FWC Bulletin

2 December 2022 Volume 24/22 with selected Decision Summaries for the month ending Wednesday, 30 November 2022.

Contents

Next edition of the Fair Work Commission Bulletin

Due to the holiday period the next edition of the Fair Work Commission Bulletin will be published in late January 2023.

Notice to Profession – Role of Junior Counsel in Commission proceedings

Former President of the Commission, Justice Ross issued a Notice to Profession on 7 November 2022.

[1] The Fair Work Commission encourages the active participation of junior counsel in cases where two or more counsel are briefed for a person and the Commission has granted the person permission to be represented by a lawyer or paid agent in a Commission conference or hearing.

[2] The Commission recognises that junior counsel will often have made a substantial contribution to the preparation of the case, and will best develop as advocates by being given opportunities to present argument and examine and cross-examine some witnesses.

[3] Where appropriate, the Commission encourages senior counsel to divide submissions between themselves and junior counsel, or ask junior counsel to make submissions in reply, call evidence or cross examine witnesses.

End of year timeframes for approval of enterprise agreement applications

December is usually the busiest time of the year for enterprise agreement applications. The Commission does not close over the festive period, and we will continue to process and approve enterprise agreements as quickly as possible.

If you want your agreement to be approved quickly and easily, we recommend you:

- Check the helpful information on our online guide: Make an enterprise agreement
- Make sure your application is complete and complies with all requirements
- Lodge your application as early as possible
- Provide contact details with your application for someone who will be available over the festive period, in case we need further information

We usually approve simple (complete and compliant) applications in about 2 weeks. More complicated or incomplete ones often take longer. If too many applications are lodged in the second half of December the increased volume may also cause delays, so we recommend you get in early.

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, 30 November 2022.

1 ENTERPRISE BARGAINING – protected action ballot – ss.437, 444, 604 Fair Work Act 2009 – appeal – Full Bench – on 15 September 2022 the National Tertiary Education Industry Union (NTEU) applied for a protected action ballot order to see if the NTEU's members employed by Curtin University (University) authorised taking industrial action – the application sought that 10 questions be put to the union members and sought that the ballot be conducted by a ballot agent, namely TrueVote P/L – at first instance the Deputy President made a protected action ballot order but the order omitted the last 8 of the 10 questions proposed in the NTEU's application – the order also required that the ballot be conducted by the Australian Electoral Commission (AEC) rather than TrueVote, as proposed by the NTEU – the NTEU's grounds for appeal included that the proposed questions (3) to (10) inclusive were ambiguous, and that there was insufficient evidence to satisfy the Deputy President that TrueVote met the statutory requirements to be appointed as the ballot agent – the Commission's power to make a protected action ballot order under s.443 of the FW Act is not discretionary in nature – s.443(1) imposes a duty on the Commission to make an order if 2 conditions have been met: first (in paragraph (a)), that an application for such an order has been made under s.437 and, second (in paragraph (b)), that the Commission is satisfied that each applicant for an order has been, and is, genuinely trying to reach an agreement with the employer of the employees to be balloted – it was not in dispute in this case that the Deputy President was satisfied that the second condition was met – the University contended that the NTEU's application did not satisfy the first condition because its proposed questions (3)-(10) did not satisfy the requirement in s.437(3)(b) that the questions to be put to the employees must 'specify … the nature of the proposed industrial action' – the Full Bench understood that the Deputy President at first instance was satisfied that the first condition in s.443(1)(a) was met only after first excising questions (3)-(10) on the ground that they were ambiguous – Full Bench found this approach is problematic on a number of levels – the apparent course taken by the Deputy President reversed the order of consideration contemplated by s.443 whereby the Commission first determines whether there is an obligation to make an order under s.443(1) and then determines the content of the order in conformity with s.443(3)-(5) – more fundamentally, however, it raised the question of what is necessary to satisfy the requirement in s.443(1)(a), which operates as a condition precedent to the duty to make an order – *John Holland* and *FreshExchange* considered – Full Bench held that an application for a protected action ballot order will comply with the requirement in s.437(3)(b), and thus will have been 'made under s.437' for the purpose of s.443(1)(a), if it specifies a question or questions, capable of being answered 'yes' or 'no' by the

employees participating in the ballot, which propose(s) action of an identified character, kind or sort capable of constituting industrial action within the meaning of s.19(1) – a question which meets these requirements can be expressed and understood in ordinary industrial English, and there is no requirement for legalism, technicality or pedantry in the drafting or analysis of such questions – it was the view of the Full Bench that the proposition that, beyond these requirements, the questions must be interrogated to identify ambiguity in aid of enabling 'informed consent' goes beyond the text of the provision and constitutes a gloss on the statute – the Full Bench affirmed that paragraph [19] of the decision in *John Holland* states the correct approach to the construction and application of s.437(3)(b) – the statements of principle in *FreshExchange* were not consistent with that approach and should not be followed – the Full Bench did not consider that the Commission has a general discretion to determine the questions which will be included in the order, or to simply exclude valid questions, independent of what has been applied for – that is not to say that the Commission is compelled, in making an order, to reproduce the questions in precisely the same terms as applied for – s.599 provides that, except as provided by the FW Act, the Commission is not required to make a decision in relation to an application in the terms applied for, and there is no reason to think that anything in s.443 ousts the operation of s.599 – if some adjustment can be made to the text of a question in order to more clearly express what the applicant proposes, then that may be done in discharging the requirements of s.443(1) and (3)(d) – in rare cases, there may also be applications which, while they contain a number of questions which meet the requirements of s.437(3)(b) and are thus validly made under s.437, contain a question which is so lacking in meaning that it is incapable of being answered – in that circumstance, unless the drafting of the question can be rectified in a way consistent with the applicant's intent, it may be necessary to make an order pursuant to s.443(1) which excludes that question – the Full Bench granted permission to appeal, upheld ground 3 of the appeal, and quashed the decision and order – on rehearing the NTEU's protected action ballot order application the Full Bench made an order which contained the 10 questions proposed in the NTEU's application (with some drafting modifications to questions (3), (4) and (5)) and required the ballot to be conducted by TrueVote.

