



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Eptesam Al Bankani

v

Western Sydney Migrant Resource Centre Ltd

(U2022/2111)

DEPUTY PRESIDENT EASTON

SYDNEY, 7 MARCH 2023

Application for an unfair dismissal remedy – misconduct – data deletion from work mobile phone – breach of company procedure – valid reason found – potentially serious consequences for conduct – procedural fairness afforded – harshness of dismissal – plausible and logical explanation provided by the employee as to why there were no client records deleted from the mobile phone – assessment of the seriousness of the consequences of the conduct – claimed difficulty in providing proof of client records that no longer exist – available information and data not searched – employer policy documents – employer policy manual was long, legalistic, complex and did not put employees fairly on notice of the employer’s requirements – remedy – reinstatement – orders for lost remuneration – mitigation.

[1] Ms Eptesam Al Bankani made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) for an unfair dismissal remedy, alleging that she had been unfairly dismissed from her employment with Western Sydney Migrant Resource Centre Ltd. Ms Al Bankani seeks reinstatement to her former position.

Background

[2] Western Sydney Migrant Resource Centre Ltd (**WSMRC**) is a not-for-profit company that provides services to the Western Sydney migrant community, including settlement services and programs, visa crisis management, emergency relief, youth and family support, and case management services.

[3] WSMRC also delivers a Tier 3 Humanitarian Support Program, providing Specialised and Intensive Services to support refugees classified by the Commonwealth as having high or complex needs. In this work WSMRC is a sub-contractor to the Department of Social Services, insofar as WSMRC contracts with Settlement Services International Limited (**SSI**) who in turn contracts with the Department of Social Services.

[4] Ms Al Bankani commenced employment in 2016 on a part-time basis and at the time of her dismissal she held the position of Specialist Intervention Services Manager (Acting). She was apparently the only employee of WSMRC providing Specialised and Intensive Services to Tier 3 clients.

[5] As part of the Tier 3 program, WSMRC is required to have a specialised caseworker available to Tier 3 clients between 5:00pm and 9:00am in case of emergency. WSMRC provided Ms Al Bankani with a second mobile telephone (**‘the on-call phone’**) to receive calls after 5:00pm. Ms Al Bankani said she received calls after 5:00pm from Tier 3 clients but clients just called her normal work mobile rather than the on-call mobile.

[6] Over Christmas 2021 Ms Al Bankani took leave and a colleague then had responsibility for the on-call phone. Before handing over the phone Ms Al Bankani deleted its contents – which ultimately led to her dismissal.

[7] The contract between SSI and WSMRC was in evidence. The terms of the contract require WSMRC to maintain client records for at least seven years and prohibit the destruction or disposal of records relating to Tier 3 clients.

[8] WSMRC also has a published manual: ‘Western Sydney Migrant Centre Policy and Procedure Manual’ (**‘WSMRC Procedure Manual’**). WSMRC said Ms Al Bankani breached the WSMRC Procedure Manual when she deleted whatever records and data were on the phone – although WSMRC concedes in the proceeding that deletion of spam messages and the like would not contravene the policy.

[9] Ms Al Bankani said that she had never seen the contract with SSI during her employment and in any event did not delete anything that could be understood to be a client record. Similarly Ms Al Bankani said she did not breach the WSMRC Procedure Manual.

[10] Despite not being able to establish that any client records were actually deleted, WSMRC dismissed Ms Al Bankani for serious misconduct on 3 February 2022.

[11] For the reasons that follow I find that the dismissal of Ms Al Bankani was harsh and that she was unfairly dismissed.

Ms Al Bankani’s evidence

Ms Eptesam Al Bankani

[12] Ms Al Bankani commenced employment with WSMRC in or around February 2016 as a part-time case worker and was offered a full-time position in July 2016. In 2020 Ms Al Bankani assumed the position of Specialist Intervention Services Manager (Acting) in the Tier 3 program.

[13] Ms Al Bankani’s duties included:

- (a) attending courts, hospitals and medical appointments with clients;
- (b) assisting clients with emergency relief by sourcing food, housing, clothing and medical expenses;
- (c) assisting domestic violence victims with finding crisis accommodation;
- (d) assisting homeless clients to find emergency housing;
- (e) assisting clients with access to the National Disability Insurance Scheme (NDIS);
- (f) attending hospital with clients for psychology, psychiatry or drug treatment appointments; and
- (g) completing and forwarding paperwork to SSI to facilitate payment for services provided.

[14] In a written statement Ms Al Bankani gave the following evidence about mobile phones:

“I have one work mobile. This is the mobile that all clients would call me on.

This mobile was given to me in 2020 during the first lockdown. The number for this phone is ...

I also had an emergency work mobile. This mobile was given to me by Anna- Marie at the end of 2020. This is the mobile that clients would call after 5 o'clock if they had emergency issues such as child protection, domestic violence or homelessness. The number for this phone is ...

I also have my personal phone. I did not use this phone for work purposes. There was one instance in or around October 2021 where my interim manager Kim (who was covering for Anna-Marie) gave a client my personal phone number and the client called me. I told this client not to call me on that number and I blocked the client's number. The number for this phone is ...

I never received a call or text message to the emergency work mobile. Even though I gave the number to clients, after 5 o'clock clients would continue to contact me on my regular work mobile. Sometimes clients would text me on my regular work mobile at 1 o'clock in the morning.

Anna-Marie advised me to switch off my regular work mobile after 5 o'clock. I was very worried about my clients and did not turn off my phone in case of emergency. I told Anna-Marie that no-one ever called the emergency mobile. I told her this because I received \$200 a fortnight for having the emergency phone. Anna- Marie said words to the effect of “the pay is for taking emergency calls, not for the specific phone”.

I normally had responsibility for the Emergency Work Mobile except for Christmas 2020 when Anna-Marie took the phone so I could have a break.

...

In November 2020, a client who had finished the program continued to contact my regular work mobile. Anna-Marie told me that when a client exited from Tier-3 I should block the number and delete the messages.”

[15] Ms Al Bankani did not depart from this account under cross-examination.

[16] WSMRC kept a database of contacts with its clients. Ms Al Bankani's job description stated that she must “input and maintain case notes, client records and documents and statistical data into client database.”

[17] Ms Al Bankani said that she recorded all the Tier 3 program client case notes into the WSMRC SIS database – being a part of the general client database that is only accessible to Tier 3 program caseworkers and the Services Manager. Ms Al Bankani’s evidence under cross-examination in relation to the client database included the following:

“Q: Would you accept that proper record-keeping is part of good case management?

A: (Through interpreter) Yes, yes, we have to keep all the records in the database for the clients.

Q: I suggest to you that part of that legal framework is maintaining proper client records, would you accept that?

A: 100 per cent should be keep the client record in the database, yes, that is part of our job.

Q: ... You'll see at (c) there is a summary of what we say you said on 14 January. If you read (c) it says you had been advised by your former manager that deletion of data pertaining to former clients was permissible. Do you see that that is what the letter says just there?

A: Yes, I'm agree with my manager that, yes. (Through interpreter) So I just want to let you know, I want to add to this point that, you know, on the phone itself my former manager, I agree with her that it was permissible to delete the data off the phone but not off the database. Okay. Because there's not much records on the telephone itself. All the proper records are on the database and we don't delete that.

Q: ... So you made no record in the CDS, or the client database system, of all of the calls received from tier 3 clients on the on-call phone, did you?

A: Everything is recorded on database, everything recorded.

Q: There's no evidence of all of the calls made to - from tier 3 clients to the on-call phone, before the Commission, are there?

A: We don't record how many times they call, the client calls, but we record the subject or the topic or the reason why the client had called.

Q: I want to suggest to you, Ms Al Bankani, that you were required to record all of the calls that were made by tier 3 clients, to the on-call mobile phone?

A: I have not received any calls from the client to the on-call phone but if the client had called me for the database I put it.”

[18] The on-call arrangement only applied to Tier 3 clients and WSMRC invoiced SSI for the on-call services provided to clients.

[19] Ms Al Bankani said that when she first started a student placement with WSMRC in 2015 she received a manual of policies that she read over two to three days and asked questions about those policies to WSMRC’s Service Manager, Ms Anna-Marie Kanaan.

[20] Ms Al Bankani also agreed that in June 2019 she signed a document acknowledging that she had she had read and understood the WSMRC Procedure Manual, and that the 2019 version of the policy included a reference to the appropriate use of IT.

[21] On or around 22 December 2021 Ms Al Bankani discovered she no longer had access to her work email and work software. From 22 December 2021 to 10 January 2022 Ms Al Bankani was on leave for the Christmas and New Year period.

[22] On 10 January 2022 the Chief Executive Officer of WSMRC, Mr Kamalle Dabboussy contacted Ms Al Bankani at around 9:15am to enquire whether she had a personal email address. Ms Al Bankani texted her email address to him and received an invitation to an urgent meeting on Zoom.

