it was immediately prior to the UPFU raising the Dispute as pleaded in the Statement of Claim'.[1]

9 The Statement of Claim pleads the following:

The Dispute

(a) On 2 April 2026, the claimant raised a dispute with the respondent regarding a proposal to restructure the BEB in a manner that would alter the BEB career pathway set out in cl 12(5) of the EA.[2]

Restructure

(b) The claimant alleges the Dispute is at stage 5 of the dispute resolution procedure (**DRP**) in cl 11 of the EA and is before WAIRC in matters C 9 of 2026 (an application for a s 44 conference regarding the Dispute) and APPL 37 of 2026 (a s 46 application for a determination regarding the proper interpretation of cl 8 and 12(5) of the EA).

(c) On or around 29 July 2026, the respondent restructured the BEB by abolishing Building Fire Safety Officer (**BFSO**) and Senior Building Fire Safety Officer (**SBFSO**) positions within the BEB and creating new positions under the *Public Sector CSA Agreement* 2024 (**Public Sector CSA**) to assume those same duties. Employees previously in the BFSO and SBFSO positions were invited to apply for the new positions. The roles and responsibilities of the new positions are the same or substantially similar to the BFSO and SBFSO positions.[3]

Contravention

(d) The claimant alleges that cl 11(5) of the EA requires the 'status quo to remain in place' until the Dispute is resolved in the WAIRC.[4]

(e) The respondent's act of restructuring the BEB as pleaded in paragraph 7 of the Statement of Claim while the Dispute remained on foot was in contravention of cl 11(5) of the EA.[5]

Interim Order

(f) The claimant sought an interim order to revert the structure of the BEB back to as it was immediately prior to the Dispute being raised.[6]

Final Orders Sought

(g) an order pursuant to s 83(5) of the Act requiring the respondent to revert the structure back to the BEB immediately before the Dispute being raised (being 2 April 2026); and

(h) an order pursuant to s 83(4) and s 83(4A) of the Act for the payment of a penalty.

10 Schedule I to these reasons outline the jurisdiction, practice and procedure of the Court.

Evidence

11 In summary, the combined evidence of Mr Marsh and Ms Kurtis reveals that the possible restructure of the BEB was the subject of at least two meetings in 2024 with a report prepared for the respondent recommending its restructure. The claimant was informed in December 2024 of the recommendation.

12 In March 2025, members of the claimant and members of the respondent met to discuss a functional review of the BEB.

13 In March 2026, the claimant was provided with a letter from Deputy Commissioner Melissa Paxton (**DC Paxton**) notifying it of the proposed restructure of the BEB and consultation timeframes and a new organisational chart. There was a meeting with members of the claimant and the respondent following this.

14 Employees in the BEB received a letter from DC Paxton in March 2026 informing them that their positions were proposed to be abolished. Mr Marsh also received the proposed restructure documents.[7]

15 On 1 May 2026, the claimant provided formal feedback on the proposed restructure.

16 On 2 April 2026, Mr Marsh sent an email to Greg Walsh (**Mr Walsh**), an employee of the respondent, where Mr Marsh says he raised a dispute regarding a proposal by the respondent to restructure the BEB. Mr Marsh in his affidavit evidence refers to this as the 'Dispute'.[8]

17 There was ensuing correspondence between Mr Marsh and Mr Walsh, to which Mr Walsh ultimately stated that the claimant could refer the matter to the WAIRC. It did so.

18 Mr Marsh states that the restructure removes 14 BFSO positions and the District Officer Plans Assessment positions. He further states that there are currently six members that have been told their positions will be abolished and they must reapply for new positions under the Public Service CSA.

19 On 29 July 2026, Mr Marsh received a letter from DC Paxton informing him of the approved restructure of the BEB and a schedule of implementation (it also included other information such as role comparisons and job description forms).

20 Mr Marsh outlines his understanding of the BEB as restructured, which includes 26 Public Sector CSA positions and 12 EA positions.

21 The claimant believes that the respondent is required to maintain the status quo in relation to the BEB as it stood immediately before 2 April 2026 until the Dispute is resolved in the WAIRC.

22 Mr Marsh states that:

(a) six members have been informed that their existing positions have been abolished and that they are required to reapply for Public Service CSA positions, of which there are fewer than six relevant positions;

(b) at least two members are expected to lose their employment as a result of the restructuring; and

(c) the claimant will no longer have coverage of the Public Service CSA positions, as those positions are outside the claimant's membership. As a result, the claimant will lose members, which will have a corresponding financial impact on the claimant.[9]

23 Mr Marsh states that these proceedings (M 122 of 2026) are not about resolving the Dispute, it is about the enforcement of the status quo requirement in cl 11(5) of the EA while the Dispute is continuing through the DRP in cl 11(7) of the EA.[10]

24 Ms Kurtis deposes to the same letter dated 29 July 2026, referred to by Mr Marsh, and outlines the steps taken to begin implementing the new structure. I do not propose to detail the steps taken in full, but there was a short consultation process involving the employees affected by the restructure process.

25 Ms Kurtis also deposed to an employee raising concerns with her if he did not follow the claimant's advice (whatever it might have been), resulting in a further meeting with the affected employees. Ms Kurtis deposes to an email from Mr Marsh informing her that 'staff' were not going to apply for jobs under the new structure.

26 On 31 July 2026, via a quarantine process, certain jobs were advertised and interviews were conducted on 20 August 2026. Ms Kurtis deposes to one affected employee not applying for a position in the restructure.[11]

27 On 26 August 2026, the affected employees were notified of the outcome and that the outcome was subject to a four-day breach period, which concluded on 31 August 2026. No breach claims were made and two of the affected employees were offered positions in the new structure.

28 Initially the two successful employees had intended to accept the positions, which are at a level higher than what they were within the old structure and there is a 'clear pathway' for progression.[12]

29 Ms Kurtis deposes to the claimant exercising a right of entry discussing each employees' outcome in an open forum, following which one of the successful applicants withdrew and requested that her position be abolished.

30 On 3 September 2026, letters offering voluntary severance were issued to three of the affected employees, which required a response by 1 October 2026.

31 The BFSO and SBFSO positions were abolished on 29 July 2026.

32 The respondent must work with affected employees to support redeployment before considering redundancy options. Some of the affected employees have obtained alternative positions. If redeployment is unsuccessful, voluntary severance may be considered for registrable employees.

The Power Under s 83 of the Act

33 For expediency reasons, I have adopted the reasoning of Smith AP in ***The Governing Council of North Metropolitan Tafe v State School Teachers' Union of WA*** [2018] WAIRC 746; (2018) 98 WAIG 1209:

> Section 83 confers jurisdiction on the [Court] to enforce instruments, including an industrial agreement. The power to enforce under s 83 is not a power at large to resolve disputes between parties. It is notable that proceedings instituted by way of an originating claim are penal in nature; that is they are claims for civil enforcement of provisions of instruments by primarily the imposition of a penalty.
>
> The mere filing of a discrete application for an interim order does not have the effect at law of the creation of a substantive application. An application for an interim order under s 83(7) cannot be made unless a substantive application has been instituted under s 83(1).
>
> …
>
> The power conferred by s 83 is not a power to resolve industrial disputes arising out of an industrial matter. The power to do so is conferred on the [Commission] pursuant to its powers and s 23(1) to enquire into and deal with any industrial matter.
>
> The primary purpose of s 83 is two-fold. Firstly, its function is to coerce and ensure compliance with an instrument by providing for the imposition of penalties as a means of deterrence. Secondly, s 83 provides the means by which sanctions can be imposed on a person who contravenes or fails to comply with an instrument.
>
> It is only where the Court imposes a penalty under s 83(4) that the [Court] is conferred with the power to make an order under s 83(5). Any order the [Court] makes under s 83(5) is required by the express statutory text to be an order against a person (who has contravened or failed to comply with an instrument) 'for the purpose of preventing any further contravention or failure to comply' with the provision of the instrument. Unless an order can be properly characterised for such a purpose, the power to make any order, other than an order imposing a penalty under s 83(4) of the [Act], cannot be invoked.
>
> The [Court] is empowered to make an interim order under s 83(5) pending final determination of an application under s 83(1) (s 83(7)). The power to make an interim order is, however, also not a power at large. Any interim order must be an order under s 83(5); that is it must be an order for the requisite purpose of preventing any further contravention or failure to comply with the provision claimed to be contravened or not complied with in the substantive application, that is the application made under s 83(1).[13]

The Pre-Conditions under s 83(5) of the Act

34 The power of the Court to make an interim order is subject to the preconditions in s 83(5) of the Act. When this principle is applied, it follows that the Court is required to be satisfied that there is a serious question to be tried as to whether:

> **First Issue: What is it the Respondent has Failed to Do?**
>
> (a) the claimant has made out a prima facie case of a contravention or a failure to comply with an instrument (to which s 83 applies); that is, is there a prima facie case that the respondent had failed to comply with cl 11(5) of the EA, when it restructured the BEB; and
>
> **Second Issue: What Further Contravention Should be Prevented?**
>
> (b) there is a prima facie case that the interim orders sought by the claimant (or the terms of an interim order the Court was considering whether to make) were orders that could properly be characterised as orders for the purpose of preventing any further contravention or failure to comply with cl 11(5).

35 It is only in the circumstances where the Court can be satisfied that a final order could be made and there is prima facie evidence or material before the Court taken at its highest which establishes that such an order is for the requisite purpose that an interim order can be made under s 83(7).

Whether the Balance of Convenience Applies?

36 The power to make an interim order under s 83(7) is discretionary by use of the word 'may'. While Smith AP did not refer to the balance of convenience as part of her discussion of s 83(5) and s 83(7), it is apparent, in my view, that she focussed on the pre-conditions going to whether there was a serious issue to be tried, rather than on other discretionary factors that may go to determining the balance of convenience. The purpose in doing so was to demonstrate the erroneous decision making at first instance, and it was unnecessary then to consider the balance of convenience in whether to make an interim order.

37 However, Commissioner Matthews did consider the balance of convenience as part of the reasons why he considered that, as a

matter of discretion, an interim order should not be made.

38 In my view, the factors that go to considering the balance of convenience for interim orders under s 83(7) should be considered in making a discretionary order of this type.

Submissions

39 Both parties made lengthy submissions. The claimant did so orally. The respondent did so in writing and orally.

40 I mean no disrespect to the parties, whose submissions I was greatly assisted by, however I do not intend to recite the submissions in full but will refer to them where necessary to resolve the issues in determining the Application.

First Issue: Is there a Prima Facie Case of the Respondent's Contravention?

41 Identifying precisely the alleged contravention is more difficult than expected.

42 The Statement of Claim states the respondent's act of restructuring the BEB on 29 July 2026 while the Dispute was on foot (in the WAIRC) was a contravention of cl 11(5) of the EA. The Statement of Claim then states that by contravening cl 11(5), the respondent (presumably) contravened the DRP in cl 11 and, therefore, contravened s 83(1).

43 The Statement of Claim limits the Dispute to a restructure of the BEB that has the effect of altering the BEB career pathway provided in cl 12.5 of the EA.

44 However, the evidence lead by the claimant in Mr Marsh's affidavit in support of the Application expands the Dispute to include cl 13 and cl 11(5) of the EA by referring to numerous email communications between Mr Marsh and the respondent's representative(s). In these emails, Mr Marsh refers to the respondent being expected to engage in the DRP and 'maintain the status quo until [the Dispute] was resolved'.[14]

45 C 9 of 2026 (referred to at JM-17 of Mr Marsh's affidavit) limits the Dispute in the application for a s 44 conference to the classification structure and career pathway for employees in the BEB, as it relates to abolishing SBFSO positions and introducing new positions. The claimant further states that in its view the respondent cannot unilaterally modify the BEB classification structure under cl 12.5 of the EA. Further, the claimant expressed concern the respondent may communicate directly with its own workforce about the changes and the respondent has refused the claimant's request to cease its consultation process.

46 APPL 37 of 2026 (referred to at JM-18 of Mr Marsh's affidavit) seeks a determination on whether cl 8 of the EA prevents the respondent from changing the pathway and qualification requirements of the BEB in cl 12(5) of the EA and prevents the respondent from creating classifications in the BEB outside the classification structure in cl 12(5) of the EA.

47 The grounds referred to in support of APPL 37 of 2026 outlines the claimant's view that the proposed removal of the classification structure in its entirety and the displacement of employees from that structure constitutes a fundamental alteration to the progression pathway contemplated by the EA.

48 Perhaps this is form rather than substance but it does highlight the difficulty in determining what it is the respondent is said to have contravened for the purposes of identifying whether there is a serious issue to be tried, and following on from that what interim orders could be made for the purpose of preventing any further contravention or failure to comply with cl 11(5).

49 The claimant seeks an order on a global level that the respondent should be ordered to unwind the whole of its restructure based on its contravention of cl 11(5) of the EA, while the Dispute is being litigated in C 9 of 2026 and APPL 37 of 2026. However, what is being litigated in C 9 of 2026 and APPL 37 of 2026 concerns the changing of pathways and qualifications in the BEB, not the restructure of the BEB, which according to the organisational charts referred to by the parties includes employees not subject to the EA or to no employee where the position is vacant.

50 The claimant says the unwinding of the restructure to a position prior to 2 April 2026 is what is required by cl 11(5) of the EA.

51 The dilemma of what is the contravention alleged is also highlighted in JM-8 of Mr Marsh's affidavit where DC Paxton informs an affected employee (and presumably one of the claimant's members) that a proposed restructure will impact the affected employee's current position which is proposed to be abolished. Several new roles are observed to be created and new opportunities offered with these positions being filled via a quarantined recruitment process. The effected employee is informed they will be invited to apply.

52 According to the claimant where one of the stages in cl 11(7) is engaged, cl 11(5) of the EA requires the status quo to the maintained.

53 For the purposes of the Application, I have some doubts as to whether cl 11(5) of the EA in referring to the 'status quo' is referring to it in the manner suggested by the claimant.

54 Having regard to the well-known principles applicable to determining the proper construction of an industrial instrument, the words 'status quo' in the second sentence of cl 11(5) appears to be in reference to ensuring that where there is a return to the situation that existed immediately before a dispute, this is not to be used against the party having to accept the return to that situation. That is, it ensures that whatever is the dispute, it will be finally determined without a party fearing a return means they accept the other party's dispute. The second sentence of cl 11(5) does not appear to contain an enforceable obligation on any party to a dispute.

55 This then leaves the first sentence of cl 11(5) of the EA, which the claimant says is an enforceable obligation on a party while the DRP is being followed. The DRP is set out in cl 11(7) of the EA.

56 Clause 11(7) refers to five stages. It is apparent from the language in at least Stages 1 and 2 that these stages have no relevance in respect of a dispute between parties such as the claimant and the respondent. These stages are very much designed for grass roots level disputes between an employee and some other employee within the organisation, albeit that under cl 11(8) the claimant or one of its representatives may become involved by agreement.

57 The language in Stages 3 and 4 is also difficult to reconcile with the claimant's position where each is predicated on a failure to settle at the immediate lower level.

58 It is really not until Stage 5 is reached that where a matter is not resolved, a party may refer the matter to WAIRC for conciliation.

59 However, if it is accepted that under cl 11(3) of the EA the claimant (on behalf of employees) may raise a dispute with the respondent, then it cannot have been intended that each and every stage of the DRP applies in a lineal manner to a dispute between the claimant and the respondent. However, where in that continuum between Stage 1 and 4 the DRP commences is not readily apparent or at least not on the limited submissions for the purposes of determining the Application.

60 The respondent submits that the DRP is more likely not 'followed' after Stage 4 or after the dispute has been referred to the WAIRC. For my part, and at this early juncture, I am sceptical that it was intended for the DRP to cease at Stage 4 notwithstanding when the dispute remains unresolved. The point of referring the dispute to the WAIRC must be to resolve the dispute, at least in part.

61 Thus, as a preliminary view, I accept the DRP is being followed through Stages 1 to 5.

62 The subsequent issue is what 'work' must continue in accordance with the existing situation or practice that existed immediately prior to the subject matter of the dispute occurring.

63 As already stated, the claimant says this means the situational practice that gives rise to the work must continue. The respondent questions what work is required to continue, particularly where the Statement of Claim does not plead what it says was the 'work' that needed to continue in accordance with the existing situation or practice, rather the claimant pleads that the 'status quo' of everything must remain the same.

64 As the respondent correctly points out the final orders sought by the claimant are the same as the interim orders sought.

65 This then circles back to the original conundrum in determining what is the contravention alleged in the Statement of Claim?

66 Clause 11(5) of the EA does not require the 'status quo' to be maintained but requires the continuation of work in accordance with the existing practice immediately before the dispute. If the claimant's construction of the first sentence in cl 11(5) of the EA is accepted, the Statement of Claim does not plead what work has not continued in accordance with the existing situation or practice that existed immediately prior to the dispute occurring. It pleads the restructure of the BEB and the BFSO and SBFSO positions ceasing to exist with these duties now being allocated to new positions. This is the subject of the Dispute of having altered the BEB career pathway in cl 12(5) of the EA.

67 The Statement of Claim then pleads the respondent's act of restructuring the BEB while the Dispute remained on foot was in contravention of cl 11(5) of the EA, but the act of restructure is not, of itself, a contravention of cl 11(5) of the EA.

68 I am left to conclude that, even if there were a *prima facie* case that the respondent contravened cl 11(5) of the EA, the claimant's case, as presently pleaded, is imprecise and vague and is not readily reconciled with the terms of cl 11(5). In those circumstances, I can only regard the claim, at this stage, as a weak one.

69 Further, it should be reiterated that while the Court is not a court of pleadings, where the imposition of a penalty is sought for an alleged contravention (as part of the Court's enforcement role), precision and clarity in what exactly is alleged is more important.

The Second Issue: the Nature of the Interim Orders Sought and What Further Contravention Could any Interim Order Prevent

70 This lack of precision and clarity then flows through to the interim orders sought by the claimant and the requirement that the orders be characterised as orders for the purpose of preventing any further contravention or failure to comply with cl 11(5) of the EA.

Restraining the Respondent

71 The second interim order sought by the claimant seeks to restrain the respondent from making any changes to the structure of the BEB.

72 Even if such an interim order could be made under the provisions of s 83(7) of the Act, which I have doubt, I understand there are a number of employees within the BEB who are not covered by the EA.

73 Is it intended that the restraint sought by the claimant:

(a) Include these employees?

(b) Include any change to the structure of the BEB, no matter how incidental or irrelevant to the Dispute?

(c) Include what part of, or the whole of, the structure of the BEB, given the differing roles and employees within the BEB (as set out in the organisational charts)?

(d) Alter the current rights of employees?

74 Further to this, it is not clear what purpose an interim order of this type serves in terms of preventing further contravention of cl 11(5), where the contravention alleged is the respondent's act of restructuring while the Dispute remained on foot.

75 The restructure has already commenced, and it appears is close to conclusion. The positions the subject of the Dispute have been abolished.

76 There is no clear statement in the Application indicating what further contravention the second interim order seeks to prevent beyond reverting the structure of the BEB back to what it was before 2 April 2026.

Reversion of the Restructure

77 The first interim order sought represents the claimant's true position. That is, for the Court to order the reversion of the restructure of the BEB.

78 However, an interim order of that kind cannot properly be characterised as an order for the purpose of preventing any *further* contravention of, or failure to comply with, cl 11(5) of the EA. Rather, it is an order directed to restoring the position that existed before the restructuring occurred.

79 Accordingly, I am not satisfied there is a prima facie case that the interim orders sought by the claimant are orders that could properly be characterised as orders for the purpose of preventing any further contravention or failure to comply with cl 11(5) of the EA.

80 Further, and notwithstanding the claimant's invitation for the Court to make some form of other interim orders, I am not persuaded that Smith AP commenting: 'or terms of an interim order the Industrial Magistrate's Court was considering whether to make'[15] is an open-ended invitation for the Court to craft orders to fill a party's void.

Consideration of the Balance of Convenience

81 If I am wrong about the character of the interim orders sought, I will also consider the balance of convenience in making or not making the order as if there was a prima facie case the interim orders were for the purpose of preventing any further contravention or failure to comply with cl 11(5) of the EA.

82 The claimant submits that the balance of convenience favours the making of the interim orders sought for the following reasons:

(a) the respondent committed to maintenance of the 'status quo' by agreeing to the bargain that was struck in the EA;

(b) there will be irreversible harm to the claimant through the loss of members (that is, positions that were under the EA will now be under a different enterprise agreement);

(c) damages cannot fix potential job losses;

(d) six members were told their positions were abolished;

(e) there is no urgency for the respondent to restructure the BEB and any interim orders will be limited to one branch of the BEB;

(f) two members of the claimant will potentially lose their jobs; and

(g) while some work in the restructure will be undone this is of the respondent's own making.

83 The respondent submits that the balance of convenience favours not making the interim orders sought for the following reasons:

(a) there are third parties who will be detrimentally affected by any winding back of the restructure and these parties have not been heard (that is, employees who have been appointed to the new positions at a higher level);

(b) employees in the BFSO positions have accepted a public servant position and winding back the restructure would require these employees to be dismissed and rehired (if this could in fact be done);

(c) two employees have been offered voluntary severance giving rise to a crystalised legal right;

(d) the restructure in part was directed to compliance issues more generally and reverting back to the prior structure does not resolve the compliance issues;

(e) there is no evidence of the progression of C 9 of 2026;

(f) the effect of the abolishment of the BFSO positions, being the union members of the claimant, is overstated where three of the new positions are covered by the EA;

(g) it is not enough to 'hold an employer to a deal' for the purpose of allegedly preventing further contraventions; and

(h) if the respondent is correct in its view that it has not contravened the EA, the harm visited on it is greater.

84 I find for the following reasons, the balance of convenience favours not making the interim orders sought:

(a) the evidence does not rise above a possibility that two employees may lose their jobs. There is no or limited evidence that this will, in fact, occur; when it will occur; and there is no evidence that there is pressure on any individual to take or not take a future opportunity. In this regard, I would warn both parties to leave any such employee to make up their own mind;

(b) as currently pleaded, a prima facie case of an alleged contravention in the Statement of Claim is weak;

(c) there is considerable doubt about the Court's power to make the interim orders sought. I am certainly not persuaded that the Court can restrain the respondent from making any changes to the structure of the BEB that does not involve employees covered by the EA, which is ultimately what is sought by the claimant (even if I could be satisfied that the Court's powers extend to restraints of that kind in any event);

(d) further I have considerable doubt that the limited powers of the Court extend to ordering the reversion of a restructure that has already occurred, particularly where it is unknown what there is left to do (but it appears little);

(e) the effect of winding back the restructure will have an unknown, but possible detrimental, impact upon employees who have been appointed to new positions;

(f) the impact upon employees generally will, arguably, be more uncertain because it is unknown how long or when the WAIRC proceedings will conclude. In the meantime, employees who now have certainty or at least a pathway to certainty will be left to wonder what will happen to them in the future;

(g) it is doubtful the Court under s 83(5) and s 83(7) can order either party to pay damages for any loss; and

(h) the Dispute is before the WAIRC (and has been for some months), which, as suggested by Commissioner Matthews, has a robust and effective regime for dealing with industrial matters. By way of example, s 44(6)(ba)(i) of the Act provides that the Commission may at or in relation to a conference give such directions as it considers appropriate, which includes preventing the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved the matter. To that end, and contrary to the claimant's submissions that the WAIRC does not have analogous powers, I note in the decision referred to by the respondent in court, ***Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services*** [2013] WAIRC 01064; (2014) 94 WAIG 563, Commissioner Kenner (as he was then), at [30], formed the view that removing the status quo (that was invoked at a previous s 44 compulsory conference) would be contrary to maintaining good industrial relations between the parties to the dispute. This indicates that the WAIRC has a mechanism, albeit not identical, for dealing with situations similar to the Application.

Outcome

85 For the reasons given, the claimant's application for interim orders sought is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

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[1] Statement of Claim [12.1].

[2] Statement of Claim [4].

[3] Statement of Claim [5] – [7].

[4] Statement of Claim [8].

[5] Statement of Claim [9].

[6] Statement of Claim [11].

[7] Affidavit of John Marsh [17], JM-9 JM-14.

[8] Affidavit of John Marsh [19].

[9] Affidavit of John Marsh [5].

[10] Affidavit of John Marsh [7].

[11] Affidavit of Teresa Anna Kurtis [10(g)].

[12] Affidavit of Teresa Anna Kurtis [10(f)].

[13] ***The Governing Council of North Metropolitan Tafe v State School Teachers' Union of WA*** [2018] WAIRC 00746 [38] - [39], [51] - [54] (Smith AP).

[14] Affidavit of John Marsh [26]

[15] ***The Governing Council of North Metropolitan Tafe v State School Teachers' Union of WA*** [55(b)].

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

Jurisdiction

[1] The Court has the jurisdiction conferred by the Act and other legislation. Section 83 of the Act confers jurisdiction on the Court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened an entitlement provision.

[2] Section 7 of the Act defines entitlement provision as, relevantly, (ii) an industrial agreement, which means an agreement registered by the WAIRC under the Act as an industrial agreement.

[3] Section 83(4) of the Act provides that on hearing of an application under s 83(1) of the Act, the Court may, if the contravention is proved, impose a pecuniary penalty under ss (4A) or dismiss the application.

[4] The powers, practice and procedure of the Court are contained in the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*.

Contravention

[5] Contravention of an entitlement provision may result in a pecuniary penalty. The pecuniary penalty may be an amount not exceeding: in the case of a body corporate $930,000 if the contravention is a serious contravention or $93,000 if the contravention is not a serious contravention; and in the case of an individual $180,000 if the contravention is a serious contravention or $18,000 if the contravention is not a serious contravention.

Burden and standard of proof

[6] In an application under the Act, 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.

[7] In the context of an allegation of the breach of a civil penalty provision of the IRA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336, 362:

> 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.

2026 WAIRC 00896

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	**:**	2026 WAIRC 00896
CORAM	**:**	INDUSTRIAL MAGISTRATE T. KUCERA
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	29 SEPTEMBER 2026
FILE NO.	**:**	M 108 OF 2025
BETWEEN	**:**	WILLIAM JOHN MANSFIELD
		CLAIMANT
		AND
		WA COUNCIL ON ADDICTIONS INC
		RESPONDENT
CatchWords	**:**	Payout of annual leave on termination – Construction of enterprise agreement – application of ss 90(1) and 90(2) of the *Fair Work Act 2009* – whether penalties and sleep disturbance allowance are to be included in payout of accrued annual leave on termination – whether s90(2) overrides the term of an enterprise agreement
Legislation	**:**	*Fair Work Act 2009* (WA)
Instrument	**:**	*Cyrenian House Agreement 2025-2028*
Case(s) referred to in reasons:	**:**	***Target Australia Pty Ltd v Shop Distributive and Allied Employees' Association*** [2023] FCAFC 66; (2023) 324 IR 304 ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131; (2018) 264 FCR 536 ***Martin Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; 97 WAIG 1595 ***Shop, Distributive and Allied Employees Association v Woolworths South Australia Pty* Ltd** [2021] FWC 617 ***Centennial Northern Mining Servicers Pty Ltd v Construction, Forestry, Mining and Energy Union*** [2015] FCAFC 100; (2015) 231 FCR 298
Result	**:**	Entitlement established: quantum to be determined
Representation:		
Claimant	:	Self-represented
Respondent	:	Ms C. Lewin (of counsel)

REASONS FOR DECISION

Introduction

1 This matter involves a dispute over the amount an employee was paid on termination for his untaken annual leave.

2 On 25 June 2025, William John Mansfield (**claimant**) who worked for the WA Council on Addictions Inc trading as Cyrenian House (**respondent**) as a 'Residential Supervisor – Sleep Shift' (**Residential Supervisor**), resigned from his employment.

3 As at the date of his resignation, the claimant had accumulated 124.1 hours of annual leave, which the respondent paid out at the claimant's ordinary rate of pay.

4 The claimant's employment was covered by the terms of the *Cyrenian House Agreement 2025-2028* (**2025 Agreement**), which was made under the provisions of the *Fair Work Act 2009* (WA) (**FW Act**).

5 In his role as Residential Supervisor, the claimant, under cl 69 of the 2025 Agreement, was entitled to be paid a Sleep and Disturbance Allowance of $120 (**Sleep and Disturbance Allowance**) for each 'sleep shift', which is a term that is defined in the 2025 Agreement.[1]

6 On 28 August 2025, the claimant lodged a small claims proceeding under s 548(1)(c) of the FW Act, alleging that the

respondent had contravened s 90(2) of the FW Act. The claimant alleged that the amount he was paid for untaken annual leave, should have included applicable penalty rates for night shifts and work on weekends (**penalties**) and the Sleep and Disturbance Allowance, which the claimant was paid for work on his usual roster.

7 The claimant contended that cl 344 of the 2025 Agreement, which the respondent says excludes the payment of penalties and the Sleep and Disturbance Allowance from what is to be paid on termination for untaken annual leave, is because of ss 55(1) and 90(2) of the FW Act, has no force and effect.

8 As a result, the claimant says that penalties and the Sleep and Disturbance Allowance should have been included in the payment made for untaken annual leave on termination. Accordingly, the claimant seeks an order requiring the respondent to pay the difference between what he says he should have received for his untaken leave on termination and the amount the respondent actually paid him (**claim**).

9 The respondent denies the claim and says that it has paid the claimant correctly, in accordance with the 2025 Agreement. In its response, the respondent contended the claimant was not entitled to be paid for penalties and the Sleep and Disturbance Allowance in the payout for untaken annual leave because these payments only apply where an employee is rostered to work.

10 The respondent contended payment for penalties and the Sleep and Disturbance Allowance cannot apply to annual leave that is paid out following termination because an employee is no longer rostered.

Relevant facts

11 The evidentiary material in this matter was provided in the following:

i. Statement of Agreed Facts (**SOAF**);[2] and

ii. The witness statement from the respondent's Chief Operating Officer - Simon James Hunter (**Hunter statement**).[3]

12 Like the SOAF, the Hunter statement was accepted into evidence by agreement between the parties. From these documents, I have extracted the facts that are relevant to describing the factual context in which the claim was made.

13 Relevantly, the respondent is a not-for-profit non-government Alcohol and Other Drug (AOD) Treatment Service, which operates the Serenity Lodge Therapeutic Community and Withdrawal Unit in Rockingham (**Serenity Lodge**).

14 Serenity Lodge is a residential AOD treatment, care and withdrawal facility that provides onsite medical support services. In providing these services, there is a requirement for staff to be onsite 24 hours a day for seven days a week. The Residential Supervisor is one of the staff members required to be at the premises and to sleep there overnight.

15 The claimant, who commenced employment with the respondent on 26 February 2021, was originally employed as a 'Night Weekend Supervisor' on a casual basis. By 13 October 2022, the claimant was employed in this role on a full-time basis.[4] During his employment, the claimant was required to perform shiftwork for which he was paid the applicable penalty rates.

16 After the 2025 Agreement was made, the fulltime role in which the claimant was employed was abolished and the terms on which he was employed were varied. From 3 April 2025, the claimant moved into a Residential Supervisor's role which was a permanent part-time position.[5]

Enterprise agreement

17 The 2025 Agreement, to which the claim relates, was approved by the Fair Work Commission (**FWC**) in a decision that issued on 27 March 2025.[6]

18 Under cl 69 of the 2025 Agreement, an employee who is rostered on a 'sleep shift' to sleepover, which includes a 'Residential Supervisor' who is required to stay overnight at Serenity Lodge, is paid a 'Sleep and Disturbance Allowance'

19 A Residential Supervisor is a defined term under cl 15 as follows;

> **Residential Supervisor – Sleep Shifts** means an employee working in a Therapeutic Centre with a fortnightly roster involving active rostered hours adjoining a Sleep Shift (weekdays and weekends) inclusive of paid meal breaks.

20 Extracted below are the other provisions from the 2025 Agreement that are relevant to the claim;

> **Shift Worker**
>
> 54. A shift worker:
>
> 1. Is required to work over a roster cycle that includes any of the 7 days of the week; and
> 2. Is regularly rostered to work Weekends and Public Holidays, and
> 3. Works in a Cyrenian House service where shifts are continuously rostered 24 hours a day for seven days a week.
>
> **Rosters**
>
> 55. A roster or working hours will be issued to each worker at least fourteen (14) day before it comes into operation. The CEO will consult with employees before implementing any significant roster changes.
>
> 56. Unless Cyrenian House agrees, an employee desiring a roster change will give 14 days' notice except where the employee is ill or in an emergency.
>
> **Shift commencing and ceasing times**
>
> 57. Day shift means any shift that commences after 6.00am and finishes at or before 8.00pm.
>
> 58. Afternoon or Evening shift means any shift which finishes after 8.00pm and at or before 12.00 midnight.
>
> 59. A Night shift is any shift which finishes after 12.00 midnight or commences before 6.00am, which requires the employee to be awake and active the entire period of the shift. This includes shifts worked by employees who are

rostered to work immediately prior to a rostered sleep shift as defined in the Definitions and immediately following a sleep shift.

60. Sleep shift means a shift which has a sleep period provided between 10.00pm and 6.00am.

…

Shift Allowances, Penalty Rates and Leave Entitlements

66. **Penalties**

1. An employee who works an Afternoon or Evening shift, will be paid a loading of 12.5% of the standard ordinary rate of pay for the whole of such shift.
2. An employee who works a Night Shift, will be paid a loading of 15% of the standard ordinary rate of pay for the whole of such shift.
3. An employee, who works a Public Holiday shift, will be paid a loading of 150% of the standard ordinary rate of pay for that part of such shift which is on the public holiday.
4. An employee who is a **Residential Supervisor – Sleep Shift** is entitled to a Night Shift Allowance of 15% on the standard ordinary rate of pay for all rostered active hours, which are rostered immediately prior to, and after a sleepover on a weekday except Friday, when a Saturday penalty rate will apply in accordance with Clause 75 and Clause 76 below.
5. A **Residential Supervisor – Sleep Shift** who works a Day shift within the span of hours, which exceeds 10 hours will be paid overtime rates for the hours worked in excess of 10 hours, or the penalty rate in accordance with 83 below, whichever is highest.
6. Where a **Residential Supervisor – Sleep Shift** is rostered to work active hours, for which any hours fall on a Saturday, Sunday or Public Holiday.

67. **Leave**

1. A full time Shift worker (see clause 54) is entitled to one additional week of annual leave. Part time Shift workers will be entitled to the extra leave entitlements on a pro-rata basis.

…

Sleep Shift – Sleep and Disturbance Allowance

69. An employee who is rostered on a Sleep shift to sleepover, shall be paid a Sleep and Disturbance Allowance of $120 to sleep at the place of work, inclusive of one hour at overtime rates (time and a half) for attendance to any disturbances during the night involving consumers or the property.

70. The Sleep and Disturbance Allowance shall be increased annual in accordance with the percentage increase to apply to salaries annually in this agreement.

71. A sleep shift is defined as a shift commencing at 10.00pm and finishing at 6.00am.

72. A sleep shift means when an employee is required to sleep overnight on the employer's premises.

73. The span for a sleep shift will be a continuous period of eight hours.

74. Employees will be provided with a separate room with a bed, use of staff facilities and free accommodation for each night when the employee sleeps over.

...

Part F – Leave and public holidays

Annual leave

105. Full-time employees are entitled to annual leave of 152 hours (equivalent to 4 weeks or 20 working days) for each year of service. Annual leave will accrue daily and credit daily. Annual leave for part-time employees accrues on a pro rata basis. Unless otherwise specified in this agreement, Annual leave does not accrue in relation to any period of leave which is unpaid.

…

107. Employees who are Shift workers as defined in clause 54 are entitled to one additional week of annual leave (5 days or pro rata for part-time employees) for each year of service. The following will also apply:

108. There will be no reduction of rostered penalty payments for Shift Workers while on Annual Leave.

109. For Residential Supervisors – Sleep Shift, the Sleep and Disturbance Allowance will be paid during Annual Leave according to their standard roster, subject to a minimum of one full shift taken when applying for Annual Leave.

…

114. Employees will receive payment in lieu of any untaken annual leave upon termination from Cyrenian House.

Part L – Separation

344. An employee who ceases employment with Cyrenian House will be paid for unused annual leave credits. Payments include allowances in the nature of salary which are paid during periods of annual leave and on a regular basis, excluding monetary allowances such as Sleep and Disturbance Allowance and allowances which are a reimbursement for expenses incurred.

The relevant statutory provisions

21 The provisions of the FW Act that are relevant to the claim appear in 'Division 3 – Interaction between the National Employment Standards [(**NES**)], modern awards and enterprise agreements'.

22 In order, s 55 of the FW Act appears under the following heading:

> ***Subdivision A – Interaction between the National Employment Standards and a modern award or an enterprise agreement***
>
> **55 Interaction between the National Employment Standards and a modern award or enterprise agreement**
>
> *National Employment Standards must not be excluded*
>
> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.
>
> *Terms expressly permitted by Part 2-2 or regulations may be included*
>
> (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
>
> (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
>
> (b) by regulations made for the purposes of section 127.
>
> Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain term must be taken into account.
>
> (3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).
>
> Note: See also the note to section 63 (which deals with the effect of averaging arrangements).
>
> *Ancillary and supplementary terms may be included*
>
> (4) A modern award or enterprise agreement may also include the following kinds of terms:
>
> (a) terms that are ancillary to or incidental to the operation of an entitlement of an employee under the National Employment Standards;
>
> (b) terms that supplement the National Employment Standards;
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.
>
> ….
>
> Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
>
> (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
>
> (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
>
> ….
>
> *Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards*
>
> (5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).
>
> *Effect of terms that give an employee the same entitlement as under the National Employment Standards*
>
> (6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:
>
> (a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and
>
> (b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.
>
> Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.
>
> *Terms permitted by subsection (4) or (5) do not contravene subsection (1)*
>
> (7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has not effect to the extent that it contravenes this section (see section 56).

23 Section 56 of the FW Act provides:

56 Terms of a modern award or enterprise agreement contravening section 55 have no effect

A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.

24 Regarding an employee's entitlement to paid annual leave, s 90 of the FW Act states:

90 Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

Alleged underpayment

25 On termination, the claimant was paid the sum of $5,040.17 for his untaken annual leave being 124.1 accumulated annual leave hours at the ordinary hourly rate of $40.62.[7]

26 The claimant alleged that he should have been paid the sum of $9,832.01 which is for 129 hours of accrued annual leave, paid at a rate which includes penalties and Sleep and Disturbance Allowance.[8] It appears 7.5 hours of the 129 hours total was for the payment of time in lieu of overtime, rather than for accumulated annual leave[9].

27 The rate at which the respondent also paid out the claimant's time in lieu was his ordinary hourly rate of $40.62. The total amount the claimant alleged he had been underpaid is the sum of $4,592.03, being the difference between the total amount claimed ($9,832.01) and payment for 129 hours accumulated leave at the rate of $40.62 per hour ($5,239.98)[10].

Issues to be decided

28 In determining this matter, it is necessary to reach a view on what an employee is entitled to receive under cls 105–116 of the 2025 Agreement when the employee goes on annual leave.

29 The second issue involves determining what an employee is entitled to receive on termination under cl 344 of the 2025 Agreement for untaken annual leave.

30 Thirdly, and even if I find the claimant, because of cl 344 of the 2025 Agreement, is not entitled to receive payment for either or both, penalties and a Sleep and Disturbance Allowance for untaken annual leave on termination, does ss 55, 56 and 90(2) of the FW Act operate to require payment of these entitlements?

31 In other words, does an employee's entitlement under s 90(2) of the FW Act override a lesser entitlement for the payout of untaken annual leave that might otherwise apply under an enterprise agreement?

Principles to be applied

32 Resolving each of the issues I have referred to involves the application of different principles. A resolution of the first two, turns on the application of the principles that are relevant to the interpretation of industrial agreements.

33 The principles to apply when interpreting industrial agreements were summarised by a Full Court of the Federal Court of Australia in ***Target Australia Pty Ltd v Shop Distributive and Allied Employees' Association*** [2023] FCAFC 66; 324 IR 304 per Bromberg J at [8].

34 Referring to ***WorkPac Pty Ltd v Skene*** (2018) 264 FCR 536 at [197]; his Honour Bromberg J set out these principles as follows:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: ***City of Wanneroo v Holmes*** (1989) 30 IR 362 (***Holmes***) at 378 (French J). The interpretation 'turns on the language of the particular agreement, understood in the light of its industrial context and purpose': ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** (2005) 222 CLR 241 (***Amcor***) at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (***Holmes*** at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (***Holmes*** at 378 - 379, citing ***George A Bond & Company Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a 'practical bend of mind' and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see ***Kucks v CSR Ltd*** (1996) 66 IR 182 at 184 (Madgwick J); ***Shop, Distributive and Allied Employees' Association v Woolworths SA Pty Ltd*** [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); ***Amcor*** at [96] (Kirby J).

35 Also relevant is the decision of the Full Bench of the Western Australian Industrial Relations Commission in ***Martin Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828, 97 WAIG 1595 at [21] – [23].

36 In summary (omitting citations), the Full Bench stated:

> The general principles that apply to the construction of contracts and other instruments also apply to the construction of

an industrial agreement:

(a) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;

(b) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, which matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;

(c) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;

(d) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;

(e) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business commonsense may be a topic on which minds may differ;

(f) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed as to have some operation; and

(g) industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

37 The resolution of the third issue involves the application of principles of statutory interpretation and a consideration of how ss 55, 56 and 90(2) of the FW Act have been construed in a comparable context.

Claimant's submissions

38 The claimant submitted that immediately prior to the cessation of his employment, he was required to work a stable and repeating roster which included:

- weekend shifts attracting penalty rates; and
- sleep shifts attracting payment for the Sleep and Disturbance Allowance.

39 It was submitted that his roster, which comprised of the features described in the preceding paragraph, was used to calculate wages and to accrue annual leave. [11]

40 The claimant submitted the words used in cls 108 and 109 of the 2025 Agreement are unambiguous and determine what is to be paid to a Residential Supervisor – Sleep Shift during their annual leave.

41 He noted that cl 108 of the 2025 Agreement states there would be no reduction of rostered penalty payments while an employee is on annual leave. The claimant also submitted that cl 109 requires that Residential Supervisors who are rostered on a sleep shift, would be paid a Sleep and Disturbance Allowance during annual leave.

42 The claimant submitted that cl 344 of the 2025 Agreement cannot be interpreted to produce a lower payout for untaken annual leave than what an employee receives who takes their annual leave during their employment. It was submitted that this result would be inconsistent with s 90(2) of the FW Act.[12]

43 The claimant contended the argument that he was not entitled to payment for penalties on his untaken annual leave because he was, following his resignation, no longer assigned to an actual roster, misunderstands s 90(2) of the FW Act.

44 It was submitted that the application of s 90(2) of the FW Act, requires a hypothetical assessment to be made on 'what would have been paid had the leave been taken?'.

45 The claimant argued that the respondent's characterisation; that penalties on the payment of untaken annual leave do not only apply post termination because the claimant is 'no longer rostered', ignores the purpose and effect of cls 108 and 109 of the 2025 Agreement.

46 It was submitted that these clauses expressly require that payment for these penalties is made when an employee takes leave, with the result that the FW Act requires the same payment on termination.[13]

47 The claimant in effect submitted s 90(2) of the FW Act requires these payments also be made when an employee is paid out for untaken leave, even though cl 344 of the 2025 Agreement might say otherwise.

48 It was submitted cl 344 the 2025 Agreement cannot override s 90(2) of the FW Act and that it should not be applied to reduce the entitlement the claimant submitted he would otherwise be entitled to receive as payment for untaken annual leave under the NES.[14]

Respondent's submissions

49 The respondent submitted that due to its need for staff to work unsociable hours and the varied nature of their roles, the 2025 Agreement provides for the payment of a large number of loadings, allowances and penalty rates.

50 It was submitted that while the 2025 Agreement provides for payment during annual leave at a rate higher than the claimant's base rate, it also provides specific guidance on which of the many available loadings, penalty rates and allowances are to be included when paying an employee for accrued and unused annual leave on termination.

51 The respondent contended that in this way, the claimant's case is distinguishable from situations in which an industrial agreement provides for a higher rate of pay on annual leave but is silent on what is to happen after the termination of an

employment relationship.

52 The respondent submitted that specific guidance is contained within cl 344, which was considered by the FWC when the 2025 Agreement was submitted for approval, and found to meet the requirements in ss 186, 187 and 188 of the FW Act. It was submitted the 2025 Agreement has therefore been found to neither contravene s 55 of the FW Act nor fail the 'better off overall' test.[15]

What clause 344 excludes

53 The respondent noted that cl 344 explicitly states that the Sleep and Disturbance Allowance is not payable on accrued and unused annual leave that is to be paid on termination. It was submitted that the respondent was therefore permitted to follow cl 344.[16]

What clause 344 includes on payment upon termination

54 The respondent submitted that cl 344 explicitly states that payment for, 'allowances in the nature of salary which are paid during period of annual leave and on a regular basis', should be included in payments for unused annual leave upon termination of employment.

55 However, the respondent argued that 'allowances in the nature of salary' are distinct from the penalties and loadings detailed in cl 66 of the 2025 Agreement and the overtime rates detailed in cls 75 and 83. Instead, the respondent submitted that 'allowances in the nature of salary', is a reference to payment for other allowances in the agreement. These include the Higher Duties allowance, Studies Assistance and Training Allowance, Remote Location Allowance and Prisons Allowance.[17]

Context of the agreement

56 The respondent submitted that when negotiating and drafting the agreement, it was the parties' intention to ensure the then-Night Weekend Supervisors (the role which became the Residential Supervisor) did not suffer a loss of pay 'when annual leave is taken'. That is, Residential Supervisors were to be paid according to the roster as if worked, which would include payment of the Sleep and Disturbance Allowance.

57 The respondent submitted that this was in part to encourage the Residential Supervisors to take their annual leave while employed, as this is a group (when called Night Weekend Supervisors) which had historically accrued a significant amount of unused annual leave.

58 It was submitted that this is because their rosters left several days in the week free, which meant these employees were less reliant on annual leave for time off, and their large annual leave balances had become a liability for the respondent.

59 The respondent submitted the purpose of cl 344 was to encourage Residential Supervisors to take their annual leave while employed. It was in effect submitted this group of employees would be more likely to take their annual leave while employed, if they are paid at a higher rate for taking their leave than if they are paid out at the same rate for accrued annual leave on termination.[18]

Interpretation of clause 344

60 The respondent submitted that its interpretation of cl 344 (that it requires payment of allowances on unused annual leave, but not penalty rates or loadings) is permissible under the FW Act because the 2025 Agreement can include terms that supplement the NES and their effect, is not detrimental to an employee when compared to the NES.