Appeal by National Tertiary Education Industry Union against decision [[2022] FWC 2514] and order [PR746016] of Binet DP of 20 September 2022 Re: Curtin University

C2022/6562
Hatcher VP
Clancy DP
O'Neill DP

Sydney

[2022] FWCFB 204
14 November 2022

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2 INDUSTRIAL ACTION – suspension of protected industrial action – endangering life – order on Commission's initiative – s.424 Fair Work Act 2009 – Svitzer Australia P/L (Svitzer) operates tug boats in 17 Australian ports, 14 of these as monopoly operator – protracted enterprise agreement negotiations between Svitzer three maritime unions over considerable time – maritime unions (AMOU, MUA and AIMPE) notified over 1100 instances of industrial action since October 2020 – Svitzer gave notice of employer response action on 14 November – response action would indefinitely lock out workers from each port operated by Svitzer from midday 18 November – Commission acted on 15 November

on its own initiative to consider suspending or terminating Svitzer's response action – urgent attempts at conciliation not successful and later refused – hearing conducted on 17 November – Svitzer wanted Commission to terminate response action – maritime unions wanted Commission to suspend response action – Commonwealth Minister for Employment and Workplace Relations submitted lockout should be terminated or, in the alternative, suspended for six months – decision issued by Full Bench early on 18 November finding proposed lockout is protected industrial action, lockout threatens to endanger welfare of Australian population or part of it and lockout threatens significant damage to Australian economy – suspended Svitzer's action for six months – reasons for decision to follow: [2022] FWCFB 209 – reasons now provided – found Svitzer's proposed lockout is protected industrial action that is threatened, impending or probable: s.424(1)(b) – consideration whether Commission must make order to suspend or terminate – whether endangering life, personal safety, health or welfare of the population or part of the population – terms 'endanger' and 'welfare' have their ordinary meaning – found proposed action threatens to endanger welfare of population or part of it in three ways – firstly found lockout will diminish, or extinguish, Svitzer's offshore emergency towing response capability – capability addresses risk of vessels carrying oil or noxious substances from running aground – secondly found lockout will disrupt import of pharmaceutical goods and other medical supplies – thirdly disrupted tug boat operations will restrict cruise ships from docking leaving passengers offshore indefinitely – held proposed lockout endangered welfare: s.424(1)(c) – consideration of damage to Australian economy – Full Bench found approximately $1.1 billion worth of goods passed through 17 ports in which Svitzer operates each day – found lockout likely to cause significant harm to many sectors of Australian economy directly and indirectly – held proposed lockout threatened significant damage to Australian economy – findings required Commission to consider whether to suspend or terminate protected industrial action: s.424(1) – whether to suspend or terminate – relevant considerations include bargaining system under the Act encourages enterprise bargaining and permits protected industrial action; length of time current negotiations have taken; progress made in those negotiations; whether prior industrial action taken; views of the parties; and potential for further industrial action – found bargaining between Svitzer and maritime unions had been going on for a very long time – found maritime unions had engaged in various instances of protected industrial action since October 2020 – Full Bench not in a position to assign blame for protracted bargaining – Full Bench observed termination order would deprive parties of rights to collectively bargain whereas suspension would not – Full Bench noted inference that Svitzer had engineered lockout situation to enliven s.424(1) and bring industrial action to an end – Full Bench noted submission by Svitzer, without admission, that it could use legal tools to facilitate end of bargaining akin to actions of Qantas – Full Bench rejected this submission – found s.424 is not to be construed on the basis it constitutes a legitimate avenue to bring about the end of a bargaining process – found s.424 exists to protect the population from endangerment and economy from significant damage threatened by protected industrial action – observed inference that Svitzer had threatened indefinite lockout, with knowledge of damage this would do to the community, in anticipation of s.424 order being made to end bargaining was a factor weighing against termination order – held termination order not appropriate as parties should not be deprived of collective

bargaining rights – ordered Svitzer's protected industrial action be suspended for six months – observed this time period will provide certainty as to operation of Australian ports and allow time for further communication between parties without distraction of industrial action.

Re Svitzer Australia P/L

B2022/1726
Hatcher AP
Cross DP
Easton DP

Sydney

[2022] FWCFB 213
22 November 2022

3 CONDITIONS OF EMPLOYMENT – classifications – time off in lieu – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – the appellant was employed for several years as an Operations Technician by the respondent, BP Refinery (Kwinana) P/L, at its Kwinana Refinery in Western Australia, having commenced employment on 16 January 2012 – in October 2018, the respondent says it nominated the appellant for a promotion to Control Technician and had scheduled him to work his first training shift as a supernumerary Control Technician on 8 January 2019 in order to begin the lengthy training process – on 31 October 2018, the appellant was suspended from work on full pay because of alleged misconduct – the respondent was satisfied that the appellant had misconducted himself and his employment was terminated with effect from 18 January 2019 – the appellant applied for an unfair dismissal remedy under s.394 of the FW Act – he was unsuccessful at first instance [[2019] FWC 4113] – the appellant succeeded on appeal resulting in his reinstatement to the position in which he was employed immediately before his dismissal and the maintenance of the continuity of his employment and service [[2020] FWCFB 820] – a judicial review application of the reinstatement decision brought by the respondent was dismissed [[2020] FCAFC 89] – by reason of an operative undertaking to the Court in the judicial review proceeding, the appellant was treated as if he had returned to work on and from 13 March 2020 pending the final hearing of the respondent's judicial review application – the appellant returned to work with the respondent in early June 2020 – subsequently, an order as to payment of lost salary by the respondent to the appellant and related matters was made [[2020] FWCFB 4206] – since 13 November 2014, and at the time the appellant returned to work, the *BP Refinery (Kwinana) P/L & AWU Operations & Laboratory Employees Agreement 2014* (2014 Agreement) applied to the appellant in relation to his employment – on 16 June 2020, the *BP Refinery (Kwinana) P/L & AWU Operations & Laboratory Employees Workplace Determination 2020* (Determination) commenced operating and applied to the appellant in relation to that employment – when the Determination commenced operating in relation to the appellant's employment, the 2014 Agreement ceased to apply to him – the appellant and the respondent have been in dispute about two issues – the first concerns the appropriate classification applicable to the appellant (classification dispute) – at the heart of the classification dispute is the appellant's contention that prior to his dismissal, he had been promoted from the position of Operations Technician to that of a Control Technician – thus, at the time of his dismissal the appellant was employed in the position of Control Technician, and it is to that position he was reinstated by order of the Commission – the respondent maintains that in October of 2018 it had

