FWC Bulletin

3 June 2022 Volume 18/22 with selected Decision Summaries for the month ending Tuesday, 31 May 2022.

Contents

Family and domestic violence leave review 2021 decision issued

New documents have been published on the Family and domestic violence leave review 2021 (AM2021/55) page on our website.

We have published:

Decision [2022] FWCFB 2001 with directions for filing

Summary of the decision

New look FWC Bulletin

As of May 2022, the Fair Work Commission publishes a monthly FWC Bulletin. This has replaced both the weekly Bulletin and the Quarterly Practitioner Update.

The monthly Bulletin contains selected Decision Summaries and other updates.

To read previous editions of the Bulletin, please go to the FWC Bulletin page on our website.

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 Tuesday, 31 May 2022.

1 TERMINATION OF EMPLOYMENT – unlawful termination – employer mask policy – ss.351, 604, 723 Fair Work Act 2009 – appeal – Full Bench – application seeking permission to appeal Commission's first instance decision on unlawful termination dispute – in July 2021, mask wearing was mandated for indoor workplaces in South Australia – appellant provided medical certificates exempting her from wearing a mask because she suffered from claustrophobia – appellant was dismissed and respondent asserted the reason was that appellant was no longer able to perform an inherent requirement of her job – appellant alleged that respondent unlawfully terminated her due to disability (discrimination claim) and because she filed a complaint against respondent (complaint claim) – at first instance, Commission found that appellant was statute-barred from making an unlawful termination application to the Commission under s.773 of the Fair Work Act because all conduct alleged by appellant engaged the provisions in Part 3-1 of the Fair Work Act and as a result, appellant was entitled to make a general protections court application – under s.723, a person must not make an unlawful termination application in relation to conduct if entitled to make a general protections court application for the same conduct – Full Bench observed that appellant raises questions about the effect of s.351(2)(a) and (b), which have not been the subject of previous Full Bench authority – appeal also raises questions about the proper construction of s.723 which were considered in *Krcho* but not determined – for the purposes of s.604(2), it is in the public interest to grant permission to appeal – permission to appeal granted – s.351(2)(b) states that the prohibition in s.351(1) against adverse action for discriminatory reasons does not apply to action taken because of the inherent requirements of the particular position concerned – appellant argued that s.351(2)(b) excluded her from making a general protections court application because respondent relied on the appellant being unable to perform the inherent requirements of her position as a reason for dismissal – if Full Bench accepted appellant's argument, then s.723 would not statutorily bar appellant from making an unlawful termination application because one of the grounds on which that application is based could not be the subject of a general protections application – Full Bench found that appellant's contention in relation to s.351(2)(b) was 'misconceived' – Full Bench found that s.351(2)(b) has no effect on the 'entitlement' of a person to make a general protections application – s.351(2)(b) operates as a defence to a general protections application where an employer asserts that action (including dismissal) was taken by the employer because of the inherent requirements of the particular position concerned – as the Commission correctly observed at first instance, to construe s.723 in the manner contended for by the appellant would require a full merit hearing to establish whether a dismissal was because of the inherent requirements of a position, to determine whether a person was entitled to make a general protections application – the appellant

contends that she was able to perform the inherent requirements of her role – it follows that she was entitled to make a general protections application contending that she was dismissed in contravention of the general protection in s.351(1) due to mental or physical disability – appellant argued that s.351(2)(a) extinguished her right to make a general protections court application in relation to the discrimination claim because respondent's conduct is not unlawful under South Australian discrimination law as it was conduct in response to an infectious disease – Full Bench noted the exclusion in s.351(2)(a) operates where discriminatory conduct is not unlawful because the anti-discrimination law in force where the conduct occurs does not cover the conduct, rather than where the law in the relevant place provides a defence or exception – Full Bench concluded that the defences available to employers in South Australian anti-discrimination law, which excluded discriminatory acts in certain circumstances, did not exclude such conduct for the purposes of s.351(2)(a) – in relation to the complaint claim, Full Bench noted there was no evidence that appellant 'filed' a complaint with an outside authority such as a court, tribunal or other relevant body, as required by s.772(1)(e) – if appellant did not file a complaint with an external body, then her allegation that she was dismissed because she made a complaint would not be caught by s.772(1)(e) and would have more appropriately been the subject of a general protections application under s.341(1)(c)(ii) – s.341(1)(c)(ii) does not require a complaint about employment is made to an external body – Full Bench found that Commission's decision at first instance that appellant's application was barred by s.723 was correct – appeal dismissed

Appeal by Jacobs against decision of Anderson DP of 24 November 2021 [[2021] FWC 6412] Re: Adelaide Theosophical Society Inc (New Dimensions Bookshop)

C2021/8553 [2022] FWCFB 79
Catanzariti VP Sydney 25 May 2022
Asbury DP
Lake DP
Bell DP

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2 TERMINATION OF EMPLOYMENT – misconduct – employer policies – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – application by Australian National University (University) seeking permission to appeal Commission's first instance decision that employee was unfairly dismissed – employee was dismissed due to conduct involving a student while at a University retreat – Full Bench considered Commission's first instance decision was attended by appealable errors including significant errors of fact and was wrong in principle – it is in the public interest to grant permission to appeal – permission to appeal granted – Full Bench noted that foundational to Commission's conclusion that the dismissal was unfair was conclusion that there was no valid reason for dismissal under s.387(a) – Full Bench further noted Commission's findings at first instance as to the matters in s.387(b)-(d) and (f)-(g) all favoured the conclusion that the dismissal was not unfair and Commission's consideration of s.387(h) did not identify any matter favouring the employee – Full Bench decided that Commission's conclusion at first instance that there was no valid reason for the dismissal was in error – '[E]ven on the primary facts…it was not reasonably open to find other than that there was a valid reason for the dismissal' – Commission's findings of fact at first instance 'make it apparent

