AIR Bulletin

18 December 2008 Volume 49/08 with the Decision Summaries for the week ending Friday, 12 December 2008.

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Decisions of the Australian Industrial Relations Commission
Summaries of decisions signed and filed in the Australian Industrial Registry during the week ending Friday, 12 December 2008.

1 TERMINATION OF EMPLOYMENT – misconduct – merits – racial discrimination against co-worker – procedural fairness – fair go all round – ss120, 643 Workplace Relations Act 1996 – appeal – Full Bench – applicant terminated due to racial discrimination against co-worker and refusal to provide written apology – Commission at first instance found valid reason for termination – appeal by former employee on many grounds including that she was not given a fair go by Commission and that Commission failed to take into account lack of procedural fairness during termination – satisfied Commission gave applicant fair go – satisfied Commission directly dealt with issues relating to procedural fairness – other grounds of appeal rejected – no appealable error – leave to appeal refused – appeal dismissed.

Appeal by Tam against decision of Richards SDP of 2 September 2008 [[2008] AIRC 1097] – Re: Brisbane City Council
C2008/3134
Lacy SDP
Ives DP
Harrison C
Melbourne 12 December 2008


Chenery v IPC Employment Ltd
U2008/4116
Cartwright SDP
Sydney 12 December 2008

3 REGISTERED ORGANISATIONS – registration – amendment of rules – whether steering committee precluded from discharging duties – ss18, 25 Schedule 1, Workplace Relations Act 1996 – application by VIPA – Independent Pilots Group for registration as organisation – VIPA sought to amend its rules under s25 – objection – objector asserted that VIPA not capable of being registered under Schedule 1 because its steering committee was unfinancial at relevant times and thus precluded from discharging duties as office holders – based on evidence so far, such assertions rejected – s25 – an applicant for registration is able to utilise s25 to amend its rules – not necessary for Commission to first determine that an association is federally registrable before discretion under s25 can be exercised – appears that VIPA has
transitional rule altering body that is relevant for this purpose (in contrast to Surgeons case) – leave to alter rules under s25 granted – Commission to now hear substantive application.

VIPA – Independent Pilots Group

D2008/111
Richards SDP
Brisbane
11 December 2008

4 TERMINATION OF EMPLOYMENT – termination at initiative of employer – repudiation – demotion – s643 Workplace Relations Act 1996 – jurisdictional objection by respondent on grounds that there was no termination at initiative of employer – applicant was teacher employed as Head of Science – Headmaster commenced meeting by stating applicant has lost confidence of supervisor and immediate subordinate, that previous performance counselling efforts had failed, that supervisory duties would be removed and that fresh employment elsewhere was warranted – respondent’s actions unilaterally acted to radically vary, by demotion, contract of employment – remuneration and responsibilities altered significantly – applicant did not acquiesce to variation of contract or proposed transition to new employment elsewhere – actions of employer not properly a consensual variation of employment contract – applicant left with no alternative but to accept repudiation of employment contract – repudiation accepted via filing unfair dismissal application – satisfied termination at initiative of employer by repudiation of employment contract – jurisdictional motion dismissed.

Butler v Presbyterian and Methodists Schools Association (PMSA) t/as Brisbane Boys’ College

U2008/2258
Richards SDP
Brisbane
8 December 2008

5 TERMINATION OF EMPLOYMENT – 100 employees or fewer – s643 Workplace Relations Act 1996 – satisfied 100 employees or fewer – no jurisdiction – application dismissed.

Morse v Call No. 3 P/L t/as City and Rural First National

U2008/6838
Leary DP
Hobart
8 December 2008

6 TERMINATION OF EMPLOYMENT – extension of time – confusion over Federal and State jurisdictions – s643 Workplace Relations Act 1996 – 1 week late – unrepresented applicant claimed confusion over relevant jurisdiction – time limits in State and Federal jurisdictions differ – confusion regarding State versus Federal jurisdiction generally acceptable explanation for delay – however applicant had visited relevant website which provided information concerning termination and with links to further information and advice – explanation unconvincing – insufficiently active contest of termination – not fair to others in like situation to allow extension – extension refused – application dismissed.
WORKPLACE AGREEMENTS – varying agreement – application to vary and extend pre-reform agreement – Schedule 7, Clause 2A of the Workplace Relations Act 1996 – application to vary and extend pre-reform agreement – no reduction in terms and conditions of employment – statutory requirements met – agreement varied and extended to 30 December 2010.

