FWC Bulletin

16 January 2014 Volume 2/14 with the Decision Summaries for the week ending Friday, 10 January 2014.

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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, 10 January 2014.

1 CASE PROCEDURES – costs – s.611 Fair Work Act 2009 – NEWTAAS sought permission to appeal which was refused – Ms Doherty sought her costs on grounds that the appeal was made vexatiously or without reasonable cause – dismissal followed a breakdown in relationship between parties – NEWTAAS genuinely aggrieved by finding at first instance that dismissal was harsh – Full Bench not satisfied appeal brought vexatiously – decision at first instance found there was valid reason for dismissal so could not conclude that there were no reasonable prospects of success on appeal – costs application dismissed.

New England and Western Tenants Advice and Advocacy Services Inc v Annabel Doherty
C2013/6060
Hatcher VP
McKenna C
Bull C
Sydney 8 January 2014

2 CASE PROCEDURES – appeals – ss.120, 604 Fair Work Act 2009 – decision at first instance dismissed application to reduce redundancy pay – on appeal further evidence of incapacity to pay allowed – appellant submitted Commissioner at first instance equated sales figures to profits in calculating ability to pay – on examination of more comprehensive financial information the Full Bench held that the appellant was not able to pay the full amount required – permission to appeal granted and appeal allowed – redundancy pay reduced to two weeks' pay per employee.

Appeal by Neonlyn P/L t/a Webbers Retravision Gladstone against decision of Spencer C of 6 September 2013 [[2013] FWC 5417] Re: Leschniok & Ors
C2013/6155
Watson VP
Gostencnik DP
Simpson C
Sydney 9 January 2014

3 TERMINATION OF EMPLOYMENT – valid reason – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision that termination was not unfair – valid reason for termination existed – employee dismissed due to allegations of derogatory and racist comments made over two-way radio system – employee appealed on numerous grounds – permission to appeal refused by Full Bench – no appellable error found – public interest not attracted.
REGISTERED ORGANISATIONS – cancellation of registration – s.30 Fair Work (Registered Organisations) Act 2009 – application on Commission’s own motion to cancel registration of Mechanical Harvesters’ Association of Australia – enquiries made by Commission as to status of organisation – history of non-compliance – Commission considered organisation defunct – registration cancelled – cancellation to take effect seven days after date of decision.

Mechanical Harvesters’ Association of Australia

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – interpretation – redundancy – s.739 Fair Work Act 2009 – question whether redundancy provisions in two agreements apply in circumstances of voluntary redundancy – if so, what rate is required to be paid for severance pay – considered principles established in various decisions relating to interpretation of contracts – approach in Kucks adopted in relation to construction of certified agreements [Australasian Meat Industry Employees Union] – considered Short in relation to legitimacy of considering history of an award provision when construing its meaning – considered role of custom and practice in interpreting agreements set out in Health Services Union – previous versions of relevant clauses are contained in various historical agreements applying at the site – original wording of clauses derived from similar provisions in a 1998 Redundancy Agreement – considered relevant clauses of historical agreements since 1998 Redundancy Agreement – evidence of previous rounds of redundancy did not indicate common understanding as to meaning and effect of redundancy provisions – necessary to start with words of relevant provision in interpreting agreement – satisfied invitation to all Production and Warehouse employees for expressions of interest for voluntary redundancy constitutes general redundancy offer – in broader context, better view of bracketed words in clause 42.11 is that they are a clarification that an employee will receive redundancy payment under voluntary redundancy provision if first two conditions are met even if their function is not redundant – satisfied requirements for access to voluntary redundancies in current round have been met – employees voluntarily made redundant are entitled to redundancy payments under Production and Warehouse Agreement – no express limitation to involuntary redundancies in Maintenance Agreement – no ambiguity as to words of introduction to clause 45.8 of Maintenance Agreement – on its plain words, Maintenance Agreement does prescribe severance payments for voluntarily redundant employee – clauses in both agreements do not clearly and unambiguously set out basis of calculation of redundancy pay in terms advanced by parties – only
evidence as to concept of ‘46 hours’ reference is found in evidence of CFMEU representative in relation to 1998 Redundancy Agreement – given confusing nature of wording and absence of any specification of a 'week's pay' it is permissible and necessary to have regard to evidence as to common understanding of provisions in bargaining negotiations, broader context of agreement, extrinsic material going to origin of provision, and relevant custom and practice – clearest guidance available from evidence is found in terms of the 1998 Redundancy Agreement – whilst redundancy payments arising from CFMEU’s interpretation are generous and in excess of common industrial standards, they are not untenable when considered in context – better explanation of purpose of clause 42.2/45.9 to specify basis of 'week's pay' in clause 42.1(d)/45.8.5 which is otherwise not found in redundancy provision as a whole – interpretation supported by terms of 1998 Redundancy Agreement – rate required is four weeks' pay (calculated as an aggregate of ordinary time earnings, continuous operating penalties, 25% over award payment and shift penalties for each year calculated on basis of 46 hours per week for each full year of service, and pro rata for part years.

