

**HOWE v SECRETARY, NEW SOUTH WALES DEPARTMENT OF EDUCATION [2025] NSWIRComm 1081 (17 September 2025)**

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Industrial Relations Commission  
New South Wales

Case Name: HOWE v SECRETARY, NEW SOUTH WALES DEPARTMENT OF EDUCATION

Medium Neutral Citation: [\[2025\] NSWIRComm 1081](#)

Hearing Date(s): 17 September 2025

Date of Orders: 17 September 2025

Decision Date: 17 September 2025

Jurisdiction: Industrial Relations Commission

Before: Commissioner Muir

Decision: The Commission declines to accept the Application out of time.

Catchwords: EMPLOYMENT AND INDUSTRIAL LAW — Termination — Statutory right — Unfair dismissal — Out of time application — Not sufficient reason to accept

Legislation Cited: [Industrial Relations Act 1996, s 85](#)  
[Teaching Service Act 1980, s 50](#)  
[Fair Work Act 2009 \(Cth\), s 394](#)

Cases Cited: [Folkes v Secretary of the Department of Transport \[2023\] NSWIRComm 1109](#)  
[Griffin and others v Health Secretary; Thorncraft and others v Secretary the Department of Education \[2022\] NSWIRComm 1027](#)  
[Hooper v Mater Pathology Services \[2013\] FWC 2013](#)  
[Luck v Secretary, Services Australia \[2025\] FCAFC 26](#)  
[Nulty v Blue Star Group Pty Ltd \[2011\] FWAFB 975](#)  
[Public Service Association of NSW \(o/b Morawsky\) v Department of Justice \[2017\] NSWIRComm 1059](#)

Category: Procedural rulings

Parties: James Howe (Applicant)

Representation: Secretary, New South Wales Department of Education (Respondent)  
Counsel:  
Mr M Watts (Respondent)  
Solicitors:  
Sparke Helmore Lawyers (Respondent)  
File Number(s): 2025/99043  
Publication Restriction: Nil

## DECISION

1. On 13 March 2025 James Howe, the applicant, filed an Application for Relief in Relation to Unfair Dismissal (Application). Mr Howe had been dismissed from the teaching service on 28 June 2024.
2. The respondent calculated the Application was at least 235 days late. Mr Howe conceded the Application was filed late and applied, pursuant to s 85(3) of the *Industrial Relations Act 1996* (IR Act), for the Application to be accepted out of time.
3. It was not contentious that Mr Howe was employed as a temporary teacher under a contract that was to end on 30 January 2025, but which was terminated early, with payment of four weeks remuneration in lieu of notice, on 28 June 2024. The respondent says the dismissal was in accordance with s 50(5) and (6) of the *Teaching Service Act 1980* (TS Act).
4. The Application was initially listed for conciliation and directions on 24 March 2025. The respondent agreed that it would engage in conciliation before the Commission, subject to reserving its right to require Mr Howe to apply to have the Application accepted out of time, if the conciliation failed.
5. The respondent also reserved its right to object to the Commission proceeding to hear the Application, if accepted out of time, on the ground that s 50 of the TS Act effectively prevented the Commission determining the Application because Mr Howe was a temporary teacher. The Commission will return to this submission.
6. There were several attempts at conciliation, and, on 30 June 2025, the parties reached an agreement of sorts to resolve the Application. I say “of sorts” because the parties subsequently disagreed as to whether this was a binding settlement. The respondent says it was binding. Mr Howe says it was not.
7. When it later became apparent that the parties did not agree the wording of a deed to set out the terms of any agreement, the Application was programmed to resolve a number of preliminary matters. These matters were:

(1) An application by Mr Howe for his Application to be accepted out of time; and

(2) A motion by the respondent that the Application be dismissed because:

(a) the Commission either lacked jurisdiction, or the proceeding was futile, because no remedy could be ordered; and/or

(b) there was a binding agreement between the parties, so there was no dispute to determine.

8. The respondent also separately moved the Commission to make orders pursuant to s 164A of the IR Act.
9. The respondent had submitted:

“... there is currently, *prima facie*, no Application before the Commission at all. The Application was filed 240 days out of time. The first step confronting the Commission is to determine whether to exercise its discretion to accept the Application out of time. ... Accordingly, ... the first matter the

Commission must determine, in the Respondent's submission, is whether to exercise the discretion in s 85(3) of the IR Act or not. ... "[1]

10. The Commission indicated both before, and at the commencement of, today's proceeding that it was inclined to accept this submission and for the reasons set out therein. Mr Howe did not oppose that course. Indeed, he agreed that before an application could be before the Commission, it needed to be accepted pursuant to s 85(3) of the IR Act.

