

FWC Bulletin

14 April 2022 Volume 14/22 with selected Decision Summaries for the week ending Friday, 8 April 2022.

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Common vaccination related issues we deal with

We perform functions under the Fair Work Act. In performing our role, we may need to consider vaccination related issues. We do not have the power to deal with all vaccination disputes at work.

We have prepared summaries of some decisions, statements and recommendations made by Members of the Fair Work Commission. These will help you understand the common vaccination-related issues we have dealt with. These summaries are for guidance only. You should read the full cases using the link in the summaries.

See [Vaccination related matters](#) for more information.

Decisions of the Fair Work Commission

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

Summaries of selected decisions signed and filed during the week ending Friday, 8 April 2022.

- 1 TERMINATION OF EMPLOYMENT – demotion – ss.386, 400, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance Commission determined that reduction in employee's employment grade and remuneration constituted a dismissal within the meaning of s.386 of the Fair Work Act notwithstanding the employee's employment was ongoing and not replaced with a new employment relationship – appellant appealed on 6 grounds, including that the Commission at first instance erred: 1) in not holding that ss.386(1)(a) and (b) establish exclusive circumstances for dismissal and s.386(2) establishes exceptions rather than further classes of deemed dismissals; 4) in not finding that the employee's demotion was made in accordance with an authorised industrial instrument and therefore there was no repudiation of the contract of employment on the initiative of the employer and the employee had not been dismissed; 5) in finding there was a significant reduction in employee's remuneration for the purposes of s.386(2)(c); 6) in finding the employee did not consent to demotion – Full Bench concluded that s.386(1) exclusively defines circumstances where an employee is dismissed – Full Bench considered that s.386(2) clarifies s.386(1) and does not create additional categories of dismissal – Full Bench considered that where an industrial instrument or statute provides that demotion does not constitute termination, then demotion of an employee in accordance with the industrial instrument or statute does not constitute a dismissal under s.386 – the *NSW Trains Enterprise Agreement 2018* and the *Transport Administration (Staff) Regulation 2012 (NSW)* 'support the conclusion that demotions authorised by those instruments do not constitute termination of employment' – appellant acted in accordance with the Agreement, which prevailed over the contract of employment to the extent of any inconsistency – demotion therefore not repudiatory conduct by appellant – Full Bench considered appellant did not establish significant error of fact in Commission's finding at first instance that pay cut constituted significant reduction in remuneration – Full Bench majority considered employee did not consent to demotion – 'where an employee voluntarily consents to a demotion and the employer acts on that consent, there will be a mutually agreed outcome that does not amount to a dismissal. Such consent can be express or implied or inferred from the circumstances' – in this case, majority found the employee was facing dismissal and it was understandable that he would seek an outcome alternative to dismissal – 'the fact that the [employee] specifically sought non-dismissal outcomes does not amount to him impliedly consenting to the imposition of *any* alternative penalty, including demotion' – one Member of the Full Bench partially dissented and concluded that a demoted employee who stayed in employment knowing of employer's repudiation consented to demotion through conduct and was not eligible to make an unfair dismissal application – the majority noted that the dissenting Member's proposition was
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contrary to Commission authority, and it was clear that Parliament did not intend s.386 to exclude all demoted employees who remain employed after their demotion from making unfair dismissal applications – majority noted that s.386(2)(c) 'proceeds on the premise that that a demotion where employment continues can amount to a termination of employment' – majority noted that 'as a general proposition, provided the employee makes clear their objection to the demotion, they should not be taken to have affirmed their original contract of employment merely by continuing to work in the demoted position and being paid for that work whilst challenging the alleged dismissal before the Commission' – appeal allowed on grounds 1, 2, 3 and 4 – appeal grounds 5 and 6 failed – the appellant's demotion of the employee in reducing his grade and gross pay did not give rise to a dismissal and as a consequence, the employee could not make a unfair dismissal application – first instance decision quashed – employee's unfair dismissal application dismissed.

