FWC Bulletin

18 December 2014 Volume 50/14 with the Decision Summaries for the week ending Friday, 12 December 2014.

Contents

Appeals, Full Bench ........................................................................................................2

Fair Work Commission provides free guest wi-fi .........................................................2

Final Bulletin for 2014 ...................................................................................................2

Decisions of the Fair Work Commission........................................................................3

Websites of Interest ........................................................................................................17

Fair Work Commission Addresses .............................................................................19
**Appeals, Full Bench**

The Fair Work Commission has taken a number of steps to improve the efficiency of its appeals process, including publishing an [Appeal proceedings practice note](#), and instituting [Appeals benchmarking](#).

The next step is to implement a pilot program for dealing with certain applications for permission to appeal.

In summary, the pilot program will work as follows:

- all appeals will be assessed for inclusion in the pilot
- for appeals allocated to the pilot, the issue of permission to appeal will be determined as a threshold matter
- all appeals included in the pilot in a particular month will be heard on one day, by one Full Bench
- the pilot will be evaluated after 12 months’ operation.

The time and costs incurred by parties in appeal proceedings may be significantly reduced if the issue of permission to appeal is determined at an early stage, in a separate hearing.

For more information read the [President’s statement](#).

**Fair Work Commission provides free guest wi-fi**

The Fair Work Commission now provides free guest wi-fi in all Commission offices.

For information regarding the use of mobile devices at the Commission, and the guest wi-fi service terms & conditions, please visit the [Media centre](#) on our website.

**Final Bulletin for 2014**

This is the final edition of the FWC Bulletin for 2014. Decision summaries for the weeks ending on Friday 19 & 26 December 2014 and 2 January 2015 will be in the first Bulletin of 2015 to be published in January.

We wish to take this opportunity to wish Bulletin subscribers a Merry Christmas and a Happy New Year.
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, 12 December 2014.

1. MODERN AWARDS – award modernisation – Sched. 6A, Item 6, Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – considers two applications to make modern awards to replace two State reference public sector transitional awards – modern awards objective considered – single modern award to replace predecessor awards – provisions which are disputed matters determined – parties to prepare revised draft award reflecting this decision.

School Services Officers (State Government Schools), Victoria, Award 2000 [Transitional] and Teachers’ (Victorian Government Schools) Conditions of Employment Award 2001 [Transitional]

AM2014/31 and AM2014/37 [2014] FWCFB 7317
Watson VP
Smith DP
Lee C
Perth
12 December 2014

2. ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – dispute concerned wage rate payable to Residential Support Officers (RSOs) under Agreement which related to classification of RSOs under SACS Award and operation of s.206 of Act – first instance decision concluded RSOs were classified at Level 3 of the SACS Award and were therefore being underpaid – Commissioner made a descriptor to descriptor comparison between the SACS Award and Agreement and assessed where work fitted under SACS Award in making decision – appellant contended Commissioner erred by failing to consider principal purpose of RSOs’ engagement, evidence of what RSOs actually did and evidence supporting that principal purpose of employment of RSOs was at Level 2 – full bench concluded no error in first instance decision – Commissioner was required to determine the classification appropriate for RSOs rather than whether classification Level of particular employees was appropriate – no error in conclusions or approach of Commissioner – appeal dismissed.

Appeal by Livienda Incorporated against the decision of Cribb C on 4 July 2014 [2014] FWC 4016 Re: Health Services Union

C2014/5562 [2014] FWCFB 8089
Watson SDP
Hamilton DP
Lee C
Melbourne
9 December 2014
MODERN AWARDS – variation – ss.134, 157 Fair Work Act 2009 – Full Bench – application by South East Water Corporation (SEW) to vary Water Industry Award 2010 to insert an annualised salary clause – proposed clause confined to Level 9 and Level 10 employees – ASU not opposed in principle to clause but submitted it should contain safeguards – clause sought by SEW similar to clause introduced into Clerks-Private Sector Award 2010 in 2009 variation – Commission not persuaded there is anything to warrant a departure from taking approach taken in earlier Full Bench decisions dealing with contested cases about terms of annualised salaries clause – however, decided to introduce three additional requirements into clause which to some extent address need for ‘safeguards’ as proposed by ASU – clause necessary to achieve modern awards objective – annualised salaries clause to be inserted.

