FCW Bulletin

10 January 2014 Volume 1/14 with the Decision Summaries for the weeks ending Friday, 20 December 2013, Friday 27 December and Friday 3 January 2014.

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Amendments to Rules & forms published

Amendments made to the *Fair Work Commission Rules 2013* dealing with applications regarding anti-bullying commenced 1 January 2014.

The Commission has published approved forms for the new anti-bullying, consent arbitration (for general protections and unlawful termination disputes) and right of entry jurisdictions.

In addition, forms F1, F2, F3, F7, F8, F8A, F12, F16–F18A, F19–F21, F23–F23B, F24–F24C, F42A, F42B, F45A, F47C & F47E were also republished with minor administrative amendments.

For more information, go to:
- [About the Fair Work Amendment Act 2013](#)
- [Fair Work Commission Rules 2013](#)
- [Forms](#)

Superannuation 2013 Review—Full Bench decision issued

A Full Bench issued a decision on 31 December 2013 regarding superannuation provisions in modern awards.

The Full Bench also issued determinations varying all modern awards to give effect to ss.149A and 155A and clauses 10 and 11 of Schedule 1 of the *Fair Work Act 2009*.

Go to:
- [Full Bench decision—Superannuation 2013 Review](#)
- [Schedule of determinations varying all modern awards](#)

4 yearly review of modern awards

The Hon. Justice Iain Ross issued a [Statement](#) on 24 December 2013 regarding the 4 yearly review of modern awards.

The Commission will convene a conference at 10.30 am on Wednesday, 5 February 2014 to commence the initial stage of the review.
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 weeks ending Friday, 20 December 2013, Friday 27 December and Friday 3 January 2014.

1  CASE PROCEDURES – appeals – lack of utility – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – appeal against decision regarding proper interpretation of clause of enterprise agreement – clause in dispute provided that base hourly rate of employees shall remain equal to or above APCS as determined – at first instance Commission determined clause shall be read as meaning base hourly rates in agreement shall remain equal to or above transitional rates in relevant modern award – common ground that purpose of dispute resolution clause in agreement to invoke operation of s.604 FW Act – permission to appeal required – given similarities between s.45 WR Act and s.604 FW Act observations in Wan still apposite – Commission's power to determine dispute conditioned by dispute settlement term and s.739 FW Act – limitation in s.739(5) enlivened because of operation of s.206 FW Act – s.206 ensures base rate of pay under agreement must not be less than that under relevant modern award – held Ports, Harbours and Enclosed Water Vessels Award 2010 (Ports Award) covers employees – despite any clause in the agreement base rate of pay for employees must not be less than transitional rates in Ports Award – operation of s.739(5) and s.206 effectively mandated outcome of dispute – Deputy President reached same conclusion based on interpretation of agreement clause – no utility in granting permission to appeal – analysed history of instruments regulating base rate of pay for relevant employees – accepted dispute between parties concerned proper interpretation of clause of agreement rather than application of s.206 FW Act – nevertheless Commission’s power to determine dispute necessarily conditioned by s.739(5) – Full Bench made clear it was forming an opinion as to existing legal rights of parties in considering whether to grant permission to appeal – not purporting to exercise declaratory power or grant declaratory relief – no substance to contention any conclusion made as to application of Ports Award would have effect of varying or revoking decision to approve agreement – permission to appeal refused.

Appeal by Ferrymen P/L against decision of Sams DP of 19 August 2013 [[2013] FWC 5848] Re: The Maritime Union of Australia

C2013/5945
Ross J
Booth DP
McKenna C

Melbourne 17 December 2013

2  MODERN AWARDS – variation – s.145A Fair Work Act 2009 – Full Bench – Fair Work Amendment Act 2013 amended FW Act by inserting s.145A – provides all modern awards must include a term requiring employers to consult employees about changes to regular rosters and ordinary hours of work – Commission to make
determination varying modern awards by 31 December 2013 – draft relevant term published – parties provided opportunity to make written and oral submissions – legislative context considered – modern awards objective considered – model clause inserted into all modern awards – Full Bench noted any issues arising from model clause should be considered during the 4 yearly review of modern awards.

Consultation clause in modern awards

AM2013/24
Ross J
Watson SDP
Wilson C

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.604 Fair Work Act 2009 – appeal – Full Bench – dispute regarding calculation of back pay for group of employees covered by DP World Brisbane Enterprise Agreement 2011 – Commissioner at first instance held supplementary employees entitled to payment of allowance and loading – preliminary issue regarding whether permission to appeal is required or whether appeal rights inherent due to wording of agreement – relevance of s.604 to proceedings – Full Bench held s.604 appeal procedure applies – permission to appeal granted – appeal upheld – decision quashed – Full Bench set out methodology for resolving dispute.

Appeal by DP World P/L against decision of Booth C of 27 August 2013 [2013] FWC 5453 Re: Maritime Union of Australia

C2013/6071
Ross J
Gooley DP
Johns C

TERMINATION OF EMPLOYMENT – identity of employer – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision in unfair dismissal matter that appellant was employer of applicant employees and order dismissing applications against Tooheys – first instance decision not contested by original applicants – appellant did not demonstrate material error in original decision – existence of arrangement under which a first company provides labour to a second does not point to the second company being the employer of the labour provided – paper evidence indisputably identified appellant as employer – while Tooheys the mainstay of appellant’s business, appellant a supplier of labour to range of other businesses – practical control which Tooheys had over employees not inconsistent with contracts between Tooheys and appellant such as to suggest a disjunct between the formality and reality of relationship – up until commercial falling out with Tooheys, appellant conducted itself as employer of applicants and other workers it supplied to Tooheys – Full Bench did not consider that there was any proper basis upon which employment contracts between Tooheys and applicants could be implied – appellant failed to provide Full Bench with authority that it was an ‘agency’ for Tooheys – Full Bench not persuaded to uphold appellant’s submission that appellant and Tooheys ‘jointly’ employed the applicants – such a finding would involve considerable development of common law – no Australian court has
approached analysis on basis that exercise of control by hirer of
labour in a labour hire arrangement may render hirer a joint
employer with the labour hire company – considered Costello –
Full Bench did not consider it the Commission’s role as a statutory
tribunal to engage in development of the common law – in any
event, for there to be ‘joint’ employment’ there must be an
express or implied contract between Tooheys and the appellant
and there were no such contracts – permission to appeal refused.

Appeal by FP Group P/L against decision [2013] FWC 2813 of Sams DP of 31 July 2013

C2013/5651
Hatcher VP
Catanzariti VP
Riordan C
Sydney 17 December 2013

CASE PROCEDURES – appeals – extension of time – s.604 Fair
Work Act 2009 – Full Bench – appeal against decision of
Commissioner that valid reason existed for dismissal and
dismissal was not harsh, unjust or unreasonable – appeal lodged
3 years after 21 day time period for lodgement had expired –
appellant applied for extension of time – principles from Tokoda v
Westpac Banking Corporation considered – reasons for delay
advanced by appellant not accepted by Full Bench – prospect of
success in appeal if time extended minimal – prejudice to
respondent – application dismissed.

Appeal by Dobson against decision of Cargill C of 26 August 2010 [[2010 FWA 6431]
Re: Dobson

C2013/6564
Hatcher VP
McKenna C
Bull C
Sydney 23 December 2013

TERMINATION OF EMPLOYMENT – remedy – ss.392, 604 Fair
Work Act 2009 – appeal – Full Bench – appeal against decision
that dismissal was harsh, unjust or unreasonable – compensation
awarded – issue on appeal whether Commissioner erred in not
deducting ex-gratia payment from total amount of compensation
– Full Bench held it was open to Commissioner not to discount the
compensation amount by ex-gratia payment amount – no public
interest – no appealable error – permission to appeal not granted.

Appeal by Allied Color & Additives P/L t/a Allied Color & Additives against decision of

C2013/6595
Catanzariti VP
Hamberger SDP
Gregory C
Sydney 23 December 2013

INDUSTRIAL ACTION – order against industrial action – ss.418,
604 Fair Work Act 2009 – appeal – Full Bench – appeal against
decision dismissing application for orders to stop alleged industrial
action – respondent did not oppose orders being made concerning
disposition of appeal – disputed existence of alleged industrial
action – focus of Commissioner’s decision solely or principally
concerned one component of application – did not determine other two components – Commissioner concluded on balance he was not satisfied alleged industrial action met definition of industrial action – appears he proceeded to refuse application on that basis – Full Bench satisfied public interest to grant permission to appeal – satisfied decision under appeal contains errors in application of s.420 FW Act – Commissioner, having found it was impracticable to determine all components of application within two days, did not make interim orders – no basis for a conclusion that it would be contrary to public interest to make interim orders – appeal allowed – decision under appeal quashed – interim orders made – matter remitted to Watson VP to consider whether to make final orders – interim orders remain in place until application determined.

Appeal by DP World (Fremantle) Limited against decision of Cambridge C of 23 December 2013 [2013] FWC 10145 Re: The Maritime Union of Australia

C2013/7852 Watson VP Sydney 3 January 2014
Hamberger SDP
McKenna C

8 TERMINATION OF EMPLOYMENT – misconduct – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision that termination was unfair despite valid reason – applicant dismissed for claiming overtime pay for hours not worked – grounds for appeal related to process adopted by appellant for terminating employment – Abdel-Karim Osman considered in relation to opportunity to respond to allegations – employee had admitted misconduct – appellant asked employee to attend meeting and show cause why he should not be dismissed – Full Bench considered appellant had properly notified employee – Full Bench satisfied there had been an error of fact and principle – satisfied in public interest to grant appeal – permission to appeal granted – appeal allowed – original decision quashed.

Appeal by Formway Group Ltd against decision of Asbury DP of 27 August 2013 [2013] FWC 5739 Re: Batrachenko

C2013/6023 Watson VP Sydney 18 December 2013
Gooley DP
McKenna C

9 CASE PROCEDURES – costs – ss.604, 611 Fair Work Act 2009 – Full Bench – application for costs in relation to appeal of unfair dismissal decision – application for permission to appeal dismissed – Full Bench applied principles set out in Walker as endorsed by Full Bench in ACI Operations – appeal related to narrow issue – employer contended grounds of appeal raised were not proper grounds of appeal and manifestly untenable – employee’s submissions did not establish grounds of appeal had any substance or any reasonable prospect of success – Full Bench held Commission had jurisdiction to make costs order – mindful of general position that each party bears own costs – also mindful that issues sought to be raised went beyond scope of decision under appeal – appeal grounds had no reasonable prospects of success – employee was put on notice of this matter prior to hearing of appeal – nevertheless proceeded with appeal – Full
Bench of view costs order should be made – costs confined to those incurred after notice until hearing and determination of appeal – parties to confer on quantum of costs – any dispute as to quantum to be settled by Gostencnik DP.

