

FWC Bulletin

3 March 2022 Volume 8/22 with selected Decision Summaries for the week ending Friday, 25 February 2022.

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Improved form for entry permit applications

The Commission has published an improved Application for an entry permit form (Form F42).

The updated form has been redesigned based on user feedback. It will help ensure we have everything we need to finalise applications and issue permits quickly.

The form also provides more information about the process so applicants will know what to expect at each step.

New declaration forms are also included. These will help make the declaration process simpler for Committee of Management members and proposed permit holders.

The new version of the form is available on our website: [Form F42 – Apply for a fair work entry permit](#).

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, 25 February 2022.

- 1** MODERN AWARDS – 4 yearly review – part-day public holidays – s.156 Fair Work Act 2009 – Full Bench – review of part-day public holiday schedules found in 112 modern awards of general application – 5 different versions of part-day public holiday schedule in these awards – on 25 September 2020 the Commission published versions of each schedule re-drafted in plain language alongside a statement [\[\[2020\] FWC 5110\]](#) inviting comment on several substantive, structural and drafting issues – submissions were received from 8 parties and a conference was convened on 21 October 2020 to discuss – following the conference the Commission published a Report [\[\[2020\] FWC 5609\]](#) setting out outstanding issues concerning finalisation of the schedules – Full Bench noted there appeared to be general agreement in submissions and during conference about the resolution of the substantive and structural issues in the re-drafted schedules – the Full Bench expressed *provisional* views in respect of: the re-drafted schedules' scope, the degree of adoption of model provisions, the reference to public holiday penalty rates, use of the words 'ordinary rate of pay' and the issue of full-day entitlements – interested parties invited to provide a response to the *provisional* views – interested parties also invited to provide a response to: an issue regarding minimum payment periods, several award-specific issues, and whether a part-day public holiday schedule should be inserted in an additional 5 awards – submissions to be filed by 21 March 2022 and submissions in reply by 10 April 2022 – Australian Industry Group, the Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division), the Housing Industry Association and Master Builders Australia were directed to provide a report on discussions in respect of proposed amendments to the *Building and Construction General On-site Award 2020* by 21 March 2022 – any party requesting an oral hearing to advise the President's chambers by 10 April 2022, absent such a request the matter will be determined on the basis of the Commission's Report and submissions received.

Part-day public holidays

AM2014/301 and Anor

Ross J

Clancy DP

Bissett C

Melbourne

[\[2022\] FWCFB 15](#)

22 February 2022

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- 2** TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – mandatory vaccination – s.394 Fair Work Act 2009 – unfair dismissal application – applicant was a relief bus driver – on 1 October 2021 the Victorian Government announced a vaccination mandate that prohibited employers from allowing certain persons to work outside their homes unless (in the case of
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transport workers) such persons received a first dose of a COVID-19 vaccine by 15 October 2021 or had a booking to receive a first dose by 22 October 2021 and were fully vaccinated by 26 November 2021 – on 1 October the respondent posted a memorandum on the staff notice board at its Pakenham depot notifying its employees of the Government's vaccination mandate – on 4 October, respondent sent a letter to applicant stating that the applicant was required to provide evidence of a first and second dose of a COVID-19 vaccine by 15 October and 26 November 2021 respectively – on 7 October the Victorian Government formally issued Directions which contained the vaccine mandate – on 8 and 12 October, the respondent sent text messages to the applicant reminding him of the requirement to provide evidence that he had been vaccinated – on 11 October, respondent sent a further letter to applicant advising that he would be stood down if he had not provided evidence of vaccination by 15 October – on 13 October, respondent sent another letter to applicant noting that he had advised that he was not prepared to be vaccinated and advising that applicant would be stood down under s.524 of the Fair Work Act as of close of business on 14 October – on 14 October, respondent gave applicant a letter advising that he was stood down without pay – on 20 October, respondent sent an email to applicant advising that a telephone meeting was scheduled for 21 October to discuss applicant's position on the vaccination requirement and that applicant could bring a support person – applicant did not attend the meeting – respondent sent an email on 21 October to applicant advising that another meeting had been scheduled for 26 October and that if applicant did not attend, respondent would make a decision on applicant's employment – on 22 October, applicant asked for the meeting to be rescheduled – on 25 October, respondent advised by email that the meeting was still scheduled for 26 October – applicant did not attend the 26 October meeting – applicant received a letter by email on 26 October that advised that applicant's employment was terminated with immediate effect – Commission found there was a valid reason for dismissal because respondent would have committed an offence that attracted a substantial financial penalty if it permitted applicant to drive its buses after 15 October – Commission found that applicant had multiple opportunities to respond to the vaccination requirement, including after the respondent issued the memorandum to employees on 1 October, the stand down letter of 14 October, the 21 October letter, and the meeting that was scheduled for 21 October and rescheduled for 26 October – Commission found the dismissal was not harsh, unjust or unreasonable and not unfair – application dismissed

