

FWC Bulletin

3 February 2022 Volume 4/22 with selected Decision Summaries for the week ending Friday, 28 January 2022.

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Black Coal Award extensively varied

The Fair Work Commission is extensively varying existing awards as a result of the 4 yearly review of modern awards.

The technical and drafting matters for the **Black Coal Mining Industry Award 2010** have been completed. The varied award was published in advance and commenced operation on **28 January 2022**.

Any outstanding substantive or common issues claims that have not yet been determined will be incorporated into the varied award by way of a subsequent variation determination.

To access the new version of the award, go to the [Modern awards list](#) on the Commission's website.

To see the decision relating to this award, go to [\[2021\] FWCFB 6050](#).

Modern awards pay database updated

In addition, the 2021 data extracts for the Modern awards pay database have been updated to include the extensive [variation PR736274](#) to the Black Coal Mining Industry Award.

The extracts are available on the [Modern awards pay database](#) page of our website.

Consultation: The future of online proceedings

As a result of the COVID-19 pandemic the Fair Work Commission moved to holding conferences and hearings online. As the world gradually returns to a 'new normal', the Commission is considering what approach we should take to online proceedings into the future.

The President has published a discussion paper on the future of online proceedings at the Commission.

We are seeking feedback on:

- any issues with how online hearings and conferences are currently used
- any benefits of how online hearings and conference are currently used
- users' experiences with, and perceptions of, online hearings and conferences at the Commission.

Learn more: [The future of online proceedings](#)

Any comments or feedback on the discussion paper should be emailed to consultation@fwc.gov.au by close of business on **Friday, 11 February 2022**.

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 week ending Friday, 28 January 2022.

- 1** MODERN AWARDS – new award – ss.157, 158, 163 Fair Work Act 2009 – Full Bench – on 24 June 2021, Menulog P/L (Menulog) filed application pursuant to s.158 FW Act to make a modern award – application sought for Commission to make a new award covering the 'on demand delivery services industry' – proposed award sought to cover employers in that industry and their employees, classified as 'couriers', to the exclusion of any other award – in earlier proceedings, a differently constituted Full Bench invited submissions and evidence in respect of its provisional views on relevant issues arising from the application – matter referred to present Full Bench which considered threshold issue of whether *Fast Food Award 2010* (Fast Food Award) and/or *Road Transport and Distribution Award 2020* (Road Transport Award) covers employers and their courier employees in the on demand delivery services industry – Menulog submitted that neither award covers couriers in the on demand delivery services industry – Menulog submitted the on demand delivery services industry is very different from the road transport industry covered by the Road Transport Award in that delivery itself comprises only one aspect and that the Fast Food Award covers only fast food outlets and not employers who do not make the food they deliver – Transport Workers' Union of Australia and Australian Industry Group both submitted the on demand delivery services industry is covered by the Road Transport Award – Full Bench held that threshold issue must be determined by reference to the coverage provision of the proposed award – Full Bench found that the business activity referred to in the proposed award clearly falls within that described in cl.4.2(a) of Road Transport Award, and conditions and limitations identified in the proposed definition of the industry do not take it outside this scope – Full Bench also found that Fast Food Award does not cover courier employees in the on demand delivery services industry due to operation of cl.4.7 in both awards, which determines employee coverage by reference to the most appropriate employee classification, relevantly the Transport Worker Grade 1 or 2 in the Road Transport Award – Full Bench concluded Road Transport Award currently covers employers and their employees in the on demand delivery services industry, as defined in proposed award, and that Fast Food Award does not cover such employees – matter to proceed to consideration of whether this coverage meets modern awards objective in s.134 FW Act – directions hearing to be listed.

Application by Menulog P/L to make a modern award

AM2021/72
Hatcher VP
Catanzariti VP
O'Neill C

Sydney

[\[2022\] FWCFB 5](#)
28 January 2022

- 2** GENERAL PROTECTIONS - dismissal dispute - mandatory vaccination - s.365 Fair Work Act 2009 - application for the Commission to deal with a general protections dispute involving dismissal - applicant was employed as a casual forklift driver - on 14 October 2021, respondent told applicant that he must provide proof that he had received his first dose of a COVID-19 vaccine, proof of a vaccination booking, or evidence of a medical exemption and if he did not, he could not be rostered to work - applicant did not provide such information - on 21 October 2021, respondent told applicant in writing that he could not be rostered for work because he had not provided proof of his vaccination status - Victorian Government had issued public health directions that required that certain employers not permit employees to work outside their home unless they had provided evidence of vaccination or medical exemption - respondent raised jurisdictional objection that it did not dismiss the applicant, but it was subject to the Government health directions - respondent submitted that it would offer applicant shifts if he became eligible to attend the workplace - Commission accepted respondent's evidence that applicant remained an employee on the respondent's books, and his employment was recorded as 'active' in their human resources management system - found that respondent was required by law to refuse to allow applicant to attend the workplace because he had not provided evidence of his vaccination status - held that respondent did not dismiss applicant - jurisdictional objection upheld - application dismissed