nominated the appellant for a promotion to Control Technician but prior to attending the requisite training necessary to undertake a Control Technician position, the appellant was suspended pending an investigation into misconduct allegations, and then his employment was terminated – it says, therefore, that at the time of the appellant's dismissal, his position was still an Operations Technician as the proposed promotion had not been effected, and it was into the Operations Technician position the respondent was obliged to reinstate the appellant, which it did – the second dispute concerns the rate at which time accrued by the appellant as time off in lieu (TOIL) would be paid out on termination of employment (TOIL dispute) – the appellant is no longer employed by the respondent having had his employment terminated by the respondent on redundancy grounds on 1 April 2021 – by decisions published on 19 July 2022 the Commission dismissed both applications – in short, the Commission appears to have dismissed the classification dispute application on 4 bases, each described as affecting the Commission's jurisdiction – first, because the appellant was no longer employed by the respondent; second, because the dispute required a determination whether as a matter of fact the appellant was promoted to Control Technician prior to his suspension in 2018, the issue did not 'in truth involve a dispute about the operation of either' the Determination or the 2014 Agreement; third, the appellant was 'seeking to overturn' the Full Bench decision determining lost wages compensation ancillary to the reinstatement order by stealth rather than appealing that decision and so is now seeking recovery of an underpayment of wages; and fourth, because the dispute is about what happened in 2018, it is a dispute relating to the operation of the 2014 Agreement not the Determination – as to the TOIL dispute application, the Commission dismissed the application on 3 alternative bases – first, the Commission did not have jurisdiction as the appellant was no longer employed by the respondent; second, the dispute relates to the operation of the 2014 Agreement not the Determination; and third, the dispute was 'in truth an underpayment claim' – classification dispute decision – the appellant set out 9 appeal grounds, many of which contain one or more sub-grounds, and each contend error in the Commission's classification dispute decision – the decision under appeal was one about the jurisdiction of the Commission to deal with the classification dispute – the decision did not determine the merits of that dispute – grounds 1-1d, 4 and 5 (Characterisation Grounds) are variously concerned with the scope of the dispute settlement term of the Determination, the characterisation of the classification dispute and whether that dispute fell within the dispute settlement term of the Determination – in substance, the appellant contends that the Commission wrongly characterised the dispute as being about the operation of the 2014 Agreement, enforcement of the 2014 Agreement, or an attempt at reagitating of the Full Bench decision in *Tracey v BP Refinery (Kwinana) P/L* – Grounds 2-2d and 3-3b (Former Employee Grounds) in substance contend that the Commission erred in concluding that, although the appellant was employed by the respondent and covered by the Determination when he lodged his classification dispute application, because the appellant was no longer employed by the respondent (having ceased that employment on 1 April 2021) the Commission no longer had jurisdiction to arbitrate the dispute – with respect to the Characterisation Grounds the Full Bench found that the Commission had jurisdiction to deal with the dispute – it was plainly permissible, indeed imperative, that the Commission determine the factual controversy, whether the appellant was promoted to Control Technician in October 2018 – it was a

necessary step in the process of arbitrating the dispute about the appellant's classification, and consequent pay entitlements, under the Determination – the Full Bench found that the Commission mischaracterised the dispute and wrongly concluded that it did not have jurisdiction to arbitrate the dispute – the Full Bench also found that the Commission wrongly characterised the dispute as one concerning an attempt by the appellant to overturn the Full Bench decision, or decisions, in *Tracey v BP Refinery (Kwinana) P/L* by stealth – Full Bench found the appellant made good his grounds of appeal directed to the Commission's erroneous characterisation of the dispute and upheld the Characterisation Grounds – turning to the Former Employee Grounds the Full Bench noted that the Commission dismissed the application for want of jurisdiction was because the appellant was no longer employed and therefore not covered by the Determination after adopting and applying an obiter observation by a Full Bench in *Ausgrid* – since the Commission's classification dispute decision was issued, another Full Bench in *Mitchell v University of Tasmania* (*Mitchell*) held that if an application under s.739 has been made at a time when an employment relationship between the relevant employer and employee remains on foot, the powers of the Commission to deal with the dispute under s.739 are engaged at that time and are not subsequently vitiated because the employment relationship later comes to an end – the respondent submitted that, in light of the decision in *Mitchell*, it accepted that the Commission's decision that it lacks jurisdiction to hear and determine the dispute, insofar as it arises out of the Former Employee Grounds, is affected by error – the respondent accepted that this aspect of the decision in relation to jurisdiction was wrongly decided – the Full Bench considered that permission to appeal should be granted for the Characterisation and the Former Employee Grounds, but permission to appeal was otherwise refused – appeal upheld on the grounds identified – decision quashed and the classification dispute application remitted to the Commission for determination – TOIL dispute decision – the notice of appeal sets out 14 grounds of appeal (with numerous sub-grounds) variously contending error in the Commission's conclusion concerning the proper interpretation of clause 8.9 of the Determination and the reasoning process which led to that conclusion – the essence of the appellant's appeal was that the Commission's construction of clause 8.9 of the Determination was wrong and that he was entitled to be paid out his accrued TOIL on termination at the rate of double-time, with the hourly rate calculated by reference to his Total Fixed Salary – the task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed – relevant context will include other provisions of the industrial instrument, read as a whole, and the disputed provision's place and arrangement in the instrument – clause 8.9(f) of the Determination imposes an obligation on the respondent to make a 'payment in respect of' an employee's accrued TOIL on termination, but it does not expressly state how such a payment is to be calculated – Full Bench considered there were a number of contextual matters which supported the Commission's conclusion that, on its proper construction, the Determination required one hour of accrued TOIL to be paid out on termination at the rate of one hour of pay, with the hourly rate calculated by reference to the appellant's Total Fixed Salary – Full Bench found the Commission's interpretation of clause 8.9 of the Determination was correct – do not consider that the public interest is enlivened by this appeal

against the TOIL dispute decision – permission to appeal refused.

Appeal by Tracey against decisions of Binet DP of 19 July 2022 [[2022] FWC 1640] and[2022] FWC 1638] Re: BP Refinery (Kwinana) P/L

C2022/5570 and Anor		[2022] FWCFB 210
Gostencnik DP Saunders DP Ryan C	Melbourne	22 November 2022

