FWC Bulletin

13 October 2022 Volume 22/22 with selected Decision Summaries for the month ending Friday, 30 September 2022.

Contents

Document search now includes citation links

We have continued to improve our Document search , based on feedback provided by users of the tool.

Documents in the Decisions and orders category now include links to cited Fair Work Commission decisions. The links are listed at the end of each document, under the heading "Cases cited by this decision".

This will make it easier for users to access relevant Commission decisions that are cited in our decisions and orders.

Currently, these links will only appear for cited Commission decisions. Links will not appear for decisions or orders made by another court or tribunal.

We will continue to work on ways to further improve navigation within the Document search.

We appreciate the feedback we have received so far and encourage you to continue to provide it. Our document search is designed to provide you, our users, with a powerful tool to search our archive of documents.

Simply email feedback@fwc.gov.au to provide your feedback.

New enterprise agreements statistical reports launched

Recently we sought feedback on a proposal to publish a new statistical report each fortnight, providing data from enterprise agreement approval applications lodged with the Fair Work Commission.

The feedback received was overwhelmingly positive and supportive of the initiative. In response to feedback we made a number of changes, including:

- historical data to be published in a spreadsheet each fortnight
- clarifications and additional details included in the information note and reports
- additional information to be provided in the statistical reports.

Read the President's statement (pdf) for more details.

To be notified when reports are published, sign up to our email subscription service: Statistical reports on enterprise agreements data.

Any further comments or feedback should be sent to chambers.ross.j@fwc.gov.au.

Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the month ending Friday, 30 September 2022.

1 GENERAL PROTECTIONS – dismissal dispute – ss.365, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance the Commission upheld a jurisdictional objection in response to a general protections application involving dismissal – Commission determined that the appellant was engaged as a referee under a series of maximum term contracts of employment and that the terms of the final contract of employment, expiring on 30 November 2020, reflected a genuine agreement between the parties that appellant's employment relationship with the National Rugby League Limited (NRL/First Respondent) would come to an end on that date – Commission concluded that appellant's employment ceased through the effluxion of time upon the expiry of the contract, and that he was not dismissed within the meaning of s.386(1)(a) of the FW Act – Full Bench of the view that the appeal raised questions of general importance and significance concerning proper construction and correct application of s.386(1)(a), in the context of the interaction between Full Bench decisions in *Khayam v Navitas* and *Sydney Trains v James* – decision also affected by uncertainty because it refers to the nonexistent s.368(2)(a) of the FW Act – as explained in *Khayam* there is a distinction between 'a contract of employment for a specified period of time…' within the meaning in s.386(2)(a) and a contract which specifies an outer limit or a maximum term – the distinction depends on whether the contract provides for an unqualified right for either party to terminate the contract – the former type of contract is sometimes referred to as a fixed term contract and the latter, variously, as an outer limit, time limited or maximum term contract – the Full Bench in *NSW Trains v James* made no finding as to the correctness of *Khayam* and the Full Bench viewed the outcomes in the 2 cases were not inconsistent and simply reflected differences in the respective factual scenarios and legal issues that arose in those cases – Full Bench noted that the appellant did not dispute that his employment relationship with the First Respondent ended on 30 November 2020, at the same time as the term of his last contract of employment – the issue of whether the employment relationship survived the termination of the employment contract does not arise – a finding as to whether a person has been dismissed within the meaning in s.386(1) is a jurisdictional pre-requisite to the person making a general protections application involving dismissal, under s.365 – Full Bench found the grounds of appeal and the submissions in relation to the construction and application of s.386(1)(a) advanced by the appellant invert the inquiry by focusing on the Commission's findings about the conduct alleged by the appellant rather than on the entire employment relationship – appeal dismissed.

C2021/8124 [2022] FWCFB 171
Catanzariti VP Sydney 7 September 2022
Asbury DP
Bell DP
Mirabella C

2 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – investigation – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – decision at first instance concerned an application made by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) for Commission to deal with a dispute in accordance with the dispute resolution procedure of the *Ausgrid Enterprise Agreement 2018* – dispute concerned an investigation and disciplinary process initiated by employer against 10 employees – in June 2020, employer received an anonymous whistleblower report which alleged that a list of named employees were: accumulating excessive amounts of overtime and engaging in other misconduct that did not align with policies; starting their days late and leaving early, thus making them unavailable to assist with planned work enquiries; and starting their shifts whilst remaining at home well into the hours of the shift, returning to their home during their shift for an excessive amount of time, and staying home whilst expected to be available even where their home was outside their assigned geographic area – employer began an investigation – the 10 employees were sent letters entitled 'Allegations of Potential Serious Misconduct' in January-February 2021 – the serious misconduct alleged was that the relevant employee had claimed and received wage payments they were not entitled to because they were either at home or not in their assigned geographic area during paid time – employees were stood down on pay and provided with an opportunity to respond – 8 employees were issued with 'show cause' letters requiring them to explain why their employment should not be terminated – employees responded to these letters in March 2021 – by the time the Commission heard the matter, 6 of the 10 employees had, pursuant to an agreed arrangement, been issued with a formal warning (a final warning in the case of 5 of them) and returned to work – substantive outcomes the CEPU sought were for the formal warnings issued to the 6 employees to be expunged, and for no disciplinary action to be taken with respect to the other 4 employees – parties requested that the Commission resolve the dispute by answering the following agreed question: 'Have any of the employees named…engaged in conduct that would justify Ausgrid taking disciplinary action against any of them?' – Commission at first instance gave the answer 'No' – employer appealed – employer contended that in answering the question the Commission at first instance limited its focus to employer's conduct and actions, and did not do what the question required, namely identifying the conduct engaged in by the employees and then determining whether employer would be justified in taking (some or any, but not what type of) disciplinary action – Full Bench accepted in part employer's submission that Commission erred by taking into account matters which were relevant only to employer's conduct and not that of the 10 employees – the agreed question required, first, that findings of fact be made about whether the employees had engaged in the conduct alleged

