FWC Bulletin

2 November 2023 Volume 11/23 with selected Decision Summaries for the month ending Tuesday, 31 October 2023.

Contents

Reminder: 2 months until sunsetting of 'zombie agreements'

On 7 December 2023, certain agreements made before 2010 that are still in operation ('zombie agreements') will automatically terminate ('sunset') unless an application is made to the Fair Work Commission before 7 December 2023 to extend their operation.

It is important for you to know if this affects you.

If a 'zombie agreement' sunsets, the legal minimum pay and conditions for employees that were covered by that agreement are very likely to change.

To find out more, visit our website for information about:

- The sunsetting of pre-2010 agreements ('zombie agreements') on 7 December
- What to do if you have a pre-2010 agreement that continues to operate (a 'zombie agreement')

We recommend you subscribe to our announcements and follow us on LinkedIn to keep up to date.

'Zombie agreements' interactive checklist and fact sheet

We have new resources to help employers and employees find out if they may be affected by the sunsetting of pre-2010 agreements.

On 7 December 2023, certain agreements made before 2010 that are still in operation ('zombie agreements') will automatically terminate ('sunset') unless an application is made to the Fair Work Commission before 7 December 2023 to extend their operation.

Go to:

- Interactive checklist: Sunsetting of 'zombie agreements'
- Fact sheet: Sunsetting of 'zombie agreements' (PDF)

It is important for employers and employees to know if this affects them.

If a 'zombie agreement' sunsets, the legal minimum pay and conditions for employees that were covered by that agreement are very likely to change.

Find out more about the sunsetting of pre-2010 agreements ('zombie agreements').

We recommend you subscribe to our announcements and follow us on LinkedIn to keep up to date.

Annual Report 2022-23 published

On 18 October 2023 the Fair Work Commission published our annual report for the 2022-23 financial year following its tabling in the Australian Parliament.

The report is now available from the Annual Reports page on our website.

Resources available in community languages

We recently published resources to help those from culturally and linguistically diverse backgrounds better understand our role and how we can help them. These include an:

- Animation
- Factsheet
- 3 social media tiles.

The resources are available in English and have been professionally translated by NAATI accredited translators into 28 community languages. The languages were chosen based on 2021 Census data and our own internal data regarding interpreter requests.

We are committed to continually improving the way we deliver information to meet the diverse needs of the Australian community. The development of these resources in community languages is part of our broader strategy to provide users with the right information, at the right time, and in the right format.

You can access these resources on our Information in your language page.

We will explore opportunities to expand on these resources over the coming year. If you have any feedback or suggestions, please contact us. We recommend you subscribe to our announcements and follow us on LinkedIn to keep up to date.

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 Tuesday, 31 October 2023.

1 ENTERPRISE BARGAINING – bargaining dispute – intractable bargaining declaration – ss.234, 235 Fair Work Act 2009 – Full Bench – application for an intractable bargaining declaration in respect of bargaining with respondent for *Fire Rescue Victoria, United Firefighters' Union Operational Staff Agreement* – respondent agreed declaration should be made – application validly made after end of minimum bargaining period – Commission has dealt with dispute in two s.240 proceedings – whether no reasonable prospect of agreement being reached – consideration requires an evaluative judgement that it is rationally improbable an agreement will be reached – applicant believed it is entitled to remuneration outcome passing on value of efficiencies said to be in amount of $117 million to employees – belief engendered by respondent in negotiations – however, respondent cannot make offer it is not authorised to make by Victorian Government – it is clear Minister will not authorise offer meeting applicant's expectations on basis it is inconsistent with 2023 Wages Policy – applicant's response to offer on 7 August 2023 demonstrated it will not discuss any proposal inconsistent with previously agreed approach – Full Bench satisfied bargaining had reached an impasse – whether reasonable in all circumstances to make declaration – consideration requires an assessment of what is 'agreeable to reason or sound judgment' in context of relevant matters and conditions of case – views of bargaining representatives significant but not necessarily determinative – Full Bench satisfied it was reasonable in all the circumstances for the following reasons – refusal to make declaration might lead to protected industrial action and respondent's firefighting services are critical to public safety – bargaining has been occurring for three years – respondent's change of position on efficiencies issue has embittered industrial relations within organisation – best resolved by speedy arbitration – parties previously prepared for arbitration on efficiencies issue and would be substantially prepared for arbitration on issue – bargaining representatives for proposed agreement agree declaration should be made – all s.235(1) preconditions for making of declaration satisfied – no matter identified weighing against making of declaration – declaration issued – whether circumstances justify specification of post-declaration negotiating period – Commission required to make intractable bargaining workplace determination as quickly as possible after making declaration or after post-declaration period – any determination must include terms Commission considers still at issue after post-declaration negotiating period or making of declaration – applicant submitted all matters in proposed agreement agreed to other than wages, allowances and related efficiencies issue and therefore a post-declaration negotiating period might be counter-productive by providing respondent opportunity to depart with agreements reached – respondent submitted there are no agreed terms because previous agreements were subject to Government approval and

therefore a post-declaration negotiating period useful to clarify agreed terms for purpose of determination to be made by Commission – the Minister supported respondent's position – Full Bench noted it is not its function in current proceedings to determine what agreed terms and matters still at issue are, that is a matter for Full Bench undertaking arbitration to come – Full Bench concerned radical difference in positions as to what has been agreed to will considerably extend arbitration due to need to first determine the matters to be arbitrated, compromising Commission's capacity to make determination as quickly as possible – specification of post-declaration negotiation period therefore useful to give parties opportunity to resolve or narrow differences as to what matters need to be arbitrated – Full Bench rejected applicant's contention it would give respondent opportunity to renege on agreed matters given respondent's position there are no agreed terms – Full Bench specified post-declaration negotiating period of two weeks.

