FWC Bulletin

12 January 2023 Volume 1/23 with selected Decision Summaries for the month ending Saturday, 31 December 2022.

Contents

Unfair dismissal application fees – refund changes

The *Fair Work Regulations 2009* set out when the Commission can refund application fees.

The Regulations have recently been amended by the *Fair Work Legislation Amendment Regulations 2022*. As a result, the circumstances where we can refund an application fee for an unfair dismissal application have changed.

From 14 December 2022, unfair dismissal application fees can only be refunded if the application is discontinued either:

- **before the Commission lists the application** for a conciliation, conference or hearing with either a Commission Member or a staff conciliator, or
- **at least 2 days before the listed date**, if we have listed the application for a conciliation, conference or hearing.

As a result of the change, fee refunds will no longer be paid where a case settles at staff conciliation.

This change applies to any case that is discontinued in the above circumstances on or after 14 December 2022, regardless of when the application was sent to us.

- Read the Fair Work Legislation Amendment Regulations 2022

Changes made to agreement related forms

We have made some changes to our enterprise agreement and bargaining related forms.

The changes follow the commencement of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 , which amended the *Fair Work Act 2009*.

The changes include:

- **Form F17** – Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement): Question 17, regarding notification time, now includes requests to bargain under section 173(2A) of the Fair Work Act.
- **Form F24C** – Declaration in relation to termination of an enterprise agreement after the nominal expiry date: New questions have been added for the new test set out in section 226 of the Fair Work Act
- **Form F28** – Application for termination of collective agreement-based transitional instrument: New questions have been added for the new test set out in section 226 of the Fair Work Act
- **Form F32** – Application for a bargaining order: Now includes requests to bargain under section 173(2A) of the Fair Work Act as one of the grounds to seek a bargaining order
- **New Form F24D** – Declaration in response to application to terminate an agreement after the expiry date: This new form allows an employer, employee or union to tell us whether they support or oppose an application to terminate an enterprise agreement after the nominal expiry date.

All our forms are available on the Forms page of our website.

You can also read more Information about the Secure Jobs Better Pay Act 2022 changes.

Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the month ending Saturday, 31 December 2022

1 TERMINATION OF EMPLOYMENT – valid reason – prior warnings – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – employee was employed for a period of 14 years – at time of dismissal employee was employed as a Cabin Crew Supervisor and was dismissed following an investigation into allegations of misconduct – concerns as to the employee's compliance with the appellant's standard operating procedures on 31 January 2021, when the employee was undertaking a supernumerary shift, preparatory to her return to work, following a period of absence – at first instance Commission found there was a failure by the employee on that date to meet the basic requirements of her role, which constituted a valid reason for dismissal, there were other mitigating circumstances which rendered the dismissal unfair on the basis that it was harsh, unjust and unreasonable – the Commission made an order for reinstatement and continuity of service – no order made for lost remuneration, based on a finding in relation to the contribution made by the employee to her dismissal – grounds for appeal included that the Commission erred in failing to have regard to prior warnings issued to the employee; erred in concluding that the termination of the employee by the appellant was unfair because: it 'solicited' the views of its employees who witnessed the employee's misconduct or 'broadly [sought] additional evidence' from those employees, and there were delays in addressing the allegations of misconduct and effecting the termination, and that the events the subject of the investigation occurred over a narrow period of time; the discretion exercised by the Commission to reinstate the employee miscarried; and the Commission made additional and significant errors of fact that infected the consideration of relevant issues – the Full Bench found that in deciding to exclude evidence of the prior warnings, the Commission acted upon a wrong principle – the Commission was bound to consider the prior warnings based on the evidence before it – Full Bench agreed with the appellant's submission that the Commission mischaracterised the investigation process into the events of 31 January 2021 – Full Bench found that the Commission erred in finding that the appellant had not considered alternatives to termination, and that the employee had not been previously warned about her lateness, when such evidence was before the Commission – permission to appeal granted – appeal upheld – decision at first instance quashed – on reconsideration of the decision, the Full Bench found that a proper balancing of relevant matters for the purposes of s.387 of the FW Act results in a conclusion that the dismissal of the employee was not unfair – the employee's unfair dismissal application was dismissed.

Appeal by Virgin Australia Airlines P/L against decision of Spencer C of 14 July 2022 [[2022] FWC 1846] Re: Blackburn

C2022/5395 | Sydney | [2022] FWCFB 232
Catanzariti VP | | 12 December 2022
Dobson DP
Simpson C