61 It was submitted the 2025 Agreement supplements the NES and provides something more than is provided for in the NES, as it provides that the claimant was to be paid his rostered penalty payments and Sleep and Disturbance Allowance when taking annual leave.

62 The respondent also argued an enterprise agreement can add something to the NES entitlement (which in this case to incentivises an employee using their accrued annual leave), without increasing the entitlement under the NES in every circumstance.[19]

Entitlements claimed

63 Regarding the entitlements that the claimant said he was entitled to receive, the respondent submitted the claimant was contracted to work 49 hours per fortnight. It was argued his annual leave accrual of 124.1 hours equates to 2.53 fortnights of contracted hours.

64 The respondent submitted that it was therefore not possible for the respondent to say (with enough certainty to calculate penalty rates and overtime etc) what shifts the claimant would definitely have worked, for these 124.1 hours.

65 It was submitted that the 'claimed weekly roster pattern' did not correspond to what the claimant actually worked as a Residential Supervisor. The respondent submitted that the amount the claimant was paid varied each fortnight, as evidenced by the gross payments that appear on his payslips.

66 It was further submitted that the claimant's roster was subject to change and so it is not possible to say with certainty what hours (and therefore what penalty rates) the claimant would have been rostered for and/or worked had he remained employed.[20]

Consideration – payment when an employee takes annual leave

67 I accept that from the words used in cls 108 and 109 that the parties clearly intended there would be no reduction in 'rostered' penalty payments for employees who are engaged as shift workers under the 2025 Agreement who take their annual leave during their employment.

68 It is also clear that a shift worker's entitlement to payment for penalties when that employee goes on annual leave is however dependent upon determining what an employee's 'standard' roster is before their leave is approved.

69 The ordinary and natural meaning of the word 'standard' includes 'normal'.[21]I therefore accept that when viewed in the context of the agreement as a whole, the parties intended with their use of the word 'standard' to mean an employee's normal roster.

70 Guidance for what is to be paid on an employee's standard shift roster is provided by other provisions within the 2025 Agreement, including by what is set out in cl 54 (Shift worker) and cl 55 (Rosters). It is reasonable to find the types of penalties that would continue to be paid when a shift worker takes annual leave would include penalties that apply for their work on weekends, on public holidays and at night.

71 Similarly, it would follow that the rostered penalty payments the respondent would need to pay would include those which would apply on the roster that is issued to a shift worker in accordance with cl 55; that is the roster the respondent is required to issue to a shift worker at least 14 days prior to the date on which it comes into operation.

72 This construction of the 2025 Agreement in so far as it provides an entitlement to payment that does not result in shift workers (which includes Residential Supervisors) suffering a reduction in pay when they go on annual leave, is readily discernible from the 2025 Agreement.

73 I accept that cl 109 is specifically directed to ensure that Residential Supervisors do not suffer a reduction in pay, by not receiving Sleep and Disturbance Allowances, when they go on annual leave. That said, it is my view that the roster a Residential Supervisor is on immediately prior to their leave, is what would determine the penalties that would be payable for the period of annual leave to be taken and the quantum of the Sleep and Disturbance Allowance to be paid.

Payment for annual leave on termination

74 From the words that are used cl 344, it is clear that the parties intended the payout of annual leave on termination would be treated differently. I accept that one of the purposes of cl 344 was to exclude the payment of the Sleep and Disturbance Allowance to Residential Supervisors on the payout of annual leave on termination.

75 I also accept that there are other allowances in addition to the Sleep and Disturbance Allowance that would not be included in payout of annual leave on termination, none of which are relevant for the purposes of this claim.

76 That said, cl 344 also provides that some allowances will be included in the payout of accrued annual leave on termination, which are 'in the nature of salary which are paid during periods of annual leave and on a regular basis'.

77 The question that then arises is whether penalty payments for employees who are engaged as shift workers are 'allowances in the nature of salary'.

Allowances in the nature of salary

78 While penalty payments under the 2025 Agreement are paid on a regular basis under a shift worker's roster and because of cl 108, are paid during periods of annual leave, I have difficulty in accepting that penalty payments, are allowances in the nature of an employee's salary.

79 I have reached this finding for several reasons. Firstly, and as noted in the respondent's submissions, it is well established that a penalty is not an allowance. Whereas penalty rates have been described as higher pay rates that employees must be paid for working particular hours or days,[22] allowances are extra payments made to employees for performing particular tasks, who use a particular skill set, are exposed to particular environmental factors or incur an expense for doing their job.[23]

80 Secondly, although the claimant was involved in the negotiations for the 2025 Agreement, I have noted he did not offer any explanation on why this term was included in cl 344.

81 I have also noted the respondent similarly did not provide any evidence on whether penalties were allowances 'in the nature of salary' to be paid to shift workers that would be included in the payout of annual leave on termination either.

82 While the Court must be cautious in accepting evidence of the parties' negotiations as an aide to interpret the agreement, there is no evidence to conclude the parties in negotiations for the 2025 Agreement had intended the term 'allowances in the nature of salary which are paid during periods of annual leave and on a regular basis to mean that penalties would be included in the payment to be made for untaken annual leave.

83 Thirdly, there is also the unchallenged evidence from Mr Hunter , that the respondent had wanted a mechanism by which Residential Supervisors would be 'encouraged' to take their annual leave entitlement. Whether viewed as an incentive or a penalty, this construction of cl 344 having regard to the words used in the provision, is at least consistent with the contextual explanation the respondent has offered.

84 Fourthly, and more significantly, if the parties had intended the penalties paid to shift workers would be included in the payout of annual leave on termination the words 'penalty payments' could have been easily used when drafting the agreement.

85 The fact that words specifically including penalties for shiftwork in a payout for untaken annual leave are not contained in cl 344, when weighed together with the matters I have set out in the preceding paragraphs [78]–[85], strongly suggests the parties to the 2025 Agreement had intended they would be excluded.

Conclusion on what the agreement requires

86 There is little doubt, having regard to the words used in the 2025 Agreement, that the parties intended the payment to be made to shift workers when they take annual leave (including Residential Supervisors), would be different to the payment they receive for untaken annual leave on termination.

87 While this interpretation of the 2025 Agreement might be correct, the question of whether the payment of annual leave on termination that excludes the Sleep and Disturbance Allowance and penalties to Residential Supervisors complies with the FW Act, is however, a whole other matter.

The application of s 90 of the FW Act

88 Despite what the 2025 Agreement provides, it is the application and interpretation of s 90 of the FW Act that ultimately decides the outcome of the matter in the present case.

89 The operation of s 90 in determining what an employee is entitled to receive in a payout of accumulated annual leave entitlements was considered in a unanimous decision of a Full Court of the Federal Court in ***Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union*** [2015] FCAFC 100; (2015) 231 FCR 298 (***Centennial***).

90 The facts giving rise to the decision, that was the subject of the appeal referred to the Full Court in ***Centennial,*** are like those at issue in the present case. The conclusions the Full Court reached are therefore both relevant and applicable.

91 In ***Centennial*** the term of the enterprise agreement regarding payment for annual leave was in the following terms:

> **19. ANNUAL LEAVE**
>
> …
>
> 19.5 On termination of employment an employee is paid for accrued but untaken annual leave at their hourly rate of pay applicable to their ordinary weekly rate of pay as prescribed in Clause 13.1 plus average bonus.
>
> **Payment for Annual Leave**
>
> 19.6 An employee taking annual leave must be paid the greater of:-
>
> (a) the employee's ordinary weekly rate of pay plus a loading of 20% of that rate; or
>
> (b) the employee's ordinary weekly rate of pay plus rostered overtime, shift allowance, weekend penalty rates and bonus.[24]

92 Like cls 108, 109 and 344 of the 2025 Agreement, cl 19 of the enterprise agreement in ***Centennial*** made provision for employees to receive payment at one rate when taking annual leave while they were employed, but at a lower rate for the payout of accumulated annual leave on termination, that did not include payment for components including shift and weekend penalty rates.

93 At first instance, the presiding Judge held that s 90(2) of the FW Act required payment of the actual amount of annual leave that would have been payable under cl 19.6 if the employee had taken the leave, even though the cl 19.5 of the enterprise agreement permitted the employee to be paid out their accumulated annual leave on termination at a lower rate.

94 In relation to s 90 the Full Court at [4] and [5] made the following observations:

> **The legislation**
>
> 4. As the primary judge observed, s 90 appears in Pt 2-2 of Ch 2 of the FW Act. Part 2-2 contains the National Employment Standards, which are 'minimum standards' of employment, providing a safety net for employees. Although they may be supplemented or enhanced in a modern award or enterprise agreement containing terms substantially to the same effect: FW Act, s 61(1). An enterprise agreement must not exclude any provision of the National Employment Standards (FW Act, s 55) and, to the extent that it does, a term of an enterprise agreement has no effect (FW Act, s 56).
>
> 5. The National Employment Standards relate to a range of matters, including hours of work, notice of termination, payment on redundancy, public holidays and various types of leave, among them annual leave. Division 6 of Pt 2-2 contains the terms relating to annual leave, of which s 90 is one.

95 Also relevant is what Full Court noted at [14] - [17];

> 14. In this case the primary judge observed that construction to the effect of s 90(2) protects the whole entitlement to annual leave could certainty not be excluded. His Honour then turned for assistance to the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), which states:
>
> **Clause 90 – Payment for annual leave**
>
> 370. Subclause 90(1) entitles an employee to be paid at their base rate of pay (as defined in clause 16) for the employee's ordinary hours of work for the period of their absence on leave.
>
> (The meaning of ordinary hours of work and base rate of pay are outlined at the beginning of this Part.)
>
> 371. This is a minimum entitlement and would not prevent an employer and employee from agreeing to, or an award or enterprise agreement providing for, more generous payment terms.
>
> 372. Subclause 90(2) provides that, on termination of employment, an employee is entitled to receive a payment in respect of any untaken paid annual leave. **The payment will be equivalent to the amount that the employee *would have been paid* if the employee had taken the annual leave.**
>
> (Emphasis and italics added)
>
> 15. His Honour said that 'this lends support to the argument that s 90(2) (unlike s 90(1)) is not confined to a statement of a minimum obligation, but it is a statement to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if employment comes to an end while paid annual leave remains untaken'.
>
> 16. He therefore rejected the construction for which Centennial was contending, saying that he was 'not prepared, in effect, to read down s 90(2) in the face of the expectation stated in the explanatory Memorandum when that construction is plainly open on the terms of s 90(2) itself.'
>
> 17. On his Honour's construction, clause 19.5 purports to confer an entitlement that is less than the minimum entitlement for which s 90(2) of the FW Act provides. He stated that 'cl 19.5 [operates] on its face ('an employee *is*

> paid') in a way which excludes the operation of s 90(2)'. Having regard to the terms of s 55(1) of the FW Act, which, it will be recalled, prohibits an enterprise agreement from excluding any provision of the National Employment Standards, his Honour held, that clause 19.5 had no effect.

96 One of the grounds of appeal in ***Centennial*** was that the primary judge had erred by finding s 90(2) of the FW Act is not confined to a statement of minimum obligation to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if his or her employment comes to an end while annual leave remains untaken.[25]

97 At [38] the Full Court in ***Centennial*** held;

> It is undoubtedly true that the National Employment Standards are minimum standards. Centennial was also right when it argued that s 90 must be read as a whole and in the context of the National Employment Standards. But there is no reason to conclude that the primary judge did not do this. Nor does it necessarily advance Centennial's case to read the section in this way. Section 90(1) creates the minimum standard: payment at the base rate for ordinary hours worked. The effect of s 90(2) is that if that is the rate at which the employee is paid when he or she takes annual leave, then that is the minimum amount that must be paid for any accrued untaken annual leave. If, on the other hand, there is a modern award or enterprise agreement which provides for payment at a higher rate for annual leave that is taken, then s 90(2) stipulates that that is the rate which is payable where annual leave has accrued but has not been taken. This is the natural way to read the section and there is nothing in the legislative context which would require a different interpretation.

98 Having regard to the passages I have extracted from the decision in ***Centennial,*** I am not persuaded the circumstances in the present case are in any way distinguishable.

99 It is clear from the decision in ***Centennial*** that the purpose of s 90(1) of the FW Act is to provide a minimum standard on what is to be paid to an employee during a period of annual leave. It is also clear that the terms of a modern award or enterprise agreement can make provision for 'supplementary terms' to increase what an employee receives when taking annual leave.

100 However, once the entitlement an employee is to receive for annual leave is clarified, either by operation of s 90(1) or under the terms of a modern award or industrial agreement, the function of s 90(2) is to ensure an employee receives the same by way of an entitlement for untaken annual leave on termination as they would for taking their annual leave when employed.

101 I am satisfied that notwithstanding cl 344 of the 2025 Agreement; the amount the claimant should have been paid on termination should have included payments for penalties and the Sleep and Disturbance Allowance that would have applied on the claimant's 'standard' roster'.

102 In other words, it is my view, having regard to the decision in ***Centennial*** that because of s 55 of the FW Act, s 90(2) overrides cl 344 of the 2025 agreement.

Effect of clause 344

103 I do not accept the respondent's submission that the FWC's approval the 2025 Agreement permitted the practice on the payout of annual leave on termination that was enshrined in cl 344. As I have noted, the Full Court in ***Centennial*** was also required to consider the terms of an enterprise agreement on the payment of annual leave that was also in conflict with s 90(2) of the FW Act.

104 While enterprise agreements under s 55(4) of the FW Act can be used as a means to improve some but not necessarily all of the minimum entitlements that apply under the NES, the combined effect of s 56 and s 90(2) of the FW Act ensures that payment at an agreed rate above the minimum standard prescribed in the NES, also applies to what is to be paid on termination.

105 In other words, it does not matter what cl 344 of the 2025 Agreement says, an employee is entitled to the same payment for accumulated leave on termination as they would for annual leave taken during their employment.

Relief sought and the entitlements claimed

106 Although I am satisfied that penalties and the Sleep and Disturbance Allowance should be included in the payment to be made to the claimant for untaken annual leave upon termination, I am at this stage not prepared to make an order for the amount being claimed.

107 This is because I was not provided with sufficient evidence on the standard roster the claimant would have been required to work in his role as a Residential Supervisor. As extracted in the preceding paragraph 20 above, cl 55 of the 2025 Agreement states that the respondent is to issue a roster to each worker at least 14 days before it comes into operation.

108 However, this is not to say I have accepted the respondent's argument that it is not possible to say with certainty what hours (and therefore what penalty rates) the claimant would have been rostered for and/or worked had he remained employed.

109 A similar argument was both made and rejected by the Full Court in ***Centennial***, who at [42] stated:

> Centennial also submitted, in effect, that the construction preferred by the primary judge is unlikely to be correct because it would give rise to uncertainty. It argued that the words 'would have been payable' refer to a liability for a future event and, if the liability is to include such matters as rostered overtime, shift allowances, weekend penalty rates and bonuses, these will vary from time to time. Centennial maintained that only its construction offers certainty because it ignores all these variable components. In our view, this argument is a furphy. The intention of the legislation is that untaken annual leave is payable at the rate at which it would have been paid had the employee taken it at the time the employee was eligible for it. If the intention were to require untaken annual leave to be paid at the base rate, then, as we have observed, in the light of the legislative history one would expect a statement to this effect in the subsection.

Conclusion

110 Having now determined what should have been included in the payment the claimant received for untaken annual leave on termination, I intend to hear from the parties on the days/nights the claimant would have been rostered as a Residential

Supervisor, his start and finish times and the penalties and allowances that would have been payable under his standard roster.

111 I also want to hear from the parties on the correct number of annual leave hours that need to be paid out on termination, whether it is 129 as is being asserted by the claimant or if it is 124.1. I raise this because the rate that is to be paid for time off in lieu is covered by a separate clause in the 2025 Agreement.

112 To this end, I intend to relist the matter for a short hearing on the issue of quantum. Relevant to any orders that I may decide to make, will be evidence of the roster the claimant had been issued on the date he submitted his resignation on 25 June 2025.

T. KUCERA
INDUSTRIAL MAGISTRATE

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[1] *Cyrenian House Agreement 2025-2028* [2025] FWCA 1049 cl 15.

[2] *Form 29 – Statement of Agreed Facts and Bundle of Agreed Documents* lodged 10 December 2025.

[3] *Form 29 – Witness Statement of Simon James Hunter* lodged 4 March 2026.

[4] *Form 29 – Statement of Agreed Facts and Bundle of Agreed Documents* lodged 10 December 2025 [2] – [5].

[5] *Form 29 – Statement of Agreed Facts and Bundle of Agreed Documents* lodged 10 December 2025 [11] – [13].

[6] *Cyrenian House Agreement 2025-2028* [2025] FWCA 1049.

[7] *Form 29 – Statement of Agreed Facts and Bundle of Agreed Documents* lodged 10 December 2025, 195 – 198.

[8] *Form 1.1 – Originating Claim* lodged 28 August 2025 – attached Statement of Claim

[9] *Form 29 – Statement of Agreed Facts and Bundle of Agreed Documents* lodged 10 December 2025, 195.

[10] *Form 1.1 – Originating Claim* lodged 28 August 2025 – attached Statement of Claim

[11] *Form 29 – Claimant's Submission* lodged 5 January 2026 (**Claimant's Submissions**) part 4.

[12] Claimant's Submissions part 3.

[13] Claimant's Submissions part 5.

[14] Claimant's Submissions part 6.

[15] Form 29 -Respondent's Outline of Submissions in opposition of claim lodged 17 December 2026 (**Respondent's Submissions**) [36] - [38].

[16] Respondent's Submissions [39] – [40].

[17] Respondent's Submissions [41] – [42].

[18] Respondent's Submissions [43] – [45].

[19] Respondent's Submissions [46] – [47].

[20] Respondent's Submissions [49] – [55].

[21] *Macquarie Dictionary* (9th ed, 2023), 1499.

[22] Stewart A, *Stewart's Guide to Employment Law* (7th Ed, 2021) [11.7].

[23] ***Shop, Distributive and Allied Employees Association v Woolworths South Australia Pty* Ltd** [2021] FWC 617 [98].

[24] *Centennial Northern Mining Services Enterprise Agreement 2011*

[25] ***Centennial Northern Mining Servicers Pty Ltd v Construction, Forestry, Mining and Energy Union*** [2015] FCAFC 100, [18].

STAY OF OPERATION OF DECISIONS/ORDERS—Application for

2026 WAIRC 00880

A STAY OF OPERATION OF THE ORDER IN MATTER NUMBER U 115 OF 2025 WHICH IS THE SUBJECT OF FBA 18 OF 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OFFICE OF THE AUDITOR GENERAL
	APPLICANT
	-v-
	ELLI GOUGOULIS
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	MONDAY, 21 SEPTEMBER 2026
FILE NO/S	PRES 20 OF 2026
CITATION NO.	2026 WAIRC 00880

Result	Declaration and Order issued
Representation	
Applicant	Mr J Carroll of counsel
Respondent	Mr S Pack of counsel

Declaration and Order

This matter having come before me on the papers on 18 September 2026, and having heard Mr J Carroll of counsel on behalf of the applicant and Mr S Pack of counsel on behalf of the respondent, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), I hereby declare and order by consent as follows –

(1) THAT the applicant has a sufficient interest as required by s 49(11) of the *Act* to apply for the orders set out herein.

(2) THAT appeal FBA 18 of 2026 has been instituted within the meaning of s 49(11) of the *Act.*

(3) THAT the whole of the operation of the order made by the Commission on 2 September 2026 in application U 115 of 2025 be and is hereby stayed pending the hearing and determination of appeal FBA 18 of 2026 subject to:

  (a) The appeal FBA 18 of 2026 being expedited; and

  (b) If the appellant in appeal FBA 18 of 2026 is unsuccessful, then within 14 days of the appeal being dismissed the applicant will:

    (i) reinstate the respondent;

    (ii) pay the respondent and her superannuation fund money the subject of the loss remuneration order made by the Commission in application U 115 of 2025 plus simple interest at six percent per annum calculated from the date that the payment was required to be made under the order that being 18 September 2026; and

    (iii) pay to the respondent the sum of money she would have earned by way of salary, superannuation and leave loading had she been reinstated on 18 September 2026 plus simple interest at six percent per annum with interest to be calculated from the date that each instalment of salary / superannuation / leave loading would have been paid had she been reinstated on 18 September 2026.

(4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2026 WAIRC 00927

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00927
CORAM	**:**	COMMISSIONER C TSANG
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	MONDAY, 12 OCTOBER 2026
FILE NO.	**:**	U 48 OF 2026
BETWEEN	**:**	BRENDON HILL Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	INDUSTRIAL LAW (WA) – Unfair dismissal application filed six days out-of-time – Whether it would be unfair not to accept the referral under s 29(3) – Whether medical certificate of unfitness for work explains failure to file within time – Merits of the substantive application assessed for the purpose of a 'rough and ready' merits assessment – Serious misconduct – Allegations of sexualised conduct towards female administrative staff – Referral not accepted
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 26(1)(b), s 29(1)(c), s 29(2)(a), s 29(3) *Public Sector Management Act 1994* (WA), s 82A(3)(b)

Result	:	Referral not accepted out-of-time; unfair dismissal application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms E Negus (of counsel)

Cases referred to in reasons:

Briginshaw v Briginshaw (1938) 60 CLR 336

Jackamarra v Krakouer [1998] HCA 27

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51

Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Reasons for Decision

1 These reasons concern the respondent's application for the Commission to refuse to accept the applicant's (**Mr Hill's**) *Form 2 – Unfair Dismissal Application* (**Form 2**), filed six days out-of-time, under s 29(3) of the *Industrial Relations Act 1979* (WA) (**IR Act**).

2 On 22 July 2026, Directions ([2026] WAIRC 00748) issued requiring the parties to file witness statements and legal submissions, with the matter to be determined on the papers.

3 On 16 September 2026, Directions ([2026] WAIRC 00863) issued granting Mr Hill's request for an extension of time to comply with the timeframe for filing his witness statements and legal submissions.

4 In these reasons, the following complainants and witnesses are referred to as follows:

(a) Fellow teacher named in Allegation 1: Ms Alpha.

(b) Complainant who made Allegation 2: Mr Beta.

(c) Complainant who made Allegation 4: Ms Gamma.

(d) Complainant who made Allegations 5 and 6: Ms Delta.

(e) Witness to Allegations 4 and 5: Ms Epsilon.

(f) Witness that Mr Hill refers to at paragraph 3(b) of his submissions (at [45(d)] ***below***): Mr Zeta.

(g) Witnesses who gave an account of Mr Hill handling items on their desk: Ms Eta, Ms Theta and Ms Iota.

(h) Witnesses who gave an account of Mr Hill's conduct at the school: Mr Kappa, Mr Lambda and Mr Mu.

5 On 5 and 6 August 2026, the respondent filed:

(a) Submissions (at [44] ***below***).

(b) A witness statement for Natalie Donnell, Senior Investigator in the Standards and Integrity Directorate at the Department of Education (**SID**), lead investigator for the disciplinary investigation which commenced in March 2025 into the suspected breaches of discipline by Mr Hill, attaching:

(i) A 126-page Investigation Report dated 10 December 2025 and an email from the Principal to Ms Donnell dated 5 August 2026.

(ii) Audio recordings of the interviews conducted by SID investigators on 20 March 2025 with the complainant who made **Allegation 4** (**Ms Gamma**), the complainant who made **Allegations 5 and 6** (**Ms Delta**), and a witness to **Allegations 4 and 5** (**Ms Epsilon**).

(iii) The respondent's proposed findings and proposed action letter dated 16 December 2025 (**show cause letter**).

(iv) The emails exchanged between the respondent and Mr Hill and his solicitors, the first of which is dated 16 December 2025 and encloses the show cause letter, the last of which is dated 6 February 2026 and notifies Mr Hill that he is granted an extension of 10 business days to respond to the show cause letter making the due date for the response by 20 February 2026.

(v) The respondent's email dated 11 March 2026 enclosing the respondent's dismissal letter dated 10 March 2026 (at [11] ***below***).

6 On 17 September 2026, Mr Hill filed submissions (at [45]–[46] ***below***) enclosing two letters from his treating psychologist and general practitioner, and three character references. Two references are from former students and one is from an employee of the Kelmscott Senior High School Farm. He did not file a witness statement for himself.

7 On 5 October 2026, the respondent filed responsive submissions, contending that:

(a) The Commission should find that Mr Hill has not given an acceptable explanation for the delay, in circumstances where he has provided no further evidence to support his assertion that he was unable to file his Form 2 within time,

despite being given an opportunity to do so.

(b) Mr Hill's submissions do not address the reason the respondent says his Form 2 has no prospects of success, namely that:

(i) The findings regarding **Allegations 4–6** are supported by evidence so strong that there is no prospect the Commission would not find the conduct occurred; and

(ii) Dismissal would have been an appropriate penalty for **Allegations 4–6** even if **Allegations 1–3** had not been substantiated.

(c) The matters raised by Mr Hill in relation to **Allegations 4–6** are that:

(i) The witnesses are 'tainted' because they had heard rumours about him having an affair with Ms Alpha. It is farfetched to suggest this would cause a witness to concoct allegations about him. There is no possibility that the incidents described in **Allegations 4–6** could have been the result of the witnesses misinterpreting innocent conduct because they had heard rumours of the alleged affair. Therefore, this assertion has no relevance to **Allegations 4–6**.

(ii) The evidence of the complainants is 'hearsay' and uncorroborated. This is a mischaracterisation of the evidence. Ms Gamma gave direct evidence about **Allegation 4**, Ms Delta and Ms Epsilon gave direct evidence about **Allegation 5**, and Ms Delta gave direct evidence about **Allegation 6**.

(iii) **Allegations 4–6** have been 'grouped together'. They were grouped together during the disciplinary process for the purpose of imposing a penalty because of the similarity in the conduct. This grouping is appropriate. Each allegation was substantiated individually. While the investigation report stated that the evidence of similar conduct from witnesses supported the direct evidence given by Ms Gamma, Ms Delta and Ms Epsilon, the direct evidence about each allegation would have been sufficient by itself to substantiate the allegations.

(d) If the Commission accepts the respondent's submissions at [7(b)] ***above***, the other matters raised by Mr Hill do not give rise to a prospect that his claim may succeed. In particular, the character references are incapable of disproving the conduct the subject of **Allegations 4–6** or establishing that this conduct is out of character. Likewise, if the submissions at [7(b)] ***above*** are accepted, any general evidence about Mr Hill's teaching could not make the penalty of dismissal harsh or unfair.

Consideration

8 The Commission may accept a referral that is out-of-time if it considers that it would be unfair not to do so: IR Act, s 29(3).

9 The principles to be considered in a s 29(3) application are well-settled and set out in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51 (***Malik***), [26] (Steytler J) and [74] (Heenan J) citing Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298, 299–300:

1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.

10 Section 29(3) does not, in every case, require an applicant to show that they have some prospect of success: ***Malik*** [25] (Steytler J). There will be no unfairness in rejecting a late application if the application could not succeed. Therefore, unfairness must involve, at a minimum, the Commission being satisfied that some prospect of success would be denied if the applicant could not pursue their late claim: ***Malik*** [73] (Heenan J). If there were no prospects of success, there can be no unfairness in declining to accept a referral of a late claim: ***Malik*** [77] (Heenan J).

The length of the delay

11 On 11 March 2026, 8:00am, Mr Hill was emailed the respondent's letter dated 10 March 2026. The letter notified him that the complaints of misconduct had been substantiated as breaches of discipline, that the respondent had decided to take disciplinary action under s 82A(3)(b) of the *Public Sector Management Act 1994* (WA) (**PSM Act**), and that he was dismissed without notice or payment in lieu of notice for serious misconduct under cl 11(4) of the *Teachers (Public Sector Primary and Secondary Education) Award 1993*.

12 The dismissal took effect when it was communicated to Mr Hill on 11 March 2026. Mr Hill does not dispute that he received the letter on 11 March 2026.

13 A claim that an employee has been harshly, oppressively or unfairly dismissed is referred under s 29(1)(c) of the IR Act and commenced by the filing of a Form 2. Section 29(2)(a) required him to file his Form 2 no later than 28 days after the day on which his employment was terminated, that is, by 8 April 2026.

14 He filed his Form 2 on 14 April 2026, six days out-of-time.

15 The delay is short. This favours Mr Hill. However, the prima facie position is that the time limit should be complied with. Even a short delay calls for an acceptable explanation: ***Malik*** [26] (Steytler J); [74] (Heenan J).

Reason for the delay

16 In his Form 2, Mr Hill states:

> On Authorised sick leave by GP and timeline given in letter verified by the department of education
>
> Due to a deterioration of mental health from protracted investigation process. i have not been able to do this earlier.

17 On 26 May 2026, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application* (**Form 2A**) contending that Mr Hill 'has not yet provided enough information to persuade the Commission to exercise its discretion to accept his application out of time.'

18 On 5 August 2026, the respondent filed submissions stating:

> **3.0 NO ACCEPTABLE EXPLANATION FOR DELAY**
>
> 8. [Mr Hill's] *Form 2 – Unfair Dismissal Form* stated:
>
> > *On Authorised sick leave by GP and timeline given in letter verified by the department of education*
> >
> > *Due to a deterioration of mental health from protracted investigation process. i have not been able to do this earlier.*
>
> 9. The respondent accepts that [Mr Hill] had provided a medical certificate from his General Practitioner certifying him as unfit for work and that his certificate covered the 28-day period [Mr Hill] had to file his unfair dismissal application.
>
> 10. This medical certificate is not currently before the Commission.
>
> 11. The respondent submits that the fact that a person has been certified as unfit to work does not necessarily mean that they are unable to complete an unfair dismissal application.
>
> 12. The respondent further submits that, for [Mr Hill] to show he had an acceptable reason for the delay, he would need to provide further explanation of why he was not able to complete the unfair dismissal application in the 28-day period (for example, by giving an account of his mental state and its effect on his capacity to file his application).

19 Despite the respondent's contentions, first raised in the Form 2A and repeated at paragraph 12 of the respondent's submissions, Mr Hill has not given an account of his mental state, or of its effect on his capacity to file his Form 2 within the 28 days after he was notified of his dismissal.

20 While Mr Hill provided no further account than that in his Form 2 of the reason for the delay, his submissions filed on 17 September 2026 enclose two letters from his treating medical practitioners.

21 The first is a letter from Dr Jarrod Turner, Senior Clinical Psychologist, dated 6 February 2026. It states that the letter was prepared on Mr Hill's request. It states that Mr Hill was referred to him on 5 August 2025 by GP Dr Jason Simpson. Further, it states that Mr Hill commenced with Dr Turner's services on 17 September 2025 and subsequently attended appointments on 28 October 2025 and 28 January 2026. Dr Turner states that Mr Hill 'requires ongoing mental health treatment at this time and for the foreseeable future.'

22 The second is a letter from Dr Jason Simpson, dated 5 February 2026. It states that Mr Hill attended on 5 August 2025 'with a worsening of his mental health as a direct result of workplace allegations.' It refers to the symptoms reported and states that Dr Simpson has increased his antidepressant dose and 'referred him to a psychologist and these sessions are ongoing.' The letter certifies Mr Hill as unfit for work from 5 February 2026 to 30 April 2026 inclusive and notes that Dr Simpson will review Mr Hill again in the interim.

23 On 16 December 2025, 1:02pm, the respondent sent an email attaching the show cause letter dated 16 December 2025. The show cause letter attached the investigation report: (emphasis added)

> Dear Mr Hill
>
> I refer to a letter dated 27 May 2025, from Mr Dave Harnett, Principal Investigator, [SID], and my letter dated 28 February 2025, advising you that the Department of Education (the Department) was dealing with complaints about you as disciplinary matters pursuant to [s 81 of the PSM Act].
>
> The investigation is now complete, and I have considered all the available evidence. **The report is attached to this letter for your benefit in providing a response.** Please be aware that use of the report for any purpose that is not directly related to the proper conduct of the investigation or any subsequent appeal process, is not permitted.
>
> …

24 In reply, on 19 December 2025, 12:01pm, Mr Hill's solicitor noted that the show cause letter required Mr Hill to respond within 10 business days and enquired whether, given the time of year, a new deadline could be accommodated. On 19 December 2025, 12:07pm, the respondent replied to confirm that the 10 business days does not include the Christmas holiday period and that the due date would not be until 6 February 2026.

25 On 6 February 2026, 12:54pm, Mr Hill's solicitor emailed the respondent, stating:

> We continue to act for Mr Brendon Hill.
>
> Unfortunately, Mr Hill is experiencing some health-related issues that have hindered his ability to respond to the Director

General's show cause letter.

I have attached:

1. a letter from Mr Hill's treating GP; and
2. a letter from Mr Hill's treating psychologist.

In light of Mr Hill's medical condition, he kindly requests that the Director General consider providing him with some more time to respond to the show cause letter. The purpose of the extension is to provide Mr Hill with a fair opportunity to respond, given that his ability to do so to date has been hindered by his medical condition.

If the extension is granted, Mr Hill requests that he be put on sick leave for the extension period.

26 On 6 February 2026, 2:10pm, the respondent replied to confirm that an extension of 10 business days had been granted, which extended the due date for any response to the show cause letter to 20 February 2026. The email also states: (emphasis added)

Any further extensions will be unlikely **noting the certificate does not say he is unfit to participate in the process.**

27 The respondent produced the documents at [23]–[26] ***above***, including the chain of emails at [23]–[26] ***above*** and the investigation report attached to the email at [23] ***above***. The respondent did not produce the attachments to the email at [25] ***above***. However, it is reasonable to infer that those attachments are the letters Mr Hill enclosed with his submissions at [20]–[22] ***above***.

28 As outlined at [26] ***above***, the respondent informed Mr Hill on 6 February 2026 that the letters from his treating general practitioner and psychologist would be insufficient to grant him another extension of time to respond to the show cause letter, given that those letters do not state he is unfit to participate in the disciplinary process.

29 As outlined at [21] ***above***, Dr Turner's letter dated 6 February 2026 states that Mr Hill requires ongoing mental health treatment 'at this time and for the foreseeable future.' It says nothing of Mr Hill's fitness, whether for work or otherwise.

30 As outlined at [22] ***above***, Dr Simpson's letter certifies Mr Hill as unfit for work from 5 February 2026 to 30 April 2026 inclusive. Those dates span the date Mr Hill was notified of his dismissal (11 March 2026), the date his Form 2 was due (8 April 2026), and the date he filed (14 April 2026). The letter says nothing about Mr Hill's fitness to file a Form 2.

31 Mr Hill has given no evidence to explain how he was unable to file his Form 2 in the period between 11 March 2026 and 8 April 2026 but was able to file it on 14 April 2026.

32 Dr Simpson's letter states that he will review Mr Hill again in the period from 5 February 2026 to 30 April 2026. Mr Hill has given no evidence of whether that review occurred.

33 Nothing in these reasons questions the genuineness of Mr Hill's mental health condition. Two treating practitioners confirm it. Dr Simpson certified him unfit for work, increased his antidepressant dose and referred him to a psychologist. Dr Turner considers that he requires ongoing treatment. However, the question under s 29(3) is not whether Mr Hill was unwell. It is whether his material explains why he could not file his Form 2 by 8 April 2026.

34 Dr Simpson certified Mr Hill as unfit for work throughout the 28-day period. That goes some way to explaining the delay but does not go far enough. The certificate speaks to fitness for work. It says nothing about his capacity to complete and lodge a Form 2. The same certificate covers 14 April 2026, the day he did file his Form 2. Mr Hill has not explained why he could file on that day and not by 8 April 2026. The respondent raised this gap in the Form 2A and again in the respondent's submissions. Mr Hill had the opportunity to address it, including through the extension granted on 16 September 2026 (at [3] ***above***). He did not.

35 Three further matters bear on the explanation. First, Mr Hill's Form 2 refers to a 'timeline given in letter verified by the department of education'. He does not explain what that means. If he relied on a timeline in the dismissal letter, he has not identified it or said how it caused him to file late. If he means the respondent accepted his medical certificate, that goes to his fitness for work, not to his capacity to file. Second, Dr Simpson and Dr Turner wrote their letters on 5 and 6 February 2026, to support a request for more time to respond to the show cause letter. The letters were not written for, and do not speak to, the period from 11 March 2026 to 8 April 2026. Third, I take into account that Mr Hill is self-represented in these proceedings. However, that does not relieve him of the need to explain the delay. As outlined at [34] ***above***, the respondent told him twice what was missing, and the Commission gave him more time to supply it. He did not.

36 On the evidence Mr Hill has given, I am not satisfied that he has provided an acceptable explanation for the delay.

Action taken to contest the termination other than applying under the IR Act

37 There is no evidence that Mr Hill took any action between the date he was notified of his dismissal (11 March 2026) and the date he filed his Form 2 (14 April 2026) to contest the dismissal, other than filing the Form 2.

Prejudice to the respondent

38 The respondent does not claim to have suffered prejudice because of the delay.

Fairness between the applicant and other persons in a like position

39 Neither party addressed the considerations of fairness between Mr Hill and others in a like position.

Merits of the substantive application

40 The question on the substantive claim, is whether the respondent's legal right to dismiss Mr Hill was exercised so harshly or oppressively against him as to amount to an abuse of that right: ***Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385 (***Undercliffe***). Mr Hill bears the onus of establishing that his dismissal was harsh, oppressive or unfair. Where the respondent dismissed him for misconduct, the

respondent bears the onus of establishing the conduct relied on. The standard is the balance of probabilities. The seriousness of an allegation, and the consequences of an adverse finding, bear on the strength of the evidence needed for reasonable satisfaction; they do not create a different standard: ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***), 361–362 (Dixon J); ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** [1992] HCA 66, [2] (Mason CJ, Brennan, Deane and Gaudron JJ).

41 As outlined at [9]–[10] ***above***, it would not be unfair to refuse to accept a referral filed out-of-time if the substantive claim could not succeed. Where the claim has some prospects of success, weak prospects weigh against accepting it. For the purposes of s 29(3), I am not required to finally determine the substantive claim. The merits assessment need only be made in a 'fairly rough and ready' way: ***Jackamarra v Krakouer*** [1998] HCA 27 [9] (Brennan CJ and McHugh J).

42 I assess the merits only to the extent necessary to decide whether it would be unfair not to accept Mr Hill's Form 2 out-of-time.

43 The show cause letter treats **Allegations 1, 2 and 3** separately, proposing dismissal for each of **Allegations 1 and 2** and a reprimand for **Allegation 3**. It proposes dismissal for **Allegations 4, 5 and 6 (taken together)**: (emphasis added)

> **Standard of proof**
>
> In disciplinary proceedings, the standard of proof required to determine if allegations of misconduct are substantiated is the '*balance of probabilities*'. This is a lesser standard than that required in criminal proceedings. The '*balance of probabilities*' means that it is '*more likely than not*' that the incident occurred.
>
> **Proposed findings**
>
> Based on my review of the information gathered in the investigation, including your response, I am proposing to make the following disciplinary findings in relation to each of the allegations.
>
> I propose to substantiate allegations 1, 3, 4, 5 and 6 in their entirety.
>
> I propose to substantiate allegation 2, except particulars (c)(iii) and (v). Further, I propose to find that your behaviour towards [Mr Beta] was retaliation because you suspected he had reported the conduct subject of allegation 1.
>
> I have decided not to substantiate allegation 7.
>
> …
>
> **Proposed Action**
>
> My preliminary view is that the disciplinary action that should be imposed is as follows:
>
> - Allegation 1 – dismissal
> - Allegation 2 – dismissal
> - Allegation 3 – reprimand
> - **Allegations 4, 5 and 6 (taken together) – dismissal**
>
> When considered in totality, I have formed the preliminary view that I should dismiss you from your employment with the Department.
>
> I consider your behaviour to have been very serious because:
>
> - In relation to allegation 1, your conduct occurred on school property at a time when you could have been encountered by staff and, more significantly, students. This conduct was extremely unprofessional and was a significant risk to the wellbeing of students and reputation of the school. The risks were obvious, and I consider you would have been reasonably aware of the risks when you engaged in this conduct.
> - In relation to allegation 2, your conduct caused significant distress and discomfort to [Mr Beta]. Further, it was more serious because I propose to find that it was in relation to [Mr Beta] reporting the conduct subject of allegation 1.
> - **In relation to allegations 4, 5 and 6, I consider your conduct to be serious because it was clearly inappropriate and carried obvious risk of distress, discomfort or other harm to [Ms Gamma] and [Ms Delta] (and did in fact cause distress and discomfort to [Ms Delta]). Further, your conduct was not isolated, with similar conduct being substantiated in relation to 2 employees, with the incidents being approximately a year apart.**

44 The respondent contends that:

(a) Mr Hill was dismissed from his employment after a disciplinary process resulting in six findings of breach of discipline.

(b) Three of the six findings related to his sexualised conduct towards administrative staff members.

(c) **Allegation 4** alleges that in August or September 2024, during a meeting with Ms Gamma in her office in the performance of her duties as Manager Corporate Services, she made reference to an issue being discussed that it would be too hard. In response, he banged his fist on the wall of her office, made a facial expression by puckering his lips and raising his eyebrows, and said 'I'm never too hard for you girl.' Ms Gamma regarded the conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress.

(d) **Allegation 5** alleges that in August or September 2023, he stood close behind Ms Delta while she was seated at her

desk, put his arm around her, placed his hand over hers on the mouse and moved her hand around. When she asked him to go away, he said she 'liked' it and 'If you keep up that attitude, I'll have to spank you'. Ms Delta regarded the conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress.

(e) **Allegation 6** alleges that in Term 4 of 2023, he lowered Ms Delta's chair without her knowledge causing her to fall when descending to sit. He emerged from out of sight, laughed at Ms Delta, and said that if she were hurt he 'would happily kiss her behind better'. Ms Delta regarded the conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress.

(f) The evidence in support of these allegations (particularly **Allegations 5 and 6**) is so strong that there is no prospect that the Commission would find that the conduct did not occur.

(g) The conduct the subject of **Allegations 4–6** (or **Allegations 5 and 6** without **Allegation 4**) is sufficiently serious that Mr Hill has no prospect that the Commission would find dismissal was not justified.

(h) This is particularly so in circumstances where Mr Hill accepts that he knows such conduct is inappropriate and unprofessional and so there is no suggestion that the conduct occurred because of a lack of training or education by the respondent.

(i) There is no prospect of the Commission finding the dismissal was unfair because:

(i) Mr Hill responded to the allegations and denied **Allegations 4-6** and raised his length of service and lack of disciplinary history as matters that should be considered by the respondent;

(ii) The show cause letter stated that the Director General had taken into account Mr Hill's age, length of service and the impact the dismissal would have on him and his career, but considered this to be outweighed by the Director General's responsibility for the safety of other employees; and

(iii) There is no indication from Mr Hill's material that he has any specific matters to raise that will call into doubt the reliability of the witnesses relevant to **Allegations 4–6**.

45 Mr Hill contends that the respondent failed to follow due process from the time of the initial incident. He says the outcome of the investigation was predetermined, that there was a failure to support him during the disciplinary process or to provide him with updates, and that the investigation was flawed. Particulars include:

(a) **Allegation 1** alleges he engaged in misconduct by engaging in sexual activity inside the bus shed on school grounds with another teacher (**Ms Alpha**). He had raised the rumours that were circulating about this with the Deputy Principal, who failed to refer his complaint about the rumours to SID for investigation.

(b) He was stood down on 28 February 2025. He was notified of the allegations on 27 May 2025. Throughout the 2025 school year, he received no support or correspondence from the respondent which indicates a predetermination of the outcome.

(c) Although the investigation report says the principles in ***Briginshaw*** were used to determine the outcomes, this was not followed. **Allegation 1** was denied by him and Ms Alpha. The staff that reported them did not witness them engaging in sexual activity. Their report was based on what they thought was happening. The initial investigation classed **Allegation 1** as minor misconduct which was subsequently changed to serious misconduct. The particulars to this allegation indicated that both he and Ms Alpha were in a state of undress, however, evidence confirmed that he was not in a state of undress.

(d) The investigator introduced new evidence from a teacher (**Mr Zeta**) who alleges that he observed him and Ms Alpha in a compromising situation 18–24 months prior, believed to be some kind of sexual act, which was used to demonstrate a pattern of behaviour. Mr Zeta's account was not put to him during the investigation. He became aware of it when he received the investigation report. By this time, he had already provided his response to the initial allegations. Mr Zeta's evidence was untested and circumstantial and was used to support other circumstantial evidence.

(e) The investigator demonstrated bias throughout the investigation. An example is that on two separate occasions in the investigation report, the complainant who made **Allegation 2** (**Mr Beta**) is described as a credible witness. However, he was able to provide evidence contradicting Mr Beta's account and **Allegation 2** was found to be unsubstantiated. His ability to contradict Mr Beta's account should have called into question Mr Beta's credibility.

(f) The investigator did not interview witnesses he nominated.

(g) Where there was a discrepancy in accounts, the investigator preferred the accounts of the other witnesses over his.

(h) **Allegations 4, 5 and 6** were grouped into one, with no witnesses other than the complainants. He admitted to one of these, which did occur, but denied the other two, which did not occur. The investigator substantiated these allegations anyway.

(i) Some witnesses have openly admitted to discussing the rumours that were circulating within the school about him. The report does not address how the rumours coloured the witnesses' perceptions of him.

46 Mr Hill contends that the matters at [45] ***above***, demonstrate that the Commission can only conclude that the respondent's process and investigation were flawed.

47 Mr Hill contends at [45(e)] ***above*** that Allegation 2 was unsubstantiated. The show cause letter states otherwise. Other than particulars (c)(iii) and (v), **Allegation 2** was substantiated through particulars (c)(i), (ii) and (iv): see [43] ***above***.

48 As outlined at [44] ***above***, Mr Hill was dismissed after a disciplinary process resulted in six findings of breach of discipline. In

this application, the respondent relies on **Allegations 4, 5 and 6** only.

49 Accordingly, I assess the merits of **Allegations 4, 5 and 6** for the purposes outlined at [41]–[42] ***above***.

Allegation 4

50 On 5 September 2024, Ms Gamma sent an email to the Principal stating:

> Hi Mark
>
> I'm emailing you in regard to continual poor behaviour displayed by Brendon Hill, which I have been told escalated again today with my receptionist [complainant of **Allegation 3**].
>
> I feel enough is enough. Brendon is continually unprofessional, being sexually suggestive to females in the front office.
>
> An example would be recently, when he asked me for advice, and my reply was, 'no that would be too hard'. His response was to bang on the brick wall in my office with his fist, pucker his lips, raise his eyebrows and say 'I'm never too hard for you girl'. I am always able to deflect his comments and move on with the conversation, but I am genuinely concerned for the School Officers that are not as resilient and find this behaviour distressing.
>
> It is 2024, and I strongly believe this behaviour needs to stop. …

51 On 20 March 2025, Ms Gamma participated in a recorded interview with SID investigators in which she said:

(a) She is the Manager of Corporate Services and part of the school's executive team.