United Firefighters' Union of Australia v Fire Rescue Victoria

B2023/771 [2023] FWCFB 180
Hatcher J Sydney 4 October 2023
Asbury VP
Hampton DP

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2 ENTERPRISE BARGAINING – supported bargaining – s.242 Fair Work Act 2009 – Full Bench – the United Workers' Union (UWU), the Australian Education Union (AEU) and the Independent Education Union of Australia (IEU) jointly applied for a supported bargaining application – application specified a total of 64 employers operating in the early childhood education and care (ECEC) sector who will be covered by the proposed multi-enterprise agreement to which the authorisation sought relates – application also specified that the employees who will be covered by the proposed multi-enterprise agreement are those employed by the specified employers who perform the following types of work in the ECEC sector: (1) Work covered by the *Children's Services Award 2010* (CS Award) or the *Educational Services (Teachers) Award 2020* (EST Award) occurring in a long day care setting, but not work performed in the following settings: adjunct care, a stand-alone preschool or a kindergarten, occasional care, out of school hours care, vacation care, mobile centres, or early childhood intervention programs, and not work covered by an enterprise agreement that has not reached its nominal expiry date, including: *Bermagui Pre-School Co-Operative Society Ltd Teachers' Agreement 2020*; *Gowrie Victoria Early Childhood Teachers Enterprise Agreement 2022*; *Victorian Early Childhood Teachers and Educators Agreement 2020*; *Victorian Early Childhood Agreement 2021* (2) Work performed in the ECEC sector in a long day care setting not otherwise covered by the CS Award or the EST Award, including that of a qualified chef or cook – employers fall into 3 categories – employers represented by the Australian Childcare Alliance (ACA), employers who appointed either Community Early Learning Australia Limited (CELA) or the Community Child Care Association (CCCA) to act as their bargaining representative, and G8 Education Limited representing itself – all of the specified employers support the making of the authorisation sought by the applicants – no employee of these employers has appeared in the proceeding to oppose the making of the authorisation – as this was the first application for a supported bargaining authorisation, the Full Bench permitted the

Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (Ai Group) and the Australian Council of Trade Unions (ACTU) to make submissions – the FW Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act), effective from 6 June 2023, to introduce (among other things) a new 'supported bargaining stream' for multi-enterprise agreements in place of the previous 'low paid bargaining stream' – Full Bench considered that the scheme for supported bargaining effected by the SJBP Act represents a modification of the previous low-paid bargaining scheme, rather than a complete innovation, with the objective of rendering the scheme more accessible and therefore more widely-used – the primary material supporting the application is an Agreed Statement of Facts (ASF) signed by the UWU, the IEU, the AEU, the ACA employers, CELA, CCCA and G8 – the ASF set out factual propositions concerning the characteristics of the employers and employees covered by the proposed authorisation and the ECEC sector generally, including in relation to employee pay rates and qualification levels, the regulatory framework and funding arrangements – the ASF identifies the source for the factual propositions stated and also annexes a number of the source documents – no party submitted the Full Bench should not rely on the ASF – the Full Bench accepted the ASF as constituting a reliable evidentiary basis upon which to found our consideration of the application – in considering the prevailing pay and conditions within the relevant industry or sector the Full Bench found, on the basis of the evidence before it, that rates of pay that are the same as, or close to, the minimum award rates of pay in the CS Award or the EST Award, are prevalent in the ECEC sector – further found that low rates of pay prevail in the ECEC sector – in considering whether the employers have clearly identifiable common interests the Full Bench found that the employers specified in the application who would be covered by the proposed agreement clearly had one overriding common interest, namely, they all operated long day care businesses in the ECEC sector – found the existence of clearly identifiable common interests weighed in favour of making the authorisation – in considering whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process the Full Bench was satisfied that the likely number of bargaining representatives for the proposed multi-employer agreement would be consistent with a manageable collective bargaining process – the Full Bench also considered it appropriate to have regard to 4 additional matters – the first was that all the affected employers supported the application and none of the employees that would be affected has advised that they oppose the making of the authorisation sought and weighs in favour of making the authorisation – second was that over 90 per cent of the workforce in the ECEC sector is female, and there was no evidentiary basis to conclude that the position was any different in respect of the workforce of the employers who would be covered by the proposed multi-enterprise agreement – having regard to the earlier finding that low rates of pay prevail in the ECEC sector, granting the authorisation applied for would open the prospect of improving rates of pay of a female-dominated workforce, which would be consistent with that part of the object of the FW Act in s.3(a) concerned with the promotion of gender equality – this weighs in favour of the making of the authorisation – third, the evidence indicated that there had been a relatively low uptake of enterprise bargaining in the ECEC sector due to a number of factors, including that a large proportion of long day care operations are

small in size and lack the management capacity and other resources to engage in bargaining, and funding and pricing constraints – employers in the sector, including (subject to one caveat discussed below) those the subject of this application, clearly need support in order to engage in effective bargaining – this weighs in favour of making the authorisation – fourth, it appeared to the Full Bench that the inclusion of G8 in the group of employers to which the authorisation would apply was somewhat anomalous – although there is no doubt that G8 shares the common interests with the other employers which we have earlier identified, its size makes it significantly different in character to all the other employers – it has some 10,000 employees and presumably has the personnel resources to permit it to engage in enterprise bargaining – the Full Bench held that this consideration weighs, to some degree, against the making of an authorisation which includes G8 – Full Bench were satisfied that it was appropriate for all of the employers and employees that will be covered by the proposed multi-enterprise agreement to bargain together – the only matter which was identified as weighing against the making of the authorisation in the terms applied for was the inclusion of G8, which is an anomalously large employer – however, having regard to the fact that G8 shares the identified common interests with the other specified employers, the Full Bench found that this matter was not sufficient to render other than appropriate that all of the specified employers, including G8, should be allowed to bargain together – supported bargaining authorisation applied for by the UWU, the AEU and the IEU made.

Application by United Workers' Union and Ors

B2023/538 | 2023 FWCFB 176
Hatcher J | Sydney | 27 September 2023
Asbury VP
Hampton DP

