

FWC Bulletin

6 May 2021 Volume 16/21 with selected Decision Summaries for the week ending Friday, 30 April 2021.

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4 yearly review – Social services industry award decision issued

A Full Bench of the Fair Work Commission has issued a decision in relation to substantive issues claims in the **Social, Community, Home Care and Disability Services Industry Award 2010**.

A summary of the decision is available on the [Summaries of significant decisions](#) page on the Commission's website.

Find out more

- [Summary of decision](#)
- [Full decision \[2021\] FWCFB 2383](#)
- [Draft determination](#)
- [Information note – Review of part-time hours clauses in enterprise agreements](#)
- [AM2018/26 – Social, Community, Home Care and Disability Services Industry Award 2010](#)

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, 30 April 2021.

- 1** GENERAL PROTECTIONS – amendment of application – ss.365, 372, 604 Fair Work Act 2009 – permission to appeal – Full Bench – employer sought permission to appeal interim decision by Commission in refusing to hear jurisdictional objection to general protections application – employee contended that employer took adverse action against him after he inquired about a performance review, pay rise and bonus and subsequently made a complaint – employer objected to the application on basis that it should have been made under s.365 of the FW Act and it was frivolous and vexatious – Commission indicated matter would not proceed to a jurisdictional hearing – employer debated this position and eventually agreed to participate in a conciliation conference 'under protest' – Commission sent parties a clarification that it had not determined any jurisdictional issue – employer lodged appeal submitting Commission had issued an appealable decision – Full Bench found 'jurisdictional objection' was without merit – found first instance 'decision' was 'unremarkable' and procedural – found that if employer did not wish Commission to conduct a conference that result could be achieved by simply declining to participate – Full Bench also found employer's objections 'spurious' and a 'waste of time, money and resources' – found employer's legal representative to have behaved inappropriately and disrespectfully – permission to appeal refused.

Appeal by XP Recruitment P/L atf Thivagar Family Trust and Ors against interim decision of Yilmaz C of 5 February 2021 Re: Boerkamp

C2021/1061
Hatcher VP
Gostencnik DP
Anderson DP

Sydney

[\[2021\] FWCFB 2297](#)
27 April 2021

- 2** TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – unfair dismissal application lodged 16 days outside of statutory timeframe – respondent raised jurisdictional objection that application was made out of time – applicant sought extension of time to lodge application – Commission found that circumstances from time of dismissal must be considered in deciding whether there is an acceptable reason for delay [*Shaw v ANZ*] – Commission found that primary reason for delay was medical grounds including impact of death of applicant's father-in-law and associated travel – applicant's father-in-law died on 29 November 2020, before applicant's dismissal – applicant became aware of dismissal on 1 December 2020, the same day the dismissal took effect – applicant said he told respondent during termination meeting that he believed his dismissal was unfair and he would discuss it with Commission – applicant travelled to Ipswich in December to attend funeral and support family members – Commission found exceptional circumstances justified

granting applicant further period to make application –
jurisdictional objection dismissed – extension of time granted.

Mansfield v Wilmar t/a Wilmar Bioethanol

U2021/150
Asbury DP

Brisbane

[\[2021\] FWC 2314](#)
29 April 2021

- 3** TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent raised a jurisdictional objection, being that the respondent was a small business, and that the dismissal was consistent with the Small Business Fair Dismissal Code – applicant had been employed on a casual basis as a swimming instructor by the respondent since December 2017 – applicant had recommended another swim school in a private Facebook group – respondent saw the post and felt that the applicant's actions were sufficiently serious to justify summary dismissal – respondent and the applicant had a telephone conversation about the Facebook post – respondent advised the applicant that the conduct was disloyal and that it was wrong of the applicant to have made a recommendation for one particular swim school in circumstances where she worked for many – applicant was dismissed without notice – Commission found the dismissal was not consistent with the Code – there was no evidence that there were any documented policies or procedures in place that were provided to the applicant by the respondent – nor a written contract of employment in place that set out the applicant's obligations to the respondent – the Commission was not persuaded that the applicant's conduct was so serious as to establish a valid reason for her dismissal – the decision to dismiss the applicant was considered a disproportionate response to a naïve and ill-advised social media post that was made without adverse intent towards the respondent – the Commission also was not satisfied that the applicant was afforded a proper opportunity to respond – the decision to terminate the applicant was made prior to the discussion with the applicant – as such any opportunity to respond and influence the decision of the respondent had no practical relevance – Commission determined that that applicant's dismissal was unfair, and that reinstatement was inappropriate – compensation was not deemed appropriate in the circumstances as the applicant had not suffered a loss of earnings in the period since the termination of her employment.