Appeal by NSW Trains against decision of Saunders DP of 3 August 2021 [[\[2021\] FWC 4733](#)] Re: James

C2021/4959
Ross J
Catanzariti VP
Asbury DP
Easton DP
Ryan C

Melbourne

[\[2022\] FWCFB 55](#)
8 April 2022

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- 2** TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – mandatory vaccination – ss.99, 394 Fair Work Act 2009 – unfair dismissal application – applicant was an onsite Multi Skilled Operator – on 7 October 2021, Victorian Government issued public health directions that required employers of specified workers (including manufacturing workers working at or in connection with a food processing or production premises) to ensure their workers did not work outside their homes unless they had provided evidence of vaccination against COVID-19 or a medical exemption – on 8 October, respondent notified all staff by email of the public health directions and that if employees refused to be vaccinated without a medical exemption, they may be deemed unable to meet the inherent requirements of their role – applicant emailed supervisor on 12 October stating he would be taking time off for stress leave – applicant's email contained a letter from a doctor which stated that the doctor could not guarantee that the applicant would not have a life threatening adverse reaction to the vaccine – respondent sent a suspension letter to applicant on 15 October which stated he would be suspended without pay until 22 October, at which time respondent would meet with him to discuss his intentions – applicant raised concerns in a reply email of 21 October – respondent sent a letter dated 22 October which explained that it was likely the applicant's employment would be terminated unless he got vaccinated or obtained a medical exemption – on 25 October, respondent issued a show cause letter giving applicant an opportunity to provide a written response as to why his employment should not be terminated – applicant sent a reply email which stated that medical exemption paperwork had been submitted by applicant's doctor and was pending approval – applicant's employment was terminated by letter on 29 October – applicant produced to Commission an email from 'myGov' dated 5 November 2021 (after he was terminated) and an Australian
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Government digital certificate in his name which appeared to have been generated on 10 November and which stated 'this individual has a medical contraindication to COVID-19 vaccines' and was stated to be valid from October 2021 to April 2022 – Commission observed that on date of dismissal, applicant was not vaccinated and had not provided evidence of a medical exemption – therefore respondent was required under the public health directions to treat him as if he was unvaccinated and was prohibited from allowing applicant to work outside his home – respondent had a valid reason for dismissing applicant because applicant lacked the capacity to perform his job – applicant argued that he was on sick leave and should not have been terminated – Commission concluded that from 15 October until his dismissal, applicant was not legally permitted to attend for work outside his home and could not perform his duties from home, so there was no work that he could be required to perform – Commission concluded that from 15 October, applicant had no ordinary hours of work and no entitlement under s.99 of the Fair Work Act to be paid for personal/carer's leave – Commission not satisfied that the digital certificate would have satisfied the definition of 'acceptable certification' in the public health directions, thus respondent would still have been prohibited from allowing applicant to work outside his home – dismissal was not unfair – application dismissed.