3 GENERAL PROTECTIONS – dismissal dispute – territoriality – ss.35, 365 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – respondent raised jurisdictional objection claiming applicant was engaged outside Australia and not an Australian-based employee as per s.35 – respondent is registered Australian public company based in Sydney which manages several lithium mines overseas – applicant was approached by recruiter acting on behalf of respondent – applicant virtually attended three interviews with respondent – applicant employed by respondent to oversee development, construction and commissioning of a project in Argentina – applicant at all times performed duties outside Australia and never attended Australia for recruitment or work purposes – employment contract contained governing law term indicating contract was governed under NSW law – applicant dismissed in January 2023 – applicant submitted Commission not entitled to determine its jurisdiction beyond question of whether or not person has been dismissed – further contended allegations that respondent had contravened Part 3-1 was enough to enliven jurisdiction – Commission agreed that alleged contravention was enough to enliven jurisdiction but rejected applicant's submissions stating that jurisdictional objections must be determined before matter can be dealt with by conciliation [*Milford*] – Commission considered definition of Australian-based employee under s.35, and exception under s.35(3) – Question to be resolved before Commission was meaning of 'engaged outside Australia' and

whether the applicant was 'engaged outside Australia' by the respondent as per s. 35(3) – Commission affirmed s.35(3) contains two limbs being 'engaged outside Australia' and 'to perform duties outside Australia' [*Winter*] – respondent submitted the first limb should be read as 'engaged [while] outside Australia', and issues of where the contract was 'accepted' or 'made' are irrelevant – Commission rejected respondent's submissions affirming plain meaning of word 'engaged' refers to entering into contract or arrangement, and first limb is a question of fact as to whether engagement occurred 'outside Australia' – Commission found applicant was engaged by respondent and considered whether applicant was engaged 'outside Australia' – Commission considered application of ss.13B, 14E of *Electronic Transactions Act 2000* (NSW) and relevant common law as to contract acceptance – applicant submitted that under the NSW Act and at common law, place of formation of contract accepted by email is the place where offeror receives offeree's acceptance email – respondent submitted that as contract was conditional, the place where contract was made was not where respondent received signed copy of contract from applicant, but the place where applicant received copy of signed unconditional contract from respondent – Commission accepted applicant's submissions affirming that 'acceptance' of contractual offer does not occur at time of signing but at time and place that acceptance was communicated (electronically) to the offeror [*Winter*] – Commission found applicant accepted contract when he returned signed copy of contract to respondent, and that execution and return of contract by respondent to applicant to be a formality as contract was already accepted – Commission found place where contract was made and where applicant was engaged to be Sydney – Jurisdictional objection dismissed – Orders issued.

Parimoo v. Lake Resources N.L.

C2023/479		[2023] FWC 2543
Boyce DP	Sydney	4 October 2023

4 TERMINATION OF EMPLOYMENT – small business employer – sexual harassment – ss.387, 388, 394 Fair Work Act – application for an unfair dismissal remedy – applicant injured his back at work – applicant provided Workers Compensation medical certificates to respondent in August 2022 – doctor advised applicant that he was not able to work more than 2 days of 8 hours daily each week – respondent required applicant to work more than the recommended hours as outlined by medical practitioner – applicant wrote to respondent on 1 January 2023 and alleged the de-facto partner of respondent, who was the Business Manager, bullied applicant by requiring him to work more than the recommended hours as per medical advice – applicant received written warning in response to letter – applicant allegedly instigated an argument with Business Manager – on 30 January 2023, respondent advised employees, including applicant, that the business would be sold to the Business Manager – as part of the sale, business would be closed and not reopen until March 2023 – on 1 February 2023, applicant lodged a stop bullying application with Commission in response to Business Manager's conduct towards applicant – on 10 February 2023 respondent conducted a survey in response to stop bullying application – survey participants consisted of seven current employees and one former employee – all participants of the survey were female – all survey participants were either related to

respondent or had relied on respondent to accommodate employment or working holiday visas – survey asked whether applicant had, inter alia, had engaged in name calling towards other employees – seven participants completed the survey – all participants who completed the survey alleged applicant had engaged in sexual harassment – on 12 February 2023, respondent filed a response to the stop bullying application – response included survey responses and a draft letter of termination – when confirming receipt of respondent's response to the stop bullying application, the Case Manager asked respondent to serve the documents on applicant as part of usual document exchange process – respondent interpreted the Case Manager's response to serve letter of termination to applicant – respondent served letter of termination to applicant on 13 February 2023 – letter of termination was dated 12 February 2023 – letter of termination cited sexual harassment allegations – applicant dismissed due to serious misconduct – jurisdictional objection to unfair dismissal remedy application raised by respondent – respondent submitted applicant's termination complied with the Small Business Fair Dismissal Code (the Code) – respondent had relied on a checklist and the correspondence from the Case Manager in dismissing applicant – respondent also submitted that he had formed a belief on reasonable grounds based on the survey responses – applicant submitted the allegations in the survey responses were false evidence – applicant further submitted four of the participants who responded to the survey were encouraged by respondent and the Business Manager to make the allegations of sexual harassment – Commission observed if an employer has not complied with the Code, the claim will be treated the same way as any other unfair dismissal claim [*Explanatory Memorandum*] – in instances of summary dismissal, the Code requires the employer to hold a belief on reasonable grounds that at the time of dismissal, the employee's conduct is sufficiently serious to justify immediate dismissal – assessment of 'reasonable grounds' involves assessment of whether the belief held was reasonable – assessment of 'reasonable grounds' involves considering whether at time of dismissal, employer held that employee's conduct was sufficiently serious to warrant summary dismissal and whether reasonable inquiries were put to employee for a response and whether there was a reasonable investigation into the matter at hand [*Pinawin*] – 'serious misconduct', as alleged by respondent, includes wilful or deliberate behaviour by an employee which is inconsistent with continuation of an employment relationship [*Cole*] – the Code does not afford protection or opportunity for an employer to dismiss an employee in circumstances where employer has taken the required steps in manufacturing a set of circumstances which are deliberately designed to terminate an employee [*Hart*] – survey responses had not been put to applicant – working relationships between applicant and survey participants did not deteriorate during time of alleged conduct – respondent did not further investigate the allegations from the survey and put those allegations to applicant – as the business would not reopen for another month after the completion of the survey, there was no immediate risk of the alleged conduct reoccurring – Commissioner held survey responses were formed based on the dependence survey participants had on the respondent to provide either employment, accommodation, or visa sponsorship – Commissioner also noted Case Manager's direction was not a direction to terminate applicant's employment – Commissioner held respondent's reliance on survey responses did not satisfy test for 'reasonable grounds' – jurisdictional objection dismissed – whether there was a valid reason for dismissal – respondent