(b) She commenced at the school in October, Term 4, 2022.

(c) She is in her late forties.

(d) She is the line manager of Ms Delta and Ms Epsilon.

(e) Ms Epsilon is a Level 3 and sat behind Ms Delta when Ms Delta was on the front desk.

(f) In 2024, Ms Epsilon reported to her that Ms Delta had relayed Mr Hill leaning over her and touching her hand as he grabbed the mouse.

(g) Mr Hill had made a suggestive comment to her at the Christmas function in 2023. So when Ms Epsilon reported Ms Delta's interaction with Mr Hill she resolved that she has had enough of Mr Hill's behaviour, and that it was necessary to watch over what Mr Hill was doing and to protect the school officers.

(h) This is what prompted her to send the email (at [50] ***above***) to the Principal about her interaction with Mr Hill. She was discussing a financial process with him and said words to the effect of 'no', and 'that's too hard'. He followed her as she kept walking and sat down. He came into her office, shut the door, had his hand on the brick wall and the door, and was banging it. He said 'nothing is too hard for you'. She told him he was being stupid, or laughed him off, opened the door and walked out. She thought it was gross. While he may think it is funny, it is inappropriate in an office environment.

52 On 20 March 2025, Ms Epsilon participated in a recorded interview with SID investigators in which she said that she had heard and seen Mr Hill's conduct, such as when Ms Gamma was in her office and he banged on one of the surfaces in her office and said something about 'doing a lot of banging in here'.

53 On 10 June 2025, Mr Hill provided a written response to **Allegation 4**, stating:

(a) He does not recall Ms Gamma saying 'that would be too hard' as alleged or any words to that effect.

(b) He denies banging on the wall of Ms Gamma's office with his fist, making a facial expression by puckering his lips and raising his eyebrows and saying 'I'm never too hard for you girl'. He says 'These claims are false. They did not happen.'

(c) In relation to Ms Gamma regarding his conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress, he says that he cannot comment on Ms Gamma's emotional or mental state. However, he denies he behaved in a sexual manner that implied sexual innuendo in Ms Gamma's presence. 'If she perceived that, then she has completely misread the situation'. 'I dispute her account of what occurred. It did not occur.'

Allegations 5 and 6

54 On 6 September 2024, Ms Delta sent an email to the Principal stating:

> I want to bring to your attention two inappropriate incidents involving Mr Hill that occurred while I was working as the receptionist at the front desk.
>
> In the first incident, Mr Hill approached my desk and placed his hand over mine, which was holding the mouse. He proceeded to move his hand around while leaning over my back, effectively blocking me into my chair. During this, he made comments implying that I enjoyed him touching my hand and leaning over me. When I told him to stop, he responded by saying something along the lines of, 'If you keep up that attitude, I'll have to spank you.'
>
> The second incident was similar. Again, Mr Hill trapped me in my chair by placing his hand over mine on the mouse. This time, I stood up and walked away. While I was away, he adjusted my chair to a lower position. When I returned and sat down, I almost fell due to the unexpected height change. He found this amusing and then commented that if my 'behind' hurt, he would gladly have me bend over so he could 'kiss it better.'

55 On 20 March 2025, Ms Delta participated in a recorded interview with SID investigators in which she said:

(a) She commenced at the school in April 2023, as receptionist on the front desk.

(b) Mr Hill regularly moves the things on her desk, her phone, keys, pen; he pushes them around the table to get a reaction 'as if he is a 12 year old boy having a joke'.

(c) The first occasion when he went over the line was in August or September 2023 when he grabbed her hand, which she had on the mouse, stood behind her chair, and held her hand over her shoulder and moved the mouse around her screen. She jokingly brushed him off and told him to go away. He continued for some time and made a comment about how she enjoyed him leaning over her and touching her in her space. He continued for a couple of minutes until he eventually got bored and moved away.

(d) From her interactions with Mr Hill, she knows that telling him 'no' or 'stop' is ineffective, so in Term 4, 2023, when he came up to the desk, she got up and walked away to the staffroom. She stayed there until she thought he had moved on past her desk. She returned to her desk and sat in her chair, and because the chair had been lowered, she almost fell and said 'ow' or 'ouch'. She was wearing a dress and felt conscious about almost falling over in a dress. He emerged and was laughing. She said that it is not funny and that it actually hurt. He said if it hurt he would happily bend her over the desk and kiss her behind better.

(e) Immediately after, the Principal arrived. Mr Hill stood ramrod straight and changed his demeanour completely. He said hello to the Principal in a professional manner and followed the Principal into his office. She got up after that and walked straight back into the staffroom because she was feeling stressed and a bit shaky. Ms Epsilon walked in and asked her if she was okay.

(f) Mr Hill's comment about bending her over a desk is a sexual comment that is highly inappropriate in a workplace. She remembers feeling angry that Mr Hill completely changed as soon as the Principal walked in, which suggests that Mr Hill thinks it is okay for him to behave like he does to her but not to another male colleague or the Principal. It suggests that even Mr Hill knows that his behaviour is wrong and inappropriate.

(g) She gave a lift to Ms Epsilon to the Christmas party in 2023 and during the journey she shared with Ms Epsilon the interactions with Mr Hill that had made her feel uncomfortable.

(h) Ms Epsilon sits behind her and was a witness to both of the incidents that she reported to the Principal.

56 On 20 March 2025, Ms Epsilon participated in a recorded interview with SID investigators in which she said:

(a) She commenced at the school in 2017.

(b) Her interactions with Mr Hill were initially cheeky and over time became sexualised. For example, she sent an email and misspelt his name as Brendan. He said she can remember him as Brendon because he was always on top, although that is not how it ends. She put her hand up and told him, no thank you, I'm fine thank you very much.

(c) She was present in early 2023 when Mr Hill asked the HR officer (who was wearing a black lace top) if she had matching black lacey knickers on underneath. She told him his comment was disgusting before walking away.

(d) She was present when Mr Hill came into the office in Term 4, 2023, hovered over Ms Delta, came up behind Ms Delta and put his hand over her hand on the mouse. This time, instead of just messing up Ms Delta's desk which he would normally do, he came around behind Ms Delta, hovered over her, put his hands over hers, such that he was in her space and she could not get out, and then put his hand over the mouse on top of her hand and started pressing her keyboard.

(e) She saw it. She is senior to Ms Delta, who is younger by 'quite a lot'. She should have reported Mr Hill's behaviour straightaway.

(f) Ms Delta mentioned Mr Hill's conduct when she was giving her a lift from the Christmas party and how it really affected her. Ms Delta did not blame her, but she felt that as the senior person in the front office that she should have done more to protect Ms Delta and should have said more to Ms Delta. She feels really sad about it; she let Ms Delta down.

(g) In mid-to-late 2024, she mentioned it to the Principal, which led to the commencement of the investigation.

(h) At the end of 2024, she was present when Mr Hill came to the office. Ms Eta and Ms Theta (see [60(a)–(b)] ***below***) were on the front reception counter. She watched as Mr Hill was messing up Ms Theta's desk, scrunching up a bit of paper, and moving her papers around. Ms Eta told Mr Hill to 'rack off'. Afterwards, she asked Ms Theta if she was okay. Ms Theta is a recently graduated student and said the behaviour 'was just Hilly' and that the students all knew what he is like. On 11 December 2024, she sent an email to the Principal, stating:

> Brendon presented to admin last week, he was talking to [Ms Theta] our new staff member and he said 'he likes to come and annoy the staff in admin and mess up their desks'.
>
> [Ms Eta] said, 'she [does] not appreciate this and doesn't find it funny'. He has done this before and messed up her paperwork and touched her keyboard. He continued to mess up [Ms Theta's] papers on her desk and took no notice of what [Ms Eta] had told him.
>
> Brendon's conversations usually always lead to sexually suggestive comments. I have witnessed this many times with other staff members and myself.
>
> I am concerned that our former student [Ms Theta] will be subjected to this as well.

57 On 10 June 2025, Mr Hill provided a written response to **Allegation 5**, stating:

(a) He denies standing close to Ms Delta, making contact with her right arm, placing his hand over hers while she was holding a mouse and moving the mouse around. He says 'These things never happened. I have no idea why [Ms Delta] has made these allegations against me. There is no basis for it.'

(b) In relation to Ms Delta regarding his conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress, he says that he cannot comment on Ms Delta's mental or emotional state, other than to say that she has not told the truth. 'I did not engage in the conduct she has alleged. Those allegations are untrue.'

(c) He understands the alleged conduct would be inappropriate and unprofessional, but he did not engage in the alleged conduct.

58 Mr Hill's written response to **Allegation 6**, states:

(a) He admits lowering Ms Delta's chair by approximately 20 centimetres. He says this was intended to be a light-hearted prank. He denies she fell. He says she sat down and was surprised the chair had been lowered.

(b) He denies laughing at Ms Delta and saying that he would kiss her behind better.

(c) He cannot comment on Ms Delta's view of the prank but did not orchestrate it to come to her aid. It was a misguided attempt to make her laugh. He accepts it was the wrong thing to do.

(d) In relation to Ms Delta regarding his conduct and comment as sexual innuendo which caused her offence, made her feel uncomfortable and caused her emotional distress, he says that he cannot comment on her mental or emotional state. He says he regrets any distress it caused her. However, he denies there was any sexual innuendo or that he made any sexual comments towards Ms Delta. He says that all he did was lower her chair.

Other witnesses

59 The investigation report notes that other than Mr Hill, the investigators attempted to contact 20 witnesses. Of the 20 witnesses, they were unable to make contact with only one, being the complainant who made **Allegation 3**. Other than that witness, they either spoke with or obtained documentary evidence from the other 19 witnesses. The investigators conducted 11 recorded interviews.

60 These included the following witnesses who observed Mr Hill moving the items on their desk, or moving the items on someone else's desk:

(a) Ms Eta commenced in January 2024. Sometime in 2024, Mr Hill came around to her desk and touched her keyboard and shifted her paperwork. She asked him to stop and explained that it was not professional or the way to behave. Mr Hill laughed it off and said it was a joke. When Ms Theta commenced in Term 4, 2024, she was present when Mr Hill stood next to Ms Theta, leant across Ms Theta's personal space and touched her keyboard and paperwork.

(b) Ms Theta commenced in week 9 of Term 4, 2024. She sits at the far righthand side of the front reception desk, facing the door. When Mr Hill saw her sitting there, he came around the front reception desk counter to her right, stood at approximately an arm's length away, and played with her Post-It notes. She laughed it off but hoped that he would not do it again.

(c) Ms Iota commenced in 2025. She estimates that three out of five days a week, Mr Hill would come over to her desk, take an item of hers and move it out of her reach. It made her feel annoyed and she regarded it as childish behaviour.

61 The witnesses also included the following witnesses who observed Mr Hill engaging in unwelcome conduct or conduct of a sexual nature:

(a) Mr Kappa is Mr Hill's line manager. He has seen Mr Hill make physical contact with staff that was perhaps unwanted, such as coming up behind someone who was sitting at a desk (male or female) and hugging them. He says that Mr Hill has made sexualised comments to both male and female staff on a number of occasions, although he cannot recall an example. He says that Mr Hill has a bias towards female staff; he showers extra attention towards younger female staff. He has called out the behaviour of Mr Hill and other male staff members, and Mr Hill has been responsive to the feedback; he would modify his behaviour in the short term. When other staff members called out Mr Hill's behaviour, he would improve his behaviour in the short term, but there was no long term improvement.

(b) Mr Lambda commenced in 2021 and previously held the role of Mr Hill's line manager. He observed Mr Hill behaving differently towards male and female prac teachers. Mr Hill displayed preferential treatment for female prac teachers in his body language and the way he spoke to them. He says he has previously replaced a female prac student who had been allocated to Mr Hill with a male prac student due to his concerns.

(c) Mr Mu commenced in 2008. He says that Mr Hill speaks in a very sexual way around the office; he is very touchy-feely and gives massages or 'Hilly-hugs' which are hugs he gives to both male and female staff. He says that Mr Hill is a very sexual person; he has heard him make sexual comments and be inappropriate towards other female staff, by talking about them, such as commenting on their breast size. He describes Mr Hill as a 'highly sexed guy'. He says that Mr Hill has been told to tone down his sexual innuendos, and he would tone it down a little, but he would 'be back on the next day'.

Assessment of the evidence

62 The show cause letter proposed separate findings for **Allegations 4, 5 and 6** and grouped them only when proposing disciplinary action. **Allegations 4, 5 and 6** were a discrete proposed ground of dismissal, separate from the dismissal proposed for each of **Allegations 1 and 2**. The dismissal letter of 10 March 2026 confirmed the proposed findings and the proposed action for each allegation. The respondent, on this application, relies on **Allegations 4, 5 and 6** only.

63 Mr Hill says the evidence of the complainants is hearsay and uncorroborated. Section 26(1)(b) of the IR Act states that the Commission must not be bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just. In any event, the core evidence on **Allegations 4, 5 and 6** is not hearsay. Ms Gamma and Ms Delta both describe what Mr Hill said and did to each of them. Ms Epsilon describes what she saw. Each speaks from their own knowledge.

64 The three character references address Mr Hill's character in a different context and across a different time period. The first referee is a former student of Mr Hill's sport and outdoor education class from 15 years ago, who following graduation, assisted as an additional supervisor on several Year 11 and 12 outdoor education camps over several years. The second referee is a former student of Mr Hill's classes in 2011–2014. The third referee has known Mr Hill for the past 10 years from his attendance at the Kelmscott Senior High School Farm and for the past two years as a parent of an athlete at Toros Netball Club playing at Southern Districts Netball Association. No referee worked at Kelmscott Senior High School during the period of **Allegations 1–6** which spans the period from June 2022 to September 2024.

65 Having considered the material at [50]–[64] ***above*** only to the extent necessary to decide whether it would be unfair not to accept Mr Hill's Form 2 out-of-time, I assess Mr Hill's claim as having week prospects, for the reasons that follow.

66 **Allegations 4–6** are serious. Findings that Mr Hill engaged in sexualised conduct towards female administrative staff would have serious consequences for him, including for his career. Consistent with ***Briginshaw***, satisfaction of those allegations should not be reached by inexact proofs, indefinite testimony or indirect inferences. The standard of proof remains the balance of probabilities.

67 In relation to **Allegation 4**, Ms Gamma's email to the Principal of 5 September 2024 was broadly contemporaneous with the alleged conduct. It preceded the commencement of the SID investigation in March 2025 by about six months. In the email, Ms Gamma recorded, in detail, the banging of the fist on the wall, the puckered lips and raised eyebrows, and the words 'I'm never too hard for you girl'. Her account in her recorded interview on 20 March 2025 was consistent with the email in its core, although the words she attributed to Mr Hill varied slightly and the interview does not mention him puckering his lips.

68 Mr Hill denies the incident in its entirety.

69 Ms Epsilon's evidence is of limited assistance on this allegation. It is unclear from her evidence at [52] ***above***, whether she heard the banging and the words as they were said, or was told of the exchange afterwards. Ms Gamma says Mr Hill shut the door. That makes it less likely that Ms Epsilon heard the words. The words Ms Epsilon attributes to Mr Hill, 'doing a lot of banging in here', also differs from Ms Gamma's.

70 The allegation is otherwise Ms Gamma's word against Mr Hill's. The contemporaneous email, written before any disciplinary investigation had commenced, lends significant weight to Ms Gamma's account.

71 On the material before me, the respondent has good prospects of establishing the core of **Allegation 4**, namely that Mr Hill responded to a remark that something was too hard by banging a surface and making a sexually suggestive comment. The prospects are less certain as to the precise words, the puckering of lips, and whether the conduct caused emotional distress. Ms Gamma's email says she was able to deflect his comments. The respondent's case does not depend on emotional distress. Neither does this assessment.

72 The respondent's case does not depend on **Allegation 4**. The respondent's submission is that **Allegations 5 and 6** alone would justify dismissal.

73 In relation to **Allegations 5 and 6**, Ms Delta's email to the Principal of 6 September 2024 records both incidents in detail. It was not contemporaneous. She wrote it about a year after the events and about six months before the SID investigation commenced. Her recorded interview on 20 March 2025 was consistent with the email in its core. There are differences. The email and the interview differ on the words used. The spanking remark is in the email but not in the interview. The email also describes the second incident as beginning in the same way, with Mr Hill's hand over hers on the mouse. In the interview, she describes leaving her desk as he approached. Those differences go to precise particulars. They do not displace the core.

74 Ms Epsilon is not the complainant who made **Allegation 5**. She says she saw Mr Hill come behind Ms Delta, hover over her, and put his hand over hers on the mouse, so that Ms Delta could not get out. Ms Epsilon places this in Term 4, 2023. Ms Delta places the first incident in August or September 2023. Ms Delta's email says the same thing happened again on the day her chair was lowered, which she said in her recorded interview occurred in Term 4, 2023. Ms Epsilon may be describing that second occasion. Either way, her evidence contradicts Mr Hill's denial that he placed his hand over Ms Delta's on the mouse. Her account is not self-serving. She says she should have reported the conduct at the time and that she let Ms Delta down. Ms Epsilon does not say she heard what Mr Hill said. The comments rest on Ms Delta's account. That account is consistent. Ms Delta told Ms Epsilon of her discomfort around the 2023 Christmas party, within weeks of the chair incident, about nine months before her written complaint, and more than a year before the investigation commenced.

75 In relation to **Allegation 6**, Mr Hill admits that he lowered Ms Delta's chair by about 20 centimetres as a prank. His admission places him at her desk, doing the act she describes. The extent of any fall and the words he spoke are in dispute. Mr Hill says the prank was 'a misguided attempt to make her laugh'. A person who plays a prank to make someone laugh usually expects to see the result. That is consistent with Ms Delta's account that he emerged from out of sight and laughed. He accepts that it was the wrong thing to do.

76 Ms Delta's account contains specific detail. The Principal arrived immediately after. Mr Hill stood straight, changed his manner, and followed the Principal into his office. Ms Delta went to the staffroom feeling stressed and shaky, and Ms Epsilon came in and asked if she was okay. Ms Epsilon's account does not mention the chair incident. The material does not show whether she was asked about it. Its absence does not detract from Ms Delta's account.

77 Mr Hill did not file any witness statements. His denial of **Allegations 4 and 5**, and his partial denial of **Allegation 6**, stand in his written response of 10 June 2025 and in his submissions. I take them into account. For this limited assessment, they do not outweigh the written complaints made before the investigation began, the consistency of the core accounts, Ms Delta's disclosure to Ms Epsilon in 2023, or Ms Epsilon's observation of the physical contact.

78 On the material before me, the respondent has good prospects of establishing the core of **Allegations 5 and 6**. That is, that Mr Hill stood behind Ms Delta and held her hand on the mouse, and remarked that she enjoyed it. It is also that he lowered her chair, laughed when she sat down, and said that he would kiss her behind better. The prospects are less certain as to the

spanking remark, which does not appear in her interview. The respondent is unlikely to establish that Ms Delta fell. That she did not overstate what happened tells in favour of her reliability.

79 The evidence of Ms Eta, Ms Theta and Ms Iota is of a pattern of Mr Hill interfering with the desks and belongings of female staff, including after being asked to stop. The evidence of Mr Kappa, Mr Lambda and Mr Mu is of a pattern of sexualised comments and unwelcome physical contact towards staff, preferential attention towards younger female staff, and improvement in his behaviour that was only short-lived when called out. That evidence does not prove the conduct in **Allegations 4–6**. It is consistent with that conduct, and it comes from witnesses who are not complainants. I give it limited weight, and only as context.

80 Mr Hill's complaints about the investigation do not disturb this assessment. His complaints are directed principally to **Allegations 1 and 2** and to the conduct of the investigation generally. Mr Zeta's account bears on **Allegation 1** and the investigator's description of Mr Beta as a credible witness bears on **Allegation 2**. The respondent does not rely on **Allegations 1 and 2** for this application. In any event, Ms Gamma's and Ms Delta's emails were sent to the Principal in September 2024, months before the SID investigation commenced. Whatever the merits of his complaints against the investigator, they cannot explain the origin of those complaints, which were recorded before, and independently of, the investigation.

81 Mr Hill's contention that the witnesses' perceptions of him were coloured by rumours circulating at the school is speculative. It is difficult to reconcile with the detail and internal consistency of the complaints. He identifies no specific matter that would call into doubt the reliability of Ms Gamma, Ms Delta or Ms Epsilon.

82 While Ms Delta told Ms Epsilon about how her interactions with Mr Hill affected her around the 2023 Christmas party, and Ms Epsilon told Ms Gamma, who resolved to watch over him, Ms Gamma wrote to the Principal on 5 September 2024 and Ms Delta wrote on 6 September 2024, there is no evidence that one account shaped another. Each complainant describes a different incident directed at herself. A manager deciding to act explains the timing of the written complaints. Ms Epsilon saw the physical contact herself. Mr Hill admits lowering Ms Delta's chair. Ms Eta, Ms Theta and Ms Iota were not complainants, yet they describe the same habit of approaching a staff member at their desk and handling their belongings. Talk among colleagues may explain when the complaints were made. It does not explain what they describe.

83 As to Mr Hill's complaint that the investigator did not interview witnesses he nominated, the investigation report records that the investigator attempted to contact 20 witnesses, spoke with or obtained documentary evidence from 19 of them, and conducted 11 recorded interviews. Mr Hill does not identify which witnesses he nominated or what they would have said. If the substantive application was accepted, the Commission would hear and determine it on the evidence before it. A procedural defect does not of itself, make a dismissal harsh, oppressive or unfair. Unfair procedures are only one element in determining whether a dismissal was harsh or unjust: ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891, 895 (Kennedy J). The question remains whether, in all the circumstances, the employer's right to dismiss was abused: ***Undercliffe*** at [40] ***above***.

84 As outlined at [62] ***above***, the show cause letter proposed separate findings for **Allegations 4, 5 and 6** and grouped them only when proposing disciplinary action. It proposed dismissal for those allegations taken together, as a ground separate from the dismissal proposed for each of **Allegations 1 and 2**. The Director General also expressed the view that, in totality, dismissal was warranted. That does not make each ground depend on the others. If **Allegations 4, 5 and 6** were established, they would, on their own, be a basis for dismissal. Even if Mr Hill's complaints about **Allegations 1 and 2** were made out, they would not touch that separate ground.

85 The grounds are independent in a further sense. For the purposes of this application, it is enough that **Allegations 5 and 6** would stand alone. The case on those allegations does not depend on Ms Gamma. Ms Epsilon saw the physical contact described in **Allegation 5**. Mr Hill admits lowering Ms Delta's chair at the centre of **Allegation 6**. Even if **Allegation 4** failed altogether at a hearing, the conduct alleged in **Allegations 5 and 6** would remain, and on this material would likely be established.

86 Mr Hill complains that there was a preference for other accounts over his. Preferring one account over another is part of fact-finding. This complaint would carry weight only if the preference lacked a proper basis. On the material before me, there is no proper basis for this complaint in relation to **Allegations 4, 5 and 6**.

87 Mr Hill complains that the outcome of the investigation was predetermined. **Allegation 7** was not substantiated, and nor were particulars (c)(iii) and (v) of **Allegation 2**. That tells against predetermination. A lack of updates or support during the investigation may be a fair grievance. It does not show that the outcome was fixed.

88 Mr Hill was notified of the allegations on 27 May 2025 and responded on 10 June 2025. He received the investigation report with the show cause letter on 16 December 2025, while legally represented. He was given until 20 February 2026 to respond to the show cause letter. There is no evidence that he did. The respondent declined a further extension because the medical certificate did not state he was unfit to take part in the process. Mr Hill had the chance to answer the investigation report, including Mr Zeta's evidence, before the decision was made. In any event, Mr Zeta's evidence goes to **Allegation 1**. The respondent does not rely on **Allegation 1** in this application.

89 As outlined at [77] ***above***, I have taken into account Mr Hill's denials of **Allegations 4 and 5** and his partial denial of **Allegation 6**. On this assessment, they do not outweigh the complaints made before the investigation began, the consistency of the core accounts, Ms Delta's disclosure to Ms Epsilon in 2023, or Ms Epsilon's observation of the physical contact.

90 As outlined at [64] ***above***, the character references speak well of Mr Hill in other contexts and over other periods. None of the referees worked at the school during the period of **Allegations 1–6**. None traverses the conduct the subject of **Allegations 4–6**. They carry limited weight for the purposes of this application.

91 For the preceding reasons, on the material before me, the respondent has credible and contemporaneous material on **Allegation 4** and good prospects on **Allegations 5 and 6**. If the substantive application were accepted, it is likely the respondent could

establish the core of the conduct the subject of **Allegations 4–6**. The conduct, if established, is serious: sexualised conduct towards two female administrative staff members, in circumstances where Mr Hill accepts that such conduct is inappropriate and unprofessional.

92 I have taken into account Mr Hill's length of service, the absence of any prior disciplinary history recorded in the material, his mental health and the character references. The show cause letter records that the Director General weighed his age, his length of service and the impact of dismissal on him and his career against the respondent's responsibility for the safety of other employees. I take those matters into account on that basis. The references speak well of his work with students and the community. None comes from a person who worked at the school during the period of the allegations, or who speaks to his conduct towards female administrative staff. Having regard to those matters, there is little prospect that the Commission would find that dismissing Mr Hill for the conduct the subject of **Allegations 4–6** was so harsh or oppressive as to amount to an abuse of the respondent's right to dismiss.

93 Overall, on a rough and ready assessment, Mr Hill's claim has weak prospects. I do not go as far as to find, as the respondent contends, that it has no prospect of success.

Conclusion

94 The Commission must be satisfied that it would be unfair not to accept Mr Hill's Form 2 out-of-time.

95 I have not found that Mr Hill's claim has no prospect of success. Therefore, the minimum condition described by Heenan J in ***Malik*** [73] and [77] (at [10] ***above***) is met. However, it is not decisive. The question is whether, weighing all the relevant factors, it would be unfair not to accept the referral.

96 Having assessed the factors relevant to s 29(3), I find that:

(a) The delay of six days is short. This favours Mr Hill, but it does not relieve him of the need to explain it.

(b) Mr Hill has not provided an acceptable explanation for the delay. This weighs against accepting the referral.

(c) Mr Hill took no action to contest the dismissal other than filing the Form 2. This weighs against accepting the referral.

(d) The respondent does not claim prejudice. This factor is neutral. The absence of prejudice is not a reason to accept the referral.

(e) Neither party addressed fairness between Mr Hill and others in a like position. This factor is neutral.

(f) On a rough and ready assessment, Mr Hill's claim has week prospects and is unlikely to succeed, for the reasons at [62]–[93] ***above***. This weighs against accepting the referral.

97 Weighing all relevant factors, I am not satisfied that it would unfair not to accept the referral of Mr Hill's Form 2 out-of-time.

98 An order will issue dismissing application U 48 of 2026.

2026 WAIRC 00928

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDON HILL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 12 OCTOBER 2026
FILE NO.	U 48 OF 2026
CITATION NO.	2026 WAIRC 00928

Result	Respondent's out-of-time objection upheld; Applicant's unfair dismissal application dismissed
Representation	
Applicant	In person
Respondent	Ms E Negus (of counsel)

Order

HAVING heard from Mr B Hill on his own behalf and Ms E Negus (of counsel) on behalf of the respondent, and Reasons for Decision ([2026] WAIRC 00927) having been delivered on 12 October 2026, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the respondent's objection to the applicant's *Form 2 – Unfair Dismissal Application* being accepted out-of-time under s 29(3) of the *Industrial Relations Act 1979* (WA) is upheld.

2. THAT application U 48 of 2026 be, and by this order is, dismissed.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00863

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDON HILL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 16 SEPTEMBER 2026
FILE NO.	U 48 OF 2026
CITATION NO.	2026 WAIRC 00863

Result	Directions issued
Representation	
Applicant	In person
Respondent	Ms E Negus (of counsel)

Direction

HAVING heard from Mr B Hill on his own behalf and Ms E Negus (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 applicant's request for an extension of time to comply with Direction 4 of the Directions ([2026] WAIRC 00748) issued on 22 July 2026 be granted.
2. THAT in lieu of Direction 4 of the Directions ([2026] WAIRC 00748) issued on 22 July 2026, the applicant file **by Wednesday, 16 September 2026**:
   (a) Witness statements, in accordance with *Practice Note 9 of 2021 – Witness outlines and witness statements*; and
   (b) Legal submissions,

   that he seeks to rely upon in relation to the respondent's objection to the Commission hearing and determining the applicant's *Form 2 – Unfair Dismissal Application* because it was made out of time.
3. THAT in lieu of Direction 5 of the Directions ([2026] WAIRC 00748) issued on 22 July 2026, the respondent file **by Wednesday, 30 September 2026**:
   (a) Witness statements that are responsive to the applicant's witness statements, in accordance with *Practice Note 9 of 2021 – Witness outlines and witness statements*.
   (b) Any legal submissions that are responsive to the applicant's submissions.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00860

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHIMA PRECIOUS OHAZURUME
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 14 SEPTEMBER 2026
FILE NO/S	U 21 OF 2026
CITATION NO.	2026 WAIRC 00860

Result	Application discontinued by leave
Representation	
Applicant	Mr C Ohazurume
Respondent	Ms A Carter (of counsel)

Order

WHEREAS on 21 August 2026, the applicant filed a Form 1A – Notice of Discontinuance seeking leave to discontinue this application;

AND WHEREAS on 27 August 2026, the respondent consented to the applicant withdrawing this application;

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

THAT U 21 of 2026 be and by this order, is discontinued by leave.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00887

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00887
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 28 MAY 2026
DELIVERED	**:**	WEDNESDAY, 23 SEPTEMBER 2026
FILE NO.	**:**	B 131 OF 2025
BETWEEN	**:**	CRAIG STEVEN PEACOCK Applicant AND STATE OF WESTERN AUSTRALIA Respondent

CatchWords	**:**	Industrial Law (WA) - Denied contractual benefits claim - Claim for accrued but unused paid annual leave - Jurisdictional objections - Whether the claim is made outside of the limitation period - Cause of action considered - Cause of action materialised on date of termination - Claim made out of time - Whether the claim is barred by deed of settlement executed between the parties - Terms of the deed of settlement considered - Deed of settlement settles all claims arising from the employment contract - Jurisdictional objections made out - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Limitation Act 2005* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Public Sector Management Act 1994* (WA) *Public Service Regulations 1988* (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr C Peacock
Respondent	**:**	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Grant v John Grant and Sons Pty Ltd [1954] HCA 23; (1954) 91 CLR 112

Steven C Catarino v Woolworths Limited [2006] WAIRC 03847; (2006) 86 WAIG 524

Zhou v Curtin University [2016] WAIRC 00703; (2016) 96 WAIG 1279

Reasons for Decision

1 Mr Craig Steven Peacock (**applicant**) was employed as Western Australia's Commissioner for Japan from 1 May 2002 until 1 February 2019 by the Director General, Department of Jobs, Tourism, Science and Innovation (**Director General**).

2 The applicant's claim concerns annual leave accrued during his employment which he says was unlawfully withheld following his termination.

3 The applicant seeks orders for payment of $93,746.70 being for 1125 hours of accrued annual leave at the rate of his salary at the time of termination of $83.3304 per hour.

4 The State of Western Australia (**respondent**) opposes the orders being granted because:

(a) Any entitlement to the payment of accrued but unused annual leave, which is denied by the respondent, arose pursuant to the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**), the applicable industrial instrument, or the *Public Service Regulations 1988* (WA) and is not a contractual right.

(b) The claim for payment of accrued but unused annual leave on his dismissal for serious misconduct, which is denied by the respondent, is made outside of the limitation period that applies to claims for contractual benefits in accordance with s 13 of the *Limitation Act 2005* (WA) (**Limitation objection)**.

(c) Any entitlement for payment of accrued but unused annual leave on his dismissal for serious misconduct, which is denied by the respondent, is barred by the terms of a Deed of Settlement executed by the applicant and the respondent (**Deed of Settlement objection**).

5 Directions were issued on 6 March 2026 for the Limitation objection and the Deed of Settlement objection to be heard and determined as preliminary issues.

Background

6 The applicant was employed under a fixed-term contract for a period of three years effective from 1 August 2017 until 31 July 2020. The applicant was employed in the role of Commissioner, Western Australian Trade and Investment Office, Japan.

7 The relevant terms of the contract of employment between the parties provided for:

> **Term of Employment**
>
> …
>
> • Should either party wish to terminate this contract at least three (3) months notice in writing is to be provided to the other party.
>
> …
>
> • The terms and conditions of employment are in accordance with the *Public Sector Management Act 1994* (WA) and the prevalent *Public Service and Government Officers General Agreement 2014* (WA) (PSGOGA) or any replacement.
>
> …
>
> **Allowances & Employee Benefits**
>
> …
>
> • Annual Leave
>
> You will be entitled to four (4) week's annual leave, as per the prevalent *PSGOGA* or any replacement. Please ensure that leave application forms are submitted to the Deputy Director General, International Education, Trade and Investment for approval, prior to your leave.

8 On 7 September 2018, the Director General commenced disciplinary action against the applicant under the *Public Sector Management Act 1994* (WA) in respect of two alleged breaches of discipline. On 27 December 2018, the Director General commenced additional disciplinary action against the applicant because of information disclosed by the Corruption and Crime Commission. The Director General proposed to suspend the applicant from duty without pay.

9 On 14 January 2019, the applicant gave notice of his resignation to the Director General in accordance with the terms of his contract of employment.

10 On 24 January 2019, the respondent obtained freezing orders against the applicant and leave of the Supreme Court to issue and serve a writ on the applicant outside of Australia.

11 On 25 January 2019, the respondent's writ in the recovery proceedings was issued by the Supreme Court.

12 On 1 February 2019, by letter, the Director General notified the applicant that his employment was terminated on the grounds that the applicant had engaged in serious misconduct:

> …
>
> In particular, I am satisfied that you have engaged in the following conduct:
>
> 1. In May 2011, you authorised the payment of government funds (in the sum of 1.4 million Yen) for the repair of your WA government vehicle, when you had damaged that vehicle whilst driving under the influence of alcohol, with a blood alcohol level of around 0.35. In authorising this payment, you obtained a financial advantage. You were neither authorised to approve this payment, nor were you entitled to receive the benefit of the payment. I consider this to be an act of serious misconduct.

2. In around 4 October 2011, you directed Ms Keiko Yamaguchi, the office manager of the Japan Trade Office, and your subordinate, to incorrectly record on the monthly statement the purpose of the payment of the 1.4 million Yen for the repair of the WA government vehicle (as referred to in point 1 above) as an end of lease payment. In doing so, you intentionally sought to deceive your employer. I consider this to be an act of serious misconduct.

13 The termination letter sets out the respondent's decision about the payment of accrued annual leave:

…

Consequently, by this letter I dismiss you from your employment as Commissioner, North Asia.

The date of your dismissal is the date of your receipt of this letter. It follows that you will not be provided with notice and will not be provided with payment in lieu of notice.

Entitlements

Additionally, relying upon s 24(3) of the *Minimum Conditions of Employment Act 1993* (WA), I have decided that you will not be paid any of your accrued entitlements to annual leave which you accrued post-December 2008, when you engaged in misconduct.

14 On 12 March 2019, the Corruption and Crime Commission tabled a report 'Report on the WA Commissioner in Japan' (**CCC Report**) in the Western Australian Parliament.

15 On 2 May 2019, the applicant and the respondent entered into a Deed of Settlement in relation to the freezing orders and recovery proceedings. The terms of the Deed of Settlement relevantly provide at Clause 6 – Release and discharge:

Subject to both the Employee's compliance with his obligations under this Deed, in particular clauses 3 and 5, and clause 7, the Parties release and forever discharge each other from any Claims that they have, or may have had in the future but for the execution of this Deed ("the Bar").

16 On 27 November 2023, the Parliamentary Inspector tabled a Corrigendum on the CCC Report (**Corrigendum**). There are three matters addressed in the Corrigendum:

…

4. Naturally, this had a catastrophic effect on Mr Peacock's professional and personal reputation. In May this year, he sent me a detailed written submission in which he requested that I review the procedures used in investigating him and preparing the Report, pursuant to my function in section 195(1)(c) of the CCM Act. I obtained the relevant files from the Commission and considered them over a period of several weeks.

5. For the most part, the procedures used in this instance were effective and appropriate, and there is no basis to dispute the Commission's opinion of serious misconduct. However, there were three matters which raised substantive concerns for me.

6. First, there was an omission. The Commission's files disclosed that within days of having been informed of a substantial overpayment by the DJTSI and asked to explain it, Mr Peacock offered in writing to enter into a repayment plan. This offer was not taken up, and the Report contained no reference to it. Mr Peacock's offer does not prove his claim that the overpayment, amounting to nearly $500,000 over a period of ten years, was an honest mistake, nor does it negate the Commission's opinion of serious misconduct. In the Commission's view, Mr Peacock's proposal to set up a repayment plan was 'self-serving and a false promise'. That may or may not have been the case (there was no evidence that pointed to Mr Peacock's state of mind when the offer was made). However, the offer was relevant to the subject matter of the Report, and as such it would have been fair and transparent to include it.

7. Second, there was a factual inaccuracy. The Report concluded that Mr Peacock was now 'jobless, without a Japanese visa and without any realistic prospects'. This statement was incorrect. Moreover, it could be read as an implication that the Japanese government had stripped Mr Peacock of his right to live and work there. This was not the case. When Mr Peacock's employment as trade commissioner was terminated, his official visa ceased. He then applied for a spouse visa, as he is married to a Japanese national. His application was granted, and he continues to reside in Japan.

8. Third, and most seriously, there was a material error. The Report speculated that Mr Peacock, who is not an Australian resident for tax purposes, may have been evading tax in Japan, as he did not pay income tax in that country. The Commission acknowledged that tax evasion fell outside its jurisdiction and explained that it had made no findings on the matter; instead, 'the tax issue' had been used 'to form a view that absent corroboration, Mr Peacock is a generally unreliable witness'. However, the way in which the Report was framed would also have left the casual reader with the misleading impression that its subject had indeed evaded his tax obligations in Japan. In particular, the Report stated that it was 'possible Mr Peacock should have been paying tax in Japan on his income as Commissioner' and that he was 'possibly evading tax'. Given that tax evasion is a criminal offence, that statement was tantamount to suggesting that Mr Peacock had possibly committed a crime.

Limitation objection

17 Essentially, the applicant argues that his contractual benefits claim is made within the prescribed period because the date of the cause of action is within that period.

18 The applicant submits that he was informed in the letter of termination that his annual leave accrued after December 2008 would be withheld. The applicant says there are legitimate questions as to whether the respondent withheld more than permitted under s 24(3) of the MCE Act, including leave that had accrued before December 2008 and whether the respondent

was able to rely on that provision to justify the withholding of the entire entitlement. The applicant argues the key issue is whether an already recognised and quantified entitlement was lawfully withheld in whole or in part.

19 The applicant argues that the date on which the withholding of the annual leave took place, has effectively changed because the basis for the decision to withhold, being the applicant's misconduct, was corrected by the Corrigendum on 27 November 2023. The applicant submits that if the lawfulness of the withholding is contestable, the Limitation objection should not be resolved by a mechanical calculation from the dismissal date.

20 The limitation period is the span of time in which a legal action must be commenced. For claims made under s 29(1)(d) of the *Industrial Relations Act 1979* (WA) **(IR Act)** that period is set out in s 13 of the *Limitation Act 2005* (WA) and is six years.

> **13. General limitation period — 6 years**
>
> (1) An action on any cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued.
>
> (2) Subsection (1) does not apply to an action if Division 3 provides for a different limitation period for that action.

21 Section 12 of the *Limitation Act 2005* (WA) specifies the date on which actions commence:

> **12. When actions commence**
>
> (1) In this Part a reference to the commencement of an action is a reference to the issue in the appropriate court of a writ or other originating application in relation to the action.
>
> (2) Nothing in subsection (1) affects the operation of section 88.

22 The Full Bench has previously found that a contractual benefits claim constitutes an 'action' for the purposes of the *Limitations Act 2005* (WA) in ***Zhou v Curtin University*** [2016] WAIRC 00703; (2016) 96 WAIG 1279 (***Zhou***) [91]:

> Pursuant to s 12(1) of the IR Act, an application referred by an employee pursuant to s 23(1) and s 29(1)(b)(ii) of the IR Act (being a claim for benefits said to be owing pursuant to a contract of employment) is an action instituted in a court as defined in s 3(1)(a) of the *Limitation Act 2005* (WA). Pursuant to s 13(1) of the *Limitation Act*, an application sought to be referred under s 29(1)(b)(ii) of the IR Act by an employee cannot be commenced if six years have elapsed since the cause of action accrued. Consequently, if an employee seeks to claim a contractual benefit, the claim must relate to a period of time that is less than six years.

23 I understand the applicant's submissions are to the effect that the cause of action only became fully justiciable in 2023 on the presentation of the findings of a review conducted by the Parliamentary Inspector in the Corrigendum.

24 The cause of action in this matter is the fact that the applicant must establish and demonstrate whether he has an entitlement to payment of accrued annual leave, being a benefit under the terms of his contract of employment. That is, the applicant must establish that he has an entitlement to payment of accrued annual leave. The terms of the applicant's contract of employment refer to an entitlement to annual leave as per the relevant *Public Service and Government Officers General Agreement 2014* (WA) or any replacement agreement.

25 Setting aside the question of whether the benefit claimed is under the terms of the contract of employment, or in accordance with an industrial instrument of this Commission, the applicant claims the value of accrued annual leave that he was entitled to 'cash out' as of 23 April 2018 being $93,746.70.

26 The applicant submits that the identification of the cause of action, being the payment of the benefit of accrued but unused annual leave, depends upon:

(a) when the entitlement became payable;

(b) whether and when the payment was refused; and

(c) the legal basis upon which the payment was withheld.

27 The respondent submits the cause of action is the date of the applicant's termination, because this is the date on which any entitlement to accrued annual leave would be due if not for the respondent's decision to refuse to pay out the applicant's paid untaken annual leave in accordance with s 26(3) of the MCE Act:

> **26. Paying out paid annual leave when employment ends**
>
> …
>
> (3) Despite subsection (2), if an employee's employment is ended by the employer because of the employee's misconduct, the employee is not entitled to be paid out for untaken paid annual leave that relates to a year of service completed after the misconduct.

28 I find that if the asserted entitlement or benefit is one under the contract of employment, and not under an industrial instrument, it became payable at the termination of the employment contract. The benefit was refused on the date of termination of the contract of employment and the legal basis for the refusal was the respondent's right to consider the applicant was not entitled to the untaken paid annual leave in accordance with s 26(3) of the MCE Act.

29 The relevant date for the cause of action is the date of termination when the benefit was due. As set out in ***Zhou,*** an application for a denied contractual benefit must be made within six years of this date.

30 The originating application in this matter was commenced on 3 December 2025. The application has been made beyond the prescribed six years.

31 In the event the Commission is persuaded by the respondent's submissions concerning the limitation period, the applicant

seeks to be heard on whether an extension of time ought to be granted. The applicant submits that the conduct of the respondent, including the delay in the correction of the CCC Report and the failure to provide accounting records, warrants an extension of time to commence the claim.

32 Section 38 of the *Limitation Act 2005* (WA) provides for an extension of time to commence an action:

> **38. Court may extend time to commence actions in cases of fraud or improper conduct**
>
> (1) A plaintiff may apply to a court for leave to commence an action on a cause of action even though the limitation period provided for under this Act has expired.
>
> (2) On an application a court may extend the time in which the action can be commenced up to 3 years from when the action ought reasonably to have been commenced if the court is satisfied that the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable.
>
> (3) Nothing in section 39, 41 or 42 prevents a court from extending, under this section, the time in which a plaintiff can commence an action.
>
> (4) This section does not apply to an action relating to the publication of defamatory matter.

33 The applicant has not particularised the conduct of the respondent he asserts is fraudulent or improper conduct. I understand that the applicant submits the Corrigendum forms the basis for the respondent's erroneous conclusion that his actions constituted serious misconduct. That is, the Corrigendum corrected the basis for the respondent's decision to consider the applicant was not entitled to untaken paid annual leave by correcting conclusions of the CCC Report that the applicant had engaged in serious misconduct.

34 I do not accept this contention because the conduct relied upon by the Director General to conclude that the applicant had engaged in serious misconduct, as set out in the letter of termination, are not matters that the Corrigendum corrects.

Deed of Settlement objection

35 In May 2019, the parties executed a Deed of Settlement (**Deed**) to settle the Recovery Proceedings and the Freezing Order Proceedings brought by the respondent against the applicant.

36 The Deed includes an express term of release:

> 6. Subject to both the Employees compliance with his obligations under this Deed, in particular clauses 3 and 5, and clause 7, the Parties release and forever discharge each other from any Claims that they have, or may have had in the future but for the execution of this deed ("the Bar").

37 Further the Deed defined the term 'Claim':

> **Claim** means any civil claim, demand, action, lawsuit, liability, cause of action or other proceeding (including but not limited to claims arising at law or in equity or under any law) asserting a right, or for relief or a remedy of any kind in respect of, arising from, on account of, or in connection with or in any way relating to, the Employees employment contracts with the State between one May 2002 and 1 February 2019.

38 Clause 8 of the Deed provides that parties may rely on the Deed to assert the existence of the Bar.

39 The respondent contends that the text of the Deed is clear and unambiguous. The applicant agreed to release and forever discharge claims that assert a right arising from or on account of his contract of employment. The applicant asserts a right arising from or on account of his contract of employment. In these circumstances, the Commission ought to dismiss the application as the applicant is acting contrary to the terms of the Deed.

40 The applicant submits that the construction of the Deed requires consideration of the text of the instrument, the surrounding circumstances and the purpose of the agreement. In addition, the applicant contends his application is not within the scope of the Deed and there is no evidence the subject of this application is identified, quantified or addressed in the Deed. Further, the applicant asserts the circumstances in which the Deed was executed are relevant to its operation, including his state of mind and the context. The applicant says these matters cannot be determined at a preliminary stage.

41 There is no evidence before me concerning the matters that the applicant submits ought to be considered in determining whether the Deed bars this claim. The applicant has not particularised his submissions relevant to the surrounding circumstances or context and purpose of the Deed.

42 In ***Steven C Catarino v Woolworths Limited*** [2006] WAIRC 03847; (2006) 86 WAIG 524 (***Catarino***), Kenner C (as he then was) summarised the principles set out in ***Grant v John Grant and Sons Pty Ltd*** [1954] HCA 23; (1954) 91 CLR 112:

> It is a principle of equity that when words of a deed of release are being considered, general words of such a release are limited and will, in an appropriate case, be read down to be consistent with the matters in the contemplation of the parties at the time of the execution of the deed: Grant v John Grant and Sons Pty Ltd (1954) 91 CLR 112; Qantas Airways v Gubbins (1992) 28 NSWLR 26. This is particularly so when a tribunal such as this Commission, is required to interpret such a deed, consistent with the terms of s 26(1)(a) of the Act, requiring the Commission to have regard to "equity, good conscience and the substantial merits of the case" in all matters before it.