2 CASE PROCEDURES – adequate reasons – s.604 Fair Work Act 2009 – appeal – Full Bench – appellant filed unfair dismissal application at first instance – respondent raised five jurisdictional objections at first instance, being: 1) the application was not lodged within time, 2) the appellant was not an employee, 3) the appellant was not dismissed, 4) the appellant had not completed the minimum employment period, and 5) the appellant earned more than the high income threshold (HIT) – Deputy President determined the HIT question would be decided first on assumption appellant was an employee despite the jurisdictional objection – found appellant earned more than HIT and dismissed application – appeal commenced – Full Bench satisfied permission to appeal was in public interest as appeal raised issue of general application concerning proper approach to considering and determining jurisdictional objections to unfair dismissal applications – determining HIT question in advance of other objections was error of principle and Deputy President failed to take other material considerations into account – Deputy President failed to consider if application was made within time, whether the appellant was an employee, and if so who her employer was, and whether the appellant was dismissed – error of *House v King* kind identified – Full Bench noted to let the decision stand would be an injustice to both parties as the application was dismissed without required consideration and respondent succeeded on an unsound basis – Full Bench observed question whether application filed in time is not strictly a jurisdictional objection, rather it determines whether the application is validly made – whether within time contested at first instance but not determined – further observed that an unfair dismissal applicant must be an employee – whether an employee contested at first instance but not determined – Full Bench noted assumption can be made of an employment relationship for the purpose of questioning whether an application was filed within time but this assumption cannot be made in respect of other jurisdictional objections – consideration must be to whether the unfair dismissal application was made within time and then whether the applicant is an employee and, if necessary, who the employer was – other jurisdictional objections can be considered after those preliminary matters determined – permission to appeal granted – first instance decision quashed – matter referred for redetermination.

Appeal by Herc against decision of Dean DP of 2 August 2022 [[2022] FWC 1997] Re: Hays Specialist Recruitment (Australia) P/L

C2022/5849 | Sydney | [2022] FWCFB 234
Catanzariti VP | | 12 December 2022
Asbury DP
Lake DP

3 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – employment – ss.604, 739 Fair Work Act 2009 –

appeal – Full Bench – appeal against decision concerning s.739 application for Commission to deal with a dispute arising under enterprise agreement or award in which appellant sought determination of whether he was an employee of respondent – Commission at first instance found appellant not an employee – whether conclusion correct – appellant undertook 12-month specialty training programs for which university pays stipend – programs each the subject of comprehensive written contracts – whether arrangements properly characterised as employment relationship – Full Bench identified three relevant principles – *first*, where relationship the subject of comprehensive written contract, characterisation of relationship is to be undertaken solely by reference to rights and obligations specified therein [*Personal Contracting*] – *second*, the 'irreducible minimum of mutual obligation' required to establish an employment relationship is employer must, under contract, be obliged to pay remuneration as consideration for services employee obliged to perform – *third*, characterisation of relationship under contract not determinative – Full Bench determined application of second principle critical to resolution of appeal – whether stipend provided payable as consideration for performance of work by appellant such as to constitute "work-wages" bargain – though not determinative, description of payment as "stipend" must be taken into account as indicative of purpose in context of contractual arrangements involving university – reference to award or bursary providing "similar benefits" suggests purpose to provide financial incentivisation and support for studies – none of the contractual obligations imposed in consideration for payment of stipend expressed as concerning performance of work – many related to undertaking of postgraduate degree – existence of employment-like provisions not determinative without fundamental element of employment relationship – Full Bench found contractual arrangements not "work-wages" bargains but of a different character – permission to appeal granted as matter raises issues of novelty and complexity – Commission's decision at first instance correct – appeal dismissed.

Appeal by Tracey against decision of Williams C of 11 August 2022 [[2022] FWC 2094] Re: Murdoch University

C2022/6026
Hatcher AP
Clancy DP
Young DP

Sydney

[2022] FWCFB 220
30 November 2022

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4 ENTERPRISE BARGAINING – protected action ballot – eligibility – ss.437, 443 Fair Work Act 2009 – application for a protected action ballot order – Transport Workers Union (TWU) applied for a protected action ballot order for employees of Cleanaway Operations P/L (respondent) who are members of, and represented by, the TWU for a proposed agreement – respondents' site is responsible for safe treatment and disposal of health related waste – respondent opposed application on basis TWU cannot be the bargaining representative for the sites' plant operators – respondent accepted TWU as a bargaining representative for truck drivers – Commission identified the issue as whether the TWU is entitled to represent the interests of plant operators under union rules and whether those employees can therefore be part of the 'group of employees' as per s.443 of the FW Act – TWU questioned whether Commission had scope to determine whether an employee organisation is entitled to

represent the industrial interests of all employees where it is accepted that the employee is bargaining for at least one employee – TWU submitted it was entitled to represent the industrial interests of the plant operators according to its own Rules as the plant operators completed work in connection with driving and transporting – the TWU submitted the word 'connection' is to be construed broadly – TWU submitted the test is that plant operators are required to have a 'functional connection of significance to the work performed in relevant industry' – TWU submitted the relevant industry is the 'transport of materials by vehicles' – TWU argued connection test is satisfied by plant operators loading and unloading materials onto vehicles – TWU contended the respondent falls both within the waste management industry and in the transport industry and it is not necessary to decide which is predominant – Respondent submitted the TWU application ignores jurisdictional requirements the only that the employees to be balloted are exclusively those whose industrial interests are capable of being represent by the TWU – respondent disagreed it falls into transport industry and instead contends it is exclusively in the waste industry – respondent contends that when determining industrial coverage, the 'substantial character' of the employer's business is to be considered – respondent submits that a classification of 'transport industry' would mark a significant departure from established demarcations and may have implication for modern awards coverage – respondent submitted the plant operators are employed with the principal purpose of waste treatment, not to load and unload – respondent submitted an activity such as loading and unloading cannot be treated as isolated from surrounding context – respondent submitted it is insufficient for the TWU to rely on the mode of transport to the site to establish relevant connection – respondent further submitted if the Commission was to agree with the respondent, the TWU's attempt to represent the plant workers would amount to misrepresentation – accordingly, respondent submitted TWU were not genuinely trying to reach agreement – Commission considered evidence from both sides – after reviewing witness statements, cross examination and CCTV footage, Commission found loading and unloading trucks was not a responsibility of the plant operators – Commission considered work performed by plant operators critical to the outcome – Commission found TWU must be entitled to represent the industrial interests of all the employees it seeks to represent – Commission found plant operators are not employed in or in connection with transport industry and therefore cannot have their industrial interests represented by the TWU – Commission stated that had the evidence supported a finding plant operators were substantially involved in the loading and unloading of trucks, the outcome would have been different – Commission considered decision in *Harnischfeger of Australia P /L v CFMEU* – Commission stated agreement which covers both plant operators and truck drivers could still be reached and it is not uncommon for an agreement to include more than one union – despite outcome, Commission satisfied TWU had been genuinely trying to reach an agreement and accordingly made a protected action ballot order for those employees able to be represented by the TWU.