sought to rely on additional evidence of sexual harassment which was acquired after applicant was dismissed – a valid reason for a dismissal should be "sound, defensible, or well-founded" and not "capacious, fanciful, spiteful or prejudiced" [*Selvachandran*] – where a dismissal relates to an employee's conduct, it must be demonstrated that the conduct occurred and justified the termination [*Edwards*] – whether an employer is seeking to have further evidence admitted will depend on how the dismissal had been undertaken and whether the new material was available to the employer at the time of the dismissal [*Papaioannou*] – when considering whether alleged conduct amounts to sexual harassment, the alleged conduct must, inter alia, be of a sexual nature, be unwelcome to the person allegedly harassed and whether a reasonable person would be offended, humiliated or intimidated by the conduct taking into account the circumstances [*Beesley and Hughes*] – Commissioner acknowledged that the alleged conduct was of a sexual nature – however, Commissioner also noted one of the survey questions elicited responses which all commonly provided a reference to conduct of a sexual nature – Commissioner further observed that there were various indicators of respondent's control and influence over several of the survey participants – Commissioner held that the required standard that the conduct occurred or a valid reason for the dismissal did not exist – whether applicant was notified of the reasons for the dismissal and whether applicant was given an opportunity to respond – proper consideration requires whether applicant was notified of the 'valid reason' for the dismissal [*Bartlett*] – applicant only notified of the alleged conduct in the letter of termination – Commissioner held applicant was not validly notified of the reason prior to the letter of termination being served and was not provided with an opportunity to respond – whether the degree to which the size of the employer's enterprise and degree to which the absence of a dedicated human resources management specialists or expertise in the enterprise would likely impact on the procedures followed in effecting the dismissal – Commissioner held process respondent undertook was flawed, predetermined and not based on a valid reason – Commissioner also considered relationships between survey participants and applicant – positive working relationship and shared friendship existed between applicant and survey participants at time of termination – Commissioner rejected applicant's argument his sexual orientation contradicted allegations of sexual harassment by the women, noting consideration of sexual orientation does not lead to automatic conclusion sexual harassment could not have taken place – respondent provided limited evidence of any detriment which directly attributed to the alleged conduct – Commissioner held that evidence and circumstances did not support the termination of serious misconduct – Commissioner ultimately held that dismissal was unfair because of a lack of procedural fairness and a lack of valid reason for the dismissal – applicant awarded with compensation.

Pewsukngem v Choc Dee Thai Restaurant

U2023/1821 [2023] FWC 2493
Spencer C Brisbane 27 September 2023

Other Fair Work Commission decisions of note

Apple Australia National Enterprise Agreement 2023

ENTERPRISE AGREEMENTS – approval – undertakings – s.185 Fair Work Act 2009 – Full Bench – application for approval of Apple Australia National Enterprise Agreement 2023 (Agreement) – bargaining representatives were Shop, Distributive and Allied Employees' Association (SDA) and Australian Municipal, Clerical and Services Union (ASU) – additional 107 employee bargaining representatives, including Retail and Fast Food Workers' Union Incorporated (RFFWU) – application referred to Full Bench pursuant to ss.582, 615 – Full Bench identified concerns regarding better off overall test (BOOT) – RFFWU opposed approval based on concerns regarding representations by employer about parental leave and failure to meet BOOT requirements – employee bargaining representatives also raised BOOT concerns – Full Bench concerned expiry date was 4 years from operative date, not 4 years from approval date – Apple proposed Undertaking 1 – Full Bench satisfied that Undertaking 1 changed expiry date to 4 years from approval date – Full Bench concerned individual flexibility agreement (IFA) clause was inconsistent with s.203(6)(a) – employer accepted that model IFA would be inserted in Agreement pursuant to s.202(4) – Full Bench noted genuine agreement requirements for agreement approval in Part 2-4 FW Act varied on 6 June 2023 – notification time of Agreement was 3 August 2022, consequently pre-6 June 2023 genuine agreement requirements apply for Agreement – Full Bench considered genuine agreement requirements – RFFWU contended employer made misleading representations about parental leave entitlements – no evidence presented to support contention – Full Bench noted employer provided clear explanatory material during access period about parental leave entitlements – not persuaded that employer misrepresented entitlement – Full Bench rejected RFFWU's objection to approval – as Agreement made on 20 August 2023, BOOT provisions in Part 2-4 as amended on and from 6 June 2023 apply – Full Bench considered BOOT – noted wage rates for permanent and casual employees between 6 and 147.22 per cent above Retail Award and between 9.6 and 95.28 per cent above Clerks Award – range of other terms and conditions in Agreement more beneficial than awards and National Employment Standards – noted that fixed term employees excluded from benefits conferred by certain leave provisions – Full Bench considered concerns raised by employee bargaining representatives – lack of travel entitlements – not persuaded that operational circumstances would give rise to a travel entitlement – exemption from payment of certain penalty rates and affected employees not being sufficiently compensated by the threshold level of their remuneration – satisfied that employees would earn more than their entitlement under the Retail Award and would not be required to work in excess of ordinary hours – lack of guaranteed Sundays off for Solutions Consultants (SCs) – held that lack of guaranteed Sundays off for SCs was detrimental – part-time employment arrangements for retail employees potentially creating 'flexi-insecure employment' – rejected RFFWU's submission that Agreement fails to meet BOOT because of the nature of the part-time provisions – satisfied that part-time employees covered by Part 3 of Agreement were better off overall – span of ordinary hours and maximum daily hours compared to Retail Award – satisfied that lack of span of hours is of limited effect and maximum shift lengths under Agreement not detrimental – span of hours and Sunday penalties compared to Clerks Award – proposed Undertaking 2 extended certain Sunday hourly rates from Clerks Award to certain classifications within Agreement – satisfied proposed Undertaking 2 would remedy those concerns – Full Bench noted BOOT is a global assessment of provisions in Agreement compared to relevant awards rather than a line-by-line test – considered all terms and conditions in Agreement including beneficial entitlements and detriments and Undertakings – satisfied Agreement passed BOOT as required by s.186(2) – satisfied that requirements of ss.186, 187, 188 and 190 had been met – noted that pursuant to s.201(2) Agreement covers SDA and ASU – Agreement approved.