4 TERMINATION OF EMPLOYMENT – contractor or employee – identity of employer – s.394 Fair Work Act 2009 – applicant made unfair dismissal application – applicant asserted that she was employed by respondent (Church of Ubuntu) – respondent raised jurisdictional objection that applicant was an independent contractor engaged by Ubuntu Wellness Clinic (Clinic), a separate entity – Vice President of respondent Church is registered as an individual/sole trader and holds a number of business names, including Ubuntu Wellness Clinic – Vice President is owner/operator of Clinic – on 29 August 2022, Commission dismissed respondent's objection and found that applicant was employed by respondent and that it dismissed her – on 7 November 2022, Commission issued its reasons for its decision of 29 August – beliefs of respondent Church are that receiving a COVID-19 'inoculation' is contrary to God's teachings and respondent will not hire anyone as contractor or volunteer who has received an inoculation – it is common ground between the parties that applicant's contract was terminated because she received a COVID-19 vaccination – principles to be applied in distinguishing between employees and independent contractors involve a multi-factorial test [*Hempel*] – High Court in *Personnel Contracting* and *Jamsek* considered multi-factorial test – where parties have comprehensively committed the terms of their relationship to a written contract and validity of contract is not in dispute, their relationship is characterised by reference to contract, rather than by reviewing the history of their dealings [*Personnel Contracting*] – but where there is no comprehensive written contract or the validity of the contract is challenged, the multi-factorial test is relevant [*Hempel*] – no written contract between applicant and Church or Clinic in this case – common ground that contract was verbal – Commission considered the factors that may be applied in a multi-factorial test, as summarised in *French Accent* – Commission found that applicant: had no control over how her work was performed; did not pursue or generate her own client base; did not work independently – purported requirement that applicant be a member of Church and comply with its belief systems was further evidence of control – no evidence that applicant: had a separate place of work or advertised her services to the world at large; provided any tools or equipment necessary to perform the work; or had the right to delegate or subcontract her work to others – no income tax was deducted from applicant's remuneration – Commission found that evidence that applicant was responsible for conducting her own taxation affairs indicated an intention by Church/Clinic to engage her as a contractor, but did not establish that she actually was a contractor – applicant did not receive paid holidays or sick leave other than an ex gratia payment when she was absent from work due to surgery – Commission found that 'While this is an indication of the Applicant being an independent contractor it is equally an indication of casual employment. Alternatively, it may be that the Church/Clinic did not provide the Applicant with NES

entitlements' – applicant did not provide invoices after completion of tasks – applicant created no goodwill or saleable assets for her own business and no evidence that applicant spent any of her remuneration on business expenses associated with any business she was running – Commission found that the relevant indicia weighed overwhelmingly in favour of a finding that she was an employee of Church or Clinic – principles applied to identify which entity employs a person were summarised in *Gothard* – Commission concluded that Clinic was part of, and controlled by, Church and it followed that applicant was employed by Church – evidence of Vice President of Church established that in her capacity as a sole trader, Vice President paid applicant's wages – no evidence from Vice President as to whether she owned any assets used to conduct the business of the Clinic – matter will now proceed to a hearing on the merits to determine whether there was a valid reason for applicant's dismissal and whether dismissal was procedurally fair.

Chait v Church of Ubuntu

U2021/9704		[2022] FWC 2947
Asbury DP	Brisbane	7 November 2022

5 CASE PROCEDURES – no reasonable prospects of success – standard of proof – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed in August 2020 following complaint made by fellow employee – applicant faced 8 criminal charges for the same or substantially the same conduct underlying dismissal – stay order issued in November 2020 pending related criminal matters – stay order in place to avoid prejudicing applicant's criminal proceeding – applicant convicted on 29 July 2022 of 6 of the 8 charges in District Court of Western Australia – applicant serving 10 year prison sentence – Commission considered requirement for 'fair go all round' for both employer and employee – preliminary view application should be dismissed as applicant cannot prosecute application in reasonable timeframe – Commission invited submissions – applicant's father suggested conviction had been appealed but made no further submissions – respondent made an application for Commission to use its discretion to cancel stay order and dismiss unfair dismissal application in accordance with s.587(1)(c) – Commission received no response or further submission from applicant – respondent submitted stay order should be dismissed – respondent submitted reasons justifying stay order are no longer applicable given 2 years have elapsed and criminal proceedings concluded – respondent submitted unfair dismissal application should be dismissed – respondent submitted conduct resulting in dismissal already proven 'beyond reasonable doubt' in criminal proceedings – Commission standard of proof less onerous – Commission should be therefore satisfied conduct occurred – respondent relied on *Bobrenitsky* to demonstrate out of work conduct had sufficient connection to work – respondent submitted onus on applicant to prosecute, unclear whether applicant has capacity to do so while incarcerated – Commission considered s.381 of the FW Act and requirement to balance and address needs of business and of employees and ensure a 'fair go all round' – no longer concern unfair dismissal application will prejudice applicant's criminal proceedings as proceedings have concluded – Commission found stay order irrelevant – stay order cancelled – Commission satisfied on balance conduct occurred – Commission further satisfied conduct sufficiently connected to applicant's employment

and dismissal was procedurally fair – considering s.587 matters, Commission satisfied applicant given a 'fair go all round' to prosecute case – no evidence applicant is able to promptly prosecute his application – Commission exercised discretion under s.587 – application dismissed.

Small v BHP WAIO P/L

U2020/12242		[2022] FWC 2956
Williams C	Perth	8 November 2022

Other Fair Work Commission decisions of note

Zhang v Kevin Australia P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – remedy – ss.394, 396 Fair Work Act 2009 – unfair dismissal application – jurisdiction objection by respondent on the grounds that it was a small business employer at time of applicant's dismissal and dismissal was consistent with Small Business Fair Code (Code) – applicant summarily dismissed for alleged serious misconduct – applicant alleged that on day of dismissal a third party approached her and stated that they were the new investor and manager of the business and that applicant would be terminated immediately – applicant contacted respondent who later confirmed in an email that applicant was immediately terminated because of long-term underperformance of the business – in Code checklist, respondent alleged applicant was dismissed for theft of money and/or goods, siphoning stock with intention of stealing, misconduct and assault – Commission noted that on day of dismissal respondent did not raise allegations of theft and siphoning of stock with applicant as a basis for dismissal and did not indicate to applicant that misconduct and assault were reasons for terminating employment – Commission did not consider that respondent's allegations, belief of performance issues or instances of assault sufficient to justify dismissal were based on reasonable grounds – Commission not satisfied that dismissal was consistent with the Code or that it was a case of genuine redundancy – Commission satisfied that dismissal was harsh because respondent terminated applicant without warning or raising issues upon which it later relied and was effected by a person who, according to the applicant, had not previously held a position of authority with respondent – satisfied that dismissal was unjust and unreasonable because it had no sound, defensible or well-founded basis – satisfied that there was no valid reason for dismissal related to applicant's capacity or conduct – satisfied that dismissal was not related to unsatisfactory performance – Commission found that applicant was protected from unfair dismissal – found that dismissal was unfair – granted application for unfair dismissal remedy – ordered compensation of $8,265 less taxation as required by law, plus requisite superannuation.

