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President releases statement outlining current work of the Commission

Fair Work Commission President, Justice Iain Ross, today issued a statement outlining the range of proceedings and other activities currently being undertaken by the Commission.

These include proceedings in relation to the modern awards safety net, significant cases currently before various Full Benches and the new anti-bullying and consent arbitration jurisdictions.

In addition, the statement provides information about the Commission's Australian Workplace Relations Survey and the Commission's Future Directions change program, including the 2014 Workplace Relations Education Series.

4 yearly review of modern awards

Following the conference held on 5 February 2014, the Full Bench issued a Statement and directions on 6 February 2014. These documents can be viewed on the 4 yearly review of modern awards website.

2014 Workplace Relations Education Series launched

The Fair Work Commission today launches the 2014 Workplace Relations Education Series.

The series builds on the success of the 2013 Workplace Relations Lecture Series and the mock unfair dismissal hearings held as part of Victoria’s Law Week in May 2013.

The series consists of three initiatives: a lecture series, a mock hearing series and an invited paper series. The lectures and mock hearings will take place in capital cities around Australia starting in Sydney.

The first mock hearing will be an unfair dismissal hearing conducted by Justice Iain Ross on 18 March 2014. The first lecture and invited paper in the series will be delivered by Professor Russell Lansbury on 19 March 2014.

For more information about, including information about how to RSVP, go to the 2014 Workplace Relations Education Series page.

First anti-bullying statistics released

Commission President, Justice Iain Ross, said that it was too early to say whether the figures released 5 February 2014 were indicative of the likely number of applications the Commission would receive throughout the year.

The Commission confirmed it had received 44 applications during the first month of the new anti-bullying jurisdiction. According to the President, the Commission 'will be monitoring the numbers closely, and will provide quarterly reports on our website'.

Further details appear in 5 February 2014 media release.
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, 31 January 2014.

1 ANNUAL WAGE REVIEW – 2013/14 financial year – preliminary consultations – s.285 Fair Work Act 2009 – statement regarding preliminary consultations – purpose of consultations identified in earlier statement – consultations to go ahead in accordance with timetable – parties invited to make submissions on research conducted for Annual Wage Review 2013-14 – submissions may also deal with issue raised regarding operation of ‘relative living standards the needs of the low paid’ paragraph in s.284 FW Act and meaning of ‘relative living standards’ – Panel may publish further questions for parties to address – directions provided in decision.

Annual Wage Review 2013-14

C2014/1
Ross J
Watson SDP
Spencer C
Hampton C
Mr Cole
Mr Harcourt
Prof Richardson

2 MODERN AWARDS – superannuation default fund review – s.156A Fair Work Act 2009 – FW Act requires Commission to conduct a 4 yearly review of default fund terms of modern awards starting as soon as practicable after 1 January 2014 – two stages of review – in the first stage Commission must make the Default Superannuation List – in the second stage Commission must review the default fund term of each modern award – after reviewing the default fund term of a modern award Commission must make a determination varying the term to remove every specified superannuation fund and to specify at least two, but generally no more than 15, superannuation funds in relation to standard MySuper products that satisfy the second stage test – to satisfy the second stage test, a standard MySuper product must, amongst other things, be on the Default Superannuation List – in the review Commission must also make the Schedule of Approved Employer MySuper Products – if a product is on the schedule, an employer covered by a modern award will be able to make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product – attached to statement are draft notices and draft forms regarding the making of the Default Superannuation List and the Schedule of Approved Employer MySuper Products – Commission invites written submissions from interested persons on draft notices and draft...
forms, timetable for the making of an application, and any other process issues.