AG2023/3058 [2023] FWCFB 185
Hatcher J Sydney 9 October 2023

Re Jolly

REGISTERED ORGANISATIONS – withdrawal – s.94(1) Fair Work (Registered Organisations) Act 2009 – Full Bench – application for ballot to decide whether the Locomotive Division of the Victorian Branch (VLD) should withdraw from the Australian Rail, Tram and Bus Industry Union (RTBIU) – the name proposed for the organisation to be registered, if the VLD is allowed to withdraw from the RTBIU, is the Victorian Train Drivers' Union (VTDU) – on 21 July 2023 the Full Bench determined an interlocutory application by the ARTBIU by striking out sub-paragraphs 6A(b)B, 6A(b)C and 6A(c) of Mr Jolly's Amended Application filed on 26 April 2023 [[2023] FWCFB 117] (July 2023 decision) – in this decision the Full Bench deal with that Amended Application – application under s.94 of the RO Act for a secret ballot to be held to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation may be made if, relevantly, it is made before a period of five years after the amalgamation occurred has elapsed – whether appropriate to accept application made after the end of the five-year period referred to in s.94(1)(c) of the RO Act – Mr Jolly contended the Commission must accept the Amended Application under s.94A(3) of the RO Act because the RTBIU had a record of not complying with workplace or safety laws to which the VLD has not contributed – RTBIU said the matters Mr Jolly relied on as constituting the record of not complying with workplace or safety laws were not such as to require the acceptance of the application because there was no finding of non-compliance within the meaning of ss.94A(2)(a) or (3) and, in any event, the matters did not constitute a 'record' within the meaning of those provisions – Mr Jolly contended in the alternative, that if the requirements of s.94A(3) of the RO Act were not met, the Commission should exercise its discretion under s.94A(1) and find that it was appropriate by accepting the Amended Application because the VLD will likely have capacity, when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members – Full Bench considered meaning of 'a record of not complying with workplace or safety laws' – whether 'a record of not complying' for the purpose of ss.94A(2)(a) and (3) may be constituted by a single finding of non-compliance, or a very small number of such instances – the 'record' on which Mr Jolly relied comprised two matters – the two matters are recorded in decisions of the Commission in *Downer EDI Rail P/L v Australian Rail, Tram and Bus Industry Union* [[2017] FWC 2725] (Downer) and *Queensland Rail Transit Authority T/A Queensland Rail v Australian Rail, Tram and Bus Industry Union* [[2018] FWC 6116] (Qld Rail) – each decision concerns a determination of an application under s.418 of the FW Act – Full Bench held that in neither case was a finding recorded that the RTBIU did not or was not complying with s.417 of the FW Act or any other workplace or safety law – found neither *Downer* nor *Qld Rail* form part of a record of the RTBIU not complying with workplace or safety laws – as no other matter was alleged or identified as constituting a relevant record, it followed that the RTBIU did not have a record of not complying with workplace or safety laws – accordingly, s.94A(3) of the RO Act was not engaged – as noted in the July 2023 decision, the RTBIU's contention that the VLD as a registered organisation would not likely have the capacity to represent the economic and social interest of its members was limited to concerns about the finances of the proposed organisation – Full Bench not persuaded that the financial position of the VTDU would likely be such as to impede in any material way its capacity to promote and protect the economic and social interests of its members – however, Full Bench found the absence of a relevant record and other conduct or reason to support the VLD seeking to withdraw from the amalgamated organisation after the expiration of the period in s.94(1)(c) weighed against a conclusion that it was appropriate to accept the Amended Application – taken together these matters outweigh the consideration that the VTDU would likely have sufficient capacity to enable it to promote and protect the economic and social interests of its members – the Amended Application was not accepted under s.94A and, as it was not made within the time prescribed in s.94(1)(c), it was dismissed.

D2023/1 [2023] FWCFB 191
Hatcher J Sydney 19 October 2023
Gostencnik DP
Bissett AC

Re McDonald

TRANSITIONAL INSTRUMENTS – default period – confidentiality – Sch 3, Item 20A(4) Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – Full Bench – employee covered by Australian Workplace Agreement (the AWA) – employee and employer, Commonwealth Bank of Australia, entered into the AWA in 2006 – the AWA is an agreement-based transitional instrument – *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (SJBP Act) established automatic expiry for agreement-based transitional instruments at end of default period unless extended – default period ends 6 December 2023 – employee applied to extend the AWA's default period to 30 June 2024 – employee to take long service leave from 22 December 2023 to 28 June 2024 – employee to retire 28 June 2024 – employee's long service leave entitlement under applicable enterprise agreement significantly less than under the AWA – employee suggested reasonable in circumstances for Commission to extend default period – employer supported application – employer sought the AWA's remuneration and long service leave details remain confidential – confidentiality considered – Full Bench noted statutory history and context of AWAs generally – historical statutory regime under *Workplace Relations Act 1996* (WR Act) required AWA content and parties remain confidential – when WR Act repealed confidentiality continued in limited circumstances – SJBP amendments directing termination of remaining AWAs no longer protect identity of parties – Full Bench noted the AWA, when made, was confidential however statutory protections diminished over time – principles of open justice were countervailing consideration – departure from open justice only justified if open justice would unfairly damage some material private or public interest – Full Bench noted embarrassing, damaging or inconvenient material has never been regarded as reason to suppress evidence [*Seven Network (No. 1)*] – found statutory confidentiality context diminished and open justice interests prevail – material employer sought to suppress concerned extent of detriment employee would suffer if the AWA terminated – such detriment was sole basis for consideration whether reasonable in circumstances to extend the AWA's default period – Full Bench found it could not satisfy SJBP Act requirement to publish reasons if it did not set out extent of detriment – employer also argued other employees on AWAs or other 'zombie agreements' may seek extension of default period – Full Bench rejected contention, repeating inconvenience is never reason to suppress evidence – held no confidentiality order required – whether extension of default period reasonable – explanatory material for SJBP Act included statement that Commission would be able to extend default period to ensure automatic sunsetting did not leave employees worse off – Full Bench found if the AWA's default period not extended employee would be $17,459.45 worse off – held outcome unreasonable given employee retiring from workforce – held reasonable to extend default period – default period extended to 30 June 2024.