Appeal by McKinnon against decision of Bissett C of 8 August 2013 [[2013] FWC 5273] Re: Eventide Homes (Stawell) Inc

MODERN AWARDS – review – 2012 Review – s.604 Fair Work Act 2009 – Sch.6, Item 5 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – appeal – Full Bench – appeal against Modern Awards Review 2012 decision – first instance decision corrected what parties agreed was an obvious error in making modern award relating to wage progression – appeal challenged part of decision which continues higher payment for existing employees into the future – Full Bench satisfied Deputy President fell into error determining that overpayment should continue in relation to some employees beyond date of correction – appropriate to grant permission to appeal and allow appeal – Full Bench determined matter – noted parties agreed a technical error existed and generally agreed error should be corrected – appropriate that error be corrected – operative date should be such as will not have effect of disadvantaging employees by way of requiring repayment of any overpayment to date – not appropriate overpayment should be continued beyond date decided – operative date of award variation 19 December 2013 – determination issued.

TERMINATION OF EMPLOYMENT – high income threshold – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appellant’s unfair dismissal application dismissed on ground appellant not covered by modern award and earned more than high income threshold – on evidence before Deputy President, only finding she could make was that respondent was employer – Deputy President made correct finding regarding salary of appellant – salary in excess of high income threshold – Full Bench agreed appellant not covered by Professional Employees Award 2010 but for different reasons – while question Deputy President answered did not accurately reflect correct construction of award, conclusion was the same – Deputy President afforded procedural fairness during hearing – appellant did not tender any documents during hearing at first instance – Deputy President cannot be criticised for not referring to documents appellant said she had but omitted to tender – reasons for decision of Deputy President not inadequate – grounds of appeal do not establish significant error.
of fact or enliven public interest – appeal dismissed.

Appeal by Baptista against decision in transcript and order [PR538798] of Booth DP of 10 July 2013 Re: Bearing Point P/L

C2013/5334
Harrison SDP
Sydney
23 December 2013

MODERN AWARDS – superannuation default fund review – variation – ss.149A, 155A Fair Work Act 2009 – statement outlines proposed changes in respect of superannuation clauses in modern awards – changes required to be made to modern awards pursuant to ss.149A and 155A and clauses 10 and 11 of Schedule 1 of FW Act – s.149A requires Commission to include a term in all modern awards permitting an employer from 1 January 2014 to make superannuation contributions for a default fund employee to a superannuation fund or scheme of which the employee is a defined benefit member – s.155A requires Commission to remove from modern awards any superannuation funds that do not offer a MySuper product or are not an exempt public sector superannuation scheme – 122 draft determinations outlining proposed changes to each award to be published – interested parties invited to make submissions on draft determinations – hearing to be held to consider submissions – final determinations varying all modern awards to be issued.

Superannuation—2013 Review

AM2013/25
Acton SDP
Melbourne
27 November 2013

MODERN AWARDS – superannuation default fund review – variation – ss.149A, 155A Fair Work Act 2009 – changes required to be made to modern awards pursuant to ss.149A and 155A and clauses 10 and 11 of Schedule 1 of FW Act – s.149A requires Commission to include a term in all modern awards permitting an employer from 1 January 2014 to make superannuation contributions for a default fund employee to a superannuation fund or scheme of which the employee is a defined benefit member – s.155A requires Commission to remove from modern awards any superannuation funds that do not offer a MySuper product or are not an exempt public sector superannuation scheme – 122 draft determinations outlining proposed changes to each award published – Full Bench invited submissions on draft determinations before hearing – several submissions received and considered – modern awards fall into three categories with regards to superannuation – Category 1 awards contain a standard superannuation provision and list specific funds – Category 2 awards contain a standard superannuation provision but do not list specific funds – Category 3 awards do not contain a standard superannuation provision – all Category 1 and 2 awards varied to include four new definitions, to include a clause permitting contributions to a fund of which an employee is defined benefit member of, and to add a qualification to grandfathering provision – some Category 1 awards further varied to delete funds which do not offer a MySuper product or are not an exempt public sector superannuation scheme – Category 3 awards varied to
include two new definitions and a clause permitting contributions to a fund of which an employee is defined benefit member of – determinations issued.

Superannuation—2013 Review

AM2013/25
Acton SDP
Smith DP
Johns C

Melbourne 30 December 2013

CASE PROCEDURES – appeals – order of joinder – s.604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision joining various companies in proceedings and making them subject to order issued – Full Bench expressed preliminary views – appellant abandoned appeal point regarding Commission’s alleged lack of power to amend application – it was agreed permission to appeal would be granted – employee’s husband lodged application in Federal Circuit Court (FCCA) – made application for joinder to his application of same companies as had been joined to wife’s application before Commission – FCCA dismissed husband’s application for joinder – Full Bench considered evidence and submissions, and reasons for judgement delivered by FCCA – rejected employee’s application to join additional respondents – appeal allowed – order quashed.

Appeal by Kensington Management Services P/L t/a Kensington Gardens Shepparton now Wilson Curry P/L against decision and order of Blair C [2013] FWC 1269 and PR534339 of 22 February 2013 Re: McMahon

C2013/287
Drake SDP
Smith DP
Lee C

Sydney 31 December 2013

TERMINATION OF EMPLOYMENT – valid reason – s.604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision that valid reason for dismissal existed and dismissal was not unfair – application dismissed at first instance – grounds of appeal included applicant was unable to present case due to personal circumstances – was not provided witness statements until late stage therefore disadvantaged – submitted Commission was in error finding there was a valid reason for dismissal – Full Bench found no appealable error – public interest not attracted – permission to appeal refused.

Appeal by Schwenke against decision of Cloghan C of 22 August 2013 [2013] FWC 4513 Re: Schwenke

C2013/5986
Lawrence DP
Gostencnik DP
Deegan C

Sydney 18 December 2013

MODERN AWARDS – 4 yearly review – s.156 Fair Work Act 2009 – Statement issued – draft statement published in November provided preliminary outline of process – parties provided opportunity to comment – Commission to convene conference at 10:30am Wednesday 5 February 2014 to commence initial stage

4 Yearly Review of Modern Awards

AM2014/1 [2013] FWC 10195
Ross J Melbourne 24 December 2013

17 TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant’s role was to be made redundant on 5 September 2013 – applicant’s last working day was 7 June 2013 – payment of redundancy and other entitlements made in lieu – application lodged 5 August 2013 – when dismissal took effect – Commission found terms of dismissal notice made it clear respondent employer intended applicant’s employment would terminate on 5 September 2013 – Commission concluded applicant’s dismissal took effect on 5 September 2013 and not on 7 June 2013 as contended by respondent – to the extent respondent’s out of time objection rested on that contention it was rejected – question of whether an extension of time should be granted does not therefore arise – other issues – applicant lodged application one month before date Commission identified as that upon which dismissal took effect – further submissions sought from parties on prematurity point.

Mihajlovic v Lifeline Macarthur

U2013/2607 [2013] FWC 9804
Hatcher VP Sydney 16 December 2013

18 CASE PROCEDURES – correction of error – ss.586, 602 Fair Work Act 2009 – correction to name of respondent on order of the Commission sought to facilitate enforcement – respondent did not claim applicant was working for other legal entity at time of dismissal – applicant intended to bring application against entity that was his employer – company with legal name ‘Australian Security and Protection P/L’ is entity that, as matter of practical reality, responded to application as employer – company with that name has ABN – applicant provided pay advice issued by his employer with same ABN and same contact number as provided in respondent’s email signature block – no confusion on part of respondent’s representative as to entity that applicant had been intending to sue as his employer – respondent’s claim of confusion and uncertainty as between two entities rejected as misleading – case of simple and minor accidental misnaming of party and error by Commission in failing to use correct name when preparing order – cannot be any doubt Commission has power to correct – satisfied in exercise of discretion, correction sought should be made – order issued.

Bennett v Australian Security and Protection P/L

U2013/8932 [2013] FWC 10133
Lawler VP Sydney 20 December 2013

19 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed for pre-meditating theft of company property –
respondent employer submitted applicant was caught in act of preparing to steal company property – applicant consistently and strongly denied any intention to steal – series of matters raised a rational concern that applicant’s denial of an intent to steal, and his explanations, were unreliable – Commission compelled to conclusion that applicant loaded stringers on to his private utility with intention of stealing them – valid reason for dismissal – other relevant matters – Commission took into account adverse consequences dismissal had (and will have) on applicant and, indirectly, his family – applicant suffered a period of unemployment before gaining insecure employment involving a very substantial drop in income – unlikely applicant will be able to find employment at anywhere near the level that he earned as an employee of respondent – dishonesty in the form of theft or planned theft is well recognised as a most serious form of misconduct – Commission satisfied that, weighing the misconduct against the mitigating factors, Company acted reasonably and that dismissal of applicant was not harsh, unjust or unreasonable – application dismissed.

Trompp v Endeavour Coal P/L

U2013/9733 [2013] FWC 9887
Lawler VP Sydney 20 December 2013

20 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – three academics became ‘displaced employees’ after rejecting offers of voluntary redundancies as result of restructure – first employee a category E professor – whether a full-time workload proposed by union consisting of tutorial work currently performed by casuals would constitute workload equivalent to first employee’s existing workload – proposed workload currently performed by casuals classified as Lecturer A or B cannot properly be equivalent of first employee’s existing full-time workload – university discharged redeployment obligations and now entitled to retrench first employee – in respect of two other employees issue is whether redeployment with proposed teaching load of 18 hrs/week is excessive and would constitute a workload more than their current workloads – whether cl.19(13) limits teaching hours to 12-14 hours per week or whether this clause is a guideline – cl.19(14) describes cl.19(13) as a guideline – considerable amount of proposed new workload is ‘repeat’ tutorials – cl.19(13) predicated upon academic undertaking some research – second employee does not undertake research – Commission satisfied proposed redeployment of second employee complies with agreement – employer entitled to retrench second employee if he does not accept offer – Commission determined third employee should be given research allocation of minimum 15% under agreement – employer must revise third employee’s offer to 16 teaching hours per week accordingly – employer entitled to retrench third employee if she does not accept revised offer – employer undertook to provide second employee and third employee seven days to decide whether to accept offers before retrenching either of them.