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
10 January 2014

6 CASE PROCEDURES – application dismissed on FWC’s own initiative – s.394, 395, 587 Fair Work Act 2009 – rule 14 Fair Work Rules 2010 – application for unfair dismissal remedy made by telephone – applicant allowed 14 days to provide completed application form and either pay filing fee or complete fee waiver form – applicant contacted three times about requirements – provisions of rule 14 of FW Rules not complied with – applicant did not provide completed application or pay required fee – application not made in accordance with Act – application dismissed.

Storer v On Call Interpreters and Translations

U2013/15643
Gooley DP
Melbourne
6 January 2014

7 CASE PROCEDURES – application dismissed on FWC’s own initiative – s.394, 395, 587 Fair Work Act 2009 – application for unfair dismissal remedy – application received without payment of required fee – applicant advised to pay fee or complete fee waiver form required to proceed with application – applicant provided with notice of discontinuance after indicating she did not wish to proceed – no response received from applicant – application dismissed.

Gladwin v Capital Country Holiday Park t/a Capital Country Holiday Village

U2013/15501
Gooley DP
Melbourne
6 January 2014
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 particular documents – applicant did not attend non compliance hearing – respondent filed objection to application and sought dismissal pursuant to s.399A – applicant directed to file submissions and advised that if no response was received, the matter would be dismissed – applicant’s response did not provide explanation of non compliance – matter determined on the papers – application for unfair dismissal remedy dismissed.

Schnitzler-Kelly v Pearls MiiHome Services P/L t/a Retracom Manufacturing

U2013/13030
Gooley DP
Melbourne
6 January 2014

TERMINATION OF EMPLOYMENT – discontinuance – ss. 394, 588 Fair Work Act 2009 – matter did not settle at conciliation – subsequently respondent and applicant’s representative advised Commission of understanding that matter had settled – applicant agreed to file notice of discontinuance following Commission correspondence – discontinuance was not lodged – Commission satisfied applicant no longer wanted to prosecute application and intended to discontinue – Commission waived rule 4 of Rules – satisfied applicant had discontinued application – application discontinued.

Hooper v Frucor Beverages (Australia) P/L

U2013/1233
Gooley DP
Melbourne
6 January 2014

TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009 – it was uncontested that applicant was working out notice period after having resigned – during notice period a staff member complained that applicant made disparaging remarks to her about his supervisor and that she was too afraid to attend for work – respondent told applicant not to finish his notice period and applicant was escorted off premises – in circumstances, it was easiest for respondent to pay applicant out notice which it did – applicant interpreted being escorted off premises as dismissal – respondent did not terminate applicant’s employment – applicant alleged he was forced to resign because of bullying from his supervisor – this had not been raised with respondent prior to conference – no evidence of bullying – insufficient detail to find there was bullying and discrimination – applicant not forced to resign – application dismissed.

Alderuccio v Sellers Muldoon Benton t/a Sellers Muldoon Benton

U2013/12132
Gooley DP
Melbourne
8 January 2014
CASE PROCEDURES – discontinuance – s.588 Fair Work Act 2009 – unfair dismissal application – applicant’s representative advised Commission verbally and in writing that parties had reached settlement agreement – no notice of discontinuance (F50) filed despite requests from Commission – Commission satisfied applicant has discontinued application.

Kahn v Blowflex Mouldings P/L

U2013/1432 [2014] FWC 275
Gooley DP Melbourne 10 January 2014

TERMINATION OF EMPLOYMENT – extension of time – casual – s.394 Fair Work Act 2009 – Form 2 lodged 21 days out of time – applicant submitted incorrect form within time – applicant made first available appointment with legal aid and lodged correct form as soon as she was advised she had lodged incorrect form – applicant disadvantaged by location – no prejudice to respondent – extension granted – Commission considered applicant was casual employee – paid casual wage – never sought annual or sick leave entitlements – however, applicant covered by s.384(2)(a) and therefore able to pursue claim – matter referred back to unfair dismissal team – Commission noted matter not been conciliated.

