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Important Information

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Federal Court of Australia
District Registry: Victoria
Division: Fair Work

No. VID 44 of 2023

SALLY RUGG
Applicant

THE COMMONWEALTH OF AUSTRALIA
First Respondent

MONIQUE RYAN
Second Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS SEEKING INTERLOCUTORY INJUNCTION

PART A. INTRODUCTION AND SUMMARY

1. Ms Rugg's employment with the first respondent was to have terminated on 31 January 2023, but undertakings have deferred that until at least 5pm, on 3 February 2023. Ms Rugg seeks orders to restrain the respondents from dismissing her, pending a trial of the issues set out in the Application.

2. Ms Rugg is employed by the first respondent (the **Commonwealth**), to the benefit of the second respondent (**Dr Ryan**) (this is explained in detail below). Ms Rugg in fact offered her resignation to Dr Ryan, but this was a dismissal under s 386(1)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**).

3. The Originating Application seeks a "final" injunction to restrain her dismissal for unlawful reasons. Ms Rugg has a strong prima facie case for a final injunction based on contraventions of the adverse action regime, and, amongst other factors relevant

Filed on behalf of	The Applicant
Prepared by	Angus Mackenzie
Law firm	Maurice Blackburn Lawyers
Tel	(03) 9605 2700
Email	amackenzie@mauriceblackburn.com.au
Address for service	Level 21, 380 La Trobe Street, Melbourne, Victoria, 3000

to the balance of convenience, an interlocutory injunction restraining the dismissal is necessary to preserve the availability and utility of that relief.

PART B. RELEVANT EVENTS

Evidential material

4. Ms Rugg has filed two affidavits, dated 25 January 2023 (the first Rugg Affidavit) and 2 February 2023 (the second Rugg Affidavit). Neither of the respondents have filed any evidence as at the time these submissions were settled.

General matters about the employment

5. Ms Rugg commenced employment with the Commonwealth on 25 July 2022. Ms Rugg is employed by the Commonwealth under a legislative arrangement that vests much of the authority of an employer in Dr Ryan.

6. Dr Ryan is a Member of the House of Representatives of the Commonwealth Parliament, for the seat of Kooyong. Under the *Members of Parliament (Staff) Act 1984* (Cth) (**MOPS Act**), Dr Ryan has the power to employ[1] and to terminate employment[2] on behalf of the Commonwealth.

7. The MOPS Act is addressed further in Part C below.

8. Ms Rugg is employed as an "Adviser". Under the *Commonwealth Members of Parliament Staff Enterprise Agreement 2020-23* (the **Enterprise Agreement**). This is not a senior position.[3] Her role is described in practice as "Chief of Staff",[4] but her formal classification (and salary) are not those of a "Chief of Staff" under the Enterprise Agreement.

9. The Enterprise Agreement is addressed further in Part C below.

10. Ms Rugg is employed on a full-time basis and is required to work 38 hours per week plus any additional hours that are reasonable.

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1 Section 20, MOPS Act.

2 Section 23, MOPS Act.

3 Attachment A to the Enterprise Agreement sets out the classifications for "senior staff". The position of "Adviser" appears in Attachment B, which deals with "other staff".

4 See, e.g., SR-3 to the affidavit of Sally Rugg dated 25 January 2023 ('the **First Rugg Affidavit**').

An important point of background

11. In the previous term of the Parliament (the 46th Parliament), "cross bench" Members of Parliament (**MP**) were entitled to employ four persons with "political roles"[5] under the MOPS Act. In the current term of the Parliament (the 47th Parliament), cross bench MPs are entitled to employ only one person with a "political role" under the MOPS Act. This change was announced by the Prime Minister on 24 June 2022.[6]

The course of the employment

12. Dr Ryan wanted Ms Rugg to perform the responsibilities of what might otherwise have been three or four separate positions.[7] To do so, Ms Rugg's usual work week involved 70+ hours of work, including late nights, early mornings and weekends.[8] She was "*often working most of* [her] *waking hours*".[9] Such hours represent 32+ hours more than the standard working week of 38 hours. Despite these efforts, Dr Ryan still demanded that Ms Rugg work harder.