2014 review of default fund terms

AM2014/6
Acton SDP
Drake SDP
Bull C
Johns C
Ms Allen
Mr Apted
Mr Gibbs

Melbourne
30 January 2014

TERMINATION OF EMPLOYMENT – genuine redundancy – reinstatement – ss.389, 390, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision that employee was unfairly dismissed and orders on remedy – test under s.400 FW Act ‘a stringent one’ [Coal & Allied] – task of assessing whether public interest test is met considered in Makin – Full Bench satisfied it is in public interest to grant permission to appeal – appeal raises novel questions about proper construction of s.389(2) FW Act and whether reinstatement order must specify position to which employee is to be appointed – central issue in contention is whether there must be an identified ‘job’ or ‘position’ to which applicant could have been redeployed in order to enliven s.389(2) – ascertaining meaning of section necessarily begins with ordinary and grammatical meaning of words used – words must be read in context by reference to language of FW Act and legislative purpose – use of past tense directs attention to circumstances which pertained at time person was dismissed – ‘redeployed’ should be given ordinary and natural meaning – meaning of s.389(2) considered extensively in Honeysett – Commission must find, on balance of probabilities, that there was a job or position or other work within employer’s enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy dismissed employee – must be an appropriate evidentiary basis for such finding – such interpretation consistent with ordinary and natural meaning of words, Explanatory Memorandum and Full Bench authority – Full Bench identified matters as to which it would ordinarily be expected employer wishing to rely on ‘genuine redundancy’ exclusion to adduce evidence – found Commissioner erroneously focussed on inadequacy of appellant’s redeployment policy – failed to make finding that there was a job, position or other work to which employee could have been redeployed – such finding a necessary step – failure to make finding an error which warrants correction on appeal – Full Bench accepted Commission’s power to order reinstatement is found in s.390(1) FW Act – s.391(1) a limitation upon that power rather than an independent source of power – nature and scope of reinstatement order considered in Sinclair – not persuaded of any relevant distinction between s.170EE IR Act and ss.390 and 391 FW Act – Sinclair remains apposite – Blackadder does not assist appellant – open to Commissioner not to specify particular position and leave it to employer to choose position to comply with order – Full Bench found Commissioner did not make finding that there was no position to which employee could have been redeployed nor was such finding implicit – permission to appeal granted – appeal upheld – decision and orders quashed – matter remitted to
Appeal by Technical and Further Education Commission t/a TAFE NSW against decision and orders of McKenna C of 12 and 16 August 2013 ([2013] FWC 4982, PR543507, PR544139] Re: Pykett

C2013/5813
Ross J
Booth DP
Bissett C

4
CASE PROCEDURES – appeals – s.604 Fair Work Act 2009 – Full Bench – appeal against decision in Transcript and Order – adjournment refused – denial of procedural fairness – observations about the form of the order – seeking an order which is contrary to authority without alerting the presiding Member to the contrary authority is inconsistent with a legal practitioner's duty to the Commission – Legal Professions (Solicitors) Rule 2007 (Qld) – permission to appeal granted – appeal upheld – order quashed – application dismissed.

Appeal by Allen and Ors against decision in Transcript and Order of Richards SDP of 4 September 2013 [PR541318] Re: Fluor Construction Services P/L

C2013/1523
Ross J
Gostencnik DP
Simpson C

5
INDUSTRIAL ACTION – order against industrial action – ss.418, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision and order directed at cessation of engagement in, and organisation of, industrial action – legislature’s clear intention in FW Act that non-protected industrial action should not occur, and that if it does it should promptly be stopped – uncontested evidence demonstrated history of employees imposing caps upon number of container movements per shift – unchallenged evidence demonstrated dispute had arisen between employer and union immediately before time at which employer alleged cap had been re-imposed – applied principles regarding approach to be taken in appeal from decision to issue order under s.418 FW Act described by Full Bench in MUA v Patrick – apart from unspecified observations lacking probative value, no direct evidence of the industrial action – principal facts of matter not in dispute – principal question whether Commissioner’s conclusion that employees had imposed the cap was one available as a reasonable and definite inference on primary facts and was more probable than any alternative explanation proffered – Commissioner’s conclusion was available to him and clearly correct – statistical evidence demonstrated abrupt change both in number of shifts exceeding 200 lifts and number of shifts in which 200 lifts were exceeded to any significant degree – evidence established that other factors could not be the explanation – industrial history suggested most probable cause for what was occurring – in the circumstances, Full Bench considered inference that union and members re-imposed the cap in response to the dispute and the standing down of four employees is a compelling one – inference could be more confidently drawn because of failure of union to call evidence denying organisation of or engagement in re-imposition of cap [Jones v Dunkel] – did not
consider distinction union sought to make with Port Botany case altered position – employer was not in position to be able to prove precise numerical basis of cap – critical question was whether limitation had been imposed at all – employer was able to demonstrate existence of limitation in its analysis of the productivity data – none of union’s proffered alternative explanations in any way probable – once Commissioner found industrial action was happening, further inference that such action was organised by union followed almost as necessary consequence – evidence makes it overwhelmingly likely re-imposition of cap was organised by union – concluded there was proper basis for Commissioner to determine he was satisfied industrial action was happening and being organised by union – no prejudicial insufficiency in reasons for decision – one area in which Commissioner’s reasons were not adequate was failure to make mention of submissions made by union as to why no order should be made – failure to demonstrate submissions were taken into account – if failure constituted error, even jurisdictional error, does not follow that permission to appeal should be granted and appeal upheld – lack of useful result a proper reason to refuse to grant relief even where jurisdictional error identified – Full Bench considered union’s submissions and concluded they lacked merit – no utility in granting permission to appeal – public interest does not otherwise require grant of leave to appeal – Full Bench made additional observations relating to conduct in relation to bargaining, and obligations under s.474 FW Act – permission to appeal refused.

