[2025] FWC 1331 [Note: An appeal pursuant to s.604 (C2025/5059) was lodged against this decision - refer to Full Bench decision dated 3 December 2025 [[2025] FWCFB 274] for result of appeal.]

DECISION

Fair Work Act 2009
s.526—Stand down

Australian Nursing and Midwifery Federation
v
St Vincent's Private Hospitals Ltd T/A St Vincent's Private Hospitals
(C2024/8346)

COMMISSIONER YILMAZ MELBOURNE, 13 MAY 2025

Application to deal with a stand down dispute –circumstances allowing stand down under s.524(1)(a) –whether stand down authorised when taking protected industrial action

[1] St Vincent's Private Hospitals Ltd T/A St Vincent's Private Hospitals (St Vincent's or Respondent) stood down an employee relying on s.524(1) of the *Fair Work Act 2009* (the Act). The employee, a nurse and member of the Australian Nursing and Midwifery Federation (ANMF or Applicant) took protected industrial action on 21 November 2024 when she refused redeployment to a different ward. The ANMF dispute St Vincent's right to stand down its member without pay and lodged an application with the Fair Work Commission (the Commission) to deal with the dispute. The ANMF submit the circumstances or in the alternative the criteria permitting standdown under s.524 do not exist.

[2] The ANMF submit that on taking protected industrial action their member was placed on unpaid leave, denying her the opportunity to earn the money she would have earned had she not been stood down. St Vincent's submit that the employee refused, as part of her protected industrial action, to be redeployed to another ward in accordance with "operational requirements and therefore there was subsequent non-availability of suitable work," and she was unable to be usefully employed on the night shift of 21 November 2024.

Background

[3] Ms Razelle Coombes, an experienced registered nurse (RN) is an employee on night duty working part-time since May 2023 with St Vincent's. Ms Coombs works three shifts of 9.5 hours per week and ordinarily works on the fourth floor. From 2023 Ms Coombes has been redeployed to a different floor or ward about twice per week.

[4] Bargaining for a new enterprise agreement and protected industrial action commenced from 18 November 2024. The form of protected industrial action included refusal to be redeployed/ reallocated to another ward or floor.

[5] On 21 November 2024 Ms Coombes received text messages at 3.30pm and 3.33pm asking whether she wished to take the night off or if she wanted to work that day, or if she wanted to work a shift on the second floor. Ms Coombes replied that she wished to work that night and did not wish to go to the second floor.[1] Ms Coombes submits that her refusal to be redeployed was protected industrial action. At 5.36pm Ms Coombes spoke on the phone to Ms Leanne Rowlands, General Manager/Director Clinical Services and was informed that the Respondent required only two of the three registered nurses (Ms Coombes was one) to care for a reduced number of patients on the fourth-floor ward and that if she was interested, she could work her shift on the second floor. As Ms Coombes refused the offer to be redeployed, one option was that she take personal leave without pay. At the conclusion of the telephone discussion Ms Coombes was advised that a letter will be sent to her regarding their conversation.[2]

[6] St Vincent's sent to Ms Coombes a letter dated 22 November 2024 advising that because of her refusal as part of the protected industrial action to be redeployed in accordance with operational requirements and the non-availability of suitable work, she could not be usefully employed during her night shift commencing 21 November 2024 at 9.30pm. The letter further states that as she is *aware* St Vincent's *rosters staff according to activity levels across wards and sites and makes reasonable operational decisions to redeploy staff… to meet staffing requirements for a better and safer care for our patients*. It further states that Ms Coombes' refusal to be redeployed left them with no alternative but to stand her down on unpaid leave in accordance with s.524(1) of the Act as there was *no available work* in her *usual work area*.[3]

[7] The ANMF filed this application on 25 November 2024 pursuant to s.526 of the Act. Conciliation failed to resolve the dispute. Directions for hearing were issued. This matter was heard on 29 January 2025.

[8] The ANMF called two witnesses: Ms Razelle Coombes and Ms Priscille Farrell. In its reply submissions, both witnesses provided additional witness statements and a further statement from Ms Marites Soriano was submitted.

[9] The Respondent called two witnesses: Ms Leanne Rowlands and Ms Alexie Kelly.

[10] Both parties were granted leave to be legally represented.

The relevant provisions

[11] Section 526 of the Act allows the Commission to deal with a stand down dispute by arbitration made by an employee that has been stood down under s.524(1)[4] or an employee organisation entitled to represent the industrial interests of an employee.[5] This application was made by the ANMF, an industrial organisation entitled to represent the interests of its member Ms Razelle Coombes, an employee that was stood down on 21 November 2024 by the Respondent. Consequently, this matter is properly before the Commission under s.526 of the Act.

[12] Section 524 of the Act provides:

> **"524 Employer may stand down employees in certain circumstances**

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) industrial action (other than industrial action organised or engaged in by the employer);

(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period."

Submissions and evidence of the Applicant

[13] The ANMF contend that the Respondent cannot stand down their member under s.524 in circumstances where the reason is that their member has taken protected industrial action.

[14] Secondly the ANMF contends that the circumstances relating to their member do not fall within s.524 of the Act which otherwise permits the stand down of employees.

[15] The ANMF contends that neither the enterprise agreement[6] or Ms Coombes' contract of employment permits stand down, therefore the entitlement to stand down only arises under s.524 of the Act.

[16] In terms of s.524 the ANMF submits that the Act does not authorise stand down of an employee that has taken protected industrial action. The taking of protected industrial action is a workplace right and the Act prohibits adverse action.