5 GENERAL PROTECTIONS – dismissal dispute – ss.365, 386 Fair Work Act 2009 – applicant was young school leaver employed as casual waiter in a Korean restaurant – applicant suggested he was forced to resign as his manager heavily patted him on the back during shifts and later threatened him – jurisdictional objection made by the respondent that the applicant was not dismissed **–** a person has been dismissed if they resigned from their employment, but was forced to do so because of conduct, or a course of conduct engaged by the employer [*Tavassoli*] – the test for forced resignation is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign [*Tavassoli*] – however, where the conduct in question is ambiguous and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised [*Barkla*] – applicant submitted that the conduct in question was repudiatory, or in any event, unreasonable – in circumstances whereby an applicant is claiming repudiation, the relevant test is, objectively, whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it [*NSW Trains*] – Commission held that the conduct in question was not repudiatory as the nature and circumstances for the breach did not "strike directly at the heart" of the relationship between the applicant and the respondent – Commission held that the conduct in question, although deemed to be at a lower level of seriousness, was still unreasonable – Commission rejected respondent's submission that conduct in question was due to cultural difference – observed in Australian workplaces there is no basis for physically handling an employee and persons managing a business must proactively adapt their cultural behaviour to avoid unintended intimidation or threats – found there was a material risk the applicant could experience similar conduct in the future and options other than resignation were, objectively, not reasonably available – observed, unlike in the case of an older or experienced employee, telling a manager to stop inappropriate conduct was a heavy burden for young inexperienced school leaver – Commission satisfied that the applicant had no effective choice but to resign – Commission stated finding made on particular facts and not as general proposition that all forms of unwelcome touching give rise to a forced resignation – applicant therefore dismissed – respondent's jurisdictional objection dismissed – matter to be referred to a conference.

Green v KS United P/L

C2022/5621 [2022] FWC 3228
Anderson DP Adelaide 7 December 2022

Other Fair Work Commission decisions of note

Appeal by Young against decision of General Manager of 6 September 2022 [[2022] FWCG 54] Re: Construction, Forestry, Maritime, Mining and Energy Union

CASE PROCEDURES – appeals – standing – s.604 Fair Work Act 2009 – appeal – Full Bench – appellant sought permission to appeal against General Manager's decision to certify alterations to rules of Maritime Union of Australia Division of Construction,

Forestry, Maritime, Mining and Energy Union (Respondent) in accordance with s.159(1) of Fair Work Registered Organisations Act 2009 (Cth) – new rules created 2 new full-time offices – appellant opposed rule alteration application in first instance – contended in first instance that process followed by Respondent in securing endorsement of rules alteration was not conducted in accordance with its rules – threshold issue of whether appellant had standing to bring an appeal – Full Bench considered whether appellant was a "person who is aggrieved" within s.604(1) FW Act – *Right to Life* and *Argos* cited – Full Bench rejected appellant's contention that he was "a person who is aggrieved" for 5 reasons – first that he was unable to point to any legal rights, privileges, permissions or interests of his that would be affected by the Decision – second that he was unable to establish that his interest rises above that of an ordinary member of the public – third that he did not show that the Decision would have an effect on his interests different to the effect on the public at large – fourth that he was not a party to the matter before the General Manager – fifth that his submission that he was denied procedural fairness was without merit – Full Bench concluded that appellant does not have standing to bring an appeal the Decision as he is not a "person who is aggrieved" within the meaning of s.604(1) FW Act – appeal dismissed.