[23] That same day Ms Al Bankani attended a meeting on Zoom with Mr Dabboussy and Ms Maria Karameli Manouso (Office Manager and Company Secretary) and was allegedly told “please don’t talk, just listen”.

[24] Mr Dabboussy advised Ms Al Bankani that she had been suspended from work for deleting data from a work phone. After the meeting she received a show cause letter requiring her to provide a statement and response by 14 January 2022.

[25] On 14 January 2022 Ms Al Bankani attended a show cause meeting with her support person Ms Michelle Perera. Ms Perera was employed by WSMRC from August 2020 until she resigned her employment in March 2022.

[26] In her written statement Ms Al Bankani describes the meeting on 14 January 2022:

“On 14 January 2022, I attended a meeting with Kamalle, Karameli and Michelle Perera (who was my support person).

During the meeting I was very upset. Kamalle began talking and laughing and asking how I was. I was very nervous and my body was shaking. I felt sick because of the language barrier, I felt afraid that I could not communicate for myself because Kamalle has English as a first language.

I asked Kamalle “what messages are you talking about”. Kamalle said words to the effect of “the data showed me that you deleted messages in August – October 2021”.

I asked Kamalle “can you tell me which client or message?”. Kamalle said words to the effect of “the data showed me the deletion but not any information”. I requested to see the statement of the data and Kamalle said words to the effect of “that is confidential”. At another point in the conversation Kamalle said words to the effect of “I can’t see what data has been erased”.

I told Kamalle that I never knew it was an issue to delete messages. I told Kamalle to call other staff members and ask if they knew that it was not okay to delete messages.

Kamalle said words to the effect of “this is different because it is Tier 3”. I said there was no different policy between General case workers and Tier-3 policies and if I was suspended everyone would have to be. Kamalle laughed. I was very upset.

I told Kamalle “I work until 11 lots of nights. I’ve never been appreciated for my work. You have blocked me from the system since 22 December like a dog. I have been treated similar to a dog. You didn’t discuss anything with me. Where is my dignity in this?”

Kamalle was surprised as I am usually a very soft-spoken person. I asked Kamalle “why did you treat people with English as a first language differently to people like me?”

I told Kamalle that I needed to know the number that the alleged deletion had occurred on so I could ask whether my foster kids had used the phones during lockdown while I was asleep to contact someone. I said I could bring evidence from the psychologist, out of home care and case worker for the kids I had reported them using the phone in August 2021. Kamalle said words to the effect of “the data doesn’t show the number”.

Kamalle said that he would give his decision on that day or within 72 hours.”

[27] After the meeting on 14 January 2022 Ms Al Bankani pursued a complaint about Mr Dabboussy to Mr Nathan Hegarty who is Chairperson for the Board of WSMRC. Ms Al Bankani alleged victimisation and differential mistreatment by Mr Dabboussy.

[28] On 3 February 2022 Ms Al Bankani received two letters – both probably drafted by the same lawyer. The first letter sent under Mr Dabboussy’s signature announced the conclusions reached by WSMRC in light of Ms Al Bankani’s responses, confirming that her employment was terminated. The letter summarised statements made by Ms Al Bankani at the meeting on 14 January 2022, and then said:

“[Ms Al Bankani’s responses as summarised] have been considered and resolved separately and the making of them is irrelevant to the findings in this letter.”

[29] The second letter sent under Mr Hegarty’s signature confirmed that Ms Al Bankani’s complaint was rejected, for reasons including:

“2. the process and investigation of the misconduct allegations against you has to date, occurred in a fair and reasonable manner; and
3. there are otherwise insufficient details to consider the Statements further.”

[30] Mr Hegarty does not appear to have actually investigated Ms Al Bankani’s complaint and he did not give any evidence in the proceedings. Mr Hegarty did not speak with Ms Al Bankani about her complaint and his letter was obviously one part of WSMRC’s co-ordinated response.

[31] As to the impact of the dismissal Ms Al Bankani said:

“I am still at a loss as to why I have been terminated after 6 years of hard work given to the WSMRC. While I have been looking for work so far I have not found any. I don’t believe the WSMRC has treated me fairly and I am worried about finding a new job.”

Anna-Marie Kanaan

[32] Ms Anna-Marie Kanaan worked for WSMRC for eight years between 2014 and July 2022. Ms Kanaan was employed as the Service Manager at the time she went on maternity leave at the end of September 2021. As the Service Manager she was directly responsible for client services including aged care, family services, and settlement support programs. In this role Ms Kanaan managed six co-ordinators, had overall responsibility for eleven staff and a budget of over \$2 million.

[33] Ms Al Bankani reported to Ms Kanaan by regular informal check-ins on a weekly basis and supervision on a monthly basis. Ms Kanaan commenced maternity leave in September 2021 and did not return to employment before resigning in July 2022.

[34] Ms Kanaan's evidence included the following:

“When staff left the WSMRC they would surrender their work telephone as part of their exit arrangements.

Upon receiving these surrendered work telephones, I have always cleared them to cleanse them of data. By restoring the telephone to its factory settings, I was able to be sure that messages containing confidential information were not passed on inadvertently to the next staff member with custody of the telephone. This deletion of information on WSMRC mobile phones was routine and not controversial. This was also done with another staff member who worked as a support worker on the HSP tier 3 program and wrapped up prior to June 2021.

While I cannot remember an exact instance or conversation, I believe it is possible that Eptesam saw me deleting a phone or I told her I was deleting a phone of its data. In a conversation about it, I may have told her that I delete the phone to protect client's privacy.

...

While I cannot remember exactly, and there was no formal procedure for when a client exited the Tier 3 program, it is possible that I directed Eptesam to block numbers of clients who had exited the Tier 3 program and who were continuing to contact her.

...

I was previously on the roster and had the on-call phone once every 3 weeks for a period of 6 months. In my experience hardly anyone ever called the on-call emergency phone. In all the time I had the emergency phone received 1 call and 1 text message. The call was not an urgent matter, and the client was requested to call back during office hours.”

[35] In cross-examination Ms Kanaan was taken to various portions of documents. WSMRC's interpretation of those documents were put to Ms Kanaan and for the most part Ms Kanaan agreed with the interpretations put to her.

Michelle Perera

[36] Ms Michelle Perera gave evidence in support of Ms Al Bankani's case. Ms Perera worked for WSMRC as a settlement coordinator from August 2020 and resigned her employment shortly after Ms Al Bankani was dismissed.

[37] Ms Perera attended the meeting on 14 January 2022 as Ms Al Bankani's support person.

[38] Ms Perera said that she has never seen any specific policy to do with the use of mobile phones and/or the deletion of messages from mobile phones, and that she was never advised by any manager or Mr Dabboussy that she was not to delete messages.

Pio Macri

[39] Similarly Ms Pio Macri gave evidence that in the 3.5 years that she worked for WSMRC (November 2018 to February 2022) she was never told of, or trained in respect to, client data retention on mobile phones. Ms Macri said she is still not aware of any policy that prevented her from deleting phone records.

[40] Ms Macri also gave evidence of experiencing difficulties with her work phone and iPad and was "encouraged to consistently delete data from my work phone to free up space to allow the phone to work more efficiently" by WSMRC's IT service provider.

Telstra records

[41] At Ms Al Bankani's request an Order to Produce was issued to Telstra in relation to activity on the on-call phone as well as Ms Al Bankani's work phone and her personal phone. The raw data was provided into evidence as well as analysis prepared on Ms Al Bankani's behalf. The high point of Ms Al Bankani's analysis was as follows:

"From this analysis, the itemised charge records for the On-call emergency mobile ... indicate the following information:

- a. There were 517 voice, SMS, or MMS charge records between 1 August 2021 and 3 February 2022;
- b. **403** of these calls were made by or to either Ms Bankani's work mobile phone or personal mobile phone;
- c. Of the **114** remaining other voice, SMS, or MMS charge records, 90 were made from the on-call emergency phone and 24 were received by the on-call phone;
- d. Of these 114 voice, SMS, or MMS charge records, only 32 occurred when Ms Bankani had custody of the on-call phone between 1 August 2022 and including 15 December 2021;
- e. Of these **32** records, 26 were voice charge records and 6 were SMS, or MMS charge records;
- f. A total of **14** telephone numbers, other than Ms Bankani's work or personal mobile phone numbers, either sent or received a voice call, SMS or MMS to or from the on-call emergency mobile phone;
- g. Of these 14 phone numbers, 10 sent or received a voice call, SMS or MMS to or from the on-call mobile phone when Ms Bankani had custody of the phone between 1 August 2021 and up to and including 15 December 2021; and
- h. Of these **10** phone numbers Ms Bankani explains:

- i. Two are the mobile numbers for WSMRC employees - ..., Karameli Mannouso, and ..., Rhianne Jeyakumar;
- ii. One was her cousin's mobile number – ...
- iii. Two appear to be related to call forwarding, roaming call forwarding and voicemail and are the same number, although one appears to be from called from Egypt. - ... and +2041...;
- iv. One is the number for Liverpool Hospital - 02 8738 300; and
- v. One of these numbers was a caller who called once or twice asking for 'Jack'."