that the essentials of the conduct alleged…were found to have occurred (and indeed were not fundamentally disputed)' – the critical evaluative judgment to be made by the Commission was whether the conduct found to have occurred was sufficiently serious to constitute a valid reason for dismissal – in making that evaluation, it was not necessary for Commission to find that employee had committed 'serious' misconduct or conduct warranting summary dismissal, or conduct giving rise to a legal right to terminate his contract of employment, in order to find there was a valid reason for dismissal – critical feature of employee's conduct 'is that it was not private in nature, involving an out-of-hours interaction with another person who happened to be a student of the University, but was rather directly connected with his employment' – the retreat was a University educational activity conducted on University premises and employee was present in his capacity as a senior academic and an organiser of the retreat and the student was there in her capacity as a student – all of employee's obligations as a senior academic with respect to a student therefore applied, even if one accepts the Commission's finding (which the Full Bench does not) that his role as a lecturer with respect to the student had for all practical purposes ended – Full Bench found that the employee's conduct and his subsequent non-disclosure of it to the University, involved a serious breach of his obligations under University's Code of Conduct and was a valid reason for dismissal – in finding at first instance that there was no valid reason for dismissal, it is apparent that the Commission at first instance placed very significant and arguably determinative weight on its finding that the intimacy which occurred was consensual and initiated by the student – however, the student and the University never alleged that employee engaged in sexual harassment or assault – employee was dismissed due to a finding that he engaged in 'consensual intimate contact of a sexual nature' – 'it should be obvious that a senior academic should not in the course of conducting an education activity engage in sexual intimacy with a student participating in that activity, even if the intimacy was consensual and initiated or invited by the student' – *Orr v University of Tasmania* considered – Full Bench noted that the University's Conflict Policy appeared to contemplate that consensual sexual relationships may exist between academics and student and it was possible for an academic to enter into a consensual relationship with a student without this having any relevant connection to the academic's employment, but the factual context in this case was entirely different – Full Bench found that Commission's consideration at first instance as to whether there was a valid reason for dismissal took into account its view that dismissal was a disproportionate response to the conduct – the question of disproportionality does not arise for consideration under s.387(a) [*Byrne v Australian Airlines Ltd*] – Full Bench found that the Commission at first instance erred in finding that there was no valid reason for the dismissal – as Commission's finding pursuant to s.387(a) was the sole basis for its conclusion that the dismissal was harsh and therefore unfair, the appeal must be upheld and the first instance decision quashed – Full Bench decided to redetermine the unfair dismissal application and found for the purpose of s.387(a) that there was a valid reason for dismissal relating to employee's conduct – in considering under s.387(h) and overall whether the dismissal was harsh, unjust or unreasonable, Full Bench decided to invite employee to provide further evidence and invite the parties to provide further submissions – appeal upheld – first instance decision quashed – parties directed to attend a conciliation

conference and if that fails to resolve the matter, it will be listed for further directions

Appeal by Australian National University against decision of Dean DP of 21 February 2022 [[2022] FWC 301] Re: Morrison

C2021/1533 | [2022] FWCFB 83
Hatcher VP | Sydney | 30 May 2022
Asbury DP
Bissett C

3 CASE PROCEDURES – evidence – consideration of fresh evidence on appeal – ss.604, 607 Fair Work Act 2009 – permission to appeal – Full Bench – application seeking permission to appeal – at first instance, Commission decided that employer did not dismiss appellant, that appellant remained a casual employee, and that employer was ready to deploy appellant if he became vaccinated against COVID-19 or if government requirements otherwise allowed him to attend the workplace – accordingly, Commission dismissed application to deal with a general protections dispute involving dismissal – one of appellant's grounds of appeal was that there was new evidence (namely an email that employer sent to appellant on 3 February 2022, which was a few days after Commission issued its decision at first instance) – email said that employer's process was to review its casual pool of staff regularly, records indicated that appellant had not worked a casual shift for over 3 months and as a result, appellant's employment had ended effective 3 February – Full Bench considered whether it should receive new evidence that appellant sought to adduce on appeal – s.607(2) of the Fair Work Act confers a discretion on Full Bench to 'admit further evidence' and 'take into account any other information' on appeal, 'however it is by no means a matter of course that it will do so' – a recent Full Bench summarised the approach, which was set down by the New South Wales Supreme Court in *Akins v National Australia Bank,* namely: '(1) it must be established that the evidence could not have been obtained or adduced with reasonable diligence for use at first instance; (2) it must be evidence which is of such a high degree of probative value that there is a probability that there would have been a different result at first instance; and (3) the evidence must be credible. However, it has been recognised by Full Benches of the Commission that, in considering whether to exercise the discretion in s.607(2), it is permissible in an appropriate case to depart from the principles set out in Akins and the principles need not be strictly applied.' [*Zahar Levin*] – *JJ Richards & Sons P/L, Mermaid Marine Vessel Operations P/L* and *Monstamac Industries P/L* also considered – Full Bench noted that email is credible and could not have been provided at the first instance because it was sent after the Commission at first instance heard and determined the appellant's application – in terms of probative value, email did not assist in determining whether, at the time of appellant's general protections application to Commission, appellant was dismissed – found the new evidence (email) is relevant to the appeal and employer sought to rely on the new evidence in that regard – Full Bench proposed 'to have regard to its terms at least for that purpose' – held that in 'the context of the casual employment operating in this matter and the absence of a mutual obligation to offer and accept work, we do not consider that at the time of the [general protections] application [lodged on 20 October 2021] it can be established that the Appellant had been dismissed' – found that employer did

subsequently expressly terminate appellant's employment in early February 2022 – during preliminary proceedings associated with this appeal, appellant was made aware that he could make a fresh general protections application to the Commission – further, in light of the Commission's first instance decision, appellant's dispute could have been taken to court as a non-dismissal general protections matter under s.372 – regrettable that appellant did not take up one of those options – Full Bench not satisfied that the appeal attracted the public interest – permission to appeal refused – application dismissed

Appeal by Varichak against decision of Colman DP of 28 January 2022 [[2022] FWC 186] Re: COG Regional Team P/L

C2022/1056 [2022] FWCFB 37
Catanzariti VP Melbourne 10 May 2022
Anderson DP
Hampton C

4 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – flexible working arrangement – ss.65, 739 Fair Work Act 2009 – application to deal with a dispute in accordance with the *Parks Victoria Enterprise Agreement 2021* – applicant is a Financial Transaction Services Officer – in 2021, applicant and other employees were encouraged to work remotely as much as possible, as a temporary measure in response to the COVID-19 pandemic – in September 2021, respondent discovered applicant had commenced working from home full-time without authorisation – at that time, respondent had a roster which required applicant's team to work 3-4 days per week in the office and 1-2 days from home per week – in October 2021, Victorian Government issued public health directions prohibiting respondent from allowing employees to work outside their home unless they were vaccinated by specified dates – applicant was not vaccinated and did not intend to become vaccinated – applicant and her husband were home schooling their child because applicant objected to mask mandates for school students – in November 2021, applicant asked to work from home 5 days per week from January 2022 onwards, pursuant to s.65 of the Fair Work Act – respondent refused applicant's request in January 2022 – s.65 permits an employee to request a change in working arrangements if they are responsible for the care of a school-aged child and if the employee has completed at least 12 months' continuous service – when applicant made request, she had not completed 12 months' continuous service – Commission found that the date when an entitlement to make a request arises is not the date on which the flexible working arrangement would commence but rather the date immediately before making the request (s.65(2)) – respondent invited applicant to submit an application for flexible working arrangements after completing the 12-month period of continuous employment but she has not done so – clause 60 of the Agreement contains a right to request flexible working arrangements but did not apply when applicant made the request in November 2021, because the Agreement commenced operation in December 2021 – respondent declined applicant's request in January 2022, at which point the Agreement was in operation, but even if Commission could treat the request as a continuing request that was still operative when the Agreement commenced operation, the request referred only to s.65 of the Fair Work Act – applicant did not make any request that engaged with clause 60 of the Agreement and so the dispute