Australian Municipal, Administrative, Clerical and Services Union

AG2008/114 [2008] AIRC 972
Lewin C Melbourne 11 December 2008


Transport Workers’ Union of Australia

AG2008/1522 [2008] AIRC 975
Lewin C Melbourne 11 December 2008

ENTERPRISE BARGAINING – suspension of bargaining period – termination of bargaining period – parallel negotiations by two competing unions – whether union genuinely seeking to make agreement – demarcation dispute – ss348, 430, 496 Workplace Relations Act 1996 – application to suspend or terminate bargaining period – both NUW and AMIEU had bargaining periods in order to make collective agreement to cover same employees – AMIEU finalised agreement to cover all relevant workers – employers then applied to have NUW bargaining period suspended or terminated on grounds NUW had no right to make any further agreement to cover same workers as per s348(3) – employers also asserted NUW not genuinely seeking to make agreement but rather were involved in demarcation dispute – assertions rejected – it is employers who are not genuinely seeking to reach agreement not NUW – no evidence of demarcation dispute – requirements of s340 not met – application to suspend or terminate NUW bargaining period refused – Federal Court proceedings regarding vote for agreement – NUW asserted that voting procedures for AMIEU agreement (and agreement itself) were flawed and have applied to Federal Court for declarations to that effect – NUW bargaining period remains in place unless and until Federal Court makes orders otherwise.

Welch v Anjoshco P/L t/as McDonald's BP Chinderah South

U2008/6420 [2008] AIRC 951
Hoffman C Brisbane 9 December 2008

11 TERMINATION OF EMPLOYMENT – termination at initiative of employer – probationary period – s643 Workplace Relations Act 1996 – respondent submitted no jurisdiction because applicant was on probationary period and no termination at initiative of employer – no evidence to support respondent's submissions – submissions rejected – conciliation already unsuccessful – s650 certificate issued.

O'Rourke v Sharman Property Services

U2008/5638 [2008] AIRC 928
Hoffman C Brisbane 9 December 2008

12 TERMINATION OF EMPLOYMENT – costs – termination at initiative of employer – resignation – ss643, 658 Workplace Relations Act 1996 – respondent sought costs following determination that applicant not terminated at initiative of respondent – various submissions by respondent in favour of costs - Commission rejected respondent's submissions - was reasonably open to applicant to believe that there was forced resignation and termination at initiative of employer – was reasonably open to applicant to conclude that respondent's removal of his clients was capricious act – applicant did not act unreasonably in failing to discontinue proceedings – applicant acted reasonably in continuing proceedings to point of having jurisdictional contest determined – application for costs dismissed.

Slatyer v Workforce Solutions (Qld) P/L

U2008/5327 [2008] AIRC 984
Bacon C Brisbane 12 December 2008

13 TERMINATION OF EMPLOYMENT – extension of time – resignation – Workcover – language skills – ss643, 659 Workplace Relations Act 1996 – 15 months late – applicant asserted termination due to discrimination related to race and illness – also asserted that employer forced him to resign by exploiting his inability to speak English – since termination applicant pursued Workcover payments – appears that s643 application was lodged as after-
thought in attempt to find resolution for losing access to Workcover payments – Brodie-Hanns applied – no acceptable reason for delay – prejudice to respondent – unclear whether applicant resigned or terminated – no action by applicant to contest alleged termination – Commission indicated that employer should provide applicant with a Statement of Service – extension refused – application dismissed.

Ali v Gina Fibreglass P/L

U2008/5887 [2008] AIRC 982
Foggo C Melbourne 11 December 2008

14 TERMINATION OF EMPLOYMENT – frivolous, vexatious or lacking in substance – whether application untenable – whether termination at initiative of employer – s643 Workplace Relations Act 1996 – respondent asserted application frivolous, vexatious or lacking in substance because applicant had not been terminated – Commission noted that respondent’s letter to applicant (together with cheque and deed of release) appeared to be termination letter – respondent has not proven that application is clearly untenable [Fullerton].– respondent’s motion dismissed – referred for conciliation.

Brewer v Carla Zampatti P/L

U2008/6479 [2008] AIRC 970
Cargill C Sydney 12 December 2008

15 TERMINATION OF EMPLOYMENT – misconduct – video on YouTube – occupational health and safety – s643 Workplace Relations Act 1996 – applicant terminated for alleged serious misconduct relating to video of applicant on YouTube – ‘Need for Speed’ video filmed at workplace involved movement of a wheeled stand ‘slightly above walking speed’ around supermarket – conduct occurred 12 months before termination during night fill operations when store was closed – conduct not repeated since – applicant was aware of being filmed but did not post videos on YouTube – whether investigation conducted properly – not satisfied respondent investigated issue properly – lack of procedural fairness – applicant not advised what meeting was about – no opportunity to respond – satisfied conduct was foolish and unsafe – satisfied inappropriate use of equipment – however applicant had not been given any OHS training during his employment – no repetition of conduct in 12 months – no evidence applicant posed continuing threat to self or others – satisfied termination harsh and unreasonable – employed almost 7 years – mitigated loss – reinstatement – reinstatement ordered with continuity of employment – no order for remuneration lost because applicant’s conduct was contributing factor in termination – however applicant should be compensated for remuneration lost since date of hearing.