Appeal by The Maritime Union of Australia against decision and order of Cambridge C
[[2013] FWC 9547 and PR545941] Re: Patrick Stevedores Holdings P/L

C2014/2578
Hatcher VP Sydney
Catanzariti VP 31 January 2014
Roberts C

TERMINATION OF EMPLOYMENT – termination at initiative of employer – ss.385, 394 Fair Work Act 2009 – whether applicant was dismissed or resigned – Commission found applicant resigned – although situation was one where misinterpretation possible, Commission preferred respondent’s submissions – no evidence supporting finding applicant forced to resign because of employer’s conduct – not necessary to determine whether termination harsh, unjust or unreasonable – circumstances such that, even if Commission found termination harsh, unjust or unreasonable, no order for reinstatement or compensation would be made – application dismissed.

Rocca v Dimasalt P/L t/a Cuts Only

U2013/10186
Watson SDP Melbourne

CASE PROCEDURES – evidence – production of documents – s.394 Fair Work Act 2009 – applicant’s representative in unfair dismissal matter sought order for respondent to produce various documents – Commission requested some documents be provided while no orders made for other material sought – right to request documents reserved – additional request for transcript of telephone hearing made by applicant – request refused –
proceedings not of nature requiring typed transcript – parties at liberty to order transcript – no requirement under FW Act to provide transcript – typing of transcript particularly expensive – access to sound files can be arranged – nothing in matter to date dictates necessity for typed transcript for fair and expeditious determination of matter.

Mace v ASC P/L
U2013/13492 [2014] FWC 670
O’Callaghan SDP Adelaide 28 January 2014

8 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent terminated applicants’ employment for engaging in fraudulent activities and falsifying records for personal gain – applicants were vehicle rental company customer service representatives – alleged to have completed customer satisfaction surveys to improve their individual feedback scores – improved scores positively affected performance bonuses – satisfied that applicants guilty of alleged misconduct – valid reason for dismissal – applicants had notification of reason, opportunity to respond and support person – procedures followed were appropriate having regard to size of employer and its access to human resource expertise – dismissal not harsh, just or unreasonable – application dismissed.

Pritchard v Hertz Australia P/L Anor
U2013/10970 and U2013/10971 [2014] FWC 666
Hamberger SDP Sydney 28 January 2014

9 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute about travel provisions in agreement – respondent provides services to Alcoa in alumina refineries at Kwinana, Pinjarra and Wagerup in Western Australia – respondent based in Canning Vale – employees entitled to be paid for travel between ‘the employee’s Company base’ and other locations – agreement provides that ‘From time to time, the Company may nominate an alternate Company base’ – dispute about whether the Alcoa sites fell within the meaning of the term ‘Company base’ – AMWU asserts ‘Company base’ must be respondent’s office at Canning Vale – respondent argued ‘Company base’ can be the location at which an employee is usually required to perform work – submitted nominated base for all employees has been Canning Vale – submitted travel payments previously paid as an above agreement payment, not as an entitlement under agreement – Alcoa met the cost of travel payments as part of its previous contract – respondent was seeking to enter into new contract with Alcoa and had been advised significant cost reduction was necessary – other contractors at Alcoa sites not entitled to be paid at overtime rates for travelling – respondent commercial imperative to reduce costs argument not helpful – consideration given to approach in Codelfa in applying the ordinary words of the agreement – ‘the employee’s Company base’ must be something that fits that description – respondent treated the Canning Vale site as the employee’s Company base for at least 10 years – employee’s Company base is the Canning Vale premises of respondent and cannot be any of the three Alcoa sites.