13. Additional working hours became a source of friction between Ms Rugg and Dr Ryan.[10]

14. Between September and November 2022, Ms Rugg made it clear that she would not perform work, or duties, beyond the large amount of work that she was already performing, essentially because of the hours of work that would be required. Ms Rugg repeatedly refused to perform additional hours of work on top of the considerable number of additional hours that she was already working.[11] Ms Rugg also repeatedly complained in relation to her work hours which were harming her ability to fulfil her family responsibilities.[12]

15. On 15 November 2022, Dr Ryan told Ms Rugg that her employment was not "*working out*" because "*you are not working hard enough and I need someone who works*

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5 The MOPS Act also covers administrative staff and staff in electoral offices, which allocations are not presently material.

6 First Rugg Affidavit, [12].

7 See the first Rugg Affidavit, [19] to [23].

8 First Rugg Affidavit, [25].

9 First Rugg Affidavit, [6].

10 First Rugg Affidavit, [26].

11 See, e.g. the first Rugg Affidavit, [28]. Affidavit of Sally Rugg dated 2 February 2022 (the **Second Rugg Affidavit**), [78]-[131].

12 See, e.g., the First Rugg Affidavit, [31], [32], [41(h)], [55(a)], [55(b)], and [55(d)].

harder than you".[13] Ms Rugg said that she "*would perform the duties of four different roles, but not the output of four people*".[14]

16. Following this discussion, Dr Ryan displayed hostility in the workplace. She ceased to greet Ms Rugg, was short with her, 'snubbed' her in front of colleagues, stopped inviting her to some meetings, froze her out of certain decisions and issued her with a dubious formal warning about travelling whilst Ms Rugg had covid.[15]

17. On 6 December 2022, Dr Ryan began openly canvassing terminating Ms Rugg on the basis that "*you're not working hard enough, you don't want to work weekends*" (despite the fact that Ms Rugg had worked the previous six weekends).[16] Ms Rugg continued to complain about Dr Ryan's conduct towards her.[17]

18. Between 8 and 16 December 2022, Ms Rugg took sick leave following Dr Ryan's conduct towards her. Extraordinarily, Dr Ryan scheduled a performance review meeting to occur during her sick leave. At that meeting, Dr Ryan told her that she could either resign or Dr Ryan would put her on a Performance Improvement Plan (**PIP**) which could lead to termination. Dr Ryan said "*I'm not terminating you at this point*".[18]

19. On 20 December 2022, Ms Rugg received a PIP containing unrealistic demands.[19] Ms Rugg complained about the PIP and asked for it to be withdrawn. It was not.[20]

20. On 21 December 2022, Dr Ryan said "*look, I'm going to terminate your employment. I have made up my mind to terminate you in January. We can either do it at the end of the PIP or before the PIP, or I could do it right now if I wanted to. We can waste our time and energy doing a PIP"*.[21] Dr Ryan offered Ms Rugg an opportunity to resign by the following day and receive 6 weeks' pay, or be terminated.[22]

21. Later that night, sure that Dr Ryan would terminate her employment, Ms Rugg sent a letter of resignation. The next day, Dr Ryan accepted her resignation with an end date

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13 First Rugg Affidavit, [41](g).

14 First Rugg Affidavit, [41](h).

15 First Rugg Affidavit, [45]-[51]. Ms Rugg was acting on the advice of her GP and did not breach any law.

16 First Rugg Affidavit, [54].

17 See, e.g., First Rugg Affidavit, [55].

18 First Rugg Affidavit, [64].

19 First Rugg Affidavit, [67].

20 First Rugg Affidavit, [68].

21 First Rugg Affidavit, [71].

22 First Rugg Affidavit, [71].

of 31 January 2023.[23] Since 22 December 2022, Ms Rugg has continued to perform some limited duties.[24]

22. On 25 January 2023, Ms Rugg initiated these proceedings, and Dr Ryan and the Commonwealth undertook not to give effect to the dismissal until at least 5.00pm, 3 February 2023.

PART C. REGULATION OF THE EMPLOYMENT

The MOPS Act

23. The MOPS Act is expressly made subject to the FW Act.[25]

24. The MOPS Act is divided into parts governing the employment of staff by Ministers, other Commonwealth office holders (being political in nature), and Senators and Members of the House of Representatives.

