[2025] FWCFB 274

The attached document replaces the document previously issued with the above code on 3 December 2025.

The word ‘the’ is changed to ‘that’ in paragraph [62].

Associate to Vice President Gibian

Dated 18 December 2025.

[2025] FWCFB 274

# DECISION

*Fair Work Act 2009*
s.604 - Appeal of decisions

**Australian Nursing and Midwifery Federation**
**v**
**St Vincent's Private Hospitals Ltd trading as St Vincent's Private Hospitals**
(C2025/5059)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT HAMPTON

SYDNEY, 3 DECEMBER 2025

*Appeal against decision [2025] FWC 1331 of Commissioner Yilmaz at Melbourne on 13 May 2025 in matter number C2024/8346 – Employee proposed to participate in protected industrial action by refusing redeployment to different ward – Employee purportedly stood down – Whether stand down authorised by s 524 of the Fair Work Act 2009 (Cth) – Whether employee could not be usefully employed because of industrial action – Stand down provisions not applicable where employee refuses to perform available work – Decision at first instance involved error – Application should nonetheless have been dismissed for different reasons – Permission to appeal granted – Appeal dismissed.*

## Introduction

**[1]** The present appeal raises an important question as to the circumstances in which an employer is entitled to stand down an employee under s 524(1)(a) of the *Fair Work Act 2009* (Cth) (the **Act**). In short, the question is whether an employer can stand down an employee under that section in circumstances in which there is useful work for an employee to perform, but the employee refuses to perform that work because the employee is participating in protected industrial action in the form of a work ban.

**[2]** The dispute arose in the following way. Razelle Coombes is an experienced registered nurse employed by St Vincent's Private Hospitals Ltd. She is also a member of the Australian Nursing and Midwifery Federation (the **ANMF**). On 18 November 2024, members of the ANMF commenced protected industrial action in support of bargaining for a new enterprise agreement at St Vincent's. One of the forms of protected industrial action involved members of the ANMF refusing to be redeployed from the ward or floor on which they typically work to another ward or floor. On 19 November 2024, Ms Coombes was asked to work on another floor for her shift that night. Ms Coombes declined because she was participating in protected industrial action. On that night, Ms Coombes ultimately took annual leave.

**[3]** On 21 November 2024, Ms Coombes was rostered to perform work on the fourth floor ward. 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, and 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. At 5.36pm, Ms Coombes spoke on the phone to Leanne Rowlands, General Manager/Director Clinical Services, and was informed that there were only 17 patients on the fourth floor and the hospital required only two of the three registered nurses rostered that night. Ms Coombes was informed that she could work her shift on the second floor. Ms Coombes said that she declined the offer because she was participating in protected industrial action. Ms Reynolds said that she informed Ms Coombes that she was stood down. At the conclusion of the telephone discussion, Ms Coombes was advised that a letter would be sent to her confirming the outcome of the conversation.

**[4]** On 22 November 2024, Ms Coombes received a letter from Ms Rowlands that advised she had been stood down for her night duty shift the previous evening. The letter asserted:

> We are writing to inform you that as a result of your refusal, as part of the Protected Industrial Action, to be redeployed to another ward in accordance with operational requirements and the subsequent non-availability of suitable work, you were not able to be usefully employed by St Vincent's Private Hospital East Melbourne during your night shift duty shift commencing 21 November 2024.
>
> As you are aware, St Vincent's Private Hospital Melbourne rosters staff according to activity levels across wards and sites (in line with the 'Flexibility' clause of your contract of employment) and make reasonable operational decisions to redeploy staff to other wards or sites to meet staffing requirements for a better and safer care for our patients. Your refusal to participate in the redeployment process left us with no alternative but to place you on stand down for the duration of your shift commencing 21 November 2024 from 9:30pm to 7:00am in accordance with section 524(1) of the *Fair Work Act 2009* (Cth), as there was no available work for you in your usual work area and you confirmed you were not willing to complete available work elsewhere in the organisation.
>
> Please note that during this stand down period, you were not required to attend work and you were placed on unpaid leave. Whilst stood down from work, you continued to be an employee of St Vincent's Private Hospital East Melbourne and your employment continued for the purpose of calculating entitlements to leave, superannuation, notice of termination and seniority.

**[5]** Ms Coombes estimated that, as a result of being stood down, she lost $557.30 in wages that she would have otherwise earned. Ms Coombes' timesheet recorded that her shift for 21 November 2024 was "Protected Industrial Action" and the payslip she subsequently received recorded that she was paid $0.00 with respect to "PIA UNPD".

**[6]** On 25 November 2024, the ANMF filed an application for the Commission to deal with a dispute under s 526 of the Act. The application contended that s 524 did not apply to the circumstances of Ms Coombes or, in the alternative, that the criteria permitting a stand down pursuant to s 524 did not exist. The application sought an order that St Vincent's compensate Ms Coombes by paying to her the amount of money equivalent to the amount she would have received had she not been stood down.

**[7]** The application was dealt with by Commissioner Yilmaz. The application was unable to be resolved by conciliation and was subject of a hearing on 29 January 2025. In her decision, the Commissioner concluded that the decision to stand down Ms Coombes fell 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 because of industrial action being her refusal to be redeployed. The Commission dismissed the application by the ANMF.[1]

**[8]** The ANMF seeks permission to appeal and to appeal from the decision of the Commissioner under s 604(1) of the Act. The sole ground of appeal is that the Commissioner erred in finding that the criterion referred to in s 524(1)(a) existed so as to entitle St Vincent's to stand down Ms Coombes in circumstances in which the absence of useful work on Ward 4 was not caused by industrial action and in circumstances in which it was agreed and found that there was useful work to be performed on Ward 2.

