

Section J Appeal Mechanism for misconduct, underperformance and other matters

J1 - Objective and Application

- J1.1 This section sets out an appeal mechanism for an employee where the employee (referred to in this section as “the appellant”) is not satisfied with the outcome of decisions described in the following clause.
- J1.2 The Head of Service (in person) must nominate a person, or position, to be the Convenor of Appeals (“the Convenor”).
- J1.3 This appeal mechanism applies to all the following decisions:
- J1.3.1 Decisions to suspend the employee without pay under clause H8 - of this Agreement.
 - J1.3.2 Decisions relating to findings of misconduct under clause H10 -, provided that such an appeal can only be made after a decision about disciplinary action under clause H11 - has been made.
 - J1.3.3 Decisions to take disciplinary action under subclause H11 - of this Agreement, except a decision to terminate the employee’s employment.
 - J1.3.4 Decisions to take underperformance action under subsection H4.17 of this Agreement, except a decision to terminate the employee’s employment.
 - J1.3.5 Decisions taken in relation to an employee’s eligibility for benefits under clauses L6 - of this Agreement and the amount of such benefits, the amount payable by way of income maintenance under clause L10 -, and the giving of a notice of involuntary redundancy under clause L9 -.
 - J1.3.6 Any other decision that is subject to appeal under the PSM Act.
- J1.4 In relation to appeals about misconduct findings and disciplinary action in accordance with subclause J1.3.2 and subclause J1.3.3, only one application for appeal can be made in relation to the same misconduct matter. The application must state which one of the following the application relates to:
- J1.4.1 The finding of misconduct under clause H10 -.
 - J1.4.2 The disciplinary action under clause H11 -.
 - J1.4.3 Both the finding of misconduct under clause H10 - and the disciplinary action under clause H11 -.
- J1.5 An employee may have an entitlement to bring an action under the FW Act in respect of any termination of employment under this Agreement. This is the sole right of review of such an action.

J2 - Initiating an Appeal

- J2.1 The appellant, or the appellant’s union or other employee representative on the appellant’s behalf, may initiate an appeal under these procedures by making an application to the Convenor in accordance with all of the following:
- J2.1.1 It is in writing.

- J2.1.2 It describes the decision or action taken or to be taken, the reasons for the application and the outcome sought.
- J2.1.3 It is received by the Convenor within 14 calendar days of being notified, or the appellant becoming aware, of the decision to take the action.
- J2.1.4 It seeks to appeal an appealable decision as set out in subclause J1.3.
- J2.2 Notwithstanding any other provisions in this section, the Convenor has the authority to dismiss an appeal if the appellant obstructs, unreasonably delays or fails to co-operate with the process.

J3 - Composition of the Appeal Panel

- J3.1 The public sector standards commissioner must keep a list of approved Appeal Panel Chairs.
- J3.2 The head of service must keep a list of suitably skilled and trained employer representatives for Appeal Panels and a list of suitably skilled and trained employee representatives, nominated by the unions.
- J3.3 Where an application is received by the Convenor in accordance with the requirements set out in subclause J2.1 and subclause J2.2 the Convenor must set up an Appeal Panel.
- J3.4 The Appeal Panel must comprise a panel member from the list of employer representatives in accordance with subclause J3.2, a panel member from the list of employee representatives in accordance with subclause J3.2 and a chair in accordance with clause J3 -.
- J3.5 The Convenor may only be a member of an Appeal Panel with the agreement of the appellant.
- J3.6 A person is not eligible to be a member of an Appeal Panel if that person was involved in the decision or the process that is the subject of the application or if there is any other perceived or actual conflict of interest.
- J3.7 Where a panel member fails to comply with a provision in this section in a manner that affects the effective operation of the appeal process, the Convenor can disqualify the member from the panel. Where that occurs the panel is dissolved and a new one must be convened in accordance with subclause J3.3.

J4 - Powers and Role of the Appeal Panel

- J4.1 In considering an application, the Appeal Panel must have due regard to the principles of natural justice and procedural fairness. Proceedings of the Appeal Panel are to be conducted as quickly as practicable and consistent with a fair and proper consideration of the issues.
- J4.2 The Convenor must invite the appellant to have a support person, who may be the appellant's union or other employee representative, present at any meetings held between the Appeal Panel and the appellant and must allow reasonable opportunity for this to be arranged.
- J4.3 The Appeal Panel must be provided with all relevant information and evidence that was available to the decision-maker in the making of the original decision or in taking the original action.

- J4.4 The Appeal Panel have the discretion to decide not to conduct a review of the appeal application, or, if it has commenced reviewing the application, to decide not to proceed further if the Appeal Panel believes any of the following apply:
- J4.4.1 The application is frivolous or vexatious, or not made in good faith.
 - J4.4.2 The appellant making the appeal may apply to another person or authority about the application who may more appropriately deal with the application.
 - J4.4.3 Further review of the application is not warranted.

Conducting an appeal

- J4.5 Where the Appeal Panel determines that an application for appeal should proceed, the Appeal Panel must conduct a procedural review on the papers provided under subclause J4.3 to determine whether all of the following apply:
- J4.5.1 It was open to the head of service to take the action they did.
 - J4.5.2 The principles of procedural fairness and natural justice were complied with in taking the original action or decision.
 - J4.5.3 The final decision of the head of service, the Public Sector Standards Commissioner or both was appropriate in all of the circumstances.
- J4.6 Where the Appeal Panel is satisfied that a fundamental piece of evidence was not considered in the original process, the Appeal Panel may request that the Convenor refer the matter back to the head of service, Public Sector Standards Commissioner or both for further investigation.
- J4.7 The head of service or Public Sector Standards Commissioner, after considering the referral from the Convenor under subclause J4.5.3, must do one of the following:
- J4.7.1 As soon as possible, arrange for a further investigation to be conducted, in line with the referral of the Convenor, and must provide any further information, evidence or outcomes of the further investigation to the Appeal Panel in order that they may complete their review.
 - J4.7.2 Provide written reasons to the Appeal Panel, within 14 calendar days, for not accepting their referral for further investigation.
- J4.8 After reviewing any application under this section, the Appeal Panel must, subject to subclause J4.5.3, make a determination of the appeal and do one of the following:
- J4.8.1 Confirm the original decision.
 - J4.8.2 Vary the original decision.
 - J4.8.3 Prescribe that other action be taken.
- J4.9 The Appeal Panel must provide a report to the public sector standards Commissioner and the head of service which must include the determination and the reasons for the determination. A copy of the report must also be provided to the appellant.

J5 - Costs

- J5.1 The Territory are not liable for any costs associated with representing an appellant in these procedures.

J6 - Right of External Review

- J6.1 The employee, or the employee's union or other employee representative on the employee's behalf, may seek a review by the FWC of a decision under subclause J4.8.
- J6.2 The FWC is empowered to resolve the matter in accordance with the powers and functions set out in clause G6 - of this Agreement. The decision of the FWC is binding, subject to any rights of appeal against the decision to a Full Bench in accordance with subclause G6.14.