Water Industry Award 2010

AM2013/26
Harrison SDP
Sams DP
Bull C

CASE PROCEDURES – costs – ss.400A, 604, 611 Fair Work Act 2009 – Full Bench – application for costs of Full Bench appeal proceedings – Commission had dismissed application of appellant for unfair dismissal remedy – appellant had no reasonable cause for appeal – respondent applied for an order for appellant to pay costs of the appeal – Commission found no errors of fact, significant or otherwise, in the decision – appeal lodged due to ignorance and as a consequence of misunderstanding not with the purpose of harassing or embarrassing the respondent – application refused.

Ikechukwu v Goodwin Aged Care Services Limited t/a Goodwin Aged Care Services

C2014/2612
Drake SDP
Sams DP
McKenna C

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant Baker was the Supervisor Mining at the respondent’s mine site – Baker was rostered to work a shift from 5.00 pm to 6.30 am – production had stopped at mine site at the start of the shift due to heavy rains and storm – Baker requested Superintendent’s permission to leave early to attend a medical appointment the following morning – permission was given on the basis that Baker must complete his work first – no departure time discussed – evidence suggested that Baker left the mine site at around 9.00 pm – second applicant Ward was also Supervisor Mining on the same shift – Ward provided a statement during an investigation into the incident suggesting Baker left the site after 1.00 am – Ward later clarified that he did not recall the night precisely and had confirmed the departure time of 1.00 am with Baker – Baker said he left the site between 2.30 and 2.45 am – Commission concluded based on mobile phone and computer records that
Baker left the site at around 9.00 pm – Baker was dismissed for leaving the site early and dishonesty during the investigation – Ward was dismissed for lying to cover for Baker – Commission found that there was a valid reason for Baker's dismissal – he left the mine site early without proper permission and was dishonest when during the investigation – Commission found no valid reason for Ward's dismissal – Ward was not able to recall the events of the evening and relied on information given to him by Baker – found that Ward was not dishonest – found Ward was denied procedural fairness in that decision to dismiss was made prior to the opportunity to respond – remedy reinstatement and continuity of service – no lost remuneration as Ward knew at the time he asked Baker what time he left that Baker was under investigation and was not entirely free of responsibility.

Baker and Anor v Thiess P/L

U2014/7515 and Anor
Hatcher VP
Sydney
11 December 2014

6 CONDITIONS OF EMPLOYMENT – redundancy – variation of redundancy pay – s.120 Fair Work Act 2009 – applicant applied to vary redundancy pay to zero on basis other acceptable employment was obtained for employee – applicant outsourced work and negotiated employee be employed on same terms and conditions by outsourced company – employee accepted employment with new employer – employee’s accrued entitlements were paid out by applicant – service with applicant not recognised by new employer – new employment commenced one day after employment with applicant ceased – Commission satisfied applicant obtained other acceptable employment – employee did not oppose application – Commission satisfied determination should be made – order issued.

Ultimate 4WD Equipment (WA) P/L v Singh

C2014/7992
Watson SDP
Melbourne
9 December 2014

7 TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – jurisdictional objection – employment terminated as respondent no long required applicant’s job to be performed by anyone – changes in operational requirements of enterprise – applicant declined offer of alternate employment – Commission of view that defensible and well-founded reason for applicants dismissal – Commission found respondent failed to consult applicant as required under award – failure to meet obligations under award not significant in this case – termination not harsh, unjust or unreasonable – application dismissed – cost application made by respondent – applicant provided opportunity to respond to cost application via written submissions.

Guerra v Speedie Waste t/a Speedie Waste P/L

U2014/7291
Watson SDP
Melbourne
11 December 2014
### 8

**TERMINATION OF EMPLOYMENT – high income threshold** – ss.332, 382, 394 Fair Work Act 2009 – application for relief from unfair dismissal – not contended that the applicant was covered by a modern award – applicant earned in excess of high income threshold – jurisdictional objection raised by respondent – applicant stated the intention of respondent was to increase his wage by $5,000 in July 2014 to bring his income over high income threshold to preclude an unfair dismissal claim – Commission found that applicant’s annual earnings were over the high income threshold – unnecessary to reach conclusion as to the reason for the wage increase – objection upheld – application dismissed.

