

## FWC Bulletin

1 June 2023 Volume 6/23 with selected Decision Summaries for the month ending Wednesday, 31 May 2023.

### Contents

President's statement about flexible working arrangements and unpaid parental leave disputes .....	2
Final statement of principles on genuine agreement.....	3
Performance commitment regarding new jurisdictions .....	4
New online application for unfair dismissal applications and expansion of online lodgment service for individual dispute applications .....	5
Decisions of the Fair Work Commission.....	6
Other Fair Work Commission decisions of note .....	11
Subscription Options.....	20
Websites of Interest .....	20
Fair Work Commission Addresses .....	22

## **President's statement about flexible working arrangements and unpaid parental leave disputes**

09 May 2023

Justice Hatcher, President has issued a statement about 2 new disputes types the Commission will be able to deal with from 6 June 2023. These are disputes relating to requests for:

- flexible working arrangements, and
- extension of unpaid parental leave.

Read the [President's statement \(pdf\)](#).

When certain employers and employees cannot agree on a solution at the workplace level, we will be able to deal with a dispute about a request. We may do this by conciliation, mediation, or mandatory arbitration if necessary.

To support these changes we are:

- creating new forms
- updating our website guidance, and
- reviewing existing modern award terms dealing with requests for flexible working arrangements.

## **Final statement of principles on genuine agreement**

12 May 2023

We have published the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*.

The statement of principles will now be lodged for registration. Following registration, the statement of principles will commence operation on 6 June 2023 (unless an earlier date is proclaimed).

Justice Hatcher, President, Vice President Asbury and Deputy President Masson have also issued a Full Bench statement.

- Read the [Full Bench Statement](#)
- Read the [Fair Work \(Statement of Principles on Genuine Agreement\) Instrument 2023](#)
- Read the [Explanatory Statement to the Fair Work \(Statement of Principles on Genuine Agreement\) Instrument 2023](#)
- Find out more about the [Statement of principles on genuine agreement](#) and the [Secure Jobs Better Pay Act – what's changing](#)

We encourage you to [Subscribe to our Announcements](#) and [follow us on LinkedIn](#) to stay up to date.

## **Performance commitment regarding new jurisdictions**

26 May 2023

*The Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* introduced several new jurisdictions to the Commission and amended the operation of some existing jurisdictions. The next tranche of amendments will commence from 6 June 2023.

From the outset of the implementation process in December 2022, we made a commitment to place our users' needs at the heart of the design of our services.

We would like to acknowledge and thank the members of our user groups for their engagement and contributions to date, including the:

- Enterprise Agreement and Bargaining advisory group
- Registered Organisations Transition advisory group
- Sexual Harassment working group
- Small Business Reference Group, and
- Rules and Benchbooks committee.

### **Commitment to performance**

We remain focussed on delivering the highest standards of performance across our entire operations. These new and amended jurisdictions will exist within our current performance framework, with some additions.

For more information please read our [Performance commitment regarding new jurisdictions \(pdf\)](#).

## **New online application for unfair dismissal applications and expansion of online lodgment service for individual dispute applications**

We continue to improve the way we deliver our services to the community by expanding our online lodgment service (OLS). Users now have the option to lodge some individual dispute applications online.

This includes an online unfair dismissal application that users can complete and lodge electronically, as well as paying the application fee or applying for a fee waiver at the time of lodgment. The online form has been developed and refined based on usability testing and includes an auto-fill functionality and alerts users when important information has been left out.

You can now lodge the following forms by OLS:

- Unfair dismissal application (F2) by completing the form online
- General protection applications (F8 & F8C) by uploading a completed form
- Unlawful termination application (F9) by uploading a completed form
- Agreement approval application (F16) by completing the form online (previously launched in June 2021)

To lodge just click [online lodgment service](#) and follow the prompts to set up an account and get started. From here you can save applications and return to them later, view your history of submitted applications and review and download previously submitted applications.

The OLS is now our preferred method of lodgment. We will continue to expand the range of forms that can be lodged online.

Once you lodge an application you will receive a lodgment confirmation email. This includes an OLS survey link you can use to provide feedback on the OLS. We encourage you to provide feedback – it helps us improve our services to better meet your needs.