11. An issue which was the subject of a discussion between the Commission and Mr Watts of counsel for the respondent should briefly be recorded. The Commission observed that, because the respondent submitted that the Application should be rejected for what was described as an objection to the jurisdiction, there was a tension in considering acceptance of an application outside the jurisdiction of the Commission.

12. Mr Watts did not resile, as suggested by the Commission, from his submission that the respondent's motion, based on s 50 of the TS Act, was not so much a jurisdictional submission, as reliant on futility. He nevertheless continued to submit that the applicant's motion to accept the Application out of time should proceed first.

13. The Commission determined as a matter of practicality to proceed in that way, not least because the respondent's motion intertwined what the respondent called jurisdiction and futility.

14. Mr Howe did not file evidence as such. He filed a document headed Outline of Submissions addressed to the out of time acceptance of the Application. After some discussion, the Commission accepted the first two sections of that document as Mr Howe's evidence. Indeed, the Commission eventually was moved to ask Mr Howe if he wished to do that because otherwise there would be no evidence before the Commission and, as Mr Howe bore the onus, that would have been a difficulty for Mr Howe's Application.

15. These two sections set out facts, based on which, the remainder of the Outline of Submissions set out submissions. The first two sections set out:

#### "1. Introduction

1. This is an application under [section 85\(3\)](#) of the [Industrial Relations Act 1996](#) (NSW) seeking leave to accept an unfair dismissal claim lodged out of time.
2. The Applicant's dismissal occurred on **28 June 2024**. The unfair dismissal application was lodged on **13 March 2025**, outside the statutory 21-day period.
3. The Applicant respectfully submits that **exceptional circumstances** exist which justify the acceptance of this application out of time and that the interests of justice favour the matter proceeding on its merits.

#### 2. Chronology of Relevant Events

Presented succinctly with each date, action, and significance:

- **28 June 2024**: Applicant receives termination letter from the Department's Professional and Ethical Standards (PES) directorate. He is immediately dismissed from Concord High School, escorted off premises by the Principal, and arrives home at approximately 10:30am.
- **28 June 2024**: Applicant contacts the NSW Teachers Federation. Professional Support Officer Jenny Moes advises there is no recourse available and that private legal action would not alter the outcome of PES investigations.
- **1 July 2024**: Applicant advises the Federation of impending financial

hardship with his wife due to give birth within 30 days. Ms Moes contacts the Department to enquire about parental leave entitlements. The Department responds that the Applicant is not entitled to the accrued leave.

- **30 December 2024:** PES Investigator Amanda Fraser emails the Applicant, advising the investigation is still in the “information gathering” stage.
- **7 March 2025:** After saving funds, the Applicant obtains legal advice from Henry William Lawyers. He is advised that his best course of action is to lodge an unfair dismissal claim with the IRC.
- **13 March 2025:** Applicant lodges unfair dismissal claim with the IRC.
- **24 March 2025:** IRC schedules a Conciliation and Directions hearing. Counsel for the Department indicates allegations will be shared. Matter adjourned to 29 April 2025.
- **7 April 2025:** Applicant receives copy of the allegations for the first time, more than nine months after dismissal.
- **29 April 2025:** Conciliation hearing held. The matter is listed for further conciliation on 30 June 2025.
- **30 June 2025:** Conciliation held. The Department presents the Applicant with a draft Deed of Release. The Applicant does not sign the Deed nor agree to its terms, stating only that he would review the proposal. Accordingly, no binding agreement was reached and the matter remained live before the Commission. The matter is listed for mention by teleconference on 21 July 2025.
- **21 July 2025:** Mention held. The matter is listed for directions hearing on 12 August 2025.
- **13 August 2025:** IRC issues procedural directions requiring filing of submissions and evidence on the out-of-time issue by 27 August 2025 (Applicant) and 5 September 2025 (Respondent), with a further reply by 12 September 2025. Hearing on procedural issues set for 17 September 2025.”<sup>[2]</sup>

(Emphasis in original.)

16. The Commission allowed the respondent to briefly cross-examine Mr Howe, despite the interlocutory nature of the proceedings, because the matters set out in those sections were broad and general, and the Commission considered the respondent should have the right to test them briefly.

17. During cross-examination, Mr Howe’s evidence was that:

- (1) he did have handwritten notes of his discussions with the Teachers’ Federation but not with him;

(2) he could not recall the exact timeline of his interaction with lawyers which led to his obtaining advice to file an unfair dismissal claim but he was reasonably clear that it was around a week from his seeking advice to filing of his unfair dismissal claim;

(3) he recalled spending around \$3,000 or \$4,000 in obtaining advice; and

(4) he was prompted to seek legal advice around December 2024 or January 2025 because he had still not been given details of the allegations of the misconduct which had led to his dismissal.