U2022/7696		[2022] FWC 2928
Clancy DP	Melbourne	3 November 2022

Rossi-Arja v Ad On Adelaide P/L

TERMINATION OF EMPLOYMENT – minimum employment period – associated entities – ss.383, 394 Fair Work Act 2009 – jurisdictional objection made by respondent – whether small business employer – applicant's period of service with respondent spanned one year and eight days – applicant took 19 days of unpaid leave due to illness – applicant submitted that the days of absence from the unpaid leave should not be deducted from his service as some of the days of absence were suggested by the respondent – applicant further claimed that he felt forced to be absent from work in order to make a full recovery from his illness – respondent argued that the unpaid leave should be excluded from the service – whether associated entities – licence agreement existed between respondent and another entity – applicant argued that an operational relationship between the two entities existed and could be exercised –

respondent submitted that the two entities are not related bodies corporate within s.50AAA of the Corporations Act 2001 – test of determining associated entities is about the capacity to make such determinations which flows from the authority to make determinations rather than historical facts [*MacInnes*] – Commission held that provisions in the licence agreement gave the other entity the ability to exert practical influence on the respondent – the two entities were found to be associated entities – minimum employment period completed due to this finding – unnecessary to determine unpaid leave issue – obiter consideration of unpaid leave issue – 'unpaid leave' and 'unpaid authorised absence' in the Fair Work Act connote periods of time off work which, but for the permission or authorisation of the employer, would have been expected if not required to have been worked by the employee [*Affinity Education Group*] – Commission held that the applicant was permitted by the respondent to be absent from work – observed that each day of leave is considered separately – unpaid leave immediately following paid leave does not characterise unpaid leave as other than unpaid leave – unpaid absence held to be excluded from the applicant's length of service – observed applicant would have served eleven days less than one year – employer not a small business – jurisdictional objection dismissed – application referred to conciliation.

U2022/8953		[2022] FWC 2941
Anderson DP	Adelaide	9 November 2022

E v Australian Association of Social Workers and Ors

ANTI-BULLYING – bullied at work – jurisdiction – ss.789FC, 789FF Fair Work Act 2009 – applicant applied for anti-bullying orders against employer and two individuals – name of applicant and two individuals supressed – applicant is director of first respondent – applicant suggested online comments on respondent's social media were not properly moderated and that second and third respondent had suggested applicant acted unethically as director or acted against applicant out of factionalism – respondents submit none of the conduct occurred at work, that the conduct was not unreasonable and no risk to applicant's health and safety – third respondent submitted she had no relationship with applicant and that conduct complained of amounted to a single social media post expressing her personal opinion – Commission may make anti-bullying order if satisfied applicant worker has been bullied at work and that there is a risk the worker will continue to be bullied at work – consideration whether bullied at work – observed modern workplace extends to virtual and online world – observed 'work-related' online posts will be considered to have occurred 'at work' if the post has a rational connection to the work a worker is required to perform – found applicant's role did not require her to be involved with social media – held conduct did not occur at work – consideration whether conduct was bullying – found posts complained of expressed genuinely held views of those who disagreed with applicant – found post of third respondent did not contain misinformation – found expressions of a point of view, while potentially confronting or upsetting, does not make those expressions unreasonable – held conduct did not constitute bullying – observed other aspects of bullying complained of were single incidents and not repeated unreasonable behaviour causing a risk to health and safety – consideration whether risk to applicant's heath and safety – observed mere fact someone may be upset, offended, indignant, or even outraged with views of others does not make those views are unreasonable or establish risk to a person's mental health or safety – held conduct did not create risk to applicant's health or safety – consideration whether risk applicant will continue to be bullied at work – observed relevant social media pages had been archived and posed no future risk – observed future risk is remote and hypothetical – held purpose of anti-bullying application is to protect a worker's health and safety, it no protection is needed no order can be made – concluded applicant not bullied at work and not satisfied there is a risk of future bullying at work – application dismissed.

SO2022/479		[2022] FWC 3019
Colman DP	Melbourne	15 November 2022

Chambers v Commonwealth of Australia (Bureau of Meteorology)

CASE PROCEDURES – costs – ss.375B, 611 Fair Work Act 2009 – applicant's initial General Protections application involving dismissal pursuant to s.365 of the Fair Work Act (Initial Application) remains afoot in Federal Circuit and Family Court of Australia (Court) – on 29 July 2021 Commission decided that respondent had not successfully discharged onus in establishing that applicant had not been dismissed within its jurisdictional objection – applicant sought cost orders pursuant to ss.375B and 611 of the Fair Work Act submitting that that respondent's jurisdictional objection to the Initial Application was unreasonable – respondent submitted that costs should not be awarded to applicant as she had failed to fully complete the Form F6 as she failed to provide an itemised schedule of costs within the form – Commission not satisfied with respondent's submission as there is no prescribed requirement for an itemised schedule of costs to be included pursuant to s.375B of the Fair Work Act – further noted that while an itemised schedule of costs was not included in applicant's Form F6 there had been 'substantial compliance…in this case' for it to be prosecutable – respondent next submitted that the Initial Application was before the Court, therefore ordering costs in favour of applicant by Commission may risk inconsistency with an order of the Court; this would not be in interest of justice – Commission not satisfied that it was prohibited from ordering costs in light of respondent's submissions – Commission specifically pointed towards the lack of an express prohibition from ordering costs when a certificate pursuant to s.368(3)(a) of the Fair Work Act has been issued or when the matter is before the Court pursuant to s.375B of the Fair Work Act – applicant submitted that the jurisdictional objection pursued by respondent towards her Initial Application was an unreasonable act meriting an award of costs – applicant relied on correspondences with respondent between November 2020 to December 2020, where applicant made repeated clarifications emphasising that she had been dismissed at respondent's initiative; no effort was made by respondent to challenge this characterisation (Communication) – applicant argued in part that it 'should have been reasonably apparent' to respondent that its jurisdictional objection 'had no reasonable prospect of success' in light of the Communication as there had been no challenge by respondent to the characterisation of the termination of employment by applicant – Commission noted that matter did not turn on respondent's reaction to applicant's emphasis on the characterisation of the termination of employment – Commission stressed that on an objective basis respondent's success in arguing for a jurisdictional objection turned on a point of law which required consideration of array of circumstances in which the characterisation of the termination of employment was not deemed to be a critical action; therefore in all of the circumstances, it cannot be said that the jurisdictional objection was manifestly untenable or groundless – Commission not satisfied that requirements pursuant to ss.611(2) or (b), 375B have been met such as to make respondent's jurisdictional objection 'unreasonable,' 'vexatious' or otherwise untenable – application for costs dismissed.