## 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 Wednesday, 31 May 2023.

- 1** TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – cultural differences – s.394 Fair Work Act 2009 – whether application filed within time – determination of date of dismissal and date dismissal took effect – subjective belief genuinely held will not establish fact of dismissal – intention to dismiss not sufficient – dismissal not communicated in plain and unambiguous terms [*Mihajlovic*] – employer referred only to fact that applicant could no longer be employed for hours he was working – general mention made of performance issues and that employer didn't want to continue current arrangement, no finality to proposition – discussion concluded with agreement that applicant would consider position by end of month – discussion that employer would pay honorarium following dismissal part of a managed negotiation, not statement of terms of dismissal – subsequent conduct supported finding that dismissal had not yet occurred – took into account cultural reasons advanced by employer as to why communication was indirect and non-specific – respondent submitted due to applicant's age it would have been disrespectful for younger manager to use direct language – Commission observed obligations under Australian law do not make exception for cryptic, riddled or inferential communication no matter how well intentioned – dismissal occurred after applicant told he did not need to come in anymore, sent two text messages asking whether employer was terminating his employment, and being advised role reduced to an honorary role – dismissal took effect on next day that applicant would have attended work but did not – took into account four weekly payments made however also consistent with payment in lieu of notice – determined application filed within time – Commission determined small business fair dismissal code (code) applied and not complied with – reason for dismissal given by inference, not in plain or clear terms – applicant spoken to about performance but was informal and in course of daily business, not such that applicant on notice as to risk of dismissal, did not have character of warning – consideration of merits – Commission found applicant dismissed because of financial pressures on business and performance of applicant – Commission accepted that business under financial pressure but did not find it was a redundancy – performance concerns a valid reason – notification of reason generally ambiguous, inferential and not expressly stated – applicant aware of employer's concerns about performance and had opportunity to respond – lack of speciality human resources capacity and cultural reasons explain in part why employer failed to act in strict accordance with code and procedural fairness – paid four weeks in lieu of notice, although employer acknowledged should have been five – honorarium not paid but not a contractual promise, not a reason for finding unfairness – overall, an appropriate level of procedural fairness not afforded – Commission determined dismissal was harsh – remedy considered – reinstatement inappropriate – compensation ordered.
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- 2 TERMINATION OF EMPLOYMENT – valid reason – ss.394, 385 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed by respondent since January 2002 in roles related to teaching and research – applicant was dismissed on 20 September 2022 following an investigation conducted by the respondent which substantiated allegations of inappropriate workplace conduct towards a former research assistant and student (complainant) in 2016 – first allegation of misconduct related to a series of text messages sent by applicant to complainant – second allegation of misconduct related to applicant touching complainant’s lower back – applicant submitted dismissal was unfair, taking into account that he was seeking only friendship from complainant; influence of complaints he made about respondent in 2019, 2020 and 2021; policies respondent relied on for investigation and dismissal were not in place at time of conduct in 2016; relevant 2016 policies didn’t apply or were only aspirational; conduct was isolated and not repeated; conduct was not crude or serious; conduct can be attributed to miscommunication and misunderstanding; applicant’s length of service and unblemished employment record; period of time between the alleged misconduct and investigation; applicant’s mental health and autism diagnosis; and alleged involvement by respondent in newspaper story discussing applicant – applicant sought reinstatement and back pay for period since dismissal or compensation in the alternative – respondent submitted dismissal not unfair and made submissions about protecting vulnerable groups within university power hierarchies – Commission considered *Briginshaw, Selvachandran v Peteron Plastics P/L, Walton v Mermaid Dry Cleaners P/L, Crozier v Palazzo Corporation P/L, Previsic v Australian Quarantine Inspection Services* and *King v Freshmore (Vic) P/L* – Commission did not have benefit of complainant’s evidence about second allegation and was not satisfied conduct occurred as alleged by respondent – Commission satisfied based on text messages that applicant’s conduct consistent with pursuit of a personal relationship with complainant and not friendship – satisfied applicant’s conduct was repeated, unwelcome, inappropriate and constituted sexual harassment – satisfied conduct breached respondent’s policies in place in 2016 and constituted misconduct – satisfied conduct constituted serious misconduct within the meaning of r.1.07 of Fair Work Regulations and posed a ‘serious and imminent risk’ to complainant’s health and safety and to respondent’s reputation – satisfied finding of sexual harassment by applicant was a valid reason for dismissal – satisfied that by failing to apply the correct policies and procedures when investigating and disciplining applicant, respondent failed to notify applicant of valid reason for dismissal, but omission not sufficient to displace weight of valid reason for dismissal – satisfied applicant’s 20 years’ service and employment record not sufficient to render dismissal unfair given gravity of conduct which applicant did not appear to appreciate – satisfied respondent promptly initiated investigation following formal complaint being made and applicant not prejudiced by time lapse – not satisfied applicant’s conduct mitigated by health condition because medical evidence provided addressed autism generally and not specific to applicant’s circumstances – satisfied media reporting occurred months after applicant’s dismissal and not a relevant consideration – found no

evidence applicant's complaint history influenced respondent and respondent's promotion of applicant in 2021 suggests it is unlikely – satisfied applicant's dismissal was not harsh, unjust or unreasonable – application dismissed.