and, second, the formation of an evaluative judgment as to whether any such conduct found to have occurred justified employer taking disciplinary action – Full Bench granted permission to appeal, upheld the appeal and quashed the first instance decision – Full Bench redetermined the dispute based on the evidence that was before the Commission – Full Bench answered the agreed question 'Have any of the employees named…engaged in conduct that would justify Ausgrid taking disciplinary action against any of them?' as follows: *Yes, but only to the maximum extent of issuing a final written warning.*

Appeal by Ausgrid Management P/L against decision of Cambridge C of 28 April 2022 [[2022] FWC 963] Re: Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

C2022/3022 [2022] FWCFB 176
Hatcher VP Sydney 14 September 2022
Hampton C
Wilson C

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3 ENTERPRISE AGREEMENTS – better off overall test – union standing – ss.185, 590 Fair Work Act 2009 – application by OGS Project Services P/L (OGS) for approval of the *OPS Enterprise Agreement 2022* – Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) filed a F18 Declaration in relation to the Agreement raising concerns about the Agreement – OGS objected to the CEPU's request to be heard – Commission determined that it would exercise discretion in s.590 of the FW Act to hear from the CEPU in relation to issues with respect to relevant awards and the BOOT – also expressed a provisional view that it would not allow the CEPU to call evidence or to cross-examine witnesses on the basis that the CEPU was not a bargaining representative for the Agreement – *Collinsville* considered – Commission confirmed its provisional view that it would only hear from the CEPU in relation to relevant awards and the BOOT – issue was taken by the CEPU with this decision – CEPU submissions included that s.590(2) gives the Commission the power to inform itself by 'by inviting, subject to any terms and conditions determined by the FWC, oral and written submissions' and the power does not extend to limiting the content of those oral and written submissions once a determination under s.590(2) has been made – Commission held its discretion to inform itself in any matter before it in such manner as it sees fit, was not constrained in the manner contended for by the CEPU and was certainly broad enough to encompass restrictions on the content or subject matter of submissions – Commission was satisfied that each of the Construction Award, the Manufacturing Award, the Hydrocarbons Award and the Electrical Contracting Award would cover employees to whom the Agreement applies, and that each of those Awards is relevant for the purposes of the BOOT and for preapproval requirements – undertaking sought from OGS to satisfy Commission that the Agreement was genuinely agreed – provisional views expressed.

OPS Enterprise Agreement 2022

AG2022/1013 [2022] FWC 2501
Asbury DP Brisbane 19 September 2022

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4 ENTERPRISE AGREEMENTS – termination of agreement – inappropriate to terminate agreement – ss.225, 226 Fair Work Act 2009 – application for termination of an enterprise agreement – on 26 November 2021 the employer made an application pursuant to s.225 of the Act to terminate the *Tuftmaster Carpets TCFUA Enterprise Agreement 2017* – union opposed this application – agreement nominally expired on 31 August 2020 – bargaining to replace the agreement commenced end of April 2021 – Commission observed s.226(a) and (b) allow Commission a degree of latitude in making evaluative assessment contemplated in s.226 and requires the Commission to take into account all of the circumstances – consideration whether it is appropriate to terminate the agreement under s.226(b) – Commission chose not to attribute significant weight to employer's views – it was not accepted that employer's evidence was relevantly unchallenged, nor were the reasons advanced for the view that the Agreement should be terminated particularly persuasive – Commission found that many of the provisions identified by employer as problematic do not have the effect for which the employer contended – many of the identified issues have been resolved in bargaining – rejected employer's assertion it could not verify authenticity of an incorporated award (*Textile Industry Award 1994* as in force 30 June 1998) as this was provided by union – Commission acknowledged the 1994 award was not available on its website but noted requests can be made to Commission for a verified copy – Commission found no evidence to support the assertion that the Agreement prevented obtaining funding or investment – employer has not adequately explained what it would do in relation to its business to ensure an improvement in its profitability and viability if it were no longer bound by the Agreement – found employer's suggested financial position and performance did not support termination of the Agreement – the Commission found that without such an explanation it is difficult to assess the likely impact that termination of the Agreement will have on employer – the Commission accepted that termination of the Agreement will relieve employer of the administrative burden associated with administering a cumbersome Agreement – the views of the employees and union on terminating the Agreement weigh against approving the application – observed that termination of the Agreement would cause employer to resile from an in principle agreed position reached during prolonged bargaining – held this was a relevant consideration – Commission concluded that employer's reasons for seeking termination of the Agreement are not persuasive – held was not appropriate to terminate the Agreement taking into account all of the circumstances – unnecessary to consider public interest as both limbs of s.226(b) must be satisfied – application dismissed.