C2022/6539 [2022] FWCFB 222
Gostencnik DP Melbourne 2 December 2022
Masson DP
Simpson C

Applied Medical Australia P/L v Monaghan

CASE PROCEDURES – costs – lawyers and paid agents – ss.400A, 611 Fair Work Act 2009 – application for costs orders – related to unsuccessful claim under s.394 for unfair dismissal remedy – worker had been dismissed in connection with their status as an 'unvaccinated person' – employer applied for costs order under ss.400A and 611(2) Fair Work Act – order seeks that worker pay some of employer's costs in defending the unfair dismissal application – Commission may order costs against a party if it is satisfied that an unreasonable act or omission caused the other party to the matter to incur costs (s.400A) – Commission may also order that a person bear some or all the costs if an application is made or responded to vexatiously or without reasonable cause or it should have been reasonably apparent that the application or response had no reasonable prospects of success (s.611) – employer submitted that the unfair dismissal application was vexatious, without reasonable cause and had no prospects of success – whether it is 'reasonably apparent' that an application or response to an application has no reasonable prospects of success requires an objective test [*Baker*] – Commission determined the worker did not act vexatiously in their unfair dismissal application – an application 'is not without reasonable cause just because it fails or is not accepted' – Commission held unfair dismissal application was not made without reasonable cause – Commission rejected employer's argument that the unfair dismissal application had no reasonable prospects for success – application for costs under s.611(2) refused – employer then relied upon s.400A – employer argued that worker failed or refused to discontinue their application numerous times, sought last minute adjournments, failed to comply with Commission directions and was combative during proceedings – argued that worker's failure to comply with directions constituted an unreasonable omission and caused costs to be incurred by the employer – worker argued that the financial, psychological and personal suffering endured during proceedings should persuade the Commission to refuse the costs order – Commission rejected this and concluded in favour of the employer – application allowed – costs order awarded under s.400A.

U2022/7842 [2022] FWC 3263
Gostencnik DP Melbourne 15 December 2022

Necovski v Department of Justice and Community Safety

TERMINATION OF EMPLOYMENT – incapacity – valid reason – vaccination – remedy – ss.385, 387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as Youth Justice Worker since 25 May 2020 – applicant's primary duties involved providing safety, security and supervision to persons at youth justice centres – applicant dismissed due to inability to perform role and non-compliance with vaccination policy – vaccination policy introduced on 15 October 2021 prohibiting employees to attend workplace without two doses of vaccine – accommodations were available for 'excepted persons' – applicant received first dose on 21 October 2021 but suffered adverse effects – applicant was advised against receiving further MRNA vaccinations – applicant was considered an 'excepted person' – medical advice provided to respondent – applicant requested alternative duties as an 'excepted person' under policy – respondent maintained applicant was unable to perform inherent requirements of role and no suitable adjustments or alternative duties were available – further communication between parties relating to compliance with company policy and applicant's inability to comply – Commission observed lawfulness and reasonableness of directions provided by vaccination policy [*Roman*] – Commission held direction to assess capacity is lawful – vaccination policy health and safety concerns deemed reasonable [*Mt Arthur Coal*] – Commission satisfied applicant could not perform inherent requirements of role – respondent had valid reason to dismiss applicant due to applicant's capacity – other relevant circumstances considered – Commission found dismissal was unfair and unreasonable as respondent failed to adequately provide reasonable adjustments or suitable alternative duties for applicant as an 'excepted person' – remedy considered – reinstatement inappropriate – no deductions from compensation – application granted – compensation awarded.

U2022/6757 [2022] FWC 3155
Clancy DP Melbourne 29 November 2022

Lavery v Cybermerc P/L

TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed by respondent as Director of Education and Research since October 2019 – applicant worked predominately as Program Director for a contract with the Australian Defence Force (Defence) providing support for a Cyber Gap Program – on 17 February 2022, Defence personnel contacted respondent raising concerns about applicant's conduct and unprofessional behaviour – inappropriate behaviour was further discussed during a meeting between Defence and respondent on 19 February 2022 – applicant stood down on 19 February 2022 as a result of unprofessional/inappropriate conduct allegations and concerns about delivery of contract requirements – letter of allegations provided to applicant on 21 February 2022 with response requested by COB 22 February 2022 – applicant responded to allegations and noted that some lacked particulars to allow for proper response – respondent sent show cause letter on 25 February 2022 advising that no further particulars were available and advising that Defence had directed that applicant not return to Cyber Gap Program and that no alternative position had been identified – applicant's lawyer provided response to show cause letter on 1 March 2022 requesting applicant return to work and be deployed to a new project – applicant was notified of dismissal on 9 March 2022 – applicant claimed that there was no valid reason for dismissal and therefore dismissal was unfair – applicant submitted that he had responded to previous letter of allegations, no particulars to allegations of inappropriate behaviour and no genuine inquiry undertaken – applicant submitted that he could be placed on an alternative project – respondent claimed valid reason for dismissal as had to consider company reputation – applicant worked solely on Cyber Gap Program with Defence and was responsible for contract – Defence had requested that applicant be removed from project due to issues with delivery of contract requirements and inappropriate behaviour – respondent submitted that as applicant could no longer work on Cyber Gap program no alternative suitable role – Commission considered criteria within Fair

Work Act – satisfied that applicant was dismissed based on capacity to work on Cyber Gap Program and not his conduct – satisfied that at time of dismissal applicant worked exclusively on Cyber Gap Program – Commission considered request from Defence for applicant not work on Cyber Gap Program – found valid reason for dismissal as applicant was unable to continue conduct on program – Commission satisfied applicant was notified of reasons for dismissal although timeframes for respondent to reply were short, opportunity to response still provided – Commission found applicant's dismissal was not unfair, harsh, unjust or unreasonable – applicant dismissed.

