

## **FWC Bulletin**

8 July 2021 Volume 25/21 with selected Decision Summaries for the week ending Friday, 2 July 2021.

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## **Filing fee increase – dismissals, general protections & anti-bullying applications**

**From 1 July 2021** the application fee for dismissals, general protections and bullying at work applications made under sections 365, 372, 394, 773 and 789FC of the *Fair Work Act 2009* increased to **\$74.90**.

The high income threshold in unfair dismissal cases also increased to **\$158,500** and the compensation limit is now **\$79,250** for dismissals occurring on or after 1 July 2021.

In addition, the Fair Work Commission has published an updated version of the **Unfair dismissals benchbook** and the **General protections benchbook**. The updated versions reflect:

increases to the application fees, the high income threshold and the compensation limit recent amendments to the Fair Work Act in relation to casual employees, and the current value of a penalty unit.

The Commission's benchbooks are designed to be read online and can be accessed from the [Benchbooks](#) page of the Commission's website. A printable version of each benchbook is also available for download.

## **New online application form for enterprise agreements**

The Fair Work Commission is building a new way for users to fill in and lodge forms.

We have developed an online application form which allows users to fill in and lodge single-enterprise and multi-enterprise agreement applications electronically.

The online application form pre-populates information and alerts users when important information has been left out or seems incorrect.

To try our new online application form, just click the button on the [Enterprise agreement application](#) page and follow the prompts to set up an account and get started.

Once you've finished lodging your application please tell us how we did by emailing us at [enquiries@fwc.gov.au](mailto:enquiries@fwc.gov.au). Any feedback you give us can help us do better.

## 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, 2 July 2021.

- 1** MODERN AWARDS – ambiguity or uncertainty – ss.134, 157, 160 Fair Work Act 2009 – Full Bench – joint application by Shop, Distributive and Allied Employees' Association (SDA), the Australian Workers' Union (AWU) and Master Grocers Australia (MGA) to vary *General Retail Industry Award 2020* by amending provisions applying to part-time employees – application included a proposal to facilitate part-time employees working additional hours by individual agreement by reference to specific agreed shifts or specific hours for an agreed period – Full Bench noted a research report filed by Australian Business Industrial and NSW Business Chamber (ABI) supported a finding that some retail employers were confused about the capacity for part-time employees to work additional hours at ordinary rates under the Award – decided to vary the Award by deleting cl.10, and inserting a new cl.10 which provided that an employer and part-time employee could agree to vary the employee's agreed regular pattern of work on a temporary or ongoing basis, with effect from a future date, and such agreement must be recorded in writing (such as by text message or email) before the variation took effect – new cl.10 allowed employer to change an employee's agreed regular pattern of work (other than their guaranteed hours) by giving 7 days' (or in an emergency, 48 hours') written notice, provided the employer must not change the regular pattern of work from week to week or fortnight to fortnight or to avoid any award entitlements – new cl.10 also stated that if an employee's guaranteed hours were less than the ordinary hours regularly worked in the previous 12 months, the employee could request in writing an increase of their guaranteed hours on an ongoing basis to reflect the ordinary hours regularly being worked, and the employer could only refuse the request on reasonable grounds – Full Bench concluded the variations would provide the flexibility required to engage part-time staff by providing more hours of work when they became available, at the ordinary rate of payment – held the Award would be varied on Commission's own motion under ss.157 and 160 because the variations were necessary to ensure the Award achieved the modern awards objective in s.134 and to resolve uncertainty about the operation of cl.10 and its interaction with cl. 15.9 of the Award – Full Bench held that a variation determination would be issued which would commence operation on 1 July 2021 .