AG2023/2689 [2023] FWCFB 175
Wright DP Sydney 22 September 2023
Roberts DP
Slevin DP

Parker-Brown v The Carly Ryan Foundation Inc

GENERAL PROTECTIONS – contractor or employee – s.365 Fair Work Act 2009 – applicant engaged as online safety presenter for a registered charity – applicant alleged dismissal in contravention of general protections – respondent raised

jurisdictional objection on basis that applicant was not engaged as an employee but rather as an independent contractor – contended that applicant therefore not dismissed – Commission required to determine dispute over dismissal before Commission can exercise powers under s.368 FW Act (*Milford*) – Commission observed contractual terms, where they can be obtained, will determine the true nature of relationship – manner relationship worked in practice relevant for limited purposes such as finding contractual terms where not able to be otherwise ascertained (*Jamsek/Personnel Contracting*) – Commission held that terms were agreed between parties but no written contract existed between parties – Commission considered evidence of initial engagement including advertisement for the role – Commission held advertisement clearly described role as a contractor position and that applicant was engaged as such – Commission held the agreed form of engagement and unchanged nature of the form of engagement pointed strongly toward contractor relationship – Commission held there was limited negotiation of terms such as price and right not to accept work – Commission also held applicant's use of private vehicle and ABN, nature of payment of remuneration were also factors consistent with a contractor relationship – Commission held lack of negotiation and a number of factors about the relationship in practice weighed toward employment relationship – Commission held respondent's decision to pay superannuation was voluntary and was not evidence of the nature of the relationship – lack of negotiation weighed toward employment relationship – Commission had particular regard for primacy of contract principles (*Jamsek/Personnel Contracting*) – Commission concluded on balance applicant was engaged as an independent contractor – held applicant was therefore not dismissed and Commission had no jurisdiction to deal with the application further – application dismissed.

C2023/4926 [2023] FWC 2549
Anderson DP Adelaide 11 October 2023

Spadavecchia v The Trustee For Modern Concrete Co Trust t/a Modern Concrete Co

TERMINATION OF EMPLOYMENT – minimum employment period – casual employment – ss.394, 384 Fair Work Act 2009 – applicant formally commenced on 10 August 2022 after completing series of trial shifts – trial shifts occurred 27 and 28 July 2022 – applicant dismissed on 4 August 2023 – applicant sought unfair dismissal remedy – respondent, a small business, submitted jurisdictional objection that applicant had not completed minimum employment period – minimum employment period of twelve months continuous service required by ss.382(a), 383 – continuous service denotes an unbroken employment relationship, may be inferred from a series of separate casual contracts – to satisfy minimum employment period applicant must have been in continuous service for at least six days prior to 10 August 2022 commencement – applicant completed trial shifts on 27 and 28 July 2022 before acceptance of official job offer – whether trial shifts of 27 and 28 July 2022 included in continuous service period – observed answer firstly rests on whether applicant was in an employment relationship after commencement of trial shifts – found work on 27 and 28 July indicative of casual employment – Commission found no evidence supporting assertion that respondent had made "firm advance commitment to continuing and indefinite work" as required by s.15A(s)(a) – fact that a casual relationship existed prior to formal offer and acceptance not indicative of an ongoing employment relationship – observed for days prior to 10 August 2022 to be counted s.384(2) required applicant to establish he was a "regular casual employee" and had a reasonable expectation of continuing employment on a regular and systematic basis – held neither proposition made out – trial shifts considered to have been separately made agreements to work on those days for purpose of assessing applicant's suitability for respondent – promise of forthcoming employment offer did not establish fact of regular and systematic employment prior to offer – held applicant not regular casual employee prior to 10 August 2022 – held no reasonable expectation of continuing employment prior to 10 August 2022 – held gap between 28 July and 10 August 2022 not period of continuous service – held applicant had not completed minimum employment period – application dismissed.

Kelly v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

TERMINATION OF EMPLOYMENT – genuine redundancy – ss.385, 389 and 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant was employed as Special Projects Officer at the AMWU – applicant was responsible for project co-ordination in Heating, Ventilation and Air Conditioning industry sector (HVAC) and multi-employer bargaining – dispute in relation to particular project's progress and success – restructure conveyed to applicant – operational requirements reviewed – applicant's role abolished and project resources re-allocated – no suitable alternative positions available – applicant terminated on 7 March 2023 – applicant alleged State Secretary's reason for termination was capricious and spiteful – applicant argued he could have been redeployed – suggested role had transferrable skills like on-site and other training, project works and organiser advice services – former AMWU organiser alleged conversation held to 'sack' the applicant – alleged that applicant's role was required to continue project coordination on HVAC project – other AMWU employees evidenced deterioration in State Secretary's behaviour towards others – respondent argued redundancy was due to budget constraints and project status – restructure was necessary due to expenditure and lack of income – applicant not considered for alternative 'on delegation' positions or organiser positions due to negative feedback from officials and employers – respondent evidence indicated poor conduct from applicant during course of duties and complaints from members as to his dismissive attitude in union matters – for successful genuine redundancy defence applicant's job must no longer be required to be performed by anyone due to operational requirements, abided by consultation obligations and redeployment would be unreasonable in all circumstances [*Pankratz; Technical and Further Education Commission*] – process does not involve merits review into employer's decision [*Adams*] – Commission must be satisfied on balance of probabilities of genuine redundancy [*Kieselback*] – Commission satisfied applicant's role was no longer required to be done by anyone – 'changes in operational requirements' included changes in labour requirements due to operational changes – job therefore becomes redundant *because of* changes in operational requirements – Commission rejected applicant's submission that *Clerks Private Sector Award 2020* and AMWU Enterprise Agreement terms relating to clerks applied to his employment – therefore no consultation obligations on respondent – Commission satisfied it would not be reasonable to redeploy applicant in organiser position – reasonable for applicant not to be redeployed into other vacancies due to concerns with applicant's conduct – Commission upheld respondent's genuine redundancy as a 'complete defence' to applicant's unfair dismissal application [*Ulan Coal Mines*] – application dismissed.

U2023/2477 [2023] FWC 2669
Easton DP Sydney 12 October 2023

Shah v Team Global Express P/L

TERMINATION OF EMPLOYMENT – misconduct – bribery – ss.387, 394 Fair Work Act 2009 – applicant engaged as despatch supervisor responsible for allocating work to subcontracting drivers – dismissed for serious misconduct following investigation finding he had accepted bribes in in return for favourable job applications – applicant alleged to have accepted two bottles of scotch whisky and assistance with construction of deck – allegations raised by another driver who raised allegations with respondent – applicant terminated following investigation – application for unfair dismissal remedy – Commission considered whether there was a valid reason for dismissal – satisfied that respondent had a valid reason for dismissal – in considering scotch whiskey allegation, Commission satisfied on balance of probabilities that

applicant met with a driver at a restaurant and after paying for dinner, driver gave applicant bag containing two bottles of whisky [*Briginshaw*] – during investigation interview applicant denied attending restaurant, however, in cross-examination applicant acknowledged that he had not answered truthfully and that he had attended restaurant with driver – Commission found that applicant had accepted bribe in exchange for favourable treatment in the allocation of work – applicant in breach of respondent's Anti-bribery and Corruption Policy – not in dispute that applicant engaged driver to assist with construction of deck – Commission found that applicant in actively accepting work on his deck without any intention to pay could affect his objectivity or independence of his decision in performing role – Commission satisfied applicant was afforded procedural fairness – applicant notified of the reason for dismissal and given an opportunity to respond – no finding of unfairness – Commission rejected applicant's submission that he was given insufficient notice to arrange a support person prior to interview – applicant advised of ability to have support person present but made no such request – warning of unsatisfactory performance, size of enterprise and absence of human resource expertise neutral considerations – other relevant matters considered – applicant's length of service, personal and financial impact and inability to secure another permanent position taken into account – reputational harm to respondent considered – Commission noted respondent paid applicant discretionary payment of 4 weeks' notice despite applicant's serious misconduct – Commission found that reason for dismissal was valid – application dismissed.