Besanko v R.B. Aquatics P/L t/a Swimmers

U2021/790
Masson DP

Melbourne

[\[2021\] FWC 1952](#)
26 April 2021

4 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant director of a childcare centre (the Centre) – respondent raised jurisdictional objection to the application – argued it was a small business employer and the dismissal complied with the Small Business Fair Dismissal Code (the Code) – respondent also stated that in the event it was not a small business employer, it had a valid reason for applicant's dismissal and procedural fairness had been afforded during the process – applicant and her estranged husband, the respondent, bought and became directors of the childcare centre – in 2019, they separated but the applicant continued her position as director of the Centre as well as her usual duties – in early 2020 the applicant faced serious health issues which meant the she had to take leave for a period of months – on the applicant's return to work, in a work from home capacity, she found she was not receiving regular updates and information that was needed to fulfil her duties – in the following weeks, personal and professional communication between respondent and applicant began to breakdown, resulting in respondent denying applicant access to her work email account as she was continuing to manage bookings remotely after she was asked to stop as the system had been changed while she was on leave – following this, and disgruntled conversations between applicant and respondent, the applicant went to the bank and changed the authority on the respondent's bank account to require three signatories to transact – these were herself, the respondent, her estranged spouse as the other director, and his sister – respondent claimed the applicant did not inform him that the signatories had changed on the Centre's bank account, which meant when he went to pay the staff he had to pay from his personal account – while at the bank the applicant also withdrew \$1000 from the Centre's bank account, which she was authorised to do, however, respondent claimed applicant did not spend the \$1000 on food and fuel for the Centre as is usual process – respondent claimed he reviewed the Code, analysed rosters and payroll information to calculate the Centre had 9 employees employed on a regular and systematic basis and a further 5 employees currently active in payroll who had not worked for 5 months – respondent then completed the Fair Dismissal Checklist and was satisfied applicant's conduct warranted summary dismissal – on 29 June 2020, applicant received a termination letter which cited that 'upon advice from the Australian Securities and Investments Commission (ASIC) your appointment as a Director of the Company has been removed due to Director Misconduct' – Commission found the respondent was a small business employer – Commission was satisfied that at the time of dismissal, the respondent held a belief that applicant's conduct was sufficiently serious to justify immediate dismissal and the belief was based on reasonable grounds – Commission therefore found that the respondent complied with the Code in relation to the applicant's dismissal – application dismissed.