[17] For an authorised stand down there are two conditions which must be satisfied as noted by the Full Bench in *Peninsula School*:[7]

> "[31] In order for a stand down of an employee to be authorised by s.524(1), two conditions must be satisfied:
>
> (1) The employee cannot be usefully employed during the period of the stand down; and
>
> (2) This must be because of one of the circumstances in paragraphs (a), (b) or (c) of s.524(1)."

[18] The ANMF contend that the Respondent needs to establish that Ms Coombes could not be usefully employed on the night of 21 November 2024 because of s.524(1)(a), (b) or (c) and it submits that it appears that the Respondent relies on s.524(1)(a) and not s.524(1)(b) or (c).

[19] The ANMF submits that it follows that it is a factual inquiry as to whether an employee can be usefully employed.[8] Evidence from Ms Coombes and Ms Farrell was that there was work to be performed on level four because it was a busy shift, and there was no need for redeployment. The witness evidence of Ms Soriano challenged the evidence of Ms Kelly particularly in relation to the events of the 21 November 2024 shift. In addition, it is submitted by Ms Coombes that she could have undertaken her professional education and administrative tasks which would have been of use to her employer. Consistent with the observations in *Peninsula School*[9] if there was useful employment, which it contends that there was, then the stand down was not authorised under s.524 of the Act.

[20] Ms Razelle Coombes gave evidence that since commencing with St Vincent's she has worked as an RN on night duty working three shifts per week of 9.5 hours each.[10] Ms Coombes has worked on the fourth floor and noticed that nurses were redeployed, including herself, at times twice per week. Ordinarily the fourth floor holds less than 30 patients and each RN will have 8-10 patients each.[11] From 18 November 2024 protected industrial action commenced, of which ANMF members voted for a ban on redeployment. The list of protected industrial action includes a ban on redeployment in the following terms:

> "A ban on redeployment, i.e. a ban on a member being required by the employer to move from the ward (or part of the ward) they typically work on, to another ward (or another part of the ward). Members are free to decline redeployment as they are participating in protected industrial action. Members can agree to be redeployed but are equally free to refuse redeployment."[12]

[21] On the night of 21 November 2024, Ms Coombes says she was told by her colleagues that worked on the fourth floor that they were very busy with high acuity patients that night. She further says that she could have been usefully employed to perform other work other than direct care. Ms Coombes described the requirement to "complete mandatory online

competencies which she could have completed had she been rostered on to the fourth floor. She described the training nurses must do as including first aid, basic life support, computer competency, confidentiality requirements, medi-tech training and other forms of training". Other duties that she contends she could have performed were tea relief, collection of drugs for patients, preparation of rooms for admission and general organisation and filling of emergency trolleys with supplies. Having been stood down Ms Coombes submits that she lost wages of $557.30 in that pay period.[13]

[22] Ms Priscille Farrell gave evidence that she too was taking protected industrial action and on 21 November 2024, while she refused to be redeployed, she was rostered to work on the fourth floor. While checking the red communication book she noted that Ms Coombes' name was crossed out rather than having a different floor against her name which would have identified that she been redeployed. On that night she says she was allocated 8 patients, and her colleague Ms Soriano was allocated 9 patients. However, after reading Ms Kelly's statement she agreed and submitted a further statement correcting the reference to 17 patients to 14. This means that 14 patients were shared between the two nurses on duty and this was within the range ordinarily allocated per nurse. She says that there are usually 7-9 patients allocated to each nurse on the fourth floor. Ms Farrell gave evidence that it was too busy for her and Ms Soriano to take a full hour lunch break, and she described other work that is not directly related to patient care such as competing online competencies which nurses are required to do when it is quiet.[14] Ms Farrell contests the evidence of the Respondent that the night of 21 November 2024 was not a busy night.[15]

[23] Ms Soriano gave evidence that on the night of 21 November 2024, she too was asked whether she wished to be redeployed or was interested in taking the night off. Ms Soriano exercised her right to engage in the ban on redeployment but was rostered to work on the fourth floor. She described how busy the night was because of the high acuity of patients and a MET call that hindered patient rounds and necessitated the assistance of Alexie Kelly, the After-Hours Coordinator.[16]

[24] The ANMF submit that the test of useful work is not "whether the employer could provide useful employment but whether there was useful employment within the meaning discussed in *Peninsula School,* commencing at [33]: [17]

> "An employee cannot be said to be one who cannot be usefully employed if there is useful work available the performance of which is within the terms of his contract of employment, although the class upon which he is normally employed or was last employed is not available."

[25] Further the ANMF submits that the Respondent has conflated the existence of useful work with a factor within s.524 and refers to Bromberg J in *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited*[18] in terms of "stoppage of work." That being that where an employee cannot be usefully employed on a day is not a "stoppage of work," the "stoppage of work is the cessation of work of the work of the particular workforce in which the employee is employed."[19] There is no contest that there was useful work on the second floor, but the ANMF submit that it was not open to the Respondent to argue "an anterior circumstance caused a stoppage after Ms Coombes took protected industrial action." The fact that the fourth floor was not particularly busy was not because Ms Coombes took protected industrial action,

nor the taking of industrial action was the cause for any lack of useful work on other floors. The conflated question concerns whether Ms Coombes could have been usefully employed rather than whether she would perform the useful work.[20]

[26] The ANMF submit that it is incorrect to "conflate the question of whether a person could be usefully employed with the question of whether the employee will perform useful work," and therefore the criteria set out in s.524(1)(a) cannot apply in Ms Coombes circumstances.[21]

[27] The ANMF seeks a remedy that Ms Coombes is compensated the amount she would have earned had she not been stood down. In this regard, it submits the Commission ought to consider fairness, that being the right of Ms Coombes to take protected industrial action as her workplace right and the prohibition in the Act against taking adverse action against an employee that has exercised their workplace right.[22]

Submissions and evidence of the Respondent

[28] St Vincent's submits that the stand down of Ms Coombes was lawful pursuant to s.524(1)(a) of the Act and the Commission ought to dismiss the application. In describing the employment of Ms Coombes, St Vincent's refers to the contract of employment which states:

> 5. Flexibility
> As the Hospital must remain flexible and respond to needs and workloads across the organisation, you may be asked to assist in other areas (in line with your classification), vary your working times (including reasonable overtime) and/or perform other tasks which are consistent with your skills and abilities.