U2022/3702 [2022] FWC 3196
Dean DP Canberra 5 December 2022

Wyss v Omnigrip Direct P/L

TERMINATION OF EMPLOYMENT – misconduct – employer policies – ss.385, 387, 394 Fair Work Act 2009 – application for an unfair dismissal remedy pursuant to s.394 of the Fair Work Act – applicant employed by respondent between April 2021 to 16 August 2022 – respondent maintained a policy of prohibiting the consumption of alcohol during work hours, unless otherwise expressly permitted by respondent (Policy) – on 4 August 2022 applicant requested permission from respondent to take his team to a company lunch (Company Lunch) – this request was permitted by respondent on the express condition that the Policy was observed – applicant submitted that he reminded staff of the Policy but that staff had disregarded this reminder – applicant further submitted that he was not 'on the clock' as he had 'finished work for the day' so he ordered an alcoholic beverage – respondent submitted that it received correspondence regarding a breach of the Policy at the Company Lunch and subsequently commenced investigations – following the investigations respondent concluded that a breach of the Policy by applicant and team members had occurred at the Company Lunch – on 16 August 2022 applicant and his support person were invited to a meeting with respondent to discuss the Company Lunch (Meeting) – applicant submitted that respondent outlined a 'version of events' and did not provide him with the chance to speak – respondent submitted that applicant said that he had 'mind lapse' when questioned regarding the breach of the Policy – applicant summarily dismissed for serious misconduct in failing to follow a direction and breach of Policy – Commission found that the direction not to consume alcohol lawful and reasonable – Commission found that applicant did not inform team members of the prohibition on alcohol consumption during the Company Lunch and subsequently breached the Policy with little regard to respondent's directions – Commission found that a breach of the respondent's Policy had occurred and that despite 'finishing work for the day' applicant still consumed alcohol during working hours per his contractual working hours – Commission satisfied that applicant's dismissal was for a valid reason – Commission satisfied that applicant provided with reasons for his dismissal and opportunity to respond to the findings of respondent as evinced by the Meeting – Commission satisfied that applicant provided with opportunity to invite a support person to the Meeting – Commission paid particular regard to the lack of remorse shown by applicant for breach of Policy and expressed that immediate dismissal was proportionate given the defiance of the explicit directions of respondent and its policy – Commission noted that despite the team members receiving final warnings for the breach of the Policy, applicant's conduct was 'much worse' given the blatant disregard of the express directions and his position of seniority within respondent's business – dismissal was not harsh, unjust or unreasonable – application dismissed.

U2022/8914 [2022] FWC 3174
Colman DP Melbourne 1 December 2022

Wazir v Monjon Australia P/L

TERMINATION OF EMPLOYMENT – minimum employment period – continuity of employment – ss.383, 384, 394, Fair Work Act 2009 – respondent raised jurisdictional objection claiming that applicant was not entitled to unfair dismissal protection as per s.382 – argued applicant was a casual employee and not employed for minimum employment period of 6 months – applicant worked for respondent as security guard during weekends from March 2014 – applicant resigned in May 2017 but respondent offered casual employment in September 2017 for Saturday shifts – respondent characterised applicant's employment with it as four employment periods: 1. from March 2014 to May 2017, 2. September 2017 to March 2020, 3. December 2020 to 14 January 2022 and 4. 13 March 2022 to 27 July 2022 (date of dismissal) – applicant unable to work from March to December 2020 due to Covid-19 pandemic and from January to March 2022 as he attended brother's wedding overseas – applicant argued that he was continuously employed by respondent from 2017 – respondent submitted that gaps in applicant's employment meant that only final period is relevant – respondent argued that its casual employees are engaged on a 'shift to shift' basis under its agreement – Commission referred to *Shortland* which notes "established sequence of engagements" of casual employees are "broken only" when either party "makes it clear to the other… that there will be no further engagements" – Commission found there is no evidence that respondent's action definitively brought the casual employment relationship to an end in March 2020, applicant was advised he was on "standby" – respondent's actions in March 2020 also contrary to termination in July 2022, where it made 2 phone calls to applicant, issued termination letter and requested applicant to return work uniform – respondent also argued that applicant was not employed between 14 January and 13 March 2022 and its practice was to terminate employment of casual employees who went on leave for over four weeks – Commission found there was no evidence that respondent's policy was to terminate casuals who went on longer leave and that final period from March to July 2022 is a new casual engagement – Commission satisfied that applicant's employment was continuous between September 2017 to July 2022 – breaks during March to December 2020 and January and March 2022 constitute an unpaid authorised absence and do not interrupt continuous service, although it is not added to service length – found that applicant is a "regular casual employee" who had "reasonable expectation of continuing employment by the [respondent] on a regular and systematic basis" as per s.384(2)(a)(i) and (ii) of the Act – Commission satisfied applicant has completed minimum employment period and is protected from unfair dismissal – respondent's jurisdictional objection dismissed – applicant's unfair dismissal application will progress.