Rasmussen Taylors Business P/L t/a Cash Converters Taylors Lakes

| U2014/9208 |
| Watson SDP |
| Melbourne |
| [2014] FWC 8581 |
| 11 December 2014 |

### 9

**TERMINATION OF EMPLOYMENT – genuine redundancy** – ss.389, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed due to loss of contract for services and subsequent downturn in work – applicant informed his position was redundant – enterprise agreement required consultation regarding redundancy – respondent failed to consult with applicant – meetings convened by respondent did not constitute consultation in any meaningful sense – absence of specialist human resources expertise impacted on the deficiencies – valid reason for termination existed – a failure to consult will not always render a termination harsh, unjust or unreasonable, however the failure to consult in this matter was significant and unreasonable – application granted – reinstatement inappropriate – compensation granted.

Mihos v Multipipe P/L

| U2014/11083 |
| Watson SDP |
| Melbourne |
| [2014] FWC 8866 |
| 11 December 2014 |

### 10

**TERMINATION OF EMPLOYMENT – genuine redundancy – overseas position** – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant returned from overseas placement in China – respondent incorrectly believed applicant would only accept domestic position – respondent searched for position for applicant within domestic market only – no domestic positions available – applicant dismissed – Commission found dismissal was not a matter of genuine redundancy – reason for dismissal was not sound, defensible and well founded – applicant given insufficient time to respond – dismissal harsh, unjust or unreasonable – six weeks appropriate period to conduct search for international positions for applicant – that no international positions were available irrelevant – Compensation of six weeks’ pay at rate and on conditions applicant received in China ordered.

Yap v Tata Consultancy Services Limited

| U2014/6926 |
| Drake SDP |
| Sydney |
| [2014] FWC 8877 |
| 10 December 2014 |
TERMINATION OF EMPLOYMENT – small business employer – s.394 Fair Work Act 2009 – applicant contacted FWO about wages outstanding – dismissed for ‘badmouthing the business to car dealers and for stirring up other employees at meetings’ – applicant was not given any warnings in relation to conduct – unclear whether respondent was a small business – Commission held there was no valid reason for termination – termination harsh, unjust and unreasonable – Commission ordered compensation of 26 weeks’ pay.

Marshman v Emgtee Holdings P/L t/a Spotless Professional Automotive Detailers
U2014/12565 O'Callaghan SDP Adelaide [2014] FWC 8670
8 December 2014

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – Respondent was small business – Respondent raised jurisdictional objection that it complied with Small Business Fair Dismissal Code – Applicant had history of poor performance and misconduct which culminated in his dismissal after alleged aggressive behaviour at a meeting – Commission found Applicant’s evidence to be contradictory and unreliable – Commission found that termination of employment was consistent with Small Business Fair Dismissal Code – application dismissed.

Sanders v The Roller Door Doctor
U2014/13078 O'Callaghan SDP Adelaide [2014] FWC 8746
9 December 2014

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute about respondent’s obligations under CDJV Construction P/L GLNG Upstream Project Enterprise Agreement 2011 to make payment to employees upon termination in lieu of requisite period of notice – notice period fell across what would have been unpaid R&R period – respondent submitted that employees would not receive payment for period of time that would have fallen across unpaid period – applicant submitted notice cannot be given across period of unpaid R&R or in respect of any other accrued entitlement – respondent raised jurisdictional objection – contended that Agreement applied to no employees for reason that project had ceased and joint venture was being wound up – applicant contended Commission’s jurisdiction enlivened for purposes of determining dispute regardless whether employees remain employed – Re: CFMEU and Re: ING Administration considered – Commission exercising power of private arbitration vested in it by the parties’ Agreement does not otherwise require parties to submit to binding procedures and enforceable outcomes in relation to determination of legal rights and liabilities – does not confer unfettered power upon parties to agree to scope of power which they vest with the Commission – Re Ranger Uranium Mines Proprietary Ltd applied – distinguished between judicial function to ascertain existence of legal rights and obligations compared with arbitral function to ascertain what rights and obligations should be created – Commission found that as there were no employees to whom Agreement applied declaration of
contravention of the Act would constitute judicial function – Commission held no jurisdiction to hear matter – application dismissed.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v CDJV Construction P/L

C2014/4855 [2014] FWC 7970
Richards SDP Brisbane 9 December 2014

15 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute over whether employee was entitled to redundancy payment having commenced new employment during notice period under agreement – employee accepted voluntary redundancy – respondent submitted employee terminated his employment by his own action – respondent raised jurisdictional objection that employee no longer covered by agreement – Commission found employee covered by agreement – dispute settlement clause in agreement activated by employee when he applied for voluntary redundancy – dispute was notified to Commission prior to termination – jurisdiction for Commission to hear dispute – parties directed to confer with a view to settlement.