Evans v Combined Warehousing Servicing P/L

U2013/13121 [2014] FWC 173
Lawrence DP Sydney 8 January 2014

TERMINATION OF EMPLOYMENT – valid reason – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant had medical issues following an injury in February 2011 – applicant unable to return to pre-injury duties and hours – found respondent had valid reason for dismissal based on applicant's incapacity to carry out substantive duties – valid reason for termination a separate issue from determination of whether termination was harsh, unjust or unreasonable – applicant not adequately notified of reason for termination before decision for dismissal taken – applicant had no real opportunity to respond – no dedicated human resource expertise was applied by respondent though expertise would have been available to it – found this contributed to deficiencies in process – in deciding to dismiss insufficient weight was given to impact of dismissal given applicant’s state of health, service, work performance, conduct and consideration of alternative work options – valid reason for dismissal was harsh, unjust and unreasonable – reinstatement not appropriate given practical difficulties – determining amount of time applicant would have remained employed difficult given applicant's medical condition – 10 weeks considered reasonable estimate – personal circumstances of applicant considered a factor in support of awarding compensation – $9,383 compensation ordered.

Ocampo v Wolper Jewish Hospital

U2013/11622 [2014] FWC 260
Lawrence DP Sydney 10 January 2014
14 ENTERPRISE AGREEMENTS – transfer of instrument – s.318 Fair Work Act 2009 – application relating to instrument covering new employer and transferring employee – sales representative employed by entity related to applicant and covered by Agreement – employee applied for position with applicant performing similar work – offer of employment made to employee conditional on applicant obtaining FWC order that Agreement not apply to new employment – employee and applicant supported making of order – no opposition to order – employee satisfied with terms and conditions of employment offered by applicant despite some differences with Agreement – if order not granted, employee would be denied opportunity for career progression – no other employee affected – Commission satisfied overall terms and conditions comparable – matters in s.318(3)(c) to (f) considered neutral – not against public interest to make order – order issued.

sia Abrasives Australia P/L t/a Sia Abrasives Australia

AG2013/12186 [2014] FWC 301
Gostencnik DP Melbourne 10 January 2014

15 ENTERPRISE AGREEMENT – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute in context of employee being offered a second voluntary redundancy after refusing one offer previously – whether an employee who has declined an offer of voluntary redundancy is no longer entitled to an incentive bonus under Agreement if they are offered voluntary redundancy on a subsequent occasion(s) – incentive bonus under clause 5.2.1 ranges from 20 to 24 weeks’ pay depending on length of service – union submitted clause 5.2.1 does not contain any provision which disentitles employees to incentive bonus for second or subsequent offers – employer submitted entitlement only payable on first offer – Commission accepted respondent had acted consistently in applying policies, however, this does not detract from clear words of policy – clause 5.2.1 states that incentive bonus is available if offer of redundancy is accepted within two weeks of offer being made – in absence of words to the contrary it must mean bonus is available each time offer is made – nothing intrinsic in the word ‘incentive’ that suggests it should necessarily be available only once – under respondent's control as to whether to offer voluntary redundancies – unions have not demonstrated acceptance of respondent’s interpretation of 2009 policy – Commission determined that proper application of clause 5.2.1 of the 2009 policy to multiple offers of voluntary redundancy made to an employee over time is that each offer must include incentive bonus and that bonus is available where offer is accepted within two weeks of it being made.

ASU v RailCorp and Transport for NSW

C2013/6715 [2014] FWC 45
Cargill C Sydney 6 January 2014

16 GENERAL PROTECTIONS – extension of time – ss.365, 366 Fair Work Act 2009 – application to deal with contravention involving dismissal – general protections application lodged over four months out of time – applicant directed to provide evidence and submissions to assist Commission in determining exceptional circumstances – applicant submitted reasons including delay in
receiving separation certificate and not being aware of time limit – Commission accepted some periods of ill-health but considered there were significant periods when applicant was capable of making application but did not – non-awareness of rights not acceptable reason – no action taken to dispute dismissal – no particular prejudice to employer despite significant delay – concluded merits of substantive application were neutral factor – no information provided about fairness between applicant and others – not satisfied of exceptional circumstances – application dismissed – order to be issued.

Dowling v Dundas Road Tavern and Restaurant t/a Boab Tavern
C2013/6711  [2014] FWC 87
Williams C  Perth  7 January 2014

17  GENERAL PROTECTIONS – extension of time – ss.365, 366 Fair Work Act 2009 – application to deal with contravention involving dismissal – application lodged five days out of time – applicant directed to provide evidence and submissions to assist Commission in determining exceptional circumstances – applicant explained he was involved in a car accident – subsequently unable to cope with stress – provided supportive medical assessment – Commission satisfied applicant was unable to make application due to health issues – acceptable explanation for five day delay – evidence applicant challenged respondent’s view of resignation rather than dismissal – no particular prejudice to employer if further period allowed – not possible to form view about merits of substantive application – no information provided about fairness between applicant and others in similar position – satisfied of exceptional circumstances – application allowed – order to be issued.