18. Mr Howe was given an opportunity to expand on his answers after the cross-examination, but did not add to his answers to Mr Watts.

19. The respondent sought to tender an affidavit of Mr Daryl Currie, Executive Director, Professional and Ethical Standards. After some interaction between Mr Watts and the Commission, the respondent sought only to tender Mr Currie's affidavit and that part of the annexure up to and including p 88. This included an investigation report of Mr Howe's conduct and certain responses of Mr Howe.

20. The Commission accepted this solely for the purpose of the respondent being able to make submissions as to the substantial merits of the Application during the respondent's submission as to whether the Application should be accepted out of time.

21. In conformity with an answer to Mr Howe, that Mr Howe would be given an opportunity to cross-examine Mr Currie as to the contents of his affidavit, if the substantial merits of the case came to be addressed, the Commission observes that the evidence of Mr Currie is not substantially relied on by the Commission on the current question. It is relied on to a limited extent addressed below. In summary, the Commission observes that it demonstrates that the respondent has a detailed case as to its allegations that Mr Howe engaged in misconduct.

22. Mr Howe's submission can be fairly summarised from parts of his written submissions:

### "3. Legal Framework

1. The Applicant was employed as a temporary teacher in the NSW public service. As such, his employment is governed by *the Industrial Relations Act 1996* (NSW), and this Commission has jurisdiction to hear and determine the unfair dismissal application.

2. *Section 85(3)* of the *Industrial Relations Act 1996* (NSW) provides that the Commission may accept an application lodged outside the statutory period where it is satisfied that **exceptional circumstances** exist.

2. If that deadline is missed, **s 85(3)** provides that the Commission **may** accept the application **late if it considers there is a sufficient reason to do so**, having regard in particular to:

- (a) the reason for, and length of, the delay;
- (b) any hardship to the applicant or the employer if the application were accepted or refused; and
- (c) the conduct of the employer relating to the dismissal.

3. 'While the present application is to be determined by the NSW Industrial Relations Commission, decisions of the Fair Work Commission on analogous 'out of time' provisions are not binding but may be regarded as persuasive guidance when assessing whether 'a sufficient reason' exists under *section 85(3)*.'

### 4. Exceptional Circumstances

#### **4.1 Reliance on Expert Advice**

Following his dismissal, the Applicant promptly sought guidance from the NSW Teachers Federation. In those calls, the Federation did not inform the Applicant that lodging an unfair dismissal claim with the Commission was an available option. Instead, he was advised that there was nothing he could do, and that private legal action would not alter the outcome of PES investigations and would likely be costly. As a result, the Applicant was unaware that an unfair dismissal application could be made and he reasonably relied on the Federation's advice in good faith.

Tribunals have accepted that reliance on misleading or incomplete advice can amount to exceptional circumstances. In **Hooper v Mater Pathology Services [2013] FWC**<sup>[3]</sup>, reliance on incorrect advice was a relevant factor in excusing delay. In [Redacted (Second Case)]<sup>[4]</sup>, time was extended where delay arose from reliance on external advice and misunderstanding the remedies available. In [Redacted (Third Case)]<sup>[5]</sup>, the Commission emphasised that prompt action after correct advice demonstrated a genuine intention to pursue the claim, supporting a finding of exceptional circumstances.

The Applicant's circumstances are closely analogous: once he obtained correct legal advice in March 2025, he lodged his application within days.

#### **4.2 Delay in Disclosure of Allegations**

The Applicant was not provided with the allegations underpinning his dismissal until 7 April 2025, over nine months after termination. This significant delay in disclosure deprived the Applicant of a fair opportunity to respond and compounded the effect of the misleading advice.

#### **4.3 Personal and Financial Hardship**

At the time of dismissal, the Applicant's wife was due to give birth within 25 days. The sudden loss of income, combined with being denied access to accrued parental leave entitlements, placed a severe financial and emotional burden on the Applicant's family. This hardship materially contributed to the Applicant's difficulty in seeking timely legal recourse.

#### **4.4 Prompt Action Once Proper Advice Received**

Once the Applicant obtained correct advice from Henry William Lawyers on 7 March 2025, he acted without delay, filing his unfair dismissal application on 13 March 2025. This demonstrates his genuine intention to pursue the claim and that the delay was not the result of negligence or disinterest.

...

### **5. Prejudice and Justice Consideration**

**To the Applicant:**

Refusal of leave would permanently foreclose any remedy for unfair dismissal under the *Industrial Relations Act 1996* (NSW). The Applicant would irretrievably lose the opportunity to pursue reinstatement or re-employment under [section 89](#) — remedies which are unique to this jurisdiction and cannot be obtained elsewhere. His dismissal would remain on record as an unresolved PES matter, with significant reputational consequences for his career.