Kruger v North West Supermarkets P/L

U2008/327 [2008] AIRC 952
Whelan C Melbourne 10 December 2008
TERMINATION OF EMPLOYMENT – second application – fairness – unlawful termination – family responsibilities – ss643, 659, 673 Workplace Relations Act 1996 – first application dismissed (s643(1)(a)) and discontinued (s661) – second application lodged 6 weeks later regarding unlawful termination relating to ‘family responsibilities’ under s659 – applicant was given opportunity during first application to amend application to include s659 grounds but chose to discontinue and lodge second application – 6 week delay due to need to arrange funding for legal representation – second application must not be allowed unless s673 preconditions met – second application does not correct error in previous application – whether fair to accept second application – Bytecture, Riley considered – fairness to applicant and respondent involves balancing conflicting considerations – the need to arrange funding for legal representation is not acceptable explanation for delay – family responsibilities – ‘family responsibilities’ is meant to encompass the need to provide care for family members – it does not extend to lending a company car to a family member – no evidence of any family emergency which required applicant’s wife to have immediate access to car – little merit in substantive application – because first application discontinued rather than amended, respondent entitled to believe applicant had abandoned claims – not satisfied it would be ‘fair’ to accept second application – matter struck out.

Zeccola v Steinborner Motors P/L t/as Steinborner Holden

U2008/6381
Whelan C Melbourne 12 December 2008

TERMINATION OF EMPLOYMENT – 100 employees or fewer – ss643 Workplace Relations Act 1996 – no response by applicant to correspondence – satisfied 100 employees or fewer – no jurisdiction – application dismissed.

Coleman v Cane & Leisure P/L

U2008/6890
Roberts C Sydney 12 December 2008

TERMINATION OF EMPLOYMENT – 100 employees or fewer – ss643, 659 Workplace Relations Act 1996 – satisfied 100 employees or fewer – unfair dismissal grounds of application dismissed – unlawful dismissal grounds of application under s659 referred for conciliation.

Plowman v Air X P/L

U2008/7348
Williams C Perth 12 December 2008
TERMINATION OF EMPLOYMENT – remuneration cap – award derived conditions – ss638, 642, 643, 661 Workplace Relations Act 1996 – Sales Manager’s remuneration was about $168,000 – remuneration cap exceeded – not employed under award-derived conditions – no jurisdiction – application dismissed.

Jamieson v SMR Learning P/L (t/as New Horizons Learning Centre (Perth))

U2008/7014 [2008] AIRC 980
Williams C Perth 11 December 2008
Decisions of Other Jurisdictions

Summaries of decisions of jurisdictions other than the Australian Industrial Relations Commission received by the Australian Industrial Registry during the week ending Friday, 12 December 2008. The majority of Summaries have been prepared by the jurisdiction of origin.

Industrial Relations Commission of New South Wales

20 APPLICATION FOR RELIEF FROM VICTIMISATION – various heads of claim – former school teacher – Teacher Improvement Program – transfer to another school – dismissal of teacher – application out of time – significant delay in filing claim – numerous applications to Commission on same subject matter – whether sufficient reason exists to warrant exercise of discretion – conduct of employer – prospects of success – principles dealing with out of time applications – respondent's claim that application frivolous, vexatious and brought without reasonable cause – costs sought – held - similar considerations as s85(3) of Act – applicant did not address requirements of s213(4) – no sufficient reason established to accept out of time application – applicant very familiar with Commission's procedures, particularly time limits on filing – previous unfair dismissal application discontinued – alleged circumstances not victimisation – delay of 5 years or 7 months – no hardship to applicant – hardship for respondent – respondent faced with numerous unmeritorious applications – no basis for Commission to exercise discretion – application dismissed – further submissions as to costs.

Mullins and NSW Department of Education and Training

IRC 1471 of 2008 [2008] NSWIRComm 236
Sams DP 10 December 2008

21 AWARD INTERPRETATION – principles to be applied – entitlement of electricians to award allowance – relevant definition clear and unambiguous – natural and ordinary meaning of terms – focus on examination of work carried out – does work satisfy requirements of definition – orders sought – held - work carried out within scope of existing job description – does not satisfy award definition – no entitlement to allowance – application for orders declined.