Harwood v The University of Melbourne

U2022/9898  
Masson DP

Melbourne

[\[2023\] FWC 824](#)  
12 April 2023

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- 3** TERMINATION OF EMPLOYMENT – identity of employer – labour hire – s.394 Fair Work Act 2009 – unfair dismissal application – jurisdictional objection that applicants not employees of respondent – suggestion applicants were employed by various labour hire companies including Secure Services – applicants denied any knowing involvement with Secure Services or other labour hire companies – applicants supplied their tax, visa and superannuation details directly to respondent – no indication that any other labour hire company involved in establishment of working relationships – no written employment arrangements between applicants and respondent, or applicants and any other company – applicants worked in various locations assigned by respondent – early in arrangement, Mr Raza enquired as to terms and conditions of employment and regarding other names on payslips, respondent replied that they were working it out – applicants paid by four different entities in addition to respondent – Contractor Services Agreement between respondent and Secure Services – no evidence that Secure Services played any role in engagement or payment of applicants prior to August 2021 – no direct evidence that Secure Services charged respondent for supply of applicants or payments made to them – work permits provided by respondents referred to applicants as employees – applicants employed in an operations roll with respondent, directly assisted in administration, accessed internal administration system, and acted on behalf of respondent – payments transferred by Secure Services without deduction of tax or payment of superannuation, no indication of paying entity – no indication that applicants supplied invoices to any organisation for payment – at time of termination applicants told by respondent they were no longer required – Secure Services played no role in dismissal – determination of whether applicants were employees involved two questions: whether applicants engaged by respondent at relevant time and whether relationship between parties was that of employment within meaning of the *Fair Work Act 2009* (Cth) (Act) – Commission determined onus on applicants to persuade Commission that it has jurisdiction – that company communicated instructions concerning performance of work to worker, without more, cannot operate to render company the employer [*Tooheys*] – only by reason of workers promise to labour hire company that worker is bound to work as directed by hirer [*Personnel Contracting*] – no evidence of engagement of applicants by Secure Services or other labour hire company – no evidence of any role played by Secure Services in assignment of tasks or cessation of applicants engagements, found respondent undertook those functions directly – fact that applicants not party to Contractor Services Agreement does not determine nature of relationship between parties – tax and super details provided by applicants to respondent and then by respondent to other labour hire companies – no evidence that applicants were required to or did issue invoices in connection with work for respondent – Secure Services practically acting as payroll services – Commission did not consider that meant it became employer – obvious party for any contractual relationships with
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applicant was respondent – elements of normal engagement missing: stated terms and conditions, and direct payments made to applicants by respondent – court may imply contract after concluding that parties intended to create contractual relations and examining extrinsic evidence – Commission determined this was an occasion in which many of the terms can be inferred from conduct [*Damevski v Giudice*] – Commission found sufficient certainty in arrangements to ascertain parties legal intention and objective intention that legal contract be made [*Damevski, Ermogenous*] – absence of expressly agreed terms on position descriptions, hours of work, whether weekly hired or casual problematic but in context of workplace where industrial instruments and statutory provisions may apply, deficiencies do not lead to an absence of enforceable rights and obligations – absence of direct payments by respondent not decisive – all work performed for respondent, information required to make payments held by respondent, that another entity which was not in contractual relationship with applicants transferred payment not a sound indicator that respondent not a party to contract – control exercised by respondent consistent with finding legal relationship – contract of employment once formed cannot be assigned to unrelated entity without notice – Commission determined applicants engaged by and worked for respondent at time of dismissals – turned to consider whether employees – no written contracts, therefore must assess totality of rights and obligations that may be discerned from conduct of oral contracts – following elements point to employment: respondent exercised day to day control over performance of work and right to exercise control strongly implied by conduct, applicants contracted to work in business of respondent, no indication that applicants could delegate performance of contractual duties, no meaningful sense in which applicants were working for themselves, applicants individually paid for work performed not by reference to output – contrary indicators include absence of tax, paid leave and superannuation however not significant in this context – applicants worked from home and supplied equipment however common post Covid-19 – Commission determined applicants engaged as employees – jurisdictional objection dismissed – matter to proceed to determination.

Raza and Anor v First Call Services

U2022/7229 and Anor  
Hampton DP

Adelaide

[2023] FWC 184  
9 May 2023

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- 4** CASE PROCEDURES – evidence – production of documents – Harman undertaking – ss.394, 589, 590 Fair Work Act 2009 – application for unfair dismissal – applicant dismissed for engaging in ‘highly inappropriate conduct of a sexual nature, for which he has been criminally charged with 11 counts of ‘act of indecency without consent’ and two counts of stalking’ – application stayed in light of ongoing criminal proceedings [[\[2022\] FWC 273](#)] – applicant found not guilty in the Criminal Proceeding, however, the ACT Office of the Director of Public Prosecutions (ACT DPP) has appealed that decision to the ACT Supreme Court – on 17 January 2023, the respondent filed an application for an order to produce – also on 17 January 2023, the applicant’s representative filed an application for a further stay of the proceedings – Applications for Orders to Produce – respondent submitted that it seeks orders compelling the applicant, the ACT DPP and the Australian Federal Police (AFP) to produce documents relevant to these proceedings, pursuant to s.590(2)(c) of the FW Act (collectively, the Production Applications) – Commission’s power to issue orders to produce under s.590(2)(c)
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is discretionary – respondent submitted that the applicant has previously raised a general objection to providing the respondent with the material requested in the application for an order against the applicant, on the grounds that the material sought in that draft order is covered by the ‘Harman Undertaking’ – the respondent submitted that it understands the applicant’s position is that the Harman Undertaking prevents him from disclosing the requested material to the respondent without leave from the ACT Magistrates Court – however, the respondent submitted that the applicant has not specified whether all or only some of the requested documents are covered by the undertaking – ‘The Harman Undertaking refers to the decision of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, and the substantive legal obligation which prevents documents and information produced under compulsion in one court process, from being used for another purpose’ – respondent submitted that it also sought orders for the ACT DPP and AFP to produce the same material that is sought from the applicant in these proceedings – the respondent further submitted that, in the event the applicant can satisfy the Commission that, as the party obtaining the disclosure covered by the Harman Undertaking he is prevented from disclosing the material, it does not follow that the same conclusion can be drawn with respect to the material sought from the ACT DPP and AFP – the applicant raised a jurisdictional objection in relation to the Production Applications and submitted that the correct Court hearing the Applications is the ACT Magistrates Court, being the Court where the documents were produced and to which the implied undertaking was given – the applicant submitted that he relies on the Harman Undertaking when opposing the release of the documents found in his possession and sought by the respondent – applicant further submitted that in Australia, this undertaking has been considered by the High Court of Australia in *Hearne v Street* – the respondent noted that the nature and extent of the Harman Undertaking was summarised by the High Court in *Hearne* – submitted that it is not the case that any document provided for the purpose of litigation is automatically covered by the Harman Undertaking – instead, for the Harman Undertaking to apply, and protect a particular document from disclosure, it is necessary to first show that the particular document in question was produced during legal proceedings as a result of a compulsory court process – the respondent maintained that the Commission has the power and jurisdiction to issue the orders sought in the Production Applications – Application for Stay of Proceedings – the applicant submitted that he has made a second application to stay the unfair dismissal proceedings (Commission Proceedings) until after the decision of his criminal matter, now on appeal in the ACT Supreme Court (Appeal Proceedings), has been decided – submitted that, as a result of a delay in the ACT Supreme Court, the matter is now listed for hearing of the Appeal on 27 September 2023 – the Applicant submitted that in exercising its power under s.589(1) the Commission should consider the following factors in accordance with the principles set out in *McMahon v Gould*: proximity of the criminal hearing and the possibility of miscarriage of justice – applicant also requested that the Commission take into consideration his financial, employment and health status – applicant submitted that a stay of the Commission Proceedings would significantly alleviate the impact of the concurrency of the two proceedings on him – the respondent opposed the further stay application and the granting of the orders sought by the applicant – Determination – in relation to the stay application of the applicant the Commission took into account the decision of *Gostencnik DP in Bowker v DP World Melbourne Limited* – Commission satisfied and