Varichak v COG Regional Team P/L

C2021/7133

Colman DP

Melbourne

[\[2022\] FWC 186](#)

28 January 2022

- 3** TERMINATION OF EMPLOYMENT - termination at initiative of employer - mandatory vaccination - ss.386, 394 Fair Work Act 2009 - unfair dismissal application - respondent made jurisdictional objection that applicant not dismissed - applicant was employed on a casual basis as a registered nurse since February 2018 - on 6 July 2021, respondent's deputy chief executive wrote to staff encouraging them to take the COVID-19 vaccine - applicant raised concerns about this and was told to speak with her doctor and, if she had a medical exemption, to provide it to respondent for consideration - on 11 August 2021, respondent wrote to all employees advising they were required to receive their first vaccine dose by 1 September 2021 and their second by 1 October 2021, otherwise they would be unable to attend the workplace - respondent advised that if an employee had a medical or other reason why they could not be vaccinated, they should advise the respondent by 20 August 2021 - on 21 August 2021, applicant emailed respondent to advise she was hesitant about the vaccine and asked respondent to allow her to refrain from being vaccinated - on 26 August 2021, respondent told applicant that if an employee chose not to comply with respondent's vaccine mandate, they would cease to be rostered for work from 1 September 2021, and that applicant should seek advice from her doctor - on 30 August 2021, applicant asked respondent about information that she required for her unfair dismissal application - on 31 August 2021, respondent told applicant she had not been dismissed - Queensland Government subsequently announced that from 15 December 2021, all healthcare workers who enter healthcare settings must be fully
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vaccinated against COVID-19 – Commission concluded that applicant had not been dismissed – found that respondent's vaccine mandate was lawful and reasonable when it was introduced – found that the position with respect to the mandate has become more certain after the Queensland Government introduced its own mandate, with which respondent must comply – Commission concluded that respondent's vaccine mandate did not amount to termination at respondent's initiative or constructive dismissal under s.386 FW Act – Commission found no evidence that applicant was given a termination letter, separation certificate or other confirmation that her employment had ended – in fact, respondent's email of 31 August made clear that applicant had not been terminated – rather, applicant would not be offered any further shifts unless she was vaccinated or provided a valid medical exemption – the situation between the applicant and respondent, before applicant lodged her unfair dismissal application with the Commission, was that the applicant was going to speak with her doctor – jurisdictional objection upheld – application dismissed

Callender v MCI Southport Properties P/L t/a Southport Day Hospital/Cosmetic Evolution

U2021/8107
Lake DP

Brisbane

[\[2022\] FWC 164](#)
25 January 2022

- 4** GENERAL PROTECTIONS – dismissal dispute – ss.365, 386 Fair Work Act 2009 – general protections dispute involving dismissal – applicant employed by respondent as a CAD Design Draftsman from around 29 January 2020 until resigning with immediate effect on 10 September 2021 – during 2021 respondent experienced financial difficulties and on 6 occasions failed to pay its employees on time – applicant submitted his resignation was a constructive dismissal because he could not continue in his role due to the negative impact of the late payments on his financial stability and the employment relationship – respondent raised jurisdictional objection that applicant resigned voluntarily – Commission considered whether applicant dismissed – considered *BUPA v Tavassoli* – considered undisputed sequence of events submitted by parties – considered matter could be resolved without having regard to allegations management engaged in bullying and pressured employees not to protest late wage payments – considered whether respondent's failure to pay applicant on time over a substantial period forced him to resign from his employment – found respondent's conduct showed egregious non-compliance with an employer's obligation to pay employees in accordance with their entitlements over a significant period and breached employment contract on multiple occasions – respondent's effort to mitigate impact of late payment of wages by making \$1000 goodwill payment and support for financial hardship did not mitigate its responsibility to pay staff pursuant to their employment contracts and obligations under the FW Act – Commission considered respondent's submission that applicant had options other than resignation because he had been paid in full at the time he resigned and could have contacted the Fair Work Ombudsman if late payment occurred in future – Commission accepted applicant could not be confident respondent's inconsistent and casual approach to the payment of wages would not continue – satisfied respondent's failure to pay wages on time for 6 months, including one month where wages were outstanding for nearly 2 months, in circumstances where
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new dates for payment were proposed and then missed, had the probable result of ending applicant's employment – concluded applicant had no other reasonable choice but to resign – found applicant was dismissed – jurisdictional objection dismissed – matter to proceed to conference.