U2023/4524 [2023] FWC 2622
O'Neill DP Melbourne 13 October August 2023

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Programmed Facility Management P/L

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – superannuation – s.739 Fair Work Act 2009 – dispute concerning whether respondent has obligation to make superannuation contributions whilst employees on long service leave – CoInvest scheme established under *Construction Industry Long Service Leave Act (Vic)* 1997 in recognition construction industry employees work from project to project and have less opportunity to accrue continuous service with one employer – employers pay charge to CoInvest for every employee – covered employee receives payment from CoInvest while on long service leave – employees and respondent covered by *Programmed Facility Management Melbourne Water AMWU Mechanical and Field Services Agreement 2022* (Agreement) – respondent contended no Agreement obligation to pay superannuation contribution to employees on long service leave paid by CoInvest – "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) contended obligation existed – Commission to resolve dispute – starting point for interpretation is ordinary meaning of words read as a whole and in context [*Workpac*] – meaning of clause should be discernible without having to know industrial history of instrument [*Melbourne Vicentre Swimming Club*] – Agreement superannuation clause requires contributions be made while employee is on 'any paid leave from the employer' – AMWU contended long service leave period is 'any paid leave from the employer' – respondent considered period of long service leave as being unpaid given employees instead being paid by CoInvest – whether long service leave paid by CoInvest constitutes 'any paid leave from respondent' – Commission considered Agreement obligation clear and found long service leave did constitute any paid leave – held 'any paid leave from the employer' was synonymous with an authorised absence for which payment is received – rejected respondent's submission regarding industrial context, including that ATO previously issued interpretive ruling that there was no obligation on employer or CoInvest to pay superannuation contribution under Superannuation Guarantee Legislation – held ATO ruling said nothing about Agreement obligation – observed neither party could point to authority as to correct interpretation of position under *Manufacturing and Associated Industries*

and Occupations Award 2020 – held long service leave paid by CoInvest does constitute 'any paid leave from the employer' for purposes of Agreement.

C2023/2015 [2023] FWC 2504
O'Neill DP Melbourne 28 September 2023

Zobair v Sydney International Container Terminals P/L T/A Hutchison Ports

TERMINATION OF EMPLOYMENT – valid reason – remedy – ss.387, 394 Fair Work Act 2009 – applicant had applied for two separate periods of leave in early 2023 to perform as a singer overseas – leave was approved – did not return to complete her rostered shifts between the two periods of leave – applicant maintained she fell ill overseas and was unable to fly back to perform those shifts – obtained a medical certificate from doctor overseas stating she was unfit for travel – certificate provided to respondent while applicant still overseas – upon return, respondent asked her to attend meeting to discuss correspondence and provide further documentation – respondent alleged personal leave was used inappropriately and applicant had no intention of returning – applicant provided copy of medical certificate provided earlier – further meetings followed – respondent terminated employment applicant made unfair dismissal application – maintained she intended to return but illness prevented her – sought reinstatement to former position, orders to maintain continuity of employment and orders for remuneration lost – Commission considered whether dismissal harsh, unjust or unreasonable under s.387 – "valid reason" under s.387(a) means sound, defensible or well founded – Commission must consider on balance of probabilities whether alleged conduct actually occurred – respondent's adverse inference that applicant allegedly did not intend to return was taken from applicant's failure to produce documents, despite not providing evidence that applicant intended to mislead them – Commission rejected this as applicant gave evidence of performances booked and drew no adverse inference against the applicant – applicant had provided documents to respondent about her travel arrangements and provided notice of her pending absence before her rostered shifts and a medical certificate that covered the period of absence – Commission did not accept applicant was required to do any more than she did – ultimately, respondent claimed dishonesty at the point of applying for annual leave was the reason for dismissal rather than failure to produce documents – Commission concluded that illness prevented applicant from returning to work – Commission refused to draw adverse inference from surrounding circumstances that illness was feigned – under s.387(h) Commission took into account eight years' service and found that satisfactory work history weighed in applicant's favour – Commission made orders for reinstatement and compensation to restore lost pay.

U2023/4406 [2023] FWC 2570
Roberts DP Sydney 5 October 2023

Conrad v Rocky Bay Ltd

TERMINATION OF EMPLOYMENT – termination at initiative of employer – forced resignation – ss.386, 394 Fair Work Act 2009 – application for an unfair dismissal remedy – applicant employed full-time as Disability Support Worker since May 2015 – applicant suffered 2 heart attacks, one in 2019 and one in December 2022 – upon returning to work respondent changed her working arrangements to part-time – on 7 March 2023 applicant emailed respondent about grievance regarding her working hours – on 10 March 2023 respondent was notified that applicant made workers' compensation claim due to stress and thereafter applicant remained absent from work on medical advice until she resigned on 1 May 2023 – applicant submitted she was dismissed – respondent submitted applicant freely resigned – Commission considered *City of Sydney RSL and Community Club Limited v Balgowan*, *NSW Trains v Mr Todd James*, *Bupa v Tavassoli*, *Sydney Water v Yelda*, *Taylor v C-Tech Laser P/L*, *He v Lewin*, *Double N Equipment Hire P/L t/a A1 Distributions v Humphries*, and