find that: i) the Criminal Proceedings in the ACT Magistrate Court/Supreme Court were commenced before the Unfair Dismissal Application; ii) if the Commission found against the applicant in this matter then that information would be used in the criminal proceeding; iii) no public interest lies in dealing with this application first; iv) relevantly and perhaps most importantly, if the Commission were to determine this application and the applicant is unsuccessful in the criminal case then, based on the commitment from the applicant that he will withdraw his unfair dismissal application if he is unsuccessful in the criminal case, the Commission and the respondent may waste a significant amount of time and money for no utility; v) the Respondent will not be prejudiced due to any further delay in the proceeding; and vi) there is little or no chance of the witnesses forgetting any relevant evidence due to the delay – the applicant further submitted that he has been found not guilty in his criminal case – the ACT DPP has appealed this decision – the Commission expects the applicant to give evidence in this matter – if the transcript of the applicant’s evidence, a copy of his witness statement or any decision of the Commission in this matter were then tendered in the criminal matter, then this information may prove to be prejudicial to the applicant – Commission satisfied that the conduct and outcome of this proceeding has the real potential to be more prejudicial to the applicant in his criminal matter compared to any prejudice which may be suffered by the respondent due to the delay in this matter – Commission will grant the stay application until the Criminal Appeal Proceedings have been concluded – in relation to the Applications for Orders to Produce – Commission found it was plainly obvious that the material sought by the respondent will be of some relevance in this proceeding – however, Commission noted that the alleged conduct of the applicant appears to have occurred outside of normal business hours – applicant has advised he is in possession of all the documents – Commission satisfied that production by the applicant will not provide an onerous burden upon the applicant – further, Commission found no evidence that the documents sought by the respondent were obtained under any form or degree of compulsion by the applicant – as such, a key element of a document being subject to a Harman Undertaking has not been satisfied – Commission satisfied that, even if the Harman Undertaking applied in this case, the undertaking does not prohibit the production of these documents because the production is a ‘valid compulsory process of law’ – satisfied that the implied undertaking, known as the Harman Undertaking, is not relevant in this circumstance – satisfied that the applicant will not be prejudiced in his criminal matter by producing these documents – these documents are already before the Courts in his criminal matter, so no further prejudice can possibly eventuate by producing them to the Commission – ordered that the applicant produce the documents as identified in the respondent’s draft order to produce – no order issued against ACT DPP or ACT Police.

Styche v The Commonwealth Of Australia (Represented By The Australian Signals Directorate)

U2021/8199  
Riordan C

Sydney

[\[2023\] FWC 921](#)  
19 May 2023

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## **Other Fair Work Commission decisions of note**

Varker v Victoria Police

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TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – unfair dismissal application – applicant employed by Victoria Police as senior Police Custody Officer (PCO) from May 2016 to 15 February 2021 – suspended from duty on 27 August 2020 after respondent received civilian complaint alleging misconduct – notified on 15 September 2020 of particulars of 3 allegations of misconduct – using inappropriate and/or excessive and/or disproportionate level of force in carrying out duties as Supervising PCO (SPCO) (Allegation 1), failing to take reasonable care for health/ safety and security/welfare of person in custody (Allegation 2), wearing an inappropriate face covering while carrying out duties as SPCO (Allegation 3) – internal investigation concluded that 2 allegations were substantiated or partially substantiated – applicant notified on 12 January 2021 of findings and proposal to terminate employment – given opportunity to respond – employment terminated effective 15 February 2021 – Allegations 1 and 2 related to an incident on 25 August 2020 involving a person in custody (Person X) – applicant did not contest use of force with Person X but disputed that force was excessive or disproportionate in circumstances – submitted that force used was necessary to process Person X in a safe manner and avoid dangerous escalation given Person X’s history of aggressive and volatile behaviour in custody – respondent submitted that circumstances did not justify applicant’s force as Person X was already being restrained by 3 other male officers – Commission viewed CCTV footage of applicant processing Person X on 25 August 2020 – satisfied that force depicted in CCTV footage was unreasonable and Person X’s past or current behaviour did not justify applicant’s violent behaviour – Commission noted applicant and other officers checked on Person X’s welfare and ultimately called an ambulance – satisfied that CCTV footage was inconclusive – noted that applicant’s face mask was not a disposable surgical mask and was not plain in design – satisfied that applicant’s role was public and the face mask worn when processing Person X did not comply with respondent’s direction of 1 July 2020 – respondent also relied on additional allegations of misconduct discovered after applicant’s dismissal – using excessive force on a person in custody (Person Y) (Allegation 4) – making concerning and inappropriate Facebook posts during the course of employment (Allegation 5) – applicant contended that force used in an incident on 23 June 2020 was reasonable given Person Y’s behaviour – respondent submitted that force was disproportionate – Commission viewed CCTV Footage of incident on 23 June 2020 – considered that grabbing Person Y’s hair when they were already restrained and under control was unnecessary and unreasonable – Commission noted that applicant’s Facebook posts did not contravene respondent’s social media guidelines or code of conduct, were made on personal time and in a personal space, made no reference to applicant being employed by respondent and were not easily attributed to applicant – Commission considered whether dismissal was unfair – satisfied that s.385 met – considered all elements of s.387 – found that Allegation 1 justified summary dismissal and was a valid reason for dismissal, Allegations 2 and 5 were not substantiated and not valid reasons for dismissal, Allegation 3 was substantiated but not a valid reason for dismissal nor did it add to the valid reason already found, Allegation 4 was partially substantiated but warranted no more than a warning and retraining – considered other elements of s.387 and on balance concluded that dismissal was not unfair – Commission found there was a valid reason for dismissal related to applicant’s conduct – not persuaded that dismissal was harsh, unjust or unreasonable – found that dismissal was not unfair – application dismissed.