National Tertiary Education Industry Union v University of Western Sydney

C2013/1570 and Ors [2013] FWC 10223
Lawler VP Sydney 30 December 2013
MODERN AWARDS – review – Sched 5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – applications were made to vary modern award as part of 2012 Review – award varied in July 2013 – correspondence received by Commission raised potential error in July 2013 determination – Statement issued identifying possible errors providing opportunity for interested parties to make submissions – one submission received accepted referencing error – proposed replacement clause developed following discussion with interested parties – Commission satisfied award as published in July contained errors that should be corrected – correction determination issued.

Plumbing and Fire Sprinklers Award 2010

AM2012/146 and Ors
Watson SDP Melbourne 16 December 2013

[2013] FWC 9514


Choice Homes (QLD) Pty Ltd Workplace Agreement 2007

AG2013/10359
Watson SDP Melbourne 16 December 2013

[2013] FWCA 9695

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – redundancies – s.739 Fair Work Act 2009 – interim decision relating to application to deal with disputes arising under two agreements – employer undertook review of operations and decided to implement changes to structure resulting in several positions being made redundant – proposed to give effect to redundancies through voluntary redundancies – disputes concern application of redundancy provisions of agreements and basis for calculating payments – employer claimed process needed to be concluded prior to Christmas – decision announced with reasons to be published later – Commission held severance payments to be made to employees being made voluntarily redundant – set out rate required to be paid under relevant clauses – reasons to be published early in 2014.

SCA Hygiene Australasia v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Anor; SCA Hygiene Australasia v Construction, Forestry, Mining and Energy Union

C2013/6292; C2013/6293
Watson SDP Melbourne 19 December 2013

[2013] FWC 9992
MODERN AWARDS – review – Sched 5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – Road Transport and Distribution Award 2010 – various applications heard seeking range of variations to award – particular variations in contention by parties – some issues resolved at conference – issues in contention include ordinary hours of work, breaks, allowances, shiftwork and classification descriptors – draft determination issued – parties to have 14 days to comment.

Road Transport and Distribution Award 2010

AM2012/38 and Ors
Harrison SDP Sydney 16 December 2013

MODERN AWARDS – review – Sched 5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – four applications sought to vary modern award – two applications subsequently withdrawn – Ai Group application sought to vary definition of waste management industry and vary coverage clause – this application also withdrawn after discussions and agreement on six understandings relating to award coverage of recycling activities – WCRA sought to vary minimum wages clause to include reference to industry allowance – Senior Deputy President decided to make variation on basis it will make award easier to understand – determination issued.

Waste Management Award 2010

AM2012/216 and Anor
Harrison SDP Sydney 23 December 2013

TERMINATION OF EMPLOYMENT – small business employer – s.394 Fair Work Act 2009 – applicant found to be employed with respondent for period just short of 12 months – respondent alleged employed less than 15 employees at date of dismissal therefore a small business employer – respondent argued Commission has no jurisdiction to hear application – on evidence before Commission satisfied respondent was a small business employer – application dismissed.

O'Leary v Johanna Johnson P/L t/a Johanna Johnson

U2013/9921
Drake SDP Sydney 2 January 2014

MODERN AWARDS – ambiguity or uncertainty – s.160 Fair Work Act 2009 – application by Australian Industry Group opposed by CFMEU – applicant argued award ambiguous and uncertain in relation to payment of shift loadings during a period of annual leave – Commission not satisfied clause 32.2 and 32.3 ambiguous – if shift work constituted ordinary hours of work as defined in clause 28 then shift rate would be payable – application dismissed.
28 TERMINATION OF EMPLOYMENT – termination at initiative of employer – ss.386, 394 Fair Work Act 2009 – respondent objected to application on basis applicant was employed pursuant to contract for specified period therefore not terminated – Commission not persuaded applicant was employed pursuant to temporary appointment – letter of appointment indicates enterprise agreement would apply – employment arrangements did not meet temporary appointment terms – not persuaded applicant was employed pursuant to contract for a specified task – submissions made in relation to future outsourcing arrangements no evidence before Commission – several factors weighed against contract being for specified period of time – letter of appointment refers to appointments ‘up to’ instead of ‘to’ a specified date – first employment contract contained probation clause with unqualified right to terminate contract on notice during probationary period – letter of appointment specified progression in salary based on annual reviews – employment was terminated on date other than that specified in last of alleged contracts for specified time – applicant was allowed to continue employment past proposed end date of original contract – satisfied applicant became permanent employee despite fact that respondent proposed to retrospectively create further fixed term contracts – gaps between fixed term contracts and fact that there was a series of such proposed contracts could have given rise to understanding employment was ongoing and permanent – concluded applicant was engaged in full-time employment brought to an end at respondent’s initiative – application not excluded from Commission’s jurisdiction – file referred for allocation – jurisdictional objection dismissed.

Hope v Rail Corporation New South Wales t/a Rail Corp

U2013/2562
Drake SDP
Sydney
3 January 2013


Construction, Forestry, Mining and Energy Union v Spotless Facility Services P/L; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Spotless Facility Services P/L; Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Spotless Facility Services P/L

B2013/1481; B2013/1482; B2013/1483
Drake SDP
Sydney
3 January 2014

each contract coincided with teaching semester – each contract contained provisions to effect applicant not guaranteed further employment after cessation of contract – Commission noted a series of contracts may give rise to understanding of permanent of employment – however, terms of contracts made it clear there was no obligation to offer further contracts – applicant’s employment ceased at end of last contract by effusion of time – no termination at initiative of employer – application dismissed – Commission not persuaded to order costs against applicant – applicant confused about jurisdictional objection – not satisfied applicant should have known application would be unsuccessful – costs not ordered.

Bokhari v Australian Campus Network P/L t/a ACN – conducting courses on behalf of La Trobe University

U2013/2046 Drake SDP Sydney [2014] FWC 67

31 TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant was not happy working for respondent and looking for other work – respondent informed applicant it intended to dismiss him – on learning applicant in process of finding other work respondent decided to facilitate exit plan for applicant instead – applicant resigned Friday and commenced new work following Monday – whether employment terminated on employer’s initiative – Commission found respondent engaged in course of conduct which forced applicant to resign his employment earlier than he would have otherwise intended – conduct included showing applicant an envelope which purported to be termination of employment advice, telling applicant relationship was unworkable, and commencing an unsuccessful negotiation process about termination payment – applicant dismissed – application may be listed for arbitration – however, Commission indicated a degree of caution about future proceedings – applicant out of work one weekend – while no conclusion reached, applicant’s behaviour may constitute a valid reason for dismissal.

Pitts v Delnorth P/L t/a Delnorth International Roadside Products

U2013/10864 O’Callaghan SDP Adelaide [2013] FWC 9818

32 RIGHT OF ENTRY – misuse of system – jurisdiction – natural justice – s.508 Fair Work Act 2009 – decision follows decision issued in course of proceedings of 10 December 2013 relative to matter commenced on Commission’s own motion pursuant to s.508 FW Act – consideration of s.508 commenced following evidence provided in course of s.418 application – decision deals with two objections raised by union – Commission not persuaded jurisdictional impediments to matter proceeding or proceedings represent a preliminary investigation – Senior Deputy President's concerns about behaviour specified in previous proceedings and directions – not satisfied s.508 limits Commission’s capacity to initiate actions to circumstances detailed in a particular application – action should only be taken where material before Member gives rise to substantial concern – ensuing enquiry must go to establishing whether concerns made out establishing misuse of
entry rights – Commission to articulate concerns giving rise to commencement of action – only if inquiry establishes misuse of nature addressed in s.508 is Commission empowered to take action – no jurisdictional barrier to matter proceeding – Senior Deputy President did not accept proceedings represented denial of natural justice – basis for proceedings clearly articulated – to extent that evidence enables conclusions about individuals is a matter for later consideration – determined matter should proceed on 10 December 2013 – refused union request for further adjournment to enable consideration of potential appeal relative to this decision.

Fair Work Commission

RE2013/1710 [2013] FWC 9860
O’Callaghan SDP Adelaide 16 December 2013

33 RIGHT OF ENTRY – misuse of system – s.508 Fair Work Act 2009 – application initiated at Commission’s own motion with respect of matters subject of earlier s.418 application – satisfied capacity for FWBC to make submissions extends to adducing evidence in support – considered evidence of FWBC inspector – not satisfied inspector’s evidence should be discounted as hearsay – no evidence before Commission disputes inspector’s evidence – adopted position that inspector’s evidence is indicative of behaviour similar to that which occurred at sites – satisfaction about misuse of rights that are exercisable under Part 3-4 FW Act a prerequisite for any action that may be taken pursuant to s.508 FW Act – persons who conducted various entries were CFMEU officials – Commission directed attention to entirety of entries on behalf of union rather than individuals – no evidence provided that confirms purpose of visits did not include discussions with employees – contention that as notices had not been given consistent with s.518 FW Act entry rights had not been activated inconsistent with concept of balance in s.480 FW Act – on plain reading of Part 3-4 FW Act Commission concluded numerous, deliberate and sustained contraventions of rights and associated obligations on permit holders involved in entries – concluded contraventions occurred as part of general CFMEU instruction relative to actions of its permit holders – absence of notice or officials’ assertions that they were trespassing does not change character of entries – evidence confirms misuse of rights exercisable under Part 3-4 – misuse for purposes of s.508 – satisfied circumstances of these entries represent serious, deliberate and sustained misuse of right of entry rights by union – scope of misuses a factor which favours imposition of some form of restriction or action pursuant to s.508 – formed no conclusion as to actions to be taken – matter to be relisted – decision to be provided to other contractors identified by FWBC.

Fair Work Commission

RE2013/1710 [2013] FWC 10168
O’Callaghan SDP Adelaide 23 December 2013

34 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant received warning about failure to participate in zero harm procedures, misuse of staff account and presence of alcohol on site – applicant improved behaviour but had poor attitude towards
staff – however, attitude with customers acceptable – received second warning about incident where he responded inappropriately and rudely to a client – in another incident, applicant failed to comply in a safety audit – this ultimately brought about dismissal – Commission considered factors in s.387 – issues related to conduct constituted a valid reason – failure to take safety issues seriously not appropriate for employee with supervision role – notified of reason – given opportunity to respond – given opportunity to have support person – received warnings about poor behaviour – procedures followed were appropriate having regard to size of employer and its access to human resource expertise – dismissal not harsh, unjust or unreasonable – applicant given ample opportunity to improve behaviour but failed to do so – application dismissed.