Sprigg – found respondent terminated applicant's employment by making unilateral decision to reduce her hours from full-time to part-time – found respondent's actions, including removing applicant from nightshift, rostering applicant to work at location she requested against, its handling of her formal grievance in March 2023 and initiating assessment of applicant's work capacity while she was absent on medical advice, forced applicant to resign – found applicant genuinely tried to resolve issue regarding working hours and her delay in accepting respondent's contract repudiation not unusual – considered respondent did not intend outcome, but outcome inevitable result of combination of factors and issues distressing applicant – noted respondent conceded it did not have a valid reason for dismissal and other factors not influential – satisfied dismissal unjust because respondent put applicant in a situation where she had no option other than to resign – found dismissal unfair – respondent submitted applicant a valued employee and re-instatement not inappropriate – applicant sought compensation only – Commission found not reasonable to insist applicant accept reinstatement because, while respondent had not acted with malice, applicant required medical leave due to stress from respondent's conduct and she did not seek reinstatement – respondent submitted any losses had been addressed by workers' compensation claim settlement (settlement) – parties submitted no element of settlement related to wages lost in period subsequent to 1 May 2023 – Commission distinguished settlement from workers' compensation in the form of ongoing wage payments to employee unable to work – found settlement not a bar to unfair dismissal compensation – found compensation appropriate in circumstances – found applicant's employment would have continued for at least 1 year – reduced compensation by 50% for applicant's failure to mitigate losses and by 4% for contingencies related to likely periods of unpaid sick leave – ordered respondent pay applicant $29,068.24 gross less taxation in lieu of reinstatement within seven days of decision.

U2023/4334 [2023] FWC 2727
O'Keeffe DP Perth 18 October 2023

Crook v CITIC Pacific Mining Management P/L

TERMINATION OF EMPLOYMENT – valid reason – reinstatement – ss.385, 387, 394 Fair Work Act 2009 – applicant lodged a complaint that he was unfairly dismissed by respondent – applicant was a dump truck operator and a supervisor at respondent's mine site – respondent received complaint from another employee – complainant contended that applicant had passed a mobile phone to another passenger during bus ride on site – suggested phone displayed lewd and pornographic images and applicant allegedly engaged in sexually explicit conversations on bus – in a separate incident in March 2023 the complainant also contended that applicant had stared at her in a lewd manner and remarked 'Coore look at that' when she finished a shift – applicant denied the allegations – applicant was stood down while investigations occurred before being terminated – applicant claimed termination was harsh, unjust or unreasonable – at issue was whether there was a valid reason for dismissal – applicant claimed respondent's investigations were not conducted with sufficient due diligence – applicant claimed allegations were vague and difficult to respond to – contended respondent had erred by seeking to place onus of proof on the applicant that he had not engaged in the alleged activities – respondent claimed that there was a valid reason for dismissal – bus incident had occurred during complainant's first week at work – complainant's claims supported by another witness (witness one) – witness one gave evidence that she had heard loud conversations between applicant and others seated near him on bus – behaviour of passing phones containing inappropriate images around bus was common amongst passengers – respondent's witnesses gave evidence that both complainant and witness one were interviewed when both were in the same room – applicant claimed he did not sit near complainant when incident occurred – did not pass a mobile phone past the complainant – submitted swipe card entries of passengers entering the bus supported his claim concerning where he sat compared to complainant – respondent's witnesses did not consider bus swipe card entries applicant submitted to support his claims –

applicant's witnesses supported applicant's claims regarding his conduct – Commission found that due to conflicting evidence swipe card records would be used to cross check the claims made by both parties and their respective witnesses – Commission found applicant and complainant had not sat next to each other when alleged incident occurred – found witness one's evidence did not confirm all of complainant's allegations – found a lack of procedural fairness in respondent's investigation – applicant also denied second incident where he was alleged to have started at complainant in a lewd manner and made sexual remarks – applicant contended it was unlikely he would have interacted with complainant at time she contended – applicant submitted shift card times to support his claim – Commission found respondent had not properly investigated second incident – found on balance of probabilities it would have been unlikely applicant and complainant crossed paths when alleged incident occurred – Commission not satisfied there was a valid reason for applicant's dismissal – Commission found lack of rigour in investigation contributed to unjust termination – held applicant was unfairly dismissed – ordered applicant be reinstated to former position – directed submissions on lost remuneration.

U2023/3578 [2023] FWC 2446
O'Keeffe DP Perth 22 September 2023

McLeod v Project 88 TPF P/L t/a Pink Flamingo Spiegelclub and Anor

TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – applicants both dismissed for alleged serious misconduct – respondent alleged applicants Ms McLeod and Ms Louie terminated disclosed confidential information of another employee's salary – Commission satisfied that conduct occurred however noted applicant's did not engage in 'wilful and deliberate' breach as they were under the impression that the employee had voluntarily shared salary information at a friendly informal dinner – applicants not aware of rule to not disclose information – Commission not satisfied that respondent provided training about this 'reasonably complicated' legal issue – rejected respondent's contention applicants contravened s.183 of *Corporations Act*, found applicants did not seek own advantage or detriment to respondent – Commission considered applicants were unaware meeting of 3 February 2023 would be about disciplinary issues – found applicants were not provided the opportunity to bring a support person – applicants were told incorrect information by respondent concerning collection of evidence – Commission satisfied that admissions by applicants during the meeting were compromised and afforded less weight – Commission not satisfied conversation about their friend's salary was sufficiently serious to provide a valid reason for dismissal – Commission considered s.387(b) and noted respondent could not have notified applicants of valid reason or provide opportunity to respond as no valid reason existed – Per *Crozier,* Commission not satisfied applicants were notified of the reason as notice was given to applicants after decision was made – Commission noted applicants were ambushed during meeting and not provided adequate opportunity to respond – Commission noted respondent's procedural deficiencies were extreme and disproportionate to the gravity of misconduct – Commission satisfied that dismissal of applicants was harsh, unjust and unreasonable and determined they were unfairly dismissed – Commission noted reinstatement inappropriate remedy and ordered compensation per s.392(2) and 4 step formula in *Sprigg* – Commission noted compensation would not significantly affect respondent's viability – no reduction based on misconduct – held anticipated length of employment would have been until 3 August 2024 for Ms Louie and until 3 August 2023 for Ms McLeod – deducted 5% from Ms McLeod due to lack of evidence of efforts to mitigate loss – Commission ordered respondent to pay Ms McLeod $18,525.00 and superannuation of $2,037.75 and Ms Louie $12,855.39 and superannuation of $1,414.09.

U2023/1057 and Anor [2023] FWC 2630
Crawford C Sydney 11 October 2023

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Websites of Interest

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.

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/.

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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