The Applicant also raised parental leave entitlements with the NSW Department of Education, via the NSW Teachers Federation, in July 2024, but was denied these following termination. If leave is refused, he loses any avenue to have such entitlements considered.

Furthermore, he was denied procedural fairness, as allegations were not provided until April 2025. Absent the Commission's intervention, this denial remains unaddressed.

The combination of these consequences — loss of statutory remedies, career damage, loss of entitlements and denial of fairness — amounts to irreparable loss which cannot be cured outside this Commission.

#### **To the Respondent:**

By contrast, the prejudice to the Department if leave is granted is minimal. The PES investigation continued until late 2024 and allegations were only provided in April 2025. The Department has remained fully aware of the issues and has been actively engaged in conciliation and directions hearings since March 2025. Allowing the matter to proceed imposes no undue prejudice beyond the ordinary requirements of defending a claim.

#### **Balancing Justice:**

On balance, the interests of justice strongly favour granting leave. The Applicant faces permanent exclusion from statutory remedies if time is not extended, whereas the Respondent faces no material prejudice.

### **6. Conclusion & Relief Sought**

The Applicant respectfully submits that exceptional circumstances exist which justify the acceptance of his unfair dismissal application out of time under section 85(3) of the Act. The delay was caused by reliance on misleading advice from the NSW Teachers Federation. Once proper advice was obtained, the Applicant acted promptly to lodge his claim. Authorities including **Hooper**, **Nulty** and **[Third Case]** support the proposition that reliance on incorrect advice, followed by prompt corrective action, constitutes exceptional circumstances.

The Applicant was further prejudiced by the Department's failure to provide allegations until April 2025, which compounded the delay and denied him procedural fairness. Refusing leave would cause irreparable loss, whereas granting leave would not unduly prejudice the Department.

The hardship at the time of dismissal was particularly acute: the Applicant's wife was

due to give birth within 25 days, and the sudden loss of income and denial of parental leave entitlements caused significant financial and emotional strain on his family.”<sup>[6]</sup>



(Emphasis in original.)

23. The Commission observes that “exceptional circumstances” is an expression found in the [Fair Work Act](#) and not in the *IR Act*, nevertheless, Mr Howe’s submissions are otherwise largely apt to assist, except as set out below.

24. There are references in Mr Howe’s submissions to decisions of the Fair Work Commission. The first decision cited by Mr Howe was located by the Commission. In interactions with the Commission, Mr Howe acknowledged there were differences from the circumstances in that case, being a significantly shorter delay, and the fact that that applicant was late filing with the Fair Work Commission because she had erroneously filed her claim with the Queensland Industrial Relations Commission. While that applicant was apparently given faulty advice, she did file an application on time, albeit in the wrong Commission.

25. Notwithstanding an error in the title of the second case cited by Mr Howe, a decision of the Fair Work Commission was located by the Commission based on Mr Howe’s submission. Mr Howe’s submissions were wrong in suggesting that the Fair Work Commission, or its Full Bench on appeal, allowed the late filing by the applicant in that matter. That case cannot assist Mr Howe.

26. The third case cited by Mr Howe could not be located by the Commission. Mr Howe could not assist the Commission as to his citation of this case during submissions.

27. As will be apparent later, the respondent speculated, based on a similar processes of searching for the cases, that Mr Howe’s submissions were prepared using generative  **artificial intelligence** .

28. In cross-examination, Mr Howe denied creating the submissions using generative AI. He gave evidence that he only used generative AI to spellcheck and assist with presentation of the submissions he had already written. In cross-examination, Mr Howe was not asked expressly how the citations with their various difficulties came to be in his submissions, despite him asserting that he did not use generative AI. Mr Howe did not address this in his opportunity to expand on his answers after cross-examination. He made no submissions on this issue, despite the speculation set out in the respondent’s written submissions.

29. The respondent’s submissions can also be fairly summarised by her written submissions:

“3. Pursuant to s 85 of the *IR Act*, any unfair dismissal application consequently needed to be filed by the Applicant by no later than 22 July 2024. It follows that the Application was filed 235 days out of time.

4. The Commission is obliged to accept an unfair dismissal application filed out of time in circumstances prescribed by s 85(2) of the *IR Act*. However, those circumstances do not apply to the Applicant in this case. Accordingly, it falls to the Commission to determine whether to exercise its discretion to accept the Application out of time pursuant to s 85(3) of the *IR Act*.

...

### **Should the Application be accepted out of time?**

8. As earlier set out, the Commission has the discretion, under s 85(3) of the *IR Act*, to accept an unfair dismissal application out of time. Importantly, that discretion is not unfettered. The Commission may only accept an application out of time if it considers there is ‘*sufficient reason*’ to do so, having regard to several prescribed factors.