U2022/8432 [2022] FWC 3180
Millhouse DP Melbourne 7 December 2022

Zucco v Mariana Chedid t/a Brulee Patisserie

GENERAL PROTECTIONS – dismissal dispute – roster notification – ss.365, 386 Fair Work Act 2009 – application to deal with contraventions involving dismissal – jurisdictional objection of no dismissal raised – whether applicant dismissed – whether action of employer principal contributing factor leading to termination of employment – applicant worked pursuant to roster published weekly via WhatsApp group – on 18 June 2022 applicant advised respondent she had injured herself and was not capable of attending rostered shift – after spending time with applicant on 19 June, and learning applicant's injury was self-inflicted, respondent reasonably formed view applicant not in fit state to perform usual duties – applicant not allocated shifts in weeks commencing 20 and 27 June on this basis – respondent invited applicant to attend work on 21 June to do food photography – applicant did not attend or notify respondent – on 26 June applicant sought conversation with respondent – respondent attempted to arrange meeting on 27 June 2022 – applicant did not attend meeting and did not respond to text message from respondent – respondent removed applicant from WhatsApp group on 2 July 2022 – respondent submitted applicant's failure to attend on 21 and 27 June, coupled with failure to communicate,

demonstrated applicant no longer intended to be employed and removal from WhatsApp reflected this conclusion – Commission found it was not reasonably open for respondent to form this conclusion as circumstances not demonstrative of applicant no longer seeking to be employed – shift on 21 June not of the kind applicant would ordinarily undertake, no agreed position as to meeting on 27 June reached and respondent on notice of applicant's health issues – WhatsApp group was the method of communicating rosters to employees without which applicant could not be notified of work or participate in ongoing employment – Commission satisfied removal from WhatsApp Group the principal contributing factor ending applicant's employment – applicant dismissed at initiative of employer – jurisdictional objection dismissed.

C2022/4028 [2022] FWC 3272
Millhouse DP Melbourne 14 December 2022

Johnson v PG & S Linehaul P/L

TERMINATION OF EMPLOYMENT – genuine redundancy – constructive dismissal – ss.386, 394 Fair Work Act 2009 – applicant was a full-time local delivery truck driver working for the respondent – applicant's role in effect became redundant after client contract lost – applicant challenged dismissal – respondent raised jurisdictional objection claiming that applicant was not dismissed pursuant to s.386(1)(a) – the respondent offered alternate interstate delivery and 'yard' work which was not accepted by applicant – applicant submitted he was constructively dismissed as respondent breached the employment contract by failing to offer suitable full time work – respondent argued applicant was not made redundant and it made attempts to retain applicant by offering other work – Commission noted wording 'constructive dismissal' not used in Act, but found that respondent's failure to provide applicant with (and pay him for) full time work was a breach of the contract – Commission observed redundancy can give rise to a repudiation – relevant test is 'whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation of either the contract as a whole or of a fundamental obligation under it [*James*] – applicant's position became redundant in respondent's organisation due to reduced operational requirements – applicant was ready, willing and able to work the terms of his contract – respondent did not provide suitable alternative work or otherwise redeploy applicant – this constituted a repudiation – respondent's repudiation of contract was accepted by the applicant, thus terminating the contract – Commission agreed that applicant taking on respondent's offered roles would constitute a significant alteration of the terms of the contract – this proposed variation of terms was not accepted by the applicant – found that applicant did not resign but was constructively dismissed according to s.386(1)(a) – jurisdictional objection dismissed – matter to proceed for merits determination.

U2022/8211 [2022] FWC 3132
Millhouse DP Melbourne 25 November 2022

Dupesovski v Motor Traders Association of New South Wales

TERMINATION OF EMPLOYMENT – genuine redundancy – ss.389, 394 Fair Work Act 2009 – applicant filed an application for unfair dismissal remedy after his Area Manager role was made redundant – applicant asserted that his dismissal from the respondent was unfair as his role should not have been selected for redundancy and/or there were suitable alternative roles – respondent submitted that the dismissal was a case of genuine redundancy within meaning of s.389 – Commission considered three questions within the scope of s.389 – in short: was the job no longer required due to changed operational requirements?; did respondent comply with its award or agreement consultation obligations?; and would it have been reasonable to redeploy the applicant? – respondent submitted it had moved to a digital customer relations system that caused an Area Manager role to become redundant – respondent made the applicant's job redundant as it was least disruptive to its operations – held genuine operational reason for redundancy – held no modern award or enterprise

agreement applied to applicant's employment – applicant submitted that redeployment was possible in a lesser role within the respondent's enterprise – relevant time for purpose of reasonable redeployment test is time of dismissal [*Honeysett*] – Commission held that available positions were not suitable as the applicant either lacked qualifications and/or were not available at the time of dismissal – held redundancy was genuine – dismissal not unfair – application dismissed.