Nielsen v Wonderland Learning Centres P/L

U2020/9653
Beaumont DP

Perth

[\[2021\] FWC 451](#)
27 April 2021

- 5** TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – COVID-19 – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant's role involved general receptionist-type responsibilities and other clerical-type duties – respondent is a community-owned, not-for-profit aged care group – applicant was employed at a respondent-operated facility named Imlay House – facility is a high-care aged care residential facility with around 89 beds – respondent also provides in-home care – applicant was dismissed with a payment in lieu of notice in circumstances related to her failure in 2020 to be vaccinated against influenza – the applicant had received work-administered flu shots in April 2015 and April 2016 – applicant gave evidence she had a reaction to the 2016 flu shot – no evidence she made a contemporaneous report to the respondent about this matter – also no evidence of any absence from work as a result of the condition – applicant chose not to have any further flu shots during the respondent's flu shot programmes in 2017, 2018 or 2019, she was not asked why she did not have flu shots and no issue was taken by the respondent concerning the applicant not having a flu shot in those years – NSW Government made a public health order (PHO) about matters related to requirements for flu shots concerning persons who worked within, or who otherwise attended, NSW residential aged care facilities – in response to the NSW Government's PHO measures, the respondent, in turn, commenced the process of putting in place its own workplace measures; it effectively was bound by law to do so – the circumstances that arose in 2020, against the background of the NSW Government's PHOs, brought the matter of flu shots into sharp focus at the respondent's Imlay House facility – in the end, a number of employees who did not wish to have the 2020 flu shot were, like the applicant, dismissed – other employees either retired or resigned against the background of their own decisions not to have the 2020 flu shot – Commission found the respondent did not give any direction to the applicant to have a 2020 flu shot – found the respondent's reliance in the dismissal letter upon its purported 'multiple lawful and reasonable directions to be vaccinated against influenza' was a misstatement – nonetheless communication was given to indicate that the respondent expected or required the applicant (and other employees) to have a flu shot unless there was a medical contraindication – Commission found valid reason on basis applicant was unable to perform the inherent requirements of her job – she was not permitted to enter or remain at Imlay House without having an up-to-date flu shot – Commission not satisfied the dismissal of the applicant was harsh, unjust or unreasonable – application dismissed.

Kimber v Sapphire Coast Community Aged Care Ltd

U2020/9867

McKenna C

Sydney

[\[2021\] FWC 1818](#)

29 April 2021

- 6** TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant employed as teacher at respondent's school since 2013 – applicant dismissed in February 2020 for serious misconduct involving inappropriate conduct towards Student A on 14 June 2019 and a tweet containing sexualised content posted in June 2019 – applicant first warned about hugging a student in February 2019 – significant factual dispute regarding 14 June 2019 incident with Student A – nature and extent of physical
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contact disputed – applicant conceded he removed Student A from class, sat next to him on a couch in a locker bay area, put his arm across Student A's shoulders and referred to him as 'sweetie' – respondent submitted applicant was in close physical contact with Student A and hugged him – applicant attended disciplinary meeting in relation to this incident on 19 June and provided written 'personal reflection' on his behaviour – Student A told school counsellor in August 2019 that applicant had touched his leg in the 14 June incident – Student A further alleged applicant had made inappropriate comments about his body in other instances since 2018 – applicant informed in October 2019 that he had been found in breach of code of conduct for June 14 incident and given final warning – applicant requested to attend further meeting on 17 February 2020 to discuss further investigation of 14 June incident and sexualised tweet following request from Student A's parents to reopen investigation – applicant called on 20 February to attend meeting that afternoon to discuss potential termination of his employment – applicant dismissed at 20 February meeting – respondent submitted further valid reasons for dismissal discovered after dismissal, being use of applicant's school laptop to access and view pornography, and emails to students breaching professional boundaries – Commission satisfied applicant's physical contact with Student A on 14 June more intimate than applicant conceded – Commission satisfied on balance of probabilities that applicant touched Student A's leg in 14 June incident – Commission satisfied applicant's behaviour constituted serious misconduct and valid reason for dismissal – Commission satisfied that applicant misled respondent in personal reflection note in response to 14 June incident and that this constituted a valid reason for dismissal – *Rankin* considered – Commission satisfied respondent did not have full knowledge of applicant's misconduct of 14 June when it made the decision to issue a final warning rather than terminate applicant's employment – Commission satisfied accessing pornography on work computer, sexualised tweet, and emails in breach of professional boundaries all valid reasons for dismissal – Commission found respondent's failure to inform applicant of allegations of leg-touching in 14 June incident and dishonesty in investigation process weigh in favour finding dismissal unfair – found failure to provide opportunity to respond to valid reasons, failure to follow disciplinary process in enterprise agreement, including speed in convening 20 February meeting, weighs in favour of finding dismissal unfair – Commission also found applicant's lack of insight into conduct and failure to take responsibility weighs against finding dismissal unfair – Commission found gravity and extent of misconduct such that dismissal was not harsh, unjust, or unreasonable – application dismissed.