McKay v Astro Aero P/L

C2021/6367
Lake DP

Brisbane

[\[2022\] FWC 170](#)
25 January 2022

- 5** GENERAL PROTECTIONS – dismissal dispute – demotion – ss.365, 386 Fair Work Act 2009 – application to deal with contraventions involving dismissal – jurisdictional objection – whether applicant was dismissed – applicant submitted she was dismissed as respondent demoted her – respondent asserted applicant resigned – applicant employed on fixed term contract as a lawyer – applicant and her direct line manager met on 10 September 2021 to discuss applicant's performance – applicant sought feedback on her work and her direct line manager told applicant her work was not well received by other managers – direct line manager had not yet made assessment on applicant's work because they had only worked together for a short time – respondent requested applicant work on freedom of information (FOI) and privacy matters to address business need – applicant commenced FOI work shortly after 10 September 2021 – FOI work was within applicant's position description – direct line manager continued to provide feedback to applicant on her work – no change made to applicant's grade, pay or fixed term tenure – no performance management process implemented – applicant did not raise concerns or objections with respondent on assigned work – applicant submitted the direction to work in FOI team amounted to a demotion because the FOI work was administrative not legal, and she was not able to do any other legal duties in her position description – applicant resigned on 23 September 2021 to accept external offer of employment – applicant alleged she was forced to resign – Commission noted that s.386(2)(c) FW Act provides that a person has not been dismissed if they are demoted, and the demotion does not involve a significant reduction in remuneration or duties – Commission found direction to work in FOI team was a reasonable direction – Commission found work undertaken in FOI team was not a demotion, as there was no reduction in applicant's grade or classification, and even if Commission had concluded there was a demotion, it did not involve a significant reduction in the applicant's duties and there had been no reduction in remuneration – Commission found no action taken by respondent that was intended to end or had the probable result of ending applicant's employment – applicant's employment ended by her voluntary resignation, not dismissal – objection upheld – application dismissed.

Bruno v Victoria Building Authority

C2021/7763
O'Neill C

Melbourne

[\[2022\] FWC 166](#)
28 January 2022

Other Fair Work Commission decisions of note

The Australian Workers' Union v Coregas P/L

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement –

superannuation – s.739 Fair Work Act 2009 – application for a dispute resolution procedure under the *Coregas P/L & AWU Coregas Operations Enterprise Agreement (Yennora) 2019* – in 1991, in the early days of award-based superannuation, Linde Gas offered to match voluntary superannuation contributions for certain employees – a group of employees took up the offer and began making voluntary superannuation payments of 5%, which Linde Gas matched by paying an additional 3% – in 2007 Coregas P/L took over the employment and continued making superannuation contributions that included an additional 3% – by 2019 a handful of the original employees were still employed by Coregas and were still making voluntary contributions matched by Coregas – in 2019 someone in Coregas learnt of these additional contributions and, not knowing of their origins, decided they were a payroll system error – by 2019 the originator of the scheme (the former HR Manager of Linde Gas) had passed away and no one employed at Coregas in HR or payroll had any direct knowledge of the scheme – Coregas undertook an audit and found almost no original documents – by May 2020 Coregas was satisfied that the additional contributions were a payroll error – the Executive General Manager decided that relevant employees would be given the chance to provide evidence of the basis of the additional contributions, otherwise employer contributions would reduce to 10% – none of the employees could provide any written proof of the arrangements from 1991 – since 1 July 2020 Coregas has made superannuation contributions at 10% rather than 13% – the AWU argued that the reduction in superannuation contributions was a 'change to conditions of employment' under the No Extra Claims provision in the Agreement and that Coregas is prevented from making extra claims to changed conditions of employment over the life of the Agreement – the Agreement's nominal term expired on 30 September 2021 and the parties agree that from at least this date Coregas was entitled to reduce the superannuation contributions for the remaining group of employees – dispute in relation to 15 months of additional 3% superannuation contributions for 6-10 employees – *CSL v NUW* considered – Commission did not find the additional payments to be a payroll error – satisfied that Coregas made the additional contributions for a very long time pursuant to the arrangement it inherited from Linde Gas – Commission held that the fact that no current HR or payroll employees had first-hand knowledge of the origins of the payments did not make the payment erroneous – found the reduction in superannuation contributions was a not a mere administrative matter outside of the reach of the no extra claims clause – contractual entitlements that arise outside of an enterprise agreement can be understood to be part of the intended 'conditions of employment' referred to in no extra claims clauses, because they can be more readily understood to form part of the 'bargain' that such clauses are designed to protect – Commission considered whether or not the additional superannuation contributions were a contractual entitlement – found no evidence that either Linde Gas or Coregas ever indicated that the additional superannuation contributions were made on an ex-gratia basis – very difficult to give specific evidence in 2021 about conversations in 1991 – primary task was to try and ascertain the legal basis upon which Linde Gas commenced paying additional superannuation contributions – could have done so in a way that it was bound in contract to continue the arrangement, or it could have done so in a way that reserved for itself the capacity to alter or finish the arrangement at its own discretion – Commission found the evidence of the events in 1991 was consistent with both possibilities – that the arrangement continued after 2008 when the relevant employees were transferred to Coregas, was consistent with Coregas taking on Linde Gas' contractual obligations – the AWU argued that the conduct of the parties during the life of the contract could be considered as evidence of a contractual term – Commission found no evidence to establish the ongoing additional payments were known to both parties, let alone that they informed the subject matter of the agreement – that the additional payments have never been dealt with in a series of enterprise agreements over a long period of time points against the notion that the contributions were a 'recognised over-award payment' – Commission found the additional contributions were not an implied term of the respective employment contracts – also found the words of the Agreement do not preclude the employer from making additional superannuation contributions – Commission found the AWU had not established that either party adopted the assumption that the additional contributions were contractually binding – found no sufficient evidentiary basis for Commission to be satisfied that Coregas had a contractual obligation to maintain the additional