[29] In terms of the flexibility provided for in the contract of employment, the Respondent submits that it is a feature in which Ms Coombes works and all RNs that are employed by St Vincent's. Registered Nurses are commonly assigned to a "home" ward but often will be assigned to other locations dependent on patient numbers and related operational needs.[23]

[30] The Respondent further refers to Ms Coombes position description which does not limit the Division/ Facility or location and identifies the essential skills and experience to work flexibly within the Facility service.[24]

[31] Further to the Protected Action Ballot Order made by the Commission on 30 October 2024, the Respondent was given notice on 18 November that ANMF members would engage in protected industrial action which includes the ban on redeployment. Ms Coombes was initially rostered on the fourth floor on 21 November 2024, but due to actual low patient numbers for the night shift, a review of the night shift roster occurred identifying a need for 2 and not 3 nurses. The reason for the revised roster was because of a high level of discharged patients earlier in the day. St Vincent's determined that it did not have useful employment for Ms Coombes on the fourth floor and she declined alternative options put to her including redeployment to the second floor.

[32] St Vincent's contends that both prerequisites of s.524(1)(a) were met. That Ms Coombes could not be usefully employed during the period of the stand down and the inability to usefully employ Ms Coombes during the stand down was because of industrial action.[25]

[33] St Vincent's submits that on the evening of the stand down, Ms Coombes was able to be usefully employed to perform the role of RN - Night Shift on ward two. It says that Ms Coombes was not exclusively assigned to the fourth-floor ward; her contract of employment, her job description and the routine practice of RNs was to be flexibly allocated to a ward to meet the operational requirements. It further submits that the change of wards ban reinforces the nature of allocation to wards, otherwise the ban would be futile. It says that there was no work for Ms Coombes on the fourth floor, but there was work on the second floor.

[34] St Vincent's submits that the evidence does not support the Applicant's contention that there was useful work on the fourth floor. It specifically contested the work that the Applicant submits would have been useful with witness evidence from Ms Leanne Rowlands General Manager/ Director of Clinical Services and Ms Alexie Kelly the After-Hours Coordinator.

[35] St Vincent's contends that ANMF members (including Ms Coombes) took industrial action within the meaning of the Act on 21 November 2024 and this action was in the form of change of ward bans. Therefore, due to the ban, St Vincent's could not usefully employ Ms Coombes. It had an operational need on the second floor, Ms Coombes was not usefully employed (on the second floor) solely because of the industrial action.[26]

[36] The Respondent submits the consideration of fairness requires the Commission to take into account the circumstances of the matter in terms of the reasonableness of the stand down. When there was no work on the fourth-floor ward, Ms Coombes was offered a range of choices; however, the option taken by Ms Coombes left St Vincent's with no alternative but to effect the stand down.[27]

[37] St Vincent's contest the Applicant's submissions that it was unable to stand down Ms Coombes under s.524 of the Act for the reason that she took protected industrial action, and that the circumstances relating to Ms Coombes does not fall within s.524 of the Act. In relation to the first contention the Respondent understands that the Applicant maintains that a stand down "*constitutes adverse treatment taken by St Vincent's Private against Ms Coombes because she was taking industrial action and – as a consequence of this – St Vincent's Private cannot rely on s.524*" of the Act.[28]

[38] The Respondent submits the Commission ought not accept this contention on the basis that: [29]

1. Stand down falls squarely within the scope of s.524 of the Act and the stand down was lawful under s.524.

2. Implicit in the Applicant's submissions is that industrial action contemplated by s.524 is not intended to cover the action of the employee being stood down. This is a *myopic view* of the scope of s.524 of the Act. It further adds that the sole caveat of s.524(1)(a) of the Act is that "industrial action" cannot be industrial action organised or engaged in by the employer. It submits that this interpretation is unrealistic in that it is often that an employer will rely on s.524 of the Act to stand down an employee because they are engaging in industrial action and cannot be usefully employed.

3. The Applicant is pressing the Commission to reach conclusions that the stand down is a breach of Part 3-1 of the Act and it ought not do so.

[39] Finally, the Respondent submits that the Commission has no power to grant compensation as sought by the Applicant.

[40] Ms Leanne Rowlands, General Manager/ Director Clinical Services[30] gave evidence that it was a general and long-standing practice that the Hospital requires nurses to change wards for a shift to meet operational requirements. Low or lower patient numbers on a ward result in changes to staff rosters by allocating staff to another clinical department where they are required. This flexibility is required to meet visiting medical officer (VMO) demand on hospital services when admitting patients. St Vincent's rosters staff and revises the rosters based on predicted patient activity the week before the shift, and on actual activity scheduled the day prior and on the day of each shift. Due to financial constraints, St Vincent's is unable to keep rostered nursing staff on the initial shift if there is a reduced level of patient activity and the nurse cannot be usefully employed.[31] Ms Rowlands further provided particulars concerning patient data on the evening of 21 November 2024.[32]

[41] Ms Rowlands says that ordinarily night shift nurses are advised of the change to their allocated floor when they arrive for their shift. However, due to the protected industrial action, nurses were contacted late afternoon before they arrived to discuss the options and for the nurse to advise of their decision. This was initiated to avoid situations where nurses may simply return home.[33]