43 I cannot agree with the applicant's understanding of the terms of Deed when this understanding conflicts with the expressly recorded terms of the Deed. The terms of the Deed are to be understood objectively.

44 The specific cause of action pursuant to the IR Act is not particularised, however it is within the scope of the definition of 'Claim'. This application is a 'Claim' or a 'cause of action' which asserts a right arising from the applicant's contract of employment.

45 Bearing the principles within ***Catarino*** in mind, I consider it is not in the interests of equity and good conscience to permit this application in the circumstances where the applicant is party to a Deed of Settlement which bars the claim.

Conclusion

46 For these reasons, I exercise the Commission's powers under s 27(1)(a) of the IR Act and dismiss the application.

2026 WAIRC 00888

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG STEVEN PEACOCK
	APPLICANT
	-v-
	STATE OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 23 SEPTEMBER 2026
FILE NO/S	B 131 OF 2025
CITATION NO.	2026 WAIRC 00888

Result	Application dismissed
Representation	
Applicant	Mr C Peacock
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), hereby orders –

THAT this application be, and by this order, is dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00879

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00879
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 15 JULY 2025, WEDNESDAY, 16 JULY 2025
DELIVERED	**:**	MONDAY, 21 SEPTEMBER 2026
FILE NO.	**:**	U 23 OF 2024
BETWEEN	**:**	LISA KING Applicant AND THE TRUSTEE FOR SARAHS FAMILY TRUST Respondent

CatchWords	**:**	Industrial Law (WA) - Unfair dismissal application - Casual employment - Closed court application - Interlocutory application to dismisss the substantive matter - Interlocutory applications refused - Whether dismissal was harsh, oppressive or unfair - Disability support worker - Alleged serious misconduct - Alleged breach of professional boundaries - Approach to after acquired knowledge - Procedural fairness - Abandonment of employment considered - Principles applied - Lack of investigation - Denial of procedural fairness - Dismissal was harsh, oppressive and unfair - Compensation for loss and injury - Principles applied - Compensation for loss awarded - Compensation for injury refused

Legislation	:	*Industrial Relations Act 1979* (WA)
		Work Health and Safety Act 2020 (WA)
Result	:	Application upheld
Representation:		
Applicant	:	Ms L King
Respondent	:	Ms S O'Sullivan

Case(s) referred to in reasons:

AWI Administration Services Pty Ltd v Birnie [2001] WAIRC 04015; (2001) 81 WAIG 2849

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Bogunovich v Bayside Western Australia Pty Ltd [No 2] (1998) 79 WAIG 8

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

Charles Henry Rosenthal v John Palermo [2010] WAIRC 00401; (2010) 90 WAIG 709

Donald Andrew Parnell v The Roman Catholic Archbishop of Perth [2020] WAIRC 00420; (2020) 100 WAIG 1216

Kenneth Luke Manook v Cockburn Hire Services [1991] WAIRC 12384; (1991) 71 WAIG 2384

Lindecker v Director General Department of Education [2017] WAIRC 00345; (2017) 97 WAIG 657

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

Mark Darren Richards v GB & G Nicoletti [2016] WAIRC 00941; (2016) 97 WAIG 117

Minister of Corrective Services v Fagan [2023] WAIRC 00984; (2023) 104 WAIG 1

Mr Alan Scicluna and Mrs Trixie Scicluna v Mr William Paul Brooks T/AS Bayview Motel Esperance, WA [2016] WAIRC 00862; (2016) 96 WAIG 1475

Newton v Toll Transport Pty Ltd (2021) 307 IR 140

Re Her Honour Chief Judge Kennedy; Ex Parte West Australian Newspapers Limited [2006] WASCA 172

Swan Yacht Club (Inc) v Bramwell (1998) 78 WAIG 579

The Minister for Health v Drake Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Wiseman v Hills Industries Limited [2001] WAIRC 03577; (2001) 81 WAIG 2622

Reasons for Decision

1 Ms Lisa King (**applicant**) was employed by The Trustee for Sarah's Family Trust trading as Alyv (**respondent**) as a Disability Support Worker from 13 July 2023, until she was dismissed for alleged serious misconduct on 15 March 2024.

2 The applicant contends her dismissal was unfair because she did not misconduct herself in the manner alleged by the respondent, she was not afforded an opportunity to respond to the alleged misconduct, and she had not been warned of the consequences of her behaviour prior to being dismissed.

3 The applicant seeks orders for an amount of $6,500 for financial compensation and an amount of $30,000 of compensation for psychological injury caused by the dismissal.

4 The respondent opposes the orders sought. The respondent says the applicant repeatedly and wilfully breached professional boundaries, wilfully and repeatedly breached Alyv's policies and procedures, repeatedly failed to comply with lawful directions and failed to participate in an investigation to address the applicant's allegations of misconduct.

5 The respondent asserts additional reasons for the dismissal because of material facts which existed at the time of the decision to dismiss. The material facts cited by the respondent include breaches of work health and safety laws, abandonment of employment, failure to submit records and leaving a minor unsupervised. These facts, the respondent says, were not known until after the termination was effected.

Interlocutory applications

6 Prior to the hearing and determination of the substantive matter, the parties filed several interlocutory applications. I decided that the reasons for decision for the interlocutory applications would be published alongside the reasons for the substantive matter.

Application to conduct proceedings in closed court

7 On 6 February 2025, the respondent emailed my Chambers. Her email said:

> Dear Commissioner,
>
> I write to formally request that the hearing in the matter of Lisa King v Alyv (Now Lisa King v The Trustee for Sarahs Family Trust), be conducted without non-party observers, limiting attendance to the direct parties and their legal representatives and their witnesses for the purpose of giving evidence and cross examination. This request is made under S 26(1)(a) of the Industrial Relations Act 1979 (WA) and is in line with
>
> The grounds for this request are as follows:
>
> 1. Protection of Sensitive Information and Compliance with Privacy Laws
>
> This case involves highly sensitive evidence, including client-related information and internal

investigative records. Allowing non-party observers could risk breaching the Australian Privacy Principles (APPs), as outlined in the Privacy Act 1988 (Cth), by exposing confidential information to individuals who do not have legal authority or consent to access it.

Given the nature of Alyv's role working within the NDIS space, we have strict privacy and confidentiality obligations, and we seek to ensure that no sensitive data is inadvertently disclosed to unauthorised persons. In order to uphold procedural fairness we feel our witnesses could not speak freely should there be non party observers present.

2. Protecting the Integrity of Mandatory Reporting in the NDIS Sector

One of the key protections within the NDIS Quality and Safeguards Framework is the right for NDIS providers (both registered and unregistered) and allied professionals to report misconduct anonymously. If non-party observers are permitted to attend, there is a real risk that individuals who have made confidential disclosures regarding misconduct could be indirectly identified.

This could discourage future reports of abuse, neglect, or misconduct from NDIS providers if they feel they could later be exposed in legal proceedings. It is essential that the Commission upholds the integrity of these reporting mechanisms to ensure the ongoing protection of vulnerable individuals within the NDIS system.

3.Ensuring Procedural Fairness for Witnesses

A key principle of procedural fairness is ensuring that witnesses can provide evidence without intimidation, bias, or undue influence. Given that at least one non-party observer has a close personal connection to the evidence in this case, their presence could create an environment where witnesses may feel unable to speak freely and honestly about the facts.

To preserve the integrity of the proceedings and ensure that all witnesses can testify without external pressure or concern for personal repercussions, we respectfully request that all non-party observers be excluded from attending the hearing.

Legislative Basis for Request

Pursuant to Section 26(1)(a) of the Industrial Relations Act 1979 (WA), the Commission has broad discretion to determine the conduct of proceedings in accordance with equity, good conscience, and the substantial merits of the case. Given the sensitive nature of the evidence in this matter, which involves confidential client-related information and internal investigative records, permitting non-party observers could risk breaching the Australian Privacy Principles (APPs) under the Privacy Act 1988 (Cth). The APPs impose strict obligations regarding the collection, use, and disclosure of personal and sensitive information, particularly in contexts involving vulnerable individuals receiving NDIS-funded supports.

Request for Consideration

Given these factors, we kindly request that the Commission exercise its discretion to limit attendance at the hearing to only the involved parties and their legal representatives. This would ensure compliance with privacy obligations, protect the NDIS misconduct reporting process, and maintain procedural fairness for all witnesses involved.

I appreciate your time and consideration of this request and am happy to provide further clarification if required.

8 On 14 February 2025, the applicant's views were sought on the respondent's application to conduct the hearing in closed court (**closed court application**). The applicant opposed the respondent's application.

9 On 24 February 2025, the closed court application was listed for hearing on 27 March 2025 at 10:30 AM.

10 At the hearing on 27 March 2025, I refused the respondent's closed court application with reasons to be published in due course. These are my reasons for deciding to dismiss the application.

11 In relation to the respondent's objections to allowing non-party observers because there is a risk that the Australian Privacy Principle**s** would be breached; it is not clear to me how this would occur. The respondent has not specified the anticipated evidence or witness who poses a risk.

12 Regarding the respondent's application for non-party observers to be excluded from attending the hearing because 'witnesses will not be able to testify without external pressure or concern for personal repercussions', the respondent did not provide any particulars or evidence of any threats or intimidation of witnesses.

13 The Commission has an obligation under the *Industrial Relations Act 1979* (WA) (**the Act)** to conduct its proceedings in public. Section 27(1a) of the Act provides that:

> Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.

14 As observed by Kenner SC (as he then was) in ***Donald Andrew Parnell v The Roman Catholic Archbishop of Perth*** [2020] WAIRC 00420; (2020) 100 WAIG 1216 [15] referring to ***Re Her Honour Chief Judge Kennedy; Ex Parte West Australian Newspapers Limited*** [2006] WASCA 172 [36] – [38], the Commission is required to adopt the principle of open justice unless there are exceptional circumstances that justify departing from the principle.

15 After considering the respondent's submissions, I was not persuaded that the respondent raises 'exceptional circumstances' necessary to depart from the principle of open justice. The submissions raised by the respondent do not outweigh the public

interest in conducting proceedings in public.

16 I do note however, that the respondent in the alternative, sought the de-identification of any clients associated with the parties. In the circumstances, I am of the view that de-identification and redaction of documentation to remove reference to any clients is the most appropriate course of action to take.

17 To maintain the confidentiality of the respondent's former clients, I issued orders on 31 March 2025 which acknowledged that the names of any clients associated with the parties, would be referred to as a pseudonym approved by the Commission in these reasons. The only client referred to in these reasons is the client who was involved in the incident on 14 March 2024. I will use the pseudonym 'Client A' for this client, as this pseudonym was adopted in the hearing.

First application to dismiss

18 A directions hearing was listed for 6 February 2025 to program the unfair dismissal application to hearing and determination. Following the directions hearing, orders were issued on 7 February 2025 for the parties to file outlines of evidence and written submissions: [2025] WAIRC 00057.

19 On 24 February 2025, the applicant filed their witness outlines and bundle of documents in accordance with the orders issued. The applicant's witness outlines and bundle of documents were served on the respondent on the same day.

20 On 27 February 2025, the respondent filed an application to dismiss the matter pursuant to s 27(1)(a) of the the Act (**first application to dismiss**). In addition, the respondent requests that certain witnesses named by the applicant, ought to be excluded from giving evidence:

> The respondent respectfully requests the following:
>
> 1. We request that the following witnesses and their testimonies and associated statements be excluded from the proceedings due to their irrelevance to the key issues in this matter.
>
> - Rebecca Waites
> - Anna Fleming
> - Erik Van Haefen
> - Kara Anderson
>
> 2. In addition we request that the following documents are excluded:
>
> - All Training Certificates from before 2024.
> - The applicants National Police Clearance dated 15th April 2021
> - Email Conversations between Ruby, Lisa and Eddy dated October 2023
> - Training Certificate dated 18th January 2025
>
> The respondent seeks these exclusions of the aforementioned witnesses based on the following:
>
> 3. The witness testimonies and outlines of the aforementioned witnesses do not address any facts in this matter.
> 4. The witness statements and outlines contain almost exclusively, testimony relating to the character of the applicant.
> 5. The Applicants character is not in questions and did not form a basis for her dismissal.
> 6. The aforementioned witnesses did not work for the respondent at the time of the applicants dismissal.
> 7. The aforementioned witnesses did not work for the respondent during the disciplinary process or investigation of the applicants conduct.
> 8. All these aforementioned witnesses did not participate of have access to any information about the respondents policies and procedures at the time of the applicants disciplinary action and dismissal.
> 9. The aforementioned witnesses played no part in the investigation or decision making around the applicants dismissal.
> 10. The aforementioned witnesses statement make no mention of any evident to support that the applicants dismissal was harsh, oppressive or unfair.
> 11. The aforementioned witnesses and their statements contain hearsay evidence which came from the applicant, meaning they provide nothing in addition to the applicants own testimony.
> 12. The aforementioned statements and testimony contain matters of opinion and speculations, not facts relevant to the matter.
> 13. The content of the statements, if admitted, would be more prejudicial than probative, creating a risk of misleading the Commission rather than assisting it in determining the substantive issues of the case.
> 14. Allowing numerous witness testimonies and statements that are irrelevant or duplicative would unduly prolong proceedings, consuming the Commission's time without adding material value to the case.
> 15. The respondent is entitled to a timely and efficient resolution of this matter. Admitting excessive, unnecessary evidence would deny the respondent procedural fairness by delaying the hearing and requiring them to respond to immaterial issues that have no bearing on the case.
>
> The respondent seeks these exclusions of the aforementioned documents based on the following:

16. The aforementioned documents are irrelevant to the Commission's determination of whether the applicant's dismissal was oppressive, harsh, or unfair under the Industrial Relations Act 1979 (WA)

17. The aforementioned documents do not relate to the circumstances of the dismissal, the reasons for termination, or any procedural deficiencies in the process.

18. The Commission is not required to admit irrelevant or unhelpful material simply because a party has submitted it.

19. The respondent submits that admitting these documents would unduly expand the scope of the proceedings without contributing to the determination of the claim.

20. The Commission has a duty to ensure proceedings are conducted efficiently and without unnecessary delay. Excluding these documents would serve this purpose and uphold procedural fairness.

21. The Commission should exercise its discretion to exclude documents that do not advance the applicant's case in any meaningful way.

Other deciding factors:

22. In Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others (1990) 70 WAIG 3525 the Full Bench recognises the importance of relevance in the evidence presented and excluded evidence that did not directly relate to the issues being adjudicated.

23. In Jing Tao Sun -v- Success Motors Service Pty Ltd 96 WAIG 1293 a witness was excused after providing evidence as the commission determined the evidence was hearsay.

24. The commission should consider the Evidence Act 1906 (WA) and common law principals of inclusion of evidence in its determination of the admissibility of the aforementioned evidence including witnesses, outlines, documents and statement

25. In Tara Jane Zeid, DOPLR v New Wave Nominees Pty Ltd T/As New Wave the Industrial Magistrate commented

> "Unfortunately in this case the waters have been muddied and, as I pored my way through the transcript, and in hindsight, it became obvious that a lot of time was wasted on matters which were irrelevant.
>
> In all matters brought in the general jurisdiction of the Industrial Magistrates Court the Claimant has the onus of proof to satisfy the Court, on the balance of probabilities, that the claims should succeed. That is best done by firstly clearly identifying the elements of the alleged breaches, then by adducing clear, concise and credible evidence in an orderly and structured manner to prove those elements to satisfy the evidentiary onus.
>
> It is my view that both parties could have done more to keep the evidence given in these matters on track and reduce the time the hearing has taken by more than one half."

21 On 2 March 2025, the respondent sent an email with further submissions on the first application to dismiss:

Im not sure what happend as the last [half] of my submission is missing, Im assuming I made an error in the cut and paste process.

How would I best have this submission amended with the following:

In relation to the remaining witness outlines and evidence:

26. In the witness outline and statement from the applicant, they have failed to reference or provide any evidence relating to their dismissal being harsh, oppressive or unfair.

27. The applicants witness statement clarifies key dates surrounding their employment contract which are not in dispute in this matter.

28. The applicants witness statements confirms they were a casual employee.

29. The applicants witness statement confirms they received an induction covering the policies and procedures and expectations applicable to their role.

30. In the applicants witness statement, points 14-18 cover a matter that occurred in October 2023 that has no relevance to the matter of her dismissal and was not part of the reasons for her dismissal.

31. The only reference to the applicants dismissal is in point 20 where the applicant states that she knew the reasons for dismissal was falsified however they fail to provide any further information, reasons, facts or evidence to support this.

32. The witness statement from the applicant specifies in point 20 part F that "The participants mother and family" supported her in lodging an unfair dismissal claim.

33. The responded seeks to use this in their own evidence to support that the applicant had formed an inappropriate relationship with the participant/client and their family which breached their policies.

34. The applicants witness statement also speaks to the purpose of her claim to keep her reputation in tact. This matter is to determine if the applicants dismissal was harsh, oppressive or unfair, not to establish her reputation or character. The applicant was not dismissed due to her reputation or character.

35. In relation to the witness statement from Jordan Amber Gresele the witness has failed to provide any evidence as to how the applicants dismissal amounted to being harsh, oppressive or unfair.

36. Jordan was never employed with the respondents business and had no knowledge of or access to the policies, procedures or internal information or decisions regarding the applicants employment or conduct.

37. This witness statement is made by the clients immediate family member and confirms that the applicant and the family had formed an inappropriate relationship that reached the professional boundaries policies of the respondents business. The respondent uses this to support their defense.

38. The witness statement from Tania Trixie Scott further fails to reference any evidence to the applicants dismissal being harsh, oppressive or unfair.

39. Tania is the mother of the client and was never employed with the respondents business and had no knowledge of or access to the policies, procedures or internal information or decisions regarding the applicants employment or conduct.

40. This witness statement is made by the clients immediate family member and confirms that the applicant and the family had formed an inappropriate relationship that reached the professional boundaries policies of the respondents business. The respondent uses this to support their defense.

41. The respondent would like to use this to support their defense in that Tania confirms she offered employment to the applicant following her dismissal thereby mitigating the losses of the applicant.

42. In relation to the employment contract in the applicants bundle of documents, page 29-40 This contract was made with the respondents former trading entity and agrees that this document was the applicants former employment contract.

43. In regard to current employment contract in evidence pages 48-53 The respondent confirms that this was indeed the current contract at the time of the applicants dismissal.

44. In relation to payslips on pages 54-57 these are an accurate reflection of the applicants fortnightly pay cycles and these payslips support the respondent it clarifying that the applicant was a casual staff member and had no grounds to claim or expect ongoing work as there was no consistent hours or patterns to her work hours.

45. The respondent agrees that the Final Formal Warning letter on page 58 is the letter the applicant was given on 22nd Feb 2025. The respondent will use this to clarify that the applicant had been given a formal warning prior to her dismissal.

46. The Complaint Contact form on pages 59-61 is evidence that the respondent made the necessary reporting to regulatory authorities and the respondent will use this evidence in their defense.

47. The termination letter on page 62 is accurate and the respondent will use this as part of their defense.

48. All the aforementioned documents do not provide any evidence or support that the applicants dismissal was harsh, oppressive or unfair.

Grounds for the case to be dismissed:

49. The respondent claims that there is no case to answer, based on the applicant’s own evidence, it is clear that there was a valid reason for the dismissal, and no reasonable tribunal could conclude that the dismissal was unfair. The respondent therefore respectfully requests that the claim be dismissed due to lack of merit."

50. In federal court Griggs v. Dandenong City Council demonstrates that the applicant has the obligation to prove their case and provide evidence.

50. The applicant's casual employment status, as confirmed by the applicant in her witness statement, means they do not meet the requirements to lodge an unfair dismissal claim under the Industrial Relations Act 1979 (WA). As the applicant has not met the minimum employment duration due to her casual status, the WAIRC does not have jurisdiction to hear this case.

51. The applicants witness Tania Trixie Gresele confirmed that the applicant gained employment immediately after their dismissal, which significantly mitigates any financial losses that would typically result from an unfair dismissal. Given that the applicant has secured alternative employment, the applicant successfully mitigated any losses and has no case for compensation or reinstatement as they are still employed elsewhere.

52. Even if the claim were to proceed and the dismissal is found to be unfair, the fact that the applicant immediately gained alternative employment undermines their claim for a remedy.

53. Based on the applicants submissions, continuing this case would constitute an abuse of process. The applicants case lacks any realistic prospect of success and serves no legitimate purpose.

54. In Williams v Spautz (1992) 174 CLR 509 abuse of process includes cases brought for a purpose other than a vindicating right. In the applicants case the vindicating right would be reinstatement or compensation of which neither are relevant due to the applicant gaining and maintaining employment after her dismissal.

55. In the applicants own statement and the statements of her character witnesses it is clean the applicants purpose for this claim is to mitigate any damage to her reputation or character which is not a vindicating right within the Industrial Relations Act 1979.

56. in Dey v Victorian Railways Commissioners (1949) 78 CLR 62, 91 a case will be dismissed if it is "manifestly groundless" or "frivolous and vexatious"

57. And in General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, 129 a case should be struck out if it can not possibly succeed.

58. The high court also upheld this in Spencer v Commonwealth (2010) 241 CLR 118.

59. The respondent seeks that the commission dismiss this matter on the aforementioned grounds to mitigate any further waste of the commissions time and resources.

22 On 6 March 2025, the applicant filed a Form 1A objecting to the application by the respondent. In the Form 1A, the applicant provided written submissions opposing the respondent's first application to dismiss.

23 On the same day, the respondent filed a further Form 1A. The Form 1A seemed to contain written submissions in response to the applicant's contentions filed on 6 March 2025.

24 The first application to dismiss was listed for hearing on 27 March 2025 at 1:30 pm.

25 From my understanding of the respondent's application, the respondent's application can be summarised in that she seeks the dismissal of the application on grounds that:

(a) the applicant was a casual employee and therefore has no standing under the Act to bring her unfair dismissal application; and

(b) the remedy sought by the applicant is not within the Commission's powers under the Act.

26 In the alternative, the respondent sought an order that certain witnesses called by the applicant, be excluded from giving evidence at the hearing of the substantive proceedings.

27 At the hearing, I dismissed the respondent's first application to dismiss with written reasons to be published. These are my reasons for deciding to dismiss the respondent's application.

28 In relation to the respondent's objections to some of the applicant's witnesses, I noted that on a fair reading of the outlines of evidence submitted by the applicant, some of the matters contained within the anticipated evidence, would be hearsay. The applicant was directed to review their proposed witness evidence and resubmit the witness outlines so that the proposed evidence was based on the direct observations of witnesses where relevant.

29 In relation to the respondent's objections concerning the lack of particulars and detail on the applicant's claim for loss and injury, the applicant was directed to provide further particulars and details.

30 The respondent also seeks for the application to be dismissed without hearing, that is summarily dismissed under s 27(1)(a) of the Act, because the respondent argues the applicant's outline of evidence and documents filed on 24 February 2025, agree with the evidence and submissions that the respondent proposes to make. The respondent says the applicant's outlines are contrary to the respondent's proposed evidence and submissions, and the applicant has not submitted sufficient evidence for some of her contentions.

31 The remaining matters raised by the respondent requires the Commission to make findings of fact concerning the rationale and process of the dismissal. These are matters for the substantive proceedings. I cannot make findings in the absence of hearing the evidence and submissions from both parties in the substantive matter. The orders issued were for parties to file *outlines* of evidence and submissions (*emphasis added*). It is at the substantive hearing that evidence is tendered, and the full submissions are made. It is unfair and unjust to dismiss an application before a party has had an opportunity to properly argue their case.

32 For these reasons, I dismissed the respondent's first application to dismiss.

Second application to dismiss

33 On 1 May 2025, the respondent filed a further application to dismiss the matter pursuant to s 27(1)(a) of the Act, on grounds that there was no case for the respondent to answer (**second application to dismiss**).

34 The respondent submitted that the material provided by the applicant, does not sufficiently detail the loss and injury they have incurred because of the dismissal. As a result, the respondent says that they have no case to answer and that it is not in the public interest for the Commission to entertain the application.

35 The second application to dismiss was listed for hearing on 26 June 2025.

36 I dismissed the respondent's second application to dismiss because in my view, the issues raised by the respondent concern the existence of facts that are to be heard in the substantive proceedings.

37 I also note that it is not unusual for unfair dismissal applications to proceed on the basis that there is a decision as to whether the dismissal was unfair, harsh or oppressive as a first step, and for there to be further evidence provided concerning loss and injury as a second step following an initial finding that the dismissal was unfair.

Unfair dismissal legal principles

38 The substantive matter concerns the question of whether the applicant's summary dismissal for alleged serious misconduct, was harsh, oppressive or unfair.

39 A dismissal will be harsh, oppressive or unfair if the respondent has exercised their right to terminate the applicant's employment so harshly or oppressively as to amount to an abuse of that right: ***The Undercliffe Nursing Home v The***

Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385 [386].

40 In ***Charles Henry Rosenthal v John Palermo*** [2010] WAIRC 00401; (2010) 90 WAIG 709 [69] - [72], Acting Senior Commissioner Scott usefully summarises a number of matters relevant to the assessment of whether a dismissal is harsh, oppressive or unfair:

> The onus lies on an applicant to prove that a dismissal has been unfair; however, there is an evidentiary onus on the employer to show that misconduct has occurred. *Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679.
>
> The decision of the Full Bench in *Western Mining Corporation Limited v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1084 deals with the requirements for procedural fairness in dismissal. The Full Bench said:
>
> > Failure to accord procedural fairness is one factor to take into account in deciding whether there has been an unfair dismissal (see *Shire of Esperance v Mourtiz* 71 WAIG 891 (IAC) per Kennedy J at page 895 where he said –
> >
> > > In my opinion, any breach of the rules of natural justice was a relevant circumstance in the determination of the critical question as to whether the dismissal was harsh or unjust. Whether an employer, in bringing about a dismissal, adopted procedures which were fair to the employee is an element in determining whether the dismissal was harsh or unjust – see *The Law of Employment, Macken, McCarry & Sappideen, 3rd ed*, 277-278, and the authorities there cited. In some cases, this can be a most important circumstance. But in a case such as the present, no question of the invalidity of a decision, as such, falls for determination. The case does not turn simply upon the respective legal rights of the parties.
>
> The Full Bench in that matter referred to the decision of the Industrial Commission of South Australia in Full Commission in *Bi-Lo Pty Ltd v Hooper* [1992] 53 IR 224 at 229-230. The Commission said at page 229 –
>
> > '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.'
>
> In *Byrne v Australian Airlines Ltd and Frew v Australian Airlines Ltd* 120 ALR 274 the Federal Court of Australia – General Division dealt with the question of substantial and procedural fairness in the following terms:
>
> > … the respondents owed to the appellants an obligation to act with both substantial and procedural fairness. In the circumstances of this case, that obligation translated into a number of specific steps which the respondent was obliged to take. First, it was obliged to conduct a reasonable investigation, to ascertain what view it should take of any circumstance which it might take into account in deciding to dismiss the appellants. Second, it was required to formulate what it alleged the appellants had done or failed to do. Third, it was obliged to put the allegations of commission and omission to the appellants, and to give them a fair opportunity to be heard as to those allegations. Finally, it was obliged to give to the appellants a fair opportunity to be heard on whether they should be dismissed, if they were to be regarded as guilty. The respondent was obliged to take into account matters not directly connected with the alleged offence which might mitigate the penalty." [69 - 72]

41 A casual employee may be unfairly dismissed. In ***Swan Yacht Club (Inc) v Bramwell*** (1998) 78 WAIG 579 (583), the Full Bench said:

> In any event, on the authorities, reinstatement can be made even if the position were a casual position, it being possible to find that a person is unfairly dismissed whether that person is casually employed or not (see Ryde-Eastwood Leagues Club Ltd v Taylor (1994) 56 IR 385 (IRC NSW (FC))).
>
> It is possible to find that a person is unfairly dismissed whether that person is casually employed or not, because the definition of 'dismissal' is broad in concept and wide enough to cover a dispensing with services, as I say in a little more detail later in these reasons. In this case, however, based on the law as it was applied in Serco (Australia) Pty Ltd v Moreno 76 WAIG 937 at 939-940 (FB) and the cases cited therein, and also Ryde-Eastwood Leagues Club Ltd v Taylor (IRC NSW (FC)) (op cit), the Commissioner was not in error in finding that the respondent was not casually employed. As a result, it was open to find that the respondent was unfairly dismissed. In any event, no order for reinstatement was made. (583)

Background

42 At the hearing, the applicant called Ms Jordan Amber **Gresele** the sister of Client A; Ms Rebecca **Waites**, a former employee of the respondent; and Ms Tania Trixie **Scott**, the mother of Client A to give evidence. The applicant, Ms Lisa King, gave evidence on her own behalf.

43 The respondent called Ms Bailey **McNaught**, an employee of Alyv; Mr Jamie **Knight-Ward**, the human resources manager of

Alyv; Ms Joanne **Atkinson**, an employee of Alyv and the applicant's team lead; and Ms Sarah **O'Sullivan**, the founder and general manager of Alyv and the respondent.

44 The applicant commenced employment with the respondent from 13 July 2023. The applicant's employment contract dated 13 July 2023 states that the applicant is a 'Support Partner' and the basis of her engagement was as a casual employee.

45 On 24 November 2023, the respondent wrote to the applicant offering her terms and conditions as set out in the letter (**Offer of Engagement**). The Offer of Engagement tendered into evidence is not signed by the applicant.

46 The Offer of Engagement was made following the successful completion of the applicant's three-month probationary period. The commencement date was 7 January 2024, the position title was Disability Support Worker, and the classification was noted as 'Not Applicable'. Unlike the previous contract of employment, the terms of the Offer of Engagement do not explicitly specify the basis of the engagement. However, Clause 4 - Hours of Work contains a reference to casual employment:

> 4. Hours of Work
>
> 4.1 As a casual employee, you have no entitlement to guaranteed hours of work.

47 The applicant's role was to provide support to people with disabilities in their own homes. The applicant's duties included providing support for clients in personal care, accessing the community and daily living tasks.

Allegations of misappropriating client funds

48 On 6 November 2023, a client contacted Ms O'Sullivan by text message alleging the applicant had misappropriated her personal funds by purchasing items for the applicant's personal use. The client alleged that the applicant had failed to provide receipts for purchases made with the client's funds.

49 The respondent along with the applicant's supervisor at the time, met with the applicant to discuss the allegations. The applicant denied that she purchased items for her own personal use with the client's credit card.

50 In her evidence, the respondent acknowledged that there was not sufficient evidence to prove the applicant had misappropriated client funds as alleged.

51 The applicant was removed from that client's team at the client's request. The applicant was then place into the team of Client A.

Alleged breaches of professional boundaries

52 The respondent asserts that one of her primary concerns was the applicant's private communications with clients. The respondent says that the applicant repeatedly breached professional boundaries with clients contrary to the NDIS code of conduct and Alyv's policies and procedures.

53 The respondent says that during a text message conversation with a client on 4 November 2023, it was disclosed that the applicant was discussing personal issues concerning the applicant's daughter with the client.

54 On 4 November 2023, the respondent messaged the applicant to inform her not to discuss her availability and rostering with clients and to defer to the respondent on these matters.

55 On 19 February 2024, the respondent issued a message to the WhatsApp group for Client A:

> Good Afternoon Team
>
> Today and last week we have had conversations with many of you and with [Client A's] mum Tania. It has come to light that we have some very concerning professional boundary breaches border lining on professional misconduct. In light of this information we have started to make an action plan going forward. Part of this will be a meeting that Jo will organise where we will go over the profess …

56 Ms Scott's evidence is that she made inquiries directly with the team members of Client A because Ms O'Sullivan had proposed that new support workers be engaged. Ms Scott was concerned new staff would be disruptive and considered that the current team members working more hours would be an alternative solution.

57 Ms O'Sullivan's evidence is that she arranged for her Human Resources Advisor to draft a letter addressed to the applicant. Ms O'Sullivan authorised Ms Atkinson, the applicant's team leader, to meet with the applicant to issue the applicant with the letter containing a final written warning.

58 On 22 February 2024, the applicant was requested to attend a meeting at the Alyv office in Malaga on the same day. The applicant says that she was not told the purpose of the meeting, nor advised she may bring a support person with her.

59 At the meeting, Ms Atkinson handed the applicant a letter titled 'Final Formal Warning':

> Dear Lisa,
>
> As discussed during the formal meeting on 22/02/2024 and in the letter issued to you on 22/02/2024 it has come to our attention that you have breached the Alyv code of conduct, our policies and expectations relating to professional boundaries and have breached the NDIS Code of Conduct with a failure to provide support in a safe and competent manner with care and skill, and a failure to act with integrity, honesty and transparency.
>
> We believe that your behaviour on this occasion demonstrates a failure to comply with our policies and procedures showing:
>
> 1. Provide supports and services in a safe and competent manner with care and skill (NDIS Code of Conduct)
>
> 2. Act with integrity, honesty and transparency (NDIS Code of Conduct)

> In light of the above, and with consideration of your response in our meeting, your behaviour constitutes misconduct. This letter is to confirm that we have decided to progress with a formal written warning. Any further similar actions would constitute further misconduct and may result in disciplinary action up to and including termination of your employment.
>
> It is expected that you will improve your behaviour in future, including but not limited to maintaining professional boundaries with all clients, their family and friends and other people you interact with as part of your role with Alyv.
>
> You are not permitted to discuss the contents of this letter or any of these allegations with staff or clients of Alyv.
>
> If you have any questions or should you wish to discuss this matter in further detail, please reach out to your Team Leader Joanne or you can email the General Manager Sarah …

60 The applicant's evidence is that she was not told at the meeting what she was alleged to have done. The applicant asked Ms Atkinson to elaborate but Ms Atkinson said she was not able to do so. The applicant asked if Ms O'Sullivan could attend to tell her specifically what she had done. The applicant claims Ms Atkinson said 'Sarah was busy today'.

61 Ms Atkinson's evidence is she informed the applicant that the issue of concern for the respondent was the applicant's discussions with a client about her personal finances.

62 The applicant's evidence is that at the end of the meeting, she left the building and passed Ms O'Sullivan at the front door. The applicant said she got into her car and burst into tears.

63 There is no evidence that the applicant was specifically told of the behaviour or conduct that constituted the alleged breaches of the NDIS Code of Conduct.

64 There is no evidence of any specific allegations, other than the applicant speaking with a client about her personal finances, that were put to the applicant and an explanation sought. There is no evidence the applicant was warned in the meeting that discussions about rostering with clients would result in her dismissal.

65 There is no evidence that the concerns about the applicant's private communications with clients were directly raised with the applicant prior to the meeting on 22 February 2024.

66 It is clear on the evidence before me that the respondent had determined to issue a final warning to the applicant *before* the meeting on 22 February 2024 (*emphasis added*). I find this because the letter refers to the consideration of the applicant's responses at the meeting. However, the letter was given to the applicant by Ms Atkinson at the commencement of the meeting. The applicant was not provided with an opportunity to explain or respond to the concerns before the respondent made a decision. The respondent had already concluded that the applicant was guilty of the alleged misconduct before issuing the letter.

67 The respondent argues that the letter sets out the process for the applicant to obtain further information. The respondent says the letter states that if the applicant had any questions or wished to discuss the matter in further detail, the applicant could speak to Ms Atkinson or Ms O'Sullivan.

68 The applicant's evidence is that she did telephone the office and requested to speak with Ms O'Sullivan about the letter. However, she was advised that Ms O'Sullivan was unavailable. The applicant telephoned a second time and was advised that Ms O'Sullivan was out of the office and would return her call later. The applicant says Ms O'Sullivan never returned her calls.

69 Following the meeting with the applicant, Ms Atkinson reported to Ms O'Sullivan that the applicant had seemed annoyed, frustrated and angry. Ms O'Sullivan's evidence is that she and Ms Atkinson looked for the applicant but could not find her anywhere. Ms O'Sullivan says she expected that she would get an email from the applicant.

70 The 'Final Formal Warning' letter dated 22 February 2024, is clear in that the respondent held the view that the applicant has breached the respondent's code of conduct, policies and expectations relating to professional boundaries and had breached the NDIS Code of Conduct. The letter states that the applicant failed to provide support in a safe and competent manner with care and skill, and failed to act with integrity, honesty and transparency. However, the specific behaviour and the way in which the applicant is said to have breached the NDIS code of conduct and the respondent's policies and expectations, are not clearly stated in the letter.

71 The conflict in the evidence between the applicant and Ms Atkinson, is whether Ms Atkinson provided further detail of the alleged behaviour. The applicant says she was not provided with further detail. Whereas Ms Atkinson's evidence is that at the meeting, she informed the applicant the alleged conduct concerned the applicant breaching professional boundaries by discussing her personal finances with a client.

72 The respondent's submissions are to the effect that it was the applicant's responsibility to follow up and clarify anything she did not understand from the 'Final Formal Warning' letter or the meeting. I find that the applicant did attempt to do so during and after the meeting.

73 In any event, I find that the respondent's approach to the warning and counselling of the applicant, was not adequately conducted to satisfy the requirements for being the basis for taking further action in the form of dismissal. The letter is vague and the alleged misconduct is not clearly set out and not sufficiently detailed.

74 Furthermore, the letter refers to the applicant's responses to allegations of misconduct as having been considered by the respondent. Clearly this could not have been so, given the letter was written before the meeting took place.

75 In these circumstances, whether the applicant contacted the respondent to obtain greater detail of the allegations or respond to the allegations, is irrelevant. The letter clearly sets out that the respondent had already decided that the applicant was to be issued a final warning regardless of the applicant's response.

76 On 12 March 2024, Ms O'Sullivan forwarded the applicant's shift notes recorded on 10 March 2024 to Ms Atkinson. Ms O'Sullivan requested the notes be added to the applicant's personnel file:

To add to Lisas file

Notes from [Client A] shifts:

March 10th

[Client A] and I did some cooking this morning and cleaned the kitchen together. we then sat down and did a good chunk of his puzzle. for the rest of the day [Client A] played xbox while I talked with Tania and Jordie

Also please note that Lisa today reported communicating privately with Tania about shifts and did not advise us of changes to todays shift reported several days ago until a half hour before her shift.

77 The respondent contends the shift notes show that the applicant was continuing to have private communications with Client A and Client A's family following the meeting on 22 February 2024. There is no evidence that the respondent raised this instance with the applicant and warned her that continued communications of this nature would result in her dismissal.

Vaping allegations

78 On 28 February 2024, the respondent met with Client A's mother, Ms Scott to discuss Client A's arrangements. The meeting agenda was recorded by the respondent:

Date: Monday 28th February 2024, 10:30 AM

Location: Marmalade Café, Carine Glades Shopping Centre, Duncraig

Participants: Tania Gresele, Sarah O'Sullivan Alyv, Sarah MacDermott SC L2

Purpose: Discuss support rostering and facilitating ongoing communication

DISCUSSION TOPICS

This is just a beginning outline of issues to be addressed based on discussions between Tania & Sarah M (SC) and Sarah M (SC) and Sarah O (Alyv). This is a **general outline** for the conversation and can, of course, be adjusted as needed.

Alyv Related Issues

- Discuss current internal management and staff rostering processes and changes including Alyv's updated rostering software and how to use the rostering app OR if Tania prefers other alternatives.
- Discuss concern that staff members are having rostering conversations with Tania and creating stress for her-what are possible management strategies?
- Discuss Individual staff rostering requests in particular Lisa, Lachy and Kara.
- Discuss Kara's change of work role.
- Discuss staff training- how [Client A] funding has been and will be used to facilitate this, plus the range of training options available for training [Client A's] team members.

79 Ms Scott's evidence is that Ms O'Sullivan proposed that two additional staff be added to Client A's team. Ms Scott says she was opposed to this.

80 In addition to the discussion on the agenda items, Ms Scott says she was shown a photo of the applicant sitting at a table in Client A's home which had a vape on it:

> Yes?---So he took a photo of - of you sitting at my kitchen table, um, sent that through to who he thought was Kara, um, and then I wound up having a meeting with, um, um, Sarah O'Sullivan and Sarah McDermott about [Client A's] - about [Client A's] staff, and this was - staffing issues and this was after I'd had a conversation with different staff members about their availability to do more shift work, because I wasn't gonna accept additional people onto his team because he - he can be too volatile with that and it takes a while to build up relationships. Um, so I wound up having a meeting with, um, Sarah McDermott and Sarah O'Sullivan, and this photo was presented - that he'd sent to Kara, was presented to me as, um, you know, you supposedly having done something wrong. (ts 25)
>
> Yes?---There was a vape sitting on the kitchen table, um, and you were accused of vaping in my house, and that wasn't on, and therefore, you know, she was considering - you're effectively going to be let go. And I said, "Well, no. Hang on a minute, um, she's never vaped in my house. Um, she's just sitting at a kitchen table where a vape happens to be. That's not an accurate portrayal of the situation - like that's just not what happened. You can't, uh, you can't get rid of her for something that she hasn't done. That's insane." And then I reiterated that you were a very important part of his team. You were effectively his person. You were the person that, um, just dealt with him calmly and you were his person. If he went on - he wanted to know when you're on next, that kind of thing. (ts 26)

81 Ms Scott's evidence is that she never observed the applicant vaping. Her evidence is that she bought her son vapes because in her view, it was a safer option than her son purchasing them behind her back. Ms Scott recalls asking a support worker to purchase a vape on one occasion and was for her and not her son. She could not recall who the support worker was.

82 Ms Scott says the respondent was aware Client A vaped and that Ms Scott had permitted him to do so.

83 The applicant emphatically denies vaping at the client's home. The applicant's evidence is that she did not vape at the client's home, did not purchase vapes for the client and did not supply the client with vapes.

84 On the evidence before me, I cannot conclude that the applicant purchased the vapes for Client A, nor supplied Client A with vapes, nor vaped herself during her shifts at Client A's home. The photo of the applicant at a table with a vape on the top of the table does not establish any of these assertions.

85 Furthermore, the respondent did not make any enquiries of the applicant to establish any of these allegations nor seek an

explanation from the applicant. This is despite Ms Scott informing the respondent that she had purchased the vapes for Client A and not the applicant, and that Ms Scott had not observed the applicant vaping in her home.

Failure to record medications

86 On 12 March 2024, the respondent posted a series of messages on the Client A staff group WhatsApp chat, confirming instructions to staff for recording medications.

87 On 12 March 2024, Ms O'Sullivan conducted an audit report of the recording of medications for Client A. The applicant was working on that day. Ms O'Sullivan's evidence is that the applicant had not documented the medications.

88 The respondent asserts the applicant made false declarations when she signed off from her shift using the system, which required confirmation that she had completed the tasks.

89 The respondent refers to an audit of the medication recording for the team providing support to Client A being conducted on 13 March 2024. The audit identified that the applicant had failed to record any observations for that day.

90 The respondent says the system used by the applicant to record and document shifts, incorporated a function for the applicant to confirm that she had completed all required tasks, which included maintaining a record of medications administered to clients. The evidence of Mr Knight-Ward is that when staff members log into the 'Supportmate app', the instructions will instantly show up on the screen.

91 The respondent asserts the applicant falsely represented that she had observed Client A taking medications by indicating she had done so in the system.

92 The applicant's evidence is that the system used for recording her shifts through her mobile phone did not prompt her to confirm the completion of tasks. The applicant's evidence is that the system in the 'Supportmate app' only prompted her to add progress notes once the shift was complete. The applicant's evidence is she had informed Ms O'Sullivan of the limited information displayed on the system and the omission of the prompt to indicate the observation of medications on 12 March 2024 by text message.

93 The respondent's evidence is that applicant's failure to record the medications, formed one of the reasons for dismissing the applicant.

94 There is no evidence that the respondent put any allegations to the applicant regarding the failure to record client medications, nor sought an explanation or confirmed whether there were any mitigating circumstances. The respondent did not specifically warn the applicant that repeated conduct of this kind, may result in her termination.

95 The termination letter does not refer to the applicant's alleged failure to record the medications.

Events of 14 March 2024

96 On 14 March 2024, there was an incident at Client A's home that resulted in the applicant and another employee, Ms Waites, leaving the premises prior to the completion of their shifts.

97 The evidence of Client A's mother, Ms Scott, is that late in the previous evening, Client A had learnt from Ms O'Sullivan that an employee of Alyv with whom he had a rapport, would no longer be working with Alyv. Ms Scott says Client A was devastated. Ms Scott's evidence is this revelation resulted in Client A's behaviour being heightened on the following day.

98 The applicant's evidence is that at the commencement of her shift on 14 March 2024, Ms Scott advised the applicant of Client A being told the employee was no longer employed at Alyv. Client A' s mother instructed her to watch Client A closely and to be on her guard.

99 The applicant's recollection of the events on 14 March 2024 is that Client A had insisted he wanted to take his dog to a Pilates session. The applicant told Client A that this was not possible and tried to reason with Client A.

100 After failing to convince Client A to leave the dog at home, Client A's sister grabbed the dogs lead from Client A and pulled the dog outside and closed the door.

101 Client A responded by going to the kitchen drawer and grabbing a knife which he threw at Ms Waites. The knife hit Ms Waites in the head. Client A threw a second knife that hit Ms Waites on her arm.

102 Ms Waites tried to call her supervisor without success because she was on leave. Ms Waites then attempted to call Ms O'Sullivan.

103 In the meantime, Client A's sister called her mother who instructed everyone to leave the home.

104 The applicant and Client A's sister left the premises and went to the applicant's car. They drove around the corner, parked and waited for Client A's mother. Ms Waites left the premises at the same time. Once Client A's mother arrived home, the applicant dropped Client A's sister home and left.

105 Later that day, at 6:54 pm, Ms Waites filed a report of the incident.

106 The respondent is critical of the applicant leaving the premises and says the applicant left the client unsupervised.

107 On the same day at 2:27 pm, someone from the office messaged the applicant indicating that they were aware of the incident:

> Hi Lisa can you please make sure your noted and incident report are done and please log into Fora/Team DSC and complete 2 hours of training.

108 The applicant received a message from Ms O'Sullivan at 3:16 pm stating 'Hi Lisa, Sorry Im just on the phone to [Client A's] PBS are you ok?'.

109 On 15 March 2024 at 12:33 pm, the applicant submitted a report on the incident from the previous day.

110 The respondent is critical of the applicant for not filing an incident report or for making contact earlier. The applicant says she did not contact Ms O'Sullivan because she knew that Ms Waites had already done so.