Burne v Hanson Constructions Materials P/L

U2013/2287
Hamberger SDP Sydney 3 January 2014

35 ENTERPRISE AGREEMENTS – varying agreement – s.210 Fair Work Act 2009 – application made by the CFMEU to vary enterprise agreement – proposed clause 3—Application of Agreement be varied – application met statutory requirements – variation provided to all relevant employees – approved by majority – variation approved – further observations and remarks included with decision.

Acrow Formwork and Scaffolding P/L and CFMEU Union Collective Agreement 2011-2015

AG2013/11518
Richards SDP Brisbane 3 January 2014

36 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute concerned whether or not employer should provide for employees to depart from site or project by bus at designated finishing time, or whether work should finish at workface at designated finishing time – CFMEU contended agreement provides for employees to have exited project or site by 5 pm – employer alleged work is to be concluded at 5 pm – agreement drafted imperfectly – Commission recommended employees recognise that the obligation on them under the agreement is to finish work at the workface at time indicated by employer that is sufficient to allow for wash up and exercise care over the employer's equipment and tools prior to designated finish time of the day (5 pm) – Commission sees no argument that agreement should be read as obligating employer to ensure employee's exit site security gates by the designated finishing time – Commission recognised that inconsistent application of template agreements across a project is frequently a source of industrial instability – however, can only deal with circumstances of application before it.
37 CONDITIONS OF EMPLOYMENT – redundancy – s.120 Fair Work Act 2009 – application sought reduction in amount of redundancy pay on basis of efforts made to obtain other acceptable employment for affected employee – applicant entered into asset sale with new employer and ceased to be an employer or operate business – during sale process, applicant agitated matter of employment of existing employees with new employer – subsequently new employer offered alternative employment to affected employees – taking into account some variations from prior terms and conditions of employment compared with new terms and conditions, amount of redundancy pay reduced to nil.

Peachey's Engineering P/L

C2013/6451
Richards SDP
Brisbane
31 December 2013

[2013] FWC 10244

38 CONDITIONS OF EMPLOYMENT – redundancy – s.120 Fair Work Act 2009 – applicant sought reduction in amount of redundancy pay on basis of efforts made to obtain other acceptable employment for affected employee – applicant entered into asset sale with new employer and ceased to be an employer or operate business – during sale process, applicant agitated matter of employment of existing employees with new employer – subsequently new employer offered alternative employment to affected employees – taking into account some variations from prior terms and conditions of employment compared with new terms and conditions amount of redundancy reduced to 7 weeks pay or 50% of applicant's original obligation.

Peachey's Engineering P/L

C2013/6450
Richards SDP
Brisbane
31 December 2013

[2013] FWC 9450

39 TERMINATION OF EMPLOYMENT – costs – ss.394, 401, 611 Fair Work Act 2009 – costs sought against employee and legal representative – employee failed to provide any submissions on costs – Holland and Read considered in relation to definition of vexatious and without reasonable cause – original unfair dismissal application dismissed because employee had abandoned his employment – Commission satisfied it was obvious the case at first instance would not succeed – costs ordered against employee – lawyer provided limited submissions – employer submitted substantial costs wasted before any offer of settlement made by lawyer – all offers made by employer rejected – lawyer failed to clarify a number of relevant facts – lawyer submitted had no reason to doubt the client – Commission satisfied conduct of lawyer disadvantaged both employer and employee – should have been reasonably apparent that settlement on terms offered would have been beneficial – satisfied that a costs order should be made against lawyer – costs to be shared equally between employee and lawyer.

Alexander M P/L v Lloyd; McDonald Murholme Solicitors

U2013/14070
Hamilton DP
Melbourne
19 December 2013

[2013] FWC 8795
Enterprise agreements – varying agreement – ss.210, 211 Fair Work Act 2009 – application made by VicSuper to delete the current superannuation provision and insert a new provision – agreement currently covers 171 employees – the effect of the variation would reduce the superannuation contribution of the employer to the compulsory contribution guaranteed under commonwealth Legislation – variation supported by a majority of employees – CPSU agreed to the variation – satisfied all the requirements of the Act have been met – application approved.

VicSuper Pty Ltd Enterprise Agreement 2012
AG2013/11884 [2013] FWCA 9890
Sams DP Sydney 19 December 2013

ENTERPRISE AGREEMENTS – termination of agreement – ss.225, 226 Fair Work Act 2009 – application by employer for termination of agreement after nominal expiry date – applicant submitted nine employees covered by agreement notified – FSU initially opposed termination – FSU concerned as to whether affected employees understood issues put before them – FSU adopted neutral view at hearing – satisfied requirements of FW Act met – termination not contrary to public interest – agreement terminated.

Perpetual Enterprise Agreement 1996
AG2013/10364 [2013] FWCA 9961
Sams DP Sydney 19 December 2013

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – union applied for Commission to deal with dispute about proper application of clause 10 of Victorian Public Service Workplace Determination 2012 in relation to reorganisation of the Shared Services Provider (SSP) – respondent had written letter to union advising it proposed to release a Request for Tender (tender) to the market place for the management of a range of office accommodation property services for the Victorian Government – letter noted services were currently jointly managed by SSP and an external service provider called Brookfield Johnson Controls – resolution of matter involves judgment about what consultation was about in first instance – on balance Commission was prepared to find consultation was about whether or not proposal of tender was to contract out all or any functions currently undertaken by SSP and to see what could be done by market – respondent had made a decision to contract out work without knowing whether or not an external provider could provide a better service – employees and union were asked to compete with the notion that an external contractor could provide a better service without knowing on what basis respondent believed this to be the case – Commission decided not to interfere with process put in place by respondent because matter involved discussions with employees and union and it was satisfied respondent did make a genuine effort to consult – application dismissed.
CASE PROCEDURES – correction of error – s.602 Fair Work Act 2009 – application to amend error in material lodged with enterprise agreement approval application – F18 not lodged – agreement approved without knowledge of form from two unions such that they were not covered by agreement – statutory declaration provided – Commission issued order to make clear the two affected organisations will be bound by the agreement.


TERMINATION OF EMPLOYMENT – minimum employment period – casual – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – objection made on ground minimum employment period not met – whether period of casual employment should be counted – Commission applied Ponce, Grives and Shortland to find casual employment was regular, systematic and continuous – not necessary to find guarantee of employment – objection dismissed.

TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – unfair dismissal application – respondent contended dismissal was a case of genuine redundancy and applicant had been dismissed due to absence record and downturn in workload – Commission held dismissal was not a case of genuine redundancy – no valid reason existed – dismissal harsh, unjust and unreasonable – reinstatement ordered – remuneration reimbursed for period from dismissal to
reinstatement.

Haan v Lipa Pharmaceuticals Ltd

TERMINATION OF EMPLOYMENT – high income threshold – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant an undischarged bankrupt – company alleged salary reduced from $174,000 to defeat creditors and avoid obligations arising from family court proceedings, and salary is $174,000 – applicant alleged salary reduced because of financial state of company and is under high income threshold – evidence does not support conclusion that salary reduced for reasons alleged by respondent – no evidence that respondent attempted to pay applicant difference in salary or that it has been set aside or held for him – respondent alleged applicant used its funds to pay his barrister for legal services he received – Commission noted this should be referred to appropriate authorities – evidence did not support the sum of company money alleged to have been used for applicant’s legal costs to be considered in calculation of wages – considered Smith – proceedings under s.471 Corporations Act 2001 do not apply to proceedings of Commission and are not an impediment to application – if matters progress to a resolution to voluntarily wind company up application could not proceed without leave of relevant Court – jurisdictional objection regarding high income threshold dismissed – question of whether undischarged bankrupt is able to pursue unfair dismissal remedy being considered by Full Bench – application will be relisted when Full Bench decision released.

North v PrimeARC t/a HFI Group

ENTERPRISE BARGAINING – bargaining order – s.229 Fair Work Act – application for bargaining order – applicant believed the agreement would apply to employees already covered by an agreement that had not yet expired and seeks to negotiate coverage to remove overlap – application made at commencement of access period – applicant sought orders that access period cease, bargaining representatives meet at least four times, the Commission to convene further conference if no agreement reached and no steps taken to have agreement approved until further order – held statutory requirements met – applicant is a bargaining representative – notice requirements have been met – no issue with timing – no discretionary grounds not to issue an order – Deputy President not prepared to issue order sought by applicant as it would excessively delay process – order issued requiring parties to meet four times prior to 31 January 2014.
49  TERMINATION OF EMPLOYMENT – misconduct – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant Financial Controller of respondent – dismissed over email to all staff containing ‘mock’ resume said to be that of CEO – no dispute conduct occurred – applicant alleged email intended as a joke – respondent argued email constituted serious misconduct, that CEO was deeply offended by contents, and conduct was inappropriate for senior manager – Commission noted that generally sending such an email would be misconduct – in circumstances of case it did not constitute a valid reason for dismissal – Commission accepted email intended as joke – emails in evidence between respondent’s staff ran full gamut of offensiveness – staff members (including managers) who gave evidence for respondent regarding the offensiveness of applicant’s email had regularly and systematically disseminated material which was much worse than the email which resulted in applicant’s dismissal – having regard to their own conduct, these staff would not have found the wording offensive – applicant notified of reason – no opportunity to respond – no refusal to allow applicant a support person – no evidence of warnings about performance – size of enterprise did not impact procedures followed – respondent had access to legal assistance in effecting dismissal – CEO an unconvincing witness – this not a case where employer had firm, well-established policy about IT system – upholding dismissal would be inconsistent compared to how other employees were disciplined for misconduct – dismissal harsh, unjust and unreasonable – considered remedy – applicant earned over high income threshold but covered by an agreement – applicant would not have stayed in employment more than one year – monies earned since dismissal deducted – amount reduced 50% for contingencies – reduced further 20% for part applicant played in dismissal – order for $62,000 to be paid to applicant within 21 days of decision – order issued.