25. Part IV concerns Members of the House of Representatives. Section 20 authorises MPs to employ a person as a member of their staff, on behalf of the Commonwealth, by agreement in writing. Sections 20(2) and 21 give the Prime Minister authority to determine some of the terms and conditions of such employment.

26. As can be seen from these provisions, the MP is not the employer, although exercises several powers of the employer. Some analogy might be drawn with persons employed by single-person companies, where the company is the employer but there is one person making all the relevant decisions.

27. Section 23 provides for termination of employment. Termination is by notice,[26] although this does not derogate from the limits to termination arising from the FW Act or the general law.

The Enterprise Agreement

28. The Enterprise Agreement applied to Ms Rugg's employment.

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23 Rugg Affidavit, [75].

24 Rugg Affidavit, [78] to [81].

25 Section 3A, MOPS Act.

26 Section 23(2), MOPS Act.

29. Clause 31 set out the ordinary hours of duty as 38 hours per week for a full time employee, being 7 hours and 36 minutes per day, generally to be worked between the hours of 8am and 6pm, Monday to Friday.[27] Provision is made for alteration of these parameters (cll 31.4 and 31.5), but no such alteration was made in respect of Ms Rugg.

30. Clause 32.1 states that the level of remuneration provided reflects an expectation that reasonable additional hours would be required, and that these are recognised and compensated through, relevantly, an allowance under cl 33, and time off in lieu under cl 35. There is no entitlement to overtime loadings.[28]

31. Clause 32.3 states that for the purposes of assessing whether additional hours are 'reasonable' (under cl 32.1), hours worked by an employee will be averaged over a 12-month period.

32. Clause 33 sets out the entitlement to a personal staff allowance (**the PSA**) in recognition of reasonable additional hours. Clause 33.3 provides that an employee in receipt of the PSA will work such reasonable additional hours as are agreed with the MP including on public holidays in accordance with cl 50. It further provides that the reasonable additional hours will be designed to best suit the operating requirements of the workplace, taking into account the personal needs of the employee.

33. Clause 33.4 provides that an employee may choose not to receive the PSA where they are unable to, or do not expect to, work significant additional hours.

34. Clause 35 provides for time off in lieu (TOIL) in recognition of additional hours worked, and relevantly states that TOIL may accrue if agreed to by the MP (cl 35.2), and that "Accrued TOIL" may be taken by an employee (cl 35.3). Properly construed, cl 35 provides a mechanism for an employee and MP to agree a regime for TOIL to accrue and to be taken, but absent such agreement, there is no entitlement to TOIL. There was no agreement in relation to TOIL between Ms Ryan and Ms Rugg, and thus Ms Rugg was not entitled to TOIL.

35. The classification structure set out in Attachments A and B is important. Attachment A deals with "senior staff", setting out the roles of "Principal Adviser", "Senior Adviser",

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[27] Clause 31.1.

[28] Clause 32.2.

"Chief of Staff", and "Senior Media Adviser", with bands existing within some of these roles. The salary range for senior staff is $133,060 - $269,631.

36. Attachment B deals with other staff, setting out the roles of "Adviser", "Media Adviser", and "Assistant Adviser", with bands existing within these roles. The salary range for these staff is $79,866 - $141,372.

37. For convenience, it is noted that Ms Rugg was employed to the classification "Adviser". Ms Rugg's contractual salary was $136,607.[29] That contractual salary is closest to the second highest rung in the "Adviser" classification in Attachment B, being $135,054.

38. Attachment D sets out the PSA, identified in cll 31.1 and 33. For Ms Rugg's classification, it was set at $29,862 per annum. Ms Rugg's position description asserts that her PSA entitlement was $30,205.[30]

Contract of employment

39. The Contract is set out at pages 99-100 of Ms Rugg's first affidavit.

40. It specified that Ms Rugg was employed as an "Adviser (Non Government)", which is under Attachment B to the Enterprise Agreement, on a full time basis, and on a salary of $136,607.

41. The "General" clause confirms that the employment is by the Commonwealth, under the MOPS Act, and that the terms and conditions include those set out in the Enterprise Agreement.