U2021/1816  
Gostencnik DP

Melbourne

[\[2023\] FWC 1161](#)  
17 May 2023

Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division, WA Divisional Branch

RIGHT OF ENTRY – application for permit – conditions – s.512 Fair Work Act 2009 – applicant applied for an entry permit for the proposed permit holder; an Assistant State Secretary of the applicant – Fair Work Ombudsman advised the Commission it would not be filing any materials in relation to the application – proposed permit holder is responsible for ten organisers and coordinates their day-to-day responsibilities involved

in negotiating enterprise agreements and ensures the health and safety of workers who are represented by the applicant – a previous application for an entry permit for the proposed permit holder was declined in November 2017 based on the proposed permit holder's conduct engaged in between 2012 and 2015 – whether the proposed permit holder is a fit and proper person to hold an entry permit – the permit qualification matters listed in s.513(1) must be taken into account when considering whether a proposed permit holder is a fit and proper person – each of the permit qualification matters must be considered and given appropriate weight [CFMEU] – the permit qualification matters must be considered in the context of whether the proposed permit holder is a fit and proper person to hold an entry permit, not whether the proposed permit holder is a fit and proper person per se [ASMOF] – proposed permit holder completed Australian Council of Trade Unions Federal Right of Entry Training Course and additional training in relation to the rights and responsibilities of a permit holder – no evidence before the Commission to suggest that the proposed permit holder completed training in relation to entry rights under Subdivision AA of Division 2 of Part 3-4 (TCF right of entry provisions) of the Fair Work Act – Commission considered the provided materials to be appropriate training – penalties under the Fair Work Act and other industrial laws imposed on proposed permit holder for conduct he engaged in between 2012 and 2015 – applicant submitted that the proposed permit holder understood that his conduct was unlawful – applicant conceded that the contraventions weighs against a finding that the proposed permit holder is a fit and proper person – conditions imposed on previous entry permits held by the proposed permit holder also weighed against a finding that he is a fit and proper person to hold an entry permit – Commission held that this finding is mitigated by the proposed permit holder's compliance with those conditions and the historical nature of those conditions – Commission held that the other permit qualification matters including offences against industrial laws, criminal offences and state permits weigh in favour of issuing a permit – Commission observed that a significant period of time has expired since the proposed permit holder's last contravention in 2015 – Commission held that by taking into account the permit qualification matters and undertakings by the applicant and the proposed permit holder, the proposed permit holder is a fit and proper person to hold an entry permit – application approved – permit issued with condition that the proposed permit holder is to not exercise entry rights under the TCF right of entry provisions until he has completed appropriate training in relation to those provisions and has filed a copy of the training certificate in the Commission.

RE2022/1430  
Binet DP

Perth

[\[2023\] FWC 728](#)  
24 April 2023

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Conlon v Savers Australia P/L

TERMINATION OF EMPLOYMENT – minimum employment period – continuity of employment – ss.394, 383 Fair Work Act 2009 – application for an unfair dismissal remedy – applicant employed at Savers (respondent) a thrift retailer – Commission considered the meaning of minimum period of employment in the context of separate employment periods – applicant had two periods of employment with respondent – first period of employment ended when applicant no longer able to perform inherent requirements of role given injury and employer's inability to appropriately redeploy – applicant sought to return to work with respondent several months later – applicant returned to work with respondent after significant gap in employment – an agreement was reached whereby respondent credited applicant leave balance that would have accrued from end of first employment period and start of second – applicant signed new contract, was issued a new employee number and undertook fresh induction training – after 5 months and 24 days second employment relationship between applicant and respondent ended – applicant submitted she was terminated and sought unfair dismissal remedy – respondent submitted applicant was not dismissed but had in fact repudiated her contract – respondent submitted applicant had not completed requisite minimum period of employment to be protected from unfair dismissal under s.382 of the FW Act – applicant submitted her gap in service should be considered part of her employment period – applicant submitted during first period of employment she

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was wrongly terminated as respondent failed to adhere to their duty to provide work under workers' compensation law – Commission found it had no jurisdiction to make binding orders under South Australian workers' compensation law – Commission found even if the original termination was found to be an unfair dismissal, this does not have the effect of re-establishing an employment relationship – Commission further found even if the respondent was in breach of workers' compensation law, this does not establish an employment relationship at the relevant time – applicant further argued respondent had acknowledged her past service by crediting her entitlements upon her return to work – Commission found this agreement did not intend to continue the original employment relationship as respondent made no representations to this effect – Commission found that two periods of applicant's employment were broken by substantial gap – no employment relationship existed during this gap – Commission found applicant had not completed the required employment period – no jurisdiction to determine unfair dismissal application – application dismissed.