Cronin v Choice Homes (Qld) P/L

U2013/1615  [2013] FWC 10240
Asbury DP  Brisbane  30 December 2013

50  ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – Dawson Mines Collective Enterprise Agreement 2010 (agreement) – dispute relates to redundancies proposed at Dawson Mine to be implemented by respondent employer – clause 4.2.1 of agreement gives employer right to determine if redundancies are necessary, its requirements, and the number of employees it requires in affected areas – right for employer to determine its requirements includes the right to determine matters such as whether it wishes to retain employees of contractors or its own employees, and the skills, qualifications, attitudes and aptitudes of the employees it wishes to retain – clause also stipulates that in determining redundancies are necessary, and its requirements in relation to them, employer
will attempt to minimise the impact on permanent workforce – obligation employer has to minimise the impact of redundancies on permanent workforce does not override its right to determine its requirements – term ‘attempt to minimise’ in clause should be given its ordinary meaning – clause requires employer to make an effort to try to reduce to the smallest possible amount, the impact of redundancies on its permanent workforce – however to interpret clause as requiring employer to give absolute preference to its permanent workforce in relation to redundancies, regardless of the needs of the business, would be inconsistent with its rights – determination that both its permanent workforce and contractors should be ranked to decide the employees in a pool of operators who were to be retained in employment is a determination employer is entitled to make pursuant to clause – no basis upon which Commission could find assessment process was unfair or that it was applied in a manner that is inconsistent with employer’s obligations under agreement – question is not whether employer could have done more to retain its permanent workforce but whether what it has done satisfies its obligations under agreement – company has satisfied obligations imposed on it by clause 4.2 of the agreement.

Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) P/L
C2013/1798 [2013] FWC 10241
Asbury DP Brisbane 30 December 2013

51 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – summarily dismissed after positive drug test – reason given for dismissal was dishonesty during investigation – applicant denied taking prohibited drugs – Deputy President found applicant dismissed because of lack of openness during interview process – respondent entitled to seek explanation from applicant – applicant not open and honest in explanation – found to be valid reason for dismissal – applicants conduct was a serious breach of relationship of trust and confidence – applicant given notification of reason for dismissal – given opportunity to respond – satisfied dismissal not harsh, unjust or unreasonable.

Vaughan v Anglo Coal (Drayton Management) P/L
U2013/1509 [2013] FWC 10101
Lawrence DP Sydney 24 December 2013

52 TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy six days out of time – applicant’s decision to go to country instead of pursuing rights was principal reason for delay – not satisfied of any reasonable explanation for delay – applicant aware of dismissal on day it took effect – no action to dispute termination except consulting solicitor – evidence merits of application particularly weak – not satisfied of exceptional circumstances – application dismissed.

Reid v Bam Wine Logistics P/L
U2013/14105 [2013] FWC 9944
Gostencnik DP Melbourne 19 December 2013
TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy over two months out of time – applicant submitted depression and anxiety reason for delay – not satisfied this prevented lodgement of application within prescribed time – applicant aware of dismissal on day it took effect – applicant took some steps to dispute dismissal – not satisfied any real prejudice to employer – satisfied applicant has arguable case – not satisfied of exceptional circumstances – application dismissed.

Dernikos v Thendro P/L t/a Off Ya Tree

U2013/14410
Gostencnik DP
Melbourne
20 December 2013

TRANSFER OF BUSINESS – enterprise agreement – s.319 Fair Work Act 2009 – Commission took into account factors in s.319(2) – applicant submitted not making order would have significant negative impact on flexibility – while no employees were currently performing transferring work, unions supported application – making orders would enhance business synergy – not contrary to public interest to make orders sought – orders issued that four enterprise agreements subject to application cover non-transferring employees of applicant as a consequence of transfer of business from Orora Limited – orders commence operation when non-transferring employees start performing transferring work.

Amcor Flexibles (Australia) P/L

AG2013/10135 and Ors
Gostencnik DP
Melbourne
20 December 2013

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute over redundancies of two employees – Commission to determine whether respondent met consultation obligations under Agreement and whether respondent complied with its security of employment obligations to take all measures to achieve employment security for its direct permanent employees – respondent did not update employees directly about redundancies – evidence respondent suggested to employee representatives that it would update employees but employee representatives said they would do it – respondent offered alternative opportunities (not in electrical work) but no employees expressed interest – evidence supports finding that respondent did not fully meet consultation obligations – however, in Commission’s view, little would turn on the failure to consult – respondent did take steps to mitigate the adverse impact of change on employees – reinstatement on grounds that respondent didn’t fully comply with consultation obligations is inappropriate – respondent did not breach security of employment provisions of Agreement – respondent’s actions in not redeploying potentially redundant electrical workers to undertake the tower electrical fit out work currently undertaken by contractor not inconsistent with obligations under cl.4.3 – Commission declined to make order sought.
TERMINATION OF EMPLOYMENT – high income threshold – covered by modern award – ss.382, 396 Fair Work Act – respondent raised jurisdictional objection – no dispute that applicant’s income exceeded high income threshold – question whether employee was covered by modern award – applicant submitted his classification as Commercial Traveller fell within the Commercial Sales Award 2010 – held that applicant engaged in some activities of a Commercial Traveller but these were incidental – applicant held a broader role in the management hierarchy which was the fundamental and inherent purpose of his employment – applicant’s employment not covered by a modern award – jurisdictional objection upheld – application dismissed.

Hallam v Sorin Group Australia P/L


Storage Services and Wholesale Award 2010

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy lodged 317 days out of time – main reason for delay provided was filing worker’s compensation claim and inability to run two cases at once – applicant submitted medical evidence of mental state at time – not accepted applicant prevented from lodging application until 19 July 2013 – applicant took no action to dispute dismissal until late lodgement – no exceptional circumstances – application dismissed.

Lombardo v Department of Education, Employment and Workplace Relations

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – second application made 392 days out of time – initial application made 136 days out of time was discontinued in March 2013 –
application to set aside discontinuance made in July 2013 was refused in August 2013 – applicant states delays due to psychological distress and prosecution of Comcare claim – Commission unable to accept events leading to second application amount to exceptional circumstances – applicant freely made decision to discontinue initial application – applicant aware of date termination took effect – no action taken prior to initial application – some prejudice to respondent – application dismissed.

Kennedy v Commonwealth of Australia as represented by the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education

U2013/13310 [2013] FWC 9932
Deegan C Canberra 19 December 2013

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as aged carer – dismissed over alleged incidents of misconduct related to ‘elder abuse’ complaints – respondent alleged applicant removed residents’ VitalCall pendants from their reach and handled residents roughly – applicant allegedly told resident C he could not use toilet at night – resident C fell and was injured after attempting to use toilet himself – applicant denied allegations – Commission satisfied beyond reasonable doubt that conduct occurred – valid reason for dismissal on treatment of resident C alone – applicant notified of reasons for dismissal – given opportunity to respond – applicant had opportunity to have support person – warned about prior performance issues (lateness, failure to follow directions, and attitude generally) – no suggestion size of employer or absence of dedicated human resource personnel negatively impacted procedures adopted – by engaging in conduct applicant destroyed trust and confidence necessary to enable respondent to continue to employ her to care for vulnerable people with little supervision – dismissal not unfair – application dismissed.

Ikechukwu v Goodwin Aged Care Services Limited

U2013/11308 [2013] FWC 10064
Deegan C Canberra 20 December 2013

TERMINATION OF EMPLOYMENT – application to dismiss by employer – s.399A Fair Work Act 2009 – applicant failed to attend conciliation and comply with Commission directions – respondent lodged application pursuant to s.399A requesting matter be dismissed – applicant failed to attend hearing – application dismissed – order issued.

Pearson v Skilled Group Ltd

U2013/13609 [2013] FWC 10109
Deegan C Canberra 20 December 2013

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute under BMA Enterprise Agreement 2012 (agreement) – Commission to determine whether in circumstances where cl.37.9 does not apply due to cl.37.5, does the 14 day time limit in cl.37.10(a) commence on the day the disciplinary outcome/sanction is
imposed’ – Commission rejected applicant’s submission that no time limit applies to initiating dispute relating to disciplinary outcomes – agreement is consistent in setting timeframes for efficient movement of matters through dispute procedure – clause 37.10 applies if employee considers the matter remains unresolved – 14 day timeframe in cl.37.10 will commence from day ‘employee considers the matter remains unresolved’ and in all but the most exceptional circumstances, this day will be day of notification of disciplinary outcome – order issued.

Construction, Forestry, Mining and Energy Union v BHP Coal P/L

C2013/4813  [2013] FWC 8741
Spencer C  Brisbane  17 December 2013

63  TERMINATION OF EMPLOYMENT – costs – ss.402, 611 Fair Work Act 2009 – applicant sought costs against respondent alleging respondent’s response to application for unfair dismissal remedy was vexatious, without reasonable cause and had no reasonable prospect of success – Commission noted at times conduct of representatives terse and frustrated with each other – however, that is not unusual in proceedings – applicant did not clearly articulate how respondent was allegedly vexatious – respondent’s concession during substantive proceedings could not be characterised as changing its position – respondent did not establish respondent had a collateral purpose in responding to application – simply because respondent’s argument was unsuccessful does not mean it was without reasonable cause – application did not have no reasonable prospect of success – was not manifestly untenable or groundless – costs application dismissed.

Lambert v Jetscape Travel P/L t/a Travelscene/ByoJet

U2012/14467  [2013] FWC 9246
Spencer C  Brisbane  18 December 2013

64  ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute related to calculation of aggregated rate and application of transport allowance – whether allowance should be applied to base rate of pay prior to penalties being applied – Commission considered provisions had been agreed between parties and applied on a consistent basis for a significant period – parties had opportunities to alter the clause – held applicant could not seek to alter the agreement because of a perceived detriment to its members – application dismissed.

United Voice v ISS Security P/L t/a ISS Security

C2013/1057  [2013] FWC 9306
Spencer C  Brisbane  18 December 2013

65  TERMINATION OF EMPLOYMENT – application to dismiss by employer – ss.394, 399A Fair Work Act 2009 – application for unfair dismissal remedy – applicant did not comply with directions to file submissions – respondent made application under s.399A for dismissal of application – applicant given opportunity but failed to provide any reasons for non-compliance with directions – satisfied applicant was aware of directions and date for
compliance – satisfied applicant given reasonable opportunity to provide reasons and evidence for failure to comply – applicant’s failure to comply unreasonable – application dismissed pursuant to s.399A(1)(b).