Byrne v Regal Cream Products P/L

U2021/10152
Clancy DP

Melbourne

[\[2022\] FWC 809](#)
8 April 2022

- 3** TERMINATION OF EMPLOYMENT – misconduct – COVID-19 – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant was an auditor – applicant's employment was terminated under s.29(3)(c) of the *Public Service Act 1999* for non-performance of duties – in March 2020, respondent approved applicant's request to work from home until May 2020 – respondent subsequently approved a remote working arrangement from May to December 2020, subject to certain conditions including some requirements to attend the office – applicant took annual leave in August and September 2020 and then applied for personal leave in September to care for her uncle – respondent refused request on basis applicant's uncle was not an immediate family member – applicant applied for leave without pay but was again refused and respondent revoked applicant's remote working arrangement, citing concerns that applicant's extended periods of leave over the past 5 years had implications for her performance – applicant took leave without pay and annual leave for most of October – applicant returned to work in respondent's Canberra office in late October – in November 2020, applicant requested leave to care for her uncle – respondent refused on basis applicant's uncle was not an immediate family member and on business grounds, but applicant was nevertheless absent from work from November 2020 to March 2021 – in November 2020, respondent issued applicant with a direction to return to work at the Canberra office and stated she was on unauthorised unpaid absence – applicant's then lawyer advised that applicant would be absent until early January 2021 as she was caring for her uncle and could not comply with the direction – in January 2021, respondent asked when applicant would be returning to the office – applicant said she had a medical certificate from 1 January to 28 February – respondent approved unpaid leave for that period – in February 2021, applicant was
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given 2 further directions to return to the office – applicant advised that she was willing and able to return to work but in a remote capacity – in March 2021, applicant was issued with a notice of intention to terminate her employment due to non-performance of duties – applicant returned to the office a few days later – for part of April 2021, applicant again took unauthorised leave, returning to the office on 21 April – in May 2021, respondent reprimanded applicant and reduced her classification due to her failure to comply with the first direction to return to the office – in June 2021, respondent terminated applicant's employment on basis set out in notice of intention – Commission found no valid reason for applicant's dismissal – found directions to return to the office were lawful but not reasonable in the circumstances – the applicant considered she had an elevated risk of COVID-19 (supported by medical evidence) and had caring responsibilities for her uncle – applicant met definition of carer in the Fair Work Act – applicant was residing at relevant time with her uncle in rural NSW and respondent was advised of this – uncle had been residing with applicant since 2016 – applicant had provided medical certificates confirming she was responsible for her uncle's care when he was not in hospital – Commission found there was no basis for respondent to decline leave requests – applicant's uncle was a member of her household and she had caring responsibilities for him – Commission not satisfied respondent had reasonable business grounds to revoke flexible work arrangement where none of the purported performance issues had formally been raised with applicant and most staff had been working from home from March 2020 and were not required to return to the office until March 2021 – respondent relied on *Dunkerley* – Commission satisfied circumstances of this matter distinguishable from *Dunkerley* – even if the directions to return to the office were reasonable, Commission found that at the time of her dismissal the applicant had been working in the office for more than 6 weeks – found that at time of dismissal there was no basis for dismissal for non-performance as applicant was performing her duties and had already received sanction including a demotion – Commission found applicant unfairly dismissed – applicant reinstated – order to maintain applicant's continuity of employment and period of continuous service – directions issued for evidence on remuneration earned since dismissal.

Cully v Commonwealth of Australia (represented by the Australian National Audit Office)

U2021/5497
Dean DP

Canberra

[\[2022\] FWC 495](#)
7 April 2022

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- 4** TERMINATION OF EMPLOYMENT – misconduct – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – 2 applications for an unfair dismissal remedy were heard together – both applicants were summarily dismissed for alleged insubordination, intimidation and sabotage – one aspect of alleged misconduct was payment of commissions by first applicant to second applicant – Commission found respondent's evidence vague and inconsistent – held no valid reason to dismiss on account of insubordination, intimidation or sabotage – instances cited by respondent were historical in nature and dealt with at the relevant times without disciplinary action – Commission observed it is not open for an employer to resurrect old incidents as a basis for dismissal if these have already been dealt with – summary dismissal aspect of
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Small Business Fair Dismissal Code considered – *Pinawin v Domingo* steps applied – considered whether commission payments were authorised and if respondent could have had reasonable belief prior to dismissal that monies were paid without authorisation – held respondent was aware of the commission payments prior to dismissals but did not act on that knowledge – considered unlikely that respondent would not act on knowledge of improper commission payments – noted commission payments were raised regarding dismissal of first applicant who paid the commissions, but not on dismissal of second applicant who received the commissions – held the respondent had not made out second *Pinawin* limb as no investigation undertaken prior to dismissals – Commission considered whether there was a valid reason to dismiss on account of commission payments – held respondent's financial records were shambolic but despite this the commission transactions were conducted transparently and documents were regularly provided to respondent for him to review with his accountant – held respondent was aware of, and authorised, commission payments – allegations not made out to *Briginshaw* standard – no valid reason to terminate employment of either applicant – dismissals unfair – *Sprigg* approach applied – financial compensation ordered for both applicants.