[Cross-references omitted]

WSMRC's evidence

The documents

[42] WSMRC's case relied heavily on the terms of its written policies and contract with SSI.

[43] The contract was in evidence and is 63 pages long, has 47 numbered clauses that cover at least 130 sub-clauses. The contract includes the following relevant terms:

- (a) "Client Records" are defined to mean:
"all information or an opinion in relation to a Client held in the HSP System. For the purpose of the Contract, a Client Record includes information recorded in whatever form (including on a personal mobile device) in the performance of the Services or to inform the development of a Client Record."
- (b) all Client Records are the property of the Commonwealth of Australia as represented by the Department of Social Services;
- (c) all Client Records...must be retained by WSMRC for a period of no less than seven years after the creation of the Client Record;
- (d) WSMRC must not destroy or otherwise dispose of Client Records;
- (e) WSMRC must not (and must ensure that its Personnel do not) alter client records; and
- (f) WSMRC must establish and maintain safeguards against the destruction, loss or alteration of Department Data in the possession or control of WSMRC.

[44] The WSMRC Procedure Manual was also in evidence. The version of the policy in evidence in the proceedings is 72 pages long and contains the following:

"12 APPROPRIATE USE OF INFORMATION TECHNOLOGY

...12.4 Appropriate Use of IT Systems

Although this Policy sets forth the general parameters of appropriate use of IT Systems, staff should consult the WSMRC's policy manual for more detailed statements on staff behavioural responsibilities and the extent of use that the WSMRC considers appropriate in light of their varying roles within the community. In the event of conflict between IT policies, this Appropriate Use Policy will prevail:

...

C. Specific Proscriptions on Use. The following categories of use are inappropriate and prohibited:

....

4. Use damaging the integrity of the MRC or other IT Systems. This category includes, but is not limited to, the following six activities:

...

e. Modification or removal of data or equipment. Without specific authorisation, Users may not remove or modify any MRC-owned or administered equipment or data from IT Systems.”

[45] WSMRC’s On Call Procedure describes the process and standards for on-call services for Tier 3 clients. The On-Call Procedure includes the following reporting obligation:

“Critical Reportable incidents must be reported to SSI within 24 hours of WSMRC becoming aware of the incident. In some cases, incidents may need to be reported immediately. For information on determining the nature of an incident and reporting an incident, please refer to critical incident policy and contact Line Manager on duty as per below (Step 3).”

[46] The On-Call Procedure applies specifically to WSMRC’s work with Tier 3 clients but does not refer to the retention of records.

Mr Gary Kamalle Dabboussy

[47] Mr Dabboussy gave evidence on behalf of WSMRC. Mr Dabboussy has been the CEO of WSMRC since 2003. Mr Dabboussy made the decision to summarily dismiss Ms Al Bankani.

[48] Mr Dabboussy’s statement described WSMRC’s history and operations and Ms Al Bankani’s employment history. The documents relied upon by WSMRC in its case were tendered in evidence as annexures to Mr Dabboussy’s witness statement.

[49] Mr Dabboussy said that on or about 19 June 2021 or 19 July 2021 he led a compulsory training session on workplace bullying, harassment and privacy. He said:

“... as part of the privacy module of the training day, I advised all employees that clients have the right to access their files and/or request to have incorrect information updated at any time. For this reason, I recall saying words to the effect of “you must never delete data, you can amend, clarify or update client information, but never delete.””

[50] On 15 December 2021 Mr Dabboussy was told by Ms McCausland that Ms Al Bankani had deleted data from the on-call phone. He asked Ms McCausland to make an incident report straight away because most of WSMRCs employees, including Mr Dabboussy, commenced a period of leave from that same day.

[51] When Mr Dabboussy returned from leave he reviewed the incident report and phone bills over the previous few months and saw that at least 46 outgoing telephone calls had been made from the on-call mobile between October and December 2021 but that there was no corresponding original records of communication appearing on the mobile itself.

[52] On 10 January 2022 Mr Dabboussy met with Ms Al Bankani online and sent an allegations letter to her arranging a meeting for 14 January 2022.

[53] Mr Dabboussy also spoke to Ms Kanaan on 13 January 2022 and he said that Ms Kanaan told him that she had never told Ms Al Bankani to delete information from the on-call mobile phone.

[54] Mr Dabboussy describes the meeting on 14 January 2022, including Ms Al Bankani's statement that she had deleted data from the phone and her denial that she had deleted client data from the phone, and her statement that she was "100% certain" that she did not receive, make calls or send messages on the on-call mobile phone.

[55] Ultimately Mr Dabboussy made the decision to dismiss Ms Al Bankani from her employment. In his written statement he said:

"After meeting with Ms Al Bankani, I assessed the information referred to in the paragraphs 28, 31, 32, 34, 39, 40, 43, 44, 45, 52 and 53 above. Based on this assessment, I determined that the Allegations have been substantiated.

I was further satisfied that Ms Al Bankani had undertaken the deletion of original data (being a primary record of client communication) from the On Call Mobile despite having known (or having ought to have known) that destruction of such data could:

- a. constitute destruction of Commonwealth Records for the purpose of the Subcontractor Agreement;
- b. present a significant potential risk to the health and safety of a client (i.e. the High-Risk Client). Should future adverse circumstances impact the High-Risk Client, WSRMC will not be in a position to assist police with information that ought to have been in its possession surrounding the whereabouts, physical and psychological well-being or other information relating to the High-Risk Client; and
- c. by reason of the above, WSMRC's reputation was also needlessly put at risk; and
- d. there had been misuse and mishandling of the On Call Phone.

...

Ms Al Bankani did not appreciate the gravity of the Allegations nor did Ms Al Bankani appear to understand that what she had done was incompatible with her fundamental obligations of risk mitigation and client safety."

[56] Mr Dabboussy was cross-examined at length about his investigation after speaking to Ms Al Bankani on 14 January 2022. At the meeting on 14 January 2022 Ms Al Bankani encouraged Mr Dabboussy to investigate the calls and SMS messages with the phone company but he did not do so. He said:

“I went back and checked the records to see if there was activity on the phone. In the last immediate period of time, I could see activity on the phone and, therefore, put to [Ms Al Bankani] that information.”

[57] In cross-examination Mr Dabboussy agreed that staff must record information about calls from clients in WSMRC’s Client Database System (**CDS**). There was no evidence or allegation that Ms Al Bankani had failed to record information in the CDS.

[58] Mr Dabboussy was tested on his understanding of the kinds of records that are client records on a mobile phone. Mr Dabboussy agreed that spam messages are not client records and that the deletion of spam messages did not contravene the contract with SSI.

[59] Mr Dabboussy said that a record of a missed call could be significant in context and so should not be deleted. Mr Dabboussy said that the consequences for an employee deleting a single missed call message would not include termination but that the person would be counselled as to how they manage the phone.

[60] Under cross-examination Mr Dabboussy was happy to say that Ms Al Bankani was a good employee, although he initially balked at the suggestion and preferred the term “satisfactory employee.”

[61] Mr Dabboussy suggested that the on-call procedure does not need to say anything about deletion of records or deletion of information because those requirements are captured in other policies and procedures and:

“... as a general rule, when we have duplicate information in multiple policies, it gives rise to errors ... It raises complications if it's updated in one place and not updated in other places, so we try and centralise information to the respective policies.”

[62] Mr Dabboussy said WSMRC does not download call information from its mobile phones as a regular course of action. He did say that WSMRC has reverted to information stored on mobile phones to track down certain incidents, but to do so was not routine.

[63] Mr Dabboussy said of his investigation methodology:

“... the phone's primary purpose was for tier 3 clients to make calls after hours and urgent situations ... So, any information that was on that phone, the first assumption is that this was client-related information, and so that is an assumption from where I started ... in going back and looking at the records of the phone records, I could see that there was activity on the phone, and if the phone's exclusive use was meant to be for Tier 3 clients and out of work activity for urgent information, then where is that information on the phone?”

... We did speak to her and gave her a time for her to respond ... And so there was a collection of information and a decision then made. The decision was not solely based on assumption, the decision was - there was a starting point, but then we ... undertook a process and that was all the information that was gathered together then to make a decision.

I didn't agree with Ms Bankani's explanation...

I terminated because there was a deletion of information from a phone which should not have had data deleted from it.”