General Retail Industry Award 2020

AM2021/7  
Ross J  
Asbury DP  
Hampton C

Melbourne

[\[2021\] FWCFB 3571](#)  
28 June 2021

- 2** TERMINATION OF EMPLOYMENT – small business employer – contractor or employee – ss.23, 394, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance Commission dismissed appellant's unfair dismissal application on the basis that respondent was a small business employer (with fewer than 15 employees) and the appellant had not served the minimum employment period applicable to employees of small business employers (one year) and was therefore not a person protected from unfair dismissal – appellant sought permission to appeal – at issue was whether Mr Robertson and Mr Lang were employees or contractors of the respondent – Full Bench found it was not a discretionary decision, so no need to establish a *House v The King* error – answer determinative of whether Commission had jurisdiction to deal with the application – permission to appeal granted in respect of the grounds relating to Mr Robertson – permission to appeal refused in respect of other grounds – appeal determined – Full Bench considered indicia and found Mr Robertson was an employee of the respondent – Commission at first instance had erred in finding otherwise – Full Bench held that if Mr Robertson was a casual under s.23(2)(b) as it was immediately before the appellant was dismissed (that is, before amendments to the Fair Work Act came into effect from 27 March 2021) he was 'employed on a regular and systematic basis' – found that under the new s.23(2)(b) as amended by the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021, Mr Robertson was likely not a casual within the meaning of s.15A(1) but alternatively even if he was a casual, he was a 'regular casual employee' under the new s.23(2)(b) – such employees are counted when determining whether an employer is a small business employer – respondent (including related companies) consequently not a small business employer – appellant had served minimum employment period – appeal upheld and first instance decision and order quashed – matter remitted for redetermination on the basis that appellant is a person protected from unfair dismissal.

Appeal by Hempel against decision and order of Bissett C of 4 March 2021 [[\[2021\] FWC 886](#)] Re: Northern Territory Air Services P/L

C2021/1353  
Hatcher VP  
Cross DP  
Lee C

Sydney

[\[2021\] FWC 3707](#)  
2 July 2021

- 3** GENERAL PROTECTIONS – jurisdiction – s.365 Fair Work Act 2009 – applicant lodged application to deal with general protections dispute involving dismissal – respondent raised jurisdictional objection that it had not employed the applicant and, consequently, had not dismissed the applicant – where a respondent submits that applicant to a s.365 application was not dismissed, Commission must first determine whether applicant was dismissed [*Coles Supply Chain P/L v Milford*] – applicant introduced to respondent by social contact – applicant submitted he later accepted a verbal offer of employment at the respondent's law firm for an unpaid position that would become remunerated once he demonstrated he could independently manage cases – applicant commenced his role on 24 August 2020 and on 25 November 2020, the principal of the respondent told applicant it could no longer offer him 'volunteer work' – applicant submitted his practising certificate described him as an 'Employee'

of a Law Practice' and identified his place of practice as the respondent; he held an account with Legal Aid NSW as a solicitor under the name of the respondent on Legal Aid's panel of law firms; the respondent printed business cards with his name and the title 'Lawyer'; the respondent made a social media post welcoming him to the firm; he performed fee paying work, he incurred expenses such as parking fees and tolls while performing tasks for respondent for which he was not reimbursed; and he had fixed hours – respondent submitted applicant was 'merely volunteering' to gain exposure to legal practice by observing practitioners at work and performing simple tasks suitable for summer clerks; the respondent gained no financial benefit from the tasks the applicant performed and time spent by the supervising solicitor correcting his work resulted in a business cost; and applicant did not have fixed hours – Commission considered whether a contract of employment existed – considered *Susan Bergman v Broken Hill Musicians Club Ltd and Pacesetter Homes P/L v Australian Builders Labourers Federated Union of Workers (WA Branch)* – Commission not satisfied applicant and respondent reached agreement on the terms of a contract or that either party had provided consideration – satisfied respondent did not intend the arrangement to be legally enforceable – Commission considered factors which distinguish work experience from employment and concluded that arrangement mainly benefitted applicant and he received opportunities to do productive work, but this was not expected or required and respondent derived no significant commercial gain or value from the applicant's work – found respondent did not advertise for employees or volunteers or proactively recruit the applicant – applicant initially had no expectation of payment and at no stage received any form of payment – found that when applicant commenced his role with the respondent, he did not have a practising certificate and was not capable of performing the duties of a solicitor – applicant maintained alternative employment and income during period of arrangement with respondent – applicant did not provide, and was not asked to provide, his taxation number or superannuation fund details to the respondent – respondent ended arrangement after 14 weeks, before point in time at which applicant may have morphed from volunteer to employee – Commission concluded relationship was one of work experience not employment – applicant was not an employee of the respondent and could not be dismissed for the purposes of s.386 – applicant ineligible to make application – application dismissed.