## Statutory provisions

**[9]** Part 3-5 of the Act is titled "Stand down". Section 524 provides that an employer may stand down employees without pay in certain circumstances.[2] The section 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.

**[10]** In summary, s 524(1) permits an employer to stand down an employee only in one of the circumstances set out in paragraphs (a), (b) and (c). The effect of s 524(2) is that the entitlement to stand down an employee under s 524(1) does not apply if an enterprise agreement

or contract of employment that applies to the employer and the employee provides for the employer to stand down an employee in the same circumstance. Section 524(3) means that, if an employer stands an employee down under s 524(1), the employer is not required to pay the employee for the period of the stand down.

**[11]** Section 526 provides that the Commission may deal with a dispute about the operation of Part 3-5. The section provides:

> **526 FWC may deal with a dispute about the operation of this Part**
>
> (1) The FWC may deal with a dispute about the operation of this Part.
>
> (2) The FWC may deal with the dispute by arbitration.
>
> Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).
>
> (3) The FWC may deal with the dispute only on application by any of the following:
>
> (a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));
>
> (b) an employee in relation to whom the following requirements are satisfied:
>
> (i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));
>
> (ii) the employee's employer has authorised the leave;
>
> (c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);
>
> (d) an inspector.
>
> (4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

**[12]** There is no issue that the dispute notified by the ANMF was a dispute about the operation of Part 3-5 for the purpose of s 526(1). The ANMF is an employee organisation that is entitled to represent the industrial interests of Ms Coombes for the purposes of s 526(3)(c) and is able to make an application to the Commission for it to deal with the dispute.

## Decision of the Commissioner

**[13]** The Commissioner handed down her decision on 13 May 2025. The Commissioner initially set out the relevant factual background to the ANMF's application and summarised the submissions of the parties.

**[14]** In her consideration of the submissions of the parties, the Commissioner recorded a number of matters that were not in dispute in the proceedings at first instance. In particular, the Commissioner recorded that it was not contested that members of the ANMF engaged in protected industrial action which included a ban on redeployment/reallocation from the employee's "home" ward to another ward, that Ms Coombes' contract of employment and job description provided for flexibility with respect to the location of work and working times and that nurses typically rostered on the fourth floor ward are commonly redeployed/reallocated to other wards based on the requirements of the hospital. The Commissioner accepted that this

flexibility is required to meet visiting medical officer demand, levels of patient activity and in order to balance staffing needs and financial constraints.[3]

**[15]** The Commissioner accepted evidence that, following the handover of the morning shift on 21 November 2025, a review of the hospital's 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 who were assessed by St Vincent's as not having high acuity. The Commissioner found that, after an assessment of operational requirements, a decision was made to roster two of the three nurses on Ward 4 and to request a nurse be redeployed to Ward 2. Because of the ban against redeployment, all three nurses were given the option to be redeployed and all refused. The Commissioner found that a decision was then made to redeploy Ms Coombes to Ward 2 because of her seniority and experience but that Ms Coombes refused the request because she was engaging in the redeployment ban.[4]

**[16]** The Commissioner recorded that the ANMF submitted that St Vincent's could not stand down its member under s 524(1). The Commissioner described the position of the ANMF as involving two objections to the stand down being: (1) that s 524 does not apply in circumstances in which its member had taken protected industrial action; and (2) s 524 does not authorise a stand down where an employee has exercised a workplace right and the Act prohibits adverse action. The Commissioner noted that St Vincent's submitted that Ms Coombes was stood down lawfully under s 524(1)(a) of the Act because she could not be usefully employed because of industrial action.[5]

**[17]** In addressing the first objection, the Commissioner considered whether the reference to "industrial action" in s 524(1)(a) includes protected industrial action. Having considered the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) and the context provided by ss 342(3) and (4) and 476 of the Act, the Commissioner did not accept that, as a result of the general protections provisions of the Act, s 524 cannot apply to the circumstances in which Ms Coombes was stood down. The Commissioner was satisfied that a stand down may be authorised where an employee has taken protected industrial action.[6]

**[18]** Under the heading "the second objection", the Commissioner first addressed the contest as to whether Ms Coombes could have been usefully employed on Ward 4 on the night of 21 November 2024. Having considered the evidence about the work available in Ward 4 on the night, the Commissioner found that the decision to roster two nurses on Ward 4 was sound and that it was not a busy night as had been argued by the ANMF.[7] The Commissioner then observed that the question of whether Ms Coombes could have been usefully employed is a factual one and noted that Ms Coombes said there were duties she could have performed in Ward 4. The Commissioner did not accept that the evidence weighed in favour of a finding that Ms Coombes would have been usefully employed had she been rostered to work on Ward 4.[8] The Commissioner continued:

> **[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.

**[19]** The Commissioner then considered whether Ms Coombes' stand down was due to industrial action. The Commissioner's conclusion was as follows:

> **[86]** It follows on the factual evidence that there was not useful employment on ward four, but there was useful employment on Ward 2. 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 with her refusal to be redeployed. The stand down was therefore authorised.