U2022/12373  
Anderson DP

Adelaide

[\[2023\] FWC 1022](#)  
1 May 2023

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Noble v Smiling Samoyed P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – constructive dismissal – ss.386, 394 Fair Work Act 2009 – applicant resigned after incident of workplace bullying by another employee and due to dissatisfaction with respondent's response- applied for unfair dismissal – claimed forced resignation – Commission considered whether end of employment was intention or probable result of respondent's conduct such that applicant had no effective or real choice but to resign [*Bupa Aged Care*] – in answering this, reason for resignation relevant – applicant's reason was conduct of respondent led applicant to lose trust and confidence in handling of bullying incident and become fearful of her safety if remaining in the workplace – Commission considered if loss of trust and confidence in the respondent's handling of bullying was reasonably founded such that it denied applicant real or effective choice but to resign – conduct included respondent undertaking assessment of bullying incident, issuing warning to other employee involved in incident, requiring that employee to issue apology to applicant, engaging external human resource expertise, commencing facilitated conflict resolution, communicating with applicant, proposing functional separation between applicant and other employee – while some conduct found to warrant loss of trust and confidence in handling of bullying, on balance Commission found applicant had a number of choices short of resignation (conflict resolution, functional separation) – held applicant had rational reasons for resignation but this did not mean resignation was forced – application dismissed.

U2022/12078  
Anderson DP

Adelaide

[\[2023\] FWC 941](#)  
24 April 2023

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Lonnie v WA Council on Addictions Incorporated

TERMINATION OF EMPLOYMENT – high income threshold – fringe benefit tax – ss.382, 394 Fair Work Act 2009 – applicant employed as General Manager of Residential Services and alleged unfair dismissal – respondent raised jurisdictional objection on basis that applicant's annual rate of earnings exceeded the high income threshold of \$162,000 and that he was not covered by an award or an enterprise agreement – applicant contended he was covered by the respondent's enterprise agreement and that his earnings were less than threshold – applicant claimed the enterprise agreement had broad coverage for all employees located in Perth Metropolitan Area (excluding child care and creche) and that he performed duties within a classification of the agreement – Commission held applicant's role as General Manager not within the classification structure of the enterprise agreement – Commission held applicant's employment not covered by an industrial instrument – Commission assessed applicant's annual rate of earnings at time of dismissal – Commission held applicant's

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salary was \$141,797 – applicant also used company vehicle with an agreed monetary value of \$10,783 – applicant provided with laptop and phone with agreed combined value of \$947.19 – respondent contended that payments or adjustments to the applicant's salary to cover accrual of fringe benefit tax on use of company vehicle ought be considered – Commission considered *Rofin's Case* and *Chang* – held where an amount paid other than to an employee and other than on their behalf or direction does not meet definition of 'remuneration' (*Rofin's Case*) – *Chang* approach not required as vehicle assigned agreed value by parties – applicant's wage adjusted to account for agreed value of car – Commission concluded fringe benefit payments or adjustments not to be counted as remuneration – applicant's total remuneration was \$153,527.19; below high income threshold – jurisdictional objection dismissed.

U2023/565  
Beaumont DP

Perth

[\[2023\] FWC 673](#)  
20 April 2023

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Saidi v Healthscope Operations P/L

TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as senior midwife and worked at respondent's birthing unit – applicant sought exemption from second COVID-19 vaccination dose on the basis that she had acquired post-infection immunity – respondent rejected exemption application and applicant refused second vaccination dose – applicant dismissed for non-compliance with respondent's vaccination policy – Commission observed that in deciding employment matters involving medicine or science, evidence of medical doctors is more likely to be accepted over evidence, opinions or beliefs of those who do not hold medical qualifications – whether respondent's vaccination policy was unlawful and unreasonable – Commission found that respondent had a legitimate and significant interest in having a healthy workforce [*Clark*] and found respondent's vaccination policy to be objectively reasonable – based on prevailing medical opinion and the evidence before the Commission, no medical reason for applicant to refuse second vaccination dose – Commission noted consequences if respondent failed to implement and enforce proper COVID-19 risk control measures across more than 40 hospitals nationwide – dismissal proportionate to non-compliance with respondent's vaccination policy – dismissal not harsh, unjust or unreasonable – application dismissed.

U2022/8984  
Easton DP

Sydney

[\[2023\] FWC 1083](#)  
8 May 2023

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Yang and Anor v Dijones Property Services P/L and Anor

GENERAL PROTECTIONS – amendment of application – alleged accessory – s.365 Fair Work Act 2009 – applicant previously worked for Mukhi RE (first employer) from 29 August 2022 to 6 October 2022 – applicant commenced with DiJones RE (second employer) on 20 October 2022 – applicant's employment terminated by second employer on 5 December 2022 – both employers operated in Sydney real estate market – applicant made single general protections dismissal application against both employers on 22 December 2022 – application out of time in relation to first employer – after lodgment applicant sought to amend application to add Mr Mukhi as party to dispute in relation to dismissal by second employer – applicant suggested Mr Mukhi was an accessory to second employer's contravention of general protection provisions – decision dealt with extension of time and amendment preliminary matters – extension of time considered – applicant suggested Mr Mukhi was deeply connected to second employer and consequently he did not want to jeopardise new role by making claim against first employer – Commission observed both employers operated under DiJones banner and shared business systems, resources and training materials – Commission rejected submission that this constituted exceptional circumstances – merits of application and other factors considered neutral – extension of time against first employer dismissed – amendment of application considered – applicant sought Mr

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Mukhi's name appear on certificate issued by Commission if conciliation not successful – Commission considered its role in relation to general protection dismissal applications – observed Commission authorised to 'deal with' certain disputes – if Commission satisfied all reasonable attempts to resolve dispute have been or are likely to be unsuccessful it must issue certificate to that effect – Commission observed certificate does not need to name every party to dispute – if certificate granted in relation to dispute against second employer applicant not precluded from making court application against both second employer and Mr Mokhi [*Bognar*] – Commission considered it a matter of discretion whether to add Mr Mukhi as a respondent – observed claim Mr Mukhi was an accessory to second employer's alleged contraventions was 'very weak' – held Mr Mukhi would be named as party to dispute – Commission to convene conference to deal with dispute with second employer with Mr Mukhi invited to attend.