9. It is the Applicant who ‘*bears the onus of demonstrating that the justice of the case requires the Commission to exercise its discretion in his or her favour*’. As Newall C concluded, albeit in the context of the equivalent discretion in s 213(4) of the *IR Act*, in *Public Service Association of NSW (o/b Morawsky) v Department of Justice* [2017] NSWIRComm 1059:

*[13] It is perfectly clear that the prima facie position is that an application brought out of time is excluded and therefore that an applicant bears the positive burden of*

*demonstrating that the justice of the case requires an extension. If an applicant cannot demonstrate that the justice of the case requires an extension, then the prima facie position will prevail, that is the application remains excluded, as the Commission recently held in Tolley v Secretary of New South Wales Ministry of Health [2016] NSWIRComm 1043.*

...

11. Ultimately, the Commission must determine whether or not the Application in this case should be accepted out of time with reference to its unique circumstances. In other words, each exercise of discretion by the Commission turns on its own facts.

12. At paragraph [3] of Part 3 to the AS, the Applicant contends that decisions of the Fair Work Commission on 'out of time' applications, while not binding, may provide persuasive guidance when assessing whether a 'sufficient reason' exists under s 85(3). Two things must be said in response.

13. *Firstly*, the submission must be rejected, as the provisions conferring discretion on the Fair Work Commission to accept applications out of time, found in s 394(3) of the [Fair Work Act 2009](#) (Cth) (**FW Act**), are markedly different to those found in s 85(3) of the IR Act. In particular, the federal regime requires there to be '*exceptional circumstances*' to grant an extension of time, as opposed to a '*sufficient reason*' under the IR Act, while s394(3) of the FW Act otherwise points to six factors to be considered by the Fair Work Commission, as opposed to the three factors referred to in s 85(3) of the IR Act. While there is a level of overlap in those factors across the two statutory regimes, the different levels of satisfaction that must be reached, and the fact that each exercise of discretion by this Commission to accept an application out of time turns on its own facts, speaks firmly against the proposition that authorities of the Fair Work Commission are persuasive. There is otherwise ample authority of this Commission upon which reliance can be placed.

14. *Secondly*, the Applicant, in the AS, refers to three decisions from the Federal sphere that he contends assists his contention that the Application should be accepted out of time. One of the decisions is said to be '[Redacted]<sup>[7]</sup>'. There is no authority that the Respondent has been able to locate carrying that citation.

15. It appears that the Applicant may be referring to [Nulty v Blue Star Group Pty Ltd \[2011\] FWA 975; \(2011\) 203 IR 1](#), which is a seminal decision of a Full Bench of the Fair Work Commission as to the meaning of '*exceptional circumstances*' in s 394(3) of the FW Act. That decision does not assist the Applicant for the reasons earlier outlined; '*exceptional circumstances*' is not the test under s 85(3) of the IR Act. Otherwise, to the extent the Applicant contends that *Nulty* was a case involving an extension of time due to reliance on external advice and a misunderstanding of available remedies, such a submission is incorrect. In *Nulty*, there was no extension of time granted, either at first instance or on appeal, to an applicant contending they were given incorrect advice by the Fair Work Ombudsman.

16. Another decision on which the Applicant purports to rely is '[Redacted]<sup>[8]</sup>'. The Respondent has not been able to locate any authority bearing this name or citation either. It appears to be an entirely fictionalised reference to a case that does not exist. This is particularly difficult to fathom given the AS goes on to make positive submissions about what that decision purportedly stands for.

17. Respectfully, it would seem that what has likely occurred is that the Applicant has utilised generative AI to prepare the AS, but regrettably, has not taken any care to ensure that the submissions he is advancing to the Commission are based on actual legal authority or principle. It suffices to say that the Applicant appears not to have heeded the cautionary reminders in the Commission's Practice Note 33 (at [8]) to be aware of the risks associated with generative AI, including the scope for fabricated case references to be created.

18. Practice Note 33 (at [18]-[20]) also requires a party who has used generative AI to prepare written submissions to verify that all authorities cited exist, are accurate and are relevant. This obligation applies to the Applicant, notwithstanding he is a self-represented party.

19. It otherwise suffices to say that the Respondent respectfully urges the Commission to not, in any published written reasons, repeat the references to the fabricated authorities on which the Applicant relies, for the reasons expressed by the Full Court of the Federal Court in *Luck v Secretary, Services Australia* [2025] FCAFC 26 (at [14]); that is, to ensure that *'the false information is not propagated further by artificial intelligence systems having access to these reasons'*.

...

#### *Length and reason for the delay*

21. The length of the delay is, on any objective view, a considerable one. ... In *Folkes v Secretary of the Department of Transport* [2023] NSWIRComm 1109, the Commission described a delay of 256 days as "substantial". ... In the Respondent's submission, the description of the delay in this case as '*substantial*' is apt.