**[20]** The Commissioner was satisfied that, although there was work of value that Ms Coombes could have performed on Ward 2, she could not be usefully employed to do that work because of the ban on redeployment, that is, because of industrial action for the purposes of s 524(1)(a).[9] As a result, the Commissioner dismissed the ANMF's application.

**Ground of appeal and permission to appeal**

**[21]** The ANMF's notice of appeal contains a single ground of appeal which is in the following terms:

> The Learned Commissioner erred in finding at [86] and [87] that the criterion referred to in s.524(1)(a) existed to entitle the Respondent to stand down the employee in circumstances where the absence of useful work on Ward 4 was not caused by industrial action and in circumstances where it was agreed and found there was useful employment on Ward 2.

**[22]** As we have explained, there was a factual dispute in the proceedings before the Commissioner as to whether there was useful work for Ms Coombes to perform in her usual ward. The Commissioner resolved that dispute contrary to the submissions of the ANMF and the notice of appeal does not seek to impugn that finding. The appeal must be approached on the basis that Ms Coombes could not have been usefully employed to perform work in Ward 4. The ANMF also does not advance a contention on appeal that the entitlement of an employer to stand down an employee under s 524(1)(a) of the Act cannot arise in circumstances in which the relevant industrial action is protected industrial action.

**[23]** The sole basis of the ANMF's appeal is a submission that the circumstances did not enable St Vincent's to stand down Ms Coombes under s 524(1)(a) because the absence of useful work on Ward 4 was not caused by industrial action and there was useful employment on Ward 2. The ANMF submits that, if it is accepted that there was useful work that Ms Coombes could have performed, she could not be stood down under s 524(1). The ANMF submits that the fact

Ms Coombes refused to be redeployed to Ward 2 to perform available work as part of participating in protected industrial action does not mean she could not be usefully employed on the night of 21 November 2024 because of industrial action for the purposes of s 524(1)(a).

**[24]** Permission to appeal should be granted in this matter. The ANMF's submissions raise a question of significance concerning the interpretation and application of s 524 of the Act. To the extent that s 524(1)(a) permits an employer to stand down an employee who cannot be usefully employed because of industrial action, the section has commonly been applied in circumstances in which an employee cannot be usefully employed because of disruption to production or the operations of the employer caused by industrial action engaged in by other employees. Based upon contested matters which have been considered by the Commission it is unusual for an employer to stand down an employee under s 524(1)(a), or an equivalent provision, because it says the employee cannot be usefully employed because the employee refuses to perform available work as part of participating in industrial action. It is in the public interest for permission to appeal to be granted to allow the Full Bench to consider the correctness of the conclusion of the Commissioner.

**[25]** It is appropriate to record that St Vincent's submits that permission to appeal should be refused for other reasons. It says that, even if the submissions of the ANMF were to be accepted, no remedy could or should be awarded to Ms Coombes and, for that reason, the appeal lacks utility. The submission has a number of components. *First*, St Vincent's submits that the Act prohibits an employer from paying an employee for a period in which the employee engages in protected industrial action. In that respect, s 470 of the Act relevantly provides:

> **470 Payments not to be made relating to certain periods of industrial action**
>
> (1) If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, this section does not apply to a partial work ban.
>
> Note: For payments relating to periods of partial work bans, see section 471.
>
> (3) A ***partial work ban*** is industrial action that is not:
>
> (a) a failure or refusal by an employee to attend for work; or
>
> (b) a failure or refusal by an employee who attends for work to perform any work at all; or
>
> (c) an overtime ban.
>
> …

**[26]** We do not accept that s 470 prevented St Vincent's from paying Ms Coombes with respect to the night shift on 21 November 2024 or constrains the outcome of an arbitration under s 526 of the Act in this case. Section 470(1) prohibits an employer from making a payment to an employee in relation to the total duration of protected industrial action engaged in by an employee. However, s 470(2) provides that the prohibition does not apply with respect to a "partial work ban". In circumstances in which an employee engages in protected industrial action in the form of a partial work ban, the employer may reduce the payments it is required to make to the employee by giving notice that it intends to do so in accordance with s 471(1). If the employer gives such a notice, the employee's payments in relation to the period of

industrial action are reduced by the proportion specified in the notice or as determined by the Commission under s 472 of the Act.

**[27]** The concept of "partial work ban" is defined in s 470(3). A "partial work ban" is any industrial action that is not a failure or refusal by an employee to attend for work, a failure or refusal by an employee who attends for work to perform any work at all or an overtime ban. We do not accept, as submitted by St Vincent's, that Ms Coombes failed or refused to attend for work for the purposes of s 470(3)(a). There were some differences in the evidence of Ms Coombes and Ms Rowlands in relation to the discussions that occurred on the afternoon of 21 November 2024. However, the Commissioner accepted that Ms Coombes declined to take leave or be reallocated to work in Ward 2 and that Ms Rowlands decided and informed Ms Coombes that she would be stood down.[10]

**[28]** In circumstances in which Ms Coombes had been informed that she was stood down prior to the time for her to attend work, we do not accept that Ms Coombes took industrial action in the form of failing or refusing to attend for work for the purposes of s 470(3)(a). Ms Coombes was evidently willing to attend work and perform work on Ward 4. She simply indicated that she would participate in industrial action and refuse to perform some work, that is, by being redeployed to another ward. That was a partial work ban both as the concept is generally understood and as defined in s 470(3). If Ms Coombes had been permitted to attend work and perform some work, St Vincent's would only have been entitled to reduce payments to Ms Coombes if it gave notice in accordance with s 471(1).