C2020/9270 [2022] FWC 1026
Beaumont DP Perth 10 November 2022

Miller v YCC Group P/L

TERMINATION OF EMPLOYMENT – valid reason – harshness – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant was initially employed as a casual Disability Support Worker but entered into a contract with respondent for full-time position in July 2021 – respondent alleged in evidence that applicant had received a letter of concern in 2019 as part of disciplinary process – applicant provided evidence that this letter wasn't received – Commission found on balance of probabilities that the letter of concern was not received by applicant – applicant's role required support being provided to one particular client and managerial responsibilities – in July 2022, applicant was informed by respondent that support was no longer being provided to particular client – applicant was concerned about how support was to be provided to client for particular shifts and made enquiries with respondent – respondent informed applicant that an email had been

sent to client to advise of shifts that respondent would be providing and had communicated with another company to ensure services were provided – applicant submitted she was not aware of email – respondent alleged that applicant had made disparaging comments about respondent during phone call with other company when discussing client care – on 12 July 2022 respondent provided letter to applicant to discuss disparaging comments as part of a disciplinary meeting – applicant was unwell and unable to attend meeting and provided a medical certificate which covered 14 July to 29 July 2022 – on 14 July 2022 respondent provided termination letter and dismissed applicant for serious misconduct – applicant provided a further medical certificate which covered 28 July to 4 August 2022 – Commission considered matters set out in s.387 of Act – Commission found that applicant felt justified to criticise respondent however should have obtained all relevant facts before doing so – applicant had contravened contractual promises with respondent who had a defensible and well-founded reason to terminate applicant's employment – Commission found valid reason for dismissal weighs against unfair dismissal – Commission considered *Sharp* to determine if applicant's conduct warranted summary dismissal – although applicant breached contractual obligations, disparaging comments were not made publicly and were not grave in nature to warrant summary dismissal – Commission found applicant was not afforded opportunity to respond to allegations and procedural deficiencies supported applicant's contention of unfair dismissal – dismissal was harsh and unreasonable – Commission concluded whilst valid reason for dismissal, applicant was summarily dismissed in circumstances where conduct didn't warrant summary dismissal – inappropriate to reinstate applicant as respondent has ceased trading – Commission used *Sprigg* to assess and determine compensation – calculated lost earnings and deducted any remuneration earned since dismissal – compensation of $3,498.52 less taxation ordered.

U2022/7994		[2022] FWC 3098
Saunders DP	Newcastle	22 November 2022

Exeter-Grant v Village Roadshow Theme Parks P/L

TERMINATION OF EMPLOYMENT – valid reason – vaccination – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed on 17 March for not providing proof of vaccination at direction of employer – applicant served four weeks' notice period – whether valid reason – applicant argued dismissal unfair as Public Health Direction requiring theme park employees to be vaccinated lifted on 14 April 2022 at end of notice period – Commission found consideration of valid reason must be undertaken at time of dismissal – at time of dismissal employer subject to Public Health Direction – applicant not vaccinated and unable to work remotely – applicant failed to follow lawful and reasonable direction – dismissal for valid reason – application dismissed.

U2022/4839		[2022] FWC 2027
Spencer C	Brisbane	17 November 2022

Archer v Australian Ceramics Engineering P/L

TERMINATION OF EMPLOYMENT – incapacity – redeployment – s.394 Fair Work Act 2009 – unfair dismissal application – applicant employed in the mining industry as a Senior Site Service Supervisor in Port Hedland on a fly-in-fly-out basis – dismissed by respondent on 16 March 2022 for not complying with Western Australian Government issued Resources Industry (Restrictions on Access) Directions (the Directions) to be COVID-19 vaccinated to visit mine sites – respondent raised jurisdictional objection that applicant earned more than high-income threshold – applicant's role required travel to mine sites – applicant asserted his employment contract did not require him to be COVID-19 vaccinated – submitted he discussed concerns with Operations Manager and reached agreement that he could be transferred to Wangara workshop if he couldn't visit mine sites – submitted that agreement meant that his employment contract was varied to enable him to continue to work – submitted that the Directions no longer applied to him because of contract variation – asserted he was asked to

carry out an unethical request relating to a competitor – asserted that respondent's attitude hardened after his refusal to carry out request – submitted that he corresponded with respondent regarding his concerns about the COVID-19 vaccine – noted that respondent stated he was terminated because it is an inherent requirement of his role to physically attend mine sites and he cannot perform that inherent requirement – respondent refused to participate in conciliation because of jurisdictional objection – did not appear at hearing – respondent's Form F3 response stated that applicant decided not to be COVID-19 vaccinated – stated that they followed and implemented the Directions issued on 2 November 2021 – no response to applicant's assertion that he was promised a transfer to Wangara workshop – no response to applicant's assertion that respondent made an unethical request relating to a client and that their attitude changed towards him after he refused to carry out request – Commission relied on respondent's Form F3 and applicant's filed materials – Commission noted that 'earnings' excluded amounts which cannot be determined in advance – found that applicant's earnings of $75 per hour for 38 hours per week, $148,200 per annum, were below the high-income threshold applicable of $158,500 – jurisdictional objection dismissed – Commission satisfied that the Directions prevented applicant from working on mine sites because he was not vaccinated and did not have a medical exemption – found there was valid reason for dismissal – *DA v Baptists Care SA* considered – Commission found it was possible to redeploy the applicant and that respondent had created expectation that applicant would be redeployed if he chose not to be vaccinated – found that dismissal was unreasonable – found that applicant was unfairly dismissed – ordered compensation of $34,200 gross.

U2022/3719 [2022] FWC 3029
Williams C Perth 18 November 2022

Wood v Amigoss Preschool and Long Day Care Co-Operative Ltd

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – summary dismissal – ss.388, 394, 396 Fair Work Act 2009 – applicant dismissed after five allegations of serious misconduct made against her – applicant arrested by NSW Police in relation to one of the allegations – charges relating to that allegation dismissed by Local Court of New South Wales – applicant submitted, inter alia, Small Business Fair Dismissal Code (SBFD Code) not complied with and respondent did not properly investigate allegations because a decision to dismiss was already made – respondent argued it held reasonable grounds to dismiss as there was a belief the conduct in question had occurred – respondent also submitted that the belief that two of the five allegations made against the applicant were genuine – respondent further contended that there was no need to consider the factors listed in s.387 of the *Fair Work Act 2009* as a finding of compliance with the SBFD Code swept away such considerations – Commission observed that the respondent had 13 employees at the time of the dismissal – Commission noted 3 other employees did not have any regular patten of employment – respondent contended that the summary dismissal was within the SBFD Code – Commission noted in assessing compliance with 'summary dismissal' section of the Code, it is necessary to determine whether respondent genuinely held a belief that the conduct was sufficiently serious to justify immediate dismissal and the belief was objectively reasonable [*Thrash*] – Commission held that dismissal was not consistent with the SBFD Code – there were no reasonable grounds for any belief that the applicant had committed the conduct which substantiated the allegations – found respondent had not investigated allegations underpinning serious misconduct finding – found respondent wanted allegations to be sustained after failing to negotiate applicant's resignation – observed respondent's substantiation of serious misconduct allegations without investigation was reckless – observed respondent's actions should trouble conscience of individuals involved – Commission also held that two of the allegations would not, even if properly substantiated, provide grounds for summary dismissal – no valid reason for dismissal – respondent made erroneous findings of serious misconduct towards the applicant – dismissal found to be harsh, unreasonable or unjust – applicant initially sought reinstatement – reinstatement was not possible as the applicant did not hold a current Working With

Children Check – compensation ordered.