Barbour v Memtaz Derbas T/A Derbas Lawyers

C2020/9025  
Binet DP

Perth

[2021] FWC 1718  
30 June 2021

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- 4** TERMINATION OF EMPLOYMENT – valid reason – ss. 385, 387, 394 Fair Work Act 2009 – applicant alleged unfair dismissal – sought compensation – applicant employed from 27 July 2020 as full-time truck driver for respondent, a metal recycling business, until 25 February 2021 – applicant's duties did not involve heavy manual labour – applicant suffered injuries to left leg and little finger of left hand on 30 October 2020 from workplace incident – worker's compensation claim accepted by respondent's insurer on 23 November 2020 – applicant produced medical certificates indicating he was unable to perform pre-injury duties – respondent unhappy with the length of time of applicant's
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incapacity – believed applicant may be fraudulently claiming incapacity – requested insurer initiate surveillance of applicant – surveillance footage supplied to applicant's treating GP – GP cleared applicant on 10 February 2021 to return to work and perform full range of pre-injury duties without limitation – respondent dismissed applicant for two reasons: first, respondent alleged applicant refused to undertake normal driving duties on 12 and 15 February 2021 after being cleared to return to work on 10 February 2021 and second, respondent alleged applicant's claims that his injuries prevented him from returning to work were fraudulent – applicant expressed confusion about his return to work arrangements and felt respondent failed to properly manage his return to work – Commission noted conflicting messages to applicant regarding his refusal to carry out driving duties and regarding advice from rehabilitation consultant on 16 February 2021 – accepted there was an absence of effective communication with applicant between 12 and 16 February 2021 rather than applicant refusing to perform duties and that applicant held concerns about his return to work – noted applicant undertook normal driving duties on 16 February 2021 as directed – as to respondent's first reason for dismissing the applicant, the Commission was not persuaded that applicant declining driving duties was a wilful breach of employment contract that constituted serious misconduct and found that events of 12 and 15 February 2021 were a consequence of miscommunication – as to respondent's second reason for dismissing the applicant, Commission satisfied applicant had recovered sufficiently by at least late January 2021 and was capable of returning to work by late January 2021 and bore responsibility to co-operate with respondent to return to work at the earliest opportunity but did not do so – noted that applicant's trigger for return to work was not his conscious decision but was that GP had viewed surveillance footage – Commission satisfied that applicant was dishonest about his capacity to undertake pre-injury or other alternate duties – satisfied that applicant engaged in deception about the severity of his injury and his capacity for work by at least late January 2021 – satisfied applicant's conduct was a valid reason for dismissal – noted procedural failures not sufficient to conclude that dismissal was harsh, unjust or unreasonable – not satisfied applicant was unfairly dismissed – application dismissed.

Singh v Manhari Management Company P/L

U2021/2126

Masson DP

Melbourne

[\[2021\] FWC 3489](#)

28 June 2021

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- 5** TERMINATION OF EMPLOYMENT – misconduct – out of hours conduct – s.394 Fair Work Act 2009 – unfair dismissal application – applicant employed as a train driver since 2005 – outside of working hours, applicant charged with high range drink driving and his drivers licence was suspended – applicant notified employer promptly that he had been charged with the offence, was contrite and provided an explanation – applicant was suspended with pay while matter was investigated internally – applicant was convicted of offence, and his drivers licence was suspended for 6 months – respondent dismissed applicant for respondent's breaching code of conduct – Commission found the drink driving offence lacked requisite connection to employment [*Rose v Telstra*] and did not provide a valid reason for termination as offence took place outside of work hours, applicant was not on call, and was not due to report for next shift until the following
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morning – drivers licence not inherent requirement of role – no more than hypothetical risk of damage to respondent's interests, including reputation – respondent ignored the rehabilitative steps undertaken by the applicant such as counselling – Commission found dismissal harsh, unjust and unreasonable – found the respondent had not established a 'sound and rational evidentiary basis' for its loss of trust and confidence in the applicant – found the connection between the offence and the applicant's workplace only arose because respondent's code of conduct required staff to immediately notify their manager if charged or convicted of a serious criminal offence – Commission noted that while the offence was a serious criminal matter, it had been dealt with in the appropriate jurisdiction – Commission ordered reinstatement with continuity of employment, and compensation for lost remuneration from dismissal to date of reinstatement, less the notice paid on termination.