[42] Ms Rowlands gave evidence that at approximately 3.30pm she met with the After-Hours Coordinator and the Nurse Unit Manager where a high number of unexpected discharges and resulting staffing requirements were discussed. The discharged patients caused a reduction in the number of patients to 14 on the fourth floor consisting of one pre-operative patient, 12 post operative patients and one medical patient. She says that the Nurse Unit Manager selected Ms Combes for reallocation due to her seniority and skillset and because she had previously indicated a preference to work on the second floor. She further says that all options to keep Ms Coombes on the fourth floor were discussed together with the movement of patients while considering the impact of the bed move on the patient. Given that Ms Coombes refused to be reallocated, Ms Rowlands, in consultation the After-Hours Coordinator and Nurse Unit Manager determined to stand her down as a last resort.[34]

[43] Ms Rowlands also gave evidence that there were no high acuity patients on the night shift of 21 November 2024. During the hearing, Ms Rowlands clarified that the attachment LR-2 is the Hospital record of patients and their diagnosis on ward four on the night of 21 November 2024. Ms Rowlands further in witness evidence was referred to attachment LR-3 which was the record of patients used by the Nurse Unit Manager with her handwritten adjustments that reflect changes to the patient activity prior to the handover from the AM shift. Her professional assessment of the list was that "*there was nothing indicating there was going to be intensive nursing care or intensive observations outside of what we would expect for routine post-operative observations*."[35] In addition, the list as indicated by LR-3 is commonly used as a tool for nurses to evidence clinical issues or alerts regarding a patient for handover to effectively plan and assess their care.[36]

[44] Ms Rowlands explained the expected practice to complete online training on shift during handover and in down time, the status of Ms Coombes' completion of online training as at 21 November 2024 (indicating no mandatory training outstanding) and she responded to Ms Coombes' evidence regarding the additional tasks identified and says they were all capable of being met by the two nurses on shift in accordance with the accepted practice and reliance on the After Hours Coordinator when necessary. Ms Rowlands further responded to the evidence of Ms Farrell clarifying that St Vincent's does not use a ratio model but rather an acuity-based model which is why the number of allocated patients can vary.[37]

[45] Ms Alexie Kelly, the After-Hours Coordinator rostered on the night shift of 21 November 2024 [38] described her role together with the nine other Coordinators that work across three shifts is to ensure the Hospital is covered 24 hours in all wards and the 11 theatres. Ms Kelly described the handover process, the checking in with the nurse in charge and providing break coverage or assistance where required. Ms Kelly says that nurses prefer to take their 30-minute unpaid break in conjunction with their two 15-minute paid breaks in one block, and she is called where required to cover the nurse on their break.[39]

[46] Ms Kelly described the make-up of patients on ward two (often orthopaedic and urology, mostly acutely unwell or elderly) and ward four (plastic surgery, ear nose and throat, low acuity oncology, often younger and fitter patients and patients undergoing elective surgery). She says that the forward planning on ward four "is a juggling act" as many surgeries are cosmetic and not covered by health insurance so patients often prefer to recover at home with pain relief. Alternatively, some surgeons prefer that patients stay overnight. Consequently, due to this patient activity nurses are often reallocated from ward four to other floors.[40]

[47] Ms Kelly further gave evidence that since the commencement of protected industrial action where nurses are electing to exercise their right to refuse to change wards, her role has been more challenging to reallocate nurses to different wards where coverage is required. Ms Kelly worked on the night of 21 November 2024 and as part of her role she checked in on each ward and at the end of her shift she emailed to Ms Rowland her spreadsheet verifying patient and nurse numbers over the night and projections for the next day.

[48] Ms Kelly says the Hospital was busy that night but ward four was quiet having 14 patients and two nurses on duty. Ms Kelly gave further oral evidence on the impact of the Medical Emergency Team (MET) call on the nurses in ward four. A MET call is made when an escalation of care is required because the patient's observations are not within normal limits. This involves the Hospital Medical Officer as part of the MET making a call on medications or fluids. The MET call on 21 November 2024 required the administration of fluids to the patient and close monitoring for the first hour. The explanation for calling the MET was consistent with the evidence of the Applicant's witnesses. Ms Kelly gave evidence that there were three MET calls that night and that the number of MET calls can vary from nil to 6 over a shift.[41]

[49] Ms Kelly responded to the evidence of Ms Farrell and Ms Coombes concerning the duties that could have been performed.[42] Ms Kelly further described her role in relieving for tea breaks and that is not normally the role of another nurse from a different floor. She described her practice of normally touching base with each ward to coordinate tea breaks at the start of her shift. However, on this occasion Ms Kelly only managed to attend the ward about 45

minutes after Ms Farrell started her shift. Nevertheless, she gave evidence that she was not called to relieve for tea breaks which would have been expected between 3 and 5 am.

[50] Ms Kelly gave evidence that she was called to assist with checking of drugs at least twice. She also confirmed that she attended the MET call and checked in on the patient each time that she attended ward four.

[51] Ms Kelly further described the role for nurses and cleaners in cleaning or preparing rooms, stating that it was not the role of nurses to prepare rooms for admission or clean the room after discharge.

Consideration

[52] It is not contested that ANMF members engaged in protected industrial action since 18 November 2024 which included a ban on redeployment/ reallocation from the employee's "home" ward to another ward. Ms Coombes an RN on night shift was initially scheduled to work on 21 November 2024 on the fourth-floor ward. It is not disputed that Ms Coombes engaged in lawful protected industrial action by refusing the redeployment.