Tuftex Carpets P/L v Construction, Forestry, Maritime, Mining and Energy Union

AG2021/8586 [2022] FWC 2383
Gostencnik DP Melbourne 7 September 2022

5 INDUSTRIAL ACTION – extension of protected industrial action period – s.437 Fair Work Act 2009 – application for a protected action ballot order in relation to the bargaining for an agreement to replace the Tip Top Bakeries (Canning Vale) Bakehouse Agreement 2017 – applicant sought an order for a ballot to be conducted of employees who are employed by Tip Top in classifications covered by the Agreement and who are represented

by the UWU, or who are bargaining representatives for themselves but are members of the UWU – respondent submitted exceptional circumstances existed and requested the Commission extend the notice period to 7 working days – Commission considered s.443 of the FW Act – Commission considered *Esso* and *Total Marine Services P/L* v *Maritime Union of Australia* – Commission satisfied application made in accordance with s.437 of the FW Act – Commission satisfied that applicant genuinely trying to reach an agreement with respondent – Commission noted respondent is the major producer of fresh bread products to Western Australia supplying 80% of its market, including fresh bread products to its primary competitor, supermarkets, quick service restaurants and vulnerable customers – Commission found product is supplied fresh daily and takes approximately 6 hours to complete per cycle – Commission accepted that the proposed industrial action would stop production and respondent would need to source bread products from South Australia, requiring a timeframe of 6 days – Commission satisfied respondent's inability to produce and supply up to 80% of the daily fresh bread product in the State of Western Australia is a situation which is out of the ordinary course, unusual, special or uncommon – Commission considered loss of supply would be detrimental to other businesses that relied on the respondent's products, distress the public and cause other employees of the respondent to not be able to perform their roles – Commission noted that the proposed industrial action resulted in considerable pressure on respondent to secure an agreement and extension of the notice period did not prevent industrial action or voting in a ballot to authorise industrial action – Commission satisfied that the nature, and the potential impact, of the proposed industrial action constituted exceptional circumstances justifying the extension of the notice period to 7 working days – protected action ballot order issued.

United Workers' Union v George Weston Foods t/a Tip Top Bakeries P/L (Canning Vale)

B2022/1274 [2022] FWC 2294
Binet DP Perth 1 September 2022

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6 TERMINATION OF EMPLOYMENT – costs – vaccination-related case – ss.394, 400A, 611 Fair Work Act 2009 – on 4 January 2022 worker made an unfair dismissal application – on 7 April and 17 May 2022 employer sent worker letters asserting that precedent decisions relevant to his case showed that his claim had no reasonable cause and no reasonable prospects of success and urged worker to discontinue his application to stop costs being incurred by employer, warning that employer would seek costs if Commission dismissed his application – on 26 May 2022 Commission dismissed worker's unfair dismissal application – on 9 June 2022 employer filed application for costs – employer submitted that as the unfair dismissal application had no reasonable prospect of success as contemplated by s.611(2), worker caused it to incur costs unreasonably and without cause; worker's actual grievance lay with vaccine mandates instituted by Victorian Government and he was seeking a decision that they were invalid; and worker's failure to discontinue application despite having no reasonable prospects of success was an unreasonable act or omission as contemplated by s.400A – Commission considered *Gugiatti v SolarisCare Foundation Ltd*, *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing, Keep v Performance Automobiles P/L (Keep), Baker v*

Salva Resources P/L, Health Services Union – Victoria No.1 Branch v Sanli, and *Macdougall v Health Axix P/L t/a Raymond Hader Clinic* – Commission noted that at the time the unfair dismissal application was made a challenge to the legality of certain public health orders in New South Wales had been dismissed by the New South Wales Supreme Court and Court of Appeal and the Victorian public health directions had not been ruled invalid – found the Victorian public health directions were in effect at all material times and it was reasonable to assume they were legal and applied to worker and employer – found worker was unvaccinated at the time of his dismissal and had given no indication this would change – noted it was not suggested worker was an 'excepted person' under the directions, or could have performed his work anywhere other than on-site, or had been denied procedural fairness – Commission satisfied worker's unfair dismissal application was made without reasonable cause and it should have been reasonably apparent to worker that it had no reasonable prospects of success – Commission satisfied that worker's failure to file a notice of discontinuance was an unreasonable act or omission in connection with the conduct or continuation of his unfair dismissal application – satisfied worker's unreasonable omission caused employer to incur costs for preparing material in compliance with directions and participation at hearing – Commission considered whether to exercise discretion to order costs – considered the conduct of worker's 'non-paid representative' in worker's case and other cases the representative has been involved in – Commission found worker was influenced by 'stubborn, misguided and almost wholly incompetent' representative and decided not to order costs against worker – application dismissed.