42. The formation of the Contract was preceded by Ms Ryan publishing a job description, and Ms Rugg agreeing to perform that job.[31] The job description states that the employment would be under the Enterprise Agreement in the position of Adviser, with the PSA available, and that significant travel was required. It then described the position as "Chief of Staff" (but not meant in the sense in which that classification is used in the Enterprise Agreement). The physical requirements of the job notified the employee that extended working hours, 12 or more hours per day, might be required

29 First Rugg Affidavit, SR-2.
30 First Rugg Affidavit, SR-3.
31 First Rugg Affidavit, SR-3.

during Parliamentary sitting weeks, and that working on weekends might also be required.

The FW Act

43. Sitting on top of this regulatory arrangement is the FW Act.

44. Relevantly, s 62 of the FW Act (part of the NES) relevantly provides:

> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> (a) for a full-time employee—38 hours; or
>
> (b) for an employee who is not a full-time employee—the lesser of:
>
> (i) 38 hours; and
>
> (ii) the employee's ordinary hours of work in a week.
>
> (2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

45. Section 62(3) of the FW Act sets out the matters to be considered in assessing reasonableness under s 62. These are considered further below.

46. The Court is no doubt familiar with the adverse action regime. It is not set out in any detail here, although it is necessary to note that the term 'dismiss' in s 342 takes its meaning from the definition in s 12 and consequently s 386.[32]

47. Section 386 of the FW Act relevantly provides that:

> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
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> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

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[32] *Jess v Cooloola Milk Pty Ltd* [2022] FCAFC] 75 (Rangiah, Downes and McElwaine JJ) at [70]; *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587 (Perram J) at [216]; *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467 (Gilmour J), at [25] and [26];

48. Ms Rugg submits that the purported dismissal on 31 January 2023 would have been a dismissal within s 386(1)(a), and any termination of the employment which would occur but for an interlocutory injunction would be a dismissal within that provision.

49. Under s 386(1)(a), a resignation that is the result of conduct by the employer such that the employee did not voluntarily leave the employment would constitute a termination at the employer's initiative.[33] That is, a termination (or purported termination) can be at the employer's initiative, and thus a "dismissal" (or purported dismissal) even where the act that ends the relationship is done by the employee.[34] This includes a circumstance in which the employer pressures or 'jostles' an employee into resigning.

50. As said in *Gunnedah Shire Council v Grout*:[35]

> It seems to us that, if the council knew, or should have known, that Mr Grout was then suffering such a degree of confusion or pressure that his act of resignation was not a considered or voluntary act, it was not open to it to resolve to accept the resignation.

51. Where the circumstances deprive a resignation of the requisite character of voluntariness, the resignation is ineffective and an employer's decision to accept the resignation without waiting a reasonable period before clarifying the employee's true intent amounts to a termination at the employer's initiative.[36] The test is objective and depends upon what a reasonable person in the position of the parties would have understood.[37]

52. The events leading up to and on 21 December 2022, detailed in the first Rugg affidavit, leave little room for doubt that Ms Ryan pushed Ms Rugg into tendering a resignation.

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33 *Mohazab v Dick Smith Electronics* (1995) 62 IR 200 at 205-206, most recently affirmed by the Full Court of the Federal Court in *Mahony v White* [2016] FCAFC 160 (Jessup, Tracey and Barker JJ) at [23].

34 *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587 at [222] (Perram J).

35 (1995) 134 ALR 156 at 166.

36 *Minato v Palmer Corporation Ltd* (1995) 63 IR 357 at 362-363, citing *Sovereign House Security Services Ltd v Savage* [1989] ARLR 115 at 116 and *Kwik-Fit (G.B.) Ltd v Lineham* [1992] ICR 183 at 188.

37 *Koutalis v Pollett* [2015] FCA 1165 at [43] (Rares J), citing *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)

PART D. PRIMA FACIE CASE

53. Ms Rugg's case for a final injunction is that she was dismissed because:

(a) she exercised a workplace right to refuse to perform unreasonable additional hours, pursuant to s 62(2) of the FW Act and/or clauses 31.1 and 32.1 of the Enterprise Agreement;[38]

(b) she made complaints or inquiries in relation to her employment under s341 of the FW Act.