C2022/8543 and Anor  
Easton DP

Sydney

[\[2023\] FWC 1005](#)  
28 April 2023

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Power v Lyndons P/L t/a Lyndons

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant's employment terminated for bullying and sexual harassment – alleged bullying included regularly making inappropriate comments to particular co-worker under guise of humour and taking same co-worker in bear hug – Commission considered one comment applicant made to co-worker that used offensive language and foreshadowed sexual conduct – applicant denied making the comment – nature of comment corroborated by witness evidence – having found applicant made the comment, Commission considered it reasonable for respondent to conclude applicant had engaged in sexual harassment that provided a valid reason for dismissal – Commission concluded dismissal of applicant not harsh, unjust or unreasonable because seriousness of conduct and failure of applicant to admit conduct when presented with evidence left respondent with no confidence there would not be reoccurrence of such conduct – application dismissed.

U2022/11758  
Dobson DP

Brisbane

[\[2023\] FWC 1060](#)  
5 May 2023

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Fouracre v BHP Coal P/L

CASE PROCEDURES – no reasonable prospects of success – ss.394, 587 Fair Work Act 2009 – application for unfair dismissal – applicant passed away following hearing but prior to decision being issued – considered whether Commission has jurisdiction to issue decision for unfair dismissal application where applicant has passed away and whether application may be continued by person of appropriate legal standing or estate – Commission concluded release of decision failed on two grounds – firstly, right to pursue s.394 application and remedy is 'personal' to dismissed employee and non-transferable – in support, Commission considered following conclusions in *Stan*: no rule in FW Commission Rules 2013 contemplating capacity to continue proceedings in event of death as is case in Federal Court rules; no express power or provision in FW Act exists allowing substitution of a party in these circumstances; remedies available for s.394 application do not follow simply by succeeding but are discretionary; remedy of compensation is intertwined with, and not severable from, discretionary considerations relating to order for reinstatement – Commission considered s.66 of *Succession Act 1981* (Qld) not applicable to personal rights vested in employment – Commission dismissed application pursuant to discretion in s.587(1)(c) on basis that application no longer had any reasonable prospects of success – secondly, release of decision failed on separate test of legal capacity to continue application, as applicant's representative failed to identify person with legal authority to maintain application in applicant's absence – in absence of instructions from applicant to assign decision or remedy in absence, or there being person with legal standing, applicant's primary remedy sought remains as reinstatement and in circumstances Commission's capacity to consider reinstatement as a remedy here is redundant – consideration of compensation in lieu

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would require a consideration of changed facts since the hearing – in applying *Millington* no effective Order could be made – application dismissed.

U2022/6596  
Spencer C

Brisbane

[\[2023\] FWC 1068](#)  
5 May 2023

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Bowen v Cape York Grassroots Aboriginal Corporation

TERMINATION OF EMPLOYMENT – misconduct – fraud – s.394 Fair Work Act 2009 – applicant terminated for misconduct around the making of two grant applications (Grant 1 and 2) and her behaviour subsequent when disciplined by management – respondent argued applicant’s conduct in relation to Grant 2 amounted to fraud and serious misconduct while Grant 1 provided context against which Grant 2 conduct should be considered – in making Grant 1, applicant sought to add the electronic signature of Chairperson to application without Chair’s knowledge – in Grant 2, applicant prepared application with paid help of consultant, provided herself as preferred contact, attached name of CEO as additional contact, and declared she was authorized by organisation to make the application all without the knowledge or consent of the CEO – application also provided project would be coordinated by separate corporation in which applicant had interest – on discovery of applicant’s conduct, respondent withdrew application and started disciplinary action – respondent engaged HR consultant to whom it was alleged applicant treated in aggressive and derogatory way – respondent then issued show cause letter to which applicant did not respond – Commission considered meaning of serious misconduct – conduct of such a grave nature as to be repugnant to the employment relationship [*Sharp*] – considered meaning of fraud [*Macleod v R*] – found no evidence applicant seeking to misuse or deprive organisation of funds so held no fraud occurred – accepted applicant’s conduct and respondent’s disciplinary response in Grant 1 provided factual backdrop to inform termination for Grant 2 conduct [*Virgin v Blackburn*] – found false declaration on Grant 2 was deceit – found submission of Grant 2 breached trust and confidence of employment relationship and its necessary withdrawal damaged reputation of respondent – found conduct of applicant met definition of serious misconduct – concluded ongoing employment untenable, constituting valid reason for termination – application dismissed.

U2022/11362  
Spencer C

Brisbane

[\[2023\] FWC 1198](#)  
19 May 2023

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Geiger v Port City Autos P/L

GENERAL PROTECTIONS – dismissal dispute – whether dismissed – ss.365, 386 Fair Work Act 2009 – application to deal with contraventions involving dismissal – applicant argued he had been dismissed on 21 October 2022 based on text messages from manager – respondent raised a jurisdictional objection that applicant was not terminated on employer’s initiative – suggested employment ended either by mutual agreement or applicant ‘deciding against returning to work’ – applicant worked at respondent since 1 July 2022 – applicant had 2 days of pre-approved leave for 17 and 18 October 2022 – from 13 October 2022 applicant became increasingly unwell at work and continued during period of leave – on 19 October 2022 applicant was taken to doctors – applicant tested positive for COVID-19 and diagnosed with tonsillitis – medical certificate valid until 21 October 2022 and isolated for 5 days – applicant did not inform respondent of absence – on 21 October 2022 applicant allegedly called respondent’s office to discuss absences – applicant received text message from respondent stating ‘your toolbox is on [the] road’ and ‘See you at court if u want’ – applicant maintained the ‘toolbox message’ evidenced termination – respondent argued that it did not initiate dismissal – applicant had been unreliable and frequently absent in August and September 2022 – applicant did not communicate ‘in a timely manner’ with respondent regarding absences – the tool box message was a ‘ruse’ to incite a response from applicant regarding whereabouts – Commission must first determine whether applicant was dismissed [*Coles Supply*] – Commission satisfied employment relationship severed

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on 21 October 2022 by respondent's text message, regardless whether manager had authority to dismiss or not – Commission concluded applicant was dismissed from employment at employer's initiative – respondent's jurisdictional objection dismissed.