Stock v Rocla Ltd

U2022/307 [2022] FWC 2597
Clancy DP Melbourne 27 September 2022

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7 ENTERPRISE AGREEMENTS – genuinely agree – ss.180, 185, 188 Fair Work Act 2009 – application for the approval of the *Viridian Glass P/L – Newcastle Enterprise Agreement 2022* (2022 Agreement) – CFMMEU requested documents in relation to approval of 2022 Agreement and sought to be heard – Commission satisfied CFMMEU have history of industrial representation, right to represent employees covered by the 2022 Agreement, and familiarity with sector – Commission found CFMMEU entitled to be heard – CFMMEU submitted Commission could not be satisfied 2022 Agreement genuinely agreed as several deficits between 2022 Agreement and predecessor agreement *CSR Limited Viridian Cardiff Workplace Agreement 2017* (2017 Agreement) were not properly explained to employees – CFMMEU submitted that: 2022 Agreement operates to exclusion of Award where 2017 Agreement incorporated Award; 2022 Agreement appeared to provide a 10 minute rest break where 2017 Agreement provided a 20 minute break; 2022 Agreement provided one month annual close down notice where 2017 Agreement provided 2 months – CFMMEU further submitted that as a result of deficiencies the 2022 Agreement did not pass the Better Off Overall Test (BOOT) – employer submitted inter alia that employees were advised Award entitlements would not apply under 2022 Agreement and reduction of break was an administrative error – explanatory document provided to employees stated that 2022 Agreement was a 'standalone

document, not read with the award' – Commission considered explanation to be simple statement that did not explain effect of change – Commission not satisfied that reduction of meal break was administrative error – Commission not satisfied that adequate explanation provided of reduction in meal break – not satisfied that adequate explanation provided of less beneficial overtime crib breaks – not satisfied that adequate explanation provided for reduction in notice of annual shutdown – Commission also considered explanation of higher duties and shiftwork overtime inadequate but minor omission – Commission satisfied that nature of explanation failures were absences of explanation rather than overstatement of benefits and therefore cannot be remedied by undertaking – Commission not able to be satisfied that 2022 Agreement genuinely agreed – not necessary to deal with BOOT concerns – application dismissed.

Viridian Glass P/L – Newcastle Enterprise Agreement 2022

AG2022/3109 [2022] FWC 2384
Masson DP Melbourne 8 September 2022

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8 TERMINATION OF EMPLOYMENT – casual – compensation – s.394 Fair Work Act 2009 – unfair dismissal application – applicant worked as an Early Childhood Educator since August 2020 – from 13 January 2022 applicant took unpaid parental leave – applicant claims she was unfairly dismissed on 23 May 2022 due to her confronting respondent about an email sent to staff regarding absences – respondent raised jurisdictional objections, stating that applicant was not dismissed and had not served the minimum period – Commission was satisfied that the cancelling applicant's shifts and also withdrawing her access to the rostering app without notification had the probable result of bringing the employment relationship to an end, even if was not the intention of respondent to do so – the rostering app was an important tool for communication and no alternate form of shift notification was provided – at no previous time was an entire week of shifts cancelled by respondent – applicant was dismissed – Commission found that applicant had met her minimum employment period of 6 months [*Shortland*] and had a reasonable expectation of continuing employment on a regular and systemic basis [*Ponce*] – Commission could not find that applicant's use of the rostering app constituted misconduct – no valid reason for dismissal – Commission found there was no notification of valid reason – no opportunity to respond to any reason related to capacity or conduct – dismissal was unfair – reinstatement considered inappropriate – Commission not satisfied applicant took appropriate steps to mitigate loss – compensation calculated using Sprigg formula – order issued for respondent to pay applicant calculated compensation.

Royall v Aussie Kids P/L

U2022/5812 [2022] FWC 2301
Masson DP Melbourne 31 August 2022

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9 RIGHT OF ENTRY – application for permit – not fit and proper person – s.512 Fair Work Act 2009 – on 10 May 2022 the Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division, Queensland Northern Territory Divisional Branch (CFMMEU) made an application for an entry

permit for an individual who had been an organiser for 6 years (proposed permit holder) – permit was due to expire on 24 June 2022 but was extended by Commission until application determined – Commission considered its discretion whether or not to issue a permit is not conferred in general, unqualified terms – discretion must be exercised with regard to the permit qualification matters set out in s.513(1) of the Fair Work Act and in a way that is not arbitrary, capricious or so as to frustrate legislative purpose – Commission considered the principles summarised in *CEPU* and *MUA* – 'fit and proper person' involves assessing relevant personal characteristics of individual and is to be applied by reference to the suitability of the official to hold an entry permit – rights that may exercised, limitations or conditions attaching those rights, and the discharge of responsibilities should be considered – each permit qualification matter must be given proper and appropriate weight – it is a matter for the decision maker to determine appropriate weight – Commission considered proposed permit holder's past conduct highlighted in proceedings brought by the Australian Building and Construction Commissioner weighed against conclusion that he was a fit and proper to hold a right of entry permit because it reduces the Commission's confidence that he would comply with this legislative obligations when exercising his right of entry powers in future – Commission held that although proposed permit holder has undertaken approved permit holder training, serious concerns were held that he would act in a similar manner in the future if he is faced with difficult situations while exercising a right of entry – proposed permit holder did not file any direct evidence to demonstrate any remorse or contrition for past contravening conduct or to explain how he would act differently in future – Commission held that the matters weighing in favour of finding that he is not a fit and proper person prevail – Commission held that proposed permit holder is not a fit a proper person – Commission not satisfied that it was appropriate to exercise discretion – application dismissed.

Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, Queensland Northern Territory Divisional Branch

RE2022/360 [2022] FWC 2332
Saunders DP Newcastle 2 September 2022

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10 TERMINATION OF EMPLOYMENT – misconduct – employer policies – vaccination policy – s.394 Fair Work Act 2009 – applicant worked as Mine Service Operator in the Hunter Valley – respondent implemented a Site Access Requirement (SAR) requiring applicant, and others, to have first dose of a COVID-19 vaccine by 15 December 2021 and be fully vaccinated by 31 January 2022 – SAR previously subject of consideration by a Full Bench of the Commission, which found that SAR prima facie lawful, was supported by scientific and medical evidence and other factors, but was not properly consulted on and not a reasonable direction given consultation deficiencies [*CFMMEU v Mt Arthur Coal*] – appropriate consultation subsequently conducted and SAR reintroduced on 14 December 2021 – during the Full Bench's review and respondent's subsequent consultation period, applicant had been stood down failing to comply with initial SAR – applicant's employment terminated on 14 January 2022 for failing to comply with SAR – applicant suggested vaccines were unsafe due to lack of long term safety data and other factors – applicant relied on evidence of a pharmacologist with expertise in clinical medical research and pharmaceutical drug regulatory affairs –

Commission noted the pharmacologist was not a medical practitioner and did not hold qualifications relevant to immunology, vaccination, epidemiology, public health or gene therapy – pharmacologist expressed view that COVID-19 vaccines available at the time were not safe – pharmacologist accepted this view did not represent a mainstream view – respondent relied on evidence of public health physician with expertise in communicable disease prevention and control, pandemic planning, vaccination program delivery and vaccine safety communication, travel medicine, maternal and perinatal health – physician accepted she was not an immunologist, vaccinologist or vaccine scientist – physician gave evidence that more than 12 billion doses of COVID-19 vaccinations have been administered by date of the hearing and efficacy and safety results were as expected – Commission found SAR, at the time of applicant's dismissal, had a logical and understandable basis and was a reasonable and proportionate response to risk of COVID-19 – found it was reasonable of respondent to not independently investigate safety of available vaccines and to rely on Australian government agency advice [*Owens v I-Med Radiology*] – found SAR was lawful – held respondent had valid reason to dismiss due to applicant's refusal to comply with SAR – dismissal not unfair – application dismissed.

Trzcinka v Mt Arthur Coal P/L

U2022/1420 [2022] FWC 2424
Saunders DP Newcastle 12 September 2022

11 TERMINATION OF EMPLOYMENT – demotion – ss.387, 394 Fair Work Act 2009 – applicant commenced employment with respondent in 2007 – in July 2017 she was employed as Customer Service Manager (CCM role) – on 24 December 2021 applicant slept in due to medication side effect and missed the start of her shift – in later communication with respondent applicant advised she was unwell and could not attend work that day – later that day respondent notified applicant she was going to be demoted from CCM role to an investigator role and have her salary reduced by 23.5% – letter arrived by courier on 24 December confirming demotion – in January 2022 applicant was offered a new role – salary of proposed new role was 11.8% lower than CCM role – applicant given 10 minutes to decide whether to accept role – applicant was upset and advised she needed to visit the doctor – shortly after leaving the building respondent communicated to applicant she had deserted her employment and was dismissed – Commission found applicant unilaterally demoted and salary unilaterally reduced – found respondent had no right to demote applicant in the manner it did – found applicant did not accept demotion or salary reduction, Commission rejected suggestion applicant accepted the demotion by action or conduct – found demotion was a substantial breach of applicant's employment contract – applicant removing herself from workplace to visit her doctor in context of pressure to accept or reject a proposed role within 10 minutes was not a valid reason for dismissal – held no valid reason for dismissal – observed there has been a total absence of procedural fairness – applicant's financial situation, which respondent was acutely aware of, weighed towards finding that dismissal was harsh – respondent's suggestion that staff and roster pressures did not lessen harshness of dismissal – held applicant's dismissal unfair – remedy considered – reinstatement inappropriate – held compensation appropriate – further

directions to be issued to determine quantum.