**[29]** *Second*, St Vincent's submits that the remedy sought by the ANMF could not be an outcome awarded by the Commission in an arbitration under s 526 because it would involve the exercise of judicial power. Referring to *Australian Municipal, Administrative, Clerical and Services Union v Helloworld Travel Limited* [2021] FWC 6535, St Vincent's submits that a claim for the payment of wages due to an employee is a claim for the enforcement of an existing legal right and cannot be made in an arbitration under s 526 of the Act.[11] We do not accept the submission. Section 526(2) allows the Commission to deal with a dispute about the operation of Part 3-5 by arbitration. Section 526(4) requires that, in doing so, the Commission take into account fairness between the parties. Full Bench authority establishes that the Commission is entitled to make a monetary order to resolve a stand down dispute based on its consideration of what is a fair outcome between the parties. In *Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015; (2021) 304 IR 1, the Full Bench explained:

> **[27]** Applying the principles stated in *Re Cram* to the Commission's functions under s 526, it seems to us that while the Commission cannot make a monetary order in grant of a claim for an entitlement to wages said to be owing under an award or a contract of employment, the Commission is empowered to make a monetary order to resolve a stand down dispute based on its consideration of what is a fair outcome between the parties and other issues relevant to the industrial merits of the matters and, in doing so, is entitled to take into account whether, in its opinion, the stand down was authorised by s 524(1).

**[30]** The Full Bench later said:

> **[31]** An approach whereby a dispute concerning a stand down is resolved by the making of a compensatory order consequential upon the formation of the opinion by the member that the stand down was not authorised by s 524(1), and which is made taking into account the business

> circumstances of the employer at the time of the stand down, any loss of income suffered by the employee, the efforts made by the employee to mitigate their loss, the current financial circumstances of the employer and employee and any other matter bearing upon the paramount consideration of fairness between the parties, would in our view be available as a matter of power under s 526.

**[31]** Although the Commission cannot itself order the payment of an amount due under a contract or industrial instrument when arbitrating a dispute under s 526, the Commission is able to make such monetary order as it considers appropriate taking into account fairness between the parties. In deciding what outcome is appropriate in arbitration of a dispute, the Commission is entitled to consider, and form an opinion about, whether the stand down was authorised by s 524(1) and the entitlement to payment that would have arisen had the employee not been stood down. It was open to the ANMF to submit that the fair and appropriate outcome to the dispute was for Ms Coombes to be paid the income she would have received had she worked on the night of 21 November 2024. We do not consider the fact that the ANMF submits that the fair outcome is that Ms Coombes receives an amount equivalent to the wages she lost means the claim is an "artificial device" to pursue unpaid wages.[12]

**[32]** *Third*, St Vincent's submits that the remedy sought by the ANMF on rehearing would not be available or appropriate even if its submissions are accepted because Ms Coombes would not be entitled to payment of wages under her contract of employment. St Vincent's submits that Ms Coombes was employed under the work/wages bargain and was entitled to the payment of wages only if she was ready, willing and able to work the duties required under her contract of employment. St Vincent's submits that Ms Coombes was not willing to perform work in accordance with her contract by reason of refusing to be redeployed to perform work on a different ward on 21 November 2024.

**[33]** Again, we do not consider that no remedy *could have* been awarded in arbitration of the dispute. Ms Coombes was willing to perform work on the night of 21 November 2024. In arbitrating a dispute under s 526 the Commission is not determining legal rights. It would be open to the Commission to determine what it considered to be a fair outcome in light of the whole of the circumstances, including the fact that Ms Coombes had refused to perform available work by being reallocated to Ward 2. It cannot be said that, if the ANMF's submissions are correct, no outcome *could* be available for Ms Coombes. Given the conclusions we have reached, it will be necessary for the Full Bench to consider what remedy, if any, should be ordered to Ms Coombes in the circumstances later in this decision.

**[34]** For these reasons, permission to appeal should be granted.

## Consideration of the appeal

**[35]** The ANMF's appeal raises a single issue. It submits that s 524(1)(a) does not authorise the stand down of an employee in circumstances in which there is useful work available for the employee to perform. That is so, the ANMF submits, even if the employee refuses to perform that work because it is subject of a work ban imposed as a form of protected industrial action. Ms Coombes could have been usefully employed to work on Ward 2 and, as a result, the ANMF submits she could not be stood down under s 524(1)(a) even though she refused to be redeployed to Ward 2 because she was participating in protected industrial action.