[64] Mr Dabboussy did not take any steps to determine whether or not Ms Al Bankani had recorded information regarding client information in the Tier 3 client case notes or database because “my investigation related to the phone.”

[65] When asked why he decided to dismiss Ms Al Bankani rather than give her a warning, Mr Dabboussy said:

“Very hard to prove a negative, as in I don't know what was deleted off the phone. I still don't know what was deleted off the phone. In approaching Ms Al Bankani, talking about the matters, she didn't seem to understand the gravity of all of what she'd done.

She didn't seem to understand that the deletion of data was an issue. She had shown that not only had she rejected the assertion I'd made that – didn't seem to understand the gravity of it. I had no other positions in the organisation that I could have put her or deployed her to and basically that – I'd lost – that deletion could have caused and may still cause damage to the organisation both reputationally and potentially legally and I felt that I had no option but to take the action that I took.”

Ms Kim McCausland

[66] Ms Kim McCausland is the Acting Services Manager at WSMRC. Her duties and responsibilities include development and maintenance of policies and procedures as they relate to the delivery of programs.

[67] Ms McCausland provided evidence that WSMRC employees used the CDS for record keeping as well as SharePoint for the retention of the Specialised Intensive Services program because that program is charged out on a fee for service basis.

[68] Ms McCausland provided evidence that all telephone records relating to clients are uploaded to the CDS as required.

[69] When Ms Al Bankani handed over the on-call phone before going on leave, and the contents had been deleted, Ms McCausland was particularly concerned that client data had been deleted from the on-call mobile. Over the previous two months Ms McCausland had discussed with Ms Al Bankani some particular events relating to a high-risk client who had been sending multiple SMS messages at night, particularly because:

“... any data relating to the High Risk Client on the On-call Mobile could be relevant in the extremely unfortunate event that a further investigation or inquiry arose/arises relating to the High Risk Client's welfare.”

[70] In cross-examination Ms McCausland said that she did not search for other records of contact with the high-risk client on different phones, and in the witness box accepted Ms Al Bankani's assertion that the high-risk client only ever contacted Ms Al Bankani on her work phone and not on the on-call mobile.

[71] Ms McCausland was also asked about her understanding of the record-keeping requirements for the SIS Program and about telephone records. In relation to records of client contact Ms McCausland basically said that any events or contact with clients must be noted in the CDS. In relation to telephone records Ms McCausland said, amongst other things, “you didn't delete things.”

[72] Ms McCausland was Ms Al Bankani's direct supervisor for the last three months of her employment. One important aspect of WSMRC case is whether Ms Al Bankani knew, or ought to have known about the terms of WSMRC's contract with SSI, Ms McCausland gave these answers in cross-examination:

“Q: Have you ever been acquainted with the SSI contract? Have you ever read that document?

A: I have read the guidelines.

Q: Where are the guidelines?

A: The guidelines for the SIS program?

Q: Yes, the SSI contract underpins that?

A: I suppose, but, no, I haven't read the whole of that. I've read the guidelines of how to run the SIS program.”

[73] The “guidelines” referred to by Ms McCausland is a government publication: “Case Management Guidelines, Humanitarian Settlement Program” dated December 2018.

[74] In other words, Ms McCausland did not read the SIS contract either.

Ms Maria Manouso

[75] Ms Maria Manouso gave evidence for WSMRC. Ms Manouso has been employed by WSMRC since 2012 and has been the Office Manager and Company Secretary since 2019.

[76] Ms Manouso attended the meetings on 10 and 14 January 2022 and gave a detailed account of what she said was discussed at those meetings.

[77] Ms Manouso's evidence otherwise referred to the terms of the WSMRC Procedure Manual.

Ms Mary Hilmi

[78] Ms Mary Hilmi commenced working for WSMRC on 29 November 2021, being two weeks before Ms Al Bankani commenced her period of leave. Ms Hilmi assumed responsibility for the Tier 3 on-call phone when Ms Al Bankani took annual leave.

[79] Ms Al Bankani prepared a handover note and also spoke to Ms Hilmi prior to commencing leave. Ms Al Bankani spoke to Ms Hilmi as part of the handover and specifically referred to a particular client who had experienced trauma. The client was suicidal and had called Ms Al Bankani on a regular basis late at night.

[80] In her written statement Ms Hilmi said:

“When the [handover conversation] finished and after Ms Al Bankani left my presence, I looked at the On-call Mobile and saw that there were no SMS text messages or telephone call records on the On-call Mobile. I then checked the WSMRC Client Database System (CDS), which is used to record client interactions so that there is a record for future reference as to historic communications and services provided to clients. However, when I searched the name of the client referred to by Ms Al Bankani in our conversation on the CDS, there were no records.

I then panicked because I knew that the client was a 'Tier 3' client and there appeared to be no record of Ms Al Bankani's communications with that client, despite the seriousness of the client's personal circumstances as relayed to me by Ms Al Bankani.”

[81] It is important to recognise that Ms Hilmi did not have security access to records for Tier 3 clients in WSMRC's database – which explains why she did not find any records for that particular client.

[82] In cross-examination Ms Hilmi said that she did not receive any training on the use of the mobile phone but was given the phone and the on-call policy to read and told that she was to keep a diary note of any calls that came in while she had the phone.

[83] Ms Hilmi also said in cross-examination that Mr Dabboussy did not speak to her about deleting messages and records until around late January or early February 2022.

McKemmish Report

[84] Months after dismissing Ms Al Bankani, WSMRC commissioned a report from Mr Rodney McKemmish who is a digital forensic expert. At the end of his report Mr McKemmish summarised his findings:

“Arising from my analysis of the iPhone I note that:

- a) A total of 179 messages have been received by the iPhone. Of these:
 - i. 6 messages are present and visible.

- ii. ii. 173 messages have been deleted.
- b) 5 attachments to messages have also been deleted from the iPhone.
- c) A total of 501 calls have been made or received by the iPhone.
- d) Only 23 call records are present. Given that the iPhone can display 100 calls, this indicates that call records have been deleted.
- e) There are indicators to show that the iPhone was in use between 13 January 2021 and 4 January 2022 and receiving messages and calls.
- f) Based on the information available I am unable to determine:
 - i. When the messages and call records were deleted.
 - ii. Whether the messages and call records were deleted in a single event or multiple events over time.”

[85] The 6 messages referred to in the report were all received after Ms Al Bankani went on leave and gave over her phone to a colleague. Similarly, all of the 23 calls in the call history of the phone were made or received in December 2021 after Ms Al Bankani had given over her phone.

Ms Al Bankani’s Submissions

[86] Ms Al Bankani’s overarching submission is that her dismissal was unfair because:

- (a) she was dismissed for deleting ‘all primary correspondence from and to clients, from a work provided device’ despite WSMRC having no basis for determining that client correspondence had been deleted;
- (b) WSMRC failed to investigate Ms Al Bankani’s consistent statements throughout her dismissal process that the information they alleged she had deleted did in fact exist and was available (then and to date) to WSMRC on both her work phone and the client database; and
- (c) she was never, either explicitly or implicitly, directed not to delete telephone data, nor was she provided with training, policy documents or contracts that specified as such.

[87] Ms Al Bankani’s submissions can be otherwise summarised as follows:

- (a) WSMRC has not identified any particular data or information that was deleted. Ms Al Bankani emphasised the distinction between being dismissed for actually deleting data that related to a Tier 3 client, as opposed to deleting information that could have been relevant to a Tier 3 client;
- (b) WSMRC therefore cannot prove that actual Tier 3 client data had been deleted. If there were other kinds of records or data on the phone (that were not Tier 3 client records) the deletion of those materials does not contravene any of WSMRC’s policies;
- (c) WSMRC’s case is flawed and is based on the following unsafe and unsupported assumptions:
 - 1) the on-call phone’s telecommunications bill showed that the phone had been in use during the period in which it was in Ms Al Bankani’s custody, so the phone must have contained client records;
 - 2) the on-call procedure provided that the on-call phone was to be used between the hours of 5:00pm and 9:00am by clients of the Tier 3 program, so the only use of that phone must have been in respect of Tier 3 clients; and
 - 3) Ms Al Bankani had reported to Mr Dabboussy that her custody of the on-call phone interrupted her time off, so the on-call phone must have been used consistently by Tier 3 clients.