111 The respondent refers the Commission to the 'Who you gunna call?' guide, which sets out who to call at Alyv in the event of an emergency. The guide sets out pathways for situations a support worker may be presented in the workplace. In the case of a client in crisis, the pathway is to 'follow the clients crisis management plan if applicable?'. When the crisis has been resolved then an incident report is to be lodged and the relevant Team Leader and the Alyv Office are to be contacted. The crisis management plan for Client A was not provided by either party.

112 The respondent says that the applicant failed to communicate with the office, her team leader or any other manager at Alyv after leaving the site. The respondent's submission is that the applicant abandoned her shift by failing to submit her shift notes, documentation or an incident report following the incident. The respondent asserts that the applicant did not follow the process set out in the respondent's policies and procedures.

113 I find that the applicant did not fail to follow the respondent's policies and procedures. It is apparent from the applicant's evidence that she understood that another employee, Ms Waites, had tried to contact both the former team leader and the office during the incident and had informed the respondent that the applicant had also been involved.

114 In the absence of the relevant crisis management plan, I cannot find that the applicant failed to follow it.

115 The applicant did submit her shift notes and an incident report albeit on the following day. The applicant's evidence is that she was shaken up by the incident. It is understandable and not unreasonable for the applicant to submit the incident report and shift notes late in these circumstances.

116 When presented with a dangerous situation the applicant retreated to a safe place. The applicant is able to do so in accordance with the s 84(1) of the *Work Health and Safety Act 2020* (WA) which states:

> (1) A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose —
>
> (a) the worker to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard; or
>
> (b) any other person to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard.

Breach of Work Health and Safety Laws

117 The respondent asserts the applicant breached work health and safety laws and policies on 14 March 2024. The respondent alleges the applicant did not conduct the safety plan at the commencement of her shift. The respondent says this meant Client A was able to access the knives in the incident.

118 The respondent contends that there is a safety plan for Client A's home requiring staff to check that all sharp items and dangerous liquids are secured by the client's family before commencing work with the client. Staff were not permitted to remain onsite if there were unsecured sharp items or dangerous liquids due to the risks posed by the client's behaviour.

119 On 14 March 2024 at 4:26 pm, the respondent informed the client's family that service arrangements with the client had been suspended pending a review of the safety plan.

120 Ms O'Sullivan's evidence is she concluded after receiving the incident report from Ms Waites, that it was clear that sharp knives had been left out and the safety plan had not been followed.

121 The respondent points to inconsistencies between the incident report submitted by the applicant and Ms Waites. In the applicant's report, she described the knives as butter knives whereas Ms Waites' report described the knives as steak knives. Ms O'Sullivan's evidence is that she contacted Ms Waites the day after the incident who confirmed that the knives were 'sorta like steak knives but not. They had a pointy end and they were silver.' Ms Waites reported they were in the dishwasher, whilst the applicant said they were in the kitchen drawer.

122 The email to the applicant notifying of her dismissal, was sent from the Alyv main office email address at 11:13 am on 15 March 2024. Neither the email nor the attached termination letter refers to the incident on 14 March 2024, nor to an investigation concerning allegations of breaches of work health and safety policies nor the relevant safety plan.

123 The respondent acknowledges she concluded the applicant did not follow the safety plan without seeking the applicant's response to the allegation. Ms O'Sullivan says she was forced to conclude the investigation of the incident without input from the applicant.

124 The respondent's reasons for failing to put allegations or concerns to the applicant before deciding to terminate the applicant, are not credible.

125 The elapsed time between the incident on 14 March 2024 and the email to the applicant informing her that she was dismissed, is less than 24 hours. In circumstances where the respondent was able to email the applicant with the letter of dismissal, the respondent was also able set out any allegations or concerns and seek the applicant's response.

126 The evidence is that the applicant submitted an incident report on 15 March 2024 at 12:33 pm. It also appears the applicant following receipt of the email and letter dismissing her, contacted the office on 15 March 2024 sometime prior to 2:30 pm and spoke with Ms McNaught. This conversation was reported to Ms O'Sullivan by text messages sent by Ms McNaught at 2:29 pm and 2:30 pm that day.

127 In these circumstances, the respondent's contentions that she was forced to conclude the investigation without the applicant's input cannot be sustained. There was ample time to provide the applicant with an opportunity to respond to allegations or concerns. In the absence of this, the investigation was not fairly conducted and the conclusions are tainted.

128 The extent to which this factor contributed to the reasons for summarily dismissing the applicant are equally flawed. Whilst the incident was serious, this does not mean the respondent is not obliged to afford the applicant an opportunity to respond to allegations and for the respondent to consider any response offered.

Termination decision and process

129 On 15 March 2024 at 11:13 am, the respondent emailed the applicant from the Alyv main office email address:

> Good morning Lisa,
>
> Our director Sarah has attempted to contact you this morning and we are sorry we couldn't get hold of you to discuss this letter with you. Should you wish to discuss this further you are welcome to call the office, your Team Leader, or Sarah directly.
>
> Please find attached your letter of termination, the information in this letter is very important and it should be read thoroughly. It includes information about your rights and responsibilities and a cease and desist for contacting our clients and their families under The Privacy Act 1988 and your employment contract. Any breach of this law and contract will result in reports to the OAIC (Office of the Australian Information Commissioner) and to the NDIS Quality and Safeguards team for recording against you and this may impact your ability to gain or keep you NDIS worker screening check and may impact on your WWCC status.
>
> This is effective immediately and your final pay will be processed within the next pay cycle.
>
> Kind regards,
>
> Alyv Team

130 The termination letter attached to the email sent to the applicant on 15 March 2024 at 11:13 am, sets out the reasons for the termination:

> **Termination of your employment**
>
> I am writing to you about the termination of your employment with Alyv.
>
> As you are a casual worker and we have already given verbal and written warnings that were in excess of our obligations to you we have made a decision to terminate your employment on the grounds of gross misconduct and are not required to provide you any notice.
>
> The conduct we have identified that constitutes misconduct is as follows:
>
> 1. Supplying a prohibited smoking/vaping implement with a person under 18 while working in the capacity of a support worker for them where a police report may be made against you.
> 2. Engaging in the use of smoking/vaping activities with a young person under the age of 18 while working in the capacity of a support worker for them, where a report to the NDIS Quality and Safeguards Commission and Department of Communities may be made against you.
> 3. Failing to act in the best interest of the client and acting in a way that deliberately causes distress and harm to them by way of continual breached of professional boundaries and conduct.
> 4. Not following reasonable directions to cease previous actions that warrant a breach of the NDIS Code of Conduct and the Alyv Code of Conduct.
> 5. Additional breaches to the NDIS Code of Conduct and subsequently the Alyv Code of Conduct where a report to the Quality and Safeguards Commission may be made in relation to you for coercion of a client and their family to produce a financial gain.
>
> This letter is a notice of summary dismissal for serious misconduct as per the Western Australian Industrial Commission.
>
> We hereby request that the following work equipment be returned to us by no later than close of business on the 18th March 2024 prior to processing your final pay.
>
> - Any and all documents you have in your possession relating to Alyv, its business, clients, operations or any other aspect of Alyvs business.
> - Any other property or information owned by Alyv including supplied PPE and first aid kits.
>
> Failure to return any of these by the due date will result in the cost of replacing the item being deducted from your final pay. We hereby accept your refusal to return the items as your agreement to deduct these amounts.
>
> Should our confidential records not be returned or be misused in any way before they are returned we reserve the right to take legal action and claim any damages resulting from misuse of these documents. Should they not be returned we are also obligated to report the data breach to the Office of the Australian Information Commissioner. *This would also include using our clients contact information or information in any way from the date of this letter, furthermore any communication directly with our clients and/or their family will result in additional reporting to the Quality and Safeguard Commission, OAIC for breach of privacy on your part and may result in further legal action. This is a request to cease and desist in communicating with the clients as per your employment contract and surviving clauses and breaches will be managed to their full extent in order to protect the rights and wellbeing of our clients.*
>
> You may seek information about minimum terms and conditions of employment from Wageline. If you wish to contact them you can call 13 00 655 266 or visit their website at https://www.commerce.wa.gov.au/labour-relations/contact-wageline. Some termination payments may give rise to waiting periods for any applicable Centrelink payments. If you need to lodge a claim for payment you should contact Centrelink immediately to find out if there is a waiting period.

> Yours sincerely,
>
> Sarah O'Sullivan
>
> Founder | General Manager

131 The applicant's evidence is that she attempted to call Ms O'Sullivan later that day. The evidence of Ms O'Sullivan is that she messaged the applicant at 2:22 pm stating 'I'm just in an NDIS planning meeting I've asked the office to contact you asap'.

132 The respondent submits that the decision to terminate the applicant was based on several factors concerning the applicant's misconduct. The respondent submits that some of the reasons were not known at the time of the dismissal and the respondent has subsequently become aware of those matters.

133 The applicant refers the Commission to the letter of dismissal and submits that the reasons for her dismissal are allegations concerning vaping. The applicant says the respondent has been inconsistent in her rationale and that the respondent seeks to reconstruct the basis of the decision to dismiss her.

134 After the dismissal, the respondent submitted reports to regulatory authorities such as the NDIS Quality and Safeguards Commission, the WA Health Tobacco Control Unit and the Working with Children's Screening Unit.

135 The reports allege the applicant purchased and provided a client with nicotine products and that the applicant vaped in the presence of an underage client while working with the client. The report to the NDIS Quality and Safeguards Commission states the applicant was summarily dismissed for this misconduct.

After acquired knowledge

136 The respondent submits that there were circumstances that subsequently came to light which justifies the applicant's dismissal even though they were not the reason for the dismissal.

137 In ***Byrne v Australian Airlines Ltd*** (1995) 185 CLR 410 (467), the High Court confirmed that a dismissal may be fair in circumstances where facts that would justify termination, become known after the termination. Such facts must have existed at the time of the dismissal: ***Newton v Toll Transport Pty Ltd*** (2021) 307 IR 140 (162). This approach to 'after acquired knowledge' has been applied by the Full Bench in ***Minister of Corrective Services v Fagan*** [2023] WAIRC 00984; (2023) 104 WAIG 1 [65] and [66].

138 The respondent has not particularised the circumstances they consider are the 'after acquired facts' that they seek to rely on.

139 The respondent's evidence is that the matters they regard as the applicant's misconduct, were matters they were aware of prior to dismissing the applicant. It is not apparent from the evidence what the respondent considers an 'after acquired fact'.

140 Given this, I have not had regard for any after acquired facts in my findings.

Did the applicant abandon her employment?

141 By 11:00 am on 15 March 2024, Ms O'Sullivan says that she concluded the applicant had abandoned her employment because they had not received any communications from her.

142 The respondent says that the applicant failed to follow up with the respondent and submits that the applicant abandoned her employment.

143 The Commission has previously considered abandonment in the context of termination of employment in ***Wiseman v Hills Industries Limited*** [2001] WAIRC 03577; (2001) 81 WAIG 2622. At [39], Gregor C says:

> … For abandonment to be established it must be shown that there was clear intention to do so, that intention may be evinced when the employee's absence is against the express instructions of the employer, and there is a substantial absence or where the employee has acted in a manner inconsistent with an award definition of the abandonment of employment. In Unfair Dismissal in New South Wales by Mark Baragwanath, LBC Information Services 1999, the learned author observes *"...a clear indication that the employee is treating his/her employment contract as continuing, despite an absence, may have the effect of rendering the abandonment of employment a mere unauthorised absence"*.

144 The elapse of time between the abrupt early conclusion of the shift on 14 March 2024 and the late morning of the following day, is not substantial, and is not sufficient to show that the applicant intended to end the employment contract. It cannot be said that the applicant treated her employment contract as at an end.

145 The applicant's submission of an incident report at 12:33 pm on 15 March 2024, indicates the applicant's continuing engagement and compliance with the respondent's processes. A delay in the time taken to submit the report, does not evince an intention to not be bound by her employment contract. In the circumstances, it is understandable that the applicant was shaken by the events the previous day.

146 I am not persuaded on the evidence before me that the applicant abandoned her employment.

Consideration - Was the applicant's dismissal unfair?

147 The respondent contends she had good cause to summarily terminate the applicant's employment.

148 I understand the respondent's reasons for dismissing the applicant are reflected in Ms O'Sullivan's evidence at the hearing, that on 14 March 2024, she formed the view that the applicant ought to be summarily dismissed:

> So during that process, and I guess after those phone meetings or whatever had been had, we still had not received any communication from Ms King. I checked with the office. Nobody had been able to reach her. And I had attempted to call her myself just before sending her termination letter. I believe during that time we had made a decision to issue a summary dismissal. Cumulatively looking at the history that she's had since she – since she passed her probation is that we have given her explicit instructions, reminded her about her policies, reminded her about professional boundaries, sent

> her documents and sent her direct requests. And then we had followed up with a final and formal warning, which she had not engaged with and hadn't shown any signs of improving that behaviour. And I guess that, in combination now needing to make a mandatory report, just under our like quality and safeguarding policies, we needed to advise the NDIS if we have reason to believe something might have happened. We don't need to provide that it did. That's the job of the commission. We only need to have an obligation to report if we suspect that something might not be quite right.
>
> So in culmination of all those things and the record keeping and the false declarations and really just a – a challenge in managing those performance issues in that space, combined with Lisa just not fooling us, you know, after an incident like that, we definitely needed to – to review safety plans and make sure that our other staff were safe. And we couldn't faithfully send them in there if we didn't know what that looked like. So we did make the determination to summarily dismiss Ms King. We had to make that determination without her present because we couldn't call her in for a meeting. We couldn't communicate with her and we were unable to, I guess, discuss with her what happened during the incident or any of the other matters. So I did try to – to – to contact her. I didn't get a response. (ts 109)

149 Essentially, the issues identified by Ms O'Sullivan are:

(a) the applicant did not comply with explicit instructions about professional boundaries;

(b) the requirement in her view for a mandatory report concerning quality and safeguarding policies to the NDIS; and

(c) inadequate record keeping and false declarations.

150 The respondent says allegation four of the termination letter, refers to the applicant communicating inappropriately with clients outside of the respondent's channels and, consequentially, breaching professional standards. The respondent argues these concerns were raised with the applicant at the meeting with Ms Atkinson on 22 February 2024. The respondent submits they had sent the applicant text messages and instructions on this issue.

151 The respondent submits the applicant was provided with plenty of opportunities, including a formal written warning and verbal warnings. The respondent submits the applicant failed to engage in any discussions or take any steps to improve her behaviour or conduct.

152 The evidence does not support the respondent's submissions.

153 I do not agree that the applicant had been warned that ongoing communications with clients, would be considered serious misconduct warranting dismissal.

154 The evidence is that the meeting and the first and final warning letter issued at the meeting on 22 February 2024, concerned the applicant's conversation with a client regarding her personal financial situation; not the concerns that the applicant was communicating with clients about rostering in a manner which breached professional standards.

155 The respondent points to the applicant being advised to contact the respondent if she had any questions or wished to discuss any matters contained in both the final warning letter and the termination letter. The respondent's submission is that it was the applicant's responsibility to contact the respondent and seek an explanation.

156 Both the first and final warning letter and the termination letter, inform the applicant of decisions already being made. The letters do not advise the applicant that the respondent is considering a particular course of action. Whilst there is information about how to contact the respondent, neither letter invites the applicant to provide information or submissions that the respondent would review. The letters do not invite the applicant to provide any relevant information or submissions for the respondent's consideration *prior* to a decision being made (*emphasis added*).

157 I find that the applicant was denied procedural fairness when she was not given any notice about the reason for the meeting on 22 February 2024. Additionally, the applicant was not provided an opportunity to have a support person or representative attend the meeting with her. Furthermore, I find that the applicant was denied procedural fairness when she was not provided with sufficient detail and examples of the conduct of concern to the respondent.

158 The applicant was again denied procedural fairness when the respondent informed the applicant it had terminated her employment because of serious misconduct, without affording the applicant an opportunity to consider the allegations or provide an explanation.

159 I note that where misconduct is alleged, there is an onus and an evidentiary burden on the respondent to establish that there were reasonable grounds for believing that the applicant was guilty of the misconduct, and that such misconduct justified dismissal: ***The Minister for Health v Drake Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [66] citing ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224 (***Bi-Lo***) (229).

160 The respondent's submissions are that the final warning letter and meeting on 22 February 2024, were evidence of the warnings provided to the applicant that her behaviour breached professional boundaries. The respondent seeks to rely on these matters to support her contentions that the applicant was warned about her behaviour prior to the decision to dismiss the applicant for a repetition of this conduct. The respondent has seized upon a warning limited to alleged discussions by the applicant with a client about finances, to extrapolate a multitude of allegations concerning conduct of the applicant in exceeding professional boundaries.

161 The respondent submits she determined that the applicant had previously not been cooperative when addressing allegations of misconduct. Ms O Sullivan says she determined it was unlikely that her input would provide any reliable evidence into the event or change the outcome.

162 I do not accept the respondent's characterisation of the communications with the applicant. I understand that some of the warnings issued were by way of policies sent to all team members and the applicant was included in this group.

163 I understand from the respondent's submissions that allegation five set out in the termination letter, refers to the applicant speaking with client A's mother about rostering arrangements:

5. Additional breaches to the NDIS Code of Conduct and subsequently the Alyv Code of Conduct where a report to the Quality and Safeguards Commission may be made in relation to you for coercion of a client and their family to produce a financial gain.

164 However, there is no evidence that the applicant was warned that she had breached the NDIS Code of Conduct and the Alyv Code of Conduct by discussing her shift availability with Client A's mother. The reference to the possibility of a report being made to the Quality and Safeguard Commission and the allegation of coercion to secure a financial gain, indicate the breaches must be serious.

165 The evidence of Ms Scott is that she raised the prospect of working additional hours with the members of Client A's team because she did not want new people joining Client A's care team.

166 Given the circumstances, the respondent ought to have commenced her investigation with an explanation from the applicant about communications concerning shifts and rosters with Client A's mother, before forming a conclusion that the applicant had seriously misconducted herself.

167 The respondent has failed to satisfy the evidentiary onus to demonstrate she undertook a full an extensive investigation into all of the relevant matters surrounding the alleged misconduct as required by ***Bi-Lo***.

168 The respondent refers the Commission to ***Kenneth Luke Manook v Cockburn Hire Services*** [1991] WAIRC 12384; (1991) 71 WAIG 2384 (***Manook***) and contends that a failure to formally warn the applicant about her conduct at each point, does not render the dismissal harsh, oppressive or unfair. In ***Manook,*** Beech C concluded at (2386):

> Viewed overall the dismissal was not harsh or oppressive. Even if the Commission has placed greater emphasis on the warnings said to have been given by Mr Pedersen than is appropriate, the Commission has not detected from the evidence of Mrs Doyle and Mr Manook, alone, a reason for it to interfere in this matter.

169 As with most unfair dismissal claims, a finding of whether a particular dismissal is unfair or not, turns largely on the facts of the case. In ***Manook***, the claim was determined on the evidence before the Commission. This does not provide authority for the general principle that a failure to formally warn, will not render a dismissal harsh, oppressive or unfair.

170 The respondent refers the Commission to ***Lindecker v Director General, Department of Education*** [2017] WAIRC 00345; (2017) 97 WAIG 657 (***Lindecker***) and submits the applicant's behaviour in this matter, is like that of the applicant in ***Lindecker***. The respondent says the applicant believed there was nothing wrong with her performance, but rather, was convinced the warnings and termination were out of malice rather than real concern.

171 The respondent has not supported this contention with evidence of the applicant's behaviour said to be like the applicant in ***Lindecker***. I cannot find any examples of where the applicant is said to have expressed a belief that there was nothing wrong with her performance or that any warning was out of malice. The applicant was understandably concerned that the 'Final Formal Warning' was issued without first putting the allegations to the applicant and seeking an explanation or an opportunity for her to detail any mitigating circumstances. The applicant was also understandably unhappy that general allegations of wrongdoing were not supported by details or examples of the conduct said to be of concern to the respondent.

172 In ***Lindecker*** [50], Matthews C concluded:

> The respondent was entitled to act in the way it did on the information it had before it. *I note that Mrs Lindecker was given the opportunity to comment before any decision was made.* The decision to dismiss her was not harsh, oppressive or unfair and her application will be dismissed for the reasons given above (*emphasis added*).

173 On this basis, ***Lindecker*** can be distinguished from this matter because unlike ***Lindecker***, the applicant in this matter was not afforded an opportunity to comment before the final warning was issued, prior to the decision to dismiss being made, nor prior to forming subsequent conclusions about other allegations concerning the applicant's conduct.

174 The respondent refers the Commission to various previous decisions. Many of these are decisions of single commissioners and therefore not binding. Some of the cited decisions have been set out in my findings. I have reviewed the decisions cited by the respondent, however, matters concerning unfair dismissals often turn on their own facts and therefore I have not addressed every matter cited by the respondent. However, I would note the observations contained within *Creighton and Stewart's Labour Law Seventh Edition*:

> Decisions on whether conduct justifies summary dismissal turn largely on their own facts. There is little point, therefore, in trying to analyse them in detail. [22.36]
>
> …
>
> ... it should be clear that most unfair dismissal cases essentially turn on their own facts. Conduct that may appear to justify dismissal in one context will be excused in another – perhaps because the employer concerned has not properly communicated its policy on that issue to its workforce, or has not applied its policy in a consistent manner, or has not properly investigated the matter, or has failed to take proper account of the employee's length of service and previous good record. This makes it difficult if not impossible to distil from the case law a clear set of principles. [23.69]

175 The respondent contends it was the applicant's responsibility to follow up if she had any concerns regarding the 'Final Formal Warning' issued on 22 February 2024 and the termination letter issued on 15 March 2024. However, this misunderstands the principles of a 'fair go all round' established in ***Undercliffe*** (386):

> Accepting then that the Commission may enquire into the termination of a contract of employment, the question then arises to what principles it should apply and having regard to circumstances in which the termination took place. The jurisdiction has been variously stated: in *re* Loty and Holloway v. Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his/her common law and/or award rights, the Court was entitled to enquire as to whether the employee had received 'less than a

fair deal'. He also approved what had been said in an earlier case whether there had been 'a fair go all round'. In a later case Metropolitan Industry Employees' Union (New South Wales Branch) (1973) A.R., 231 at 233 Watson J thought that even if there are grounds for terminating the contract of employment it was still open to the tribunal to examine the severity or otherwise of the step of the dismissal. In the majority judgement in Western Suburbs District Ambulance Committee v Tipping at 277 their Honours stated the question as being 'whether the employer's action was harsh or unjust or that the employer has abused his right to dismiss the employee'.

… Finally in North West Council v Dunn 129 CLR 247 at 263 Walsh J, specifically approved a test stated by McKeon J. in the case immediately last cited as being the question to ask:

> Has there been or has there not been oppression, injustice, or unfair dealing on the part of the employer towards the employee.

As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question of 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.

176 The respondent failed to afford the applicant an opportunity to respond to the allegations which formed the reasons for the decision to dismiss. Clearly there was an injustice, and it was unfair to the applicant to dismiss her without first considering any response the applicant may provide.

177 It is not sufficient for the respondent to refer to the communications with the applicant that provided her with contact details to seek further information or clarity. The communications conveyed a definite decision had been made. There was no indication from the respondent that anything the applicant may offer would be considered by the respondent. The respondent was not proposing a course of action, the respondent had already decided to dismiss the applicant.

178 For the reasons set out above, I find that the applicant was unfairly dismissed by the respondent.

Remedy – Compensation for loss

179 Pursuant to s 23A of the Act, the Commission may upon a finding of an unfair dismissal, order reinstatement to the employees' former position on comparable terms or re-employment in another position:

(3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

(4) If the Commission considers that reinstatement would be impracticable, the Commission may order the employer to re-employ the employee in another position that the Commission considers —

(a) the employer has available; and

(b) is suitable.

(5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders —

(a) an order it considers necessary to maintain the continuity of the employee's employment;

(b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.

180 However, if the Commission considers reinstatement or re-employment to be impracticable, the Commission may order the employer to pay the employee an amount of compensation for loss or injury:

(6) If, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

(7) In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to —

(a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal; and

(b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and

(c) any other matter that the Commission considers relevant.

(8) The amount ordered to be paid under subsection (6) is not to exceed 6 months' remuneration of the employee.

(9) For the purposes of subsection (8) the Commission may calculate the amount on the basis of an average rate received by the employee during any relevant period of employment.

181 I find that it is impracticable to reinstate the applicant, given the breakdown in the relationship between the parties.

182 It is not in dispute that the applicant was engaged on a casual employment contract. The respondent argues they could have simply not offered the applicant any further shifts. However, this is not what happened. The respondent alleged misconduct and terminated the applicant's employment on that basis. The respondent also reported the alleged misconduct to the relevant regulatory authorities. Applying ***Swan Yacht Club (Inc) v Bramwell*** (1998) 78 WAIG 579, I find that the applicant as a casual employee, was unfairly dismissed. Given it is impracticable to reinstate the applicant, a remedy for compensation or injury

ought to be considered.

183 The Full Bench in ***Mr Alan Scicluna and Mrs Trixie Scicluna v Mr William Paul Brooks T/AS Bayview Motel Esperance, WA*** [2016] WAIRC 00862; (2016) 96 WAIG 1475 [61] citing ***Bogunovich v Bayside Western Australia Pty Ltd [No 2]*** (1998) 79 WAIG 8, sets out the principles to be applied in determining compensation for loss:

> The principles for an assessment of compensation were comprehensively set out in ***Bogunovich [No 2]***. ***Bogunovich [No 2]*** was decided prior to the amendments to s 23A in 2002. The principles set out in ***Bogunovich [No 2]*** and subsequent decisions of the Full Bench and the Industrial Appeal Court which are referred to below, together with the matters set out in s 23A(7) of the Act which are relevant to the disposition of this appeal, are as follows:
>
> (a) The powers conferred under s 23A to order payment of compensation must be for a demonstrated loss or injury caused by the dismissal.
>
> (b) Such payments are not a means for punishing an employer: ***Garbett*** [85] (EM Heenan J). However, an award of compensation is not restricted to the damages which might be recovered at law for wrongful dismissal: ***Garbett*** [85] (EM Heenan J). It is a statutory remedy that is different from the species of relief which may be available under the contract of employment: ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114; (2004) 136 IR 156; (2004) 84 WAIG 2152 [60] - [61] (EM Heenan J).
>
> (c) In determining whether an employee has been unfairly dismissed, and in considering whether pursuant to s 23A it should order the employer to pay any, and what amount of compensation to the employee for loss and injury caused by the dismissal, the Commission acts judicially: ***Helm v Hansley Holdings Pty Ltd (In Liq)*** [1999] WASCA 71; (1999) 118 IR 126; (1999) 79 WAIG 1860 [9] (Kennedy J).
>
> (d) Like the assessment of an award for general damages, the assessment of compensation under s 23A is not an exact science: ***Gilmore v Cecil Bros*** (1996) 76 WAIG 4434, 4447 (Sharkey P), (4449) (Gifford C).
>
> (e) The first step is to assess the total amount of compensation that can be awarded; that is the amount of the remuneration of the employee that would be payable in a period not exceeding six months (see s 23A(8) and s 23A(9) of the Act).
>
> (f) The employee is to establish his or her loss and/or injury on the balance of probabilities. This involves a finding of fact or mixed law and fact, as to what is the loss and injury established on the evidence: ***Bogunovich [No 2]*** (9) (Sharkey P), (13) (Kenner C).
>
> (g) The onus of proof of failure to mitigate rests upon the employer. If it is established that an employee has failed to mitigate his or her loss, then it may be that there has not been a loss of remuneration caused by the dismissal. A finding that an employee has a duty or is required to mitigate his or her loss is a misstatement of the law: see the discussion in ***Sealanes (1985) Pty Ltd v Foley*** [2006] WAIRC 04110; (2006) 86 WAIG 1239 [99] - [104]; applied in ***Curtis v Ausdrill Ltd*** [2006] WAIRC 05656; (2006) 86 WAIG 3133 [35] - [38] (Ritter AP and Gregor SC).
>
> (h) Regard is also to be had to any efforts of the employer to mitigate the loss suffered by the employee as a result of the dismissal (s 23A(7)(a)).
>
> (i) The Commission must assess the proper amount of compensation for loss and/or injury in light of all the relevant circumstances, but disregarding the cap prescribed by s 23A(8). If the amount is in excess of the cap, the amount to be awarded is the permissible maximum: ***Bogunovich [No 2]*** (8) (Sharkey P).
>
> (j) The assessment of compensation:
>
> (i) is to be made in light of all relevant circumstances;
>
> (ii) must not be arbitrary;
>
> (iii) must have regard to whether the employee has taken reasonable steps to find alternative employment: ***Curtis*** [36] - [38], [43] (Ritter AP and Gregor SC);
>
> (iv) is a determination pursuant to s 26(1)(a) made according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms. This legislative direction does not enable the Commission to determine the matter without resort to established legal principles, where those principles are established. However, as Beech CC observed in ***Curtis***, when considering an award of compensation made pursuant to s 23A [64]:
>
> > The Commission should be slow to fetter its own wide discretion under s 26(1) to produce an outcome which is just and equitable and not simply lawful. It is not irrelevant to note that the power given to the Commission is to order compensation, not damages; what might be a correct outcome in a court of law may nevertheless be unacceptable according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. There may well be good reason for the inclusion of s23A(7)(c) if it thereby allows the Commission to have regard to any other matter believed to be crucial to achieving a fair go all round to be taken into account in the overall assessment of any compensation ordered in lieu of reinstatement (*Sprigg v. Paul's Licensed Festival Supermarket* (1998) 88 IR 21 at 31).
>
> (k) The Commission is also bound pursuant to s 26(1)(c) to have regard for the interests of the persons immediately concerned whether directly affected or not.
>
> (l) To the extent that it is relevant, the Commission is directed to take into account the matters set out in s 26(1)(d)

of the Act: ***Gilmore*** (4447) (Sharkey P), (4449) (Gifford C). Section 26(1)(d) provides:

> In the exercise of its jurisdiction under this Act the Commission —
>
> (d) shall take into consideration to the extent that it is relevant —
>
> (i) the state of the national economy;
>
> (ii) the state of the economy of Western Australia;
>
> (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
>
> (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;
>
> (v) any changes in productivity that have occurred or are likely to occur;
>
> (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
>
> (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

It is notable, however, that it is unlikely that the matters set out in s 26(1)(d) will be raised on the facts as a relevant consideration when determining an assessment of compensation.

(m) When deciding questions of future loss, assistance can be derived from ***Malec v J C Hutton Pty Ltd*** [1990] HCA 20; (1990) 169 CLR 638 in which it was held by Deane, Gaudron and McHugh JJ that a court must assess the degree of probability that an event would have occurred or might occur, and adjust its award to reflect the degree of probability. Unless the chance is so low as to be regarded as speculative or so high as to be practically certain, the chance is to be taken into account in assessing compensation: ***Bogunovich [No 2]*** (8) (Sharkey P).

(n) How long an employee would have remained employed by the employer is a matter that is relevant to an assessment of loss causally connected to an unfair dismissal. In particular, it may be open to find on the evidence that an unfairly dismissed employee could have been fairly dismissed by the employer at a time post the dismissal*:* ***Bogunovich [No 2]*** (13) (Kenner C). It may also be open on the evidence that an employee may have left the employer's employment voluntarily at some point in the future following the dismissal: ***Bogunovich [No 2]*** (13) (Kenner C). However, there would need to be evidence capable of characterisation as more than mere speculation and that there was a real prospect of the employment being terminated fairly at some point thereafter (the dismissal): ***Fisher & Paykel Australia Pty Ltd*** [79] (Kenner C), [2] (Ritter AP).

(o) It has been found that unconscionable or culpable conduct on the part of the employer and employee in the employment relationship and the issues that went to the determination of whether the termination of employment was unfair are not relevant in assessing loss and injury; that is, loss or injury is not to be assessed by reference to fault: ***Capewell v Cadbury Schweppes Australia Ltd*** (1997) 78 WAIG 299, 302 (Sharkey P), (305) (Coleman CC); ***Bogunovich [No 2]*** (8) (Sharkey P), (13) (Kenner C). This principle must be qualified by the observation made by Kenner C in ***Bogunovich [No 2]*** at (13), that this principle does not prohibit a finding by the Commission on the evidence that the employment may not have continued for a long period. To this qualification we would add the observation that it is well established by the authorities, in particular ***Lynam v Lataga Pty Ltd*** [2001] WAIRC 02420; (2001) 81 WAIG 986 [56] - [58] and ***AWI Administration Services Pty Ltd v Birnie*** [2001] WAIRC 04015; (2001) 81 WAIG 2849 [200] (Coleman CC and Smith C) in which it was accepted that the circumstances in which the dismissal from employment has been effected, such as callous treatment, may be sufficient to demonstrate the injury which is experienced. However, it is the injury itself, not the actual conduct of the employer, including callous treatment, which is the condition precedent for compensation for injury. There may be unreasonable conduct but it may not necessarily lead to the employee suffering an injury. That is a question of fact. For example, in ***Lynam***, the evidence was of the stress and injury suffered by Mr Lynam including grinding his teeth at night, feeling hard done by and upset. It was the 'callous, oppressive and humiliating course of conduct culminating in a dismissal and injury to Mr Lynam' [58]. (original emphasis).

184 The evidence is that the applicant following the termination, commenced employment directly with Client A's family on 25 March 2024 as a private support worker.

185 The respondent's evidence is that shift rosters were scheduled four weeks in advance. The first two weeks of the shift roster was published in advance.

186 The respondent argues the services to the client were suspended pending the review of the safety plan. Consequently, the applicant would not have been rostered for shifts with the client. However, had the applicant been afforded an opportunity to participate in the review or respond to the allegations, her input may have affected the duration of any suspension. There is a degree of speculation regarding the effect on the applicant's roster and duration of the suspension.

187 There are ten days between the applicant's dismissal and her securing employment on 25 March 2024. In accordance with s 23A(9) of the Act, I have averaged the hours of work per week for the month of February and find that the applicant worked

on average 19 hours per week. Therefore, I will order that the applicant be paid the equivalent of 19 hours of work.

Remedy – Compensation for injury

188 The applicant also seeks an order for injury caused by the dismissal. The applicant submits that she has needed to consult with medical practitioners and undertake psychological treatment due to escalating anxiety and recently diagnosed depression.

189 In support of her contentions, the applicant's evidence includes:

(a) A mental health plan completed on 20 March 2025;

(b) A letter from a registered psychologist to the applicant's general practitioner dated 9 April 2025 concerning the applicant's referral for depression;

(c) Notes of the applicant's consultation with Dr Chye dated 8 July 2024;

(d) Notes of the applicant's consultation with Dr Chye dated 10 January 2025, and

(e) Notes of the applicant's consultation with Dr Schaffer dated 7 May 2024.

190 In ***Mark Darren Richards v GB & G Nicoletti*** [2016] WAIRC 00941; (2016) 97 WAIG 117 [37] and [38], the Full Bench outlines the principles to be applied in considering an award for injury:

> 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 ***Birnie*** wherein it was said [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.

191 When a claim for injury is made, the claim must be supported by sufficient evidence: ***AWI Administration Services Pty Ltd v Birnie*** [2001] WAIRC 04015; (2001) 81 WAIG 2849 (***Birnie***) [200]. Furthermore, the injury incurred must be beyond the distress experienced in most dismissal cases: ***Lynam v Lataga Pty Ltd*** [2001] WAIRC 02420; (2001) 81 WAIG 986 [56].

192 There is no doubt that the applicant was distressed by the respondent's decision to dismiss her.

193 However, I cannot find on the evidence before me that the conditions suffered by the applicant have a causal link with the termination of employment, as required by ***Birnie***.

194 Given this, I decline to make an order for injury.

Conclusion

195 For the reasons set out above, I will order that the respondent pay the applicant $608 gross within 14 days of the date of the order issuing.

2026 WAIRC 00884

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LISA KING
	APPLICANT
	-v-
	THE TRUSTEE FOR SARAHS FAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 22 SEPTEMBER 2026
FILE NO/S	U 23 OF 2024
CITATION NO.	2026 WAIRC 00884

Result	Application upheld
Representation	
Applicant	Ms L King
Respondent	Ms S O'Sullivan

Order

HAVING heard from the applicant on her own behalf and the respondent on her own behalf, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the respondent pay the applicant $608 gross, as compensation for loss, within 14 days of the date of this order.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00885

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00885
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 20 JANUARY 2026
DELIVERED	**:**	TUESDAY, 22 SEPTEMBER 2026
FILE NO.	**:**	U 65 OF 2025
BETWEEN	**:**	MYKCAL SCOTT Applicant AND DIRECTOR GENERAL, DEPARTMENT OF JUSTICE Respondent

CatchWords	**:**	Industrial Law (WA) - Unfair dismissal application - Probationary discharge - Youth Custodial Officer - Out of time - Whether to accept application out of time - Extension of time and substantive matter heard and determined together - Whether employers concerns were genuinely held - Whether dismissal was a disproportionate penalty - Serious misconduct - Breach of professional boundaries - Principles applied - Employers concerns were genuinely held - Doubt over applicant's suitability - Right to dismiss not misused or abused - Not unfair to not accept application out of time - Application refused out of time
Legislation	**:**	*Industrial Relations Act 1979 (WA)* *Young Offenders Act 1994 (WA)* *Young Offenders Regulations 1995 (WA)*
Result	**:**	Application refused to be accepted out of time
Representation:		
Applicant	**:**	Mr M Scott
Respondent	**:**	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Annette Tracy Garlett v Brendan Penzer - Wirnda Barna Artists Inc [2015] WAIRC 00911; (2015) 95 WAIG 1645

Crabtree v Director General, Department of Education [2021] WAIRC 00538; (2021) 101 WAIG 1401

East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth [2000] WAIRC 00067; (2000) 80 WAIG 3155

Lawn v Director General, Department of Justice [2024] WAIRC 00773; (2024) 104 WAIG 1926

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Michael Moore-Crouch v Goldfields Individual and Family Support Association (Inc.) t/as GIFSA [2014] WAIRC 01364; (2014) 95 WAIG 147

Van Der Heyden v Community Arts Network Ltd [2022] WAIRC 00211; (2022) 103 WAIG 341

Reasons for Decision

1 Mr MykCal Scott (**applicant**) was formerly employed as a Probationary Youth Custodial Officer at the Banksia Hill Detention Centre from 29 April 2024.

2 The Director General, Department of Justice (**respondent**) discharged the applicant from office under regulation 52A(2) of the *Young Offender's Regulations 1995* (WA) (**the Regulations**), effective on 28 April 2025.

3 The applicant says his discharge was unfair because he did not misconduct himself in the manner alleged by the respondent, the conduct in question was not misconduct, and the respondent failed to adequately consider the context of the conduct. In addition, the applicant submits dismissal was a disproportionate penalty and that the respondent had other penalties available.

4 The applicant seeks orders for compensation of $60,000 for loss of income, reputational damage, pain, suffering and emotional distress.

5 The respondent opposes the orders sought because the respondent considers there were genuinely held concerns for the applicant's conduct. The respondent says their right to discharge was exercised without misuse or abuse.

Out of Time

6 The applicant filed the unfair dismissal application on 12 June 2025. As the applicant was dismissed on 28 April 2025, the application was filed outside of the prescribed 28-day time limit. Prior to filing the unfair dismissal application, the applicant filed a Form 8C – Notice of Appeal challenging his dismissal under s 11CH(2) of the *Young Offenders Act 1994* (WA) on 27 May 2025.

7 Whilst the respondent accepts the applicant has been relatively prompt in filing the present application after being informed the Form 8C was the wrong application, the applicant had not provided any explanation for his delay in filing the initial notice of appeal.

8 Section 29(3) of the *Industrial Relations Act 1979* (WA) provides the Commission power to accept an application that is out of time if the Commission considers that it would be unfair not to do so.

9 On 1 October 2025, directions were issued to hear and determine the question of whether to accept the application out of time at the hearing of the substantive application of unfair dismissal: [2025] WAIRC 00819.

10 The factors to be considered in determining whether to accept an application for unfair dismissal out of time, are set out in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51; (2004) 84 WAIG 683 [26]:

> Like E M Heenan J, I consider that the principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six 'principles' (at 299 - 300):
>
> 1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.

Length of Delay

11 The application was filed on 12 June 2025. The applicant was discharged on 28 April 2025. Therefore, the application was made 17 days beyond the prescribed timeframe.

12 The delay is not lengthy and this weighs in favour of accepting the application out of time.

Reasons for Delay

13 The applicant's unfair dismissal application was received in the Commission's Registry on 3 June 2025. Following the rectification of a number of procedural errors, the application was accepted for filing on 12 June 2025.

14 On 3 June 2025, the Registry wrote to the applicant to advise that the application was incomplete. On 6 June 2025, the applicant wrote to the Registry to enquire as to whether the Form 2 been received. On 9 June 2025, the Registry wrote to the applicant forwarding the original email of 3 June 2025. On 11 June 2025, the Registry sent a follow up email. On 12 June 2025, the applicant submitted an amended application which was subsequently accepted for filing and served upon the respondent.

15 The process of filing the application was affected by a number of deficiencies, requiring the applicant to make changes and rectify any errors.

16 Commencing legal proceedings in jurisdictions involving the regulation of public sector employment, can be confusing. I accept that the applicant was genuinely attempting to make an application for unfair dismissal. However, the application was delayed because of two errors. Firstly, the application was commenced in the wrong jurisdiction. Secondly, the application was not properly completed.

17 In these circumstances, this factor is a neutral consideration.

Other actions taken by the applicant

18 The applicant did file a Form 8C – Notice of Appeal on 27 May 2025. The respondent was on notice that the applicant was challenging his dismissal from 28 May 2025, being the date on which the respondent was served with the notice.

19 This factor favours accepting the application out of time.

Prejudice to the respondent

20 The respondent does not raise prejudice except to the extent there is any prejudice in responding to the claim.

21 The respondent accepted that the decision of whether to accept the application out of time, would be heard and determined alongside the substantive unfair dismissal application.

22 In these circumstances, I find there is no prejudice to the respondent and this a neutral factor.

Persons in a similar position

23 Delays due to the confusion of the Commission's jurisdiction, have been considered previously. In circumstances where the delay is due to the applicant filing in the incorrect jurisdiction, the facts need to be assessed based upon how the applicant has responded to the identification of the error. This has been considered previously in: ***Michael Moore-Crouch v Goldfields Individual and Family Support Association (Inc.) t/as GIFSA*** [2014] WAIRC 01364; (2014) 95 WAIG 147 where an application was accepted out of time after the applicant promptly amended his jurisdictional error once he was made aware of it.

24 In circumstances where the applicant was made aware of the error and did not act upon it promptly, it would not be unfair to refuse the application: ***Annette Tracy Garlett v Brendan Penzer - Wirnda Barna Artists Inc*** [2015] WAIRC 00911; (2015) 95 WAIG 1645, ***Van Der Heyden v Community Arts Network*** Ltd [2022] WAIRC 00211; (2022) 103 WAIG 341.

25 In this matter, the applicant acted promptly to file this application once he became aware he had attempted to make an application in error.

26 This factor weighs in favour of accepting the application out of time.

Merits of the application

27 In determining the merits of an application for the purpose of deciding whether to accept an application out of time, the assessment is to be on a 'rough and ready' basis: ***Jackamarra v Krakouer*** [1998] HCA 27; (1998) 195 CLR 516 (***Jackamarra***).

28 In this matter, the merits of the claim were substantively heard and determined as set out below.

29 For the reasons set out below, this factor weighs against accepting the application out of time.

Unfair dismissal - Background

30 On 3 November 2025, the parties filed a statement of agreed facts and a bundle of agreed documents containing:

(a) the applicants' contract of employment;

(b) the respondents' letter to the applicant regarding suitability concerns dated 25 February 2025;

(c) the applicants' response to the suitability concerns dated 25 March 2025;

(d) the respondents' letter discharging the applicant dated 24 April 2025; and

(e) CCTV Footage of the incident subject to the discharge letter taken on 21 February 2025;

31 Both parties agree that the applicant was a Probationary Youth Custodial officer and had commenced his training on 29 April 2024. The applicant's employment was subject to a 12-month probationary period, which was due to end on 29 April 2025.

32 The applicant called Ms Monique **Seneviratne** and himself to give evidence on his behalf.

33 The applicant gave evidence of examples where the rules or practices taught at the Corrective Services Training Academy (**the Academy**) during his training, were not followed at Banksia Hill Detention Centre. The applicant says applying the

Academy's version of interaction with detainees, resulted in grievance amongst detainees and grievance amongst other officers through inconvenience.

34 The applicant refers to his observation of a Probationary Youth Custodial Officer who tried to apply the rules taught in the Academy and ended up having to write reports for two days. I understand the applicant says this is a reason to not always follow the rules or practices taught at the Academy.

35 The applicant says calling the recovery team for every single incident, would exhaust the facility's resources.

36 The applicant says his approach to interactions with detainees makes the day safer for the facility and safer for the other staff and detainees.

37 The applicant gave evidence of observing that at least some of the youth detainees made positive statements about him. They were positive if he was rostered on shift and they would 'protect' him and the officers rostered alongside him in high-risk situations.

38 The applicant gave an example of allowing detainees engaged in telephone calls to borrow his watch, so that they would be aware of the duration of the call and when their permitted time was ending.

39 In relation to the first allegation of misconduct, it is the applicant's evidence that the youth detainee called him 'gay' several times. He responded by leaning into the detainee, touching him on the shoulder and faked giving him a kiss. The applicant explains that he did not actually kiss the detainee and his lips did not touch the detainee. The applicant agrees that he was probably two to three centimetres away from the detainee and that the detainee leaned away from him.

40 In the second allegation of misconduct, the CCTV footage clearly shows the applicant grabbing the same detainee around the neck from behind. The applicant then steps away, and the applicant and detainee appear to raise their fists in pretence of getting ready to fight. The applicant then hugs the detainee and rolls him onto a table tennis table.

41 The applicant's evidence is that the purpose of his actions was to move the detainee away from the back of another officer in a manner that would not provoke the detainee. The applicant says Youth Custodial Officers are not to have their backs to the detainees at any time. The applicant says he used reasonable force to gently move the detainee away from the back of the other officer in a manner that would not inflame the situation.

42 Under cross-examination, the applicant agreed he did not advise the other officer to move away from the detainee or turn around so that he was facing the detainee before grabbing the detainee.

43 The applicant accepted during cross-examination that he received training on spatial awareness and that he was taught physical contact with a detainee was not acceptable unless it is required. The applicant recalls being provided with access to the 'Grooming Behaviours' document during his training, which was tendered in the proceedings by the respondent.

44 Under cross-examination, the applicant accepts his evidence is to the effect that he considers his conduct on both occasions, was appropriate playful banter that could be a positive method to engage detainees.