Appeal by Transport Workers’ Union of Australia against decision and order of Harrison SDP of 16 December 2013 *[2013] FWC 9805* Re: Road Transport and Distribution Award 2010

TERMINATION OF EMPLOYMENT – multiple actions – s.394 Fair Work Act 2009 – applicant filed two applications seeking unfair dismissal remedy – respondent advised at time first application filed that no dismissal had taken place – applicant subsequently dismissed – filed second application – two jurisdictional objections raised by respondent – relationship between notice of dispute and dismissal – respondent’s second jurisdictional objection dismissed – notice of listing for directions conference regarding applications attached to decision.

Lawless v Qantas Airways Limited

TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – applicant told that employer no longer employed technical project managers and his position was redundant – no opportunity was provided to change employer’s decision and discuss alternatives – found that despite downturn, there were vacant positions in the business – reason to terminate employment was sound, defensible or well founded – failure to comply with obligation to consult meant that it was not a genuine redundancy – applicant denied opportunity to consider other positions while at work – termination was harsh, unjust or unreasonable – respondent ordered to pay compensation to applicant.

Murray v Ventyx P/L t/a Ventyx an ABB Company
TERMINATION OF EMPLOYMENT – valid reason – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant summarily dismissed for serious misconduct because of alleged conflict of interest – entered consultancy agreement with company demonstrating products in homes – applicant’s employment contract contained restraint preventing her from working for anyone respondent considered a competitor – applicant’s employment terminated after declining to resign from consultancy – out of hours conduct by employees considered [Cementaid] – Commission did not accept respondent’s submissions about conflict of interest – no evidence that applicant breached confidentiality – terms of contract to be interpreted by what reasonable person would understand them to mean – terms of contract cannot override statute – Commission concluded no valid reason for termination – although respondent’s procedure was fair, applicant not guilty of alleged misconduct and therefore dismissal unfair – reinstatement not sought – compensation awarded.

Suckling v Adidem P/L t/a The Body Shop

U2013/9753 [2014] FWC 743
Gooley DP Melbourne 31 January 2014

REGISTERED ORGANISATIONS – registration – s.18(b) Fair Work (Registered Organisations) Act 2009 – ASU initially objected to application but objection was withdrawn – ISU gave undertaking not to recruit or seek to cover employees eligible to join ASU – Commission satisfied applicant has met criteria for registration – association registered with the name Industrial Staff Union-PSA of NSW.

Industrial Staff Union

D2013/126 [2014] FWC 765
Lawrence DP Sydney 31 January 2014

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – travel allowance – s.739 Fair Work Act 2009 – application to deal with dispute in relation to whether travel allowance is payable to employee – not open for employee to determine starting and finishing locations or any other location at which to start work – employer entitled to determine runs and manner in which service will be conducted – proper construction of terms of arrangement entered into does not provide employee’s preferred mode of operating – although arrangement is capable of construction advanced by employee, alternative construction is better and proper construction of arrangement – reading document chronologically, seems clear that the words are intended to convey that which is to occur at conclusion of shift – construction preferred by Commission consistent with hours of work agreed – on basis of correct construction of arrangement, employee’s ordinary starting and finishing place is Whittlesea depot – Kilmore is not a place from which he commences work and is not another place of work decided by employer – employee not required under arrangement to commence work at a place other than ordinary starting or finishing place – not required to use personal vehicle for transportation to or from ‘such other place of work decided by the employer’ – conditions precedent to
travel allowance entitlement do not arise – no entitlement to travel allowance – fact that employee submitted timesheets inconsistent with hours and places of work determined by employer does not change this.

Stewart v Seymour Passenger Service P/L

C2013/6443 [2014] FWC 664
Gostencnik DP Melbourne 29 January 2014

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant terminated for breaching IT Policy and APS Code of Conduct – applicant submitted that while there was valid reason for dismissal, sanction was disproportionate in circumstances [Australia Post] – respondent submitted it was a reasonable person test in terms of nature of content [Australia Post] – respondent submitted the material in this case was disturbing – held there was a valid reason for dismissal – IT policy had been repeatedly communicated to applicant, was stringently monitored and enforced – held that applicant flagrantly breached IT policy – sanction not disproportionate – dismissal not harsh, unjust or unreasonable – application dismissed.