about the granting of the request was not one which arose under the Agreement – Commission noted that if the National Employment Standards or clause 60 of the Agreement applied to the request, the enquiry would be whether respondent's refusal was on reasonable business grounds but in this case is not so confined – Commission noted that while some of applicant's duties could be undertaken remotely, respondent was entitled to insist that her duties be carried out on site in accordance with the employment contract – a refusal to allow applicant to work from home full-time was not unreasonable – Commission found that applicant's request for flexible working arrangements was motivated largely by her opposition to becoming vaccinated – applicant made request just a few days before the deadline for becoming vaccinated as a condition of returning to the office, and her submissions to the Commission contained contentions about vaccination – the flexible working arrangements sought by applicant were sought as a shield to becoming vaccinated or to avoid the possible consequences to her employment of not becoming vaccinated – Commission also noted that mask mandates in schools have been discontinued so there was no need for home schooling to continue – applicant not prevented from requesting a change in working arrangements under s.65 of the Fair Work Act (again) or clause 60 of the Agreement – no proper basis to grant applicant the relief sought – application dismissed

Zhang v Parks Victoria

C2021/8533 [2022] FWC 1203
Gostencnik DP Melbourne 19 May 2022

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5 TERMINATION OF EMPLOYMENT – incapacity – COVID-19 border closures – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant employed as a Cash Processor – at time of dismissal, applicant was in India where he had been for some time – international travel restrictions in response to COVID-19 pandemic made returning to Australia difficult – applicant went to India on 4 April 2019 to attend to the care of his mother and father and has not returned to Australia – applicant applied for and used accrued personal and annual leave to cover some of his absences – on 25 July 2019 he applied for 20 weeks of annual leave commencing on 8 May 2019 – this was approved – on 16 January 2020 respondent sent email to applicant about applicant's continued absence from work and requested that he respond within 14 days or respondent would consider his employment terminated by way of abandonment of employment – applicant provided a response on 29 January 2020 and included an application for long service leave – long service leave was not approved and applicant was issued with a Written Warning on grounds of misconduct being a breach of the terms and conditions of employment – applicant was directed to return to work on 3 February 2020 – applicant did not return to work on 3 February as directed and advised he had assumed the role of primary carer of his father – respondent retrospectively approved leave during the period 11 November 2019 to 13 March 2020 – ultimately respondent formed preliminary view that applicant's employment should be terminated – this was communicated to applicant on 1 September 2021 – applicant responded by email on 15 September 2021 saying he would be returning to his job when the international borders open – on 23 September 2021, respondent advised applicant he had been dismissed without notice 'for contract repudiation – inability to render substantial performance'

– Commission found at time of dismissal applicant was not ready, willing or able to attend for work – that position had pertained for quite some time and prospect of him returning to work in near future was vague and this provided a valid reason for his dismissal – held that the fundamental employment obligation that, as a full-time employee, applicant attend for work and perform work for respondent, was not being, and could not be met – found the valid reason related to both conduct and capacity – Commission held that in the course of its dealings with applicant, respondent was, speaking colloquially, 'very slack' in responding to applicant – on one occasion a period of 3 months elapsed, on another 13 months passed without any action – Commission found the employment relationship could properly have been brought to an end much earlier – Commission not persuaded the dismissal was harsh, unjust or unreasonable – dismissal not unfair – application dismissed.

Mangamuri v Linfox Armaguard

U2021/9126 [2022] FWC 763
Gostencnik DP Melbourne 2 May 2022

6 TERMINATION OF EMPLOYMENT – misconduct – employer policies – vaccination policy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant worked as maintenance planner at respondent's University Hospital Geelong facility – applicant's duties involved undertaking inspections, audits etc – Victorian Government issued public health directions which required respondent to obtain vaccination status information from its employees and prevented respondent from permitting unvaccinated workers from working on site unless a valid exemption applied – respondent also updated its immunisation policy to state that respondent may mandate specific vaccinations for certain employees – respondent's intranet contained information about employee vaccination and stated that employees in clinical and non-clinical roles were required to be vaccinated against COVID-19, whether they worked onsite or remotely and that exclusively working from home would not be considered an alternative to vaccination – applicant refused to be vaccinated and was not covered by valid exemption – show cause process conducted – applicant's employment terminated effective immediately with 4 weeks' pay in lieu of notice – applicant contended that dismissal was unfair because respondent could have complied with public health direction by allowing him to work from home, as he had done during periods when the Government had issued work from home directions – Commission noted that respondent told applicant that work from home arrangements would not be allowed as a shield for employees against becoming vaccinated and given respondent is a provider of health services, that position is reasonable – Commission noted it was unnecessary to make findings about whether applicant's duties could be undertaken remotely, but observed that between January 2021 and October 2021, when the Government's work from home directions were in place, applicant attended the workplace on approximately 150 separate days, usually from 7.30 am to 4.00 pm – Commission noted that respondent was under no obligation to allow applicant to continue to work from home and respondent was entitled under applicant's employment contract to require applicant to work onsite – held applicant's legal inability to attend work site, when respondent required him to attend, meant he could not perform inherent requirements of his role –

Commission found there was a valid reason for dismissal relating to applicant's capacity – Commission noted there was an implied term in contract of employment for an employee to obey the employer's lawful and reasonable directions – held respondent's direction that applicant prove vaccination status was lawful and consistent with applicant's employment, and was reasonable – Commission likened it to a new regulatory requirement for a role [*Roman v Mercy Hospitals Victoria Ltd*] – Commission found applicant's failure to comply with lawful and reasonable direction was a second valid reason for dismissal – observed that applicant was entitled to refuse or decline to become vaccinated, but his choice had consequences – due to that choice he was unable to meet inherent requirements of the role and failed to comply with a lawful and reasonable direction – held dismissal was not harsh, unjust or unreasonable – application dismissed.