‘Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union’ known as the Australian Manufacturing Workers’ Union (AMWU) v Simplot Australia P/L

C2014/1312 [2014] FWC 8538
Lawrence DP Sydney 8 December 2014

16 TERMINATION OF EMPLOYMENT – genuine redundancy – ss.389, 394 Fair Work Act 2009 – application for unfair dismissal remedy – jurisdictional objection on ground of genuine redundancy – position redundant if no longer any function or duties to be performed [Jones] – Commission found applicant’s dismissal a result of changes in respondent’s operational requirements – applicant’s job not required to be performed by anyone – obligation to consult – consultation not perfunctory – provides bona fide opportunity to influence decision maker [Vodafone] – evidence supported finding that there was meaningful consultation – significant cost to respondent to retrain applicant for redeployment within enterprise – satisfied genuine redundancy – no position available for redeployment – application dismissed.

Riazati v Interactive Media Solutions P/L

U2014/7425 [2014] FWC 8995
Kovacic DP Melbourne 12 December 2014

17 CASE PROCEDURES – costs – ss.400A, 611 Fair Work Act 2009 – application for costs against applicant employee in unfair dismissal matter – employee discontinued unfair dismissal application prior to arbitration – approach in relation to costs applications set out in Church and Roy Morgan applied – no evidence employee did not intend to prosecute claim to finality nor that he unnecessarily prolonged matter – fact that he did not engage representative or instruct him to pursue possible settlement until after receiving material from respondent not an unreasonable act or omission –
employee’s actions or omissions in meeting with respondent prior to dismissal not in connection with conduct or continuation of matter – applicant did not act unreasonably in failing to discontinue claim earlier – test for ‘without reasonable cause’ not whether application might have been successful but whether it should not have been made – similar observations made about phrase ‘no reasonable prospects of success’ – no evidence that employee made claim for improper or ulterior purpose – motivation to pressure employer into reinstating or paying compensation could be attributed to most applicants who make claims relating to their dismissal – Commission found employee’s claim not ‘so obviously untenable’ nor ‘manifestly groundless’ – claim not made vexatiously or without reasonable cause – on basis of evidence, Commission did not consider claim so lacking in merit or substance as to be not reasonably arguable – costs application dismissed.

Khan v Australian Islamic College of Sydney
U2014/10736 [2014] FWC 8902
Cargill C Sydney 11 December 2014

18 ENTERPRISE BARGAINING – protected action ballot – notice period – s.437 Fair Work Act 2009 – application for protected action ballot – respondent objected seeking to extend minimum period of notice from three days to seven days due to exceptional circumstances – perishable nature of product (meat) – wastage and the unnecessary slaughter of livestock – AMIEU v Coles and Bi-Lo and CEPU v Australia Post considered – Commission found exceptional circumstances – notice period extended to five working days for remote and regional Queensland stores for the Easter 2015 period.

Australasian Meat Industry Employees Union, The v Coles Supermarkets Australia P/L t/a Coles Supermarket
B2014/1659 [2014] FWC 8871
Spencer C Brisbane 12 December 2014