Raffie v Allied Express Transport P/L

U2022/983 [2022] FWC 2398
Boyce DP Sydney 9 September 2022

12 TERMINATION OF EMPLOYMENT – misconduct – reinstatement – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant was employed as a Forensic Officer from 1999 to 2022 – applicant's husband was also employed by respondent and was involved in an affair with another employee of respondent (XY) – applicant's husband was involved in IBAC proceedings – applicant dismissed on grounds that she contacted XY on her dedicated work landline number during her rostered shift and that she attempted to solicit information in relation to the IBAC investigation involving her husband in a deceitful manner – Commission satisfied that applicant did call XY – respondent submitted that it does not rely on the purpose of the phone call made by applicant to XY as necessary to find a valid reason for dismissal, however that the evidence supports a finding that applicant made a call in order to confront XY on their dishonest complaint and the reasons why they were making a dishonest complaint about applicant's husband – Commission not satisfied that any purpose related to applicant's husband's court case was behind applicant's call to XY – Commission was however satisfied that applicant's conduct in contacting XY was improper – the call related to highly personal matters that had no place in the workplace – it was a matter for applicant to pursue outside the workplace in her own time – respondent submitted that applicant's conduct was a clear breach of the Victorian Public Service – Special Bodies Code and the VPM – Professional and Ethical Standards – Commission accepted that applicant's conduct was wrong but found that this was not a breach of the policy such that could alone provide a valid reason for dismissal – the evidence did not support a finding that applicant was misleading in seeking out XY's phone number – Commission did not consider that making a private call to another employee of respondent was a misuse of respondent's resources – however Commission noted that in misleading XY in saying that she was from a newspaper, applicant engaged in conduct that was a blatant breach of professional and ethical values in employment – XY was an informant in applicant's husband's IBAC matter – applicant was aware of these facts when she made the call to XY – Commission was satisfied that in calling XY and by misleading XY as to who was calling, applicant's conduct provided a valid reason for her dismissal – Commission was satisfied that applicant was provided procedural fairness however the evidence before the Commission did not explain the inordinately long time it took respondent to conduct an initial assessment and investigation – Commission found that dismissal was harsh because of the economic impact on applicant – Commission found that in making a call to XY, there was no attempt by applicant to improperly gather information to assist her husband and considering the circumstances of the affair Commission considered the termination of applicant's employment to be disproportionate to the conduct that provided a valid reason for dismissal – Commission was satisfied taking into account all the matters, that the dismissal was harsh, unjust or unreasonable – Commission noted that applicant's conduct warranted a sanction and a breach of policy does not automatically mean termination of employment

– Commission found that applicant should be reappointed to the position she occupied immediately prior to her dismissal and respondent required to pay for lost salary plus superannuation caused by her dismissal for a period of 8 weeks

Bateson v State of Victoria, Victoria Police

U2022/1739 [2022] FWC 2289
Bissett C Melbourne 12 September 2022

13 TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – disability – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed in November 2018 as a Store Manager – in November 2019 applicant diagnosed with PTSD – applicant remained off work, including on parental leave until February 2021 – on 5 April 2021 an incident at work triggered applicant's PTSD – applicant certified as having no capacity for work until a certificate of capacity was issued on 12 November 2021 for the period 8 November 2021 to 8 February 2022 – in September 2021 respondent required applicant undergo a Psychological Assessment of Capacity – respondent also obtained medical reports from applicant's 2 treating clinicians – in a series of meetings and written communication between December 2021 and January 2022 respondent put findings of medical reports to applicant and engaged in discussions about options for applicant to continue employment – at a meeting on 31 January 2022 respondent terminated applicant's employment with immediate effect – respondent submitted applicant dismissed because she could no longer perform the inherent requirements of her job, based on the reports about her medical fitness – applicant disputed this – applicant submitted that her mental health and PTSD amounted to a disability under s.4 of the Disability Discrimination Act (DDA) and the respondent had abrogated its responsibilities under the DDA – Commission considered whether dismissal was harsh, unjust or unreasonable – considered ss.21A and 21B of the DDA – considered *J Boag and Son Brewing P/L v Allan Button, X v Commonwealth, Qantas Airways Ltd v Christie,* and *CSL P/L (t/as CSL Behring) v Papaioannou* – considered if applicant could fulfil the inherent requirements of her job as Store Manager, not a modified or adjusted role, at the time she was dismissed – considered the 3 medical reports, the unchanged diagnosis in the certificates of capacity issued over an extended period in 2021, and the adjustments the applicant requested to her work arrangements in order to enable her to return to work in January 2022 – satisfied applicant could not fulfil the inherent requirements of her role as Store Manager – satisfied that there was a valid reason for terminating applicant's employment that went to her capacity to fulfil the inherent requirements of her job – satisfied that respondent considered, but could not accommodate, applicant's proposed adjustments to her role – satisfied applicant advised of the reason for dismissal and given an opportunity to respond prior to a decision being made – concluded dismissal not harsh, unjust or unreasonable and dismissal not unfair – application dismissed.

Davis v Aldi Stores (A Limited Partnership)

U2022/2158 [2022] FWC 2387
Bissett C Melbourne 20 September 2022

14 ANTI-BULLYING – bullied at work – unreasonable behaviour – s.789FC Fair Work Act 2009 – applicant works as aftermarket sales consultant at employer's automotive company – applicant contended she has been bullied at work by her manager and others since returning to work – absence from work due to worker's compensation related to earlier bullying experienced at another site of the employer – applicant contended she was treated differently to other staff including by being offered fewer sales opportunities, had her property tampered with, was excluded from events and faced unreasonable criticism – Commission observed reasonable management action carried out in a reasonable manner is not bullying at work – applicant contended upon return to work her manager gave her fewer sales opportunities and excluded from certain sale categories – employer contended applicant was on a graduated return to work – Commission found applicant was marginalised in role because of decisions of manager in allocating work – unreasonable pattern of behaviour – risk to health and safety created – bullying conduct established – found further that allocation of work which would not attract commissions was part of pattern of bullying behaviour – applicant contended work property and files had been tampered with while absent on worker's compensation – applicant suggested manager had accessed her email account, reorganised electronic files, set up a forwarding rule to copy all applicant's incoming and outgoing emails to manager and deleted documents relating to an earlier bullying complaint – Commission rejected submission mail forwarding was part of agreed return to work plan – found mail forwarding not reasonable as applicant not advised of this process – found deletion of personal correspondence, including details of complaint, was unreasonable – held this constituted bullying at work – actions attributed to manager – applicant's allegations of unreasonable criticism and exclusion found to be reasonable management action or otherwise not established on the evidence – bullying conduct not found on those allegations – Commission observed applicant's tone in communication with manager was disrespectful at times and that this could constitute bullying at work as it was a repeated pattern of behaviour towards the manager creating a risk to health and safety – held applicant had been bullied at work – orders issued to prevent further marginalisation and address dysfunctional relationships in the aftermarket sales team – separate orders issued for manager, applicant and employer.