Elege v Barwon Health

U2021/10287 [2022] FWC 1082
Gostencnik DP Melbourne 16 May 2022

7 TERMINATION OF EMPLOYMENT – misconduct – employer policies – mask policy – summary dismissal – ss.392, 394 Fair Work Act 2009 – unfair dismissal application – applicant was a food services assistant at an aged care facility and prepared and distributed meals to residents – respondent's policy required staff to wear masks over the nose and mouth – on 2 December 2021, external auditors conducted an assessment of the facility and an auditor saw applicant with her mask lowered – after a disciplinary meeting on 6 December, applicant was dismissed with immediate effect on 9 December – Commission found respondent had valid reason to dismiss applicant because she failed to comply with its requirements that she wear a mask properly over her nose – applicant had been reminded on 2 December that there was an audit that day and that she was required to wear her mask properly – she had signed the daily declaration acknowledging that she would wear personal protective equipment – previous instances of staff not wearing their masks properly does not affect the conclusion that there was a valid reason for dismissal – respondent repeatedly reminded staff to wear their masks properly, including by memorandum on 1 August 2021, whereby staff were told that pulling their masks down to communicate with residents was not acceptable – respondent's discussions and correspondence with applicant alerted her to the proposed reason for dismissal and gave her an adequate opportunity to respond – Commission found that dismissal was warranted because it should have been obvious to staff working in aged care that they risked dismissal if they did not wear their masks properly, even though respondent did not have a robust approach to disciplinary action as was evidenced by its common practice during spot checks of reminding workers to pull their masks up, rather than warning or dismissing them – past leniency does not mean employees should not reasonably have expected the possibility of being dismissed for not wearing their masks properly – respondent's previous lenient approach did not deprive it of the ability to take firm and fair disciplinary action – Commission considered whether applicant committed serious misconduct, such that respondent was not required to give notice of termination or payment in lieu of notice under s.117 Fair Work Act – Commission not persuaded that applicant committed 'serious misconduct' – it was not established that her conduct 'caused a serious and imminent risk to the health

and safety of a person' (r.1.07(2)(b)(i) Fair Work Regulations 2009) – for instance, it is not known how close she was to residents or other persons when her mask was lowered – Commission not satisfied that applicant's conduct 'caused a serious and imminent risk' to respondent's reputation (r.1.07(2)(b)(ii)) where the December 2021 audit report identified a number of other areas in respect of which the respondent's facility was found to be non-compliant with aged care standards – Commission not persuaded that applicant 'refused' to carry out a lawful and reasonable direction (r.1.07(3)(c)) or that her conduct as inconsistent with the continuation of the contract of employment (r.1.07(2)(a)) – in any event, serious misconduct does not necessarily mean that summary dismissal is fair – Commission found that if respondent proposed to dismiss an employee 'summarily' for incorrect mask-wearing, it should have warned employees that this could be the sanction for such conduct – the absence of a warning renders harsh the decision to summarily dismiss applicant – summary dismissal was disproportionate because applicant had not been told she was at risk of immediate dismissal if she did not wear her mask properly – applicant should have been given notice of termination or payment in lieu of notice – found that if respondent had not dismissed applicant on 9 December 2021, it likely would have dismissed her shortly afterwards on 5 weeks' pay in lieu of notice – Commission was satisfied for the purposes of s.392(3) that 10% should be deducted from the compensation amount due to applicant's misconduct – respondent ordered to pay $3,152.84 being 5 weeks' pay less a deduction of 10%

Daddona v Menarock Aged Care Services (Shepparton) P/L

U2022/153 [2022] FWC 1184
Colman DP Melbourne 17 May 2022

8 TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – working from home – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant was employed on a temporary basis – role required external site visits prior to COVID-19 pandemic – role required inspections of venues both before and after events – in late 2021 venue inspections became majority of applicant's role – in April 2021 the respondent encouraged applicant to apply for his role to become permanent – applicant did not apply – applicant encouraged to apply for other roles with respondent – applicant did not apply for roles as he was unvaccinated, and roles had attendance requirements – on 14 October 2021, Victorian Government issued public health directions requiring respondent to not permit defined workers (which included the applicant) to work outside their homes unless they were vaccinated against COVID-19 by 26 November 2021 or had a medical contraindication – applicant confirmed he did not intend to receive vaccination – applicant stood down 24 November – respondent's COVID-19 vaccination policy came into effect in December 2021 and required all employees to be vaccinated unless they had a medical exemption – applicant failed to provide vaccination information to respondent – show cause letter issued 10 December – applicant given opportunity to respond to show cause letter during 13 December meeting – applicant dismissed 14 December – applicant submitted that in late 2021 he was permitted to work home on long-term basis with site inspections to be conducted by other staff – respondent submitted the arrangement was short-term, not long-term – applicant submitted

he should have been provided alternative duties to allow him to work remotely until public health directions ceased – Commission found respondent had no legal obligation to find applicant alternative duties – applicant elected not to be vaccinated where he understood it was a requirement to perform the role – Commission found that to permit applicant to work remotely 100% of the time would have required the respondent to arrange for other employees to perform the site inspections – Commission agreed it was suitable in short-term for other staff to perform site inspections for applicant but not in long-term – Commission found applicant's inability to fulfil the inherent requirements of the role was a valid reason for his dismissal related to his capacity – application dismissed

Webber v Yarra Ranges Shire Council t/a Yarra Ranges Council

U2022/269 [2022] FWC 1196
Masson DP Melbourne 18 May 2022

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9 TERMINATION OF EMPLOYMENT – misconduct – employer policies – vaccination policy – s.394 Fair Work Act 2009 – unfair dismissal application – applicant was a Case Worker which involved supporting people who were vulnerable to COVID-19 – respondent decided to require employees working in the Supporting and Securing Tenancies program, including applicant, to be vaccinated against COVID-19 unless they had a medical contraindication – applicant did not have a medical contraindication and was sent a show cause letter on 19 November 2021 and a termination letter on 29 November 2021 – applicant was given 2 weeks' pay in lieu of notice – applicant's employment contract required him to comply with respondent's policies and procedures and gave respondent the right to summarily dismiss him if he engaged in serious breach of such policies and procedures – Commission was satisfied that there was an implied term in the employment contract that applicant comply with lawful and reasonable directions issued by respondent – found that applicant's right to personal and bodily autonomy and integrity was not violated by the direction for him to be vaccinated to continue working in his role [*Kassam v Hazzard]* – respondent's direction enlivened the consultation obligations in the enterprise agreement and in the Work Health and Safety Act 2011 (NSW) – Commission was satisfied that respondent complied with its consultation obligations by giving employees a reasonable opportunity to express their views and contribute to the decision making process, taking into account workers' views, and advising of outcome of the consultation in a timely manner – Commission found that respondent's direction to applicant to get vaccinated was within the scope of his employment and was lawful and reasonable – applicant's failure to comply with the lawful and reasonable direction gave respondent a valid reason to terminate his employment – Commission found respondent afforded applicant procedural fairness prior to making a decision to end his employment – dismissal was not harsh, unjust or unreasonable – application dismissed