- (d) these assumptions are unsafe because Ms Al Bankani's evidence was that emergency client contacts were made on her work phone rather than the on-call phone. Mr Dabboussy surmised that Tier 3 clients were regularly contacting the on-call phone because that was what was written in the procedure and what he interpreted to be the basis for Ms Al Bankani's report that these calls were interrupting her time off. However, Ms Al Bankani has consistently stated that clients contacted her on her work phone - and handing the on-call telephone to another worker would have afforded her the opportunity for uninterrupted time off in the knowledge that the Tier 3 clients would get through to an employee of WSMRC in the event she did not pick up their call from her work mobile;
- (e) WSMRC is fundamentally unable to establish that Ms Al Bankani had any understanding of the SIS contract or (to a lesser extent) the On-Call Procedure;
- (f) WSMRC may well have contractual obligations to preserve certain records and information, however, Ms Al Bankani said those obligations were never communicated to her, she did not ever read the terms of the contract between WSMRC and its client was ever asked to read it;
- (g) recognising that WSMRC has the practical onus to satisfy the Commission, to the *Briginshaw* standard, that the misconduct occurred, there is no basis for the commission to find that there was a valid reason for dismissal;
- (h) according to WSMRC, the terms of the contract with SSI, and to a lesser extent the WSMRC Procedure Manual, proscribed the deletion of any records or data off the on-call phone because those records or data pertained to clients. Ms Al Bankani cannot be held personally responsible for upholding terms of an agreement to which she was neither privy nor party. It was therefore essential that WSMRC establish that Ms Al Bankani was aware or otherwise should have been aware of the terms of the SSI contract. Mr Dabboussy gave evidence that Ms Al Bankani's manager had gone through the terms of the SSI contract in detail. When pressed during cross-examination, however, Mr Dabboussy admitted that he had not described this having happened in either of his two statements, and that it was an assumption on his part that it had occurred;
- (i) Ms Al Bankani's direct manager and her predecessor both gave evidence in the proceedings and neither manager had read WSMRC's contract with SSI either;
- (j) Ms Al Bankani's previous manager gave evidence that she too deleted data from her allocated mobile phone which did not lead to her dismissal;
- (k) there is no evidence of Ms Al Bankani's conduct causing any actual harm to WSMRC. When WSMRC reported the matter to SSI there was no action taken by SSI;
- (l) WSMRC does not have any established system for retaining information stored on mobile phones issued to staff – other than relying on staff not to delete anything from their phones; and
- (m) WSMRC's investigation, even on Mr Dabboussy's evidence, is infected to a significant degree by assumptions and misinterpretations. Mr Dabboussy admits that he terminated Ms Al Bankani in circumstances where he did not know what data she had deleted, and he could not be sure that the deleted data included client records.

WSMRC's Submissions

[88] WSMRC submits:

“...once it is accepted that:

- a. the Applicant deleted the data from the On Call Mobile, which is admitted,
- b. that she was not given authority to do so, and
- c. that it was contrary to the [WSMRC's Procedure Manual] and/or the Subcontractor Agreement,

the question is, does the Applicant's conduct amount to serious misconduct that gives rise to a valid reason for her dismissal? The answer is yes.”

[89] WSMRC submits that Ms Al Bankani made her decision to delete the data from the on-call mobile knowing that:

- (a) WSMRC runs a humanitarian support program funded by the Australian Government, and provides services under a contract with SSI;
- (b) WSMRC operates the Specialist Intensive Services in order to provide a higher level of support to Tier 3 clients;
- (c) WSMRC services refugees who are classified by the government as having high or complex needs including clients experiencing severe trauma, domestic violence, poverty, homelessness and physical and mental health concerns;
- (d) unlike the Tier 1 or Tier 2 clients that WSMRC assists, the Tier 3 clients are on an interventionist program, this means that, in effect, WSMRC acts on their behalf rather than assisting them to make independent enquiries;
- (e) consequently, the case work and client records that are made with respect to Tier 3 clients are at a higher threshold than ordinary case work records (more alike in importance to a medical record than to an ordinary business record);
- (f) by virtue of these complex and high needs clients WSMRC assists under the Specialised Intensive Services, Ms Al Bankani's role was distinguished from that of an ordinary community service case worker; and
- (g) the on-call mobile is distinguished from an ordinary work telephone provided to employees and has a specific and significant purpose in respect of Tier 3 clients.

[90] WSMRC's submissions can be summarised as follows:

- (a) Ms Al Bankani is a well-qualified and experienced case worker who was aware of the WSMRC Procedure Manual and, in addition, knew or ought to have known of the very real importance of maintaining Tier 3 client records and not deleting data off the on-call mobile;
- (b) as the only Tier 3 case worker for WSMRC and as the case worker in the role when the SIS contract was established, Ms Al Bankani was aware or ought to have been aware of the necessity to keep Tier 3 client records (pursuant to clause 20 of the contract) as “all client records are the property of the Department”;
- (c) on 5 June 2019, Ms Al Bankani confirmed that she had read and understood the WSMRC Procedure Manual, which includes, at clause 12, the appropriate use of information technology. It was not otherwise harsh, unjust or unreasonable for WSMRC to enforce the WSMRC Procedure Manual or the protection of Tier 3 data and, in doing so, the SIS contract;

- (d) it was part of Ms Al Bankani’s role for her to issue invoices under the SIS contract. This role, WSMRC said, required an in-depth knowledge of how the SIS contract worked, including in respect of services rendered and charged for;
- (e) a copy of the contract was stored in a ‘shared’ folder on Office 365 within WSMRC’s computer system and Ms Al Bankani had access to this shared folder;
- (f) the Commission would not be persuaded that Ms Al Bankani could have run the Specialised Intensive Services program without a detailed understanding of the SIS contract;
- (g) WSMRC has an employment portal called ‘Employment Hero’ where policy and procedure documents are kept and available to all employees, including Ms Al Bankani. Employees undergo training on the WSMRC Procedure Manual at the time they commence in a role;
- (h) on 5 June 2019, Ms Al Bankani confirmed that she had read and understood the WSMRC Procedure Manual which included at clause 12, the appropriate use of information technology;
- (i) the WSMRC Procedure Manual prohibits the deletion of data without authorisation. By application of the definitions within the WSMRC Procedure Manual the data on the mobile phone issued to Ms Al Bankani is part of WSMRC’s “IT System” and the “modification or removal of data or equipment ... without specific authorisation” is one form of “use damaging the integrity of the MRC or other IT systems”;
- (j) Ms Al Bankani also breached the following provision in the WSMRC Procedure Manual:
“Use in violation of WSMRC’s Contracts. All use of IT Systems must be consistent with the MRC’s contractual obligations, including limitations defined in software and other licensing agreements”.
- (k) WSMRC has an On-Call Procedure that is said to describe “the process and standards for on-call services in the ... Specialised & Intensive Services at WSMRC”;
- (l) WSMRC said the Commission would not accept Ms Al Bankani’s evidence that she was unaware of the On-Call Procedure in the circumstances where she was the sole Tier 3 caseworker (and as such the sole caseworker expressly employed to deal with clients for whom the on-call mobile was used); and
- (m) Ms Al Bankani was not in any way deprived or otherwise hindered in providing her responses to WSMRC, nor was she subjected to any other procedural unfairness.

Consideration – Section 387

[91] Section 387 of the FW Act requires me to take into account the following matters in determining whether Ms Al Bankani’s dismissal was harsh, unjust or unreasonable:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[92] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me. I set out my consideration of each below.

Consideration - valid reason

[93] Ms Al Bankani was dismissed for an alleged breach of WSMRC’s published policy. In *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [26] (“**Hilder**”) the Full Bench summarised the well-established principles for determining such matters:

“The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:

- (1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.
- (2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.
- (3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).
- (4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee’s dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).
- (5) Whether an employee’s conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee’s contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.

(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.”

[94] In *Hilder* the Full Bench found at [29]:

“However, the Deputy President’s consideration of whether there was a valid reason was affected by error of a more consequential nature, in that he did not address the material issues identified in the principles identified above but rather determined the issue by reference to a number of irrelevant matters. As the Deputy President recognised, there was no dispute as to the occurrence of the conduct which was the reason for Sydney Trains’ dismissal of Mr Hilder. Nor was it in dispute that this conduct constituted a breach of the Policy. Mr Hilder conceded that he was aware of the Policy and its significance. The only question to be resolved therefore was whether the breach of the Policy was a matter of sufficient gravity to constitute a sound, defensible, well-founded and therefore valid reason for dismissal. This required an assessment of the importance of the Policy in the context of Sydney Trains’ operations and Mr Hilder’s work duties.”

[95] The Full Bench noted that the Deputy President at first instance also made an alternate finding that Mr Hilder’s dismissal was harsh on the premise that there was a valid reason for dismissal (at [38]), upheld the original alternate finding that the dismissal was harsh (at [41]) and dismissed the appeal (at [42]).

[96] WSMRC decided to summarily dismiss Ms Al Bankani and not issue her with a warning. Mr Dabboussy thought that Ms Al Bankani “didn’t seem to understand the gravity of [her conduct]” and that he had no option except to summarily dismiss Ms Al Bankani.

[97] Ms Al Bankani admits that she deleted all of the information and data on the on-call phone prior to handing it over to a co-worker.