**[36]** Consideration of that submission requires some reflection on the purpose and operation of s 524(1) of the Act. Provisions conferring an entitlement on an employer to stand down employees who cannot usefully be employed as a result of industrial action or breakdown in machinery or equipment or a stoppage of work were a feature of industrial awards made by this Commission and its predecessors for many years. The operation of that type of provision was considered by the High Court as long ago as *Pickard v John Heine & Son Ltd* (1924) 35 CLR 1. Provisions of a similar nature remained a common feature of federal awards throughout the period since that time.[13] In 2006, the *Workplace Relations Act 1996* (Cth) was amended by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) to provide for a statutory right for employers to stand down employees for the first time in what became ss 691A and 691B of the *Workplace Relations Act*. Section 691A conferred an entitlement on an employer to stand down an employee if the employee could not be usefully employed because of a strike, breakdown of machinery or a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

**[37]** If an enterprise agreement or contract of employment does not make provision with respect to the stand down of employees in the same circumstances, s 524(1) of the Act now permits an employer to stand down an employee "during a period in which the employee cannot usefully be employed" because of industrial action, breakdown of machinery or equipment or a stoppage of work for any cause for which the employer cannot reasonably be held responsible. The rationale for stand down provisions in awards, and now in s 524, was explained by Bromberg J in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others v Qantas Airways Ltd* [2020] FCAFC 285; (2020) 282 IR 130 in the following terms:[14]

> The mischief to which s 524 is directed is apparent from the very rationale for a stand down provision. As Gaudron J recounted in *Food Preservers Union of Australia v All States Ready Foods* (1976) 182 CAR 391 (Food Preservers) at 391, stand down provisions were "introduced into awards of the Conciliation and Arbitration Commission in the 1920's to temper the effect of the change from daily to weekly hiring". In circumstances where an employee who "stands and waits" is entitled to be paid irrespective of whether that employee can be usefully employed (*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466 (Dixon J)), the weekly hire of employees was more prone to impose upon employers the burden of paying the cost of employing an employee during a period in which that employee could not be usefully employed. Stand down provisions enabled employers to be relieved of that burden in certain circumstances. However, such provisions have never been open-ended because to do that would effectively have given to the employer the capacity unilaterally to convert ongoing (even if only weekly) employments into casual employments. Accordingly, limitations upon an employer's capacity to stand down an employee who could not be usefully employed were typically included in stand down provisions. Those limitations commonly took the form of those now found in s 524(1).

**[38]** As his Honour observed, a stand down is authorised by s 524(1) only in limited circumstances. This is no doubt because consequences of a stand down can be severe for an employee who may be deprived of wages for a substantial period through no fault of their own if they are stood down.

**[39]** In providing that an employee can be stood down if the employee cannot be usefully employed because of industrial action, s 524(1)(a) and equivalent historical provisions are primarily directed at a situation in which an employee cannot be usefully employed because of disruption to the operations of the employer caused by industrial action engaged in by other

employees either within the same enterprise or a different enterprise. An example is found in the judgment of Morling J in *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358. In that case, the operations of the General Motors-Holden assembly plant in Elizabeth in South Australia were interrupted as a result of a strike at a company which supplied heater boxes for the cars manufactured by Holden and, as a result, General Motors Holden stood down some of its employees. Similarly, in *Kidd v Savage River Mines* (1984) 6 FCR 398, an employer purported to stand down employees at an iron ore mine on the north coast of Tasmania as a result of disruption caused by work bans imposed by members of another union which prevented iron ore pellets being transported away from the mine.

**[40]** Section 524(1)(a) is also directed at that type of scenario. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) provided the following illustrative example in relation to the operation of s 514(1)(a):[15]

> **Illustrative example**
>
> Wilko Corporation (Wilko) has a number of divisions including an Engineering Division and a Maintenance Division. Wilko's employees in the Maintenance Division are engaging in protected industrial action. As a result Wilko's employees in the Engineering Division are not able to continue to perform their duties.
>
> In such circumstances, Wilko could stand down employees in the Engineering Division (subject to other requirements set out in this Part).

**[41]** The ANMF accepts, however, that s 524(1)(a) can operate in circumstances in which an employee engages in industrial action which causes there to be no useful work for that employee to perform. The ANMF referred to the decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v FMP Group (Australia) Pty Ltd* [2013] FWC 2554 in which Gostencnik DP said:

> **[31]** … The words "because of" in s.524(1) are used to indicate a causal link between the occurrence of a circumstance and the absence of useful employment. In that sense, the alleged absence of useful employment for the Relevant Employees cannot be said to have been caused by industrial action, as no industrial action had taken place at the time the Relevant Employees were stood down.
>
> **[32]** It follows, in my view, that in order 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. It cannot be said that the Relevant Employees could not usefully be employed during a period unless that period is affected by actual industrial action taken by then. Consequently, in my view, the Employer did not have a proper basis to stand down the Relevant Employees under s.524(1)(a). Given that finding, it is unnecessary for me to consider whether the Relevant Employees could usefully be employed in the event that the industrial action eventuated.

**[42]** The employer had, in that case, stood down employees in anticipation of industrial action being taken by the employees in the form a work ban. The Deputy President concluded that s 524(1)(a) did not authorise the employees being stood down because no industrial action had actually taken place at the time of the stand downs.

**[43]** To the extent that the Deputy President said that, to exercise the right to stand down an employee under s 524(1)(a), the employee to be stood down must themselves be engaging in the industrial action or have previously engaged in industrial action, the statement must be understood in the context of the issue then being considered. We understand the Deputy President to be saying that industrial action must have actually occurred which has caused a situation in which the employees cannot be usefully employed. That situation might have been caused either by industrial action engaged in by the employees to be stood down or, as has commonly been the case, by other employees. Relevantly for present purposes, we accept that the circumstance that an employee cannot be usefully employed might arise from industrial action engaged in by the employee themselves.