U2022/8380		[2022] FWC 3185
Boyce DP	Sydney	2 December 2022

Tomkins v Sandalford Wines P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – forced resignation – ss.385, 386, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as Restaurant/Bar Manager since 22 March 2021 – 'long-standing' company policy where respondent retained staff 'tips' – applicant raised tip concerns with CEO and HR consultant – ethics and legality of company policy questioned – applicant dissatisfied with investigation – requested adequate dispute resolution as per contract – working relationship between parties deteriorated further – applicant raised bullying and harassment concerns by management – complaints unresolved in timeframe proposed by applicant – applicant resigned due to respondent's alleged conduct – applicant's notice period was 8 weeks – during notice period applicant's duties were stripped and she was removed from communications – applicant was then stood down after 2 weeks for remainder of notice period – jurisdictional objection raised by respondent to applicant's submissions – argued conduct was 'reasonable management action' and not designed to force resignation – maintained tip retention occurred prior to applicant's engagement with company – tips were collected and kept in account to be used to support staff events and not treated as company income – Commission considered meaning of dismissal – acts of employer must directly or consequentially result in termination [*O'Meara*] – Commission not required to make findings on bullying under s.789FD *Fair Work Act 2009* [*Celia-O'Keefe*] – Commission considered probability of employer's conduct leaving applicant no effective or real choice but to resign – conduct following resignation, particularly dissatisfaction with management action or decisions, cannot be construed as having contributed to resignation [*Neil-Ashton*] – Commission observed that there was no evidence that the respondent's actions compelled the applicant's resignation – other options available to applicant aside from resignation – Commission not satisfied that applicant had no effective or real choice but to resign due to conduct engaged in by respondent – Commission concluded that the applicant was not dismissed within the meanings of ss.385 and 386 *Fair Work Act 2009* – application dismissed.

U2022/3580		[2022] FWC 3176
Williams C	Perth	8 December 2022

Purves v Queensland Rail Transit Authority T/A Queensland Rail

TERMINATION OF EMPLOYMENT – termination at initiative of employer – harsh – reinstatement – ss.394, 387 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed by respondent for 39 years and at time of dismissal was as a Track Worker at the Queensland Rail Roma Depot and classified as a Rail Safety Worker for the purpose the Rail Safety National Laws (RSNL) – on 24 June 2022 respondent terminated applicant's employment because on 24 March 2022 he provided a positive test result for alcohol during a random test, reading 0.037 BAC at 6:57am and 0.025 BAC at 7:15am, conducted by respondent on reporting for work at Roma depot – respondent contended applicant breached requirement in its alcohol and other drugs policy that all workers must be under the prescribed limit for alcohol of zero BAC when signed on for work, in the workplace, rostered on duty, on call, or when formally representing Queensland Rail at any event or workplace – applicant submitted presenting to work with a BAC of 0.025 not a valid reason for termination

as the effect of the dismissal was severely disproportionate to the gravity of the alleged misconduct and harsh – respondent submitted it had a valid reason for dismissal because it gave the applicant a lawful and reasonable direction by way of its alcohol policy, it had obligations to uphold safety standards in the workplace and comply with its obligations at law, and it considered the breach serious given the applicant performed safety critical work which could have life threatening consequences if undertaken incorrectly – respondent submitted dismissal not harsh and opposed reinstatement or compensation – Commission considered *Selvachandran* v *Petron Plastics P/L*, *Sydney Trains v Gary Hilder*, *B, C and D v Australian Postal Corporation T/A Australia Post*, and *Perkins v Grace Worldwide (Aust) P/L* – Commission accepted respondent's alcohol standard was lawful and reasonable considering the nature of the rail industry, including the types of hazards and the potentially extreme consequences of accidents, the regulatory impost on the respondent, and the applicant's role – Commission satisfied for the purposes of the RSNL that applicant would have fallen within the meaning of attempting to carry out rail safety work by reporting for work on the morning of 24 March 2022 – Commission satisfied applicant's breach of alcohol policy was of sufficient gravity to constitute a valid reason for dismissal and the termination process was procedurally fair – Commission considered applicant's age, limited literacy and formal qualifications, reliance on housing supplied by respondent, financial circumstances, prospects of finding employment given respondent's dominance in rail industry, previously unblemished work record, and honest belief he had a zero BAC reading when he reported for work on 24 March 2022 because he had followed his usual drinking pattern which had not previously resulted in a positive reading – Commission noted RSNL did not impose termination and respondent's policy did not make termination the only disciplinary option available and allowed for exceptions – Commission concluded dismissal was too harsh and disproportionate to the gravity of the misconduct – Commission noted evidence applicant is a person who follows strict routine, never failed a test before, showed remorse and contrition, and the BAC reading was relatively low – satisfied that should applicant be reinstated he would adjust his behaviour to avoid reporting to work without a zero BAC and would highly likely remain employed with the respondent until his retirement – ordered applicant be reinstated and continuity of employment maintained – ordered respondent restore 50% of lost pay to the applicant, including superannuation contributions on that amount – reduction recognised applicant's failure to comply with the policy constituted misconduct and sends message to others about failure to comply with the policy.

U2022/6996 [2022] FWC 3343
Simpson C Brisbane 21 December 2022

Health Services Union v Paston P/L t/a Meredith House Nursing Home

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – jurisdiction – s.739 Fair Work Act 2009 – applicant lodged application for Commission to deal with dispute regarding *Meredith House Aged Care, NSWNMA, ANMF NSW Branch and HSU New South Wales Branch Enterprise Agreement 2017* (Agreement) – employees of respondent were advised by letter on 9 March 2022 that the residential aged care facility would close on 24 April 2022 – applicant raised employee concerns about redundancy and other entitlements with respondent – respondent assured applicant that entitlements would paid in accordance with FW Act – after termination, applicant received reports about incorrect calculations and non-payment of cancelled shifts – lodged application on 3 May 2022 stating, in part, certain notice entitlements were not paid and certain calculations were not consistent with Agreement – respondent raised two jurisdictional objections – first, that matter related to former employees of respondent so Agreement no longer applied – second, that applicant had not followed dispute resolution procedure (cl.9) in Agreement – regarding first jurisdictional objection, respondent submitted that cl.9 did not apply to former employees – Commission considered whether dispute settlement clause was intended to apply to current employees only *[North Goonyella]* and whether dispute was known prior to termination of employment *[Jajoo]* – noted that there is no capacity under