superannuation contributions – of the limited documentation that has been found, none of it is consistent with an ongoing contractual obligation to make the additional contributions – Commission found Coregas' actions to remove the additional contributions was not an attempt to 'strike a new bargain' – the question put to the Commission for determination was: 'Did any terms of the *Coregas P/L & AWU Coregas Operations Enterprise Agreement (Yennora) 2019* prevent Coregas from reducing the superannuation contributions paid to some employees' superannuation funds on or about 1 July 2020 from 13% to 10% of their ordinary time earnings?' – the Commission's answer to the agreed question was 'no'.

C2021/671
Easton DP

Sydney

[\[2022\] FWC 163](#)
25 January 2022

Daley v Ambulance Victoria

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – unfair dismissal application was received 3 days outside the 21-day statutory period – applicant was dismissed while on 'extended sick leave' – the reason for the dismissal was the applicant did not comply with direction to have a vaccine – applicant stated the information received from respondent was confusing and the dismissal was both unfair and lacked procedural fairness – the Commission did not make any finding as to the merits of the claim for unfair dismissal – applicant submitted application and supporting documentation by email on 27 December 2021, which was a public holiday – 28 December was also a public holiday, and Commission was closed for an additional holiday on 29 December – applicant received communication from Commission on 30 December advising that the application was incomplete due to the application form being blank – applicant drove 140km to a location where they could access internet and the stored application and resubmitted the application the same evening of 30 December – applicant stated that 27 and 28 December were public holidays and this should be taken into account in determining if application was late and if an extension of time should be granted – Commission noted that s.36(2) of the Acts Interpretation Act (AI Act) states that where the last day of a prescribed statutory period falls on a public holiday, time is extended until the next business day – Commission noted that as the last day for filing the unfair dismissal application was a public holiday and the following day was also a public holiday, applicant was not required to file the application until 29 December – Commission found the complete application was submitted on 30 December – in this respect, the application may be considered to be only one day out of time – Commission found that the applicant could not have known that 29 December was a holiday for Commission staff – Commission found that when applicant became aware on 30 December that the application was incomplete, applicant took all necessary steps to file an amended application with the Commission that day – Commission found applicant provided acceptable explanation of the delay in submitting a completed application – Commission found exceptional circumstances occurred in this case – had the Commission offices been open on 29 December, the applicant would have been notified on that day that they had failed to file a completed application form, and the applicant would likely have re-submitted the application that same day – this would have been received within time (given the operation of the AI Act) – Commission granted extension of time.

U2022/1
Bissett C

Melbourne

[\[2022\] FWC 122](#)
27 January 2022

Subscription Options

You can [subscribe to a range of updates](#) about decisions, award modernisation, the annual wage review, events and engagement and other Fair Work Commission work and activities on the Fair Work Commission's website. These include:

Significant decisions – This service contains details of recently issued full bench decisions and other significant decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed when decisions are published.

All decisions – This service contains details of all recently issued Commission decisions with links to the complete decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed up to twice daily.

Websites of Interest

Attorney-General's Department - www.ag.gov.au/industrial-relations - 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 Court of Australia - www.federalcircuitcourt.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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Out of hours applications

For urgent industrial action applications outside business hours, please refer to our [Commission offices](#) page for emergency contact details.

The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Fair Work Commission
- Practice Directions concerning the practice and procedure of the Fair Work Commission
- weekly decisions summaries
- details of procedural changes and developments within the Fair Work Commission, and
- advice regarding the rights and obligations of organisations registered under the *Fair Work (Registered Organisations) Act 2009*.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: subscriptions@fwc.gov.au.

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