Frerichs v BN & VL Heck t/a Video Ezy Mackay

U2013/14349 [2013] FWC 9776
Spencer C Brisbane 18 December 2013

66 ENTERPRISE AGREEMENTS – termination of agreement – Sch.3, Item 16 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – ss.225, 226 Fair Work Act 2009 – application by employer for termination of agreement – applicant unsure of nominal expiry date – clause 4.2 of agreement confirmed agreement lodged with Office of Employee Advocate – to expire five years from date of lodgement – applicant filed no evidence regarding when agreement was lodged – directions issued by Commission – applicant request for extension of time to file evidence granted – applicant failed to comply with amended directions – Commission corresponded with applicant – no response – no material filed in support of application – Commission has no ability to assess matters required by s.226 FW Act – cannot be satisfied termination not contrary to public interest – not appropriate to terminate agreement – Commission must be satisfied agreement passed nominal expiry date – application dismissed.

Armesto's Transport Employee Collective Agreement 2007

AG2013/11044 [2013] FWCA 9947
Spencer C Brisbane 18 December 2013

67 TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – jurisdictional objections to unfair dismissal application – applicant not an employee of respondent and in alternative was case of genuine redundancy – applicant was a company Director – activity undertaken by applicant consistent with a significant shareholder – Commission held applicant was not an employee – therefore not protected from unfair dismissal – unnecessary to determine genuine redundancy issue – application dismissed..

Lee v Klean King P/L

U2013/10242 [2013] FWC 6759
Spencer C Brisbane 20 December 2013

68 MODERN AWARDS – review – 2012 Review – Sch.5 Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – interim decision – considers applications to vary Security Services Industry Award 2010 as part of 2012 Review – applicants sought variation to central station definition and crib breaks provision – Commissioner satisfied proposed consent variations are consistent with modern awards objective – determination to be issued in the terms sought – other variations still in contention to be dealt with at arbitration hearing.
TERMINATION OF EMPLOYMENT – minimum employment period – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed two months – applicant provided some materials in support of application however nothing in material suggested other than applicant was employed for less than six months – applicant not served minimum employment period – not a person protected from unfair dismissal – application dismissed for want of jurisdiction – order issued.

Henry v EMT Recruit

ENTERPRISE BARGAINING – protected action ballot – s.437 Fair Work Act 2009 – application by MUA for protected action ballot order – employer (Mermaid) opposed application on grounds it cannot be made – MUA is a bargaining representative for agreement – parties in dispute about scope of proposed agreement and a range of other elements of proposed agreement – another agreement (Gorgon agreement) covers subgroup of employees performing offshore work under the Gorgon contract – Mermaid argues s.438 prohibits making of application because some employees to be covered by proposed agreement are covered by Gorgon agreement that has not expired – scope of agreement is a matter that can itself be subject of bargaining – pursuing scope order is one option open to bargaining party however in absence of scope order parties are entitled to continue bargaining over scope – employees who will be covered by proposed agreement are those who fall within MUA’s preferred scope – MUA’s preferred scope excludes those covered by Gorgon agreement – jurisdictional objection dismissed – satisfied MUA genuinely trying to reach agreement – requirements of FW Act met – protected action ballot order made.

Maritime Union of Australia v Mermaid Marine Vessel Operations P/L

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – conflict between parties as to date of dismissal – evidence of applicant versus evidence of respondent regarding conversation on 17 April 2013 – satisfied applicant terminated by respondent on 17 April 2013 and applicant understood, or should have, dismissal was effective that day – application made 16 May 2013 therefore application out of time – no acceptable reason for delay – applicant aware of dismissal on day it took effect – applicant took some action to dispute dismissal – no material prejudice to respondent – little merit in applicant’s case – no exceptional circumstances – application dismissed.
72 CASE PROCEDURES – application dismissed on FWC’s own initiative – s.587 Fair Work Act 2009 – unfair dismissal application – Commission attempted to contact applicant on two occasions by email and post – Commission explained lack of response would indicate applicant did not want to continue with application – no response received from applicant – application dismissed pursuant to s.587(c) FW Act – order issued.

Russ v Pure Profit P/L t/a Blue to the Bone (Entertainment Nightclub Licence)

73 CASE PROCEDURES – application dismissed on FWC’s own initiative – s.587 Fair Work Act 2009 – applicant failed to participate in conciliation – Commission wrote to applicant on two occasions – no response or contact from applicant at date of decision – application dismissed pursuant to s.587(3) FW Act – order issued.

Cheedy v The Pilbara Infrastructure P/L

74 TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – applicant sought order that transferrable instrument not apply to five employees – declarations from three employees supported applications – Commission satisfied no disadvantage for employees if order made – appropriate to make order in relation to three employees – orders issued with decision – situation different for remaining two employees – their employee declarations requested terms of Murrin Murrin Operations Common Law Contract regulate terms of conditions of their employment – two employees argued these terms were more beneficial – not self evident that the positions of the two employees are covered by classifications prescribed in the enterprise agreement – Commission not satisfied two employees have agreed to order sought – would be misleading to make order if enterprise agreement said to cover them may not have a classification that aligns with their positions – no orders issued in relation to the two remaining employees.

Murrin Murrin Operations P/L

75 ENTERPRISE AGREEMENTS – pre-approval requirements – s.185 Fair Work Act 2009 – application for approval of single-enterprise agreement – information provided on lodgement disclosed pre-approval issue – parties agreed Agreement was incapable of
approval - applicant indicated the matter would be discontinued – Notice of Discontinuance has not been received – applicant advised of intention to dismiss application – accordingly application dismissed.

Students’ representative Council of the University of Sydney Enterprise Agreement 2013

AG2013/11815
McKenna C Sydney 20 December 2013

76 INDUSTRIAL ACTION – order against industrial action – s.418 Fair Work Act 2009 – interim orders previously granted – industrial action consisted of a limitation or cap on work performed by union members – Commission satisfied that industrial action was occurring during the nominal term of the relevant enterprise agreement – order that industrial action stop to be issued on terms sought.

Patrick Stevedores Holding P/L v The Maritime Union of Australia

C2013/7531
Cambridge C Sydney 19 December 2013

77 INDUSTRIAL ACTION – order against industrial action – ss.19, 418 Fair Work Act 2009 – application to stop industrial action that is threatened, impending or probable – order sought against MUA and its members who are employed at employer’s terminal in Fremantle – alleged covert industrial action involved refusal of employees to volunteer for work for extended shifts – particularly for work on Christmas and New Year public holidays – alleged causing significant costs and reductions in productivity – considered s.19 FW Act definition of industrial action – individuals refusing to volunteer for work not industrial action in circumstances – questionable efficacy of any order – application refused.

DP World (Fremantle) Limited v The Maritime Union of Australia

C2013/7801
Cambridge C Sydney 23 December 2013

78 MODERN AWARDS – dispute about matter arising under award – s.739 Fair Work Act 2009 – consent arbitration pursuant to dispute resolution clause of Higher Education Industry (General Staff) Award 2010 – applicant submitted respondent breach obligation under award relating to consultation regarding major workplace change – applicant submitted no consultation occurred regarding redeployment of employee being made redundant – Commission held employee notified of impending redundancy – employee accepted role until February 2014 – employer obligated to consult – if change continues consultation obligations continue – Commission directed respondent to consult with employee and union in regard to available roles within workplace.
79 TERMINATION OF EMPLOYMENT – performance – ss.385, 394 Fair Work Act – applicant involved in car accident resulting in physical and psychiatric impairments – after period of time applicant returned to work on part time basis with certain work restrictions – periodic assessments found applicant’s performance was unsatisfactory – respondent made adjustments to the work and provided advice and feedback to applicant in an attempt to assist the applicant’s return to work – further assessments continued to find applicant’s performance unsatisfactory – dismissal procedures were initiated and applicant dismissed – applicant led evidence that performance was impaired by medication to treat impairments – held respondent had valid reason for dismissal and followed a fair process – application dismissed.

De Sousa v Department of Education, Employment and Workplace Relations

80 TERMINATION OF EMPLOYMENT – identity of employer – genuine redundancy – remedy – ss.392, 394 Fair Work Act 2009 – application for unfair dismissal remedy – dispute over whether Brobo Group or Atlas Engineering was employer – Commission satisfied there was a transfer in 2008 from Brobo Group to Atlas Engineering – applicant employed by Atlas Engineering – whether applicant’s dismissal ‘genuine redundancy’ – Commission satisfied employer no longer required employee’s job to be performed – however, respondent failed to meet consultation requirements under award – redundancy not genuine in accordance with s.389 – whether dismissal harsh, unjust or unreasonable – applicant also dismissed for being most expensive CNC milling machine operator – applicant less flexible than other employees because he had declined some work outside ordinary hours – this constituted valid reason and weighs in favour of decision not being unfair – applicant not notified or given opportunity to respond – no allegation of unsatisfactory performance – Commission stated respondent a small business which would significantly impact procedures followed – the lack of dedicated human resource managers impacted procedures followed – these factors tended toward dismissal being unfair – Commission also considered applicant’s length of service, age, skills, experience and the lack of consultation as relevant factors – Commission determined dismissal harsh, unjust, unreasonable – reinstatement not appropriate – having regard to factors in s.392 determined to award compensation of $15,000 – order issued.

Levit v Brobo Group P/L t/a Brobo Waldown (Aust) P/L / Atlas Engineering Australia P/L

Ryan C

3 January 2014
ENTERPRISE AGREEMENTS – termination of agreement – ss.222, 223 Fair Work Act 2009 – application for termination of enterprise agreement – agreement nominal expiry date 31 March 2015 – applicant declared one employee employed under agreement approved termination – advised all staff redundant with effect 13 December 2013 – proposed a termination date post 31 December 2013 to ensure employees received all entitlements under the agreement – views of CFMEU were sought – no information filed relation to application – satisfied requirements of Act have been met – agreement terminated effective 1 January 2014.


AG2013/11852
Ryan C Melbourne 16 December 2013

ENTERPRISE AGREEMENTS – termination of agreement – s.225 Fair Work Act 2009 – application for termination of enterprise agreement after nominal expiry date – applicant advised all staff redundant with effect 13 December 2013 – proposed a termination date post 31 December 2013 to ensure employees received all entitlements under the agreement – AMWU did not opposed application – satisfied termination not contrary to public interest – concluded termination appropriate – agreement terminated effective 1 January 2014.