54. Were it not for the unlawful reason, or reasons, animating the purported dismissal, Ms Rugg submits that she would have continued in her employment, and thus, justice requires that she should be restored to her employment.

Exercise of workplace rights

55. 'Workplace right' is defined in section 341 of the FW Act as follows:

> (2) A person has a workplace right if the person:
>
> (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
>
> (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
>
> (c) is able to make a complaint or inquiry:
>
> (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
>
> (ii) if the person is an employee – in relation to his or her employment.

Refusal to perform unreasonable additional hours

56. Ms Rugg does not seek an interlocutory injunction based directly on the allegation of contraventions of s 62 of the FW Act. However, establishing a contravention of s 62 is an element of the adverse action case based on the exercise of the workplace right under s 62(2), in that it must be shown that the additional hours which Ms Rugg was requested or required to work, which were refused, were indeed unreasonable.

[38] Ms Rugg will not press the claim in the Application based on the employment contract.

Consequently, it is necessary to sketch out the case that Ms Rugg wishes to take to trial on the "s 62 issue".

57. Dr Ryan "requested or required" Ms Rugg to work the hours that she was working (see s 62(1)). This occurred by way of a requirement that Ms Rugg perform duties that, on Dr Ryan's apparent admission,[39] she knew required 70 hours of work per week. Dr Ryan demanded more work, and reproached Ms Rugg for not working hard enough, in a context where Ms Rugg was already regularly working 70+ hours per week, including early mornings, late nights and weekends. Dr Ryan's demands for work to be performed necessitated additional hours from Ms Rugg beyond the 70+ hours per week that were already being performed.

58. On the present evidence before the Court, the additional hours requested or required to be worked are the difference between the 38 hours per week, and the 70+ hours per week that were regularly worked by Ms Rugg, and the further hours still that Ms Ryan requested Ms Rugg to perform.[40] On this evidence, Ms Rugg regularly worked 32+ additional hours each week.

59. Justice Katzmann has recently said that the effect of s 62(1) of the FW Act is that requiring or requesting a full-time employee to work in excess of 38 hours is prima facie unreasonable but that there is an exception if it is reasonable for such a requirement or request to be made.[41]

60. The burden rests on the respondent employer to prove that the additional hours were reasonable.[42]

61. What is "reasonable" is necessarily assessed on a case-by case basis, by reference to the employee's circumstances and the employer's business in accordance with the terms of s 62(3): *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298 at [173].

62. On the present state of the evidence, addressing the factors set out in s 62(3):

(a) <u>Risk to employee health and safety</u>

There was some risk to employee health and safety from working the additional hours requested or required, evidenced by the fact that Ms Rugg had to take

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39 First Rugg affidavit, [33].

40 First Rugg affidavit, [25].

41 *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* [2022] FCA 512, [224].

42 *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* [2022] FCA 512, [224].

stress leave in November 2022. This weighs in favour of Ms Rugg's argument. Ms Ryan seemingly acknowledged this to a journalist, describing the 70 hour work weeks as "not healthy".[43]

(b) The employee's personal circumstances (including family responsibility)

Ms Rugg's personal circumstances of relevance are her parental responsibility for her step-daughter. This is set out in the second Rugg affidavit, paragraphs 7 to 19.

(c) The needs of the workplace

It may be accepted that the needs of the workplace extended to *some* additional hours. This much is reflected in the Enterprise Agreement and the payment of the PSA. It is thus accepted that some additional hours were reasonable, including because of the nature of the employment and the demands of the workplace. However, the issue is one of degree.

It is immaterial that Dr Ryan might have been "squeezed" by the reduction in her entitlement under the MOPS Act to one parliamentary staffer. The Commonwealth, as employer, created that situation. The employer cannot expect employees to shoulder the burden of cost savings measures by breaching statutory protections.

It is also necessary to distinguish between the needs of the workplace and the culture of the workplace. The culture of a workplace must conform to the law, not the other way around. The statutory consideration is the *needs* of the workplace, not its culture.