45 The applicant says that whilst he does not agree his conduct was unprofessional and inappropriate, he is remorseful for how the video footage would look on a media report.

46 Ms Seneviratne gave evidence that when working at Banksia Hill Detention Centre, she had witnessed inappropriate conduct such as officers 'pushing kids' and an incident where an officer punched a youth detainee in the face multiple times. Ms Seneviratne says the officer involved in that incident continued to be employed at the facility. Ms Seneviratne says that officers 'on the floor' told her to '… ignore everything that we were taught at the academy and just pick it up when we learn and – like, ourselves, and – based on what we want to do as officers' (ts 4).

47 Under cross-examination, Ms Seneviratne agreed she had commenced training at the Academy in June 2025 and commenced at Banksia Hill Detention Centre on 5 September 2025. In November 2025, she sustained an injury at work resulting in an absence from the workplace. Therefore, her experience as a Youth Custodial Officer was approximately two months experience.

48 Ms Seneviratne agreed that the training for Youth Custodial Officers included grooming and spatial awareness training. Youth Custodial Officers are taught in the academy that unless there is a need to make physical contact with a youth detainee there should always be a distance of two metres or more. Ms Seneviratne agreed that it is not appropriate to kiss a youth detainee on the neck or the cheek in a playful manner, nor is it appropriate to play wrestle with a youth detainee.

49 The respondent called Mr Keith **Dash**, the Team Leader of Youth Justice Training at the Academy to give evidence. Mr Dash gave evidence about the 13-week training program given to Probationary Youth Custodial Officers which covers mental health, first aid, trauma informed care, grooming, defensive tactics and the appropriate use of force. The training involves both classroom and practical scenario settings. Mr Dash specifically gave evidence on the 'Grooming Behaviours Youth Custodial Officer Entry Level Program' Slide Presentation Training Tool.

Allegations and Discharge process

50 By letter dated 25 February 2025, the applicant was informed of concerns regarding his suitability to remain as a Probationary Youth Custodial Officer at the Banksia Hill Detention Centre. The letter sets out the alleged conduct of concern:

> …
>
> a) On 21 February 2025, you were on duty at Banksia Hill Detention Centre.
>
> b) During your interaction with a male detainee, you kissed him on the neck.
>
> c) Shortly afterwards you engaged in rough play with the detainee where you grabbed him around the back of the neck and then pushed him backwards onto the table tennis table.

d) The physical contact you made with the detainee was unnecessary and inappropriate.

51 The applicant was advised he was not to attend duty until further notice. The applicant was informed he may provide a written response within seven days of receipt of the letter.

52 On 25 March 2025, an industrial officer from the Civil Service Association (**CSA**) provided a written response on behalf of the applicant:

Incident One

Mr Scott understands that both incidents outlined in the Allegation Letter were examples of inappropriate behaviour and is genuinely remorseful for this; however, we believe that it is important to provide further context to reflect the circumstances of the events more accurately. The first issue to be addressed in this matter is that upon viewing the CCTV footage of the alleged incidents, Mr Scott submits that the detainee who is subject of the Allegation Letter is not one singular detainee, but two separate detainees.

Concerning the first allegation, wherein it is alleged that Mr Scott kissed a detainee on the neck, Mr Scott contends that, while he understands that this type of gesture is inappropriate, he did not make contact with the detainee. Mr Scott's comments are provided below:

> *"The gesture was part of an ongoing playful banter with the particular detainee who has a history of riling up officers by saying usually highly inappropriate comments and personally offensive statements to get under an officer's skin.*
>
> *My response to these insults, names, and statements is to 'roll with the punch' and so, after being called gay many times (among other things) I moved toward the detainee to feign blowing them a kiss to get them to find another way to interact than to simply call inappropriate names. At no point did my lips connect with the detainee anywhere."*

It is shown in the CCTV footage that Mr Scott turned his face away from the detainee as he leant in, he did not make contact with the detainee. Further to this, Mr Scott is aware that the health and safety of YCOs, as well as the detainees, is of the utmost importance and understands that this type of contact could be potentially dangerous for himself, hence, he would not put himself, or the detainees, at risk in that way.

Allegation Two

Concerning the second allegation, Mr Scott reiterates his remorse for the overstepping of boundaries when getting caught up in horseplay. Mr Scott maintains the fact that this act was not one of aggression or malintent. Mr Scott submits the following:

> *"As with the first event, the camera is not showing the totality of the event. Yes, I pushed the detainee over while he was already sitting on the table tennis table, but in no way was the interaction rough play. It was a gentle rolling over of the detainee in response to a similarly inappropriate comment as above."*

Mr Scott understands that both incidents outlined in the Allegation Letter were examples of inappropriate behaviour and, upon reflection, is regretful of the way that this type of asinine repartee has reflected on his performance as a YCO as he takes great pride in his position at Banksia Hill Detention Centre ("BHDC").

Conclusion

Mr Scott wholly accepts that his behaviour on the day of 21 February 2025 was inappropriate and in breach of Department's Code of Conduct. Mr Scott accepts that there must be consequences for his lapse in judgement and failure to uphold the Code of Conduct.

The CSA submits that conduct does not occur in a vacuum, but in the course of the day-to-day interactions of persons and circumstances. The events which lead up to an action, and those which accompany it, may qualify or characterise the nature of the conduct involved as noted in the decisions of *Qantas Airways Ltd v Cornwall* [1998] FCA 865 and *Claydon v Celotti Workforce Pty Ltd T/A Celotti Workforce* [2021] FWC 6318.

Accordingly, Mr Scott's conduct needs to be considered in the context in which it occurred. BHDC is an extraordinarily dynamic environment in which staff and detainees face a range of pressures in their day-to-day surroundings. BHDC is unique to many other detention centres in that the detainees are extremely vulnerable youth, for which we appreciate that the Department is now acting to ensure that duty of care obligations are fulfilled.

Mr Scott noted that following the tragedy that occurred at BHDC in August of 2024, many YCOs have made a concerted effort to further connect with detainees in an attempt to ensure the environment is more supportive of detainees who may be dealing with mental health issues. While Mr Scott was not employed at BHDC at the time, he is aware of how impactful these types of events are on YCOs and the detainees.

Mr Scott has attempted to approach his position as a YCO in a restorative way as many of the children in custody at BHDC have not had positive adult role models throughout their lives. He strongly believes that YCOs have the unique ability to play a beneficial role in the rehabilitation of the detainees. Accordingly, Mr Scott has attempted to forge productive relationships with the detainees that includes providing them with encouragement and guidance in the hope that they will not remain in the cycle of incarceration.

Mr Scott feels that he has a unique ability to connect with children in these situations as he himself had a background that could have led him down a similar path. Mr Scott believes that, in order to establish a genuine connection with the detainees, you often have to meet them on their level. This can, at times, seem unorthodox when viewing day-to-day interactions in a vacuum. Mr Scott has found that this has been an effective way of working with the detainees that is beneficial for both parties long-term and will hopefully provide the detainees with a positive adult influence during a

difficult period of their lives.

To further evidence the dedication Mr Scott shows to mentoring younger people, he is also a youth pastor and has been involved in youth mentoring for over 30 years. Mr Scott has dedicated much of his life to helping children in vulnerable circumstances who may have previously struggled to envision a different future for themselves. In forging constructive relationships with detainees, Mr Scott has ensured that respect goes both ways and that he isn't a one-dimensional authority figure to them, which can lead to behaviour that, lacking context, may seem over-familiar. Mr Scott elaborates on this below:

> *"I have found that the ethos I have brought into my job and the careful play-based interaction has enabled me to be able to reach kids where they are at than simply standing in the corner and issuing instructions all day. It builds rapport, and rapport builds respect on the ground with the detainees."*

While Mr Scott has thoroughly reflected on the incidents and is aware of the way in which his conduct overstepped a line, he maintains that there was no malicious intent behind his action and that it was simply asinine repartee that is commonplace to the environment that, in this instance, went too far. Mr Scott notes that once a YCO reaches BHDC, there is little guidance given regarding day-to-day interactions with the detainees and that much of it is learned through observing interactions between other YCOs and detainees. Mr Scott reflects this in his submission below:

> *"As there is no formal mentoring on the ground at Banksia, we have to learn our own way of establishing a respect-based relationship with each detainee. My way has largely been to observe other, more experienced, officers at work. Nothing in the above actions have I not seen other officers do in a similar attempt to make active connections / relationships with the detainees, for which I have witnessed to have great effect. So, I have attempted to emulate that model rather than that of simply standing by and issuing orders."*

Mr Scott unreservedly apologises for any harm caused by his conduct of 21 February 2025. In hindsight, he is aware that the way he conducted himself was not conducive to effectively fulfilling his role as a YCO. Mr Scott unreservedly apologises to the two detainees for any harm that may have been caused by his behaviour. He would appreciate the opportunity to present and express his deep remorse for his behaviour and he would also like to acknowledge the impact that this may have had on them and their rehabilitation. Further to this, Mr Scott provides the Department with an unconditional assurance that this behaviour will not be repeated and that any course/s that the Employer deems to be appropriate to maintain and reinforce behavioural standards in accordance with the Code of Conduct shall be attended to and completed.

Mr Scott understands that a fair, effective, and safe corrections environment ensures the complex work performed by YCOs at BHDC is valued and that inappropriate behaviours and integrity risks are effectively managed, that is, that they are managed in a fair, safe, and humane manner for all involved. Mr Scott accepts that there must be consequences for his failure to maintain the Department's Code of Conduct in this instance. He now seeks to re-establish a relationship of trust and confidence with the Department, the other BHDC staff, and the detainees by developing more mutually beneficial and effective ways to interact with the detainees.

Mr Scott is committed to taking all steps possible to deal with the issues that led to his errors in judgement, and he genuinely commits to ensuring that no such errors will occur in the future.

53 On 24 April 2025, the respondent wrote to the applicant informing him that she had considered his response and had decided that he would be discharged from office pursuant to regulation 52A(2) of the Regulations for the following reasons:

> The probationary period provides me with an opportunity to assess a youth custodial officer's suitability prior to the Department committing to your permanent status. Suitability includes an assessment of that person's awareness of the integrity and accountability expected of them, both when on duty and their associations in the community.
>
> This opportunity to assess suitability during the probationary period is critical to maintaining public confidence in employees of the Department, who in their roles are given significant powers over vulnerable populations, in an environment where officers are potentially exposed to significant risks of corruption.
>
> The Department's Code of Conduct is unequivocal regarding expectations for staff physical interactions with children and young people in our care. It emphasises the critical importance of maintaining professional boundaries and ensuring that all interactions are appropriate, respectful, and beyond reproach.
>
> Regrettably, you did not adhere to these stringent guidelines. Specifically, your conduct when dealing with a young male detainee fell short of the required standards of professionalism and appropriateness. This lapse in judgement could easily be perceived by a reasonable person as inappropriate or unprofessional. Such behaviour undermines the trust and safety that are paramount in our care environment.
>
> It is imperative that all employees strictly comply with the Code of Conduct to uphold the integrity and safety of our care practices. Your actions failed to reflect the highest standards of professionalism to foster a secure and respectful environment for individuals in our care.
>
> While I have carefully considered your response to the information put to you by Mr Livingstone and I note that you are remorseful and accept responsibility for your actions, I am satisfied that that the physical contact you made with a male detainee was unnecessary, inappropriate and unacceptable.

Factual contentions of the parties

54 The respondent contends the applicant's conduct failed to maintain appropriate professional boundaries and contravened Standard Two in the Department's Code of Conduct, which states in part: 'Give very close attention to ensuring that our conduct when dealing with children and young people is professional and appropriate at all times and is not likely to be misinterpreted by a reasonable person'.

55 The respondent says that it is not appropriate for Youth Custodial Officers to make unnecessary physical contact with youth detainees. The respondent submits it is particularly inappropriate to make a kissing gesture towards the neck of a youth detainee, even if it was intended in jest. The Department of Justice is reposed with significant levels of trust from the community to manage youth detainees in a way that is appropriate and professional having regard to the needs of young persons. The conduct at Banksia Hill Detention Centre goes on behind closed doors, and the respondent is entitled to expect the highest levels of professionalism by her Youth Custodial Officers when it comes to managing and engaging with youth detainees.

56 The respondent argues that the applicant's conduct provided a sufficient basis to hold concerns for the applicant's suitability to remain as a Youth Custodial Officer.

57 In the circumstances, the respondent's concerns were genuinely held and the respondent's right to dismiss was exercised without misuse or abuse.

58 The applicant argues that he was not warned or counselled for his actions.

59 The applicant says his conduct was an attempt to make positive changes in the detainees' lives.

60 The applicant says when viewed 'in the greater context' his actions ought not be considered sufficient to discharge him from office. The applicant submits his conduct demonstrates a commitment to the welfare of the youth detainees. The applicant relies on his efforts to ensure their interests are met, to gain their trust so that they respect his direction, and the positive feedback he has received from his colleagues, unit managers and senior officers. The applicant says his positive rapport with the detainees has saved staff from serious assault, as the detainees would comment that the applicant was 'one of the good guys'.

Principles

61 The applicant claims his dismissal was harsh, oppressive and unfair. The applicant says his conduct when viewed properly in context, was not a breach of the Department's Code of Conduct. In these circumstances, the applicant argues his discharge was harsh and disproportionate.

62 The respondent submits the applicant was discharged during probation and the test to be met is whether the employer had genuine grounds for concern that the applicant was not suitable for the position in which he was engaged. The grounds for concern do not need to be substantiated per se. Instead, the focus is on whether the employer's concerns were genuinely held and whether the employer's right to discharge was exercised without misuse or abuse.

63 The principles relating to probationary discharge are summarised by the Full Bench in ***East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth*** [2000] WAIRC 00067; (2000) 80 WAIG 3155 (***East Kimberley***) [49]:

> Again, the following principles apply:
>
> (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
>
> (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
>
> (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
>
> (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
>
> (d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).
>
> (ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see S*ommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).
>
> (e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein).

64 The Commission may have regard to and place weight upon the subjective views of the respondent in relation to the applicant's suitability in matters concerning probationary employees: ***Lawn v Director General, Department of Justice*** [2024] WAIRC 00773; (2024) 104 WAIG 1926 [18] citing ***Crabtree v Director General, Department of Education*** [2021] WAIRC 00538; (2021) 101 WAIG 1401 [32].

Consideration

65 At the commencement of the probationary period, Youth Custodial Officers undertake training at the Academy. Part of the training includes identifying the appropriate situations to have physical contact with youth detainees. The training tool 'Grooming Behaviours Entry Level Training Program' states on page 46:

> What is not in your remit?
>
> …
>
> • 'Physical contact with a detainee except where your duties deem this appropriate (providing first aid, prescribed use of force, applying instruments of restraint etc)'. (**Exhibit R2**)

66 The evidence is clear from the CCTV footage that the applicant's physical contact with the detainee, did not comply with the standards taught in the training.

67 The applicant contends that his behaviours and interactions with the youth detainees developed rapport with them. In his evidence, the applicant gave examples of situations in which his presence and approach, instilled a positive impact on the detainees:

> … This interaction between myself and this detainee is, in my opinion, um, the more appropriate approach to take than simply applying, ah, the law according to – for want of a better word, ah, the Department's teaching and the Department's code of conduct.
>
> Because neither of those things are going to be successful in maintaining the good order of the facility. They're not going to be successful in maintaining this particular detainee, um, in a place where he's not going to be a management problem. Like a lot of the detainees there, ah, playful banter between officers and detainees is the most successful way to keep and maintain, um, a positive outlook in the detainee, and, therefore a positive outlook in the wing, the unit. This particular unit, where these allegations have taken place, is the ISU. We had transferred this detainee down to the ISU moments before this had happened. And this is an extension of that. So when I went to this unit with the other YCO, when this particular detainee saw that it was me, he calmed down, calmly turned around, put his head to the wall, as you – they're required to do, voluntarily put his hands behind his back, and allowed himself to be handcuffed and taken down to the ISU, because it was me.
>
> Now, this isn't an isolated incident. Um, there are many instances where my interactions with the detainees at Banksia Hill have resulted in positive outlooks for the day. Detainees know, "Okay. MykCal Scott's on – on roster today. It's going to be a good day". And at the end of the day, they are often asking me, "Hey, are you on again tomorrow?" Because they know it's going to be a good day tomorrow. This keeps the facility safe. It keeps the unit safe. It keeps other staff members safe. (ts 15)
>
> … But it's an example of unorthodox methods working at Banksia Hill. Methods that aren't taught at – at the – can't be taught at the academy, because interactions with each of the detainees, ah, is different. But if you find a way to positively interact with them, you are adding to the potential that no other officer is going to be injured, no other detainee is going to be injured, um, and the facility is going to be safe. Another example of unorthodox interaction is my watch. (ts 16)

68 In relation to the two incidents raised by the respondent in the letter dated 25 February 2025, the applicant argues:

> Um, what they teach you at the academy doesn't instil that natively in the kids. You have to get into the kid's space. And the kids' space isn't the academy space. It isn't the Department's space. But if you're going to work in a kids' space, you have to get into that space to be effective. That was the intention of these two interactions, was to keep this offender, detainee, in a happy place, because that has positive benefits for the rest of the day, for the rest of the facility. (ts 18)

69 The applicant's evidence is that upon commencing at the facility he was told, as all officers are told, to forget everything that was taught at the Academy and to rely on the facility's informal rules and expectations.

70 In his evidence, the applicant was critical of the standards and practices taught during his training and asserts the practices he adopted should be preferred. The applicant accepts his approach conflicts with the respondent's standards and practices; however, he asserts his practice ought to be preferred because they produced better results.

71 The respondent has adopted a standard requiring Youth Custodial Officers to limit physical contact with youth detainees unless appropriate, and to maintain spatial awareness by adopting a distance of two metres or more from youth detainees.

72 The respondent did not consider the applicant's views about the appropriate method to interact with youth detainees at the time of arriving at a decision to discharge him from office. This is because the applicant's response to the two allegations, through his representative at the CSA, was that he accepted his conduct was inappropriate.

73 Considering the applicant's evidence and submissions, I am not convinced the applicant's true views are reflected in the response provided to the respondent on 25 March 2025.

74 The applicant's opinions of the efficacy or appropriateness of the respondent's training, standards and approaches, are irrelevant to a consideration of whether he must abide by them. The applicant's contract of employment states:

CONDUCT AND BEHAVIOUR

15. It is your responsibility upon commencing in this position to ensure that you abide by and remain familiar with the Public Sector Code of Ethics, the Department of Justice Code of Conduct and all legislation, policies, rules, guidelines and professional standards applicable to your employment in this position, as may be introduced and amended from time to time. These are available to all employees on the Department website. If you do not have access to the website you may request copies from your manager. You will from time to time be required to undergo alcohol and drug testing and you will comply with such requirements.

16. You will be required to comply with the *Young Offenders Act 1994,* the *Young Offenders Regulations 1995,* Juvenile Custodial Rules, Australasian Standards for Juvenile Custodial Facilities, Standing Orders, Local Orders and Procedures of the centre, as may be introduced and amended from time to time, copies of which will be made available to you at the centre.

75 The applicant's persistent criticism of the respondent's training and standards, and his view that when working at the facility it is better to act contrary to the standards, casts doubt over his suitability to be a Youth Custodial Officer. The conduct of the applicant in question, which is contrary to the requirements of his position, confirm that doubt.

Grooming and intentions

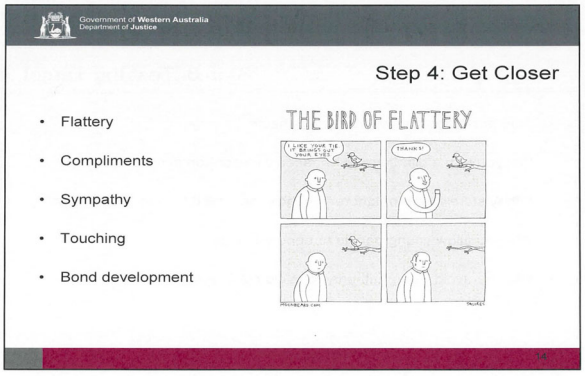
76 The applicant says that simply because there is physical interaction, it does not follow that there is a greater intent or grooming. The applicant argues that his conduct is not grooming because he did not intend to establish a relationship with the youth detainee.

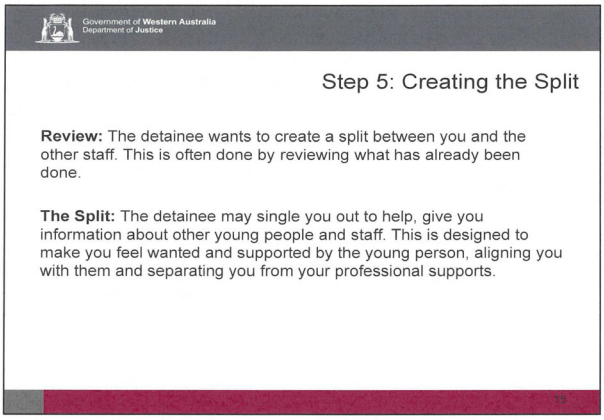
77 The applicant denies his conduct was grooming because the other youth detainees did not react during the incidents subject to the allegations. If he had been grooming a detainee, the applicant says the other detainees would recognise this and would have done something about it. The applicant in his evidence said:

> These kids know if you're trying to, ah, coerce them into something they don't want to do. They, ah – there are – a lot of these kids have been abused, have been assaulted by people that are close to them. So they are acutely aware of the potential for assault. They're acutely aware, a lot of them, of the potential for grooming, because they've been [g]roomed by adults in their lifetimes. They're acutely aware of it. This interaction with this detainee isn't that. And it's evidenced by the fact the detainee is still laughing and smiling about it. None of other kids moved. This isn't something, um, implied. There is no implied relationship beginning here. This isn't, um – this isn't grooming. It's not a kiss. It's not grooming. It's, um, a professional outlook trying to be applied to an unprofessional situation. (ts 24)

78 As I have noted above, the applicant's evidence is that some of the youth detainees made positive statements about him. The detainees were positive if he was rostered on shift and that they would 'protect' him and other officers with him in certain high-risk situations.

79 I note the behaviour described by the applicant fits within the examples in the training tool presentation slides 'Grooming Behaviours Youth Custodial Officer Entry Level Training Program' developed by the respondent and provided to trainees:





80 I accept the respondent's evidence that ascertaining the intention of a behaviour, is a challenge, and it is not readily apparent in many situations. That is the reason for adopting practices that apply to all situations. For example, a standard which prescribes physical contact between a Youth Custodial Officer and a youth detainee, is not appropriate unless it is necessary for the administering of first aid or in restraining a detainee.

81 In this matter, the behaviour of the applicant and that of any of the youth detainees, may not be seeking to manipulate or coerce the other person. It is not possible to ascertain whether the behaviour was intended to seek to manipulate in an adverse manner.

82 It is not necessary to find that the applicant's conduct was seeking to groom any youth detainees nor that the applicant was being groomed by them. The issue to determine is whether the respondent held genuine concerns that the applicant's conduct made him unsuitable to remain as a Youth Custodial Officer.

83 The applicant's submission that his conduct was appropriate because he was not seeking to establish a relationship with the detainee, is misconceived. The applicant fails to grasp the importance of adhering to the standards and practices so that it is not necessary to ascertain the intention.

84 I accept the respondent's evidence and submissions that the concerns for the applicant's conduct, were genuinely held, and the concerns were for the applicant's conduct regardless of his intentions.

Disciplinary process

85 I observe there is no evidence that the applicant was counselled and informed that his conduct did not meet the required standards. In addition, there is no evidence that the applicant was personally informed that his failure to meet the required standards, may result in his dismissal.

86 Consistent with ***East Kimberley***, the applicant may have expected to be counselled and informed he did not meet the required standards of behaviour and be warned that a continued failure to improve would result in his dismissal.

87 However, the applicant's evidence is that he knowingly did not comply with the respondent's standards for interaction with detainees because his approach although contrary and inconsistent with the respondent's standards and practices, are in his view superior. The applicant's evidence leads me to conclude there is a genuine question of the applicant's suitability for the role.

88 In the context of the probationary period being an extension of the selection process, as observed in ***East Kimberley*** [49], I would uphold the respondent's decision to discharge and dismiss the application.

Conclusion

89 In this matter, having considered the evidence and submissions from both parties, I would dismiss the application on the basis that the respondent's exercise of the decision to discharge because of the concerns for the applicant's suitability, was not a misuse or abuse.

90 In relation to the question of whether to accept the application out of time, I adopt the reasoning in ***Jackamarra*** and given my conclusions in the substantive matter, I find that it would not be unfair to refuse the application out of time and therefore, I will refuse to accept the application out of time.

2026 WAIRC 00889

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MYKCAL SCOTT
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 24 SEPTEMBER 2026
FILE NO/S	U 65 OF 2025
CITATION NO.	2026 WAIRC 00889

Result	Application refused to be accepted out of time
Representation	
Applicant	Mr M Scott
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), hereby orders –

THAT the referral of this application out of time be, and by this order, is refused.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00856

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT WILLIAM BRADY
	APPLICANT
	-v-
	SL TUCKETT & WB TUCKETT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 11 SEPTEMBER 2026
FILE NO/S	U 74 OF 2026
CITATION NO.	2026 WAIRC 00856

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an unfair dismissal application under s 29(1)(c) of the *Industrial Relations Act 1979* (WA) that was filed on 22 June 2026 and listed for a show cause hearing on 11 September 2026;

AND WHEREAS at the show cause hearing on 11 September 2026 there was no appearance for or by Mr R Brady;

AND WHEREAS the Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS service on Mr Brady was effected by sending notice of the hearing by email to the email address that Mr Brady provided to the Commission for the purpose of service and correspondence: r 25(3) of the *Industrial Relations Commission Regulations 2005* (WA), in circumstances where Mr Brady has no fixed address;

AND WHEREAS the Commission was satisfied that Mr Brady had been duly served with notice of the show cause hearing and proceeded in Mr Brady's absence;

AND WHEREAS Mr Brady has not progressed application U 74 of 2026 since 26 June 2026, despite the Commission:

(a) emailing him on 26 June 2026 to ask for his availability for a conciliation conference;

(b) emailing him on 2 July 2026 to follow up on his availability for a conciliation conference;

(c) telephoning him twice on 13 July 2026 and leaving him voicemail messages asking him to contact the Commission;

(d) telephoning him twice on 14 July 2026 and leaving him voicemail messages asking him to contact the Commission; and

(e) emailing him on 15 July 2026 to tell Mr Brady that the Commission is concerned that he is not prosecuting his application, and if he did not respond to the Commission's emails about listing a conciliation conference by 10 August 2026, then the matter would be listed for a show cause hearing. Mr Brady replied to that email the same day saying 'Received and understood', but did not respond to the Commission's emails about listing a conciliation conference or otherwise do anything to progress his application;

AND WHEREAS the Commission emailed Mr Brady on 13 August 2026 and told him that application U 74 of 2026 had been listed for a show cause hearing on 11 September 2026. If he did not attend the show cause hearing and show cause why his application should not be dismissed, application U 74 of 2026 would be dismissed for want of prosecution. Further, the Commission telephoned Mr Brady on 7 September 2026 and left a voicemail message reminding him that the show cause hearing was listed on 11 September 2026;

AND WHEREAS Mr Brady has not responded to the Commission since 15 July 2026, despite the Commission contacting Mr Brady many times about his matter, and did not attend the show cause hearing on 11 September 2026;

AND WHEREAS the Commission considers that application U 74 of 2026 should be dismissed for want of prosecution because:

(a) the two and a half month delay in prosecuting application U 74 of 2026 is a long delay in the context of an unfair dismissal application;

(b) there has been no explanation for that delay;

(c) there is no evidence of hardship to Mr Brady if his application is dismissed; and

(d) there is nothing before the Commission to suggest that the respondent's conduct in the matter has in any way contributed to Mr Brady's lack of prosecution of his application;

AND HAVING also given reasons for the decision during the hearing on 11 September 2026;

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

THAT this application be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2026 WAIRC 00855

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00855
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 19 SEPTEMBER 2025
DELIVERED	**:**	FRIDAY, 11 SEPTEMBER 2026
FILE NO.	**:**	U 104 OF 2024
BETWEEN	**:**	STEVEN ANDREW LLOYD
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
		Respondent

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Probationary employment - Principles of probationary discharge - Whether employer's concerns were genuinely held - Whether employer's right to discharge on probation was misused or abused - Performance concerns - Employers' concerns regarding performance were genuinely held - No improvement in performance - Right to discharge on probation not misused or abused - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Prisons Act 1981 (WA)
		Prisons Regulations 1982 (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr S Lloyd
Respondent	**:**	Mr M McIlwaine (of counsel)

Case(s) referred to in reasons:

Crabtree v Director General, Department of Education [2021] WAIRC 00538; (2021) 101 WAIG 1401

East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth [2000] WAIRC 00067; (2000) 80 WAIG 3155

Lawn v Director General, Department of Justice [2024] WAIRC 00773; (2024) 104 WAIG 1926

Reasons for Decision

1 On 22 October 2024, Mr Steven Andrew Lloyd (**applicant**) filed an unfair dismissal application against the Director General, Department of Justice (**respondent**) alleging his discharge on probation was harsh, oppressive and unfair.

2 The applicant was employed by the respondent as a Vocational Support Officer (**VSO**) to fill the position of Chef Supervisor at Greenough Regional Prison on 2 February 2024.

3 The applicant's appointment was subject to a nine-month probationary period in accordance with regulation 3(4) of the *Prisons Regulations 1982* (WA).

4 The applicant was discharged from his probation on the basis that the respondent was of the view that he was no longer suitable to be a VSO.

5 The applicant says his discharge was unfair because there were procedural defects in the performance improvement process. The applicant says that he was not correctly informed about the alleged inadequacies of his performance and there were no personal performance appraisals given at any stage of his employment.

6 The respondent submits that the applicant's discharge was warranted as his performance during the probationary period was unsatisfactory. The respondent says that the decision to discharge the applicant was substantively and procedurally fair, as the applicant's performance was consistently below the expected standard and the applicant failed to improve.

7 I must decide whether the respondent misused or abused its right to discharge the applicant on probation.

Legal Principles

8 The principles relating to probationary discharge are summarised by the Full Bench in ***East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth*** [2000] WAIRC 00067; (2000) 80 WAIG 3155 (***East Kimberley***) [49]:

> Again, the following principles apply:
>
> (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
>
> (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
>
> (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
>
> (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
>
> (d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).
>
> (ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see S*ommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).
>
> (e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)
>
> (ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein).

9 The Commission may have regard to and place weight upon the subjective views of the respondent in relation to the applicant's suitability in matters concerning probationary employees: ***Lawn v Director General, Department of Justice*** [2024] WAIRC 00773; (2024) 104 WAIG 1926 (***Lawn***) [18] citing ***Crabtree v Director General, Department of Education*** [2021] WAIRC 00538; (2021) 101 WAIG 1401 [32].

10 The focus is on whether the respondent's concerns were genuinely held and whether the respondent's right to terminate a probationary employee are exercised without misuse or abuse. It is not necessary for the grounds for concern to be substantiated: ***Lawn*** [95].

Evidence and Facts

11 Evidence was given by the applicant, Mr Steven Lloyd. The respondent called as witnesses to give evidence Mr Mathew **Cooper**, the facilities manager at Greenough Regional Prison; Ms Kylie **Crockett**, the Senior Project Officer of Catering at Greenough Regional Prison; and Mr Dean **Wellman**, the Assistant Superintendent of Offender Services at Greenough Regional Prison.

12 The applicant commenced employment with the respondent on 2 February 2024 as a VSO for the position of Chef Supervisor at Greenough Regional Prison.

13 On 6 March 2024, an external food safety audit was conducted by Food Safety Plus. This process was conducted on an annual basis with the previous audit conducted on 23 March 2023.

14 On 11 March 2024, Ms Crockett emailed the applicant, noting the audit report was received on 8 March 2024, and a response was required to be completed by 5 April 2024. The email identified nine 'non-compliance' areas to be addressed by the applicant in a response.

15 In late April and early May 2024, Mr Cooper received several complaints about the food quality and quantity.

16 On 8 May 2024, the applicant met with the Assistant Superintendent of Operations (**ASO**) Nicholas Mitchell and Mr Cooper. The Acting Assistant Superintendent of Offender Services (**AS**) Chantelle **Cameron** recorded the meeting. ASO Mitchell outlined concerns with the quality of meals, the quantity of meals and the attitude of the kitchen staff. Several other areas of concern were outlined including the arranged positions for the kitchen staff, the hours of work, breakfast packing production and the cleaning routines. The applicant was directed to prepare a plan for prisoner working hours that was consistent between shifts for presentation to a meeting in one week. The applicant would undertake to improve the quality and quantity of meals, ensure consistency across shifts with staff and discuss improvements which were required.

17 A week later, on 15 May 2024, the applicant met with ASO Mitchell and Mr Cooper as planned. AS Cameron recorded the meeting. It was noted that the issues concerning prisoner working hours, quality and quantity of meals and the discord amongst kitchen staff, had not been resolved. A concern relating to breakfast packing positions in the main kitchen was also raised. The outcome of the meeting was that the issues raised would continue to be monitored until there was improvement.

18 The evidence is that following the meeting on 15 May 2024, complaints continued to be received from prisoners and staff regarding the quality of the food. There were also concerns raised about the lack of produce being ordered, resulting in small quantities being served to prisoners. Mr Cooper and Mr Wellman conducted inspections of the kitchen between 22 July 2024 and 26 July 2024. Mr Cooper's notes from the inspections record the following issues:

> After events of Wednesday 24th FM and ASOS conducted a broad review of kitchen while VSO Lloyd was not on shift. Staff on shift were spoken too about their concerns and deficiencies were highlighted. Some of the issues noted were:
>
> - The dinner for that night had not been prepped in line with cook, chill and was awaiting supplies to be delivered that day.
> - Quantity of chicken not enough to fill containers for the planned dish and alternate needed to be identified to make meal quantity sufficient.
> - Under order of fresh produce from Bunbury further effected by some rotten veg arriving and no pre prepared veg arriving. This had been ongoing and a known issue at Bunbury but no compensation for reduced quantities arranged.
> - Prisoner lunch was 1 piece of quiche only. No fruit or rolls as no Produce had arrived and nothing prepped.
> - Mince identified as very finely ground leading to the unappetising look.
> - Fish for Friday dinner identified as not being adequate for serving with intended salad. 110g battered each piece with very small salad with no variety due to lacking produce.
> - PC Cereals were just enough to cover the week ahead, with no advanced holding.
> - 1 of the 2 external freezers was practically empty with less than 1 dinner meal identified as back up had been dated 23/09/2023.
> - No back up meals for lunches, no freezer stock identified as back up and no QF Veg.
> - Self-Care kitchen in Unit 4 noted to be preparing meals with whatever ingredients they could get with no planning for supplies in line with cyclic menu.
> - General cleanliness of the kitchen was poor.
> - Water only being used to clean with.

19 On 28 July 2024, Mr Cooper received a telephone call from the Principal Officer, Mr Craig **Javens**, who informed him that the applicant had not reported for duty and there were no backup meals. A Prison Officer with previous experience in the kitchens was deployed to prepare meals for lunch and dinner. Mr Javens reported to Mr Cooper that the kitchen was 'in a terrible state'. Mr Javens reported that there were food scraps on the floor and bread remained left in the bread slicing machine. In addition, the benches did not appear to have been cleaned. There were dirty knives on the benches, dirty water in the washing tubs and fat was dripping onto the floor. Mr Javens sent an email to Mr Cooper on 28 July 2024 attaching a number of photographs which were taken by the kitchen staff on the day: **Exhibit R13**.

20 On 31 July 2024, Mr Cooper issued an Internal Memorandum for the 'Greenough Kitchen Get Well Plan' (**Kitchen Care Plan**) to the Greenough Regional Prison Kitchen Staff and Senior Management Team. The document informed all recipients of the requirements to return the kitchen to full functionality and productivity.

21 On 31 July 2024, the applicant attended a meeting with Mr Cooper and Ms Cherie Williams, the Acting Business Manager of Greenough Regional Prison. Notes of the meeting were taken by AS Cameron. At the applicant's request it was arranged for the Laundry Manager to attend as a support person. Mr Cooper summarised the issues set out in six Regular Monitoring Forms (**RMF**) which were issued to the applicant. The applicant declined to respond and said that he would review the RMFs after the meeting and then respond later. Mr Cooper raised a further five issues for resolution and outlined a list of proposed

interventions. Mr Cooper informed the applicant he would be performance managed whilst on probation. The meeting concluded with Mr Cooper requesting the applicant provide his responses to the RMFs by 4:00 pm the following day.

22 The applicant signed the RMFs on 1 August 2024. The section for an optional employee response was left blank for each RMF.

23 The applicant's responsibilities included addressing the issues raised in the Kitchen Care Plan because he was the supervisor of the kitchen. The applicant was one of the recipients of the Kitchen Care Plan.

24 On 13 August 2024, Ms Crockett conducted an internal audit of the kitchen and provided a report to Superintendent Patten and Mr Cooper.

25 On 15 August 2024, the applicant met with Mr Cooper and Human Resources Coordinator, Ms Williams. The applicant was accompanied by the Laundry Manager as a support person. Notes of the meeting were recorded by AS Cameron. The notes reflect that Mr Cooper outlined matters from the Kitchen Care Plan concerning the supply of produce and set out the expectations going forth. Improvements to the cleanliness of the kitchen and the urgent need to address the replacement of plastic packaging were also raised by Mr Cooper.

26 On 28 August 2024, a meeting was held between the applicant, Mr Wellman and Ms Williams. The applicant was accompanied by the Laundry Manager as a support person. The record of the meeting reflects that further issues concerning supply shortages and food wastage were raised.

27 At the meeting, the applicant was issued four additional RMFs by Mr Cooper:

Regular Monitoring Forms (RMF's) handed to Mr Lloyd by Mr Cooper:

1. RMF 1 – Wastage due to the over-ordering of food supplies for the kitchen.

It was also noted that the following meat has been disposed of due to spoilage as it was not on the menu.

- 3 boxes approx 20kg each of soup bones, 8 boxes of red emperor fish. (23 Aug)
- 120kgs steak. (22 Aug)
- 30kg Sausages. (20 Aug)
- 1 box of Tuna. (17 Aug)
- 5 boxes Bok Choy (15 Aug)
- 30kg sausages, 30kg soup bones (29 Jul)
- 45kg Chops (23 Jun)
- 200kg prepped pumpkin (5 Jun)
- 40kg fresh chicken (07 May)
- 100kg fresh chicken (05 Apr)
- 7x 6kg lamb roasts that had been cooked but were not used. Were discarded. (04 Apr)

These noted disposals are only what is known and recorded in the kitchen diary. The level of wastage may be far in excess of normal. Above qualities are evidenced via kitchen staff recordings in kitchen diary.

2. RMF 2 – Plastics Ban

On 01 September 2024 the stage 2 plastics Ban for WA comes into effect. The Senior Project Officer - Catering Kylie Crockett sent information on 16 February 2024 to all catering managers at all WA Prisons including VSO Steve Lloyd. Mr Lloyd has not actioned this task which was raised in February 2024 and as of the 28/08/24 there are two more days until the 1st of September.

3. RMF 3 – Audit Non-Compliance

The kitchen internal audit was conducted by Senior Project Officer-Catering Kylie Crockett on the 13th and 14th of Aug 2024. This was a follow up audit after a non- compliant audit conducted during 28th and 29th May 2024. The August audit highlighted that the kitchen continues to be non-compliant and has worsened rather than improved.

4. RMF 4 – Non-compliance for Kitchen Care (Get Well) Plan

On Wednesday 31 Jul 2024 VSO Lloyd was issued a Memo which contained a plan for the kitchen to address shortfalls. Targets set were achievable and allowed for a build up over 3 weeks with the bulk to be completed in the last week to allow time for produce to be ordered and available. The date for completion was Friday 23 Aug 2024. During a meeting with VSO Lloyd on Thursday 15 Aug VSO Lloyd, he was reminded of the requirement to complete 1020 meals and 2 days worth of bread by 23 Aug 2024. It was also noted there had been 907 meals prepared and frozen which was in line with the plan to date. As of 23 Aug 2024 the additional requirements due by that date and identified to VSO Lloyd on 15 Aug 2024 had not been completed.

28 The applicant did not provide a response at the meeting and advised that he would do so after he had reviewed the documents.

29 On 17 September 2024, the Acting Executive Director of Management and Intervention at the Department of Justice wrote to the applicant, setting out the concerns the respondent held in relation to the applicant's performance and suitability:

I am writing to you about a matter that has come to my attention regarding your suitability to continue as a Chef Supervisor with the Department of Justice (**Department**) located at Greenough Regional Prison (**GRP**). Your

appointment is in accordance with s 3(1) of the *Prisons Act 1981*.

You commenced your employment as a Chef Supervisor with the Department on 4 February 2024. In accordance with r. 3(4) of the *Prisons Regulations 1982* (**Regulations**) you are required to serve a nine-month probation period.

During your time at GRP, you have been counselled on a number of occasions with regards to your performance and have been provided with support and guidance by the Senior Management Team and the Facilities Manager Matthew Cooper (**Mr Cooper**).

Based on the information that is currently available to me, I am proposing to recommend to the Director General that she consider your suitability to be a prison officer pursuant to regulation 5(4) of the Regulations.

30 The applicant provided a six page response to the matters set out in the respondent's letter on or around 25 September 2024. In the response, the applicant submits that:

(a) he was not counselled on his personal performance;

(b) he was not offered performance management;

(c) he was not given adequate information by management to perform his role;

(d) he was not offered or given a job description of the role;

(e) he was not given the appropriate training;

(f) he observed a negative and toxic environment amongst staff and towards him;

(g) the resources and facilities provided by senior management were insufficient;

(h) he has not been given a fair opportunity to improve his performance;

(i) termination would have an impact on his financial and personal circumstances; and

(j) he is willing to either undertake a performance development plan or step back to a level three position with a mentorship program.

31 On 3 October 2024, the respondent wrote to the applicant stating that his response had been considered and confirmed that she had decided to discharge him in accordance with regulation 5(4) of the *Prisons Regulations 1982* (WA).

Consideration

32 The applicant argues that he was unfairly dismissed because he was not provided with an opportunity to improve his performance. The applicant contends that the correct procedure was not followed.

33 The applicant asserts in his examination-in-chief that:

> … the correct procedure was not given to me by my line manager of the time, by way of the correct procedure is to email the person requesting a meeting with the said agenda, attend the meeting with the line manager, and then they would go through the process of outlining their potential concerns. And then, with discussion with the person in question, develop a strategy that would benefit the new employee and the established department. I was not given that opportunity by the correct procedure. And, in the short time - as I stated before - there were not official one on appraisals with me. And it's not until the meeting that I attended, which was an unscheduled meeting regards – I had no information, only 15 minutes prior knowledge, to attend a meeting. And at that meeting there was five individuals. And then the overwhelming information was given to me with their outlined concerns. It wasn't directed to me as an individual; it was as a group. Now, with the performance management, it is this person one-on-one, so it would be me that should be given a working plan that is suitable for the development of that person, not detrimental to their employment. I say that from that unannounced meeting transpired into my termination, because there was a lot of other information which was - was compounded by other ongoing day-to-day occurrences. So my main concern is that I was not given the correct procedure in the first instance, which would have helped develop a plan to suit a new recruited employee to improve, potentially, if whatever concern the line manager had, and that was not given (ts 4).

34 The applicant also asserts in evidence that many of the issues identified with his performance, were either the fault of other staff members or the nature of the facilities he was required to work under.

35 The applicant contends that he was not provided with a performance appraisal. The applicant says that if a proper performance improvement plan had been directed to him personally, there would have been a different outcome.

36 The applicant's response to the proposed discharge letter dated 17 September 2024, sets out his view that the issues were the fault of others, a result of obstacles and a lack of support from senior management. In summary, the applicant considers the performance issues were the responsibility of the entire team and not just himself individually.

37 I consider that the concerns held by the respondent were communicated to the applicant in both general terms and in detailed terms on several occasions. I conclude from my review of the evidence that these concerns were clearly about the applicant's personal performance. I also conclude this was clearly communicated to the applicant. The applicant was clearly informed of the respondent's concerns during meetings on:

(1) 8 May 2024;

(2) 15 May 2024;

(3) 31 July 2024;

(4) 15 August 2024; and

(4) 28 August 2024.

38 I do not accept the applicant's contention that the issues identified concerned the entire kitchen team and were not directed to him personally. Matters such as the quality and quantity of meals are clearly within the applicant's job description and his domain of responsibility. Other matters such as the kitchen staffing, preparation of back up meals, cleaning routines and hygiene standards, are also within the applicant's job description and his responsibility.

39 Even where I accept that some of the issues also concern other members of the kitchen team, such as the manner of communication with other staff, the applicant fails to acknowledge that he was the supervisor of the kitchen team and therefore bears a considerable responsibility for their performance. The applicant appears to not accept this as a fact.

40 In addition to the meetings where the applicant was advised of the respondent's concerns, the applicant was issued with multiple RMFs documenting the concerns at the meetings on 31 July 2024 and 28 August 2024. The applicant did not provide any response to the concerns set out in the RMFs.

41 The RMFs signed by the applicant on 1 August 2024 records that he committed to improve his performance for each of the matters raised.

42 At the meetings and during the formal disciplinary process, the applicant was offered opportunities to provide his perspective on any concerns raised with him. The meeting notes record that the applicant did provide some feedback and explanations, and it was acknowledged by senior officers that some matters were beyond the applicant's control where appropriate. There were many issues that were the responsibility of the applicant for which the applicant committed to implementing improvements and raising standards. However, the improvements were not adequately realised.

43 The applicant submits that he was not provided with notice nor an agenda for at least one of the meetings. It is not clear from the applicant's evidence and submissions the date of the meeting he is referring to. Nevertheless, at each meeting the applicant was accompanied by the Laundry Manager as his support person and was provided with an opportunity to respond either at the meeting or later. The applicant did not always avail himself of these opportunities.

Conclusion

44 It is clear on the evidence that the respondent's concerns were genuinely held. The respondent provided the applicant with clear guidance on the areas that required his attention and supported him in implementing improvements. The respondent informed the applicant of the consequences should he fail to make improvements. Unfortunately, the applicant did not make sufficient improvement to his performance.

45 The respondent did not act upon these concerns in a manner that was an abuse or misuse of their power to exercise their right to discharge a probationary employee, as set out in ***East Kimberley*** and ***Lawn***.