22. As McDonald C indicated in *Folkes* (at [50]), '*[w]hile I do not consider that a delay of 256 days would in every case outweigh every other consideration...it does mean that the cause of the delay must be properly explained, and the other relevant factors will need to be strongly in the Applicant's favour*'.

23. This brings the Commission to the Applicant's explanation for the substantial delay in filing his Application. It must firstly be observed that the Applicant has not filed any evidence to explain the delay, despite the Commission's directions to do so. Instead, the AS is an amalgam of both evidence and submissions. It may be that the Applicant seeks to rely on the AS by way of evidence. There may, however, be some level of difficulty in permitting the Applicant to do so given the AS has, as earlier outlined, plainly been prepared with generative AI and contains inaccuracies. In other words, it begs the question whether the Commission can confidently rely on the AS to be honest and accurate from a factual perspective.

24. Assuming the Applicant adopts the AS in evidence, and deposes to it being truthful, the Commission must then scrutinise the AS for the explanation for the nearly eight-month delay in filing the Application. In Part 2 of the AS, the Applicant sets out a chronology. In short, he says that, on 28 June 2024, the same day he received the termination letter, he contacted a Professional Support Officer (PSO) at the NSW Teachers **Federation**, who advised him '*there is no recourse available*'. The next relevant aspect of the chronology is 7 March 2025, when the Applicant says he obtains legal advice informing him he should lodge his Application, which he did just under a week later.

...

29. Plainly, the Applicant could have readily made his own enquiries. He could have contacted the Commission Registry or perused the Commission website and done his own research as to his ability to file a claim. Instead, the Applicant appears to say that he was told by the Federation there was nothing he could do, so nothing is what he did.

30. That said, the Applicant's indolence did not last forever. In March 2025, he belatedly sought legal advice. One difficult aspect of the Applicant's narrative that he has not explained is why, if he was given advice by the Federation that there was nothing he could do to challenge his dismissal, did he wait till March 2025 in order to obtain a second opinion, rather than promptly seek such legal advice?

...

33. Simply put, in the absence of the Applicant taking sufficient steps to try and obtain advice between June 2024 and March 2025, or to undertake any of his own enquiries about his capacity to bring an unfair dismissal claim, the Commission could not be persuaded that there is sufficient reason to explain the delay.

34. In addition to the Applicant's reliance on the information he was given by the Federation, he also endeavours to rely on four other factors. In particular, the Applicant says:

(a) he was not provided with allegations underpinning his dismissal until 7 April 2025. This is of no assistance to the Applicant. He knew he had been dismissed on 28 June 2024. There is no suggestion that he was waiting for those allegations in order to determine whether to commence proceedings. To the contrary, he filed the Application before receiving the allegations. It follows that this does not provide any satisfactory explanation for his substantial delay;

(b) he suffered personal and financial hardship. It can be accepted that loss of employment will have a financial and emotional impact. However, beyond the Applicant's bare ipse dixit, there is no evidence before the Commission to support the contention that the Applicant was suffering from any kind of acute financial difficulty that prevented him from seeking legal advice any earlier than March 2025. Indeed, if he was, one might have expected him to have sought out pro bono advice, done more himself to make enquiries as to his ability to bring a claim, and otherwise sought alternative employment in 2024 to earn money in order to seek the legal advice he says he wanted. Again, there is no evidence the Applicant did any of these things;

(c) he took prompt action once he received legal advice. Respectfully, given unfair dismissal application forms are not complex, taking six days after receiving advice to file the Application is not overly prompt. In any event, the Commission is not considering an application filed six days late, but rather, one filed nearly eight months late; and

(d) there was no binding agreement reached to resolve the proceedings. That is irrelevant to his explanation for the delay in commencing the proceedings.

...

#### *Hardship*

36. The Applicant's contentions as to hardship are extremely limited. He contends, at Part 5 of the AS, that not extending time would permanently foreclose his ability to pursue his case. Respectfully, that is a hardship that any applicant whose application is not accepted out of time will suffer.

37. The Applicant otherwise says he was denied parental leave entitlements, and if he is not permitted to pursue his case, he will lose the ability to pursue such entitlements. The Commission is not empowered to make orders for the re-crediting of leave in any unfair dismissal proceeding regardless. In other words, if the Applicant's primary pursuit of the proceeding is premised on seeking parental leave entitlements, he will not suffer any hardship in not getting to pursue the litigation, as no such entitlements can be awarded to him.

38. On the other hand, the Respondent will face hardship if required to defend the Application. Given the statutory time limit on bringing unfair dismissal claims, the Respondent is entitled to arrange its affairs on the basis that claims will not be made once time has elapsed. This particularly impacts public authorities such as the Respondent, which are taxpayer funded.