Of course, the culture of a workplace may be considered under s 63(3)(j), but this might cut several ways. On one view that a culture of long hours of demanding work, done because it is seen as a "privilege" or "honour", points to higher additional hours being reasonable. But, on another view, situations of that type are prone to exploitation of labour, or worse.

[43] First Rugg affidavit, [33].

(d) Overtime, penalty rates, other compensation or remuneration for working additional hours

Ms Rugg is not entitled to receive overtime payments or penalty rates, although she did receive the PSA. Her overall level of remuneration ($166,812) reflects an expectation of some additional hours. Again, it is a question of degree.

Her level of remuneration reflects an expectation of *modest* additional hours, perhaps associated primarily with travel occurring on weekends around Parliamentary sitting weeks.

This is consistent with a basic calculation of Ms Rugg's hourly rate.

If one treats Ms Rugg's "base salary" of $136,607 as being remuneration for a standard 38 hour working week, and assuming 52 weeks in the year, Ms Rugg is paid $69.13 per working hour (not accounting for leave entitlements etc). Applying this metric of $69.13/hour to the value of the PSA in dollars suggests that the PSA contemplates, roughly, 437 additional hours per year (again, not accounting for leave entitlements etc), or, about 8.4 additional hours per week. If one assumes 48 weeks per year (accounting for annual leave), the figure is about 8.1 additional hours per week.

In this light, the PSA arguably compensates for around 8 or 9 additional hours per week. This falls well short of the 32+ hours per week that both Ms Rugg and Dr Ryan agree that Ms Rugg was regularly working.

For completeness, it is noted again that Ms Rugg is not entitled to TOIL.

(e) Any notice given by the employer

This consideration is largely neutral because this is not a case of shift work, or work to be performed during specific timeframes. The 'notice' of additional work was therefore ad hoc and reactive to events in real-time.

(f) Any notice given by the employee of her intention to refuse to work the additional hours

Ms Rugg gave specific notice of her intention to refuse to work additional hours.

(g) The usual patterns of work in the industry

The Commonwealth is perhaps best placed to present evidence on this question. On the limited evidence available at present, this consideration is essentially neutral.

The point about workplace culture not being allowed to be a "tail that wags the dog" on s 62 questions, noted above, applies equally to this consideration.

(h) The nature of the employee's role and the employee's level of responsibility

The role expected of the applicant carried a measure of seniority and responsibility. As much is reflected in the working job title of "Chief of Staff". However, there is a disconnect between her title and Dr Ryan's expectations of the role, and Ms Rugg's classification under the Enterprise Agreement, under which she was not as a "Chief of Staff" and not even a senior staffer. At most, the role – properly understood – carried a *moderate* degree of seniority and responsibility. This is commensurate with an expectation of modest additional hours, which might accurately be thought of as being in the range of up to around 8-12 hours per week (having regard to the PSA).

(i) Averaging terms

Clause 32.3 of the Enterprise Agreement provides for an averaging arrangement, to be done across one year. The impact of an averaging clause of this type still allows for consideration of the circumstances attendant upon any *particular* additional hour worked.[44] The existence of an averaging term is just one of the relevant considerations in assessing reasonableness under s 62 of the FW Act. In some cases, especially roster scenarios, it might be quite important, but it is of limited significance in a case such as this one.

(j) Other relevant matters

To the extent that the following also fit within this paragraph, the applicant points to: (i) the useful indication of the value of each hour of work, as calculated above; (ii) the background of Dr Ryan expecting four staff under the MOPS; (iii) Ms Ryan's complaints, made to a journalist, that having Ms Rugg work 70 hours

[44] *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* [2022] FCA 512, [250].

per week was note enough, that there was no way to decrease her workload, and that this was not healthy.

63. There is a powerful case that at least *some* additional hours that Ms Rugg was requested or required to work were unreasonable. Regularly requesting or requiring seventy-hour work weeks in a non-senior role such as this with a remuneration of $166,812 is not reasonable.

64. Obviously, the evidence will go into a greater level of detail about these matters at trial. At this stage, it is sufficient to observe that Ms Rugg has good prospects of establishing that s 62 has been contravened.