[53] It is further not contested between the parties that the contract of employment and job description provides for flexibility in respect to location of work and working times consistent with skills and experience and operational requirements. Nor is it contested that nurses typically rostered on the fourth-floor ward are commonly reallocated/ redeployed to other wards based on Hospital requirements. I also accept the undisputed evidence that the required flexibility meets VMO demand, predicted patient activity and balances staffing needs with financial constraints. Ms Coombes herself gave uncontested evidence that she has regularly been required to work on another ward for up to two of her three shifts in a week.

[54] I accept the evidence that following the handover at morning shift (around 2pm), a review of Hospital operational requirements identified a reduction of patients expected for the night shift to commence at 9.30pm. The reduction from 31 forecasted patients by 17 because of unexpected discharges left 14 patients which were assessed by St Vincent's as not being high acuity. After assessment of operational requirements, a reasoned decision was made to roster two of the three nurses on ward 4 and to request a nurse to be redeployed to level two. This assessment by St Vincent's was not uncommon in such circumstances. Because of the redeployment work bans all three nurses were given the option to be redeployed and all refused. The decision then followed to redeploy Ms Coombes to ward two because of her seniority and experience. However, Ms Coombes refused the request because she engaged in a redeployment ban.

[55] This dispute does not concern the application of an industrial instrument; the dispute solely concerns the application of s.524 of the Act. The ANMF submit that St Vincent's cannot stand down their member that has taken protected industrial action under s.524(1)(a) on which the Respondent relies. In fact, the ANMF raise two objections to the stand down:

1. Section 524 does not apply in circumstances where their member has taken protected industrial action.

2. Section 524 does not authorise a stand down where an employee has exercised a workplace right and the Act prohibits adverse action.

[56] The circumstances, relating to their member, does not fall within s.524 because for an authorised stand down, two conditions must be met:[43]

- The employee cannot be usefully employed during the period of the stand down; and
- The stand down where an employee cannot be usefully employed must be because of one of the circumstances in section 524(1)(a), (b) or (c).

[57] A breakdown in machinery or equipment for which the employer cannot be held responsible,[44] or a stoppage of work for any cause for which the employer cannot be held responsible[45] are not relevant in this matter, nor are these grounds relied on by St Vincent's. The Respondent submits that Ms Coombes was stood down lawfully pursuant to s.524(1)(a) of the Act – industrial action (other than industrial action organised or engaged in by the employer).

The first objection

[58] Taking the first objection, the ANMF is correct, that to rely on s.524(1) to stand down the employee, the condition is that the employee cannot be usefully employed because of the industrial action. It is following this point that the parties do not agree. St Vincent's submit that there is no narrowing of s.524(1)(a) and therefore the industrial action includes any industrial action taken by the employee being stood down. The ANMF however submit that the reference to industrial action cannot mean the protected industrial action taken by the employee because it is a workplace right and the Act protects against adverse action.

[59] I observe that Part 3-5 stand down, together with general protections and industrial action are found in Chapter 3 – Rights and responsibilities of employees, employers organisations etc. Chapter 3 includes the following relevant provisions in this matter:

- Part 3-5 Stand Down s.524
- Part 3-3 Industrial Action s.476
- Part 3-1 General Protections, Adverse Action s.342

[60] Division 1- introduction (of Part 3-5) provides no additional guidance in respect to whether the different rights and responsibilities interact or affect another part. Simply the introduction provides the default circumstances (if there is no industrial instrument) where a national system employer may stand down a national system employee without pay and for the Commission to deal with disputes under this Part.[46]

[61] There is guidance in Part 3-3 – Industrial action in Division 9, subdivision C, s.476 which reads:

> "If an employee engaged, or engages, in industrial action against an employer, this Division does not affect any right of the employer, under this Act or otherwise, to do

anything in response to the industrial action that does not involve payments to the employee."

[62] The Explanatory Memorandum to the *Fair Work Bill 2008* at 1904 clarifies that s.476 *"does not affect any right of the employer, under this Bill or otherwise (e.g., at common law), to do anything in response to employee industrial action that does not involve payments to the employee (e.g., standing down the employee)."*

[63] In addition, in Part 3-1, s.342 provides the meaning of adverse action and contains at s.342 a table which lists the circumstances in which a person takes adverse action. Relevantly at subsection (3) an exception concerns any adverse action that is authorised by or under:

(a) this Act or any other law of the Commonwealth; or
(b) a law of a state or Territory prescribed by the regulations.

[64] Further, subsection (4) provides:

"Without limiting subsection (3), adverse action does not include an employer standing down an employee who is:

(a) engaged in protected industrial action; and
(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances."

[65] The relevant extract from the *Fair Work Bill 2008 Explanatory Memorandum* at 1389 states:

"Without limiting the exclusion to adverse action in subclause 342(3), subclause 342(4) provides that adverse action does not include an employer standing down an employee who is engaged in protected industrial action and employed under a contract of employment that provides for the employer to stand down the employee in the circumstances. An employer could also stand down an employee in accordance with the terms of an enterprise agreement without such action being adverse action, because the action would be authorised by this Bill and would therefore fall within the exception in subclause 342(3)."

[66] From the above sections of the Act and the relevant extracts of the *Explanatory Memorandum*, it is evident that while an employee is entitled to take protected industrial action, they are not immune from the rights of an employer to stand down the employee where authorised by s.524(1) of the Act or an industrial instrument without contravening the general protections provisions.

[67] Therefore, while taking protected industrial action is a workplace right protected under Chapter 3, the meaning of adverse action must be considered in the context and scope of the Act. The fact that subsections 342(3) and (4) contemplate action authorised by the Act (as in this case - stand down pursuant to s.524 of the Act) I cannot find that due to a general protection, s.524 cannot lawfully apply to the circumstances in which Ms Coombes was stood down. Not only are there no limitations contained within s.524 of the Act, sections 476 and 342(3) and

342(4) authorise stand down by the employer under circumstances that meet the requirements of s.524(1). In these circumstances, it is not appropriate nor necessary to consider whether the stand down was a breach of Part 3-1 or whether the stand down constituted adverse action.