39. In addition, and for reasons expanded upon below, the hardship to the Respondent is exacerbated by the fact that the Applicant's claim, prima facie, has limited prospects of success. As stated by Newall C in *Morawsky* (at [23]), '*it is a hardship to the employer and more, a hardship to the long suffering taxpayer, to have a case run by a public authority before this tribunal that cannot give rise to the result the association seeks*'.

40. Taken as a whole, the hardship faced by the Respondent is a factor that carries some weight against accepting the Application out of time. As to hardship faced by the Applicant, that is not a factor that carries any weight in the Applicant's favour.

#### *Prospects of success*

41. In the recent authorities, prospects of success have been considered in the context of hardship. In particular, if the Commission forms an impressionistic view that an applicant has low prospects of succeeding on the merits of their claim, then any hardship to the applicant in not being able to pursue their claim will be more limited.

42. In this case, as the Commission knows, even if the Application is accepted, it will immediately face two hurdles; the first being the Applicant's apparent compromise of the proceedings, and the second being whether the Commission has jurisdiction to hear the Application at all. The Respondent's separate submissions on those topics are apposite and not repeated here. It suffices to say that there is an unlikelihood that the Application will even reach a hearing on the merits, and even if it did, there is a genuine question as to whether the Commission could award the Applicant with relief even if he succeeded.

43. Assuming the Application was nonetheless heard on the merits, it is apparent from the Respondent's investigation into the Applicant's conduct that his prospects of succeeding are not strong. While it must be accepted that the Commission does not have all the evidence and is only forming an impressionistic assessment as to prospects at this preliminary stage, the investigation report demonstrates that the Applicant deleted a considerable volume of student records and school documents while employed ... .

44. Importantly, while the Applicant appears to challenge the assertion that he did so from the computer terminal of another employee, he does not seem to challenge the contention that the records and documents were deleted by him. Rather, it seems the Applicant seeks to justify that conduct by saying he did so as a form of archiving outdated or superseded materials.

45. In the Respondent's submission, the Applicant's contention that deleting student files is a form of archiving is inherently weak and implausible. Equally implausible is the idea that the Applicant, as a temporary employee, had any obligation, right or entitlement to delete data belonging to the Respondent, and in particular, sensitive and important information like student records.

46. Such unchallenged conduct by the Applicant was, of itself, sufficient grounds to warrant the dismissal. It suggests real difficulty for the Applicant in successfully prosecuting his Application on the merits. It follows that the already limited hardship to the Applicant if not permitted to pursue his claim is greatly reduced.

#### *Conduct in relation to which the order is sought*

47. There has been no conduct on the part of the Respondent that has contributed to the Applicant's delay in initiating these proceedings. Accordingly, this is a neutral factor, which does not assist the Applicant.

48. To the extent it is said that the Respondent contributed to the delay through its publication of allegations against the Applicant in April 2025, as earlier outlined, there is no evidence to that effect

in the AS. Indeed, given the Applicant filed the Application prior to receiving the allegations, it is apparent that had nothing at all to do with the reasons why the Applicant did not take steps to file his Application promptly following his dismissal.”<sup>[9]</sup>

(Emphasis in original. Footnotes omitted.)

30. The Commission largely accepts the submissions of the respondent. Exceptions to acceptance of the respondent’s submissions are set out below.

31. The length of the delay in filing is substantial. The lateness is ten times the prima facie limit. Plainly the need for the applicant to provide a persuasive reason increases with such a delay.

32. At best, it is not clear that the applicant’s efforts to seek advice were about challenging his dismissal. On balance, the Commission concludes that the applicant sought advice from the Teachers’ Federation about recourse against the Professional and Ethical Standards investigation into Mr Howe, not his dismissal as such. The dismissal and the PES investigation are related, but they are not the same.

33. When combined with his answers in cross-examination, that in December 2024 or January 2025 he became interested in seeking legal advice “because he did not have the allegations against him”, the Commission infers that what Mr Howe challenged was the PES investigation, not his dismissal as such. Mr Howe appeared to concede as much when this was put to him by the Commission.

34. Mr Howe gave scant detail of his conversations or interactions with the Teachers’ Federation. He did not produce notes he says he has of these discussions. He did not produce any correspondence between himself and the Teachers’ Federation; documents he at one point sought to have produced under summons. It would be safe to assume Mr Howe believes those documents exist.

35. At best, the absence of such documents in the evidence raises further questions about what advice Mr Howe sought. As Mr Watts submitted, it leaves open the question of whether the documents would have contents that would harm Mr Howe’s case. The Commission does not conclude the documents would have harmed Mr Howe’s case but it does conclude their absence raises sufficient question that their absence undermines the strength of Mr Howe’s explanation for his delay.