Casper v New Horizons

U2021/11580 [2022] FWC 1269
Saunders DP Newcastle 24 May 2022

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10 TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – mandatory vaccination – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant was employed in the position of Passenger Services Delivery Agent at Sydney International Airport Precinct – was dismissed on 11 November 2021 – NSW Government made public health orders which required certain airport workers to receive their first dose of a COVID-19 vaccine by 28 June 2021 and their second by 29 September 2021 – applicant did not comply with requirement to provide proof of vaccination – Commission found no dispute that the public health orders applied to applicant in relation to her employment with respondent – unlike many COVID-19 vaccination matters, and in particular applications by applicant's co-workers, applicant apparently received Pfizer vaccine on 23 September and 18 October 2021 – applicant failed, however, to provide proof of vaccination to respondent – on 1 November 2021, applicant sent an email to respondent asking if she could come in and show her vaccination certificate rather than emailing it – shortly thereafter, respondent sent reply email that applicant needed to send vaccine certificate to respondent as respondent needed to record the details as evidence that applicant had complied with the public health order, but applicant did not comply with that direction – Commission found applicant's conduct in not promptly advising respondent of her vaccination status belied any reasonable explanation – found that 'Quite extraordinarily, notwithstanding that the Applicant received her first vaccine dose 49 days before dismissal and her second vaccine dose 24 days before dismissal, the Applicant took no steps to ensure the Respondent was advised of her vaccination status but for offering to '…*show the vaccin cert* [sic] *instead of emailing it through.'* That was despite numerous communications from the Respondent advising of the need for such proof' – Commission found that applicant failed to comply with respondent's lawful and reasonable direction – Commission found respondent had a valid reason to dismiss applicant and afforded procedural fairness to applicant prior to making decision to bring her employment to an end – dismissal was not unfair – application dismissed.

Gharib v Dnata Airport Services P/L

U2021/11085 [2022] FWC 1015
Cross DP Sydney 5 May 2022

11 TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – employer vaccination policy – medical contraindication to vaccination – ss.387, 394 Fair Work Act 2009 – unfair dismissal application – respondent is a not-for-profit organisation providing home care to people over 65 years old – applicant employed for 11 years as a clinical nurse in the Community Care Program in Mackay region – in March 2020, Queensland Government issued a public health direction mandating influenza vaccination for visitors to residential aged care facilities from 1 May 2020 – on 8 April 2020 respondent made influenza vaccinations mandatory by 1 May 2020 for all employees working in residential aged care facilities and also for all employees working in community care services who have direct client contact – as part of her role, applicant attended the homes of patients – on 17 April 2020 applicant provided medical certificate regarding medical contraindication – on 20 April respondent notified applicant that it

was now an inherent requirement of her role that she be immunised annually against influenza – respondent told applicant that if she was not vaccinated, then from 1 May 2020 she would not be rostered to work or permitted to enter respondent's premises but could take personal or other accrued leave – applicant was not rostered to work after 14 May 2020 and commenced paid leave – on 8 June 2020 respondent accepted applicant's doctor's advice that applicant was unable to be safely vaccinated – applicant was on unpaid leave from 25 January 2021, after she exhausted her paid leave entitlements – on 14 May 2021 respondent sent a Show Cause letter regarding applicant's failure to meet ongoing requirement of her role to be vaccinated – on 28 July 2021 applicant attended an independent medical examination which confirmed medical contraindication – on 18 August 2021 applicant's employment was terminated with 5 weeks' pay in lieu of notice – applicant submitted that reasonable accommodations could have been made to her job so she could undertake the role with limited contact with clients – submitted that she should not have been required to be vaccinated – contended that she had successfully performed her role for 10 years without being vaccinated and respondent had previously accepted her medical circumstances as a valid reason for declining the vaccine – Commission noted that the government public health direction did not extend to home care workers but nonetheless, respondent considered that clients receiving home care, and staff providing that home care, were at greater risk of catching and spreading infectious disease compared to a residential aged care facility – Commission noted that staff vaccination was necessary for respondent's aged care operations – noted that applicant could not meet the inherent requirements of her role and that there were no other roles to deploy her to that did not also require vaccination – held that respondent's vaccination policy was a lawful and reasonable direction – found that applicant's dismissal was based on a valid reason – determined that dismissal was not harsh, unjust or unreasonable – application dismissed.

Paul v Ozcare

U2021/8169 [2022] FWC 1139
Spencer C Brisbane 12 May 2022

12 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – employer vaccination policy – ss.589, 739 Fair Work Act 2009 – application made on 15 March 2022 for Commission to deal with a dispute under the *University of Tasmania Staff Agreement 2017 – 2021* – on 18 March 2022, respondent sent letter to applicant terminating his employment with 4 weeks' pay in lieu of notice on the basis that applicant had decided not to be vaccinated against COVID-19 – prior to dismissal, applicant had requested alternative working arrangements but respondent had advised that applicant was expected to be available on campus – respondent had implemented a policy which mandated COVID-19 vaccination and rejected applicant's request for an exemption – applicant sought for the Commission to arbitrate as to whether respondent's direction that vaccination was mandatory was a lawful and reasonable direction due to an alleged failure to consult as required under the Agreement – applicant sought an interim order for reinstatement, pending arbitration of the dispute, relying on the Commission's powers in s.589 of the Fair Work Act – Commission found that it did not have jurisdiction to hear the application – applicant was no longer employed as of 18 March

2022 and so was no longer covered by the Agreement [*Simplot*] – the legislature chose not to include in s.739 any power for the Commission to continue to deal with a dispute in respect to an enterprise agreement that no longer applies to a person – in this case, unlike in *Simplot,* the Agreement has not ceased to operate and remains a source of power to arbitrate disputes in respect of parties who are covered by it, but the applicant is not in that category – Commission noted that the dispute resolution clause in the Agreement allows the settlement of disputes regarding the application of terms of the Agreement or disputes about the National Employment Standards – Commission agreed with respondent's submission that the dispute was about whether the respondent's requirement for the applicant to comply with the mandatory vaccination policy was a lawful and reasonable direction – such a dispute is beyond the reach of the dispute resolution clause in the Agreement – the terms of the Agreement make clear that University Policy, Procedure and Guidelines do not form part of the Agreement – Commission concluded there was no jurisdiction to arbitrate the dispute because it was not a dispute about the application of terms of the Agreement – while the dispute resolution clause states that the Commission 'may' arbitrate such that there is a discretion to arbitrate in this matter, Commission found there was no utility in conducting an arbitration where the most favourable outcome to the applicant would involve orders for the respondent to take further steps to consult in respect to implementing the mandatory vaccination policy – there is no utility in such an outcome as the applicant is no longer employed – in relation to interim reinstatement, Commission noted that s.589 facilitates the Commission's effective exercise of its substantive power and is not to be used to support remedial or beneficial orders related to reinstatement particularly where, as here, reinstatement is sought as a final relief [*Virginia Wills*] – no authority to deal with the dispute under s.739 – application dismissed