[98] There are at least three different ways that WSMRC could have formulated its allegation of misconduct/valid reason for dismissal:

- (a) that Ms Al Bankani actually deleted client records (even though WSMRC cannot prove it);
- (b) that Ms Al Bankani engaged in conduct that could have deleted client records, either intentionally or inadvertently, when she deleted all of the content of the on-call phone; or
- (c) that Ms Al Bankani breached WSMRC's IT policy by deleting WSMRC's computer records, regardless of whether those records included any client records.

[99] WSMRC relies on the second formulation – that the removal of all data on the on-call phone was misconduct because it could have deleted client records - which is no surprise given WSMRC cannot prove that Ms Al Bankani actually did delete client records.

[100] Deleting or erasing the contents of a device issued by an employer without authorisation is a valid reason for dismissal.

[101] There is at least a possibility that there were client records on the on-call phone. The whole purpose of the on-call phone was to provide after-hours emergency contact through a publicised dedicated phone. Although the likelihood that client records were on the phone is low (see below) I must accept the possibility that at least some clients had called the on-call phone.

[102] The potential damage this conduct could cause is reasonably obvious: the employer is deprived of the opportunity to inspect the device, it may compromise WSMRC's record keeping systems and potentially its contractual obligations to retain records.

[103] In this context such conduct is not a "trivial misdemeanour" that does not reach the mark of being a sound, defensible, well-founded, and therefore valid reason for dismissal.

[104] I am also prepared to accept that on some occasions such conduct could be sufficiently serious that it warrants summary dismissal.

Was the Applicant notified of the valid reason?

[105] Section 387(b) requires me to take into account whether Ms Al Bankani "was notified of that reason." Sections 387(b) and (c) direct the FWC's inquiry to matters of procedural fairness. In general terms a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case.

[106] In context, the inquiry to be made under s.387(b) is whether the employee was "notified" of that reason *before* the employer made the decision to terminate. The reference to "that reason" is a reference to the valid reason(s) found to exist under s.387(a) and the reference to being "notified" is a reference to explicitly putting the reasons to the employee in plain and clear terms.

[107] The allegation put to Ms Al Bankani by letter on 10 January 2022 was:

“1. It is alleged, that on or immediately before the 15 December 2021, you deleted all primary correspondence from and to clients, from a work provided device. The device was a mobile phone, an apple iPhone with the phone number [redacted].

2. Further, that this destruction of primary client information was undertaken without consent or direction.”

[108] This formulation of the allegation is different to the reason for dismissal that WSMRC relied on in these proceedings.

[109] I am nonetheless satisfied that the allegations that were put to Ms Al Bankani gave her sufficient opportunity to present a case in response.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[110] The opportunity to respond to which s.387(c) refers is an opportunity to respond to the reason for which the employee may be about to be dismissed.

[111] Ms Al Bankani was given a proper opportunity to respond to the allegations against her. I have some concerns about what WSMRC did and did not do once they received Ms Al Bankani’s response, and the somewhat flimsy basis for disregarding Ms Al Bankani’s responses, but I am content to find that for the purposes of s.387(c) Ms Al Bankani was given an opportunity to respond to the stated reasons for her dismissal.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[112] Ms Al Bankani was allowed to have a support person present in the meeting on 14 January 2022.

Warnings about unsatisfactory performance

[113] The dismissal did not relate to alleged unsatisfactory performance, the fact that Ms Al Bankani was not warned about unsatisfactory performance (s.387(e)) does not affect the fairness of the dismissal.

The size of the enterprise and access to HR resources

[114] Neither party submitted that the size of WSMRC’s enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of WSMRC’s enterprise had no such impact.

[115] In this matter the absence of dedicated human resource management specialists or expertise in WSMRC’s enterprise did not significantly impact on the procedures followed by WSMRC in dismissing Ms Al Bankani. WSMRC was advised through the process by its lawyers.

Other matters (s.387(h))

[116] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[117] For the following reasons I am satisfied that the dismissal was harsh, unjust and unreasonable:

- (a) Ms Al Bankani breached the literal terms of the WSMRC Policy Manual, however the terms of the policy are long, complex, legalistic and did not fairly and clearly put Ms Al Bankani on notice of WSMRC's requirements;
- (b) There is very little evidence of WSMRC ensuring that its employees read and actually understood the WSMRC Procedure Manual;
- (c) WSMRC's procedures regarding mobile phones and IT were haphazard;
- (d) Ms Al Bankani's explanation for why she said there were no Tier 3 client records on the on-call phone was rational and plausible;
- (e) the consequences of Ms Al Bankani's conduct were not serious in the circumstances because there was a very low risk or likelihood that the on-call phone contained client records; and
- (f) WSMRC had access to materials that most probably would have proved (or disproved) Ms Al Bankani's explanation but did not investigate those materials.

[118] I shall now expand on each of these findings.

The company policy is legalistic, obtuse and unsuited to the particular workforce

[119] Ms Al Bankani should not have erased the records from her on-call phone. Ms Al Bankani breached the terms of the WSMRC Procedure Manual when she deleted the contents of the on-call phone. In this regard there was a valid reason for the WSMRC to dismiss her.

[120] The reference in the WSMRC Procedure Manual to deleting data or information held on mobile phones is far from clear or obvious. I accept that a broad literal reading of the words used in the WSMRC Procedure Manual capture information or data stored on a mobile phone. However, if deleting information on a mobile phone was regarded by WSMRC as serious misconduct, its stated policies should have unambiguously spelt out the requirements for retaining and preserving information held on mobile phones and the very serious consequences for not complying with those requirements.

[121] Clause 12 of the WSMRC Procedure Manual – “Appropriate Use of Information Technology” – is approximately 2500 words long. The opening paragraphs are:

“Information technology (“IT”), the vast and growing array of computing and electronic data communications facilities and services, is used daily to create, access, examine, store, and distribute material in multiple media and formats. Information technology plays an integral part in the fulfilment of WSMRC's research, education, clinical, administrative, and other roles. Users of WSMRC's IT resources have a responsibility not to abuse those resources. This IT Appropriate Use Policy provides guidelines for the appropriate use of WSMRC's IT resources as well as for the centre's access to information about and oversight of these resources.

Most IT use parallels familiar activity in other media and formats, making existing centre's policies important in determining what use is appropriate.

This Policy addresses circumstances that are particular to the IT arena and is intended to augment but not to supersede other relevant WSMRC's policies."

[122] The terminology in clause 12 is legalistic, complex and more commonly found in a commercial or government contract than in a document used by workers in a migrant assistance agency. Clause 12 might make sense to copyright lawyers and some IT specialists, but probably no one else.

[123] If a single breach of the policy was regarded by WSMRC as serious and wilful misconduct, then the requirements should have been made obvious to staff through regular and clear messaging. WSMRC relies on a sub-clause on page 64 of 72 of the WSMRC Procedure Manual. Ms Al Bankani last signed a document that said she had "read and understood" the policy in 2019.

[124] English is not Ms Al Bankani's first language. She required an interpreter when giving her evidence in the proceedings. Ms Al Bankani was able to answer most questions directly but sought assistance from the interpreter when either the question or her answer was more complex.

[125] Despite Ms Al Bankani signing a document in 2019 that said that she had "read and understood" the WSMRC Procedure Manual, I have serious reservations about whether Ms Al Bankani would have understood and remembered all of the terms of clause 12 of the WSMRC Procedure Manual. I mean no disrespect to Ms Al Bankani in this regard - my concern arises from the wording of the Manual and the connection between the document and WSMRC's operation.

[126] There is very little evidence of WSMRC ensuring that its employees actually read and understand the WSMRC Procedure Manual (cf *Queensland Rail v Wake* (2006) 156 IR 393, cited heavily in *B, C and D v Australian Postal Corporation T/A Australia Post* (2013) 238 IR 1, [\[2013\] FWCFB 6191](#)). I note in this regard that Ms Perera and Ms Macri said they were not aware of any specific policy regarding the use of mobile phones.

[127] WSMRC relied on the fact that clause 12 of the WSMRC Procedure Manual says:

"All use of IT Systems must be consistent with the MRC's contractual Obligations and the fact that the SIS contract was accessible within the Respondent's computer system."

[128] Neither Ms Al Bankani nor her supervisor Ms McCausland have read the contract and WSMRC's reliance on this provision linking the policy to the SIS Contract is unsound.