**[44]** Nonetheless, the ANMF submits that s 524(1)(a) only authorises an employee to be stood down if the industrial action engaged in by the employee causes there to be no useful work for the employee to perform. It submits that s 524(1)(a) does not authorise an employee to be stood down if there is useful work available for the employee to undertake, but the employee refuses to perform that work. The ANMF submits that the refusal to perform useful work does not have the effect that there is no useful work to perform. St Vincent's, in contrast, submits that s 524(1)(a) asks a single question, namely, whether the employee cannot be usefully employed because of industrial action and that requirement is satisfied if an employee refuses to perform available work because of industrial action engaged in by that employee.

**[45]** The answer to that debate is to be found in the text of s 524(1). Two aspects of the subsection are, in our opinion, critical. They are the words "cannot be usefully employed" and the words "because of". There is no dispute that the phrase "cannot be usefully employed" refers to a situation in which there is no useful work available for an employee to perform in accordance with their contract of employment. In *Re Carpenters & Joiners Award* (1971) 17 FLR 330, for example, Spicer CJ and Smithers J said:[16]

> 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 work of the class upon which he is usually employed or was last employed is not available.

**[46]** The phrase "because of" generally implies a relationship of cause and effect[17] and denotes a connection or relationship between two things by which one is the explanation of the other.[18] The words should not be given a different meaning in the context of s 524(1). That is, the existence of one of the circumstances in subsections (a), (b) or (c) must have caused the employee to be unable to be usefully employed in the relevant period. As Gostencnik DP said in *FMP Group*, an instance of industrial action, a breakdown of machinery or equipment or a stoppage of work must have occurred and had the consequence that there was no useful work available for the stood down employee to perform.

**[47]** In relation to s 524(1)(a), industrial action must have been taken, or be underway, which has produced a situation in which the employee to be stood down cannot be usefully employed in the sense that there is no useful work for them to perform. That is not what occurred in this matter. Ms Coombes was told at about 5.30pm, prior to the time that her shift was to commence, that there was not sufficient work on Ward 4, but work available on Ward 2. There is no dispute that there was useful work that Ms Coombes could have performed. Ms Coombes refused to perform that work. Ms Coombes' refusal to perform work on Ward 2 did not affect the

availability of useful work. Useful work remained available and had to be performed. No industrial action had taken place which caused a situation in which Ms Coombes could not be usefully employed. She simply refused to perform available work in accordance with the notified protected industrial action, being a partial work ban.

**[48]** That conclusion is consistent with the decision of the Full Bench in *The Peninsula School v Independent Education Union of Australia* [2021] FWCFB 844; (2021) 305 IR 139. That case concerned a dispute about a stand down of employees during the COVID-19 pandemic. In relation to s 524(1), the Full Bench explained:

> **[33]** We agree with the School that, in an assessment of whether a particular employee may be stood down pursuant to s 524(1), the logical process of analysis is to begin with the question of whether the employee can usefully be employed over the relevant period. If the employee can be usefully employed, the stand down will not be authorised by s 524(1) and no further inquiry as to causation is needed. The priority of this consideration is, we think, confirmed by [2077] of the Explanatory Memorandum for the *Fair Work Bill 2008* (Cth), which stated that "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". An employee may be usefully employed, notwithstanding that the employee cannot perform their normal duties, if alternative duties of benefit to the employer are available to be performed.

**[49]** The approach of the Full Bench, with respect, correctly isolates the question of causation by first asking whether the employee to be stood down could be usefully employed. The entitlement to stand down an employee is only enlivened if the employee cannot be usefully employed. If there is no useful work for an employee to perform, the question of causation then arises and it is necessary to ask whether that situation occurred because of one of the circumstances in subsection (a), (b) or (c). If there is useful work to perform, then the question of causation does not arise.

**[50]** It might appear, at first blush, surprising that s 524(1)(a) is not available in circumstances in which an employee refuses to perform available work because they are participating in industrial action. The reason this is the case is that s 524 addresses a circumstance in which there is no useful work available to perform rather than a circumstance in which there is available work, which the employee refuses to perform. The point is illustrated by *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383. In that case, Mr MacPherson refused to perform work in accordance with a new roster implemented by his employer. Mr MacPherson was told he was "stood down" until he was prepared to work in accordance with his contract. Discussing the equivalent provisions to s 524 then contained in Division 7 of Part 12 of the *Workplace Relations Act 1996* (Cth) (ss 691A-691B), Marshall and Cowdroy JJ said:[19]

> It follows that Mr MacPherson was not "stood down" as that expression is usually understood in an industrial context, which connotes an absence of work to be done, for whatever cause. There was work for him to perform but he was not ready and willing to perform it until such time as he chose to return to work.
>
> In the circumstances, Coal and Allied acquiesced in Mr MacPherson's decision to withdraw his services. There is no basis to suggest that arising from this circumstance, Coal and Allied

> engaged in disciplinary conduct against Mr MacPherson nor in any conduct of the kind contemplated by the stand down provisions of the Act.
>
> The circumstances now before the Court are quite distinct from that encompassed by Div 7 of Pt 12 of the Act. Those provisions concern circumstances where an employer cannot usefully use the services of an employee, because of a particular circumstance which affects an employee's ability to work. The provisions under Div 7 of Pt 12 of the Act are not appropriate to describe the nature of Coal and Allied's direction to Mr MacPherson that he not attend for work until he agreed to work in accordance with the new roster.