Bobrenitsky v Sydney Trains

U2021/1757  
Cross DP

Sydney

[\[2021\] FWC 3792](#)  
1 July 2021

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### **Other Fair Work Commission decisions of note**

Caliskan v Ilim College

TERMINATION OF EMPLOYMENT – contract for specified term – ss.386, 394 Fair Work Act 2009 – unfair dismissal application – applicant commenced employment as a relief teacher with respondent in 2016 – dispute concerned nature of applicant's engagement during 2020 school year – applicant contended they were an ongoing employee and were dismissed at the end of 2020 school year – respondent contended applicant was employed under 2 contracts in 2020, a fixed term contract which was extended from 2019, before ending through effluxion of time at the end of the 2020 school year, and a casual employment contract which remains on foot – respondent contended that as fixed term contract ended applicant was not dismissed as s.386(2)(a) exception applied – alternatively, respondent contended dismissal was not unfair – Commission found that applicant had accepted an offer of casual employment in January 2021 that was clearly intended to supersede and end any casual arrangements of the previous year, but this was no bar to finding that applicant was dismissed from part-time employment – Commission found that the subject lines in relevant emails, a diary note of the respondent, a relevant employment conditions document and witness evidence tended to support respondent's version of events that offer of part-time employment made during a November 2019 meeting was not ongoing – Commission considered that parties had agreed at the meeting that applicant would be employed on a fixed term contract which concluded at the end of the 2020 school year – Commission held s.386(2)(a) therefore applied and applicant was not dismissed – application dismissed.

U2021/37  
Gostencnik DP

Melbourne

[\[2021\] FWC 3061](#)  
30 June 2021

Nasr v Mondelez Australia P/L

TERMINATION OF EMPLOYMENT – contract for specified term – ss.386, 394 Fair Work Act 2009 – application for unfair dismissal, seeking order for reinstatement – applicant employed by respondent from 2 July 2018 to 31 December 2020 pursuant to 8 successive maximum term contracts – employment also governed by 2016 and 2018 enterprise agreements – after expiry of 8th contract, applicant not offered further contract due to respondent's reduction in work volume – applicant gave evidence that an officer of the respondent told him he could work as casual employee through labour hire arrangement after expiry of 8<sup>th</sup> contract, which contradicted officer's evidence that he told applicant that he would not be offered further employment as there was no work for him to perform – Commission accepted

officer's evidence – issue of whether expiry of applicant's maximum term contract constituted termination on employer's initiative for the purposes of s.386(1)(a) considered, using principles set out in *Khayam v Navitas* – Commission rejected applicant's submissions that contracts rolled over in 'perfunctory way' over the 2.5 year period and that he expected employment was continuous in reality – rejected applicant's submissions that period of employment reflected on employment separation certificate 'obviously' evidenced that applicant's employment was continuous, and rejected evidence given by applicant that respondent made oral assurances to applicant that employment was permanent – Commission accepted respondent's submission that contracts based on operational requirements of respondent and represented genuine agreement by parties that employment relationship would end upon expiry of contracts – Commission found applicant accepted terms of contract; knew there was no guarantee of employment after the expiry date in contracts; and knew that employment relationship was not ongoing – Commission accepted evidence given by an officer of the respondent that he met with applicant in relation to the 6th to 8th contracts and explained reasons for duration of contracts and that employment would cease at expiry date of contracts – Commission rejected applicant's submissions that contracts operated for administrative convenience and were 'rolled out again and again with little discussion...'; that applicant was engaged on basis of representations made by the respondent that employment would be ongoing notwithstanding the express terms of contracts; and that employment was not consistent with the terms of 2016 and 2018 enterprise agreements – Commission concluded employment relationship between parties ended by effluxion of time upon expiry of 8th contract and applicant's employment not terminated on initiative of the employer – therefore applicant not dismissed pursuant to s.386(1)(a) – application dismissed