WSMRC's procedures regarding mobile phones and IT were haphazard

[129] The written policy had no connection at all with the WSMRC's everyday practices regarding phones. WSMRC's procedures, as opposed to its published policy, regarding mobile phones and IT were haphazard:

- (a) WSMRC did not differentiate between data that might be a Tier 3 client record and other data except for storing Tier 3 client records in a separate section of the client database;
- (b) there is no evidence of WSMRC taking any steps to preserve or protect data that might be stored on a mobile phone. Mr Dabboussy acknowledged that the WSMRC did not require staff to back up the data on their phones;
- (c) in fact Ms Macri said she was told by an external IT consultant to consistently delete data from her phone to free up space to allow the phone to work more efficiently. WSMRC's submission that Ms Macri was "authorised" to delete data by an external IT consultant and therefore did not breach the WSMRC Procedure Manual is nonsense;
- (d) similarly Ms Kanaan, Ms Al Bankani's former supervisor, said when staff returned phones to her that she always cleansed them of data by restoring the telephone to its factory settings. Ms Kanaan said this was "routine and not controversial"; and
- (e) Ms Kanaan said there was no formal procedure for when a client exited the Tier 3 program. Ms Al Bankani said she was told by Ms Kanaan that when a client exited from Tier-3 she should block the number and delete the messages.

[130] If the preservation of records stored on mobile phones was so vitally important to the WSMRC then I would have expected WSMRC to put proper systems in place to ensure that these important records were actually preserved. For example WSMRC could have required employees to back up data from their phones to other devices, and the back-up files could have been saved to a central server for safekeeping. This is an obvious and simple measure and would have protected WSMRC's data and records from both deliberate and accidental loss.

Ms Al Bankani's explanation was rational and plausible

[131] Ms Al Bankani gave an explanation for why she said there was no client information on the on-call phone: she said that Tier 3 clients never rang the on-call phone because they rang her on her work phone instead.

[132] Ms Al Bankani's explanation was entirely plausible in that she was dealing with high-needs Tier 3 clients and the on-call arrangement was specifically in place to deal with urgent and serious matters. Ms Al Bankani was supposed to turn off her phone at 5:00pm on what appears to be the assumption that Tier 3 clients will know that they must ring a different phone number after 5:00pm to reach the same person. Ms Al Bankani did not turn off her work phone because, she said, she was worried about her clients.

[133] Ms Al Bankani was the only caseworker working with Tier 3 clients. It makes sense that WSMRC maintained a designated after-hours number for emergency situations, but it does not make sense that WSMRC insisted, or even assumed, that Ms Al Bankani would make her normal work phone unavailable after 5:00pm when it knew that Ms Al Bankani was the only one dealing with Tier 3 clients during office hours and was the only one dealing with Tier 3 clients outside of office hours.

[134] It also seems quite unlikely that clients would have made the distinction between two different mobile phone contact numbers for the same case worker.

[135] Ms Al Bankani's explanation is also consistent with the evidence from her former supervisor, Ms Kanaan, who said that when she had the on-call phone every third week over a period of six months, she received one phone call and one text message, and that the one phone call was not actually urgent and she asked the client to call back the next day.

[136] Basically Mr Dabboussy did not believe Ms Al Bankani's explanation when he decided to dismiss her, and instead assumed that because the policy stated that employees were to only use the on-call phone after 5:00pm then that was what happened.

WSMRC failed to properly investigate

[137] The only basis upon which WSMRC said that there could have been client records on the phone is the policy. The evidence supporting that case must be tested against Ms Al Bankani's evidence about whether there could have been client records on the phone.

[138] WSMRC provided no compelling evidence that Ms Al Bankani had contact with any Tier 3 clients using the on-call phone.

[139] Ms Al Bankani was cross-examined on the importance of keeping records of client interactions and she readily agreed that all contacts must be noted in the client database. WSMRC has not ever alleged that Ms Al Bankani failed to record dealings with Tier 3 clients in the CDS. Nor has WSMRC ever alleged that Ms Al Bankani failed to record interactions with Tier 3 clients in her activity reports sent to SIS.

[140] Mr Dabboussy said WSMRC cannot "prove the negative", which I understood to be a reference to the difficulties faced by WSMRC in trying to provide evidence of something that no longer exists. However WSMRC did not properly investigate Ms Al Bankani's response prior to deciding to dismiss her or search available records that could have either proved or disproved her response.

[141] WSMRC has had access to at least the following/information since suspending Ms Al Bankani in January 2022:

- (a) **Ms Al Bankani's normal work phone:** WSMRC does not appear to have inspected Ms Al Bankani's work phone at all. An inspection of the work phone would quickly verify Ms Al Bankani's claim that Tier 3 clients contacted her after hours on her work phone rather than the on-call phone;
- (b) **WSMRC's client database:** The evidence was that all client contact was recorded in the CDS database. WSMRC could have reviewed these entries to identify whether they show any client contact through the on-call phone and/or client contact that was not recorded on Ms Al Bankani's work phone; and
- (c) **SIS claim documents:** prepared by Ms Al Bankani and sent to SIS for payment. These records may have indicated dates and times when Tier 3 clients made after-hours calls (to either the on-call phone or the work phone).

[142] There is no evidence that these records were examined at all.

[143] There was evidence from Mr Dabboussy of examining another phone on another occasion “when we've had to track down certain incidents that have taken place and we're trying to be precise about that information for record keeping.” If WSMRC did investigate Ms Al Bankani’s claim after the dismissal it has not led evidence to disprove what Ms Al Bankani said.

[144] After she was dismissed Ms Al Bankani obtained phone records from Telstra via an Order for Production issued by the Commission. Ms Al Bankani’s analysis of the phone records (see [41] above) satisfactorily explains almost every call, MMS and SMS. Ms Al Bankani provided in evidence the raw data from which the analysis was made and her analysis was not challenged in any way by WSMRC. WSMRC could have also, for example, cross-referenced the raw data against its own client database records.

The consequences of Ms Al Bankani’s conduct were not serious

[145] As referred to above in the principles stated in *Hilder*, the degree of seriousness of the misconduct and matters of mitigation are relevant matters to consider under s 387(h).

[146] In this matter the seriousness of the misconduct is closely related to the likelihood that the on-call phone actually contained client records. If there was a very high likelihood that there were important client records on the phone then Ms Al Bankani’s misconduct was more serious. If there was only a slight chance that the on-call phone contained client records, then the misconduct is not likely to be regarded as serious.

[147] On the evidence described above I find that there was only a slight chance that the on-call phone contained client records.

Is the Commission satisfied that the dismissal of Ms Al Bankani was harsh, unjust or unreasonable?

[148] I find that the dismissal of Ms Al Bankani was harsh, unjust and unreasonable.

[149] Although there was a valid reason for dismissal and WSMRC gave Ms Al Bankani the opportunity to respond to the allegations against her, WSMRC did not properly investigate Ms Al Bankani’s response.

[150] Ms Al Bankani breached the literal terms of the WSMRC Procedure Manual. However the policy was too complicated for its context and bore little connection to the procedures initiated and/or tolerated by managers.

[151] WSMRC’s decision to summarily dismiss Ms Al Bankani was clearly harsh and unjust. There does not appear to be any sinister motivation for Ms Al Bankani’s dismissal – it seems that WSMRC simply made a bad judgment call to dismiss her so swiftly.

[152] Employer policy documents and manuals are generally helpful. As the Full Court of the Federal Court observed in *Westpac Banking Corporation v Wittenberg* (2016) 256 IR 181 at 196-7, [2016] FCAFC 33 at [76]-[80], [334] and [341]:

“The question of compliance by an employee (and by the employer) with an employer’s policies also raises difficult issues in some cases.

At one level, a contractual requirement to comply with an employer's published policies (often expressed as compliance with the policies as they exist from time to time) is simply an agreed record of a basic contractual obligation imposed by implication on an employee – i.e. when performing work under the contract to always comply with the lawful directions of the employer. This requirement is necessary to permit compliance by the employer with obligations to other employees and to third parties because an employer is generally vicariously liable to third parties for the conduct of employees when carrying out their duties and liable to other employees for their safety and well being at work.

Policies of this kind are subject to adjustment. The adjustment is in the discretion of the employer. The employee normally agrees to comply with the instructions in the policy as it is in place at any particular time. There may also be good reason for an employer to make discretionary exceptions to its own policies, from time to time, either generally or in particular cases without formal alteration. These are usually not matters intended to be subject to negotiation; nor are they in practice in most cases.

Policies of this kind are, by their nature, applicable generally to employees. They may apply to thousands of employees. They are broad guides to behaviour, not individually stated for particular employees. In a contract of employment, an employee sometimes promises obedience, but not always – even when a policy is referred to. Sometimes the contract merely records, in a letter of offer: “You will be expected to comply with [the Company's] policies concerning [.....] as published or in force from time to time”. There may be a real question whether a counterpart signature by an employee on a letter of offer like this raises any particular contractual obligation on the employee, arising from the contract. Any allegation of failing to comply with a policy would be more safely expressed as a failure to follow a lawful instruction (an obligation implied by law into contracts of employment) than as a contractual failure to comply with the policy. However that may be, in my view no contractual obligation is directly or expressly cast upon the employer by an exchange of this kind.