Molina and Anor v Galloway

U2020/4351 and Anor
Easton DP

Sydney

[\[2022\] FWC 776](#)
6 April 2022

- 5** TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – mandatory vaccination – ss.387, 392, 394 Fair Work Act 2009 – unfair dismissal application – applicant worked as manager of shoe store operated by respondent – store closed during NSW lockdown of August and September 2021 due to COVID-19 pandemic – NSW Government issued public health orders that prohibited unvaccinated staff and customers from entering respondent's store – in preparation for store reopening, in September the respondent contacted applicant to ascertain whether applicant was vaccinated – applicant informed respondent that she was waiting on outcome of court cases regarding the validity of vaccine mandates – applicant also sent the respondent a template letter that she downloaded from a website asking for a number of assurances on COVID-19 vaccine safety – respondent informed applicant that as an employer they were obligated to follow the public health orders and could not roster unvaccinated staff – as applicant could not be rostered to work, respondent removed applicant's security administrator's rights on the store Facebook page – respondent added that if the public health orders changed then they would contact applicant – on 3 October 2021, respondent emailed applicant to ask again if she had been vaccinated – applicant responded with the same template letter she had sent in September and also made demands to be paid her normal permanent part time hours plus superannuation and other entitlements for the period since 11 September during which she said she had been stood down for not being vaccinated – respondent terminated applicant's employment by reply email on 3 October – Commission found there was valid reason for dismissal in applicant's incapacity to attend for work in light of her vaccination status and the public health orders in force, and applicant's conduct in how she communicated with respondent about her capacity – Commission found that applicant's letter of 3 October and her earlier messages
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unambiguously conveyed that she was not prepared to be vaccinated, and respondent was entitled to interpret her letter of 3 October as a refusal to be vaccinated – but Commission found applicant was not notified of reasons for her dismissal prior to the dismissal itself for purposes of s.387(b) of the Fair Work Act – also found applicant not given any meaningful opportunity to respond to respondent's reasons for dismissal under s.387(c) – so while there was a valid reason for dismissal, the lack of procedural fairness in dismissing applicant by reply email meant dismissal was unjust and unreasonable – Commission found that respondent should have invited applicant to make one further response, in light of her letter of 3 October, as to why her employment should not be terminated – in considering an appropriate remedy, Commission observed that as applicant could not perform any paid work at the time of her dismissal, even if applicant had been given procedural fairness, the loss of remuneration was nil – finding no financial loss to support an order for compensation, Commission dismissed the application.

Inwood v Baxter & Co. P/L

U2021/9536
Easton DP

Sydney

[\[2022\] FWC 792](#)
7 April 2022

- 6** TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – mandatory vaccination policy – s.394 Fair Work Act 2009 – application to deal with unfair dismissal – applicant worked as a Court Security Officer with the respondent – respondent has a contract with Court Services Victoria (CSV) to provide security services to Victorian courts and tribunals – on 1 October 2021 the Victorian Government announced a public health order would require authorised workers to be fully vaccinated – when the announcement was made, 'authorised workers' included any person who performed work that is essential for the continued operation of CSV, including security – on 4 October 2021 the respondent emailed all staff to explain the public health order and request that all staff provide proof of vaccination to the respondent – however on 7 October 2021 the Victorian Government issued *COVID-19 Mandatory Vaccination (Workers) Directions* which excluded people who work in connection with court proceedings from the mandatory vaccination requirement – CSV then implemented its own COVID-19 mandatory vaccination policy which required anyone working at a CSV workplace after 19 October 2021 to be fully vaccinated by certain dates or provide proof of a medical exemption – the respondent informed the applicant of the CSV's requirements to be vaccinated – the applicant gave evidence that he had not received a COVID-19 vaccine due to health and safety concerns and had been told by the respondent that he did not have to rush into getting a vaccine and could claim sick leave and annual leave – the applicant provided the respondent with medical certificates which certified that he was unfit to continue with work – on 8 November 2021 the applicant was given a notice of termination stating that as a Court Security Officer he was required to comply with the CSV's mandatory vaccination policy – on 29 November 2021 the respondent sent a letter to the applicant confirming that his employment had been terminated as he had not provided evidence of being vaccinated or a medical exemption – Commission held that there was a valid reason for dismissal as the applicant was unable to do his job and had not provided evidence of being vaccinated or of a medical exemption to the
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respondent – respondent had a contractual obligation with CSV to ensure respondent's employees complied with the mandatory vaccination policy and to prohibit the applicant from entering workplace unvaccinated – as a Court Security Officer the applicant could not perform his job from another location – the applicant was notified of the dismissal and given ample opportunity to respond – Commission also noted that the applicant submitted that his dismissal was unfair because he had been contracted to work for a minimum of 24 hours per week but at the time of his dismissal was only working one day per week – Commission held this was not a cogent submission – Commission found dismissal was not harsh, unjust or unreasonable – application dismissed.

Fawaz v G4S Integrated Services P/L

U2021/10424
Mirabella C

Melbourne

[\[2022\] FWC 777](#)
7 April 2022

Subscription Options

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

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

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

Websites of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Out of hours applications

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

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

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

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

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

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