C2022/7486

[\[2023\] FWC 916](#)

Hunt C

Brisbane

12 May 2023

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Armour v Mader Contracting P/L

TERMINATION OF EMPLOYMENT – valid reason – ss.385, 387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed by respondent as heavy-diesel mechanic and worked at gold mine operated by respondent's client – on 12 April 2022 applicant found in possession of shifters from client's warehouse – applicant asserted that removal of shifters from site was accidental – client treated possession of shifters as theft and banned applicant from its site – respondent learned of incident on 15 April 2022 – respondent terminated applicant's employment on 19 April 2022, based on practical implications of client's decision to revoke applicant's access to site – while not satisfied serious misconduct occurred, Commission satisfied applicant's conduct gave rise to valid reason for dismissal as applicant aware of seriousness that any unauthorised removal of, and failure to return, equipment from gold mine would have on employment – Commission considered s.387 factors and concluded dismissal harsh and unreasonable – satisfied respondent failed to provide applicant with procedural fairness as applicant not notified of reason for dismissal, nor given opportunity to respond to reason, prior to respondent's decision to terminate – Commission observed respondent relied on applicant's explanation to client as his show cause – Commission noted respondent's lack of dedicated human resource management specialist and absence of separate investigation conducted by respondent regarding applicant's conduct contributed to unfairness of termination and flaws in procedure – satisfied that applicant was unfairly dismissed per s.385.

U2022/5218

[\[2023\] FWC 1034](#)

Schneider C

Perth

2 May 2023

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A v Respondent

GENERAL PROTECTIONS – extension of time – s.365 Fair Work Act 2009 – 167 days late – parties and other identifying details anonymised – respondent directed applicant to undertake medical assessment – applicant refused to attend assessment – applicant dismissed for failing to follow lawful and reasonable direction – applicant's dismissal took effect on 18 January 2022 – final day to file within statutory timeframe was 8 February 2022 – application filed on 26 July 2022 – application 167 days out of time – extension of time required for general protections application to proceed – respondent objected to extension suggesting applicant had previously filed two proceedings concerning dismissal – whether exceptional circumstances considered – Commission noted exceptional circumstances may include a single exceptional matter, a combination of exceptional factors or a combination of individually ordinary factors that when combined become exceptional [*Nulty*] – applicant suggested severe mental health issues, being diagnosis and treatment of schizophrenia, prevented lodgment within time – Commission noted applicant's mental health situation required government services intervention and involuntary hospitalisation – timeline provided by applicant – Commission noted in September 2021 (prior to dismissal) applicant ceased taking prescription psychiatric medication – in period to 18 January 2022 dismissal applicant's mental health condition worsened but due to nature of condition applicant was not aware of this deterioration – in period after dismissal applicant continued to refuse mental health treatment – applicant involuntarily hospitalised in June 2022, schizophrenia diagnosed during hospitalisation – applicant discharged from facility in July 2022 subject to involuntary community treatment order – Commission found reasons for delay weighed in favour of finding exceptional circumstances – found applicant was having significant issues 'maintaining their grip on reality and,

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accordingly, was not in a mental state to adequately address their termination' – rejected respondent's submission concerning prior applications, finding applicant 'was unable to function, in even most minimally satisfactory way, to support their vital life needs let alone initiate legal proceedings – found applicant took action to dispute dismissal within time but these were minimal and misguided due to personal circumstances – found an extension would prejudice respondent – Commission noted it could not assess adequately merits as matter involved contested issues of fact – held applicant not medically fit for entire period from termination until discharge from mental health facility – held exceptional circumstances existed – extension granted.

C2022/5303  
Schneider C

Perth

[\[2023\] FWC 958](#)  
21 April 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/](http://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/](http://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/](http://www.australia.gov.au/).

**Federal Register of Legislation** - [www.legislation.gov.au/](http://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](http://www.legislation.gov.au/Series/C2009A00028).

**Fair Work (Registered Organisations) Act 2009** - [www.legislation.gov.au/Series/C2004A03679](http://www.legislation.gov.au/Series/C2004A03679).

**Fair Work Commission** - [www.fwc.gov.au/](http://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/](http://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.fccoa.gov.au/>.

**Federal Court of Australia** - [www.fedcourt.gov.au/](http://www.fedcourt.gov.au/).

**High Court of Australia** - [www.hcourt.gov.au/](http://www.hcourt.gov.au/).

**Industrial Relations Commission of New South Wales** - [www.irc.justice.nsw.gov.au/](http://www.irc.justice.nsw.gov.au/).

**Industrial Relations Victoria** - [www.vic.gov.au/industrial-relations-victoria](http://www.vic.gov.au/industrial-relations-victoria).

**International Labour Organization** - [www.ilo.org/global/lang--en/index.htm](http://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](http://www.qirc.qld.gov.au/index.htm).

**South Australian Employment Tribunal** - [www.saet.sa.gov.au/](http://www.saet.sa.gov.au/).

**Tasmanian Industrial Commission** - [www.tic.tas.gov.au/](http://www.tic.tas.gov.au/).

**Western Australian Industrial Relations Commission** - [www.wairc.wa.gov.au/](http://www.wairc.wa.gov.au/).

**Workplace Relations Act 1996** - [www.legislation.gov.au/Details/C2009C00075](http://www.legislation.gov.au/Details/C2009C00075)

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