In other cases, an employee may actually agree to comply with an employer's policies as published from time to time. Upon the assumption that an express contractual term is thereby stated, difficult questions then arise about whether, and to what extent, an employer becomes contractually bound to the same policies, given that (usually) it should be concluded that an employer intends to retain complete control over the content of its own policies which are in no sense negotiated with its individual employees.”

[153] The case advanced for WSMRC focused on the extensive documentation within which there were snippets of terms and phrases that, according to WSMRC's case, connected the proverbial dots between Ms Al Bankani's conduct in deleting the contents of the on-call phone and the termination of her employment. This approach did not fully engage with the primary question at hand, being whether the dismissal of Ms Al Bankani was unfair.

[154] Employer policy documents and manuals must be accessible, understandable and reasonable in their terms.

[155] The WSMRC Procedure Manual was accessible to Ms Al Bankani. To the extent that WSMRC relies on the link between the WSMRC Procedure Manual and the SIS Contract, the contract was not reasonably accessible to Ms Al Bankani. Although the evidence was that she could access the contract within WSMRC's computer system, there was no practical reason established for her to do so, and no evidence at all of the employer asking or requiring Ms Al Bankani to familiarise herself with the contract.

[156] As I have explained above, I am very concerned that the terms of the WSMRC Procedure Manual relied on by WSMRC were not readily understandable to Ms Al Bankani.

[157] To the extent that the WSMRC Procedure Manual prohibited the deletion of client records that WSMRC was required to keep, the policy was reasonable. However WSMRC relies on terms in the policy that are significantly broader, and in a wider context those terms were not reasonable.

[158] Employer policy documents and manuals must also be applied fairly and reasonably. For reasons that do not need to be restated in this part of my decision, the WSMRC Procedure Manual was not applied and enforced consistently, reasonably or fairly in Ms Al Bankani's case.

Remedy - reinstatement

[159] Being satisfied that Ms Al Bankani made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal and was unfairly dismissed within the meaning of s.385 of the FW Act, I may order Ms Al Bankani's reinstatement, or the payment of compensation to Ms Al Bankani, subject to the FW Act.

[160] The Commission must perform its functions and exercise its power in a manner that is fair and just and promotes harmonious and co-operative workplace relations (per s.577 of the FW Act) and must take into account the objects of the Act, and equity, good conscience and the merits of the matter. The power to order reinstatement is "a very drastic one" (per *Slonim v Fellows* (1984) 154 CLR 505 at 515, [1984] HCA 51, cited in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548, [2005] HCA 22 at [28]). As the High Court observed in *Blackadder* (at 548 [28]), such an order is an intrusion into the personal relationship of employer and employee, and an intrusion that is "deliberate and envisioned by the Act."

[161] As the Full Court in *Perkins v Grace Worldwide Australia Pty Ltd* (1997) 72 IR 186 at 190, [1997] IRCA 15 observed, the employment relationship is capable of withstanding some friction and doubts.

"Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is

that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.”

[162] Neither party made extensive submissions on remedy.

[163] WSMRC’s opening oral submissions on remedy were:

“The last point to make is that the applicant seeks reinstatement in this matter. If the applicant is successful and the Fair Work Commission finds that she has been unfairly dismissed, which is denied, we say that reinstatement would not be a practical or appropriate remedy for the reasons that I have taken the Commission to in terms of the gravity of the offence, what we say is a failure to understand the gravity of that offence, and the case against reinstatement for that reason is compelling and an order to that effect should not be made.”

[164] WSMRC’s closing written submissions were equally brief:

“The Applicant seeks reinstatement in this matter. If the Applicant is successful and the Commission finds that she has been unfairly dismissed (which is denied) reinstatement would not be a practical or appropriate remedy.

We say that given the gravity of the conduct and the Applicant’s apparent failure to comprehend the significance of her actions, the case against reinstatement is compelling. An order of reinstatement should not be made.”

[165] The dismissal was harsh and unfair – Ms Al Bankani should not have been dismissed. The gravity of the conduct was such that she should not have been dismissed and is a factor in this case that supports an order for reinstatement.

[166] Taking all these matters into account I find that it would be appropriate to order that Ms Al Bankani be reinstated to her former position pursuant to s.391 of the FW Act.

[167] Further, it is appropriate to make an order that maintains the continuity of Ms Al Bankani’s employment (per s.391(2)(a)) and to make an order that WSMRC pay to Ms Al Bankani an amount for the remuneration lost by Ms Al Bankani because of the dismissal (per s.391(3)).

[168] In making an order under s.391(3) I am required by s.391(4) to consider:

- (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

[169] There is no specific evidence that could allow the above two amounts to be calculated. To finalise the matter I will make some procedural directions to overcome this gap in the evidence.

[170] An order to restore lost pay under s.391(3) is discretionary and the Commission may take into account all of the circumstances of the case, including the conduct of the employee that led to the dismissal (see *Humphries v Buslink Vivo Pty Ltd* [2015] FWC 6278 citing *Kenley v JB Hi Fi*, Print [S7235](#) at [36]).

[171] I do consider that Ms Al Bankani's conduct prior to dismissal warrants a reduction in payment for lost remuneration.

[172] However it is appropriate to reduce the amount ordered to take into account the fact that there is almost no evidence of Ms Al Bankani making reasonable attempts to find alternative employment and mitigate her loss.

[173] Ms Al Bankani said in her written evidence:

“On [the day after I was dismissed], I attended the doctor to get a prescription for Valium. I have had to take it to sleep every night since then.

...

I have dealt with a lot of problems in my life but this problem has really affected me. Mentally, it is too much.

I began seeing a psychologist, Miriam Broadhurst, in February 2022. She is very nice. It has helped me with a lot of things but I have not been able to manage my emotions about this termination.

...

I am still at a loss as to why I have been terminated after 6 years of hard work given to the WSMRC. While I have been looking for work so far I have not found any. I don't believe the WSMRC has treated me fairly and I am worried about finding a new job.”

[174] Ms Al Bankani's evidence was not challenged in any way. Ms Al Bankani's evidence nonetheless falls short of showing that Ms Al Bankani took appropriate steps to mitigate her loss.

[175] I recognise that Ms Al Bankani said that the dismissal affected her mentally. There is evidence of Ms Al Bankani enduring a long history of abhorrent circumstances in Iraq and Australia. In this context it is understandable that Ms Al Bankani was affected by her dismissal.

[176] However there is no medical evidence suggesting that Ms Al Bankani was not fit to work in other employment and no specific evidence of Ms Al Bankani applying for any other jobs.

[177] When making “appropriate” orders under s.391(3) the Commission often considers the efforts of an applicant to mitigate their loss. In a slightly different context the same matter must be considered when considering an order for compensation (per s.392(2)(d)). In my view it is

appropriate that the amount payable WSMRC for the remuneration lost by Ms Al Bankani be reduced by 25%.

[178] In the circumstances I will make an order¹ that within 21 days Ms Al Bankani be reinstated to the position in which she was employed immediately before her dismissal (per s.391(1)), an order that maintains Ms Al Bankani's continuity of employment (per s.391(2)(a)) and also the following directions for the filing of material by the parties in order to facilitate the making of an order to restore lost pay (per s.391(3)):

“Pursuant to subsection 391(3) of the Act, WSMRC is to pay to Ms Al Bankani an amount for the remuneration lost by Ms Al Bankani because of the dismissal, calculated as follows:

- a. The amount Ms Al Bankani would have earned for ordinary hours of work between the date of her dismissal and the date she is reinstated;
- b. MINUS any monies paid by WSMRC in lieu of notice of termination;
- c. MINUS any income earned from other work;
- d. MINUS 25% of the amount calculated after each of the above steps.

If the amount payable in accordance with the above order is agreed between the Parties by 17 March 2023, WSMRC must pay the amount agreed to Ms Al Bankani by no later than 28 March 2023 (or by such other date that is agreed between the parties).

If the amount payable in accordance with the above order is not agreed between the Parties by 17 March 2023, each party must file and serve submissions and any supporting evidence by no later than 22 March 2023 in relation to:

- a) the amount each party submits to be the correct amount the Commission should order; and
- b) the amount of remuneration earned by Ms Al Bankani from employment or other work during the period between the dismissal and the making of the Order for reinstatement; and
- c) the amount of any remuneration reasonably likely to be earned by Ms Al Bankani during the period between the making of the Order for reinstatement and the actual reinstatement.”



DEPUTY PRESIDENT

Appearances:

Mr *K Bolwell*, for the Applicant
Ms *S McCarthy* of Counsel instructed by Ms *P Forster* and Ms *M Roberts* of Kennedys Lawyers
for the Respondent

Hearing details:

2022.
Sydney
September 12 and October 20

Final written submissions:

Respondent, 6 December 2022
Applicant, 13 December 2022

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