[68] It is relevant at this juncture to settle the contested point that s.524 does not authorise the stand down of the employee that has engaged in industrial action. Decisions of this Commission have settled disputes concerning employees affected by industrial action by other employees, but also the stand down of employees engaging in industrial action. Notably in an often-cited decision *CEPU Anor v FMP,*[47] Deputy President Gostencnik considered the threatened or probable stand down of employees to engage in a paper work ban. Relevantly, he reasoned:

> "for an employer to validly exercise its right under s.524(1)(a), the employee who is to be the subject of a stand down must, at the time of being stood down be engaging in the industrial action/ have previously engaged in industrial action which causes the unavailability of useful employment, or have his or her capacity to be usefully employed affected by the industrial action of others that is happening or has happen."

[69] I cannot find in favour of the ANMF's first objection, on the basis that the Act, *Explanatory Memorandum* and relevant authorities recognise that stand down may be authorised in circumstances where an employee has taken protected industrial action. It is appropriate to now consider the second substantial objection, that is whether the stand down of Ms Coombes is authorised by s.524(1)(a). Section 524 (1) permits an employer to stand down an employee during a period in which they *cannot usefully be employed because of* industrial action.

The second objection – useful employment during the period of stand down (the first condition)

[70] There is contest that Ms Coombes could not be usefully employed on ward four on the night of 21 November 2024. I accept the evidence of Ms Coombes that she was informed by Ms Rowlands in the afternoon of 21 November 2024 that due to a number of unexpected discharges there were fewer patients on ward four to cover the work of three nurses. While unclear what specifically was said, it is not disputed that there were 14 patients on ward four, this effectively reduced the usual load of 8-10 patients per nurse.[48] I do observe that Ms Farrell's evidence differed, she says that on average a nurse would oversee 7 - 9 patients a night. Witnesses other than Ms Farrell referenced an average of patients per nurse at 8-10, even though St Vincent's did not utilise a ratio model; on balance I prefer the evidence that 8-10 patients was an average number. Although the difference in average number of patients per nurse makes no material difference in this matter. I also accept the evidence of Ms Kelly that initially when the rosters were set there were 31 patients expected on ward four on 21 November, but with 17 unexpected discharges, there were only 14 patients and none were high acuity patients.[49]

[71] Both parties referred to the reasoning of the Full Bench decision in *Peninsula School*,[50] and I accept that the authority is relevant to this matter. The Full Bench aptly summarised the long history in connection to s.524(1) of the Act. The Full Bench went on to say that for a *stand down of the employee to be authorised by s.524(1), there are two conditions* that need to be satisfied. It is helpful to repeat the conditions: [51]

> "In order for a stand down of an employee to be authorised by s.524(1), two conditions must be satisfied:
>
> (1) The employee cannot be usefully employed during the period of the stand down; and
>
> (2) This must be because of one of the circumstances in paragraphs (a), (b) or (c) of s.524(1)."

[72] Relevantly the decision in *Peninsula School*,[52] as do several other decisions, refer to the *Explanatory Memorandum* which states at 2077:

> An employer can only stand down an employee if they cannot be usefully employed. If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee.

[73] The *Explanatory Memorandum* provides some guidance on what is relevant in the consideration of useful employment. The employment must be of benefit or value to the employer. St Vincent's evidence was that having considered the relevant information on patient numbers and their care needs, they determined that for 14 low acuity patients, and consistent with ordinary rostering practices there was sufficient work for two nurses and not three. St Vincent's then determined, consistent with ordinary practices that there was a need to redeploy one of the three nurses to the second ward floor where additional staffing was required. Ms Coombes refused the redeployment and the Respondent incurred additional cost in securing staffing resources from outside of the hospital. Ms Coombes maintains there was work on the fourth-floor ward, yet the Respondent challenged this proposition with evidence that there was no value or benefit in having a third nurse rostered on ward four.

[74] Observations from Morling J in *Townsend,* cited in *AMWU v McCain* [53] further provides guidance in respect to useful work in the context of this matter:

- The question of whether the employee cannot be usefully employed is because of industrial action is largely a question of fact.
- The economic consequences for the employer cannot be ignored.
- Questions of fact and degree will entail determination whether the employee cannot be usefully employed against whether she can be usefully employed but it is not of convenience to the employer.
- Had the employer acted on good principles and in good faith.
- The *evidence is not to be gone through with a tooth comb*….to a *standard of perfection*.

[75] The Vice President in *AMWU v McCain* further added that the "dispute requires consideration of the circumstances to determine whether employees could have been usefully

employed at the time they were stood down, taking into account fairness between the parties concerned as required by s.526(4).”[54]

[76] Therefore, the starting point is whether the employee can be usefully employed at the time of the stand down. The ANMF submit that Ms Coombes could be usefully employed because the night of the stand down was a busy night on ward four to justify the employment of the third nurse.

Was it a busy night?