Parris v Trustees of Edmund Rice Education Australia t/a St Kevin's College

U2020/2749

Lee C

Melbourne

[\[2021\] FWC 2341](#)

28 April 2021

Subscription Options

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

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

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

Websites of Interest

Attorney-General's Department - www.ag.gov.au/industrial-relations - provides general information about the Department and its Ministers, including their media releases.

AUSTLII - www.austlii.edu.au/ - a legal site including legislation, treaties and decisions of courts and tribunals.

Australian Building and Construction Commission – www.abcc.gov.au/ - regulates workplace relations laws in the building and construction industry through education, advice and compliance activities.

Australian Government - enables search of all federal government websites - www.australia.gov.au/.

Federal Register of Legislation - www.legislation.gov.au/ - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

Fair Work Act 2009 - www.legislation.gov.au/Series/C2009A00028.

Fair Work (Registered Organisations) Act 2009 - www.legislation.gov.au/Series/C2004A03679.

Fair Work Commission - www.fwc.gov.au/ - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

Fair Work Ombudsman - www.fairwork.gov.au/ - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

Federal Circuit Court of Australia - www.federalcircuitcourt.gov.au/.

Federal Court of Australia - www.fedcourt.gov.au/.

High Court of Australia - www.hcourt.gov.au/.

Industrial Relations Commission of New South Wales - www.irc.justice.nsw.gov.au/.

Industrial Relations Victoria - www.vic.gov.au/industrial-relations-victoria.

International Labour Organization - www.ilo.org/global/lang--en/index.htm
- provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission - www.qirc.qld.gov.au/index.htm.

South Australian Employment Tribunal - www.saet.sa.gov.au/.

Tasmanian Industrial Commission - www.tic.tas.gov.au/.

Western Australian Industrial Relations Commission - www.wairc.wa.gov.au/.

Workplace Relations Act 1996 - www.legislation.gov.au/Details/C2009C00075

Fair Work Commission Addresses

Australian Capital Territory

Level 3, 14 Moore Street
Canberra 2600
GPO Box 539
Canberra City 2601
Tel: 1300 799 675
Fax: (02) 6247 9774
Email:
canberra@fwc.gov.au

New South Wales

Sydney

Level 10, Terrace Tower
80 William Street
East Sydney 2011
Tel: 1300 799 675
Fax: (02) 9380 6990
Email:
sydney@fwc.gov.au

Newcastle

Level 3, 237 Wharf
Road,
Newcastle, 2300
PO Box 805,
Newcastle, 2300

Northern Territory

10th Floor, Northern
Territory House
22 Mitchell Street
Darwin 0800
GPO Box 969
Darwin 0801
Tel: 1300 799 675
Fax: (08) 8936 2820
Email:
darwin@fwc.gov.au

Queensland

Level 14, Central Plaza
Two
66 Eagle Street
Brisbane 4000
GPO Box 5713
Brisbane 4001
Tel: 1300 799 675
Fax: (07) 3000 0388
Email:
brisbane@fwc.gov.au

South Australia

Level 6, Riverside
Centre
North Terrace
Adelaide 5000
PO Box 8072
Station Arcade 5000
Tel: 1300 799 675
Fax: (08) 8308 9864
Email:
adelaide@fwc.gov.au

Tasmania

1st Floor, Commonwealth
Law Courts
39-41 Davey Street
Hobart 7000
GPO Box 1232
Hobart 7001
Tel: 1300 799 675
Fax: (03) 6214 0202
Email:
hobart@fwc.gov.au

Victoria

Level 4, 11 Exhibition
Street
Melbourne 3000
PO Box 1994
Melbourne 3001
Tel: 1300 799 675
Fax: (03) 9655 0401
Email:
melbourne@fwc.gov.au

Western Australia

Floor 16,
111 St Georges Terrace
Perth 6000
GPO Box X2206
Perth 6001
Tel: 1300 799 675
Fax: (08) 9481 0904
Email:
perth@fwc.gov.au

Out of hours applications

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

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

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

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

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

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