46 For the reasons set out above, I dismiss the application.

2026 WAIRC 00861

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN ANDREW LLOYD
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 14 SEPTEMBER 2026
FILE NO/S	U 104 OF 2024
CITATION NO.	2026 WAIRC 00861

Result	Application dismissed
Representation	
Applicant	Mr S Lloyd
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from the applicant 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 –

THAT this application be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

STOP BULLYING/SEXUAL HARASSMENT—

2026 WAIRC 00870

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHIRACK MWANZA KADIMA
	APPLICANT
	-v-
	CLOUGH PROJECTS PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER C TSANG
DATE	THURSDAY, 17 SEPTEMBER 2026
FILE NO.	S 20 OF 2026
CITATION NO.	2026 WAIRC 00870

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS on 12 August 2026, the applicant filed a *Form 21 – Application for a Stop Bullying Order* (***Form 21***), naming Clough Projects Pty Ltd as the employer respondent and others as individual respondents;

AND WHEREAS on 19 August 2026, the Commission wrote to the parties, noting that the *Form 21* named Clough Projects Pty Ltd, which is a proprietary limited company, as the employer respondent. The Commission noted its jurisdiction in stop bullying applications involving State system employers and the Fair Work Commission's jurisdiction in stop bullying applications involving national system employers, and requested the applicant to respond by 4:00pm on 21 August 2026 as to whether he agrees or disagrees that Clough Projects Pty Ltd is a national system employer;

AND WHEREAS no response was received from the applicant, and on 24 August 2026, the Commission wrote to the parties requesting the applicant to respond by 4:00pm on 26 August 2026 as to whether he agrees or disagrees that Clough Projects Pty Ltd is a national system employer;

AND WHEREAS no response was received from the applicant, and on 27 August 2026, the Commission wrote to the parties requesting the applicant to respond by 4:00pm on 31 August 2026 as to whether he agrees or disagrees that Clough Projects Pty Ltd is a national system employer. The Commission informed the applicant that as the applicant he bears the onus of actively prosecuting his application, and informed the applicant that if he did not respond by 4:00pm on 31 August 2026 that the Commission may list the matter for a Show Cause Hearing;

AND WHEREAS no response was received from the applicant, and on 1 September 2026, the Commission wrote to the parties requesting the applicant to provide his unavailable dates for the listing of the Show Cause Hearing by 4:00pm on 3 September 2026. The Commission informed the applicant that if he did not respond by 4:00pm on 3 September 2026 that the Show Cause Hearing may be listed without his input as to his unavailable dates;

AND WHEREAS no response was received from the applicant, and on 4 September 2026, the Commission wrote to the parties issuing the Notices of Hearing listing the Show Cause Hearing on Thursday, 17 September 2026 at 2:00pm. The Commission informed the applicant that if he no longer wished to pursue the matter that he 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 S 20 of 2026 is dismissed for want of jurisdiction.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00921

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00921
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 7 OCTOBER 2026
DELIVERED	**:**	WEDNESDAY, 7 OCTOBER 2026
FILE NO.	**:**	S 25 OF 2026
BETWEEN	**:**	ELIZABETH JOAN LEDGER
		Applicant
		AND
		CITY OF SOUTH PERTH AND OTHERS
		Respondents

CatchWords	**:**	Industrial Relations Law (WA) - Application for interim relief under s 32(8) of the *Industrial Relations Act 1979* (WA) - Employer entitled to continue disciplinary proceedings - Commission must not regulate the conditions of employment of a person who holds an office for which the reumeration payable is determined or recommended pursuant to the *Salary and Allowances Act 1975* (WA) - Alternatively no basis for an interim order on the merits - Commission should not interfere with disciplinary process unless the allegations are baseless - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 6(cb), 22B, 23(3)(b), 26(1), 27, 27(1)(o), 27(1)(v), 28, 32(8), 44(6)(ba), 44(6)(bb)(ii), 51BK, 80I
		Salaries and Allowances Act 1975 (WA) s 7A
		Public Sector Management Act 1994 (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr S Rogers (of counsel)
Respondents	**:**	Mr J Carroll (of counsel)
		Mr A Sinanovic (of counsel)

Case(s) referred to in reasons:

Brown v President, State School Teachers' Union of WA (Inc) (1989) 69 WAIG 1390

Civil Service Association of Western Australia (Inc.) v Department of Education [2019] WAIRC 00644; (2019) 99 WAIG 1564

Civil Service Association of Western Australia Inc v Director General of Department for Community Development [2002] WASCA 241; (2002) 82 WAIG 2845

Granitto v Director General of the Department of Education [2021] WAIRC 00127; (2021) 101 WAIG 394

Robe River Iron Associate v Federated Engine Drivers' and Firemens' Union (1986) 67 WAIG 315

The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection [2010] WAIRC 00206; (2010) 90 WAIG 214

The Director General, Department of Education v The State School Teachers' Union of WA (Inc) [2011] WAIRC 00058; (2011) 91 WAIG 166

The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education [2017] WAIRC 00737; (2017) 97 WAIG 1497

The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education [2016] WAIRC 00125; (2016) 96 WAIG 230

Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Community Living Association Inc. [2017] WAIRC 00825; (2017) 97 WAIG 1647

Reasons for Decision

1 Ms Elizabeth Ledger is the Chief Executive Officer of the City of South Perth (**City**). Her substantive application to the Commission is an application for a stop bullying order (**Stop Bullying Order Application**), in which she seeks a range of directions in relation to the City, its Mayor and Deputy Mayor, as set out below.

2 On 30 September 2026, before the Stop Bullying Order Application could be listed for conciliation, Ms Ledger filed a *Form 1A - requesting the Commission exercise any other power pursuant to section 27(1) of the Industrial Relations Act 1979* (**Form 1A Application**). The Form 1A Application asks the Commission to make interim orders including restraining the City,

its officers, councillors, employees, agents and any external investigator from 'taking any further step in the misconduct investigation' against her until all her matters before the Commission, Work Health and Safety Tribunal, and Industrial Magistrates Court are finalised. At the hearing, Ms Ledger said instead she wants interim orders to prevent the City from acting on the investigator's report before the Commission can determine the Stop Bullying Order Application.

3 The City opposes the Form 1A Application and says the Commission has no power to make the orders sought, or, if the Commission does have the power to make the orders sought, it should not do so.

4 Ms Ledger asks the Commission to determine the Form 1A Application on an urgent basis.

5 As a consequence of the circumstances, the timeframes for the parties to prepare their submissions and for me to make a decision have been short. These reasons issue late in the evening, hours after the hearing. My observations and conclusions in these reasons should not be read as relating to the merits of the substantive matter, on which the parties have yet to be heard.

Question to be decided

6 I must decide whether to make the interim orders sought. This involves considering the Commission's powers to make interim orders.

Legal principles that apply to making interim orders

7 The Commission can make interim orders under s 32(8) of the *Industrial Relations Act 1979* (WA) (**IR Act**).

8 That section relevantly provides:

> **32. Conciliation and arbitration of industrial matters**
>
> …
>
> (8) For the purposes of this section the Commission may —
>
> (a) give such directions and make such orders as will in the opinion of the Commission —
>
> (i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter; or
>
> (ii) enable conciliation or arbitration to resolve the matter; or
>
> (iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;
>
> (b) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act.
>
> …

9 The Full Bench in ***The Director General, Department of Education v The State School Teachers' Union of WA (Inc)*** [2011] WAIRC 00058 from [57] – [63] considered the principles to be applied when making interim orders under s 44(6)(ba) of the IR Act. In my view, that reasoning applies equally to this matter, given the wording in s 32(8) of the IR Act mirrors the wording of s 44(6)(ba) of the IR Act. The parties agree.

10 The Full Bench held that the principles that apply to interim injunctions in common law courts, which were applied in ***Brown v President, State School Teachers' Union of WA (Inc)*** (1989) 69 WAIG 1390 (**Brown**), should not be applied to applications for interim orders made under s 44(6)(ba) of the IR Act: at [57], [93] and [122].

11 The Full Bench in ***The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education*** [2016] WAIRC 00125 also held that the test in Brown should not be applied, saying '[w]hilst any interim order made pursuant to s 44(6)(bb)(ii) of the IR Act is an interlocutory order, I do not agree the principles to be applied should be the principles that apply to the granting of an interlocutory injunction,' (per Smith AP at [49], with whom Beech CC and Scott ASC agreed).

12 In light of [9] – [11] above, the test to apply in this matter is not, as Ms Ledger contends in her written submission, whether there is a serious question to be tried and whether the balance of convenience weighs in favour of the interim orders. However, given s 32(8) of the IR Act involves exercising a discretion, I agree with the parties that where the pre-conditions for making the order sought is established, some facts and circumstances that would ordinarily be relevant to considering the balance of convenience may be considered in order to decide whether the discretion should be exercised.

Interim orders Ms Ledger seeks

13 In the Form 1A Application, Ms Ledger asks the Commission to make the following interim orders:

> 1. THAT order [1] of the order of the Commission made on 23 September 2026 in Application S 25 of 2026 (**Interim Order**) is extended and continues in force until the determination of Application S 25 of 2026, or until further order.
>
> 2. THAT, to avoid doubt, until the determination of Application S 25 of 2026 or further order, the First Respondent, its officers, councillors (including the Second and Third Respondents), employees and agents, and any external investigator appointed by or on behalf of the First Respondent, must not:
>
> (a) take any further step in, continue or pursue the investigation initiated against the Applicant by resolution of the Council of the First Respondent on 14 August 2026 (**Investigation**);
>
> (b) finalise, issue or circulate any draft or final report, finding or recommendation arising from the Investigation; or

(c) take any action in reliance on any draft or final report, finding or recommendation arising from the Investigation.

3. THAT any time fixed for the Applicant to respond to the allegations in the Investigation is suspended. If the Investigation resumes after the Interim Order ceases, the Applicant is to be allowed a period of not less than [21] days to respond, beginning on the day she is given written notice that the Investigation has resumed, or such other period as the Commission orders.

4. THAT until the determination of Application S 25 of 2026 or further order, the First Respondent must preserve, and must not delete, alter, overwrite or dispose of, any data, logs, recordings, reports or other records relating to any electronic monitoring of the Applicant's computers, devices, accounts or communications, including system audit logs.

5. THAT until the determination of Application S 25 of 2026 or further order, any communication from the First Respondent or any investigator to the Applicant concerning the Investigation must be in writing and directed the Applicant.

6. THAT the parties have liberty to apply on [48 hours'] notice, including to vary or discharge these orders.

14 Notwithstanding proposed order 1 set out above in [13], the Commission has not yet made any orders in this matter, interim or otherwise.

15 At the hearing, Ms Ledger was represented by counsel. He said Ms Ledger no longer seeks the orders set out at [13] above. Instead, she asks the Commission to order that the City and its councillors 'be restrained from taking any action to implement or give effect to any findings or conclusions in the investigation report that may be delivered… which would have the effect or likely effect of resulting in the termination of Ms Ledger's employment.' Ms Ledger's counsel said that, in effect, Ms Ledger seeks to prevent the City from terminating her employment before her Stop Bullying Order Application has been determined.

Does the Commission have the power to make the interim orders sought?

16 In her written submissions, Ms Ledger says the Commission's power to make the interim orders sought is conferred by ss 32(8)(a), 27(1)(o), 27(1)(v) and 28 of the IR Act. She submits that those powers must be exercised consistent with ss 26(1)(a), 26(1)(c), 22B, 51BK and the object in s 6(cb) of the IR Act. At the hearing, counsel for Ms Ledger said ss 27(1)(o) and 27(1)(v) of the IR Act 'go to the context through which the Commission has to view the power in s 32(8)(a)' of the IR Act.

17 The City says the Commission has no power to make the orders sought. In essence, it argues that the effect of s 23(3)(b) of the IR Act is that the Commission cannot regulate 'conditions of employment' of Ms Ledger, which it says includes her suspension and the investigation into her conduct.

18 Section 23(3)(b) of the IR Act provides:

23. Jurisdiction of Commission

…

(3) The Commission in the exercise of the jurisdiction conferred on it by this Part must not —

…

(b) regulate the rates of salary or wages, or the conditions of employment of any person who holds an office for which the remuneration payable is determined or recommended pursuant to the *Salaries and Allowances Act 1975*;

…

19 It is not in dispute that Ms Ledger is employed as the Chief Executive Officer of the City and that in accordance with s 7A of the *Salaries and Allowances Act 1975* (WA), the Salaries and Allowances Tribunal from time to time makes determinations in relation to the remuneration paid to Chief Executive Officers of local government, including the determination made this year, the Local Government Chief Executive Officers and Elected Council Members Determination No 1 of 2026.

20 The City argues that 'conditions of employment' is a broad phrase and its context includes the regulation of discipline in employment (see ***Granitto v Director General of the Department of Education*** [2021] WAIRC 00127). Further, Ms Ledger's express contractual conditions of employment includes terms which govern suspending her and conducting investigations into allegations of misconduct. Accordingly, the City submits that the interim orders sought by Ms Ledger would be orders to regulate investigation into alleged misconduct, and therefore regulating Ms Ledger's conditions of employment. The Commission lacks power to make such orders.

21 Counsel for Ms Ledger submits that the orders sought would not regulate the rates of salary or wages or terms of conditions of employment. He says at most the orders sought would continue Ms Ledger's employment. Counsel points to s 23(3)(d) of the IR Act, and says that if Parliament had intended to exclude the Commission's ability to make the orders sought, Parliament would have included wording similar to that of s 23(3)(d) in s 23(3)(b) of the IR Act. Counsel for Ms Ledger argues that if the City's construction of s 23(3)(b) of the IR Act is correct, then the Commission would have no ability to make any stop bullying orders for any employees whose remuneration is set under the *Salaries and Allowances Act 1975* (WA).

22 I accept the City's submission about the 'carve outs' in s 23(3)(b) and (d) of the IR Act being directed at different purposes. To read s 23(3)(b) of the IR Act as only being intended to prevent inconsistency between the Commission and the Salaries and Allowances Tribunal would mean not giving effect to the words 'conditions of employment'. Further, it does not follow that the consequence of the City's construction of s 23(3)(b) of the IR Act is that the Commission could never make final orders in a stop bullying application. It would depend on the nature of the orders sought.

23 I consider that the phrase 'conditions of employment' is broad and extends to the regulation of discipline in employment. I note

this view is consistent with the Full Bench's reasoning in ***The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection*** [2010] WAIRC 00206, that 'conditions of employment' is wide enough to encompass all statutory and contractual terms of appointment, including those in relation to disciplinary processes: see Smith AP (as she was then) at [95] and Kenner C (as he was then) from [136] – 138]. I consider that I am bound by this Full Bench authority. In any event, I agree with it. It is not to the point that the *Public Sector Management Act 1995* (WA) does not apply to Ms Ledger's employment. The Full Bench was considering the now repealed s 80I(1) of the IR Act. Ms Ledger's contract of employment provides for discipline in employment, expressly referring to the City's power to suspend and investigate her. I consider that the interim orders Ms Ledger seeks would be an order to regulate the disciplinary process in relation to alleged misconduct, which would regulate her conditions of employment. Section 23(3)(b) of the IR Act prevents the Commission from regulating the conditions of employment of any person who holds an office for which the remuneration payable is determined or recommended pursuant to the *Salaries and Allowances Act 1975* (WA). Ms Ledger holds such an office. Accordingly the Commission does not have power to make the interim orders sought by Ms Ledger.

24 However, if I am wrong and s 23(3)(b) of the IR Act does not prevent the Commission from making the interim orders sought by Ms Ledger, in my view, the Commission should not make the interim orders for the following reasons.

Should the Commission make the interim orders sought?

25 I cannot accept Ms Ledger's written submission that ss 27(1)(o), 27(1)(v), and 28 of the IR Act confer power on the Commission to make the orders she seeks. Section 28 of the IR Act merely enables the Commission to exercise the powers in s 27 at any time after a matter is lodged. It is beyond doubt that the powers in s 27 of the IR Act are procedural powers, not substantive powers. The Industrial Appeal Court made it clear in ***Robe River Iron Associate v Federated Engine Drivers' and Firemens' Union*** (1986) 67 WAIG 315 that the powers set out in s 27 do not support the making of an order in the nature of an interlocutory injunction (see Brinsden J at 317 and Kennedy J at 318 and 319). As Kennedy J held at 319, 'Section 27(1) is concerned with the method by which the Commission exercises jurisdiction already conferred on it, and does not confer substantive jurisdiction.' As Kenner SC (as he was then) concluded at [45] of ***The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education*** (2017) 97 WAIG 1497, the powers in s 27 of the IR Act are procedural and not substantive in nature and would not support an interim order.

26 It is clear that the Commission has power under s 32(8) of the IR Act to make interim orders where the Commission forms the requisite opinion. Namely, the Commission must consider that the interim orders will:

a) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter; or

b) enable conciliation or arbitration to resolve the matter; or

c) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter.

27 In this case, given the focus of Ms Ledger's submissions, the Commission must consider whether the interim orders sought will prevent the deterioration of industrial relations in respect of the matter, until conciliation or arbitration has resolved the matter, or enable conciliation or arbitration to resolve the matter. That must be looked at in light of the bullying Ms Ledger complains of in her substantive application.

28 Ms Ledger submits that:

a) there is a serious question to be tried, namely whether the investigation is an extension of the bullying conduct and is not reasonable management action carried out in a reasonable matter; and

b) the balance of convenience strongly favours relief. Without an order, the subject matter of the application will be overtaken before the Commission can hear it, and the Commission cannot compensate Ms Ledger for the harm that results.

29 In her written submissions, Ms Ledger argues that the investigation is the subject matter of the application, and says that her case is that the investigation and the way it is being conducted is a continuation of the repeated unreasonable behaviour that she has complained of. At the hearing, counsel for Ms Ledger rightly conceded that the Stop Bullying Order Application does not allege that the investigation is part of the bullying. Since filing the Stop Bullying Order Application, new conduct has given rise to new concerns. Counsel said Ms Ledger has not sought to amend the Stop Bullying Order Application because she has been unwell.

30 In her written submissions, Ms Ledger argues that final relief could include the order she seeks here, because nothing in the text of s 51BM of the IR Act excludes orders that 'touch [sic] an investigation or disciplinary process'. She says that if the Commission may, at final hearing, restrain an investigation that forms part of the bullying, then the Commission must be able to preserve that possibility pending the hearing.

31 In the Stop Bullying Order Application, Ms Ledger briefly mentions an investigation. At the point of filing on 2 September 2026, the investigator had not yet written to Ms Ledger, nor put the disciplinary allegations to her. A fair reading of the Stop Bullying Order Application shows that Ms Ledger's case is about a range of matters, including having been suspended. Ms Ledger's case is not that the investigation and the way the investigation is being conducted is a continuation of the repeated unreasonable behaviour she complains of. The Stop Bullying Order Application has not been amended to include the manner in which the investigation is being conducted.

32 A further difficulty for Ms Ledger is that her Stop Bullying Order Application does not seek an order restraining or suspending the investigation or its process. Rather, in response to the question 'What are you seeking?' at 3. of the *Form 21 – Application for a Stop Bullying Order* filed on 2 September 2026, Ms Ledger states:

> Direction that the Mayor and Deputy Mayor stop bullying and further:

a) not to communicate directly with the applicant except in writing;

b) not to undermine, disparage, or participate in discussion in respect to the Applicant with any persons whatsoever, and adhere to the lawful roles of Councillors only;

c) communications with the applicant to occur in writing;

d) ensure that the applicant is separated from the Mayor and Deputy Mayor;

e) the employer is to implement and enforce an appropriate workplace bullying policy or procedure overseen by an independent third party with experience in dealing matters of bullying;

f) ensure that Council undertakes workplace bullying training; and

g) such other practical measures designed to remove or control the identified risk of further bullying.

33 Ms Ledger says the Commission should make the interim orders because:

a) the Commission must act with speed. Parliament's requirement that stop bullying applications be dealt with within 14 days would be empty if the conduct complained of could 'be completed before the Commission could act';

b) there is a serious question to be tried and she continues to be exposed to harm that is not compensable;

c) the interim orders protect the Commission's ability to grant effective final relief and do not involve determination of the merits of the allegations against Ms Ledger or her bullying complaint;

d) the cost to the City is only delay and the financial impact of paying Ms Ledger while she is stood down is unlikely to damage the City's bottom line; and

e) ratepayers have an interest in their council functioning as it should.

34 Clearly the Commission must act with due speed, in accordance with s 22B of the IR Act. However, the IR Act does not require the Commission to have dealt with stop bullying applications within 14 days, in the sense of determining stop bullying applications within 14 days. Rather, s 51BK of the IR Act provides that the Commission 'must *start* to deal with a stop bullying application within 14 days after the application is made' (emphasis added).

35 In relation to Ms Ledger's arguments about the City's council acting on any findings made by the investigator, ultimately if that were to happen, as counsel for Ms Ledger rightly conceded at hearing, there would be other avenues open to Ms Ledger to consider. For example, if the City were to dismiss Ms Ledger, she may challenge such a dismissal. Further, the City highlighted another avenue in relation to the code of conduct that applies to councillors. However, counsel for Ms Ledger says that the City using a disciplinary process to curtail the exercise of Ms Ledger's rights is the antithesis of the stop bullying jurisdiction.

36 The parties agree that the Commission is not bound by the relief sought in the application. However, the City highlights that Ms Ledger sought the present final relief (set out at [32] above) when she was stood down and aware that she was facing disciplinary allegations. She did not seek to restrain a disciplinary process. Instead Ms Ledger seeks to restrain the way in which the second and third respondent communicate with her (and otherwise seeks orders for bullying training to be done). I agree.

37 The City submits that whether an inference can be drawn that the laying of the allegations and the investigation into those allegations was part of continued bullying behaviour, rather than reasonable management action, will depend on all of the circumstances, including the nature of the allegations put to Ms Ledger and the prima facie evidence in support of them (both put to Ms Ledger and before the Commission). I accept the City's submission that:

a) a cursory examination of that material shows there was a reasonable basis to suspect Ms Ledger had engaged in serious misconduct in the course of her employment; and

b) the most likely prima facie inference to be drawn from the material before the Commission is not that the allegations and investigation were improperly motived, but that the elected council had concerns that Ms Ledger might have engaged in serious misconduct and there were allegations that required investigation.

38 Essentially, the City argues that the matters Ms Ledger raises do not, individually or together, provide a prima facie basis to think the investigation process amounts to bullying conduct.

39 The City submits that the precondition in s 32(8) of the IR Act is not met. As the City notes, Ms Ledger's written submissions do not squarely address the threshold issue of whether the making of orders will, in the Commission's opinion, prevent the deterioration of industrial relations 'in respect of the matter' until conciliation or arbitration has resolved the matter, or enable conciliation or arbitration to 'resolve the matter'.

40 I accept that in this case, the 'matter' in s 32(8)(a) of the IR Act is whether the second and third respondents have repeatedly behaved unreasonably toward Ms Ledger as alleged in her Stop Bullying Order Application, in a way that creates a risk to her health or safety, and is not reasonable management action carried out in a reasonable manner.

41 I appreciate that the interim orders may prevent deterioration of industrial relations, until at least arbitration could resolve the matter, from Ms Ledger's perspective. At the same, from the City's perspective, the effect of the interim orders would be to halt industrial relations between the parties, in that the City could not proceed with its disciplinary process while the interim orders were in place, even if findings of corruption were made, which I agree would not be a satisfactory state of affairs.

42 I have considered all of Ms Ledger's arguments in support of the Form 1A Application, including those in relation to the:

a. subject matter being overtaken;

b. Commission not being able to order compensation in substantive matter; and

c. impacts to her health and reputation, in particular that the harm to Ms Ledger outweigh the impost on the City.

43 The difficulty for Ms Ledger is that even if I could form the requisite opinion required by s 32(8) of the IR Act, ultimately I consider that the following discretionary matters weigh too heavily against making the orders:

a) there is a long line of authority cautioning the Commission against interfering with an employer's right to continue disciplinary proceedings unless the allegations are baseless, including where the disciplinary processes were alleged to be unlawful, see for example ***Civil Service Association of Western Australia Inc v Director General of Department for Community Development*** [2002] WASCA 241; (2002) WAIG 2845 at [20], ***Civil Service Association of Western Australia (Inc.) v Department of Education*** [2019] WAIRC 00644; (2019) 99 WAIG 1564 at [14] and ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Community Living Association Inc.*** [2017] WAIRC 00825; (2017) 97 WAIG 1647 per Matthews C at [8]. Here the documents before the Commission show that detailed allegations have been put to Ms Ledger. Considerable material in support of those allegations has also been provided. In those circumstances, the Commission cannot conclude that the allegations are baseless;

b) I accept the City's submission that the whole of the elected council is the decision-making body that decided to investigate the allegations of misconduct, and not just the second and third respondents. Further, as counsel for Ms Ledger concedes, the whole of the elected council is the decision-making body that must make any decision in relation to Ms Ledger's employment once the investigation is complete. Even together, the second and third respondents do not make up a majority of the council. The other council members are not respondents to the Stop Bullying Order Application and Ms Ledger has not alleged in the Stop Bullying Order Application that the other council members have bullied her. This weighs against the Commission being persuaded, on a prima facie basis, that the investigation is a continuation of alleged bullying;

c) at this very early stage in the proceedings, considering the substance of the allegations against Ms Ledger and the material the City relies on as prima facie evidence of those allegations, I am not satisfied that there is a prima facie case that the investigation amounts to bullying as defined in the IR Act;

d) the Commission must have regard for the interests of those immediately concerned and, where appropriate, also for the interests of the community as a whole. Plainly it is appropriate for the Commission to consider the interests of the City's ratepayers in having the serious allegations of misconduct put to the City's Chief Executive Officer, and being investigated and resolved in a timely way, without undue delay. I accept that having a Chief Executive Officer subject to serious, unresolved allegations creates instability, even where an acting Chief Executive Officer is in place;

e) it would be premature to make the interim orders before the investigation is completed and the investigation report is received by the City, particularly in circumstances where presently it is not apparent that the City is using a disciplinary process to curtail Ms Ledger's exercise of her statutory rights. I am not satisfied that there is a proper basis to prevent the City from exercising its usual employment powers; and

f) the City's observation that Ms Ledger's allegations of bullying by the second and third respondents are insufficiently particularised is a fair one. Necessarily that lack of particularisation will delay the progress of the proceedings, and that weighs against the Commission making interim orders that stay in place while the proceedings are on foot. Further, if Ms Ledger does seek to amend the Stop Bullying Order Application, as she foreshadowed, that may well require additional respondents to be joined to the application. That would add to the delay. It is unlikely this matter would be substantively heard for some time, resulting in interim orders operating for an unknown and potentially lengthy period.

44 Simply put, having carefully considered the parties' materials and submissions, I am not persuaded that the interim orders sought should be made in the circumstances.

45 The Form 1A Application is dismissed. Application S 25 of 2026 will be listed for conciliation.

2026 WAIRC 00922

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELIZABETH JOAN LEDGER
	APPLICANT
	-v-
	CITY OF SOUTH PERTH AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 7 OCTOBER 2026
FILE NO/S	S 25 OF 2026
CITATION NO.	2026 WAIRC 00922

Result	Interlocutory application dismissed
Representation	
Applicant	Mr S Rogers (of counsel)
Respondents	Mr J Carroll (of counsel)
	Mr A Sinanovic (of counsel)

Order

Having heard from Mr S Rogers (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

THAT the applicant's *Form 1A - requesting the Commission exercise any other power pursuant to section 27(1) of the Industrial Relations Act 1979* be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2026 WAIRC 00897

DISPUTE RE DECISION TO DEMOTE EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	WEDNESDAY, 30 SEPTEMBER 2026
FILE NO/S	CR 11 OF 2026
CITATION NO.	2026 WAIRC 00897

Result	Order issued
Representation	
Applicant	Mr Robert Knox (of counsel)
Respondent	Mr Michael McIlwaine (of counsel)

Order

HAVING heard from Mr R Knox (of counsel), on behalf of the applicant, and Mr M McIlwaine (of counsel), on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT order [2026] WAIRC 00615 issued in matter C 11 of 2026 on 14 July 2026 is to also apply in matter CR 11 of 2026.
2. THAT order [2026] WAIRC 00803 issued in matter C 11 of 2026 on 18 August 2026 is to also apply in matter CR 11 of 2026.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

CORRECTIONS—

2026 WAIRC 00904

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIERAN JASON LEE
	APPLICANT
	-v-
	DATA ENGINEERING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	THURSDAY, 1 OCTOBER 2026
FILE NO.	B 84 OF 2025
CITATION NO.	2026 WAIRC 00904

Result	Correction order issued
Representation	
Applicant	Dr Kieran Jason Lee
Respondent	No appearance

Correction Order

WHEREAS the Commission issued Order [2026] WAIRC 00844 on 3 September 2026 (**Order**).

AND WHEREAS by email on 30 September 2026, the Applicant informed the Commission there were typographical errors in the Order.

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

1. THAT Order 1 be corrected by deleting 'THAT the respondent pay the applicant the gross sum of $34,0455.28' and substituting 'THAT the respondent pay the applicant the gross sum of $34,055.28' in lieu thereof.
2. THAT paragraph [7] of the recitals be corrected by deleting 'AND WHEREAS on 3 December 2026;' and substituting 'AND WHEREAS on 3 December 2025;' in lieu thereof.
3. THAT paragraph [8] of the recitals be corrected by deleting 'AND WHEREAS the respondent filed a response on 12 January 2025 which stated;' and substituting 'AND WHEREAS the respondent filed a response on 12 January 2026;' in lieu thereof.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2026 WAIRC 00912

SHIRE OF RAVENSTHORPE INDUSTRIAL AGREEMENT 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRE OF RAVENSTHORPE
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	FIRST RESPONDENT
	THE LOCAL GOVERNMENT, RACING AND CEMETRIES EMPLOYEES UNION (WA)
	SECOND RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 5 OCTOBER 2026
FILE NO/S	AG 25 OF 2026
CITATION NO.	2026 WAIRC 00912

Result	Order issued
Representation	(on the papers)
Applicant	Shire of Ravensthorpe
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Second Respondent	Local Government, Racing and Cemetries Employees Union (WA)

Order

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

THAT the name of the second respondent be amended to Local Government, Racing and Cemeteries Employees Union (WA).

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00920

APPLICATION FOR AN ENTERPRISE ORDER PURSUANT TO SECTION 42I

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION WA
	APPLICANT
	-v-
	CITY OF WANNEROO
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	TUESDAY, 6 OCTOBER 2026
FILE NO.	APPL 58 OF 2026
CITATION NO.	2026 WAIRC 00920

Result	Direction issued
Representation	
Applicant	Local Government, Racing and Cemeteries Employees Union WA
Respondent	City of Wanneroo

Direction

THE COMMISSION, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, directs that –

1. The respondent file a response to the application by close of business on Friday, 30 October 2026;
2. By close of business on Friday, 20 November 2026, the applicant file:
   (a) its written submissions in support of the application;
   (b) A witness outline in accordance with Practice Note 9 of 2021 for each witness it proposes to call to give evidence; and
   (c) Any other documentary material upon which it intends to rely.
3. By close of business on Friday, 11 December 2026, the respondent file:
   (a) its written submissions in response to the application;
   (b) A witness outline in accordance with Practice Note 9 of 2021 for each witness it proposes to call to give evidence; and
   (c) Any other documentary material upon which it intends to rely.
4. By the close of business on Friday, 18 December 2026. the applicant file any responsive submissions, witness outlines or other material upon which it intends to rely;

5. The matter be listed for hearing on a date after 18 January 2027;
6. There be liberty to apply at short notice.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2026 WAIRC 00886

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 15 OF 2026

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	QUAI-DE AZAM EDOO
	APPELLANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	SEAWARD J
DATE	TUESDAY, 22 SEPTEMBER 2026
FILE NO/S	IAC 2 OF 2026
CITATION NO.	2026 WAIRC 00886

Result	Programming Order Issued

Order

1. The appellant file submissions and a list of legal authorities and serve a copy on the respondent by 4pm on 13 October 2026.
2. The respondent file submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 3 November 2026.
3. The appellant file the appeal book and provide three hard copies and serve a copy on the respondent by 4pm on 24 November 2026.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2026 WAIRC 00858

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 4 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROSSANA TRINCHI
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 14 SEPTEMBER 2026
FILE NO.	P 13 OF 2026
CITATION NO.	2026 WAIRC 00858

Result	Order issued correcting name of respondent
Representation	
Applicant	In person
Respondent	Ms S Walsh (of counsel)

Order

HAVING heard from Ms R Trinchi on her own behalf and Ms S Walsh (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent to the application 'Department of Communities' be deleted and substituted with 'Director General, Department of Communities'.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00936

REFERRAL OF A DECISION TO DISMISS EMPLOYEE 10 APRIL 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAUSHALENDRA SINGH RATHORE
	APPLICANT
	-v-
	THE BOARD OF THE NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 14 OCTOBER 2026
FILE NO.	P 28 OF 2026
CITATION NO.	2026 WAIRC 00936

Result	Directions issued
Representation	
Applicant	Mr C Beetham (of counsel)
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from Mr C Beetham (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the parties file a statement of agreed facts and a bundle of agreed documents **by 6 November 2026**.
2. THAT the parties notify Chambers of the following matters **by 6 November 2026**:
   (a) their agreed estimate of the number of days required for the hearing; and
   (b) their unavailability in the 3-month period from 15 February 2027.
3. THAT at the final hearing of this matter:
   (a) lay evidence in chief directed towards what was said during a telephone discussion between the applicant and Dr Joshi on 17 December 2024 is to be given orally;
   (b) lay evidence in chief directed towards matters other than the matter referred to in paragraph 3(a) is to be given by affidavit; and
   (c) expert evidence is to be given concurrently.
4. THAT the applicant file any witness outlines, affidavits, expert reports, and a bundle of documents (other than those in the bundle of agreed documents) **by 27 November 2026**.
5. THAT the respondent file any witness outlines, affidavits, expert reports, and a bundle of documents (other than those in the bundle of documents at paragraphs 1 and 4) **by 18 December 2026**.
6. THAT the applicant file **by 22 January 2027**:
   (a) any witness outlines, affidavits, expert reports, and a bundle of documents (other than those in the bundle of documents in paragraphs 1, 4 and 5) in reply; and
   (b) an outline of written submissions.
7. THAT the respondent file an outline of written submissions **by 5 February 2027**.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00933

REFERRAL OF A DECISION TO DISMISS EMPLOYEE 10 APRIL 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAUSHALENDRA SINGH RATHORE
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 14 OCTOBER 2026
FILE NO.	P 28 OF 2026
CITATION NO.	2026 WAIRC 00933

Result	Order issued correcting name of respondent
Representation	
Applicant	Mr C Beetham (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr C Beetham (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent to the application 'North Metropolitan Health Service' be deleted and substituted with 'The Board of the North Metropolitan Health Service'.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00895

REFERRAL OF A DECISION TO TERMINATE EMPLOYMENT ON 20 MAY 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODI EDWARDS
	APPLICANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 25 SEPTEMBER 2026
FILE NO.	P 33 OF 2026
CITATION NO.	2026 WAIRC 00895

Result	Direction issued
Representation	
Applicant	Ms K Boey (of counsel)
Respondent	Ms A Kildea (of counsel)

Direction

HAVING heard from Ms K Boey (of counsel) on behalf of the applicant, and Ms A Kildea (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby directs –

(1) THAT discovery be informal;

(2) THAT the parties file a statement of agreed facts and a bundle of agreed documents by no later than 2 November 2026;

(3) THAT the applicant file any outlines of witness evidence and any documents upon which they intend to rely (which are not contained in the bundle of agreed documents) by no later than 16 November 2026;

(4) THAT the respondent file any outlines of witness evidence and any documents upon which she intends to rely (which are not contained in the bundle of agreed documents) by no later than 7 December 2026;

(5) THAT the applicant may file any further outlines of witness evidence and any further documents (which are not contained in the bundle of agreed documents) in reply by no later than 21 December 2026;

(6) THAT the matter be listed for hearing for [4] days on a date to be fixed (having regard to the parties' unavailable dates and which is not before 22 February 2027);

(7) THAT the applicant file outline of submissions by no later than 21 days before the hearing;

(8) THAT the respondent file an outline of submissions by no later than 7 days before the hearing; and

(9) THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00871

APPLICATION TO REFER BREACH OF PUBLIC SECTOR STANDARDS CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MECHELLE TURVEY
	APPLICANT
	-v-
	WA POLICE FORCE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 17 SEPTEMBER 2026
FILE NO.	P 40 OF 2026
CITATION NO.	2026 WAIRC 00871

Result	Direction issued
Representation	
Applicant	No Appearance
Respondent	Ms F Negus (of counsel)

Direction

HAVING heard from Ms F Negus (of counsel) on behalf of the respondent and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

(1) THAT by no later than 4:00 PM on 24 September 2026 the applicant is to provide a response by email notifying whether she agrees to or objects to the jurisdictional objections raised by the respondent at paragraph 26 of the respondent's *Form 4 – Response (General)* **(Jurisdictional Objections)**.

(2) THAT if the applicant agrees with the jurisdictional objections, the applicant is invited to file a Form 1A – Notice of Discontinuance to discontinue the application.

(3) THAT if the applicant objects to the respondent's jurisdictional objections, then the applicant is to file a response to the jurisdictional objections outlining the reasons why the applicant disagrees with the jurisdictional objections, by no later than 4.00 pm, 8 October 2026.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2026 WAIRC 00898

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 12 MAY 2026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSIE WICKHAM
	APPLICANT
	-v-
	LOTTERYWEST (HEALTHWAY)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 30 SEPTEMBER 2026
FILE NO.	P 44 OF 2026
CITATION NO.	2026 WAIRC 00898

Result	Directions issued
Representation	
Applicant	On her own behalf
Respondent	Ms E Negus (of counsel)

Directions

HAVING heard from Ms J Wickham on her own behalf and Ms E Negus on behalf of the respondent about programming the jurisdictional question of whether the respondent dismissed the applicant, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), directs –

1. THAT by 4pm on 7 October 2026 the applicant file outlines of evidence, documents, and written submissions in support of her contention that the respondent dismissed her;
2. THAT by 4pm on 21 October 2026 the respondent file outlines of evidence, documents, and written submissions in response; and
3. THAT the matter be listed for a short hearing on a date to be fixed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2026 WAIRC 00934

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 16 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SLADJANA NESKOVIC
	APPLICANT
	-v-
	CHILD AND ADOLESCENT HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 14 OCTOBER 2026
FILE NO.	P 48 OF 2025
CITATION NO.	2026 WAIRC 00934

Result	Application for leave to call witnesses refused
Representation	
Applicant	In person
Respondent	Mr J Raja

Order

HAVING heard from Ms S Neskovic on her own behalf and Mr J Raja on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the applicant's *Form 1A – Application*, filed on 5 October 2026, for leave to call two named witnesses, or in the alternative one of them individually at the 5-day hearing listed on Monday, 19 October 2026 to Friday, 23 October 2026, is refused.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00882

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 16 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SLADJANA NESKOVIC
	APPLICANT
	-v-
	CHILD AND ADOLESCENT HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 21 SEPTEMBER 2026
FILE NO.	P 48 OF 2025
CITATION NO.	2026 WAIRC 00882

Result	Directions issued
Representation	
Applicant	In person
Respondent	Mr Raja

Direction

HAVING heard from Ms S Neskovic on her own behalf and Mr J Raja on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the applicant have leave to file **by 4:00pm on Monday, 5 October 2026**:
   - (a) An outline of legal submissions in response to the Respondent's Outline of Submissions filed on 4 September 2026 seeking the Commission impose a harsher disciplinary outcome than the reprimand imposed, by way of reduction in classification and/or alteration of the applicant's scope of duties to remove her from a managerial position.
   - (b) Outlines of witness evidence addressing the harsher disciplinary outcome sought by the respondent at paragraph (a) for:
     - (i) Gaylene Louizou.
     - (ii) Don Ranatunga.
     - (iii) Jodie Hulm.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00883

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALLY DENNIS
	APPLICANT
	-v-
	STATE SCHOOL TEACHERS UNION OF WA
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	MONDAY, 21 SEPTEMBER 2026
FILE NO/S	PRES 9 OF 2026
CITATION NO.	2026 WAIRC 00883

Result	Order and Directions issued
Representation	
Applicant	Mr J Nicholas of counsel
Respondent	Mr A Illich of counsel
Proposed	
Intervenor	Mr J Carroll of counsel

Order and Directions

HAVING heard Mr J Nicholas of counsel on behalf of the applicant, Mr A Illich of counsel on behalf of the respondent and Mr J Carroll of counsel on behalf of the Registrar, Western Australian Industrial Relations Commission as the proposed intervenor, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) hereby –

(1) ORDERS that the Registrar, Western Australian Industrial Relations Commission be and is hereby granted leave to intervene in the herein proceedings.

(2) ORDERS that leave be and is hereby granted to reopen the proceedings regarding the applicant's application for interim orders.

(3) DIRECTS that:

(a) The Registrar file written submissions in relation the interim orders sought by no later than 4.00 pm 17 September 2026;

(b) The respondent file any written submissions in reply by no later than 23 September 2026; and

(c) The applicant file any written submissions in reply by no later than 29 September 2026.

(4) ORDERS that there be liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Chief Commissioner.

2026 WAIRC 00854

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 KUCERA - CHAIRPERSON
	MR MARK HAYMON - BOARD MEMBER
	MR BRUCE HAWKINS - BOARD MEMBER
DATE	THURSDAY, 10 SEPTEMBER 2026
FILE NO	PSAB 21 OF 2024
CITATION NO.	2026 WAIRC 00854

Result	Order issued
Representation	
Appellant	Ms Dana Levitt (of counsel)
Respondent	Ms Tse Chee Loo (of counsel)

Order

HAVING heard from Ms D Levitt (of counsel), on behalf of the applicant, and Ms T Loo (of counsel), on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the directions hearing listed for Tuesday, 8 September 2026 is hereby vacated.
2. THAT the appellant file and serve an outline of written submissions which he intends to rely upon by no later than

Tuesday, 29 September 2026.

3. THAT the respondent file and serve an outline of written submissions upon which it intends to rely by no later than Tuesday, 20 October 2026.
4. THAT the matter be listed for a 2-day hearing on 17 and 18 December 2026.
5. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2026 WAIRC 00881

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW GERARD OWEN POW
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE AND ANOTHER
	RESPONDENTS
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 21 SEPTEMBER 2026
FILE NO.	S 7 OF 2026
CITATION NO.	2026 WAIRC 00881

Result	Directions issued
Representation	
Applicant	Mr S Farrell (as agent)
First Respondent	Mr M McIlwaine (of counsel)
Second Respondent	No appearance

Direction

HAVING heard from Mr S Farrell (as agent) on behalf of the applicant, Mr M McIlwaine (of counsel) on behalf of the first respondent and there being no appearance by the second respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the first respondent have leave to file evidence and submissions addressing paragraph 12 of their *Form 1A – Application* for an order that the proceedings be dismissed under s 27(1)(a)(ii) or (iv) of the *Industrial Relations Act 1979* (WA) filed on 14 May 2026.
2. THAT the first respondent file **by 4:00pm on Friday, 2 October 2026**:
   (a) Any outlines of witness evidence; and
   (b) An outline of amended legal submissions.
3. THAT the applicant file **by 4:00pm on Friday, 16 October 2026**:
   (a) Any responsive outlines of witness evidence; and
   (a) An outline of responsive amended legal submissions.
4. THAT the part heard application be adjourned and listed for a half-day hearing on **Friday, 30 October 2026 at 11:00am**.
5. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00864

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MONA MORGAN
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 16 SEPTEMBER 2026
FILE NO.	U 16 OF 2026
CITATION NO.	2026 WAIRC 00864

Result	Directions issued
Representation	
Applicant	In person
Respondent	Ms A Kildea (of counsel)

Direction

HAVING heard from Ms M Morgan on her own behalf and Ms A Kildea (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the applicant's request for an extension of time to comply with Direction 4 of the Directions ([2026] WAIRC 00761) issued on 30 July 2026 be granted.

2. THAT in lieu of Direction 4 of the Directions ([2026] WAIRC 00761) issued on 30 July 2026, the applicant file **by Tuesday, 27 October 2026**:

   (a) Any witness statements in accordance with *Practice Note 9 of 2021 – Witness outlines and witness statements*; and

   (b) Legal submissions,

   that she seeks to rely upon in relation to the respondent's application for the matter to be dismissed under s 27(1)(iv) of the *Industrial Relations Act 1979* (WA) for the reason that it is futile for the Commission to hear and determine the matter in circumstances where no remedy is available to the applicant.

3. THAT in lieu of Direction 5 of the Directions ([2026] WAIRC 00761) issued on 30 July 2026, the respondent file **by Tuesday, 10 November 2026**:

   (a) Any responsive witness statements to the applicant's witness statements, in accordance with *Practice Note 9 of 2021 – Witness outlines and witness statements*; and

   (b) Any responsive legal submissions to the applicant's submissions.

4. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00862

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA ANN BYRNE
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 16 SEPTEMBER 2026
FILE NO.	U 28 OF 2026
CITATION NO.	2026 WAIRC 00862

Result	Directions issued
Representation	
Applicant	Mr T Lettenmaier (of counsel)
Respondent	Mr N Ellery (of counsel)

Direction

HAVING heard from Mr T Lettenmaier (of counsel) on behalf of the applicant and Mr N Ellery (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 Friday, 6 November 2026**:
   (a) A statement of agreed facts; and
   (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) in accordance with *Practice Note 9 of 2021* **by Friday, 4 December 2026**.
3. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) in accordance with *Practice Note 9 of 2021* **by Friday, 15 January 2027**.
4. THAT the applicant file an outline of submissions **by Friday, 12 February 2027**.
5. THAT the respondent file an outline of submissions **by Friday, 12 March 2027**.
6. THAT the matter be listed for a 5-day hearing on **Monday, 12 April 2027 to Friday, 16 April 2027** inclusive.
7. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2026 WAIRC 00899

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH PALANDRI
	APPLICANT
	-v-
	WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 30 SEPTEMBER 2026
FILE NO.	U 70 OF 2026
CITATION NO.	2026 WAIRC 00899

Result	Directions issued
Representation	
Applicant	On her own behalf
Respondent	Ms E Negus (of counsel)

Direction

HAVING heard from Ms S Palandri on her own behalf and Ms E Negus on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), directs –

1. THAT by 4pm on 7 October 2026 the respondent file a replacement response to the application;
2. THAT by 4pm on 21 October 2026 the applicant file any outlines of evidence, documents, and written submissions to support her request that the Commission accept application U 70 of 2026 out of time;
3. THAT by 4pm on 4 November 2026 the respondent file any outlines of evidence, documents, and written submissions in relation to whether the Commission should accept application U 70 of 2026 out of time; and
4. THAT the question of whether the Commission should accept application U 70 of 2026 out of time be listed for a short hearing on a date to be fixed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2026 WAIRC 00932

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL HARDINGE
	APPLICANT
	-v-
	DEPARTMENT OF TRANSPORT AND MAJOR INFRASTRUCTURE
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	WEDNESDAY, 14 OCTOBER 2026
FILE NO/S	U 98 OF 2026
CITATION NO.	2026 WAIRC 00932

Result	Order issued
Representation	
Applicant	Mr Michael Morgan (of counsel)
Respondent	Mr Michael McIlwaine (of counsel)

Order

HAVING heard from Mr M Morgan (of counsel), on behalf of the applicant, and Mr M McIlwaine (of counsel), on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the parties are to file a statement of agreed facts and bundle of agreed documents by Friday, 16 October 2026.
2. THAT the applicant is to file any witness outlines and documents which he intends to rely upon in support of the application, in the manner required by Practice Note 9 of 2021 by Friday, 30 October 2026.
3. THAT the respondent is to file any witness outlines and documents which they intend to rely upon in opposition to the application, in the manner required by Practice Note 9 of 2021 by Friday, 13 November 2026.
4. THAT the applicant is to file an outline of legal submissions and list of authorities in support of the application by Friday, 20 November 2026.
5. THAT the respondent is to file an outline of legal submissions and list of authorities in opposition to the application by Friday, 27 November 2026.
6. THAT the matter be listed for a 2-day hearing not before Monday, 30 November 2026.
7. THAT there be liberty to apply.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2026 WAIRC 00924

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SATNAM SINGH
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 12 OCTOBER 2026
FILE NO/S	U 136 OF 2025
CITATION NO.	2026 WAIRC 00924

Result Order issued
Representation
Applicant Mr S Singh on his own behalf
Respondent Ms T Loo (of counsel) from the State Solicitors Office

Order

HAVING heard from the applicant on his own behalf, and Ms T Loo (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that –

The substantive hearing listed on 12 October and 13 October 2026 be adjourned on a date not before 23 November 2026.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Belmont Inside Workforce Industrial Agreement 2026 AG 28/2026	05/10/2026	City of Belmont	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Belmont Outside Workforce Industrial Agreement 2026 AG 24/2026	05/10/2026	City of Belmont	Local Government, Racing and Cemeteries Employees Union (WA), Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Joondalup Inside Workforce Industrial Agreement 2026 AG 26/2026	05/10/2026	City of Joondalup	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered
Ovis Community Services Enterprise Agreement 2025 AG 25/2025	18/09/2026	Pat Thomas House Inc.	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner T Emmanuel	Agreement registered
Shire of Ravensthorpe Industrial Agreement 2026 AG 25/2026	05/10/2026	Shire of Ravensthorpe	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, The Local Government, Racing Cemeteries Employees Union (WA)	Senior Commissioner R Cosentino	Agreement registered
Town of Port Hedland Industrial Agreement 2026 AG 27/2026	01/10/2026	Town of Port Hedland	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered

PUBLIC SECTOR INDUSTRIAL MATTERS—Matters dealt with

2026 WAIRC 00865

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 12 DECEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00865
CORAM : COMMISSIONER T EMMANUEL
HEARD : TUESDAY, 1 SEPTEMBER 2026
DELIVERED : THURSDAY, 17 SEPTEMBER 2026
FILE NO. : P 67 OF 2025
BETWEEN : GAIL MCKENZIE

Applicant

AND

THE BOARD OF THE EAST METROPOLITAN HEALTH SERVICE

Respondent

CatchWords	:	Industrial law (WA) - Objection to application on basis of jurisdiction - Dismissal application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) - Whether disciplinary decision or finding was made - No standing to refer application - No jurisdiction - Application dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) ss 27(1)(a), 29(1)(i), 29(1)(j), 36AA(2)(c)
		Public Sector Management Act 1994 (WA) ss 76, 78
		Health Services Act 2016 (WA) ss 6, 104, 150(1), 163(3)(b), 166(6), 171
Result	:	Application dismissed
Representation:		
Applicant	:	On her own behalf
Respondent	:	Ms S Walsh (of counsel)

Case(s) referred to in reasons:

Edoo v South Metropolitan Health Service [2026] WAIRC 00825

Jade Smith v Minister for Corrective Services [2022] WAIRC 00848; (2023) 103 WAIG 51

Lee v South Metropolitan Health Service [2025] WAIRC 00767; (2026) 106 WAIG 357

Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service [2017] WAIRC 00991; (2017) 97 WAIG 1871

Palaloi v Director General, Department of Education [2025] WASCA 130

Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (1987) 67 WAIG 325

Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Ors v (Not Applicable) [2024] WAIRC 01044; (2025) 105 WAIG 45

Reasons for Decision

1 Ms McKenzie was employed as an administrative assistant by the Board of the East Metropolitan Health Service (**Health Service**). On 12 December 2025, the Health Service temporarily transferred Ms McKenzie from her substantive position at Bentley Health Service to work at Royal Perth Hospital.

2 Ms McKenzie has referred that decision to the Commission under s 29(1)(i) of the *Industrial Relations Act 1979* (WA) (**IR Act**), as a decision to take disciplinary action under s 78 of the *Public Sector Management Act 1994* (WA) (**PSM Act**). She asks the Commission to reinstate her to her substantive position.

3 The Health Service says the Commission has no jurisdiction to hear and determine application P 67 of 2025. It asks the Commission to make an order under s 27(1)(a) of the IR Act dismissing application P 67 of 2025 on the basis of a lack of jurisdiction (**Application to Dismiss**).

4 Ms McKenzie says the Commission should not uphold the respondent's Application to Dismiss and the matter should proceed to a substantive hearing.

What the Commission must decide

5 To resolve this matter, I must decide whether application P 67 of 2025 should be dismissed. That involves considering whether Ms McKenzie has standing to refer an industrial matter to the Commission and whether the Commission has jurisdiction to deal with her application.

Legislation and principles

6 As the Full Bench recently held in ***Edoo v South Metropolitan Health Service*** [2026] WAIRC 00825 at [11]:

> It is trite that before enquiring into and dealing with an industrial matter, the Commission must be satisfied that it has jurisdiction to do so. If a challenge as to jurisdiction is made by a party to a proceeding, then the Commission is duty bound to deal with that issue first, before proceeding further to enquire into and deal with the industrial matter: ***Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia*** (1987) 67 WAIG 325.

7 Section 27(1)(a) of the IR Act provides:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it –
>
> (a) at any stage of the proceedings dismiss the matter or any part of it or refrain from further hearing or determining the matter or part if it is satisfied –
>
> (i) that the matter or part is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a

sufficient interest in the matter; or

(iv) that for any other reason the matter or part should be dismissed or the hearing of it discontinued, as the case may be;

…

8 As I set out in ***Lee v South Metropolitan Health Service*** [2025] WAIRC 00767 at [21] – [23]:

> The principles that the Commission must apply when considering whether to dismiss an application under s 27(1)(a) of the IR Act are well established. Recently, the Industrial Appeal Court in ***Palaloi v Director General, Department of Education*** [2025] WASCA 130 confirmed at [26] that the approach taken by the Full Bench in relation to s 27(1)(a) was correct, describing the Full Bench's approach at [13]:
>
> > The Full Bench said that the power of the Commission to dismiss a matter under s 27 of the Act is a broad power. However, given that a person who brings proceedings before the Commission is entitled to have the jurisdiction invoked, the statutory power to dismiss a matter under s 27(1)(a) of the Act is to be exercised sparingly and only in a clear case... (footnotes omitted)
>
> This approach is consistent with that taken in many Commission decisions, including in ***Jade Smith v Minister for Corrective Services*** [2022] WAIRC 00848; (2023) 103 WAIG 51 at [24]. Recently the Commission in Court Session in ***Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Ors v (Not Applicable)*** [2024] WAIRC 01044; (2025) 105 WAIG 45 set out the principles from [4] – [6]. I respectfully adopt and apply that reasoning in this matter.

Background

9 Ms McKenzie has referred to the Commission the Health Service's decision dated 12 December 2025 to temporarily transfer her from her substantive position at Bentley Health Service. She says the transfer is punishment, a breach of the industrial agreement, and does not comply with the agreement reached at conciliation in a different matter before the Commission, being application P 25 of 2025.

10 It is not in dispute that:

(a) the Health Service is a health service provider under the *Health Services Act 2016* (WA) (**HS Act**);

(b) the Health Service is Ms McKenzie's employer;

(c) there has been no finding that Ms McKenzie committed a breach of discipline;

(d) no disciplinary action has been imposed under a disciplinary process; and

(e) the Health Service has since abolished Ms McKenzie's substantive position.

Should application P 67 of 2025 be dismissed?

11 Ms McKenzie argues that the question for the Commission to decide is whether there is a real and serious dispute justifying the use of the Commission's resources. She says:

> I just feel there's a need … [for] an independent tribunal to – to see that – to make a decision whether the – the decisions and actions of - management over, ah, an extended period has - has been justified [and] procedurally fair. Um, and – and I need my, um, reputation to be, um, restored… What they've done to me is – it's just beyond belief from my perspective and they need to be held accountable.

12 Ms McKenzie disagrees that she lacks standing under the PSM Act to refer her application to the Commission but she could not explain why.

13 Ms McKenzie disputes that there is no decision capable of review for her to refer to the Commission under s 29(1)(j) or (i) of the IR Act. Almost all of Ms McKenzie's submissions are about her substantive matter and not the question I must decide here.

14 It is clear that Ms McKenzie is aggrieved by the way the Health Service has dealt with her and she considers that the Commission should be able to deal with her substantive matter. However, as I explained in ***Lee v South Metropolitan Health Service*** [2025] WAIRC 00767 at [26], the Commission does not have jurisdiction to enquire into and deal with every employment matter that may arise.

15 Ms McKenzie was represented by a lawyer when she filed application P 67 of 2025. In her *Form 5 – Application to Refer Public Sector Matter* (**Form 5**), Ms McKenzie has referred to the Commission an industrial matter under s 78 of the PSM Act.

16 Under s 29(1)(i) of the IR Act, an employee aggrieved by an industrial matter defined by s 78 of the PSM Act may refer to the Commission a decision or finding made in relation to the employee to whom Part 5 of the PSM Act applies.

17 Section 78 of the PSM Act applies to employees referred to in s 76 of the PSM Act. Section 76 of the PSM Act relevantly provides that Part 5 of the PSM Act applies to all public service officers or such other employees as prescribed.

18 Section 3 of the PSM Act defines 'public service officer' as one employed in the public service under Part 3 of the PSM Act.

19 The difficulty for Ms McKenzie is that she is not an employee referred to in s 76 of the PSM Act. She was not employed under Part 3 of the PSM Act. Ms McKenzie agrees that she is employed by the Health Service. She agrees that the Health Service is a health service provider under the HS Act. Employees of a health service provider are employed under s 140 of the HS Act.

20 Further, s 104 of the HS Act makes it clear that Part 3 of the PSM Act does not apply to employees employed by a health service provider.

21 Section 36AA(2)(c) of the IR Act confines the Commission's jurisdiction to enquiring into and dealing with industrial matters relating to public sector employees, being those decisions or findings that are defined by statute, relevantly here in s 78 of the

PSM Act and s 171 of the HS Act.

22 There is no basis for me to conclude that Ms McKenzie has standing to refer an industrial matter as defined by s 78 of the PSM Act.

23 It is not in dispute that Ms McKenzie is employed by the Health Service and that it is a health service provider under the HS Act. Ms McKenzie was not employed under Part 3 of the PSM Act. Accordingly, Part 5 of the PSM Act does not apply to Ms McKenzie. Ms McKenzie does not have standing under s 29(1)(i) of the IR Act to refer to the Commission an industrial matter under the PSM Act. The Application to Dismiss must be upheld on that basis.

24 However, for the reasons that follow, even if Ms McKenzie had referred to the Commission an industrial matter under s 171 of the HS Act (or if her Form 5 were amended accordingly), the Commission would still lack jurisdiction to deal with her application. This is because a decision to transfer an employee, where the transfer is not disciplinary action, is not an industrial matter that may be referred by an individual to the Commission under s 29(1)(j) of the IR Act.

25 Under s 29(1)(j) of the IR Act, an employee aggrieved by an industrial matter defined by s 171 of the HS Act may refer that decision or finding to the Commission.

26 As set out at [21] above, s 36AA(2)(c) of the IR Act confines the Commission's jurisdiction to enquiring into and determining those decisions or findings that are defined by statute.

27 Section 171 of the HS Act provides that the following are an industrial matter for the purposes of the IR Act:

> (1) Subject to section 118, each of the following is an industrial matter for the purposes of the *Industrial Relations Act 1979* —
>
> (a) a decision under section 147, 148 or 164(1)(a) to suspend an employee or former employee on partial pay or without pay;
>
> (b) a decision under section 150(1), 163(3)(b) or 166(b) to take disciplinary action in relation to an employee or former employee;
>
> (c) a decision under section 159(1)(b) or (c) in relation to an employee or former employee;
>
> (d) a finding mentioned in section 165(5)(a)(ii) made in relation to an employee or former employee;
>
> (e) a decision under section 168(1) to terminate the employment of an employee or former employee;
>
> (f) if proceedings have been taken under this Part against an employee or former employee for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a lawful redeployment direction —
>
> (i) a finding mentioned in section 163(3)(a), 165(5)(a)(i) or 166(a) made in relation to the employee or former employee; or
>
> (ii) a decision under section 164(1)(a) to suspend the employee or former employee on partial pay or without pay.
>
> …

28 In essence, Ms McKenzie says that the decision to temporarily transfer her was disciplinary in nature. She says she has been aggrieved by the Health Service's actions and decisions because they have impacted and affected her. In effect, Ms McKenzie argues that the impact and consequences of the Health Service's decision to transfer her means the Commission has jurisdiction under s 29(1)(j) of the IR Act to hear and determine application P 67 of 2025.

29 Disciplinary action is defined in s 6 of the HS Act:

> ***disciplinary action***, in relation to a breach of discipline by an employee, means any one or more of the following —
>
> (a) a reprimand;
>
> (b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;
>
> (c) transferring the employee to another health service provider with the consent of the employing authority of that health service provider;
>
> (d) if the employee is not a chief executive, transferring the employee to another office in the health service provider in which the employee is employed;
>
> (e) reduction in the monetary remuneration of the employee;
>
> (f) reduction in the level of classification of the employee;
>
> (g) alteration of the employee's scope of practice or duties, or both;
>
> (h) dismissal;
>
> …

30 First, contrary to Ms McKenzie's submission, s 29 of the IR Act does not confer jurisdiction on the Commission. Rather, s 29 of the IR Act is about standing. It sets out who may refer industrial matters to the Commission.

31 Second, while a transfer could amount to disciplinary action in some circumstances, it will not always amount to disciplinary action. For example, under cl 66.4 of the WA Health System – HSUWA – PACTS Industrial Agreement 2024 (**Industrial**

Agreement), a health service provider may temporarily or permanently transfer employees in certain circumstances. In this case, the Health Service said in its letter to Ms McKenzie dated 12 December 2025 that the decision to temporarily transfer her was in accordance with cl 66 of the Industrial Agreement. As the Health Service submits, '[t]ransfers effected pursuant to the Agreement are conceptually and legally distinct from transfers imposed as disciplinary action under Part 11 of the HS Act and are subject to their own regulatory framework and review mechanisms.'

32 In a decision of the Public Service Appeal Board in ***Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service*** [2017] WAIRC 00991, the Public Service Appeal Board considered whether it had jurisdiction to hear and determine an appeal brought by a doctor after the health service that employed him decided to terminate his appointment as Head of Department, in circumstances where the doctor otherwise remained employed. In that case, being removed as Head of Department reduced the doctor's remuneration and altered his scope of duties. The doctor argued that that meant that the health service had taken disciplinary action against him.

33 For the reasons set out from [96] – [103] in that case, the Public Service Appeal Board held that for removal as Head of Department to fall within the definition of disciplinary action under s 6 of the HS Act, it must be *in relation to a breach of discipline*. That the effect of the removal fit part of the definition of disciplinary action did not mean that disciplinary action had been taken.

34 Similarly here, under s 6 of the HS Act, a transfer will only amount to disciplinary action if it is *in relation to a breach of discipline*.

35 In this case, Ms McKenzie agrees that:

(a) there has been no finding that she committed a breach of discipline; and

(b) no disciplinary action has been imposed under a disciplinary process.

36 The decision to transfer Ms McKenzie was not a decision made under ss 150(1), 163(3)(b) or 166(6) of the HS Act. Ms McKenzie's transfer was not in relation to a breach of discipline. The decision dated 12 December 2025 to transfer Ms McKenzie cannot amount to disciplinary action. Accordingly, there is no industrial matter under s 171 of the HS Act for Ms McKenzie to refer to the Commission.

37 Ms McKenzie has not pointed to any other decision or industrial matter as the basis for her referral which could enliven the Commission's jurisdiction under s 29(1)(j) of the IR Act.

Conclusion

38 In circumstances where Ms McKenzie lacks standing to refer application P 67 of 2025 and the Commission lacks jurisdiction to hear and determine it, it cannot be necessary, desirable in the public interest or appropriate to further hear or determine application P 67 of 2025. I am satisfied that this is a clear case where the power under s 27(1)(a)(ii) and (iv) of the IR Act should be exercised. It is consistent with the Commission's obligation to act according to equity, good conscience and the substantial merits of the case.

39 The Application to Dismiss must be upheld. An order will issue dismissing application P 67 of 2025.

2026 WAIRC 00866

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 12 DECEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAIL MCKENZIE
	APPLICANT
	-v-
	THE BOARD OF THE EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 17 SEPTEMBER 2026
FILE NO/S	P 67 OF 2025
CITATION NO.	2026 WAIRC 00866

Result	Application dismissed
Representation	
Applicant	On her own behalf
Respondent	Ms S Walsh (of counsel)

Order

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 –

THAT application P 67 of 2025 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2026 WAIRC 00900

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 7 FEBRUARY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2026 WAIRC 00900
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 9 JUNE 2026
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2026
FILE NO.	**:**	P 9 OF 2025
BETWEEN	**:**	KIM MARIE HALL
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
		Respondent

Catchword's	**:**	Industrial Law (WA) - Breach of discipline - Referral of decision to dismiss under the *Public Sector Management Act 1994* (WA) - Allegations of misconduct - Breach of policies, procedures and Code of Conduct - Inappropriate use of email systems - Unauthorised disclosure of confidential information - Discriminatory and offensive correspondence - Inappropriate comments directed to work colleagues - Prior warnings and improvement action - Lack of insight into behaviour - Dismissal not harsh, oppressive or unfair - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Public Sector Management Act 1994 (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Ms K Hall
Respondent	**:**	Ms E Negus (of counsel)

Case(s) referred to in reasons:

Deborah Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Krishna Thavarasan v The Water Corporation [2006] WAIRC 04089; (2006) 86 WAIG 1434

Gary Mark Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Sanja Spasojevic v Speaker of the Legislative Assembly [2021] WAIRC 00641; (2021) 102 WAIG 70

Reasons for Decision

1 Ms Kim Marie Hall (**applicant**) was employed by the Director General, Department of Justice (**respondent**) as a prison officer from 25 September 2009.

2 On 6 February 2025, the applicant was dismissed by the respondent on the grounds that she misconducted herself by using her Department of Justice (**Department**) email account to:

(1) release confidential Department information for an unauthorised purpose on five occasions;

(2) make discriminatory and offensive comments about people and groups of people on nine occasions; and

(3) make inappropriate and derogatory comments about her work colleagues on 20 occasions.

3 On 7 March 2025, the applicant referred the respondent's decision to dismiss to the Western Australian Industrial Relations Commission (**Commission**) under s 78 of the *Public Sector Management Act 1994* (WA) **(PSM Act)**.

4 The applicant claims the decision to dismiss is unfair because:

(a) the emails sent by her were private emails, and the Department's email system was used because she did not have access to her private email account or mobile phone whilst at work;

(b) several emails have been taken out of context and she sent one email in error;

(c) other prison officers that have misconducted themselves have not been disciplined;

(d) the disciplinary process and her dismissal are a continuation of the targeting and bullying of her by senior officers;

(e) dismissal is disproportionate.

5 The applicant seeks reinstatement to her role at Karnet Prison Farm or alternatively, re-deployment to another prison or another department. The applicant seeks orders for compensation for duress and stress.

Facts and Evidence

6 The applicant called Mr Phillip Stryers, Mr Anthony Ford and herself to give evidence on her behalf.

7 The respondent called Mr Martin **Miller**, Assistant Director of Professional Standards at the Department to give evidence.

8 On 12 April 2024, Mr Miller received a complaint about an email the applicant had sent, regarding an article posted in the staff newsletter. The article concerned past and present service women, marching together behind a combined service banner. The applicant took objection to the proposal and in requesting clarification of the arrangement, made statements that were alleged to be disparaging of women in the Department.

9 As part of the complaint assessment process, the applicant's Department email account was audited for the previous 12 months to ascertain whether this email reflected a pattern of similar behaviour. An audit is part of the Department's Professional Standards Operating Procedures.

10 On 1 July 2024, a delegate on behalf of the respondent wrote to the applicant setting out allegations concerning emails sent by the applicant from her Department email account. There are three categories of allegations set out in the letter, which particularised the allegations and provided examples of the applicant's alleged misconduct:

Allegations

1. Between 11 October 2023 and 21 February 2024, at Karnet Prison Farm, you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994*, in that you committed an act of misconduct when you used your Department of Justice email account to release confidential Departmental information for an unauthorised purpose.

Particulars

(a) You are employed by the Department of Justice **(Department)** as a prison officer at Karnet Prison Farm.

(b) Between 11 October 2023 and 21 February 2024, you used your Department email account on five (5) occasions to release confidential Department information to internal and external email account holders.

(c) Examples of these emails are attached in **Attachment A**.

(d) You did not have an authorised purpose to release confidential Department information.

(e) Your conduct by releasing confidential Department information for an unauthorised purposed considered improper and/or immoral by the standards of ordinary people and therefore constitutes a breach of discipline.

2. Between 12 September 2023 and 18 April 2024, at Karnet Prison Farm, you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994*, in that you committed an act of misconduct when you used your Department of Justice email account to make discriminatory and offensive comments about various people and/or groups of people.

Particulars

(a) You are employed by the Department of Justice **(Department)** as a prison officer at Karnet Prison Farm.

(b) Between 12 September 2023 and 18 April 2024, on nine (9) occasions, you used your Department email account to make discriminatory and offensive comments about various people and/or groups of people, which included Aboriginal Australians, people of Indian descent, Women and LQBTIQA+ people.

(c) Examples of these emails are attached in **Attachment B**.

(d) Your conduct by making discriminatory and offensive comments about various people and/or groups of people is considered improper and/or immoral by the standards of ordinary people and therefore constitutes a breach of discipline

3. Between 3 June 2023 and 13 April 2024, at Karnet Prison Farm, you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994*, in that you committed an act of misconduct when you used your Department of Justice email account to make inappropriate and derogatory comments about your work colleagues.

Particulars

(a) You are employed by the Department of Justice (Department) as a prison officer at Karnet Prison Farm.

(b) Between 3 June 2023 and 13 April 2024, on 20 occasions, you used your Department email account to make inappropriate and derogatory comments about your work colleagues.

(c) Examples of these emails are attached in Attachment C.

(d) Your conduct by making inappropriate and derogatory comments about your work colleagues is considered improper and/or immoral by the standards of ordinary people and therefore constitutes a breach of discipline.

11 The attachments to the letter set out five emails in the category of 'Official Information', nine emails in the category of 'Discrimination' and 20 emails in the category of 'Inappropriate comments towards colleagues'.

12 On 22 August 2024, the applicant's lawyers wrote to the respondent on behalf of the applicant informing:

> Our client does not intend to traverse each of the matters raised in DOJs letter of allegations.
>
> Our client maintains that, collectively, her remarks had no racial intent, and the comments were made to peers as a casual observation only. Further, our client maintains that she has never openly displayed any bias towards any prisoners or DOJ staff, and that she has treated all persons during her employment with DOJ ethically, fairly and with kindness.
>
> DOJ's allegations are wholly unsubstantiated and lack a clear connection to any breach of policy by our client. As such, in the absence of further particulars from DOJ identifying our client's 'breaches of discipline' between 19 April 2023 and 19 April 2024, our client cannot adequately respond to DOJ's allegations.
>
> In the event our client's employment is terminated, our client reserves her rights to take whatever action she deems fit.
>
> All correspondence going forward in relation to our client's employment with DOJ should be directed to our office.

13 By letter dated 14 November 2024, the respondent advised the applicant she had formed the preliminary view that the applicant had committed a breach of discipline and proposed to dismiss the applicant.

14 On 2 December 2024, the applicant emailed the respondent with her response to the proposed actions and proposed findings. The applicant stated she had dismissed her lawyers who previously responded on her behalf. The applicant said her lawyers did not follow her instructions. The applicant now sought to submit her response to the allegations. In the applicant's response, she acknowledged responsibility for her actions and set out her personal circumstances including her personal history and background. The applicant outlined the consequences for her should she be dismissed. In addition, the applicant addressed each allegation cited in the three categories of emails included in the respondent's letter dated 1 July 2024.

15 By letter dated 6 February 2025, the respondent informed the applicant she was dismissed from her employment effective immediately upon service of the letter. The applicant received the letter on 7 February 2025.

16 The applicant says she has always endeavoured to do her job to the best of her ability. She has done her best to always display a professional attitude and treat her colleagues with fairness and respect. The applicant admits she has made mistakes.

17 The applicant says she has been targeted because she is one of the few people who is not afraid to stand up to the 'hierarchy' and bullies in the Department.

18 The applicant's evidence is that she now suffers depression, anxiety, high blood pressure and extremely low esteem from being dismissed.

Legal Principles

19 Section 29(1)(i) of the *Industrial Relations Act 1979* (WA) **(IR Act),** read together with s 78(c) of the PSM Act, provides the applicant with a right to refer to the Commission, a decision to take disciplinary action by the respondent including dismissal.

20 A public sector employee who commits an act of misconduct, commits a breach of discipline and therefore may be subject to disciplinary action as prescribed by s 80 of the PSM Act.

21 The Commission may review a public sector employing authority's decision de novo. That is, the Commission can decide the matter afresh on the evidence before it and decide whether the applicant engaged in the alleged misconduct: ***Deborah Harvey v Commissioner for Corrections, Department of Corrective Services*** [2017] WAIRC 00728; (2017) 97 WAIG 1525 (***Harvey***) [31] and [65].

22 The employing authority bears the onus of establishing the misconduct occurred: ***Harvey*** [24] - [25] citing ***Gary Mark Raxworthy v The Authority for Intellectually Handicapped Persons*** (1989) 69 WAIG 2266, ***Krishna Thavarasan v The Water Corporation*** [2006] WAIRC 04089; (2006) 86 WAIG 1434 [20] and ***Sanja Spasojevic v Speaker of the Legislative Assembly*** [2021] WAIRC 00641; (2021) 102 WAIG 70 [37].

23 The respondent submits the applicant's conduct was inconsistent with the Department's Code of Conduct as applied at the time:

> The Department's *Code of Conduct* (2020 and 2022 versions) relevantly provide: "We show respect, follow instructions and work in cooperation with our supervisors, managers and work colleagues in the workplace" (clause 3.1); "We act without prejudice, seeking to prevent and eliminate bullying behaviour, unlawful discrimination or harassment in any form based on grounds such as national origin, race, culture, appearance, language, gender, sexual orientation, age, place of residence, belief, religion, political affiliation, social, economic or health status, family responsibilities or marital status" (clause 3.1); "We exercise proper courtesy, consideration and sensitivity in the performance of our duties and our dealings with our Departmental work colleagues" (clause 3.2); "We do not access the Department's systems, data or information for personal reasons or purposes that are not part of our official duties, or out of curiosity. Unauthorised use or access of a computer system (eg ICMS, TOMS, CBIS, etc) is a criminal offence and will result in charges being laid" (clause 3.6). (Footnote 2, Respondent' Submissions filed 30 January 2026)

24 The respondent submits the applicant's conduct was inconsistent with the Department's Acceptable Use of IT Policy applied at the time:

> The Department's *Acceptable Use of IT Policy* provides: "Staff must not**:** • Use ICT Resources for purposes that are contrary to the Code of Conduct or harmful to the Department, as this places the Department at risk. • Use ICT Resources for storing, transmitting, publishing or displaying material, which is obscene, defamatory, offensive, abusive, indecent, menacing, sexually explicit/oriented, threatening or based on race, religion, colour, age, sex, disability, ethnicity, sexual orientation, related to terrorist activities, unwanted or otherwise unlawful or unauthorised or violates any law or regulation". (Footnote 3, Respondent's Submissions filed 30 January 2026).

Parties Contentions

25 The respondent submits that the applicant's dismissal for misconduct was fair because the applicant's conduct was improper and immoral by the standards of ordinary people and, therefore, constitutes a breach of discipline. In the circumstances, where the applicant's conduct was serious and she had been previously warned about her conduct on multiple occasions, the respondent's right to dismiss was not exercised unfairly, harshly, or oppressively.

26 I understand the applicant argues her dismissal is unfair because:

(a) she did not have access to her personal email and mobile phone during shifts, resulting in her being unable to contact people. The professional advice she has received is for her to express her views or feelings, which means she has used her work email to make a point or communicate with her partner;

(b) many of the emails were taken out of context and she was motivated to send the emails because she had objections to the Department's policies and actions;

(c) employees she had insulted in her emails had behaved badly in the past;

(d) other employees had engaged in derogatory conduct toward the applicant in the past;

(e) other employees had not been disciplined either at all or in the same manner that the applicant has been for conduct that the applicant considered was similar or less serious than her conduct;

(f) she has been the target of personal vendettas from superior officers; and

(g) the applicant's personal circumstances make the dismissal harsh.

27 In her written submissions, the applicant acknowledges she made errors of judgement. She expresses remorse for her conduct and agrees that some form of punishment is warranted. However, the applicant says dismissal has adversely affected her physical and mental health, as well as her financial circumstances. The applicant says that a lesser penalty, such as a fine, a transfer to another prison, or a temporary reduction in pay, would have been more appropriate.

Allegation One - Official Information

28 It is not contested the applicant sent emails containing Department information to external individuals including:

(1) an email disclosing a Special Operations Group (**SOG**) Operation at the prison to her partner;

(2) a screenshot from the Total Offender Management Solution (**TOMS**) System relating to a prisoner to external individuals and internal colleagues;

(3) a screenshot from the TOMS system relating to a prisoner to her private email;

(4) a screenshot from the TOMS system relating to a prisoner to various individuals, along with an inappropriate comment; and

(5) an email to various external individuals containing a copy of her complaint against the Superintendent of Karnet Prison Farm at the time.

29 The applicant argues she used the Department's email system because she did not have access to her personal email and mobile phone while at work.

30 In relation to the specific emails set out in the respondent's letter dated 1 July 2024, the applicant says the following in her response on 2 December 2024:

(1) Email to partner, disclosing an SOG Operation

Response: The applicant says she was simply making her partner aware that she would not be available for their regular telephone catch up.

(2) Email containing a screenshot of a TOMS record relating to a prisoner to internal and external parties

Response: The applicant explains that she was raising a valid point to like-minded staff and former staff members.

(3) Email containing a screenshot of a TOMS record in the background to her private email address

Response: The applicant says this email was an accident and the TOMS screenshot was inadvertently included with personal material she had sent.

(4) Email of screenshot with TOMS record and Commentary

Response: The applicant says she is extremely remorseful if her actions caused any distress and that her intention was to lighten the mood. The applicant says she now accepts it was poor judgement and she regrets the email.

(5) Email of a copy of a complaint against the Superintendent to external parties

Response: The applicant says that she was sharing the complaint with current and former employees of the Department, whom had acted as support persons for her in the past. The applicant says she felt that she was the victim in the situation and therefore she turned to her colleagues for support and advice.

31 I find the applicant's explanations lack credibility.

32 In relation to the first email, the applicant has been a prison officer with the Department for about 15 years. The applicant would have been aware of the nature of SOG operations and the potential for operations to be undermined if prisoners or prison visitors became aware of the operations. The applicant's protest that she was simply advising her partner of her unavailability, demonstrates that she does not understand the gravity of her conduct. The relevant issue is not whether her partner, the recipient of the applicant's email, has an interest in prison operations. The issue is the fact that the applicant disclosed highly confidential information.

33 Regarding the emails containing screenshots of TOMS system records, I note access to the TOMS system is for official purposes only. Prison officers are only permitted to view TOMS system records for the purposes of performing their duties. This is clearly set out in the Department's Acceptable Use of IT Policy. The evidence is that upon accessing the TOMS system, the entry screen displays a message:

> Please note that all access to TOMS is recorded and monitored. ONLY access information for lawful and legitimate reasons.

34 The applicant has been employed by the respondent within prisons for an extensive period and would be aware of the confidentiality of the TOMS system. The applicant did not contest that she ought not to have sent the screenshots.

35 The applicant's conduct in emailing the screenshots, is not compliant with the Department's policies and the Code of Conduct. The applicant's explanation for her conduct being an attempt to 'lighten the mood' and that she was raising a valid point, indicates she does not understand the importance of complying with the Department's policies and procedures.

36 In relation to the final email in this category of allegations, I do not find the applicant's explanation for the distribution of her complaint against a Superintendent to be credible. It is clear from the applicant's comment in her email 'Be interesting to see what the feather foots have to say about this' that the applicant is not sending the email for the purposes of obtaining advice from current or former colleagues. The email appears to have been sent for a gratuitous or spiteful purpose.

Allegation Two – Discriminatory or Offensive Comments

37 The nine examples of emails sent by the applicant in this category contain racist, sexist, discriminatory or offensive comments about Aboriginal and Torres Strait Islander people, people of Indian ethnicity, women and LGBTIQA+ people.

38 The applicant used her Department email account to communicate her views and opinions to her partner, former prison officers, external individuals and staff within the Department.

39 The applicant explains in her response that she was simply expressing her opinions to like-minded officers and former officers. The emails were not public or global. A common theme in the applicant's explanations is her frustration with the respondent's decision to direct resources inappropriately. The applicant says she was not being racist, and that the subject of her commentary just happened to be about a particular ethnicity. The applicant explains in her response that her opinion is that Aboriginal and Torres Strait Islander prisoners, are favoured because of their race. Similarly, the applicant explains her views that staff of Indian ethnicity are favoured over others.

40 The applicant says regardless of her personal feelings, she always conducts herself with integrity and treats all prisoners with fairness and without prejudice.

41 I find the applicant's explanations for sharing her unsolicited personal opinions in the manner and language adopted, to be unconvincing and uncompelling.

42 The applicant's communications are clearly not compliant with the Department's policies and the Code of Conduct. The applicant's explanations in defence of her emails, indicate she does not understand the importance of complying with the Department's policies and procedures concerning professional conduct, nor the standards of common decency. In addition, the applicant's explanations demonstrate that she does not understand that the respondent's concerns about her conduct relate to her use of highly offensive language.

43 The applicant may be entitled to hold personal opinions and communicate such opinions in a personal context. However, the applicant exceeded her rights when she resorted to expressing her opinions in an offensive manner via her Departmental email account at work and engaging in communications contrary to the Department's policies.

44 At least two of the emails in this category, are not emails sent in a personal context and are directed to staff in other business units and concern work related matters. The applicant's language in these emails is offensive and racist. The applicant explains that, in one email, she was seeking clarification and, in the other, raising her concerns that she was unreasonably and unfairly bearing the workload associated with being assigned more Aboriginal and Torres Strait Islander prisoners than others. In her words 'I don't believe it is fair that I am given extra work simply because other staff are lazy'.

45 It is understandable that there may be a need to seek clarification for individual circumstances. It is also valid for employees to raise concerns for their workload. However, in this matter, the central issue is the manner the applicant expressed herself. The applicant fails to grasp that her language is objectively offensive and in the last email, racist.

Allegation Three – Inappropriate Comments About Colleagues

46 In the 20 emails sent by the applicant and cited by the respondent in this category, the applicant shares her opinions about other

staff, union delegates and officials, and senior officers at Karnet Prison Farm.

47 In some of the emails, the applicant makes adverse claims about colleagues including allegations of domestic violence, stalking and speculation about personal relationships in a disparaging manner.

48 In her response dated 2 December 2024, the applicant's explanations include that:

(a) she is not the only member of staff to refer to people in a disrespectful manner;

(b) her emails are private emails intended for like-minded staff and former staff; and

(c) she cites being overlooked for promotional positions, targeted, bullied, mocked, belittled and victimised by senior officers.

49 The applicant characterises some of her emails with former staff as her reaching out for advice.

50 The applicant's explanations do not provide a sound basis to find that the decision to dismiss was unfair, oppressive or harsh.

51 Some of the emails are malicious.

52 The emails sent by the applicant were offensive and disrespectful to many colleagues. The applicant's grievances and allegations of adverse conduct are not supported with evidence.

Prior Warnings About Conduct

53 The respondent's evidence is that the applicant has been given warnings and guidance concerning her inappropriate emails and disrespectful behaviour on numerous occasions.

54 In November 2016, the applicant was counselled about an inappropriate email she sent to a select group of prison officers about a Human Resources staff member's car crash.

55 On 30 March 2018, the applicant was issued with a Regular Monitoring Form (**RMF**) for inappropriate language towards a Senior Officer.

56 On 29 June 2020, the applicant sent an inappropriate global email regarding a union meeting. The Superintendent of Karnet Prison Farm at the time sent the applicant an email on 30 June 2020, stating her email was unacceptable. The Superintendent referred to the Code of Conduct and told her that she was to cease using the email system in an inappropriate manner as her language and tone were offensive, confronting and distressing to the recipients.

57 On 27 May 2021, the applicant was given improvement action and a final warning for posting an inappropriate comment on a social media post in which her employment with the Department was visible. The applicant was informed her comments could be reasonably interpreted as reflecting views that are discriminatory on the grounds of national origin, race, culture and appearance. The applicant was referred to the relevant provisions of the Department's Code of Conduct and Social Media Policy. The applicant was warned that similar conduct in the future may result in disciplinary action.

58 On 6 September 2021, the applicant was given improvement action and a formal warning, because of reports she had referred to a senior officer in derogatory and offensive terms. The applicant was referred to clause 3.1 of the Department's Code of Conduct and warned that similar conduct in the future could result in disciplinary action.

59 On 25 January 2024, the applicant was issued an RMF because of an email sent by the applicant to a group of officers alleging that one of them stole her epaulettes from her uniform. The RMF states 'you are ordered to cease using the department's email system for such inappropriate communications and are reminded of the Code of Conduct'.

60 I find the applicant released confidential information for the purposes other than her official duties.

61 I find the applicant's conduct was objectively offensive and discriminatory toward Aboriginal and Torres Strait Islander people, people of Indian ethnic origin, women and LQBTIQA+ people.

62 I find the applicant made inappropriate, offensive, and derogatory comments about her work colleagues using the Department's email system and contrary to the Department's policies.

Conclusion

63 The applicant seeks reinstatement to her former position. The applicant's explanations for each of the cited emails, as set out in her response dated 2 December 2024, do not provide a basis to be confident that the applicant understands the nature of her conduct. I am not confident that the applicant will not repeat her offensive conduct.

64 The applicant's statements that she is remorseful, are not consistent with her evidence and submissions. The applicant's evidence and submissions at the hearing indicate she has not understood her conduct constitutes misconduct. The applicant has not demonstrated any insight into her behaviour. Despite being previously counselled and warned about her use of the Department's email facilities, her inappropriate, offensive language and the tone in her communications, the applicant did not correct her behaviour.

65 Given the applicant's lack of insight and failure to change her behaviour, reinstatement or re-employment to another prison or another department is not appropriate.

66 When weighed against the gravity and persistence of the applicant's conduct, I consider a lesser penalty is not appropriate.

67 For the reasons set out above, I find the applicant's dismissal was not harsh, oppressive or unfair and I will dismiss the application.

2026 WAIRC 00905

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 7 FEBRUARY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM MARIE HALL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 2 OCTOBER 2026
FILE NO/S	P 9 OF 2025
CITATION NO.	2026 WAIRC 00905

Result	Application dismissed
Representation	
Applicant	Ms K Hall
Respondent	Ms E Negus (of counsel)

Order

HAVING heard from the applicant on her own behalf, and Ms E Negus (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders –

THAT this application be, and by this order, is dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

WORK HEALTH AND SAFETY ACT—Matters dealt with

2026 WAIRC 00857

APPLICATION TO EXTEND A DEADLINE FOR MAKING A DECISION PURSUANT TO SECTION 82A OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	WORKSAFE COMMISSIONER
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS UNION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 11 SEPTEMBER 2026
FILE NO/S	WHST 5 OF 2026
CITATION NO.	2026 WAIRC 00857

Result	Order issued
Representation	
Applicant	Ms V Burns (of counsel)
Respondent	Mr B Hanlon (as agent)

Order

WHEREAS on 7 September 2026, the Western Australian Prison Officers Union (**WAPOU**) asked the WorkSafe Commissioner (**Regulator**) to appoint an inspector under s 82(1) of the *Work Health and Safety Act 2020* (WA) (**WHS Act**) to resolve an issue relating to a review and assessment of safe systems of work, risk and infrastructure assessments, staffing and emergency management plans and the adequacy of controls for infrastructure hazards at Casuarina Prison;

AND WHEREAS under s 82(3) of the WHS Act, an inspector must make a decision resolving the issue no later than two days after the day on which the request that an inspector be appointed is made;

AND WHEREAS on 9 September 2026, the Regulator applied to the Work Health and Safety Tribunal (**Tribunal**) under s 82A of the WHS Act to set a new deadline in application WHST 5 of 2026;

AND WHEREAS on 9 September 2026, application WHST 5 of 2026 was allocated to Commissioner T Emmanuel (constituting the Tribunal) and was listed that day for a hearing on 11 September 2026;

AND WHEREAS on 9 September 2026, the Tribunal sent the Regulator, the WAPOU and the Department of Justice (**Department**) a document prepared by the Tribunal titled 'Information for workers affected by the issue' (**Information Sheet**). The Tribunal asked the Department by 2pm on 10 September 2026 to:

(a) display the Information Sheet in a suitable, prominent place in the workplace where it can be seen by affected workers; and

(b) email the Information Sheet to its workers who may be affected by the issue;

and to confirm with the Tribunal that it had done so;

AND WHEREAS at 10:44am on 10 September 2026, the Department confirmed that it had complied with the Tribunal's request to notify workers affected by the issue;

AND WHEREAS in those circumstances, the Tribunal is satisfied that all affected workers and parties to the issue were notified of the hearing and had an opportunity to be heard about the Regulator's application for a new deadline;

AND HAVING HEARD at the hearing on 11 September 2026 from Ms V Burns on behalf of the Regulator, Mr B Hanlon on behalf of the WAPOU, and Ms A Carter on behalf of the Department;

AND WHEREAS the Regulator says that a new deadline is necessary because the matter to be resolved relates to a complex issue and the WAPOU, in its s 82 WHS Act referral letter to the Regulator, requests the inspector to:

1. determine whether the issue-resolution process has adequately addressed all identified hazards;
2. review the consultation undertaken with HSRs, affected workers and WAPOU before prisoner numbers and floor mattresses were increased;
3. require production and examination of all relevant risk assessments, SSoWs, staffing models, emergency plans, infrastructure assessments and operational directions;
4. assess whether the existing and proposed SSoW gives adequate weight to actual staffing, experience, fatigue, emergency capability, infrastructure, psychosocial hazards and cumulative risk;
5. assess whether the Emergency Management Framework remains suitable for the current prisoner population and accommodation density;
6. assess the adequacy of controls for sewage exposure, water and hot-water failures, building capacity, kitchen capacity and other infrastructure constraints;
7. examine the circumstances and relevant controls associated with the reported officer assault on 6 September 2026;
8. assess the cumulative physical and psychosocial risks to workers;
9. review whether Unit 18 or other purpose-built accommodation provides a reasonably practicable alternative or additional control;
10. advise the parties on an effective consultation and risk-assessment process suitable for these unprecedented conditions; and
11. consider whether any compliance or other regulatory action is required;

AND WHEREAS the Regulator gave the Tribunal a copy of its investigation plan that sets out the steps involved in making its decision under s 82 of the WHS Act, and the Regulator seeks a new deadline of 30 October 2026 so that the Regulator can comply with the deadline. In essence the Regulator says that the WAPOU has referred a very complex issue. The Regulator intends to thoroughly investigate the issue, which involves a considerable amount of work;

AND WHEREAS the WAPOU says that it understands that the investigation will take time, but the matter should not be dragged out. The WAPOU would like the issue resolved in half the timeframe sought by the Regulator. The WAPOU says the prison is a high risk workplace with a high injury rate. This matter should be dealt with as a priority. The Regulator should resource this matter appropriately and investigate quickly and properly. Documents should be produced within 24 hours. The WAPOU says the inspector should make a decision resolving the issue by 5 October 2026, being four weeks from the date the issue was referred;

AND WHEREAS the Department does not object to the new deadline sought by the Regulator;

AND WHEREAS no other party to the issue attended the hearing or wished to be heard;

AND WHEREAS in setting a new deadline the Tribunal considers to be practicable, the Tribunal must evaluate the facts and circumstances of the case in question;

AND WHEREAS the Tribunal accepts that the WAPOU has referred a complex issue to the Regulator, comprising many items and requesting review and assessment of safe systems of work, risk and infrastructure assessments, staffing and emergency management plans and the adequacy of controls for infrastructure hazards. Further, as the WAPOU points out in its referral to the Regulator, the nature of the hazards involved are complex and intertwined, and as the Regulator notes in its investigation plan:

> The concerns appear to relate primarily to the Department's compliance with its duty of care under sections 19, 47, 48 and 49 of the *WHS Act 2020 (WA)*, particularly in relation to the identification and management of WHS risks, the adequacy of risk assessments and controls, and consultation with affected workers and HSRs. The matters may also engage the due diligence obligations of officers under section 27;

AND WHEREAS the Tribunal considers that the steps set out in the investigation plan are reasonable, and a new deadline of 5 October 2026 would not be practicable, in circumstances where the inspector will need to:

(a) identify a wide range of stakeholders including Health and Safety Representatives, workers and Casuarina prison management, and to interview what will likely be a large number of people;

(b) request and consider a large number of documents;

(c) conduct an onsite inspection;

(d) consider any appropriate enforcement action; and

(e) convey findings and outcomes to the WAPOU and the Department;

AND WHEREAS the Tribunal notes the complexity and significance of the many matters comprising the issue referred, and the importance of the inspector efficiently conducting a thorough investigation to enable the inspector to make a decision resolving the issue. In all the circumstances of this application, the Tribunal considers that a new deadline of 23 October 2026 is practicable;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA), orders –

THAT an inspector make a decision resolving the issue by 23 October 2026.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]