Diebold Physical Security Pty Ltd Collective Bargaining Workshop Agreement 2010

AG2013/11845
Ryan C Melbourne 16 December 2013

ENTERPRISE AGREEMENTS – notice of representational rights – ss.174, 185 Fair Work Act 2009 – application for approval of single enterprise agreement – notice of employee representational rights issued to employees contained additional content to that prescribed by the Fair Work Regulations 2009 (Regulations) – s.174(1A) of FW Act requires that notice must not contain any other content to that prescribed by Regulations – statement that employees had to provide employer with any appointment of bargaining representative within seven days of receiving notice was the most critical defect – clear under FW Act employee can appoint bargaining representative at any time whilst bargaining – non compliance with s.174(1A) means there is no valid enterprise agreement before Commission – application dismissed.

Sims E-Recycling Collective Agreement Victoria 2013

AG2013/12052
Ryan C Melbourne 24 December 2013

ENTERPRISE AGREEMENTS – notice of representational rights – ss.174, 185 Fair Work Act 2009 – application for approval of single enterprise agreement – notice of employee representational rights issued to employees contained additional content to that prescribed by the Fair Work Regulations 2009 (Regulations) – s.174(1A) of FW Act requires that notice must not contain any
other content to that prescribed by Regulations – no valid enterprise agreement before Commission – application dismissed.

De Neefe Signs Melbourne Manufacturing/Production Employees, Enterprise Agreement 2013

AG2013/12782 [2013] FWC 10227
Ryan C Melbourne 30 December 2013

85 ENTERPRISE AGREEMENTS – pre-approval requirements – voting process – ss.180, 185 Fair Work Act 2009 – application for approval of single enterprise agreement – discrepancies in form F17 employer declaration regarding when voting commenced – declaration stated voting commenced 10 December 2013 however answer to question 2.6 suggested voting process commenced 29 November 2013 – therefore 7 day access period ended immediately before 29 November 2013 – applicant contacted to clarify voting process – employer had at very least commenced voting process on 29 November by sending employees cover letter for vote, ballot paper and return envelope – letter specifically requiring employees to vote between 10 December and 13 December is insufficient to overcome issues with voting process – employer did not comply with requirements of s.180(3) – non-compliance meant employer could not make request under s.181(1) to approve agreement – no valid application before Commission – application dismissed.

Chelgrave Contracting Australia Pty Ltd Metals Labour Hire Agreement 2013-2016

AG2013/12095 [2013] FWC 10232
Ryan C Melbourne 31 December 2013


Wine Industry Award 2010

AM2012/158 [2013] FWC 9683
Hampton C Adelaide 17 December 2013

87 TERMINATION OF EMPLOYMENT – genuine redundancy – merit remedy – ss.387, 389, 394 Fair Work Act 2009 – application for unfair dismissal remedy – genuine redundancy – respondent submitted termination was for reasons of genuine redundancy – accepted job performed by applicant no longer exists – accepted change in business that led to applicant’s termination was a major change with significant effects which triggered obligations to consult specified in clause 8.2 of Vehicle Manufacturing, Repair, Services and Retail Award 2010 (award) – obligation to consult is an obligation to consult before an irrevocable decision has been made and one where there is a genuine opportunity to influence
and potentially change the mind of the decision maker – applicant had no reasonable opportunity to consider proposed change and to suggest alternatives and to have those alternatives considered – Commission satisfied respondent failed to meet its obligations under the award to consult – Commission not satisfied respondent took obligations to consider redeployment of applicant seriously enough – given skills and experience of applicant he could have been successfully redeployed to vacant area in respondent’s enterprise – range of redeployment options and opportunities for redeployment could have been greatly enhanced through proper consultation – Commission satisfied would have been reasonable in all circumstances for applicant to have been redeployed within employer’s enterprise – termination not a genuine redundancy – merits – there were sound, defensible and well-founded reasons for dismissal, being that respondent no longer required applicant’s job to be performed by anyone because of changes in operational requirements of enterprise – in circumstances failure to consult was unreasonable and failure to allow time for applicant to get advice and consider his responses was also unfair and unreasonable – failure to allow applicant to work during notice period had harsh consequences for applicant – termination was harsh, unjust or unreasonable – remedy – reinstatement inappropriate – compensation appropriate – Commission considered that if applicant had not been dismissed he would have been employed for two further years – total earnings would be $123,676.00 – in making estimate Commission took into account capacity for applicant to be redeployed, his extensive skills and experience, long service and good conduct and performance – 25% deduction for contingencies appropriate given uncertainties involved in estimate of likely period of further employment if applicant had not been dismissed – total compensation $81,877.00 – amount greater than 26 weeks pay for applicant – therefore amount of compensation 26 weeks pay $27,768.00 – with addition of commission amount comes to $31,168.92 – 15% deduction for applicant’s misconduct (making an unauthorised recording of conversation) – final amount of $26,493.58 – order issued requiring payment of compensation within 14 days issued.

Evered v AHG Services (Vic) P/L t/a Coffey Ford

U2013/2601
Roe C Melbourne 12 December 2013

[2013] FWC 9609

88 ENTERPRISE BARGAINING – scope order – s.238 Fair Work Act 2009 – application for scope order – bargaining orders issued previously – applicant sought separate agreement for warehouse at Truganina site – respondent negotiating to maintain single national agreement – Commission satisfied applicant is a bargaining representative – satisfied applicant’s concerns were known to other parties – applicant provided bargaining representatives reasonable time to respond to concerns – applicant made clear it did not consider other parties have responded appropriately – legislation requires issue of scope be reason for concerns about efficiency or fairness of the bargaining – this does not mean there cannot be other motivations for pursuing a particular scope – Commission’s role in determining matters in dispute between bargaining parties limited to certain specified situations – determining scope of bargaining through order does not determine an agreement with that scope will eventuate – satisfied applicant has concerns about efficiency and fairness of bargaining and reason for those concerns is scope –
satisfied parties are bargaining in good faith – considered and adopted approach of Full Bench in MFB and Cimeco in relation to views of employees and whether group fairly chosen – not satisfied legislation suggests scope order should not be granted where parties could resolve matter through good faith bargaining order – views of employees relevant to consideration of this matter – satisfied petition shows significant proportion of employees support claim for separate agreement – satisfied group who would be covered if proposed scope order is in place would be ‘geographically, operationally or organisationally distinct’ – national agreement also geographically and operationally distinct – satisfied either scope is fair in that its choice is not arbitrary or discriminatory and would not undermine collective bargaining or other legislative objectives – interests of employer and employees who will not be covered also relevant – interests of parties may be relevant to efficiency, fairness and reasonableness considerations – Commission could not conclude proposed scope is more fairly chosen than current scope of national agreement – accepted some unfairness in current conduct of bargaining for NUW and its members – in current situation granting order would not overcome unfairness produced by parallel negotiation process – not satisfied there will be overall improvement in fairness when effect of overall conduct and effect on parties are considered – weight given to minority group of employees’ concerns about being swamped by interests of majority depends on the circumstances – evidence has not established major problems of fairness have been created by scope of national agreement or that fairness will be significantly enhanced by change in scope – disadvantage to interests of other bargaining parties greater because of late stage of bargaining – fairness of intervention in bargaining process must be carefully considered in particular circumstances of each case – evidence suggests applicant made inadequate attempts to resolve situation – right to utilise protected industrial action an important consideration – where bargaining parties are acting consistent with good faith bargaining requirements Commission should be reluctant to interfere with legitimate bargaining tactics utilised by bargaining parties – not satisfied conduct of bargaining will be fairer or more efficient if scope order granted – not satisfied requirement in s.238(4) met – cannot make order – application dismissed.

National Union of Workers v Linfox Australia P/L

B2013/1556

Roe C

Melbourne

16 December 2013

CASE PROCEDURES – application dismissed on FWC’s own initiative – ss.587, 739 Fair Work Act 2009 – application initially lodged with FWO and passed on to Commission – application indicated matter was a dispute over a contract of employment – one aspect of dispute appeared to relate to payment of NES entitlements – numerous attempts to contact applicant to better understand nature of application – applicant failed to attend conference or contact Commission – application dismissed pursuant to s.587 FW Act.

Westerhoff v EJM Financial Services

C2013/6299

Roe C

Melbourne

16 December 2013

[2013] FWC 9851

[2013] FWC 9855
TERMINATION OF EMPLOYMENT – genuine redundancy – ss.387, 389, 394 Fair Work Act 2009 – application made by two employees terminated contiguously – new role created with varied duties and fewer hours than two roles combined – respondent claimed dismissals were genuine redundancies – satisfied positions no longer required to be performed by anyone for operational reasons – change meets requirements set out in consultation clause of Award – respondent failed to consult with applicants as required by that clause – requirements of s.389(1)(b) not met – regard given to Ulan Coal Mines Limited – applicant’s evidence that they were not offered redeployment accepted – satisfied it would have been reasonable to redeploy either or both applicants into new role – exemption in s.389(2) found to apply – terminations not genuine redundancies – no valid reason for termination in relation to capacity or conduct – satisfied termination was unjust and unreasonable – order for compensation – adjusted for wages since termination, redundancy payments and 40% contingency due to uncertainty of whether redeployment found and accepted by applicants – orders to be issued.

McCarthy v Natures Organics P/L; Dixon v Natures Organics P/L

U2013/12099; U2013/12103
Roe C Melbourne 18 December 2013

TERMINATION OF EMPLOYMENT – costs – ss.394, 400A, 402 Fair Work Act 2009 – application for unfair dismissal remedy – respondent granted permission to be legally represented on 25 November 2013 – applicant’s representative lodged appeal against decision to grant permission on the morning of scheduled hearing – respondent attended scheduled hearing – applicant and representative did not appear – hearing relisted – applicant’s representative lodged a notice of discontinuance of the appeal on morning of scheduled appeal hearing – respondent lodged costs application – applicant discontinued unfair dismissal application – costs hearing held – grounds were unreasonable failure to attend initial hearing, unreasonable failure to comply with directions of Commission – satisfied of unreasonable actions and acts of omission by the applicant – satisfied that costs incurred by respondent at initial hearing were incurred unnecessarily and due to unreasonable behaviour – costs to be paid by applicant – schedule of costs to be submitted by respondent within seven days.

Church v Eastern Health t/a Eastern Health Great Health and Wellbeing

U2013/9121
Roe C Melbourne 18 December 2013

TERMINATION OF EMPLOYMENT – termination at initiative of employer – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent alleged applicant resigned – applicant submitted leave was approved by respondent – respondent did not repudiate contract – applicant’s employment was terminated – application made 47 days out of time – applicant not aware his employment had been terminated until return to work – applicant took immediate action to dispute dismissal – no prejudice to employer – circumstances
Indicate merit in application – satisfied exceptional circumstances exist – extension of time granted.