Application by Ripsinkis

SO2021/66 [2022] FWC 2054
McKinnon C Sydney 1 September 2022

15 TERMINATION OF EMPLOYMENT – small business employer – s.394 Fair Work Act 2009 – respondent company was owned by applicant's parents until 15 December 2020 when it was acquired by Toddle Enterprise Group P/L – applicant and her parents remained employed by respondent – respondent recognised applicant's service to 23 January 2019 – on 28 January 2022 applicant was locked out of respondent's email and IT system and received correspondence to her personal email advising that her employment was terminated with immediate effect – applicant's parents were terminated on the same day – applicant submitted there was no valid reason for dismissal, that procedural fairness was not afforded to her and that evidence does not support

respondent's claim that her employment was conditional on the continued employment of her parents – applicant sought compensation for unfair dismissal – respondent submitted that applicant's employment was terminated when her parent's employment ceased as per their agreement – Commission found that respondent was a small business employer – Commission considered whether applicant's dismissal was consistent with the Small Business Fair Dismissal Code irrespective of respondent not relying on the Small Business Fair Dismissal Code – applicant's dismissal was assessed against 'other dismissal' section of the Small Business Fair Dismissal Code – crucial considerations under the 'other dismissal' section 'are whether the employer gave the employee a valid reason why he or she was at risk of being dismissed, warned the employee of the risk of being dismissed if there is no improvement, gave the employee an opportunity to respond to the warning, and gave the employee a reasonable chance to rectify the problem' *[Suttie]* – Commission found that respondent did not give any reason to applicant that she was at risk of being dismissed prior to the dismissal, applicant did not receive any warnings or have an opportunity to rectify any issues or concerns prior to her dismissal – dismissal was not consistent with the Small Business Fair Dismissal Code – Commission found that there was no valid reason for dismissal – evidence did not demonstrate that applicant's employment was conditional upon parents remaining employed by respondent – applicant's dismissal was harsh, unjust and unreasonable – applicant unfairly dismissed within the meaning of s.385 of Fair Work Act – remedy considered – reinstatement inappropriate – applicant awarded compensation.

Elliott v Care For Kids Group P/L

U2022/2039 [2022] FWC 2368
Ryan C Sydney 6 September 2022

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16 TERMINATION OF EMPLOYMENT – valid reason – vaccination policy – s.394 Fair Work Act 2009 – unfair dismissal application – applicant dismissed on 7 February 2022 for not complying with respondent's vaccination policy – the applicant had had 1 of the required 2 doses of a vaccine – he was unable to take the second vaccine as he had stated due to having contracted COVID-19 – respondent was not satisfied with documentation provided in support of first vaccination or confirming the time required to wait after contracting COVID-19 before being able to have another dose – failure to comply with a lawful and reasonable policy may constitute a valid reason for termination [*BCS Infrastructure*] – respondent directed the applicant to show proof of vaccination or medical exemption by 7 February 2022 – evidence shows the applicant was told by his GP that he was exempt from needing the second dose for 4 months – GP failed to provide proper exemption form, instead only providing a medical certificate – applicant made clear to the GP the importance of obtaining the proper form by 7 February 2022 – applicant told respondent that he was waiting on the completed form but respondent was not satisfied with this and terminated his employment at 4:33 PM during a telephone call – the applicant received the proof documents from his GP at approximately 4:45 PM on that same day – Commission found that respondent acted unreasonably by terminating applicant's employment prior to close of business on 7 February 2022, by which time they would have had the required evidence – Commission also suspected that respondent had other performance related issues with respondent and was using this as

a way to terminate his employment – no valid reason related to applicant's conduct – applicant was unfairly dismissed – reinstatement not appropriate – compensation awarded.