Vu v Commonwealth of Australia as represented by the Australian Taxation Office

Deegan C Canberra 30 January 2014

TERMINATION OF EMPLOYMENT – valid reason – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy dismissed in first instance – found to be genuine redundancy – overturned on appeal – Full Bench found consultation requirement pursuant to s.389 FW Act not satisfied – original Decision quashed – matter referred to Commissioner Roberts to consider if dismissal was harsh, unjust and unreasonable – having regard to reasoning of Full Bench, Commissioner found there was a valid reason for termination – however dismissal found to be harsh largely based on employer’s failure to consult about proposed redundancy – reinstatement considered impracticable and undesirable given acrimonious relationship and Full Bench conclusions regarding economic circumstances of employer – each criteria of s.392(2) FW Act considered in determining compensation – applicant’s length of service, age, skillset considered – financial effects on applicant considered – employer’s statements regarding financial situation taken into account – having regard to s.393 FW Act compensation to be paid in two instalments – $9,230.72 compensation ordered – satisfied each party accorded ‘fair go all round’.

Joseph v Amandon P/L t/a World Business Travel

U2013/429 [2014] FWC 687
Roberts C Sydney 29 January 2014

CASE PROCEDURES – application dismissed on FWC’s own initiative – ss.394, 587 Fair Work Act 2009 – application for unfair dismissal remedy – matter not resolved at conciliation – applicant requested to proceed with application – matter listed for hearing –
Commission requested additional materials, failure to comply with directions application will be dismissed – applicant did not comply with direction – application for unfair dismissal remedy dismissed.

Richardson v Southern Cross Care (WA) Inc

U2013/13061

Williams C

Perth

29 January 2014

19 TERMINATION OF EMPLOYMENT – high income threshold – ss.382, 394 Fair Work Act – reg 3.05 Fair Work Regulations 2009 – application for unfair dismissal remedy – jurisdictional objection that applicant not protected from unfair dismissal – applicant not covered by modern award and no enterprise agreement applies – applicant base salary $120,000 per annum plus bonus structure – leadership element of bonus structure of $2,500 per quarter was guaranteed amount – earnings of $130,000 per year – non-monetary benefits included a phone allowance, laptop, city parking spot and relocation assistance – applicant’s annual rate of earnings and other amounts were not less than the high income threshold – applicant not protected from unfair dismissal – application dismissed.

Parker v Publican Group Australia P/L ATF Publican Group Australia Unit Trust t/a Publican Group Australia

U2013/12955

Williams C

Perth

29 January 2014

20 TERMINATION OF EMPLOYMENT – costs – ss.400A, 402, 611 Fair Work Act 2009 – application for costs by employer – employee made unfair dismissal application alleging constructive dismissal due to bullying – matter unable to be resolved at conciliation – procedural directions issued for arbitration – employee failed to comply with directions – matter listed for non-compliance hearing – application for unfair dismissal discontinued by employee before hearing – employer submits that employee caused costs to be incurred by her unreasonable acts or omissions in connection with the continuation of the matter up until the date of discontinuance and that application was frivolous and vexatious – each person to proceedings must sustain their own costs in relation to a matter – what is reasonable or unreasonable – application for unfair dismissal not unreasonable and did not cause costs to be incurred – in the circumstances non-compliance not unreasonable and did not cause costs to be incurred – timing of discontinuance not unreasonable – application for unfair dismissal not made vexatiously – application for costs dismissed.

Prism P/L t/a Vigil Antislip v Falzon

U2013/10318

Cloghan C

Perth

29 January 2014

21 MODERN AWARDS – review – Sch 5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – WALGA and ASU sought variation to higher duties, meal breaks and annual leave clauses – clause 18 ‘higher duties’ varied to provide clarity concerning entitlements of employees who perform higher duties immediately prior to period of leave – clause 22
meal breaks’ varied to reflect requirement in some occupations of remaining at workplace during meal break – variation does not negate requirement of working no more than five hours without receiving 30 minute meal break – clause 25 ‘annual leave’ varied to remove ambiguity, correct drafting error, and clarify that where an employee takes annual leave they are to be paid for hours so taken – determination issued.