U2020/15433		[2022] FWC 2925
Cambridge C	Sydney	3 November 2022

Burley v Cleanaway Operations P/L t/a Cleanaway

TERMINATION OF EMPLOYMENT – valid reason – process – reinstatement – ss.387, 390, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed for misconduct – used handheld phone whilst operating heavy vehicle to answer two phone calls concerning elderly mother's medical condition – conduct captured on CCTV recording – in breach of code of conduct – whether dismissal harsh, unjust or unreasonable – valid reason for dismissal to be assessed against other relevant factors – no genuine opportunity to respond – applicant's response to termination notice, with potential to influence decision, not provided to decision maker – dismissal disproportionately harsh – employer failed to regard personal circumstances – process followed manifestly different to that afforded other employees – procedural errors attributable to employer's improper motivation to dismiss applicant due to his engaging in industrial activity as delegate of TWU – dismissal harsh, unjust and unreasonable – application allowed – orders for reinstatement and continuity of service – no order to restore lost pay as applicant did not pursue alternative employment.

U2022/5500		[2022] FWC 3055
Cambridge C	Sydney	24 November 2022

Jackel v Erindale Jersey Stud P/L

TERMINATION OF EMPLOYMENT – application to dismiss by employer – deed of settlement – duress – ss.394, 587 Fair Work Act 2009 – the parties apparently entered into an agreement during conciliation – terms of the agreement provided in writing – applicant later requested for her application to be reopened – applicant claimed that she did not freely enter an agreement to settle the dispute – applicant further submitted that she was under duress from her representative at the time of the conciliation as she felt that she had no other option but to agree to the proposed settlement – respondent submitted that, viewed objectively, there was a clear intention from both parties to reach a binding agreement – respondent further claimed that an agreement was reached by both parties at the conciliation – conciliator provided evidence acknowledging that the applicant and her representative were not in agreement as to what should be put during the conciliation – if a binding settlement has been reached by the parties, the original application may be dismissed because it no longer has any real prospects of success [*Australian Postal Corporation*] – the use of the phrase 'in-principle' must be considered in the context of the matter in which it is being used [*Singh*] – the effect of duress, if established, would render the settlement agreement voidable rather than void [*Chapman*] – Commission held that the parties had entered into a binding settlement based on the applicant not indicating in her correspondence with the Commission that a settlement had not been reached – Commission further noted that the written terms of the settlement did not suggest some vagueness as to the existence of an agreement – Commission also held that the applicant's evidence did not outline the applicant's mental state at the time of the conciliation – Commission observed that there was no evidence provided to indicate that the applicant was incapable of making an informed decision at the time of the conciliation – held that the application has no reasonable prospects of success – application dismissed.

U2022/7045		[2022] FWC 3027
Bissett C	Melbourne	23 November 2022

Efstathiou v Property Management Virtual Assistant P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – Small Business Fair Dismissal Code – ss.23, 387, 394 Fair Work Act 2009 – on 11 May 2020 applicant employed with respondent initially as an Outsourcing Technician – on 7 May 2021 applicant was promoted to the Head of Service and Technology – respondent is a small business within the definition of s.23 of FW Act – the respondent utilised 'best practice' blueprints for business operations – on 27 April 2022 respondent enquired whether blueprints were being utilised; applicant responded that she had been conducting the process as usual – other staff confirmed that applicant was not utilising blueprints and had also instructed them not to utilise them – respondent requested applicant's access card, cut her work email access, and requested her company laptop be left behind on 27 April 2022 – respondent submitted applicant returned to the work premises after the conclusion of the working day on 27 April 2022 and began 'scooping documents' which appeared suspicious – upon questioning applicant became verbally aggressive – applicant told not to come into work on 28 April 2022 in order 'cool off' – applicant submitted respondent said 'you're fired' during this exchange and as result left the workplace – on 28 April 2022 respondent sent emails to applicant confirming status of her employment as 'ongoing' – applicant confused by sudden change in respondent's decisions and responded to the emails noting she had been fired by respondent on 27 April 2022 – respondent replied that 'I take it…that you are resigning' – Commission found given severity of action in requesting applicant's access card, cutting applicant's email access and request for company laptop, on balance, point towards applicant's rendition of the events – further noted inconsistencies in respondent's evidence – Commission satisfied respondent told applicant that she had been 'fired' and therefore terminated – Commission considered respondent's compliance with the Small Business Fair Dismissal Code – Commission not satisfied that applicant engaged in solicitation of clients or engaging with a competitor, nor that there were performance concerns to warrant a valid reason for dismissal – dismissal held to be harsh, unjust or unreasonable – applicant unfairly dismissed within the meaning of s.387 of FW Act – remedy considered – reinstatement inappropriate – Commission deducted from compensation amount due to money's earned by applicant since termination and a failure to mitigate her loses as evinced by applicant's limited effort to find other employment in the real estate industry – application granted – compensation awarded.

U2022/5519 [2022] FWC 2922
Simpson C Brisbane 2 November 2022

Australian Nursing and Midwifery Federation v Jeta Gardens (QLD) P/L t/a Jeta Gardens

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – hours of work – overtime – rapid antigen tests – s.739 Fair Work Act 2009 – Australian Nursing and Midwifery Federation (ANMF) filed application for Commission to deal with dispute regarding *Jeta Gardens Enterprise Agreement 2019* – respondent delivers services in retirement living, home care and aged care in Queensland – Agreement covers nurses and personal carers – ANMF submitted that respondent issued a direction on 15 February 2022 that staff were to attend work at least 15 minutes before start time of their shift to allow them to do a rapid antigen test before starting work – dispute relates to whether, during period from 15 February to 31 August 2022, employees were entitled to be paid for time spent taking rapid antigen tests – 2 employees claim they were verbally directed to do tests before their shifts – respondent submitted that from 15 February to 3 March 2022, they informed staff in writing that they 'should' do a test each work day and made test kits available, but did not 'direct' staff to do a test before each shift, did not direct staff to attend the workplace 15 minutes before their shift, and did not dock the pay of any staff who arrived less than 15 minutes before their shift – Commission accepted respondent's evidence that it did not authorise staff to be given a direction that they must take a test from 15 February or that they must be at work 15 minutes before their start time – Commission considered it more likely that respondent was operating on basis that from 15 February, staff were prepared to arrive earlier than their rostered start time