**[51]** In relation to the statement made to Mr MacPherson that he was "stood down", their Honours said:

> The use of the term "stand down" was an attempt by Mr Gloster to describe the status of the relationship between Coal and Allied and Mr MacPherson for so long as he refused to offer his services. However, this was not a "stand down" within ss 691A and 691B of the Act, an essential element of which is that the employer cannot gainfully employ the employee.

**[52]** In the same manner, s 524 concerns circumstances in which there is an absence of work to be done, rather than a circumstance in which there is work to be done but the employee is not willing to perform it. The premise upon which s 524 operates is that the employee is ready and willing to perform work but there is none available.

**[53]** For those reasons, and with respect, the Commissioner erred in paragraph [86] of her decision in concluding that Ms Coombes' indication that she would refuse to be redeployed to Ward 2 because she intended to participate in protected industrial action created a "causal link to the stand down". Ms Coombes did not take any industrial action which caused there to be no useful work for her to perform. There was useful work that Ms Coombes could have performed. Ms Coombes simply refused to perform that work. In those circumstances, St Vincent's was not entitled to stand down Ms Coombes under s 524(1)(a).

**Redetermination**

**[54]** The parties accepted that, if error was found in the decision of the Commissioner, the Full Bench should determine for itself the appropriate disposition of the dispute. The ANMF submits that the Full Bench should determine that St Vincent's was not entitled to stand down Ms Coombes under s 524(1) of the Act and order that Ms Coombes be compensated in the sum equivalent to the amount she would have earned had she not been stood down. St Vincent's contends that Ms Coombes was not willing to perform work in accordance with her contract of employment, no entitlement to wages arose and any award of compensation would amount to unjust enrichment.

**[55]** For the reasons given above, St Vincent's was not entitled to stand down Ms Coombes under s 524(1)(a) of the Act. That does not mean that the Commission will necessarily, or automatically, make an order for the payment of the amount Ms Coombes would have received had she worked the night shift on 21 November 2024. In dealing with the dispute in arbitration, s 526(4) requires that the Commission must take into account fairness between the parties concerned. As the Full Bench explained in *Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015; (2021) 304 IR 1, the function of the Commission is to determine a fair outcome between the parties rather than a determination of their legal rights.

**[56]** In the circumstances of this matter, and taking into account fairness between the parties, we do not consider it is fair or appropriate to order the payment of an amount of money to Ms Coombes in respect of the night shift on 21 November 2024. The unchallenged findings of the Commissioner include that Ms Coombes could be directed to perform work in a different ward consistent with her contract of employment and that this was a typical feature of the work of nurses at the hospital. There is also no challenge to the Commissioner's finding that there was no useful work for Ms Coombes to perform on Ward 4 on that night.

**[57]** Ms Coombes did not refuse to attend work entirely. However, she refused to perform work she could be directed to perform under her contract of employment and which she commonly undertook as part of her employment. The common law position is that, unless the employer expressly or impliedly accepts part performance, the entitlement of an employee to wages is ordinarily dependent on the employee performing their full duties. In *Csomore v Public Service Board (NSW)* (1986) 10 NSWLR 587, Rogers J stated the principle as follows:[20]

> Unless an employer waives the usual requirement of a contract of employment that an employee perform the full range of work properly assigned to him or unless the award under which the employee works makes a contrary provision, payment of wages is conditional upon performance by the employee of the full range of work assigned or, at least, a readiness and willingness to do so.

**[58]** Furthermore, where an employee indicates that they are unwilling to perform the full range of duties associated with the employment, the employer is ordinarily entitled to refuse part performance and not permit the employee to commence work unless different provision is made by contract or statute. For example, in *Spotless Catering Services Ltd v Federated Liquor and Allied Industries Employees Union of Australia (NSW Branch)* (1988) 25 IR 255, Fisher P referred to an earlier decision of Cahill J in *Electrical Trades Union of Australia v Illawarra County Council* (1982) 3 IR 101 in which his Honour said:[21]

> … it is clear that the employees in question were not ready and willing to carry out, during the relevant period, work which they were obliged to perform under their contracts of employment. They were ready and willing to perform part of such work, but a readiness and a willingness to perform part, but not the whole, particularly when the banned work was of an important and significant nature having regard to the enterprise carried on by their employer (as was the case here), are insufficient to demonstrate the preparedness of the employees to carry out the terms of their contract. In the circumstances, it is my opinion that it was not incumbent on the employer to allow the employees to commence work on terms which they, the employees, desired to dictate, terms different from the terms of their contracts of employment, and that, in law, the employees have no right to payment while they maintained that attitude.

**[59]** In *Coal & Allied Mining Services Pty Ltd v MacPherson*, the members of the Full Court found that ss 691A-691B of the *Workplace Relations Act 1996* (Cth), in providing for employees to be stood down if they could not be usefully employed, did not prevent an employer from refusing to accept part performance where an employee refused to perform their full range of duties.[22] The same conclusion should be drawn with respect to s 524. The conferral of a right on an employer to stand down an employee under s 524(1) if the employee cannot be usefully employed for one of the reasons set out in the subsection does not exclude the right that ordinarily exists for an employer to refuse part performance or exclude an employee who refuses to perform the full duties of their employment from the workplace. Where applicable, s

524(1) confers a capacity for an employer to stand down an employee who is ready and willing to perform work if there is no available useful work for one of the reasons set out in the section.