Mitchell v University of Tasmania

C2022/1761 [2022] FWC 1115
Lee C Melbourne 27 May 2022

13 INDUSTRIAL ACTION – suspension of protected industrial action – endangering life – s.424 Fair Work Act 2009 – application to suspend or terminate industrial action – employer provides aged care services at 17 South Australia (SA) locations and employs 1696 persons with varying union membership – United Workers' Union (union) provided employer with 2 notices for Protected Industrial Action – one notice was for the wearing of union badges and campaign clothes and is not in dispute – second notice for work stoppages at all employer's SA locations – application to terminate industrial action (work stoppages) lodged on 1 May 2022 – on 6 May 2022, union provided undertaking to modify proposed industrial action – modifications included restricting locations that industrial action would occur by excluding sites which had COVID-19 outbreaks and limiting work stoppage duration – Commission considered key resident care tasks required to be undertaken by employer's staff, the effects of COVID-19 on staff shortages and strategies used to deal with staff shortages – Commission also considered the impact of staff shortages at the employer's various locations during week of proposed industrial action and the level of union participation at each location – employer submitted that reduction in labour as a

result of industrial action was unacceptable and mitigation of effect of stoppages not possible due to staff shortages – union submitted that consequences of stoppage must be more than inconvenience, residents must be exposed to danger – Commission took into account union's undertakings and considered impact of industrial action on life, personal safety or health of residents – even if conduct is not serious enough to endanger life, it might constitute a significant risk to personal safety or health [*Victorian Hospitals' Industrial Association*] the term 'welfare' in s.424 of the Fair Work Act is not limited to situations where life, personal safety or health is endangered [*State of Victoria – Department of Health and Community Services*] – taking into account facility residents' needs, Commission found some residents may be impacted more seriously whilst others will be inconvenienced – taking into account union membership and reduction of labour when staff shortages already occurs would place the most vulnerable residents at risk – Commission found proposed industrial action would threaten to endanger the life, personal safety or health, or welfare of part of the population – order issued to suspend industrial action for 2 weeks.

Southern Cross Care Inc (SA, NT & Vic) v United Workers' Union

B2022/380 [2022] FWC 1080
Platt C Adelaide 7 May 2022

14 GENERAL PROTECTIONS – dismissal dispute – employer vaccination policy – ss.365, 386 Fair Work Act 2009 – applicant lodged a general protections application alleging he was dismissed on 25 February 2022 – respondent raised jurisdictional objection that applicant not dismissed – Commission required to determine the jurisdictional objection before the matter could proceed [*Milford*] – applicant employed as a part time Customer Service Agent working 36 hours over a 4-week cycle – in October 2021, respondent implemented COVID-19 vaccination requirements, including that employees must be vaccinated or have a valid medical exemption by certain dates in order to work onsite in Tasmania – applicant was required to have his first vaccine dose by 25 February 2022 unless he was exempt – on 23 February 2022, respondent told applicant by text message that unless he was exempt, he would be unable to work from 25 February 2022 unless he had received his first vaccine dose and would be unable to work from 31 March 2022 if he had not received his second dose – respondent offered to allow employees who did not meet requirements to access leave – applicant last worked on 24 February 2022 – applicant did not provide evidence of vaccination/exemption status by 25 February – respondent said that applicant did not indicate whether he wanted to access his leave entitlements for the period after 25 February and since that time, respondent has recorded his absence from work as leave without pay – Commission considered whether applicant has been dismissed within meaning of s.386 of the Fair Work Act – *Lord v Amywood P/L t/a Central Kitchens* considered – principles of interpretation of s.386(1)(a) were outlined by a Full Bench in *Khayam v Navitas* – Commission found no evidence was before it that established that respondent had a right to unilaterally place applicant on leave without pay – no such provision contained in any award that would have been applicable to applicant's employment – no suggestion that any applicable enterprise agreement provides such a term – held that respondent has no

right to unilaterally place applicant on unpaid leave – by failing to offer applicant shifts after 24 February, respondent brought employment relationship to an end, despite not formally communicating that to applicant – applicant was dismissed – jurisdictional objection dismissed – parties can choose to engage in conciliation and if matter does not resolve by conciliation, Commission will issue a certificate under s.368(3)(a).

Haywood v Coles Supermarkets Australia P/L

C2022/1787 [2022] FWC 1087
Platt C Adelaide 10 May 2022

15 TRANSITIONAL INSTRUMENTS – termination of instrument – Sch.3, Item 16 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – an employee of Staff Services P/L applied for Commission to terminate the *Staff Services P/L Certified Agreement 2000* – Agreement commenced in 1999 and nominal expiry date was 2002 – in February 2010, Commission extended Agreement's nominal expiry date to 31 December 2012 – application must be dealt with pursuant to ss.225, 226 and 227 of Fair Work Act 2009 (FW Act), with same considerations required as if Agreement were an enterprise agreement made under the FW Act – s.226 requires Commission to terminate an enterprise agreement on application under s.225 if satisfied it is not contrary to public interest and Commission considers it appropriate to terminate taking into account all circumstances including views and circumstances of employees, employers and employee organisations covered by the agreement and the likely effect that termination will have on each of them – Commission satisfied that it was not contrary to public interest to terminate the Agreement because it 'was made approximately 23 years ago and has significantly less beneficial terms and conditions to employees than those contained within the two modern awards that would otherwise apply to employees covered by the Agreement' – Commission held that the likely effect on Staff Services P/L is that it would need to comply with the award and commence paying penalty rates to employees – Commission found that for 'more than two decades, the Employer has had the benefit to it, and to it only in depriving employees of payment of penalty rates for work performed at night, on weekends and on public holidays…The effect of employees working without the payment of penalty rates is staggering…It is difficult to understand how an employer could have, for so many years, knowingly deprived a large number of employees of penalty rates, to which they would have otherwise been entitled under the relevant award, simply because it lawfully could do so…it is unconscionable this arrangement has continued in place without an application by the Employer to terminate the Agreement' – in obiter, Commission stated that 'The effect of this Employer having the benefit of an agreement made in 1999, without the payment to employees of penalty rates, at least in the last decade, is a disgrace. It has resulted in this Employer having an enormous competitive advantage over other employers who pay to employees penalty rates in accordance with the relevant awards or their own agreements which satisfy the better off overall test' – Commission expressed concern about information provided by another employee of Staff Services P/L – that employee told the Commission that they declined a request by Staff Services P/L to work for another entity, Hot Wok Food Makers P/L – Commission noted that the *Hot Wok Food Makers P/L (ABN 15 058 494 447)*