Local Government Industry Award 2010

AM2014/130 and Anor
Cloghan C
Perth
31 January 2014

22 MODERN AWARDS – review – Sch 5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – nine applications by ASU and WALGA to vary Local Government Industry Award 2010 (LGI Award) – variations sought related to hours of work, penalty rates, wages and related matters – when making LGI Award the Full Bench expressed concern about rostering and ordinary hours of work provisions – ASU sought replacement of entire section – Full Bench opted to retain clauses from exposure draft – Commission satisfied that AIRC Full Bench, in making LGI Award, had before it extensive submissions and supporting evidence which included variations now sought and decided not to include proposed variations – two year review not a ‘fresh assessment’ unencumbered by previous Tribunal authority – applicant would have to show cogent reasons for departing from previous Full Bench decision, such as significant change in circumstances which warrant different outcome – ASU sought variations to give appropriate weight to WA and NT underpinning awards – Commission not satisfied there are good reasons to depart from Full Bench decisions – ASU also submitted that there was a technical problem because insufficient consideration was given to employees who would be covered by LGI Award and too much weight given to pre-reform awards covering employees who would not be covered because they operated in state jurisdiction – ASU submitted greater weighting should have been given to WA and NT – Commission satisfied that Full Bench was extensively informed of difference between terms and conditions in various states and territories – Commission not satisfied of ‘technical problem’ – two year review intended to have narrow focus – broad changes more appropriately dealt with by four year review – parts of ASU’s application which were opposed by LGA dismissed – Commission noted that from 1 January 2014 local government employees in Victoria and Tasmania also covered by award.

Local Government Industry Award 2010

AM2012/20 and Anor
Cloghan C
Perth
31 January 2014

23 ENTERPRISE AGREEMENTS – notice of representational rights – ss.174,185 Fair Work Act 2009 – application for approval of single enterprise agreement – s.174(1A) of FW Act requires that notice of representational rights (notice) must be in form prescribed by Regulations – notice issued to employees contained additional content – non compliance with s.174(1A) – no notice provided – request for approval of agreement could not have been made –
enterprise agreements – termination of agreement – s.225

Fair Work Act 2009 – nominal expiry date 12 April 2013 – five state and territory divisions set to amalgamate – only Victorian division covered by agreement – other states covered by Award modified by common law employment contracts – applicant contended more generous Victorian conditions may be outvoted if there were negotiations for an Australia-wide agreement – Commission considered if there were any grounds for believing employees had not genuinely agreed to termination – whether employees aware of difficulties and costs associated with enforcement of common law contract in absence of dispute settlement process under agreement – views of employees sought – employees provided with letter outlining Commission's concerns – no opposition to employer application – Commission considered it appropriate to terminate Agreement – termination of Agreement approved operative from 30 January 2014.

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant youth justice worker for DHS – dismissed for taking mobile phone into secure work facility, possessing phone on duty and denying she had phone – act prohibited by policy and Children, Youth and Families Act 2005 – phone detected by security screening but applicant waved through security and not manually screened as there were no female security staff on duty – phone later rang and applicant questioned – incident reported to police and applicant charged – charge later dismissed – Commission must determine whether misconduct occurred – Commission found applicant did not knowingly bring phone into facility – however, on discovering phone, she did not attempt to remove it from facility – records indicated applicant used phone in the facility – applicant did not lie to manager about having it – Commission found a valid reason for dismissal – Commission considered factors under s.387(h) – facility accommodates serious young offenders and introduction of mobile phone raised potential for safety and security of facility to be undermined – applicant appeared to be treated inconsistently compared to another staff member who introduced phone into facility but was not dismissed – respondent's security system failed to detect prohibited item so respondent partly to blame – however, applicant still responsible for her actions – applicant had 13 years' service with respondent and no history of disciplinary problems – difficult for applicant to find other work as work in her chosen area requires a police check – applicant has suffered severe financial and person ramifications since dismissal – Commission considered applicant's actions in using mobile phone once she discovered it had substantial bearing on Commission's decision – applicant knew she was in breach of policy and her responsibility at time of using phone – on balance,
dismissal not harsh, unjust or unreasonable – application dismissed.

26 TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected on basis termination was genuine redundancy – disagreement amongst parties regarding whether respondent complied with consultation requirements in Real Estate Industry Award 2010 (award) – respondent argued consultation clause not relevant as modern award did not apply to applicant’s employment -alternatively, respondent argued that they complied with clause – satisfied decision to terminate applicant’s employment due to changes in operational requirements – satisfied applicant’s job not simply replaced by another employee – whether dismissal genuine redundancy does not go to process of selecting individual employees for redundancy followed by employer – selection process must not be for prohibited or unlawful reason – application of award central matter to proceedings – requirements for consultation – relevant authorities that deal with award application considered – reference to decision in Carpenter in particular – role of facilities manager does not fall within award classifications – employer not bound to comply with consultation provisions under award – had employer been covered by clause 8 in award it would be right to say employer would not have complied with consultation requirements – no evidence to suggest position could have been reasonably redeployed – satisfied this was case of genuine redundancy – no jurisdiction for Commission to consider substantive matter – application dismissed.