cl.9 of Agreement for a former employee or representative to initiate a dispute resolution process – noted that dispute relating to provision of payment summaries was lodged after relevant employees were terminated – noted that it was not apparent that dispute under cl.9 of Agreement relating to underpayment of personal leave had been initiated prior to employee's termination – determined that Commission does not have jurisdiction to deal with that matter – regarding second jurisdictional objection, respondent submitted that dispute raised by applicant related to concerns resulting from termination and was lodged after termination of employees – Commission noted that that mandatory step in cl.9.2 of Agreement did not take place – not satisfied that applicant undertook necessary steps in cl.9 of Agreement as a precondition for referring dispute to Commission – Commission satisfied that dispute before it related to concerns raised after termination – determined that dispute about whether certain employees received notice and redundancy pay in accordance with Agreement was not initiated prior to termination – determined that it does not have jurisdiction to deal with matters in dispute – Commission observed that it is a legal requirement of respondent to calculate redundancy payments in accordance with Agreement – observed that it is a legal requirement of respondent to pay a former employee their notice period in accordance with Agreement – observed that it is a legal requirement of respondent to provide a payment summary to a former employee – observed that applicant may wish to raise concerns with the appropriate regulator, Fair Work Ombudsman or court of competent jurisdiction if allegations of underpayment are substantiated – application dismissed.

C2022/2737 [2022] FWC 3344
Matheson C Sydney 20 December 2022

McIlwain v Woolworths Group Limited

TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – ss.387, 394, 396 Fair Work Act 2009 – applicant dismissed after not providing COVID-19 vaccination or exemption information to the respondent – s.394(2) Fair Work Act imposes a procedural condition that an application must be made within 21 days of the dismissal – unfair dismissal application lodged outside of the legislative timeframe – respondent raised jurisdictional objection as application was lodged out of time – Commission held applicant had satisfied legislative requirement of filing application within the required timeframe given the final day of the 21-day period fell on the weekend – where final day falls on a weekend or public holiday the prescribed time is extended until the next business day [*Transdev*] – s.394(2) respondent jurisdictional objection dismissed – Western Australian Government had issued the Critical Business Worker (Restrictions on Access) Directions (No 2) (Directions) effective 1 February 2022 – nature of the applicant's work required him to disclose his vaccination or exemption status to the respondent as per the Directions – Directions were issued by Chief Health Officer pursuant to s.190(1)(p) Public Health Act (WA) – respondent submitted that it was required to act in compliance with the Directions which extended to the work site and role of the applicant – respondent submitted that it required the applicant to provide evidence in support to attend the work site in a lawful manner – applicant failed to provide evidence in support to attend the work site and the respondent believed that the applicant could no longer perform the inherent requirements of the role – Commission held that the respondent had a valid reason for the dismissal citing that the applicant's arguments were not original and were inconsistent with the findings of the Courts – Commission held that the respondent did provide the applicant with a notification of the reason for the dismissal in explicit and plain and clear terms – Commission held that the applicant was not dismissed in an unfair manner per s.385 Fair Work Act.

U2022/3957 [2022] FWC 3060
Schneider C Perth 28 November 2022

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Websites of Interest

AUSTLII - www.austlii.edu.au/ - a legal site including legislation, treaties and decisions of courts and tribunals.

Australian Building and Construction Commission – www.abcc.gov.au/ - regulates workplace relations laws in the building and construction industry through education, advice and compliance activities.

Australian Government - enables search of all federal government websites - www.australia.gov.au/.

Department of Employment and Workplace Relations - https://www.dewr.gov.au/workplace-relations-australia - provides general information about the Department and its Ministers, including their media releases.

Federal Register of Legislation - www.legislation.gov.au/ - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

Fair Work Act 2009 - www.legislation.gov.au/Series/C2009A00028.

Fair Work (Registered Organisations) Act 2009 - www.legislation.gov.au/Series/C2004A03679.

Fair Work Commission - www.fwc.gov.au/ - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

Fair Work Ombudsman - www.fairwork.gov.au/ - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

Federal Circuit and Family Court of Australia - https://www.fcfcoa.gov.au/.

Federal Court of Australia - www.fedcourt.gov.au/.

High Court of Australia - www.hcourt.gov.au/.

Industrial Relations Commission of New South Wales - www.irc.justice.nsw.gov.au/.

Industrial Relations Victoria - www.vic.gov.au/industrial-relations-victoria.

International Labour Organization - www.ilo.org/global/lang--en/index.htm - provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission - www.qirc.qld.gov.au/index.htm.

South Australian Employment Tribunal - www.saet.sa.gov.au/.

Tasmanian Industrial Commission - www.tic.tas.gov.au/.

Western Australian Industrial Relations Commission - www.wairc.wa.gov.au/.

Workplace Relations Act 1996 - www.legislation.gov.au/Details/C2009C00075

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