Ceccoli v Fire and Safety Australia

U2022/2319 [2022] FWC 2518
Matheson C Sydney 20 September 2022

Other Fair Work Commission decisions of note

Green v Citic Pacific Mining Management P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – abandonment – s.394 Fair Work Act 2009 – unfair dismissal application – applicant worked as a field service technician in the Pilbara region of WA – applicant commenced employment on 25 August 2015 – he was dismissed on 27 April 2022 for abandoning his employment – after extended periods of leave due to COVID-19 border restriction, applicant was rostered to return to work 15 March 2022 – after 2 days he then left his place of work without approval – respondent attempted on multiple occasions to ascertain when he would return and direct him to fill out a leave form – Commission found that the failures by applicant to comply with lawful and reasonable directions to apply for leave, to attend for work unless absence was authorised and to provide a definitive date of return to work were breaches of his employment obligations – there was a valid reason for dismissal – Commission found that applicant had multiple opportunities to respond to his obligations and regularise his absence – these opportunities arose across at least a 4 week period – there was adequate opportunity to respond – applicant argued that dismissal was harsh in light of his family responsibilities – Commission found that the obligation to attend work when rostered and lawfully required is fundamental to a functioning employment relationship – the obligation to apply for leave and ensure it is authorised is equally as important – breach of these obligations was serious and had material consequences for the business and its management of labour – respondent did not display a lack of empathy for applicant's family responsibilities – he was not required to choose between his work and family, simply to meet basic employment obligations – Commission found dismissal was not harsh considering applicant's conduct – applicant submitted that dismissal was harsh because he worked at the mine during pandemic and did not return to his family – Commission did not consider that the applicant's past commitment to the job discounts his obligations – dismissal not harsh, unjust or unreasonable – application dismissed.

U2022/5271 [2022] FWC 2455
Anderson DP Adelaide 14 September 2022

Bailey v Octeros Manufacturing P/L

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant employed as project manager – applicant approached by employer's contractors manager to provide quote for metal works from applicant's suppliers in China – applicant submitted he made it clear at the time he would receive commission from supplier – procurement of metal works was delivered and accepted in December 2021 – applicant contended it was common knowledge throughout the respondent company that applicant was facilitating procurement from Chinese suppliers and receiving commission for same – applicant instructed to take leave on 22 March 2022 – applicant removed from respondent's IT systems – applicant sought advice as to whether respondent's instruction to take leave was lawful and requested to return to work 28 March 2022 – respondent replied 'see you Monday' – applicant attended work on Monday 28 March and met with respondent's director – applicant submitted that director accused applicant of taking kick-backs, refused applicant's request to put

allegation in writing, and instructed applicant to leave – applicant received separation certificate on 1 April 2022 nominating 22 March as date of termination citing misconduct as reason for termination – respondent did not file any evidence in proceedings – only communication received from respondent was refusal to attend conference due to local show day – Commission considered no sound reason to conclude applicant was receiving kick-backs – Commission accepted applicant's evidence and noted respondent did not refute any of applicant's evidence – Commission considered dismissal took effect 28 March – Commission found no valid reason for dismissal and applicant not notified of reason for dismissal – Commission found applicant had some opportunity to respond to kick-backs allegation and was not issued any warnings – Commission found dismissal harsh, unjust, and unreasonable – Commission satisfied reinstatement inappropriate – Commission ordered 9 months' pay less remuneration earned between dismissal and compensation order – Commission not satisfied reduction should be made for misconduct – order of compensation for $44, 692.3 gross less tax plus superannuation to be issued concurrently.

U2022/4110 [2022] FWC 1946
Hunt C Brisbane 29 September 2022

Conliffe v Hera Resources P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant was employed as a shift electrician – shortly after commencing employment applicant was advised he would be required to be on-call during his shift cycle – applicant complied with this requirement during his probation period – in March 2021 applicant advised the respondent that it was unfair to be on-call for 24 hours per day, four days per week – on 22 March 2021 applicant sent correspondence to the respondent raising his concerns and requesting that a policy or procedure be implemented in relation to employees required to be on-call – on 7 April 2021 applicant attended a meeting with respondent during which he was advised that he was required to be on-call and have the on-call telephone with him after hours – applicant requested that an 'on call allowance' be implemented – applicant was advised that disciplinary action would be taken if he refused to comply with the on-call requirement – applicant advised that from 29 April 2021 he would not be answering the on-call telephone after completing his rostered shift – applicant refused to take the on-call telephone from 29 April 2021 to 2 May 2021 – respondent directed that applicant be on-call – on 4 June 2021 the AWU filed a dispute application with Commission on behalf of the applicant regarding respondent's direction that applicant be on-call – on 10 June 2021 respondent sent correspondence to AWU and applicant advising that applicant was expected to comply with the on-call arrangement while dispute application progressed – on 11 June 2021 respondent asked applicant to take the on-call telephone for his shift, applicant refused and was given written notice that he was suspended from his duties on full pay – on 9 August 2021 applicant advised that he would not comply with the on-call arrangement unless there was on-call compensation in place – applicant refused to return to work – on 19 August 2021 respondent sent correspondence to applicant advising him that his employment had been terminated – Commission found that respondent's direction that applicant comply with the on-call requirement pending resolution of the dispute was lawful, reasonable and within scope of applicant's employment contract – Commission accepted that any on-call arrangement would inevitably impose some degree of inconvenience or restriction on an employee, but was of the view that applicant was agitating the issue for the purpose of seeking additional remuneration – Commission held there was a valid reason for dismissal – Commission satisfied applicant's dismissal was not harsh, unjust or unreasonable – Commission found it was not unreasonable that respondent expected that applicant comply with the on-call requirement while the dispute application took its course – application dismissed.

U2021/7752 [2022] FWC 2291

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Websites of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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