**[60]** In this case, Ms Coombes did not merely offer only part performance. On the findings of the Commissioner, the consequence of Ms Coombes' refusal to accept redeployment to Ward 2 was that she refused to undertake the only available work there was for her to perform. That is not a criticism of Ms Coombes. She had a right to participate in the protected industrial action organised by the ANMF and, no doubt, did so because she supported the industrial campaign being conducted by her union. Nonetheless, even if s 524(1) was not available in the circumstances, because of her refusal to accept redeployment, St Vincent's was not required to permit her to perform work, and Ms Coombes would not ordinarily be entitled to payment unless St Vincent's accepted part performance. We are conscious that an arbitration under s 526 is not limited to the determination of legal rights. However, having taken into account fairness between the parties, we do not believe it is fair or appropriate for an order to be made for a monetary payment to Ms Coombes in all the circumstances.

**[61]** It is appropriate to mention one further submission made by the ANMF. The ANMF submits that the appropriate course for St Vincent's to follow was to give notice under s 471(1) that it intended to reduce Ms Coombes' payments because she was engaged in a partial work ban. Having not done so, the ANMF submits that the fair outcome is for Ms Coombes to receive compensation equivalent to the amount she would have earned on the shift if she had not been stood down. Giving notice under s 471(1) was perhaps an option St Vincent's could have adopted. However, it was not required to do so. Section 471 provides a procedure for an employer to reduce the payments made to employees in circumstances in which the employer accepts part performance. That is, the section operates if an employer permits employees who are imposing work bans to perform other work. The section does not prevent an employer refusing to accept part performance and refusing to permit the employees to perform work at all. That is, in effect, the course St Vincent's adopted with respect to Ms Coombes.

**Conclusion**

**[62]** For these reasons, we have identified an error in the decision of the Commissioner. With respect, we do not believe that the stand down of Ms Coombes was authorised by s 524(1)(a) of the Act. However, upon redetermination of the dispute, the outcome should be the same albeit for different reasons than those given by the Commissioner. In the circumstances, the appropriate order is that permission to appeal should be granted, but the appeal should be dismissed.

**[63]** The Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is dismissed.


VICE PRESIDENT

*Appearances*:

*E White*, of counsel, instructed by Gordon Legal for the appellant.
*L Howard*, of counsel, instructed by K & L Gates for the respondent.

*Hearing details:*

15 July 2025.
Melbourne (in person).

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[1] *Australian Nursing and Midwifery Federation v St Vincent's Private Hospitals Ltd trading as St Vincent's Private Hospitals* [2025] FWC 1331 at [90].

[2] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCAFC 205; (2020) 282 FCR 130 at [2] (Rares and Colvin JJ).

[3] [2025] FWC 1331 at [53].

[4] [2025] FWC 1331 at [54].

[5] [2025] FWC 1331 at [55]-[57].

[6] [2025] FWC 1331 at [66]-[69].

[7] [2025] FWC 1331 at [77].

[8] [2025] FWC 1331 at [78]-[83].

[9] [2025] FWC 1331 at [88].

[10] [2025] FWC 1331 at [42] and [54].

[11] See *Australian Municipal, Administrative, Clerical and Services Union v Helloworld Travel Limited* [2021] FWC 6535 at [56]-[59].

[12] Cf. *Australian Municipal, Administrative, Clerical and Services Union v Helloworld Travel Limited* [2021] FWC 6535 at [61].

[13] See discussion in *The Peninsula School v Independent Education Union of Australia* [2021] FWCFB 844; (2021) 305 IR 139 at [30].

[14] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Ltd* [2020] FCAFC 285; (2020) 282 IR 130 at [130] (Bromberg J).

[15] Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [2078].

[16] *Re Carpenters & Joiners Award* (1971) 17 FLR 330 at 333. See also *Kidd v Savage River Mines* (1984) 6 FCR 398 403-404 (Gray J).

[17] *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 at 321-322 (Lockhart J); *Republic of Croatia v Sneddon* [2010] HCA 14; (2010) 241 CLR 461 at [22] (French CJ).

[18] *John Holland Group Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] VSC 322; (2010) 198 IR 439 at [29] (Pagone J).

[19] *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383 at [27]-[29].

[20] *Csomore v Public Service Board (NSW)* (1986) 10 NSWLR 587 at 595 (Rogers J) referred to with approval in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383 at [18] (Marshall and Cowdroy JJ) and [81] (Buchanan J) and *Construction, Forestry and Maritime Employees Union v Sydney International Container Terminals Pty Ltd* [2025] FCAFC 19; (2025) 307 FCR478 at [56] (Katzmann J) and [162] (Kennett J).

[21] *Electrical Trades Union of Australia v Illawarra County Council* (1982) 3 IR 101 at 103 (Cahill J). See discussion in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383 at [73]-[94] (Buchanan J).

[22] *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383 at [46] (Marshall and Cowdroy JJ) and [103]-[111] (Buchanan J). See also, by analogy, *United Firefighters' Union of Australia v Metropolitan Fire Brigades Board* (1998) 86 IR 340 at 355 (Ryan J) and *Construction, Forestry and Maritime Employees Union v Sydney International Container Terminals Pty Ltd* [2025] FCAFC 19; (2025) 307 FCR478 at [62]-[64] (Katzmann J).