Petrie v Technaus P/L
C2013/6424  [2014] FWC 91
Williams C  Perth  7 January 2014

18  TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant had been a police officer – dismissed after accessing confidential information and passing it on to a third party – applicant directed to attend meeting – support person present – investigation conducted recommending applicant’s dismissal – applicant submitted he had viewed the information by accident and given only general information to his brother – Commission not satisfied by the evidence of the applicant – held valid reason for dismissal – satisfied that notice and opportunity to respond were given to the applicant – held dismissal not harsh, unjust or unreasonable – application dismissed.

Khan v Northern Territory of Australia (Commissioner of Police)
U2013/1216  [2014] FWC 194
Cambridge C  Sydney  10 January 2014

19  TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – applicant sought order that transferrable instrument not apply to transferring employee – application argued conditions of employment for transferring employee more
beneficial over time than terms under transferable instrument – Commission satisfied appropriate to make orders – order issued.

Eastern Australia Airlines P/L
AG2013/12205 Sydney 10 January 2014

20 TERMINATION OF EMPLOYMENT – minimum employment period – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – employer objected on basis applicant had not served minimum employment period – submissions filed by parties considered – applicant employed as a casual from 5 August 2013 – employment terminated 14 August 2013 – applicant concerned with manner in which dismissal was effected – not a matter for determination by the Commission – Commission found minimum employment period not served – therefore applicant not protected from unfair dismissal – application dismissed – order issued.

Hellewell v Life Without Barriers

U2013/12992 Perth 10 January 2014


Herrmann v Transcoat Engineering

U2013/13773 Perth 10 January 2014

22 ENTERPRISE INSTRUMENTS – termination of instrument – Sched. 3, Item 15 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – ss.222, 223 Fair Work Act 2009 – application for termination of 2005 collective agreement-based transitional instrument – nominal expiry date 25 July 2008 – applicant provided documentation that majority of employees voted in favour of termination – information provided to employees stated that they would secure higher wages and conditions under a new 2013 agreement upon termination of 2005 agreement – Commission wrote to applicant raising concern that employees may not have been given a reasonable opportunity to decide or that employees may not have agreed to termination – also that 2013 agreement not registered with FWC and therefore not enforceable – after termination, minimum enforceable terms and conditions would be those in modern award and NES – directed applicant to provide employees with Commission correspondence – employees requested to respond directly to chambers with concerns – no responses received – no employee organisations covered by 2005 agreement – Commission satisfied requirements in s.223 of Act for termination of enterprise agreement after its nominal expiry date have been met –
agreement terminated effective 9 January 2014.

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant dismissed over incident where he broke window of a forklift when new driver was being trained to drive it – considered evidence of several witnesses – in case of inconsistency, Commission preferred evidence of respondent – Commission found applicant deliberately attempted to hit or bang rear panel of forklift – applicant missed metal part of forklift and instead hit window and shattered the glass – applicant aware 'horseplay' not allowed at workplace – applicant trained on safety procedures – Commission found valid reason – considered IGA Distribution – that applicant meant conduct as joke does not derogate from seriousness of actions or potential consequences – applicant notified of reason – given opportunity to respond – not refused support person – considerations related to size of employer and access to HR expertise not relevant – applicant argued his treatment was inconsistent with how other employees had been treated – applicant did not raise other relevant incidents that indicated he had been treated differently – applicant alleged health issues of himself and his wife were not taken into account – these issues were not raised at time of incident with respondent – Commission accepted applicant's submission that threshold for summary dismissal is high under enterprise agreement – Commission did not find agreement was breached – applicant had 10 years' service with no history of misconduct – on balance dismissal not harsh, unjust, unreasonable – applicant provided a 'fair go' – application dismissed.

ENTERPRISE AGREEMENT – dispute about matter arising under agreement – s.394 Fair Work Act 2009 – interim decision – whether Commission has jurisdiction to deal with dispute where applicant no longer employed by respondent – considered Shields and ING – agreement limited to disputes between employer and employee – dispute arising for first time after dismissal is not a dispute between employer and employee – however, disputes may arise while employment exists – question is whether applicant complied with requirements of procedure while still an employee – Commission has insufficient information on whether steps of dispute settlement procedure in clause 12 have been complied with – directions filed with interim decision providing applicant and respondent opportunity to file submissions and evidence on this point.
Websites of Interest

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


Fair Work Commission (FWC) - 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.


High Court of Australia - www.hcourt.gov.au/.
Industrial Relations Commission of New South Wales -

- 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 -

Road Safety Remuneration Tribunal—www.rsrt.gov.au

South Australian Industrial Relations Court and Commission -


Western Australian Industrial Relations Commission -

Workplace Relations Act 2009 -
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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*.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: [FWCsubscriptions@fwc.gov.au](mailto:FWCsubscriptions@fwc.gov.au).

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