Workplace Agreement 2021 was approved by the Commission [[2021] FWCA 4524] and attempted, by means of clause 4.5, to distinguish between when Hot Wok Food Makers P/L would 'direct and require' an employee to work unsociable hours, as opposed to the employee completing a 'voluntary hours form' requesting to work unsociable hours without the payment of penalty rates – Commission stated that it was 'inconceivable to imagine an employee voluntarily agreeing to work for…$28.77 per hour on a public holiday when they would otherwise be entitled to $56.15 per hour…Employees of Hot Wok Food Makers P/L are…invited to sign away their entitlements to penalty rates…Only if they are requested and directed by Hot Wok to work unsociable hours, and they haven't signed a voluntary hours form will they become entitled to penalty rates' – Staff Services P/L's evidence is that it has offered its employees the opportunity to transfer their employment from Staff Services P/L to Hot Wok Food Makers P/L – Commission further noted that, as the *Staff Services P/L Certified Agreement 2000* would now be terminated, it 'begs the question; will future shifts…be offered to employees of Staff Services P/L who are [soon to be] entitled to penalty rates, or to employees of Hot Wok Food Makers P/L where they have not signed the voluntary hours form? These two groups of employees are a far more expensive proposition…than those employees of Hot Wok Food Makers P/L who have signed the voluntary hours form for seemingly no benefit to themselves' – Commission considered that Hot Wok Food Makers P/L should 'consider very seriously its moral obligations to its employees…Hot Wok Food Makers P/L should never offer an employee a voluntary hours document, and where an employee has requested to work without the payment of penalty rates, it should refuse to allow the employee to do so in the future' – Commission concluded it was appropriate to terminate the *Staff Services P/L Certified Agreement 2000* – application to terminate the Agreement is approved – termination will take effect from 9 June 2022

Staff Services P/L Certified Agreement 2000

AG2022/684 [2022] FWCA 1543
Hunt C Brisbane 12 May 2022

Other Fair Work Commission decisions of note

Appeal by Qube Ports P/L against decision and order of Riordan C of 28 February 2022 [[2022] FWC 281] Re: Burkhardt and Ors

CASE PROCEDURES – appeals – review of decisions – ss.387, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appellant made appeal against Commission's first instance decisions that 6 shift managers be reinstated – employees were shift managers who were asked to perform stevedoring work during period of protected industrial action at Fremantle Port – employees refused to perform duties they considered outside the scope of their employment – they were dismissed for serious misconduct, being failure to follow a lawful and reasonable direction – Full Bench identified jurisdictional errors at first instance – permission to appeal granted – first appeal ground made out as Full Bench held that at first instance, Commission only had regard to whether there was a valid reason for dismissal (s.387(a) of the Fair Work Act) when determining whether the dismissals were unfair, rather than considering all s.387 considerations as required [*Titan Plant Hire v Shaun Van Malsen*] – Full Bench observed this jurisdictional error would not arise if no other factor in ss.387(b)-(h) was relevant – second appeal ground made out as at first instance, the Commission improperly considered ss.387(b) and (c) as neutral – Full Bench found these factors were not neutral and should have weighed somewhat against a finding

of unfairness – failure to include these factors in general assessment of unfairness was a jurisdictional error – Full Bench cautioned about expressing a consideration as 'neutral' and suggested a factor should only be neutral if it is not relevant or if countervailing considerations exist such that each cancel the other out – Full Bench further observed while it is appropriate to indicate whether a consideration weighs for or against a conclusion, it is not necessary to explicitly indicate the precise weight given to each consideration provided that relevant considerations are taken into account – appeal granted and first instance decision quashed – unfair dismissal applications redetermined by Full Bench – on redetermination, Full Bench found each of the shift managers was ready, willing and able to perform their contractual duties, their refusal to undertake ambiguous additional tasks was not a breach of duty or misconduct, nor was it a failure to follow a lawful and reasonable direction – no valid reason for dismissal – held dismissals were harsh, unjust and unreasonable – reinstatement with continuity and back pay ordered – any post-dismissal earnings to be deducted from back pay.

C2022/1511 and Ors [2022] FWCFB 65
Catanzariti VP Perth 16 May 2022
Anderson DP
Hampton C

Telstra Award 2015

MODERN AWARDS – variation – flexibility arrangements – ss.134, 158 Fair Work Act 2009 – Full Bench – application to vary *Telstra Award 2015* – multiple amendments sought including introduction of flexibility arrangements – a 'preferred hours arrangement' would allow day workers to work ordinary hours between 6.00 am and 11.00 pm, Monday to Sunday (instead of the current ordinary span of hours for day workers which is 7.00 am to 7.00 pm, Monday to Friday) – employer suggested safeguards (such as guaranteed 2 consecutive days off each week, common protections from individual flexibility provisions and ability to terminate unilaterally on 4 weeks' written notice or at any time by agreement) – employer suggested the proposed variations reflected desired work practices and were necessary to achieve the modern awards objective, particularly the need to promote flexible work practices and social inclusion (s.134(d) and (c) Fair Work Act) – CEPU, CPSU and Professionals Australia did not oppose application – Full Bench had regard to *Variation of awards on the initiative of the Commission* decision [[2020] FWCFB 1837] – Full Bench considered the need for additional remuneration for employees working, for instance, overtime or on weekends (s.134(da)) to be neutral, citing *Penalty Rates* case [[2017] FWCFB 10001] – Full Bench *provisionally* held that employer's proposal is necessary to achieve the modern awards objective but that an employee should be required to make their preferred hours arrangement request in writing – a 'multiple discrete periods of work' arrangement would allow a shift worker to perform multiple discrete periods of work in a day – an internal survey demonstrated 35% of the employer's shift workers who responded to the survey wanted the opportunity to work split shifts – employer proposed that multiple discrete periods of work arrangement could be terminated unilaterally on 3 calendar months' written notice or at any time by agreement – Full Bench concluded there was insufficient material to persuade it that termination notice period of 3 calendar months was necessary – Full Bench took *provisional* view that employer's proposal would be consistent with modern awards objective but that an employee should be required to make their multiple discrete periods of work arrangement request in writing and that the timeframe to unilaterally terminate a multiple discrete periods of work arrangement should be reduced to 4 weeks' notice – Full Bench noted that the employer has the right under the Award to vary a shift roster with one week's notice – interested parties invited to provide submissions on Full Bench's proposed modifications by 3.00 pm AEST on 10 June 2022 before Full Bench expresses a concluded view on flexible work arrangements variations.