to take a test, without being given a formal direction – Commission accepted that the 2 employees held a belief that from 15 February, they were required to take a test before their shift started – Commission acknowledged it was possible that a supervisor may have told employees they were required to take tests as claimed by the 2 employees, but if a supervisor did so, the evidence supports the conclusion that such a direction was contrary to respondent's position and not authorised by respondent – respondent submitted that from 4 March to 12 May, respondent did direct staff to perform a test at the start of each shift or work day but did not direct staff to attend at least 15 minutes before their shift and did not dock pay if staff arrived less than 15 minutes before their shift – Commission not satisfied that evidence established that the 2 employees were directed to commence work 15 minutes early to take a test from 4 March to 12 May – respondent submitted that from 13 May to 31 August, respondent directed staff to attend a testing area at least 15 minutes before rostered start time and a negative test was a condition of entry to workplace, but pay was not docked if staff arrived less than 15 minutes before rostered start time – respondent argued that no employee was entitled to be paid for taking a test before their rostered start time because taking a test was not 'work' for the purposes of the Agreement as it was not a 'substantive activity forming an essential aspect' of their duties as personal carers – Commission was satisfied that respondent's direction to take a test prior to entering workplace was to be considered 'work' – it is clear that the direction requires employees to be at a certain place, undertaking a certain duty, at a particular point in time – Commission held that a 'direction to comply with an infection control measure is consistent with what would be expected as falling within the role of a nurse or personal carer' and is consistent with what is contemplated by the classification definitions in the Agreement – Commission accepted ANMF's submission that the requirement to attend work 15 minutes before rostered start time was not imposed by government or any other third party – respondent submitted that its testing arrangements were consistent with Commonwealth and State public health guidelines and that its practices were public health activities in line with mutual and individual responsibilities of staff and respondent in accordance with Work Health and Safety Act 2011 (Qld) – Commission accepted that staff taking tests resulted in a public health benefit, but that did not detract from the fact that the Agreement applied to respondent and its employees when they performed the work of taking rapid antigen tests at the specified times from 13 May to 31 August as directed by respondent – ANMF sought an arbitrated determination that the time spent taking tests must be paid as overtime – Commission decided that it would be unsafe to make a blanket ruling when specific evidence had not been led to deal with various circumstances that could impact on question of whether every 15-minute period between 13 May to 31 August was a period that would attract overtime pay under the Agreement – however Commission expressed an opinion that 'it seems likely the overwhelming majority of the relevant time would attract overtime pay' – Commission observed that it would be sensible for the parties to attempt to settle all claims pertaining to all employees covered by the Agreement between 13 May and 31 August.

C2022/3966 [2022] FWC 3039
Simpson C Brisbane 16 November 2022

Soans v KDR Victoria P/L t/a Yarra Trams

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as a tram driver – applicant was 63 years old and employed by respondent for 21 years – applicant required to comply with the National Standard, a statutorily imposed safety code – applicant suffered a stroke on 8 July 2022 and was treated in hospital – National Standard provides workers 'should be 'categorised temporarily unfit' for '3 months following a stroke' – applicant returned to work and drove a tram on 8 August 2022 – applicant later assessed by two workplace accredited doctors on respondent's instruction – applicant did not tell either doctor of stroke – first doctor notified of stroke after medical report obtained from hospital – respondent claimed applicant failed to disclose his diagnosis to workplace doctors – once made aware of applicant's

stroke, workplaces doctors informed applicant he was unfit for 3 months – applicant denied being told he was unfit for work – during subsequent workplace investigation, respondent claimed applicant was dishonest and inconsistent – applicant was dismissed for serious misconduct – applicant submitted his dismissal was harsh, unjust and unreasonable under s.387 of the FW Act – applicant submitted he did not disclose his diagnosis due to concern he might inadvertently provide misleading information, and was fearful for his job security – applicant instead allowed workplace doctors access to his medical records – applicant submitted workplace doctors breached National Standard by sharing confidential medical details to his employer and therefore such information was unsound to rely upon – applicant submitted respondent was aware of applicant's stroke, and onus lay with respondent to inform workplace doctors – applicant pointed to his 21 year tenure and potential difficulty in finding new employment as factors pointing to harshness – respondent submitted applicant had received relevant training and was aware of his National Standard obligations – respondent submitted dishonesty during an investigation process constitutes misconduct – respondent submitted applicants dishonesty undermined relationship of trust and confidence – Commission considered considerable factual inconsistencies between applicant and workplace doctors – Commission noted applicant's evidence was inconsistent – Commission preferred doctors' evidence – Commission satisfied applicant was aware of his National Standard obligations and that his stroke rendered him temporarily unfit – Commission considered s.387 factors – satisfied applicant provided misleading statements to doctors – found this was 'serious' as it 'strikes at the heart of the employment relationship' – valid reason for dismissal found – satisfied applicant was afforded procedural fairness – found one doctor in breach of confidentiality, however this did not outweigh other findings – found dismissal was not harsh, unjust or unreasonable under s.387 of the FW Act – no unfair dismissal – application dismissed

U2022/1431 [2022] FWC 2876
Lee C Melbourne 27 October 2022

Hilltop Meats P/L Enterprise Agreement 2022

ENTERPRISE AGREEMENTS – genuinely agree – bargaining representative – ss.176, 185 Fair Work Act 2009 – application to approve *Hilltop Meats P/L Enterprise Agreement 2022* – Australasian Meat Industry Employees Union (AMIEU) opposed application – AMIEU suggested it was a bargaining representative – per s.176 a union is a bargaining representative for a member unless member appoints someone else or revokes union's status – employer refused to recognise AMIEU – employer suggested each employee represented themselves or appointed someone else as bargaining representative – confidential evidence suggested not every AMIEU member appointed an alternative bargaining representative – Commission considered evidence of person employer suggested to be bargaining representative unpersuasive – found AMIEU was a bargaining representative – consideration of genuine agreement – AMIEU suggested employer failed to provide relevant material, such as *Meat Industry Award 2020* (Award), available to employees – employer suggested Award was publicly available on the internet – Commission found that as Award is in public domain the employer was not required to take further steps to provide access to it [*McDonald's*] – consideration whether employer took all reasonable steps to explain proposed agreement – observed agreement contained comprehensive changes – found employer relied heavily on Information Pack and internal bargaining representatives at negotiation committee to explain changes to employees – Information Pack did not explain effect of key agreement terms and was inconsistently disseminated – internal bargaining representatives only briefed employees in ad hoc manner – held not satisfied employer took all reasonable steps to ensure terms of agreement were explained – consideration whether employees of culturally and linguistically diverse backgrounds – observed a significant proportion of employer's workforce is from a non-English speaking background – Commission not satisfied particular circumstances of those employees were taken into account in determining manner of communication on terms and effect of agreement – held agreement not genuinely agreed – application dismissed.

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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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