Baxter v Skyros Cycle P/L t/a South Yarra Picture Framers

U2013/12515 [2013] FWC 9435
Bissett C Melbourne 16 December 2013

93 ENTERPRISE AGREEMENTS – approval – notice of representational rights – ss.173,181,185 Fair Work Act 2009 – signed copy of the agreement had not been lodged – statutory declaration indicated the vote to approve agreement occurred on 21st day after last notice of representational rights was provided to employees – centre asked to provide a copy of signed agreement and any further information to support the application – to date no information has been received – on basis of material supplied on lodgement the application has not been validly made – based on the information provided the vote occurred prior to the minimum period required under the Act – application dismissed.

Thomastown Child Care Centre Inc

AG2013/11108 [2013] FWC 10005
Bissett C Melbourne 19 December 2013

94 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute arising under Serco Immigration Services Agreement 2011 – question as to whether agreement provided express right for parties to be legally represented – permission to be represented granted to respondent pursuant to s.596 of FW Act – dispute about whether employee entitled to overtime whilst working outside normal roster – Commission held overtime paid in certain instances while working outside normal roster – Commission ordered respondent to make adjustments to payments received by employee.

United Voice v Serco Group P/L

C2013/739 [2013] FWC 9911
Bissett C Melbourne 23 December 2013

95 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – jurisdictional issue relating to applicant’s status as an employee previously determined – applicant submitted he was dismissed after raising the issue of his status as an employee not a contractor – respondent submitted dismissal due to misconduct – held that although applicant’s conduct required some disciplinary response not satisfied that it was a valid reason for termination – termination not in compliance with Small Business Fair Dismissal Code – satisfied dismissal was unfair considering s.387 criteria – compensation ordered after considering s.392 – reduction for misconduct – $2500 compensation ordered.

Moir v Industrial Abseiling P/L

U2013/8258 [2013] FWC 9845
Simpson C Brisbane 19 December 2013

38
TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant dismissed following range of complaints and allegation of serious misconduct – applicant accessed confidential staff records and made allegations of fraudulent activity by CEO – subsequently suspended and terminated – Commission held accessing records not a serious breach of confidentiality that would warrant suspension or termination – Commission held due to a range of circumstances trust and confidence in applicant had eroded to point where it was not unfair to terminate employment – application dismissed.

Torrisi v Mareeba Shire Job Training Association Incorporated t/a Quality Innovation Training and Employment

U2013/11762 Simpson C Brisbane 24 December 2013

TERMINATION OF EMPLOYMENT – performance – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed due to ongoing performance and failure to follow safety procedures – Commissioner found applicant’s operational negligence a valid reason for termination – applicant’s final warning failed “fair go” test – failed practical and commonsense test applied in Fastidia – not fair or practical to give someone a warning or put them on notice in relation to aspects of their future performance if they have not contravened any of those aspects in the past – any warning must be appropriately and deliberately particularised – final warning should have only applied to safety procedures issue – investigation by employer did not provide procedural fairness to applicant – applicant had not been disciplined for any operational performance issues in 35 years of employment prior to single incident – applicant had been a difficult and belligerent employee – respondent failed to discipline applicant and restrain ongoing conduct – warnings must be used to advise an employee of shortcomings – warnings must be precise so employees can improve performance – final warning letter did not cover critical safety procedures for which he was being disciplined – dismissal harsh, unjust and unreasonable – applicant’s position subsequently redundant – relationship cannot be restored to allow for reinstatement – compensation reduced due to misconduct – compensation of 26 weeks pay ordered.

Sirijovski v Bluescope Steel (AIS) P/L

U2013/1841 Riordan C Sydney 24 December 2013

TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – application that agreement cover applicant and transferring employees – considered factors in ss.311 & 318 FW Act – Commission satisfied agreement is a transferable instrument and circumstances described are a transfer of business – entitlements under agreement more beneficial than those under agreement which would otherwise apply – applicant will provide transferring employees with 3% increase from 1 October 2013 – applicant submitted comparison documents in support of application – appropriate and not contrary to public interest to made orders in relation to application – order will issue.
99 ENTERPRISE BARGAINING – majority support determination – s.236 Fair Work Act 2009 – issue to be determined whether union is a bargaining representative under s.176 – site inspections undertaken to review nature of work – union Rules considered – R v Dunlop Rubber Aust. Ltd considered – Commission satisfied that union is a bargaining representative – considered whether union entitled to represent the interests of all employees – considered nature of employment of different groups – held that only some employees are entitled to be covered by the union rules – is the application is valid under s.236 – employer submitted that union was restricted to proposing an agreement that only covered the employees it is entitled to represent – rejected by Commission – satisfied that application valid – in relation to jurisdiction employer submitted that union could not bargain on behalf of all employees – because employer was partially successful in jurisdictional objection matter to be relisted to hear balance of s.237.

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited

100 TRANSFER OF BUSINESS – enterprise agreement – s.319 Fair Work Act 2009 – application for order relating to instruments covering new employer and non-transferring employees – new employer employed non-transferring employees under the modern award – applicant seeks order that the agreement cover all employees, including current and future non-transferring employees who will perform transferring work – agreement is a transferrable instrument by virtue of s.312(1)(a) therefore applicant and transferring employees are already covered by the agreement – whether agreement should also cover non-transferring employees – taking into account matters in s.319(3) Commission satisfied order sought should be granted.

J.R. O'Shaughnessy P/L

101 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – jurisdiction – whether Commission has jurisdiction to deal with dispute between applicant and respondent – dispute about whether respondent’s employees accrue annual leave when in receipt of workers’ compensation – Commission to determine whether nexus established between issue in dispute and enterprise agreement – Commission properly invested with jurisdiction to hear and determine dispute – matter to be referred to another Commission Member.
102 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute about rostering senior team managers for operational hours – Commission required to interpret clause in Ambulance Victoria Enterprise Agreement 2009 – determine whether rostering of senior team managers in question is consistent with the position description contained in the agreement – Commission held policies, procedures and clinical guidelines can aid construction of agreement – applied principles in DP World Brisbane P/L v The Maritime Union of Australia – held operational work for senior team managers is inconsistent with role defined in agreement.

United Voice v Ambulance Victoria
C2013/5373; C2013/5491
Johns C Melbourne 24 December 2013


Paul Sadler Swimland (Bacchus Marsh) Collective Agreement 2006
AG2013/10453
Johns C Melbourne 24 December 2013

104 ENTERPRISE BARGAINING – protected action ballot – s.437 Fair Work Act 2009 – applicant sought to ballot employees of Country Fire Authority (CFA) who will be covered by proposed agreement – CFA questioned extent Union was genuinely trying to reach an agreement – based on subsequent information provided by the Union, statutory criteria has been met – CFA raised two further issues – the questions to be put to voters in the ballot provides for a ‘yes’ or ‘no’ response – the Commissioner referred to John Holland and NTEU v RMIT which made it clear drafting of the questions is a matter for the applicant and should be specific enough to be responded to by employees – accordingly proposed question is consistent with the Act – the CFA sought closing date for ballot 30 days from date order issued due to coming festive season – satisfied period of 30 days consistent with requirements of s.443(3A) FW Act – legislative requirements complied with – order made.

Australian Municipal, Administration, Clerical and Services Union v Country Fire Authority
B2013/1571
Wilson C Melbourne 17 December 2013
105  TERMINATION OF EMPLOYMENT – high income threshold – ss.332, 382 Fair Work Act 2009 – application for unfair dismissal remedy – whether applicant subject to a modern award – having regard to position description, applicant not covered by award – considered applicant’s earnings – applicant’s annual rate of earnings for year prior to dismissal $132,539.30 – no amounts to be added to annual earnings because of factors in FW Regulations – applicant’s earnings exceed high income threshold – not protected from unfair dismissal – application dismissed.

McGeoghegan v CSC Healthcare Australia

U2013/12478  [2013] FWC 9926
Wilson C  Melbourne  17 December 2013

106  GENERAL PROTECTIONS – extension of time – ss.365, 366 Fair Work Act 2009 – application to deal with contravention involving dismissal – application lodged over three months out of time – applicant lodged unfair dismissal claim within prescribed period – applicant submitted reason for delay was legal advice obtained on 20 November after which general protections claim lodged – not satisfied of a credible reason for delay – applicant took action to dispute termination by lodging unfair dismissal claim and complaints about respondent to other authorities – prejudice to respondent if extension granted – not satisfied of sufficient merits to claim – unfairness between applicant and others – not satisfied of exceptional circumstances – application dismissed – order to be issued.

Mayall v French Island Ferries

C2013/7321  [2013] FWC 9880
Wilson C  Melbourne  18 December 2013

107  ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute regarding accrual of sick and personal leave for workers with nine-day fortnight arrangements – affects outdoor depot based employees – concerned method of accrual and deduction of sick leave – proper construction of agreement is that employee is entitled to leave calculation on notional day – correct interpretation provides sick leave entitlement accrual of 12 ordinary days per year notionally of 7.6 hours each – equivalent to 91.2 hours in case of outdoor depot based employees working nine-day fortnight.

Australian Municipal, Administrative, Clerical and Services Union v Hobson’s Bay City Council

C2013/5148  [2013] FWC 10161
Wilson C  Melbourne  23 December 2013
Decisions of Other Jurisdictions

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 of jurisdictions other than the Fair Work Commission received during the week ending Friday, 20 December 2013, Friday 27 December and Friday 3 January 2014.

Road Safety Remuneration Tribunal

108 ROAD SAFETY REMUNERATION ORDER – minimum entitlements – s.27 Road Safety Remuneration Act 2012 – decision follows 12 months extensive consultation with interested road transport industry stakeholders – considered material and submissions presented to Tribunal in respect of clauses in draft order – Tribunal’s jurisdiction and matters Tribunal must have regard to s.20 RSRT Act considered – order sets out minimum entitlements for road transport drivers and requirements for their employers or hirers and participants in the supply chain for long distance and supermarket chain distribution sectors – does not deal with rates of payment for road transport drivers and associated issues – President to convene conference about future proceedings in respect of those issues and second annual work program – making of an order in at least some form was widely supported by a broad cross-section of persons and bodies – order commences 1 May 2014 and expires 30 April 2018.

Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014

RTP2012/1 and Ors

[2013] RSRTFB 7

Acton P Melbourne 17 December 2013

Hampton C

Prof Williamson
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 Commission (FWC)** - [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.


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- 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.

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