Electrical Trades Union of Australia NSW Branch and Sydney West Area Health Service (Nepean Hospital)

IRC 288 of 2008 [2008] NSWIRComm 1137
Bishop C 12 December 2008

22 COSTS – unfair dismissal claim rejected – appeal withdrawn – settlement reached – application for costs directed against agent as confirmed by terms of settlement of appeal – jurisdiction found – responsibility of advocates in unfair dismissal proceedings explained – the "cab rank" rule – supplementary decision issued – application for costs dismissed.

Notification under s130 by Ambulance Service of NSW of a dispute with Health Services Union – Re: threatened industrial action in Inner Hunter area

INDUSTRIAL DISPUTE – payment of annualised salary for training – principles of interpretation – lacuna in industrial agreement – strict application of literal interpretation determination made - held - employee remains in position of operator at Liddell Power Station entitled to total annualised salary package until appointed to alternate substantive position.

Notification under s130 by Construction, Forestry, Mining and Energy Union (NSW Branch) of a dispute with Macquarie Generation – Re: refusal to pay annualised salary


AWARD – application for a new award in relation to teacher staffing entitlements – notice of motion contending Commission was without jurisdiction – whether there was inconsistency between Teaching Service Act 1980 and award-making functions of Industrial Relations Commission available under Industrial Relations Act 1996 – whether s47A(9) of Teaching Service Act 1980 operated as privative clause to prevent in part the making of award sought – whether no extra claims provision of award operated to prevent in part the making of the award sought – first issue answered in negative – second issue answered in affirmative.
third issue answered in negative.

Crown Employees (Teacher Staffing Entitlements) Award
IRC 1389 of 2008 [2008] NSWIRComm 241
Boland J Pres
Walton J VP
Haylen J
McLeay C 10 December 2008

APPEAL – leave to appeal – unfair dismissal – Juvenile Justice Officer dismissed for using excessive force on detainee – CCTV footage of incident – consideration on appeal of whether excessive force used – consideration of whether hold used by officer on detainee was improper and unauthorised – held no error at first instance regarding excessive force – held officer did not intentionally restrain detainee in an unauthorised and improper manner – held no error at first instance that termination was harsh, unreasonable and unjust – leave to appeal refused – appeal dismissed.

Director of Public Employment by her Agent the Director General of Department of Juvenile Justice v Public Service Association and Professional Officers' Association Amalgamated Union of NSW (on behalf of Sweet)
IRC 2003 of 2008 [2008] NSWIRComm 239
Boland J Pres
Walton J VP
Grayson DP 9 December 2008
Websites of Interest

**Australian Industrial Relations Commission (AIRC)** - [http://www.airc.gov.au/](http://www.airc.gov.au/) – includes hearing lists, rules, forms, major decisions, termination of employment information and student information. Related websites include:


**Australian Fair Pay Commission** – [http://www.fairpay.gov.au](http://www.fairpay.gov.au) – established to set and adjust the federal minimum wage to promote the economic prosperity of the people of Australia;


**ComLaw** - [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/) - legislative repository that has replaced SCALEplus, contains:

- Commonwealth primary legislation, as well as other ancillary documents and information, in electronic form; and
- the new Federal Register of Legislative Instruments (FRLI) which was established on 1 January 2005 under the *Legislative Instruments Act 2003* as the authoritative source for legislative instruments and compilations of legislative instruments;


**Tasmanian Industrial Commission** - [http://www.tic.tas.gov.au](http://www.tic.tas.gov.au);
WebLaw – http://www.weblaw.edu.au/weblaw/index.phtml – provides access to a range of online Australian legal information;

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

Workplace Authority - http://www.workplaceauthority.gov.au - primary role is to accept lodgments of workplace agreements; includes information regarding Australian Workplace Agreements (AWAs), development and lodging procedures;

workplace.gov.au – http://www.workplace.gov.au - provides access to online employment and workplace relations services and information, including government assistance, jobs, careers, training, working conditions and Indigenous Employment Centres;


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The Australian Industrial Registry Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Commission;
- Practice Directions concerning the practice and procedure of the Commission;
- weekly decisions summaries;
- details of procedural changes and developments within the Registry; and
- advice regarding the rights and obligations of organisations registered under the *Workplace Relations Act 1996*.

For inquiries regarding publication of the Bulletin please contact the Registry’s Information Help Desk - Postal address: GPO Box 1994, Melbourne Vic 3001, Tel: (03) 8661 7807, Fax: (03) 9655 0406.

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