AM2021/85 [2022] FWCFB 46
Masson DP Melbourne 26 May 2022

Millhouse DP
O'Neill C

Symbonis v Telstra Corporation Ltd

TERMINATION OF EMPLOYMENT – misconduct – employer policies – vaccination policy – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant was a Constructor Operative who performed his role at health care facilities, shopping centres, stadiums, et cetera, and came into contact with customers, members of the community and other workers – contract of employment required applicant to comply with respondent policies – respondent introduced a COVID-19 Vaccination Policy in September 2021 – Policy required employees 'in roles that frequently interacted with customers and other members of the public…[or] who were required by government or health regulations to be vaccinated to enter a location or premises' to be vaccinated against COVID-19 by a specified date unless they had a medical exemption – on 7 October 2021, Victorian Government issued public health direction requiring vaccination which applied to respondent in respect of the work undertaken by applicant – applicant notified respondent on 18 October 2021 that he had not received COVID-19 vaccine – applicant and respondent met on 21 October 2021 and applicant confirmed he did not intend to be vaccinated and did not have vaccination booking but may in the future – on 27 October, respondent issued final warning and Further Direction – at meeting on 4 November 2021 respondent notified applicant had failed to comply with the Further Direction, failed to comply with the Policy and that respondent proposed to terminate his employment – applicant was given opportunity to respond and said he had not failed to comply with the Further Direction and that the Policy was wrong – applicant dismissed on 5 November – Commission found 2 valid reasons for dismissal – first, from 15 October 2021, the public health direction prohibited respondent from allowing applicant to work outside his home if he was unvaccinated – applicant was unable to perform his role because he could not do his job from home – second valid reason was that applicant engaged in misconduct by refusing to follow a lawful and reasonable direction – respondent's direction was lawful because it was within scope of applicant's contract of employment (unless he followed the direction, applicant could not lawfully perform his job) – a direction to an employee to do something that is a necessary condition for them to be capable of doing their job is a lawful direction – direction was reasonable because applicant's role required him to move from location to location and perform duties at high risk facilities, and direction was consistent with the Policy regarding health regulations – dismissal not harsh, unjust or unreasonable – application dismissed.

U2021/10843 [2022] FWC 1018
Young DP Melbourne 4 May 2022

Colwell v Wellways Australia

TERMINATION OF EMPLOYMENT – misconduct – employer policies – vaccination policy – ss.387, 394 Fair Work Act 2009 – unfair dismissal application – applicant dismissed for failure to comply with a lawful and reasonable direction to be vaccinated against COVID-19 or produce medical exemption – respondent is provider of disability services – applicant's contract of employment specified that he would be required to comply with company policies and procedures – in October 2021 respondent introduced COVID-19 vaccination policy (policy) and required employees to receive the first dose by 31 December and provide evidence of vaccination – applicant raised concerns about the policy and respondent replied to all concerns – on 15 December applicant advised respondent that he had no intention of getting vaccinated – respondent invited applicant to meet on 13 January 2022 to show cause regarding termination – at meeting applicant reiterated his intention not to be vaccinated, that he had no contact with others and could easily work from home – applicant dismissed on 18 January 2022 with immediate effect, for serious misconduct – Commission considered *Mt Arthur Coal* – satisfied that the respondent's policy was based on its legal obligations for the health and safety of staff and clients and that employees'

views were considered before its introduction – Commission found there was valid reason for dismissal, namely that applicant failed to comply with the policy and thereby failed to comply with a lawful and reasonable direction – Commission considered meaning of 'serious misconduct' in *Fair Work Regulations 2009* – satisfied that applicant's decision to refuse to comply with the policy was a wilful act and that applicant was aware that his wilful act could result in dismissal – concluded that dismissal was not harsh, unjust or unreasonable – not satisfied that dismissal was unfair – application dismissed.

U2022/1556 [2022] FWC 1086
Bissett C Melbourne 24 May 2022

Blyth v Penhalluriack

TERMINATION OF EMPLOYMENT – termination at initiative of employer – abandonment – ss.386, 394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent raised jurisdictional objection that applicant abandoned her employment – applicant casually employed as Sales Assistant at respondent's hardware store – applicant told respondent she was unable to work from 15 March 2021 until 21 March 2021 but did not provide a reason for her absence – applicant did not inform respondent that absence would be longer than one week – applicant did not attend 2 rostered shifts after her notified absence – applicant did not respond to phone calls or messages from respondent over multiple days – calls made using messaging application WhatsApp – applicant and respondent both deleted WhatsApp records prior to hearing – applicant contacted respondent's General Manager (rather than her manager) in July 2021 seeking to perform marketing work for respondent – respondent declined and noted she was no longer an employee – Commission considered Full Bench decision in *4 Yearly Review of Modern Awards-Abandonment of Employment* [[2018] FWCFB 139] – test expressed as 'whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it' [*Abandonment of Employment*] – held applicant's conduct conveyed to respondent a decision to end her employment – applicant did not attend rostered shifts, did not reply to calls and messages and changed her residential address – applicant did not contact respondent for 4 months until she approached respondent proposing marketing services in line with her studies – Commission observed applicant's suggestion she was unwell and taking a 'break' is not reasonable as she did not specify the length of the intended break and waited a significant amount of time to contact the respondent – applicant found to have abandoned her employment – employment ended following applicant's renunciation – termination not at initiative of employer and applicant not forced to resign – no dismissal – application dismissed.

U2021/8102 [2022] FWC 972
Mirabella C Melbourne 3 May 2022

Bostock v Austmont P/L

TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant employed as Factory Foreman – in March 2021, respondent advised applicant that it had received an anonymous complaint against him which would be investigated – respondent found complaint was not substantiated – applicant became unwell and went on leave from 22 April 2021, which was the last date that he attended the workplace prior to his dismissal – on 16 July 2021, respondent wrote to applicant advising that it required him to undertake a fitness for duties assessment – applicant's spouse responded stating that, after seeking advice, applicant had been informed that there was no requirement for him to attend a doctor's appointment made by an employer – applicant made 2 workers' compensation claims and subsequently attended an independent medical examination – respondent dismissed applicant on 10 February

2022, with respondent stating the reason for dismissal as being the applicant's inability to perform the inherent requirements of his role – Commission found applicant's own evidence corroborated respondent's contention that applicant was not able to perform the inherent requirements of his role and was not able to return to work – Commission satisfied respondent had a valid reason for dismissal and that decision was sound, defensible and well founded – however found the dismissal was harsh because, even though there was a valid reason, applicant should have been notified of respondent's intention to dismiss him before the decision was made and should have been provided opportunity to respond – Commission satisfied applicant was unfairly dismissed – reinstatement inappropriate – ordered that respondent pay compensation of $470.72 gross, less taxation as required by law.

U2022/2707 [2022] FWC 1185
Matheson C Sydney 16 May 2022

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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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