65. Ms Rugg exercised her workplace right to refuse to perform unreasonable hours. She did so by "pushing back" on the additional duties that Dr Ryan requested her to perform. This "push back" on additional duties was because of the additional hours that would be required, and is thus properly characterised as a refusal to work additional hours. If those additional hours were, or would have been, unreasonable, then it was a refusal to work unreasonable additional hours and an exercise of the right under s 62(2) of the FW Act.

Complaints or inquiries in relation to employment

66. Ms Rugg was able to make complaints or inquiries in relation to her employment within the meaning of section 341(1)(c), including by complaining to the MP who employed her on behalf of the Commonwealth.

67. Ms Rugg exercised this right on the following occasions:

    (a) on 30 September 2022, Ms Rugg complained that "*we are exceptionally short-staffed, and the consequence of this is that we're not able to deliver the volume of work of a fully-staffed team (or a fully staffed team with assistance from additional fundraised roles). We don't have a social media manager, we are all doing our very best"*;[45]

    (b) later on 30 September 2022, Ms Rugg complained that "*I was working so hard, that I was already working long hours and over the weekend*";[46]

[45] First Rugg Affidavit, [31].
[46] First Rugg Affidavit, [32].

(c) on 15 November 2022, Ms Rugg complained that "*the bar you have set for me is far too high, and if your expectations are impossible to achieve, then I have been set up to fail and will never meet them"*;[47]

(d) on 7 December 2022, Ms Rugg:

(i) made an inquiry by requesting that she be informed ahead of time if Dr Ryan was planning to raise termination of her employment in a meeting;[48]

(ii) complained that Dr Ryan had raised terminating her employment when she wasn't expecting a conversation about her performance or employment;[49] and

(iii) complained that her position description was "*inappropriate*" and Dr Ryan's expectations were "*unreasonable*";[50] and

(e) on 20 December 2022, Ms Rugg complained that Dr Ryan's Performance Improvement Plan did not follow fair process and was setting Ms Rugg up to fail.[51]

Adverse action because of the exercise of workplace rights

68. The Commonwealth, via Dr Ryan, took adverse action, including by seeking to dismiss Ms Rugg.

69. Under section 361, the Commonwealth bears the onus of establishing that it did not dismiss Ms Rugg for reasons including her exercise of workplace rights. In the absence of Dr Ryan giving direct evidence, it is difficult to imagine how the Commonwealth could meet this onus.

70. In any event, there is a strong circumstantial case against Dr Ryan that Ms Rugg's exercise of workplace rights was at least one material and operative reason for the adverse action.[52]

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47 First Rugg Affidavit, [41](h);

48 First Rugg Affidavit, [55](a);

49 First Rugg Affidavit, [55](b).

50 First Rugg Affidavit, [55](d).

51 First Rugg Affidavit, [68].

52 *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 at [127].

71. Dr Ryan wanted Ms Rugg to perform duties across the four roles that Ms Ryan might otherwise have employed. This indicates a desire for a high level of output, commensurate with the work of four employees.

72. Notwithstanding her publicly expressed her concerns about her staff working excessive hours, Dr Ryan was at times explicit in her demands for even more hours of work. For example:

(a) on 15 November 2022, Dr Ryan stated: "*I feel when I ask you to work longer hours or on the weekend, you look at me like you don't want to and that you feel that I'm taking you away from your family and that I'm a bad person. You are not working hard enough and I need someone who works harder than you"*;[53] and

(b) on 6 December 2022, Dr Ryan stated: "*it just isn't working out, I can't trust you to deliver the work, you're not working hard enough, you don't want to work weekends.*"[54]

73. Dr Ryan told a journalist in October 2022 that she knew Ms Rugg was working 70 hour weeks, but that there was no way to reduce Ms Rugg's workload. This is apparently because Dr Ryan wants to be "*the best*", and has high aspirations for her political life.[55] This drive makes it more likely that the Court would find that Dr Ryan thinks it is unacceptable for her staff not to work long hours (lest her ambition not be realised). Indeed, when Dr Ryan told Ms Rugg "*if you are not prepared to work as hard as I want, I will need to consider my options*",[56] the sense appears to have been the communication of an expectation that Ms Rugg should work "as many additional hours as I need you to, in order to achieve my ambition".