U2021/569  
Young DP

Melbourne

[\[2021\] FWC 2802](#)  
1 July 2021

Rahimi v Venture West Holdings P/L atf the DJ Bovell Family Trust t/a Corica Pastries

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant made unfair dismissal application – applicant had been employed as a pastry cook assistant at a bakery – respondent's CCTV footage showed applicant taking home cake – applicant gave evidence that employees are permitted to take home excess produce – gave evidence that she asked another employee for permission – respondent submitted that employees can only take products with permission from owner or manager – English was applicant's second language – attempted to arrange support person to be present for disciplinary meeting – respondent went ahead with meeting despite applicant requesting the meeting be rescheduled – applicant dismissed for serious misconduct – Commission found that applicant mistakenly believed she had been given appropriate permission to take home cake – Commission found that given the serious nature of the respondent's allegation, it was unreasonable and prejudicial for meeting to proceed without the applicant having a support person – considered that applicant would have been disadvantaged in the meeting without an English-speaking support person – Commission found that a proper informed discussion with the applicant and her support person would have ensured respondent understood applicant's explanation that she had asked permission to take the cake, and enabled respondent to stand down applicant for a few days and make an informed, fair decision – concluded there was no valid reason for the dismissal and procedure followed by respondent prejudicial to applicant – dismissal was unreasonable and therefore unfair – in considering appropriate compensation, Commission found that applicant would not have continued work for more than 20 weeks had she not been dismissed – respondent ordered to pay \$9,064 gross – compensation calculated by deducting 9 weeks from 20 weeks' pay – amount deducted consisted of 4 weeks' pay for misconduct and 5 weeks' pay that respondent had paid applicant at the time of her dismissal, in lieu of notice of termination.

U2020/14274  
Williams C

Perth

[\[2021\] FWC 3619](#)  
29 June 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](http://www.ag.gov.au/industrial-relations) - provides general information about the Department and its Ministers, including their media releases.

**AUSTLII** - [www.austlii.edu.au/](http://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/](http://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/](http://www.australia.gov.au/).

**Federal Register of Legislation** - [www.legislation.gov.au/](http://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](http://www.legislation.gov.au/Series/C2009A00028).

**Fair Work (Registered Organisations) Act 2009** - [www.legislation.gov.au/Series/C2004A03679](http://www.legislation.gov.au/Series/C2004A03679).

**Fair Work Commission** - [www.fwc.gov.au/](http://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/](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.

**Federal Circuit Court of Australia** - [www.federalcircuitcourt.gov.au/](http://www.federalcircuitcourt.gov.au/).

**Federal Court of Australia** - [www.fedcourt.gov.au/](http://www.fedcourt.gov.au/).

**High Court of Australia** - [www.hcourt.gov.au/](http://www.hcourt.gov.au/).

**Industrial Relations Commission of New South Wales** - [www.irc.justice.nsw.gov.au/](http://www.irc.justice.nsw.gov.au/).

**Industrial Relations Victoria** - [www.vic.gov.au/industrial-relations-victoria](http://www.vic.gov.au/industrial-relations-victoria).

**International Labour Organization** - [www.ilo.org/global/lang--en/index.htm](http://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](http://www.qirc.qld.gov.au/index.htm).

**South Australian Employment Tribunal** - [www.saet.sa.gov.au/](http://www.saet.sa.gov.au/).

**Tasmanian Industrial Commission** - [www.tic.tas.gov.au/](http://www.tic.tas.gov.au/).

**Western Australian Industrial Relations Commission** - [www.wairc.wa.gov.au/](http://www.wairc.wa.gov.au/).

**Workplace Relations Act 1996** - [www.legislation.gov.au/Details/C2009C00075](http://www.legislation.gov.au/Details/C2009C00075)

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## Out of hours applications

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

The address of the Fair Work Commission home page is: [www.fwc.gov.au/](http://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](mailto:subscriptions@fwc.gov.au).

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