19 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant dismissed for alleged serious misconduct arising from him watching a sexually explicit movie whilst on duty in Control Room – applicant maintained that his actions in watching the movie did not constitute serious misconduct – applicant claimed he was ‘set up’ – Commission must determine whether the alleged conduct occurred [King v Freshmore] – found respondent tolerated employees accessing the internet and watching movies during low activity periods – movie was highly sexually explicit and absolutely unsuitable for viewing in the workplace – satisfied that applicant was aware that he should not have watched the movie – applicant engaged in a conscious and continuing act of misconduct – on the balance of probabilities, there was a valid reason for termination of applicant’s employment for misconduct – unable to find that termination was harsh or unjust or unreasonable – applicant was not dismissed as a result of some conspiracy but rather because his fascination with the movie’s content overcame his commonsense – application dismissed.
20 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – application involves a dispute under the Alcoa World Alumina Australia WA Operations AWU Enterprise Agreement 2014 – applicant reported that she was suffering from a non-work related psychological issue which prevented her from performing her duties and applied for extended sick leave (ESL) pursuant to the respondent’s ESL Policy – ESL Policy is conditional on an employee being capable of returning to their substantive role – return to work plan developed – after three shifts applicant advised that she was unable to perform the required shifts – respondent advised applicant that as a result of her failure to adhere to the requirements of the ESL Policy, her entitlements under that policy were being terminated – specific requirements for applicant to notify Alcoa of any absence from work were specified in the RTW Plans – discrepancies were identified which suggested the applicant was not at work for all the hours she was rostered on – applicant was unable to address all the concerns relating to her non-attendance at work – decision was taken to terminate the applicant’s employment – disciplinary procedure provides that where Alcoa decides to dismiss an employee they are obliged to notify the AWU prior to the dismissal taking effect, if the AWU disputes the matter the case will be referred to the Commission for arbitration – Commission found the applicant was not authorised to be absent on any of the occasions and did not comply with the obligations to notify her employer – the decision to dismiss applicant not harsh, unjust or unreasonable and so will not be unfair.

The Australian Workers' Union v Alcoa World Alumina Australia Limited

C2014/1466 [2014] FWC 8874
Williams C Perth 9 December 2014

21 TERMINATION OF EMPLOYMENT – performance – s.394 Fair Work Act 2009 – applicant’s conduct repeatedly breached the respondent’s standards – applicant received counselling and written warnings – applicant dismissed – applicant notified of reasons for dismissal – Commission found valid reason for dismissal – held that dismissal was not harsh, unjust or unreasonable – application dismissed.

Vita v Downer EDI Mining P/L

U2014/5006 [2014] FWC 8962
Williams C Perth 12 December 2014

22 ENTERPRISE AGREEMENTS – approval – better off overall test – s.185 Fair Work Act 2009 – application for approval of the Cagemaker Enterprise Agreement – Commission identified concerns with agreement – applicant permitted to make submissions on identified issues – employer offered a number of undertakings which addressed the concerns of the Commission –
the combined effect of the number of undertakings offered to the Commission results in substantial changes to the agreement that was voted on by employees – Commission not satisfied that a pay increase of five cents per hour was adequate compensation for the loss of allowances and special rates – proposed agreement contained terms not pertaining to the employment relationship – application dismissed.

Cagemaker Enterprise Agreement 2014

[2014] FWC 8887

Ryan C Melbourne 10 December 2014

23 ANTI-BULLYING – bullied at work – s.789FC Fair Work Act 2009 – application for an order to stop bullying – senior management employee alleging Managing Director repeatedly behaved unreasonably so as to constitute bullying – all parties sought decision to be issued without identifying parties – hearings conducted in private – request of parties accommodated – sale of applicant's former business into larger undertaking and contract of employment formed – dispute about conduct – dispute as to whether contract document represented the terms of employment agreement – after hours work – changes in reporting arrangements – warning issued to applicant – lack of communication on certain matters – conversation at bar after work function – whether occurred at work – whether conduct represents repeatedly unreasonable behaviour – some behaviour not demonstrated on the evidence but certain unreasonable conduct found – not necessary to make finding as to whether conduct was at work and created relevant risk to health and safety – no basis to make orders due to expiry of fixed term employment contract – absence of any context in which future risk might arise – observations made about problematic nature of orders given the particular context – application dismissed.

Mr G.C.