74. If the Court found that Dr Ryan thought it was unacceptable that Ms Rugg was not prepared to work as hard (or long) as Dr Ryan wished, that makes it more likely that Dr Ryan would treat Ms Rugg's refusal to work certain additional hours, or her complaints in that regard, as a reason for the purported dismissal.

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53 First Rugg affidavit, [41](g)

54 First Rugg affidavit, [54](k)

55 First Rugg Affidavit, [41](j).

56 First Rugg affidavit, [41](l).

PART E. BALANCE OF CONVENIENCE

75. The balance of convenience favours the grant of an injunction.

76. *First*, it should be noted the strength of Ms Rugg's case for a final injunction is relevant to the balance of convenience; stronger arguments call for "less" on balance of convenience to justify an interlocutory injunction.

77. S*econd,* unless the interlocutory injunction is granted, the employment will be terminated at 5.00pm on 3 February 2023. It might then be impractical, if not impossible, for any order to be made after trial reinstating Ms Rugg to her employment (on a final basis). This is because, if the termination of Ms Rugg's employment is allowed to occur, Ms Ryan would employ another person under the MOPS Act. If so, it would then seem to be impossible for Ms Rugg to be re-employed under the MOPS Act, because of the Direction limiting her to one staffer under the MOPS Act.

78. Thus, an interlocutory injunction is necessary to preserve the subject matter of the litigation.

79. Ms Rugg's reputation would suffer if she could not resume in her employment,[57] and Ms Rugg would forever lose a valuable opportunity (in some ways analogous to a Judge's associateship),[58] including to work for someone who is at the spearhead of a movement that is "bigger than Kooyong" and with ambitions to become the Prime Minister.[59]

80. In the meantime, one can expect both parties to be mature about the matter and work together until trial. Dr Ryan is now assisted by lawyers experienced in workplace law. Ms Rugg is certainly able to do so.[60]

81. To the extent that there has been any hostility in the workplace, one can expect that it will be reigned in, both immediately if an interlocutory injunction is granted, and in the longer term if a final injunction is granted. Dr Ryan is a MP who campaigned in part on a political platform of "integrity" in government. She is very much in the public spotlight, with close attention and scrutiny on her conduct (evidenced by matters including the media interest in this case). Dr Ryan has identified her office as

57 First Rugg affidavit, [86]-[89].

58 First Rugg affidavit, [84]-[85], [89].

59 First Rugg affidavit, [41].

60 First Rugg affidavit, [82]-[84].

embracing the values of respect and optimism.[61] She promotes the behaviours of "engaging in positive action", "being welcoming" and "demonstrating decent behaviour".[62] No doubt these virtues will be brought to bear to ensure civility, professionalism, and productivity, until this matter is tried.

82. However, if Dr Ryan wished, it would be open to her to place Ms Rugg on "Miscellaneous Leave" under cl 43 of the Enterprise Agreement (ie, gardening leave) until this matter is tried.

83. If Ms Rugg is correct in her allegations in relation to s 62 of the FW Act, one expects that Ms Ryan would comply with the law, and adjust her expectations of the role. Upon a correct understanding of the limits to which Dr Ryan can request or require Ms Rugg to perform additional hours, there is no reason to doubt that the professional relationship would continue on a professional and productive basis.

84. There is an additional consideration here. If Ms Rugg is dismissed in circumstances that are later shown to have been unlawful, but reinstatement to employment is made impossible because of the subsequent conduct of the employer (whether because someone else is employed under the MOPS Act, or because of hostile conduct in the workplace), a concern might arise that an employer might treat any orders of the Court, short of reinstatement (ie, compensation and penalties) as the "cost of doing business" to achieve an unlawful dismissal.

85. If Ms Rugg is ultimately unsuccessful in obtaining a final injunction, including if there has not been any contravention of the law, then the undertaking as to damages that Ms Rugg will proffer as a condition of the interlocutory injunction will protect the interests of the Commonwealth.

2 February 2023

Angel Aleksov

Declan Murphy

Counsel for the Applicant

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61 First Rugg affidavit, page 113.2.

62 First Rugg affidavit, page 113.3.