36. The Commission observes that Mr Howe’s evidence was that he was out of work for eight weeks after his dismissal. The Commission accepts the respondent’s submission that this time could have been used to investigate remedies in relation to his dismissal, but to a somewhat lower level given that this period coincided with the birth of Mr Howe’s child.

37. As Mr Watts submitted, there is no evidence of any action by Mr Howe to challenge his dismissal or to investigate means to challenge that dismissal for six months. There is a gap of two months before action is then taken. While ultimately the legal advice sought was apparently expensive, there is no evidence of seeking other advice such as pro bono advice, Legal Aid or indeed checking the Industrial Relations Commission’s or the Fair Work Commission’s websites.

38. Neither the reasons for, nor the length of, the delay in commencing the Application are in favour of accepting the Application. To the extent it is necessary to articulate the strength of that disfavour, the Commission categorises it as at least moderately against and tending to strongly against in both cases. The delay is significant, and the reasons are, at best, weak.

39. Turning to hardship, the Commission considers both the limbs of hardship are against the applicant. There are several sub-elements in each case.

40. The applicant clearly loses his right to test his claim. In the present case, that is weakly in his favour. Clearly any applicant has this hardship if unable to proceed, but nevertheless it is a loss for the applicant.

41. Against that are a range of reasons that that loss may be minimal. Firstly, Mr Howe’s case is weakened by the fact that his contract of employment has expired, bringing into question whether there is a prospect of reinstatement or re-employment. Section 50 of the TS Act, at least on its face, says no compensation is available. The decided cases of the Commission, for example *Thorncraft*<sup>[10]</sup>, support this outcome.

42. Each of these are against Mr Howe suffering hardship, as they suggest he is not likely to succeed in obtaining a remedy.

43. The respondent says there is a binding agreement. The Commission concludes this is largely a neutral factor and not against Mr Howe on hardship, as the law surrounding this question is not straightforward. It is against Mr Howe to the extent that its outcome is uncertain and, therefore, there is hardship to the respondent in having to argue that case.
44. The Commission considers the financial hardship bound up in the merits and while they exist it is hard to see how they are relevant to the question of acceptance out of time.
45. The respondent says there is a hardship to her in terms of having to defend a case in which it has a strong case when Mr Howe is so late.
46. As it was submitted by the respondent, the Commission does not accept the Commission can conclude that the respondent has a strong case. The Commission does accept the hardship which the respondent will suffer from having to engage with the case is real. The onus will be on the respondent to prove the misconduct. That misconduct is denied and will be complex to prove. A prima facie late application, at ten times the presumptive time limit, in such circumstances does cause hardship to the respondent. It is nearly 18 months since Mr Howe's dismissal. It is likely that many witnesses will have reduced recollection of events. Some may be difficult to locate.
47. In conclusion, there is at best a low negative to Mr Howe on the issue of hardship to him. There is a clear hardship to the respondent which, in totality, the Commission would assess as moderate to high. Neither limbs of hardship support accepting the Application out of time.
48. The respondent submitted that the conduct of the employer has no bearing, or at best minimal bearing, on the question of acceptance out of time.
49. The Commission reluctantly accepts that submission. It is clear to the Commission that the employer has conducted herself in a way which would probably be the subject of a successful unfair dismissal claim in the case of a permanent member of the teaching service.
50. Mr Howe was dismissed and placed on the not-to-be-employed list without knowing the details of his alleged conduct; he was not given an opportunity to respond. But the legislature has created this dichotomy. This conduct is not sufficient to counterbalance the weight of the other matters.
51. The Commission finds that there is not a sufficient reason to accept the Application out of time. Accordingly, the Application is not accepted.
52. Accordingly, other issues before the Commission in this matter no longer fall to be determined.

## **Order**

53. The Commission declines to accept the Application out of time.

## **C Muir**

### **Commissioner**

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[1] Respondent's Outline of Submissions (Jurisdiction and Binding Agreement) filed 27 August 2025

[2] Applicant's Outline of Submissions, filed 27 August 2025

[3] The full citation for the case is *Hooper v Mater Pathology Services* [2013] FWC 2013.

[4] The case which was apparently relied on was *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975.

[5] The case as cited by the applicant has been redacted to avoid it being further spread by Generative AI based on this Decision.

[6] Applicant's Outline of Submissions, filed 27 August 2025

[7] The case as cited by the applicant has been redacted to avoid it being further spread by Generative AI based on this Decision.

[8] The case as cited by the applicant has been redacted to avoid it being further spread by Generative AI based on this Decision.

[9] Respondent's Outline of Submission (Out of Time), filed on 5 September 2025.

[10] Griffin and others v Health Secretary; Thorncraft and others v Secretary of the Department of Education [2022] NSWIRComm 1027