[2014] FWC 6988

Hampton C Adelaide 9 December 2014

24 ENTERPRISE BARGAINING – protected action ballot – s.437 Fair Work Act 2009 – application opposed based on form and nature of questions proposed in ballot and alleged HSU not genuinely trying to reach agreement – alleged some forms of action may have significant adverse health consequences and that many questions related to industrial action that did not fall within meaning of 'industrial action' under Act – whether future proposed action appropriate or reasonable not considered – no impending or probable action so potential impact of action cannot be assessed – proposed action does not need to be available to each employee balloted – considered decision in Ambulance Victoria – some of proposed action may not be industrial action as defined – on balance, questions proposed capable of inclusion – any future actions taken not found to be industrial action within relevant context would not be protected industrial action – HSU has been put on notice of this – order issued.
TERMINATION OF EMPLOYMENT – remedy – s.394 Fair Work Act 2009 – initial decision found that the employee had been unfairly dismissed and ordered she be reinstated ‘by appointing her to another position, not in the high care unit, on terms and conditions no less favourable than those on which she was employed immediately prior to her dismissal’ [[2014] FWC 3529] – on appeal the Full Bench found that the failure to alert the parties, and the employer in particular, to the possibility of reinstatement qualified on the basis that the employee should not work in a high care area constituted a denial of natural justice and an error of jurisdiction [[2014] FWCFB 5969] – permission to appeal was granted as to remedy and the matter remitted back to Commissioner Bissett to hear evidence and submissions on reinstatement and determine a remedy – the employee submits that the incident that lead to her dismissal occurred at the Audrey Prider Centre (APC), a dementia unit that houses residents with behavioural concerns – the employee is a Medication Endorsed Enrolled Nurse (ENME) and submits it is reasonable that she be reinstated into Lake Lodge, a high care area which does not generally accommodate residents with dementia or those exhibiting the behavioural issues, as an ENME – applicant further submitted she is happy to perform an Enrolled Nurse (EN) function in the Hostel and accepts that if she is placed in the Hostel, a low care facility, she may not utilise on a daily basis all the skills she uses as an ENME – the employer submits that based on the employee’s training and experience he has no confidence in her ability to carry out the work of team leader in the Hostel – the employer further submitted that the employee demonstrated that she cannot be trusted to perform the role of caring for the residents in the nursing home – Nguyen & Le and Colson v Barwon Health adopted – Commission does not accept there has been a loss of trust and confidence or that the employee cannot work with high care patients – the employee has the skills and qualifications to work in Lake Lodge or the Hostel – Commission considers that the reinstatement of the employee is appropriate, however she should be issued with an appropriate warning that recognises the findings in the initial decision with respect to her actions and also recommend that she be provided with any refresher training and reorientation necessary – Commission does not consider it appropriate that the employee receive all remuneration she has lost – ordered that the employee be reinstated, her employment be continuous and the continuity of service be maintained and that she receive payment based on average hours over the 12 months prior to termination of an amount equal to 12 weeks’ pay.

CONDITIONS OF EMPLOYMENT – redundancy – s.120 Fair Work Act 2009 – application to reduce redundancy pay – applicant
sought to reduce obligation to pay redundancy pay to respondent to zero – Commission satisfied that there was employment opportunity for respondent at point at which he was advised he was redundant – remuneration, hours of work and required duties of alternative employment was overall more beneficial to respondent – however likely requests to travel to Iran could have impact on employment relationship – respondent also suffered loss of accrual of personal leave and future long service leave – considering all factors, Commission reduced entitlement to redundancy pay by 80% – order issued.

SuperChoice Services P/L t/a SuperChoice Services P/L v Lovquist

C2014/6294  
Lee C  
Melbourne  
11 December 2014

27  
TERMINATION OF EMPLOYMENT – extension of time – unlawful termination – ss.773, 774 Fair Work Act 2009 – application to deal with an unlawful termination dispute lodged 105 days out of time – applicant has lodged four applications since March 2014 – an application for an order to stop bullying and a general protections application pre-date the termination of her employment – the applicant’s representative became aware of a potential conflict of interest, and arranged for the file to be given to different legal representatives – the new legal representatives advised the applicant that she should make an application under s.773 – applicant withdrew her s.365 application and filed this application – applicant submits there are two periods of delay, marked by the change in her legal representation – Commission found during the first period of delay the applicant attempted to progress the matter in a timely way and the delay is properly apportioned to her representative – the circumstances of the applicant over the second period fall squarely within Nulty – factors that make it outside the ordinary course and very uncommon are that no party identified that the applicant had a potential claim under the Act, her legal representatives lodged a claim that was not available to the applicant for reasons identified by the respondent – Commission concluded that the applicant has been able to explain her delay for the full period from dismissal until lodgement of the present application due to unusual and uncommon circumstances – time for lodging extended.