Harrison v Ventura Transit P/L

U2021/8047
Anderson DP

Adelaide

[\[2022\] FWC 335](#)
25 February 2022

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- 3** TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – respondent raised a jurisdictional objection that the application was lodged outside of 21 day timeframe – respondent also disputed whether applicant was dismissed – applicant submitted that his employment ceased on 10 January 2022 – applicant completed and signed application on 22 January 2022 – applicant posted application by priority post on 24 January 2022 to the Commission's PO Box address in Adelaide – application was
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received at Commission's Melbourne office on 8 February 2022 – applicant was unaware that during the COVID-19 pandemic, mail received at the Adelaide PO Box is re-directed to the Melbourne office – s.394(3) of the Fair Work Act considered in context of *Nulty* – applicant was aware of 21 day timeframe to submit application – Commission found applicant's employment ceased on 10 January 2022 – delay required to be considered by the Commission is the period beyond the prescribed 21 day period for making an application [*Diotti*] – an acceptable explanation for the entirety of the delay is not required to find exceptional circumstances that justify an extension of time [*Stogiannidis*] – Commission found the reason for the delay was a result of Commission's decision to redirect mail sent to the Adelaide PO Box to the Melbourne office – Commission found it reasonable for applicant to expect priority mail to be received by Adelaide office with 7 days – credible reason for delay – no submission was made that granting the extension of time would prejudice the respondent – insufficient evidence to make assessment of merits of application – fairness as between the applicant and other persons in a similar position not a relevant consideration – Commission found exceptional circumstances warranting the exercise of discretion to extend time – extension of time granted.

Kane v Agile Mining Service P/L

U2022/1668
Platt C

Adelaide

[2022] FWC 366
22 February 2022

- 4** TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant was a Health, Safety, Environment & Training Manager (HSEQ Manager) – she was dismissed for reasons including performing non-work-related activities on multiple occasions during her work hours – applicant was renting out a cottage on her property to Airbnb customers – respondent alleged applicant had been taking excessive phone calls relating to her private business instead of performing active and meaningful duties as well as filling up her personal jerry cans with the respondent's client's diesel and taking the jerry cans home – applicant was verbally warned of her inappropriate conduct on 12 July 2021 – Commission found applicant was not only failing to perform her work to the reasonable standards required by the respondent, after 12 July 2021, she was deliberately failing to follow a lawful and reasonable direction to have her phone turned off while at work – found that even if the applicant did not make or receive phone calls for the week after 12 July 2021 after she had been warned, she continued to send an extraordinary amount of text messages during work hours, in breach of the direction given to her – Commission satisfied there were numerous valid reasons for dismissal including the extraordinary amount of text messages sent during work hours throughout applicant's employment; failure to follow a lawful and reasonable instruction to not use mobile phone during work hours; and the applicant's failure to dedicate her full time and attention to her work responsibilities and her conduct in wasting a significant amount of the respondent's time on her personal business matters – Commission not satisfied the dismissal was unjust, nor was dismissal disproportionate or otherwise unreasonable considering the conduct engaged in by the applicant and her deliberate failure to follow a lawful and reasonable direction issued by the respondent – dismissal was not unreasonable – dismissal not unfair –
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application dismissed.

Murphy v Clear Day P/L

U2021/7558
Hunt C

Brisbane

[\[2022\] FWC 373](#)
22 February 2022

- 5** TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – unfair dismissal application was lodged one day late – applicant gave evidence that he had a good working relationship with one of the owners of the respondent's business – however, that owner's son became involved in the business and verbally abused the applicant – on the day his employment ended, the applicant explained that the employees could not complete certain work in the time proposed – the owner's son swore at the applicant in front of the other employees and in front of the owner – the applicant told the owner that he could not work at the business anymore and that he would give 2 or 4 weeks' notice – on hearing this, the owner's son pushed the applicant and the applicant fell down – after police attended the business premises, the owner's son told the applicant he was 'fired' – in explaining the delay in making his application, applicant submitted that he experienced a lot of mental stress due to the abuse and humiliation he suffered, and that he was in shock at how he had been treated after nearly a decade of working for the respondent – applicant submitted that he initially did not intend to make an unfair dismissal claim because he trusted the owner to pay him his entitlements to long service leave, annual leave and notice of termination – applicant provided 2 emails received from the owner after the applicant had been terminated, whereby the owner advised applicant that his entitlements would be paid – however, applicant's entitlements remain unpaid – by the time the applicant stopped believing that the owner would pay the applicant's entitlements, and thought of making an unfair dismissal application, it was 22 days after his employment had ended – Commission concluded that while stress, shock and confusion are not unusual consequences of losing employment, in this case the applicant's reaction to his termination was 'exacerbated by the abuse and humiliation he was subjected to...culminating in a physical assault and the calling of Police to assist' – Commission also found that the applicant was assured on 2 occasions that he would be paid his lawful entitlements by an owner of the respondent's business with whom the applicant 'had a good relationship and therefore no reason to distrust' – Commission found these factors were highly unusual and constituted exceptional circumstances justifying an extension of time – extension of time granted

Singh v Vincent Refrigerated Logistics P/L

U2022/1422
O'Neill C

Melbourne

[\[2022\] FWC 368](#)
21 February 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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