[77] Ms Coombes gave evidence that she was informed by the two nurses that worked on ward four on the night of 21 November 2024 that it was a busy night.[55] Ms Farrell provided a second statement after accepting that her recollection of 17 patients was incorrect and her evidence of seeking assistance to cover tea breaks is not reliable. Ms Kelly was the Coordinator on duty and she gave evidence that she was not asked to relieve for tea breaks. However, Ms Soriano did give evidence that Ms Kelly was called to assist at the time of the MET call. I accept the evidence that Ms Kelly did attend to assist with the MET call plus attended the ward at least twice to assist Ms Soriano with drug checking. This assistance was not out of the ordinary but expected support from the After-Hours Coordinator. Ms Kelly contested the evidence that it was a busy night or that a third nurse was required, and I accept her evidence. Her recollections and documentary evidence[56] were more reliable than the applicant’s witness evidence. In Ms Kelly’s reporting to Ms Rowlands there were three MET calls in the hospital overall but on ward four there were 14 patients enough for two nurses on duty even though there was a MET call. And further, despite the MET call the nurses completed their tasks. Although it is accepted that the MET call required more regular observation there was an absence of evidence that a third nurse was required and would be usefully employed for the shift. Having considered the evidence and the material before me I find that the decision to roster two nurses was sound, it was not a busy night as argued by the Applicant.

Could Ms Coombes be usefully employed?

[78] The question of whether Ms Coombes could have been usefully employed is a factual one.[57] Ms Coombes gave evidence that there were relevant duties for which she could have been usefully employed on the night of 21 November 2024. These duties included the completion of online training, tea relief, drug collection and bed checking, preparation of rooms for admission and restocking and checking of supplies and equipment for emergency trolleys. All of these tasks are clearly important and necessary, however, I do not accept that the evidence weighs in favour that had she been rostered to work that she would have been usefully employed. There was also an absence of evidence that any of these duties indicated by Ms Coombes as alternative work on the fourth ward was of economic value to St Vincent’s. The evidence was that there was no need for a third nurse as tea breaks and trolleys were checked and restocked without the need for assistance and drug checks were completed with the assistance of Ms Kelly. To roster an additional nurse despite operational requirements has economic consequences. Not rostering Ms Coombes was not simply a matter of convenience.

[79] Ms Coombes admitted to not having checked whether she had any outstanding mandatory training when she completed her statement.[58] The evidence of Ms Rowlands was that there was no outstanding mandatory training on the night of 21 November 2024.[59] Ms

Coombes confirmed the evidence of her training record.[60] I am not satisfied that Ms Coombes had mandatory training to be completed nor that it is sufficiently relevant to the consideration of useful employment.

[80] Ms Coombes did not contradict the evidence of both Ms Rowlands and Ms Kelly concerning the duties nurses ordinarily perform on shift, whether the nurses performed their tasks on 21 November and where assistance is required the role of the Coordinator on duty to provide assistance.

[81] It is accepted practice that the Coordinator takes an active role in the administration of nursing duties and nurses are aware that they ought to contact the Coordinator for assistance. Rosters require forward planning and the night shift Coordinator takes into account the handover from the Coordinator in the afternoon, the number of patients on each ward, the medical condition of each patient and other matters to ensure nurses can manage patient welfare and take their breaks.

[82] Much time was spent explaining the process of drug collection and bed checking but the evidence did not support the need for an additional nurse to be rostered to assist with this process.[61] Evidence concerning preparation of rooms for admission was overstated by the Applicant.[62]

[83] Evidence of stocking and checking of emergency trolleys demonstrated that there was no requirement for an additional rostered nurse. Evidence of the Daily Adult Emergency Trolley Equipment Checklist[63] was confirmed as a familiar document to Ms Coombes, and the document demonstrates that on the night of 21 November 2024 all items were checked and complete even though it is unclear what time the check was completed.[64]

[84] The evidence shows that in a hospital even with the best planning, emergencies can arise and therefore rosters including the services of the Coordinator are relevant considerations. The evidence of the witnesses in this matter, on my assessment, did not support the contention that a third nurse on ward four would have been usefully employed. I am not satisfied that it was busy, that the nurses on shift needed the assistance of a third nurse to complete their duties or that the duties identified by Ms Coombes suffice as useful employment. No further forensic analysis is required, and I am satisfied that the Respondent acted on good principles and in good faith. Therefore, the question of whether Ms Coombes could have been usefully employed on ward four on 21 November 2024, and taking into account fairness between the parties, the answer is no.

The second objection – Is the stand down due to industrial action (the second condition)?

[85] Ms Coombes gave evidence that due to the lower number of patients on ward four that she was offered to work on ward two. Ms Coombes further gave evidence that that she refused the offer to work on the second ward because she engaged in industrial action.[65]

[86] It follows on the factual evidence that there was not useful employment on ward four, but there was useful employment on ward two. However, Ms Coombes opted not to work on the second ward because she engaged in industrial action, i.e., the ban on redeployment to

another ward. Her industrial action has a causal link to the stand down. St Vincent's stood down Ms Coombes while she took industrial action because she could not be usefully employed. The accepted practice of redeploying nurses to other wards when there is an operational requirement could not take place because of the refusal to be redeployed.

[87] I am satisfied on the evidence that St Vincent's decision to stand down Ms Coombes falls within the scope of s.524(1) on the basis that Ms Coombes could not be usefully employed on the night of 21 November 2024, and she could not be usefully employed because of industrial action[66] with her refusal to be redeployed. The stand down was therefore authorised.

Conclusion

[88] Section 524 of the Act authorises an employer to stand down an employee for a period where the employee cannot be usefully employed because of one of the provisions contained in s.524(1)(a) – (c). I am satisfied on having taken into consideration the submissions and evidence that St Vincent's stood down Ms Coombes on 21 November 2024 when she was asked to redeploy to another ward after her home ward did not have useful employment or work of value to the Hospital. However, it did have work of value on the second floor ward, but Ms Coombes could not be usefully employed because of the ban on redeployment, i.e., industrial action under s.524(1)(a).

[89] The ANMF seeks a remedy arising from this dispute, I am unable to make the orders as proposed. I appreciate that Ms Coombes suffered a loss in wages by being stood down, but also St Vincent's drew no benefit. On the contrary their experienced employee was not available to perform duties in a ward where her employment would have been useful, but they had to engage external staffing resources at a cost to cover shifts their nurse refused to do because of the ban.