Meuleman v Moggill Primary P&C Association t/a Moggill Outside School Hours Care

C2014/6260  
Booth C  
Brisbane  
12 December 2014

28  
INDUSTRIAL ACTION – order against industrial action – s.418 Fair Work Act 2009 – application for order to stop industrial action by NUW and its members employed by the applicant and covered by the Coles Eastern Creek (NUW) National Distribution Centre Enterprise Agreement 2012 – Commission satisfied work stoppages were unprotected industrial action – industrial action did not fall within any of the exclusions as described in s.19(2) of the Act – action instigated at initiative of NUW site delegates – Commission not satisfied unprotected industrial action currently threatened or impending – NUW did not explain why grievance procedure was not followed – no undertakings provided by NUW that further industrial action would not occur – Commission
concluded future risk and propensity of NUW and its members to engage in unlawful work stoppages when grievances arise – Order issued against NUW members who took unprotected industrial action – order to operate for four months.

Coles Group P/L v National Union of Workers

29 TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – delay due to applicants’ solicitor failing to file application within requisite time period – clear instructions from applicant to file – representative error can constitute exceptional circumstances [Robinson and Clark] – Commission found applicant was blameless in the circumstances – applicant not required or expected to chase up whether application lodged – Commission within its discretion to grant additional time – application allowed.

Bice v Yarra Advantage P/L t/a Yarra Services

30 CONDITIONS OF EMPLOYMENT – redundancy – s.120 Fair Work Act 2009 – application to vary redundancy pay – whether applicant obtained other acceptable employment for employee – Derole Nominees and Datacom considered – circumstances leading to employee’s redundancy stemmed from outsourcing of part of applicant’s operations – applicant’s submissions outlined degree of cooperation between the two businesses and involvement of the employees in those processes – satisfied applicant had been a strong moving force in enabling its former employees to obtain work with new employer on same terms and conditions – fact that new employer did not recognise previous accrued personal leave entitlements provides some detriment – employee was employed for less than two years by applicant and could only have had limited personal leave entitlement in any case – employee received payout of annual leave including leave loading which would otherwise only have been available when leave was taken – employee raised concern about remaining in ongoing employment, as he was initially employed by new employer on a six-month trial period – remaining in ongoing employment will always be a concern for any employee – satisfied it is ‘acceptable employment’ – satisfied applicant should be relieved of any obligation to make redundancy payment – order issued.

Ryans Freight Trust t/a Ryans Freighters v Timms

31 CONDITIONS OF EMPLOYMENT – redundancy – s.120 Fair Work Act 2009 – application to vary redundancy pay – whether applicant obtained other acceptable employment for employee –
Derole Nominees and Datacom considered – circumstances leading to employee’s redundancy stemmed from outsourcing of part of applicant’s operations – applicant’s submissions outlined degree of cooperation between the two businesses and involvement of the employees in those processes – satisfied applicant had been a strong moving force in enabling its former employees to obtain work with new employer on same terms and conditions – fact that new employer did not recognise previous accrued personal leave entitlements provides some detriment – employee received payout of annual leave including leave loading which would otherwise only have been available when leave was taken – employee raised concern about remaining in ongoing employment, as he was initially employed by new employer on a six-month trial period – remaining in ongoing employment will always be a concern for any employee – satisfied in all the circumstances applicant obtained other employment for employee – satisfied it is ‘acceptable employment’ – satisfied applicant should be relieved of any obligation to make redundancy payment – order issued.

Ryans Freight Trust t/a Ryans Freighters v Campbell

C2014/7580 [2014] FWC 8901
Gregory C Melbourne 12 December 2014

TERMINATION OF EMPLOYMENT – performance – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objection that applicant had not met minimum employment period decided in favour of applicant – applicant had prior service with previous owner of business (WAS) – applicant had not been informed before new employment that previous service with WAS would not be recognised – merits of application – applicant dismissed for unsatisfactory performance – respondent’s concerns extensive – entitled to set standards for business – standards such that applicant unable to achieve them even with previous experience – Commission held that more likely than not, this was a case where applicant’s aptitude for reasonable performance standard required and his core competencies ill-suited to continued employment – valid reason – respondent did not warn applicant about unsatisfactory performance issues or risk to continued employment – size of business and lack of dedicated human resources experience impacted on procedures – fair go not given – Commission satisfied dismissal harsh, unjust or unreasonable – reinstatement inappropriate – compensation awarded.