27 TERMINATION OF EMPLOYMENT – identity of employer – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected to application on ground it was not employer – respondent submitted applicant was employed by labour hire organisation Programmed Integrated Workforce (PIW) – applicant submitted clause 4.2.4 within enterprise agreement created employment contract between applicant and respondent – found clause 4.2.4 did not give rise to a contract of employment between parties absent express elements of a contract – even if it did, satisfied clause of agreement is of no effect as not permitted matter – applicant contended finding that applicant not an employee of respondent would be contrary to FW Act and Agreement relying on s.739(5) – s.739(5) has no application to matter arising under s.394 – applicant submitted relationship of control existed between applicant and respondent – satisfied these tests not relevant in this matter – applicant submitted jointly employed by respondent and PIW – not satisfied of express or implied contract between parties – doctrine of joint employment not yet recognised as law in Australia – respondent
TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – applicant dismissed because he was unable to perform inherent requirements of flight attendant role – after being cleared for ‘pre-injury’ duties applicant advised respondent his injury had not gone away and he was learning techniques to manage it and put up with constant pain – over next month applicant advised respondent he was having trouble sleeping, could not work morning shifts and could not use shoulder – under Civil Aviation Regulations 1998 respondent cannot assign a crew member unless they are competent in using emergency and life-saving equipment – respondent sought expert evidence about applicant’s fitness for work – doctor gave evidence that applicant did not have capacity to perform full duties and was not likely to improve and be able to perform required duties in foreseeable future – whether valid reason for dismissal – generally, valid reason will exist where applicant no longer able to perform inherent requirements of position – specialist opinion was not sought for an improper purpose but on basis of statements made by applicant – applicant argued role of lifting 15kg aircraft window exit could be assigned to another staff member if he was unable to do it – Commission did not accept this argument as it ignored respondent’s obligations under Civil Aviation Regulations – applicant notified of dismissal – applicant alleged he was not given realistic opportunity to respond – decision to dismiss applicant was not taken until approximately a month after applicant was put on notice of potential dismissal – applicant took no action to get second opinion until over a month after dismissal – did not take up invitation to meet with respondent – Commission determined applicant given opportunity to respond – issues of support person and warnings not raised – some procedural deficiencies, however, threshold of unfairness not met by deficiencies – applicant gained alternative employment – applicant accorded ‘fair go all round’ – dismissal not harsh, unjust or unreasonable – application dismissed.

ENTERPRISE BARGAINING – protected action ballot – s.437 Fair Work Act 2009 – application by United Firefighters’ Union (UFU) for protected action ballot order – ESTA initially opposed application – UFU amended application and draft order in response to objection – ESTA advised it no longer opposed application – ESTA did not contest that UFA were genuinely trying to reach agreement – matter determined on papers – UFU’s description of employees to be covered went beyond statutory prescription in s.437(5) – order to reflect statutory prescription – satisfied requirements of s.443(1) met – order issued.
United Firefighters’ Union of Australia v Emergency Services Telecommunications Authority (ESTA)

B2014/463

Johns C

Albury

28 January 2014

[2014] FWC 663
Websites of Interest

**AUSTLII** - [www.austlii.edu.au](http://www.austlii.edu.au) - a legal site including legislation, treaties and decisions of courts and tribunals.


**Fair Work Act 2009** -

**Fair Work (Registered Organisations) Act 2009** -


**Fair Work Ombudsman** - [www.fairwork.gov.au](http://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.


Industrial Relations Commission of New South Wales -

- 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 -

Road Safety Remuneration Tribunal—www.rsrt.gov.au

South Australian Industrial Relations Court and Commission -


range of online Australian legal information.

Western Australian Industrial Relations Commission -

Workplace Relations Act 2009 -
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<th>Location</th>
<th>Address</th>
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<th>Postcode</th>
<th>Tel</th>
<th>Fax</th>
<th>Out of hrs emergency:</th>
<th>Email</th>
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<tbody>
<tr>
<td><strong>Australian Capital Territory</strong></td>
<td>2nd Floor, CML Building 17-21 University Avenue</td>
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<td>Canberra 2600 GPO Box 539 Canberra City 2601 Tel: (02) 6209 2400 Fax: (02) 6247 9774</td>
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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: FWCsubscriptions@fwc.gov.au.

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