[90] For the above reasons the ANMF application for orders is dismissed.

COMMISSIONER

Appearances:

E White of Counsel instructed by *A Nippard* and *N White* of Gordon Legal for the Applicant
S Cheligoy of Counsel instructed by *G Marks* of K&L Gates for the Respondent

Hearing details:

2025.

Melbourne:
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[1] Exhibit A1 *Statement of Razelle Coombes*, Digital Hearing Book (DHB) 18-39, Attachment RC-4, DHB 35-37.

[2] Applicant's Submissions at [6] – [8], DHB 11-17 and Exhibit A1.

[3] Letter dated 22 November 2024 from Leanne Rowlands General Manager - Exhibit A1, Attachment RC-6, DHB 39.

[4] Section 526(3)(a).

[5] Section 526(3)(c).

[6] *St Vincent's Private Hospitals Ltd Victoria and the Australian Nursing and Midwifery Federation Nurses Enterprise Agreement 2020* [AE513860].

[7] *Peninsula School T/A Peninsula Grammar School v Independent Education Union of Australia* [2021] FWCFB 844 (Peninsula School) at [31].

[8] Ibid at [33]; Joske J in *Re Carpenters and Joiners Award* (1971) CAR 1031, 1035; 17 FLR 330, 335.

[9] Op Cit at [33].

[10] Exhibit A1 at [3] – [4], DHB 18.

[11] Ibid at [5] - [6].

[12] Exhibit A1, Aattachment RC-3 at [17], DHB 34.

[13] Exhibit A1 at [12] – [14], DHB 20.

[14] Exhibit A3 *Statement of Priscille Farrell* at [9] – [11], DHB 41.

[15] Exhibit A4 *Further Statement of Priscille Farrell*, DHB 53-55.

[16] Exhibit A5 *Statement of Marites Soriano*, DHB 49-52 and Exhibit A6 *Further Statement of Marites Soriano* dated 28 January 2025 tendered by E. White on 29 January 2025.

[17] [2021] FWCFB 844 and Applicant's Reply Submissions at [2] – [6], DHB 46.

[18] [2022] FCAFC 50 at [131].

[19] Applicant's Reply Submissions at [8] - [9], DHB 47.

[20] Applicant's Submissions at [26] – [27], DHB 16.

[21] Ibid [28] – [30], DHB 16-17.

[22] Ibid [31] – [32], DHB 17.

[23] Respondent's Submissions, DHB 63-71 and Exhibit R3 *Statement of Leanne Rowlands* at [9] – [10], [12] – [17], DHB 87, 88.

[24] Ibid.

[25] Respondent's Submissions at [15] – [16], DHB 65.

[26] Respondent's Submissions at [25] – [27], DHB 68.

[27] Ibid at [28] - [30].

[28] Ibid at [33], DHB 69.

[29] Ibid at [34] – [36].

[30] Exhibit R3.

[31] Ibid at [9] - [16], DHB 87-88.

[32] Record of patients on ward four on 21 November 2024 - Exhibit R3 Attachment LR-2.

[33] Exhibit R3 at [17], DHB 88.

[34] Ibid at [19] – [35], DHB 89-91.

[35] Transcript of proceedings dated 29 January 2025 (Transcript) PN549 – PN552.

[36] Transcript PN560 – PN566, PN584 – PN594.

[37] Exhibit R3 at [36] – [38], DHB 92-93.

[38] Exhibit R4 *Statement of Alexie Kelly*, DHB 104-113.

[39] Ibid at [6] - [8], DHB 105.

[40] Ibid [9] – [10], DHB 106.

[41] Transcript PN614 – PN629.

[42] Exhibit R4 at [12] – [23], DHB 106-109.

[43] Section 524(2).

[44] Section 524(1)(b).

[45] Section 524(1)(c).

[46] Part 3-5.

[47] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd* [2013] FWC 2554 at [32].

[48] Transcript PN57 – PN78.

[49] Exhibit R4 at [15] – [17], DHB 107 and Attachment AK-2, DHB 111-112.

[50] [2021] FWCFB 844.

[51] Ibid at [31].

[52] Ibid at [33] and Fair Work Bill 2008, *Explanatory Memorandum* at [2077].

[53] *Townsend v General Motors- Holden's Ltd* [1983] FCA 212; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) v McCain Foods (Aust) Pty Ltd* [2011] FWA 6810 at [16].

[54] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) v McCain Foods (Aust) Pty Ltd* [2011] FWA 6810 at [17].

[55] Transcript PN83 – PN 85.

[56] Exhibit R1, Exhibit R2, Exhibit R3, Attachments LR-2 – LR3, DHB 98-101 and Exhibit R4, Attachments AK-1 – AK-3, DHB 110-113.

[57] See *Re Carpeters and Joiners Award* (1971) 17 FLR 330*; Townsend v General Motors- Holden's Ltd* [1983] FCA 212, [1983] 4 IR 358; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) v McCain Foods (Aust) Pty Ltd* [2011] FWA 6810; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd* [2013] FWC 2554.

[58] Transcript PN86 – PN102.

[59] Exhibit R3 at [36], DHB 92 and Attachment LR-4, DHB 102.

[60] Transcript PN92.

[61] Transcript PN105 – PN128, PN191 – PN203.

[62] Transcript PN129 – PN134, PN204 – PN205.

[63] Exhibit R1 *Daily Adult Emergency Trolley Equipment Checklist* tendered by S. Cheligoy on 29 January 2025.

[64] Transcript PN135 – PN145, PN163 – PN182.

[65] Transcript PN79 – PN82.

[66] Section 524(1)(a).