Traill v Wrights Contractor P/L

U2014/8425 [2014] FWC 8786
Johns C Melbourne 10 December 2014

ANTI-BULLYING – consideration of past action – s.789FC Fair Work Act 2009 – application for order to stop bullying – applicant argued that she was bullied by a colleague and the Centre Director – applicant argued that her colleague had yelled at her and inappropriately questioned her about her other colleagues – Commission found that although the parties may not have liked each other and may have been mutually hostile towards each other, the actions did not amount to bullying – found that the
colleague may have exhibited intolerance or low-level anger but it
did not constitute unreasonable behaviour under the legislation –
Commission stated that if Centre Director provided a warning
after failing to accord fair procedure, the finding could have been
different – application dismissed.

Ms YH v Centre and Ors

AB2014/1146
Wilson C
Melbourne

[2014] FWC 8905
11 December 2014
Websites of Interest

**AUSTLII** - [www.austlii.edu.au](http://www.austlii.edu.au) - a legal site including legislation, treaties and decisions of courts and tribunals.


**Fair Work Commission** (FWC) - [www.fwc.gov.au](http://www.fwc.gov.au) - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

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


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 -
### Fair Work Commission Addresses

<table>
<thead>
<tr>
<th><strong>Australian Capital Territory</strong></th>
<th><strong>Northern Territory</strong></th>
<th><strong>New South Wales</strong></th>
<th><strong>South Australia</strong></th>
<th><strong>Tasmania</strong></th>
<th><strong>Victoria</strong></th>
<th><strong>Western Australia</strong></th>
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<td>2nd Floor, CML Building 17-21 University Avenue Canberra 2600 GPO Box 539 Canberra City 2601 Tel: (02) 6209 2400 Fax: (02) 6247 9774 Out of hrs emergency: 0419 318 011 Email: <a href="mailto:canberra@fwc.gov.au">canberra@fwc.gov.au</a></td>
<td>10th Floor, Northern Territory House 22 Mitchell Street Darwin 0800 GPO Box 969 Darwin 0801 Tel: (08) 8936 2800 Fax: (08) 8936 2820 Out of hrs emergency: 0418 563 601 Email: <a href="mailto:darwin@fwc.gov.au">darwin@fwc.gov.au</a></td>
<td>Sydney Level 8, Terrace Tower 80 William Street East Sydney 2011 Tel: (02) 8374 6666 Fax: (02) 9380 6990 Out of hrs emergency: 0419 318 011 Email: <a href="mailto:sydney@fwc.gov.au">sydney@fwc.gov.au</a></td>
<td>Level 6, Riverside Centre North Terrace Adelaide 5000 PO Box 8072 Station Arcade 5000 Tel: (08) 8308 9863 Fax: (08) 8308 9864 Out of hrs emergency: 0419 563 601 Email: <a href="mailto:adelaide@fwc.gov.au">adelaide@fwc.gov.au</a></td>
<td>1st Floor, Commonwealth Law Courts 39-41 Davey Street Hobart 7000 GPO Box 1232M Hobart 7001 Tel: (03) 6214 0200 Fax: (03) 6214 0202 Out of hrs emergency: 0418 124 021 Email: <a href="mailto:hobart@fwc.gov.au">hobart@fwc.gov.au</a></td>
<td>Level 4, 11 Exhibition Street Melbourne 3000 GPO Box 1994 Melbourne 3001 Tel: (03) 8661 7777 Fax: (03) 9655 0401 Out of hrs emergency: 0419 960 157 Email: <a href="mailto:melbourne@fwc.gov.au">melbourne@fwc.gov.au</a></td>
<td>Floor 16, 111 St Georges Terrace Perth 6000 GPO Box X2206 Perth 6001 Tel: (08) 9464 5172 Fax: (08) 9464 5171 Out of hrs emergency: 0448 275 936 Email: <a href="mailto:perth@fwc.gov.au">perth@fwc.gov.au</a></td>
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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: FWCsubscriptions@fwc.gov.au.

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