

FWC Bulletin

31 March 2022 Volume 12/22 with selected Decision Summaries for the week ending Friday, 25 March 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, 25 March 2022.

- 1** TERMINATION OF EMPLOYMENT – contractor or employee – ss.380, 394 Fair Work Act 2009 – unfair dismissal application – applicant alleged he was dismissed in November 2021 – respondent raised jurisdictional objection alleging applicant was a contractor not an employee at the date of alleged dismissal – applicant and respondent entered into joint venture agreement on 24 January 2020 for a new business entity to be created and for applicant to be employed by that entity if prospective client was secured – applicant began work on project in South Australia in February 2020 and respondent paid for services by invoice – applicant travelled between South Australia and Queensland to work – proof of work required for applicant to enter South Australia during COVID-19 pandemic – applicant relied on unsigned email stating that applicant was employed by respondent to enter South Australia – respondent disputed its authenticity – prospective client not secured for joint venture – respondent suspended applicant's services in November 2021 – respondent submitted applicant was a contractor until joint venture commenced and joint venture did not commence – applicant contended that he worked as an employee under the same terms of that the agreement contemplated once the joint venture commenced – Commission noted approach in *Jamsek and Personnel Contracting* modified former approaches to distinguishing between contractors and employees – considered whether terms of agreement created employment relationship for work undertaken before intended joint venture commenced – noted that agreement was a contract for sale and purchase of services associated with intended business venture – noted that agreement was conditional on business entity being created through which joint venture would operate and that did not occur – Commission concluded that applicant was seeking to give effect to terms of the agreement but was not working as an employee under that agreement – Commission considered relationship in practice – held that applicant worked primarily to give effect to joint business venture and that was indicative of work as a contractor – Commission concluded that applicant was acting on this own behalf and no contract of employment existed – found applicant was working as a contractor not an employee at the date of alleged dismissal – jurisdictional objection upheld – application dismissed.

Waring v Hage Retail P/L

U2021/10835
Anderson DP

Adelaide

[\[2022\] FWC 540](#)
23 March 2022

2 CASE PROCEDURES – apprehension of bias – recusal – s.394 Fair Work Act 2009 – 2 applicants made unfair dismissal applications against the same respondent – on 21 March 2022, the Commission Member dealing with the applications disclosed to the parties that he was appointed to the Commission in March 2017 and prior to that, between 2008 and 2015, he was a director of a not-for-profit called Australian Made Campaign Limited (company) – during that period, Mr Cooper of Coopers Brewery Limited (the respondent in these proceedings) was also a director of the company and was its chairman when the Commission Member left the board of the company in early 2015 – in 2014, the respondent donated some beer (to an approximate value of \$200) to a fundraising auction conducted by the Commission Member – since leaving the company's board, the Commission Member, in his capacity as a former board member, met Mr Cooper at a function in about 2018 and another function in 2021 – the Commission Member said that he did not have any personal association with Mr Cooper or persons associated with the respondent other than in the aforementioned professional capacity and has no pecuniary or other interest in the respondent's business – parties were directed to notify the Commission if they had any concerns – the applicants' legal representative responded that while he did not suggest any actual bias, the disclosures gave rise to a reasonable apprehension of bias – respondent's representative was content for the Commission Member to continue dealing with the applications on the basis that the disclosures were not related to the respondent's business or any issues in dispute in these proceedings – Commission noted that Members have an active obligation to make relevant disclosures and must recuse themselves if circumstances objectively support a finding of actual or apprehended bias [*Ebner*] – the test for apprehended bias is whether a 'hypothetical fair-minded lay observer appraised of the relevant facts might reasonably apprehend that the Member might not bring an impartial mind to the determinations of proceedings' – if a Commission Member, prior to their appointment to the Commission, sat on the board of a non-profit company and a person associated with another company also sat on that board and, years later, that other company was a respondent in proceedings before the Member, there would not, without more, be apprehended bias – Commission noted that it would not consider the test for recusal was made out merely if the Commission Member had sat on the board of the company and a senior officer of the respondent had also sat on that same board at that time – in such a scenario, there would be no relevant interest in the respondent and no relationship with an officer of the respondent other than a 'past professional and arms-length association arising from independently made board appointments' – however in the present case, the Commission Member had in the past accepted, in his personal capacity, a gift from the respondent – the fact that 'the gift was a donation made more than seven years ago, was put to the benefit of a registered charity and was an in-kind donation of small dollar value is relevant but does not change its essential character' – Commission Member considered it appropriate to recuse himself from further dealing with the applicants' applications – applications to be referred for re-allocation

Jovicic and Anor v Coopers Brewery Limited

U2022/1663 and Anor
Anderson DP

Adelaide

[\[2022\] FWC 659](#)
25 March 2022

3 TERMINATION OF EMPLOYMENT - incapacity - inherent requirements - mandatory vaccination - ss.385, 388, 394 Fair Work Act 2009 - applicant was a sales consultant for the respondent's real estate agency - she was dismissed after failing to provide evidence she had been vaccinated against COVID-19 - Victorian Government issued public health direction which required employers to collect vaccination information about any worker who was or may work outside their homes and prohibited workers from attending the workplace unless they provided evidence of vaccination or were exempt because they had a certificate showing medical contraindication - applicant did not have an exemption - on 13 October 2021, respondent asked employees to provide evidence of vaccination status by 21 October - on 14 October, applicant told respondent's managing director that she would not provide vaccination information - respondent scheduled an online meeting for 15 October - at the meeting, it was agreed that applicant would take leave without pay - on 20 October, respondent sent applicant a letter which stated that requiring all employees to comply with the public health direction was a lawful and reasonable direction, compliance was also an inherent requirement of her role, and failure to comply would result in termination of her employment - on 21 October the parties attended another online meeting, where respondent asked applicant how all of her duties could be done from home - applicant replied that there would need to be an interim period with a 'different working situation' and asked if there were options other than termination - respondent said it would seek advice - on 22 October respondent sent applicant a letter advising that her employment was terminated - Commission noted that a dismissal cannot be unfair if a small business employer as defined under s.23 of the FW Act complies with the Small Business Fair Dismissal Code (Code) - for a non-summary dismissal the employer must warn the employee that they are at risk of being dismissed due to a valid reason based on their conduct or capacity and give the employee an opportunity to respond to the warning and rectify the problem - Commission found applicant was given a valid reason in the 20 October letter and was warned on several occasions that she was at risk of being dismissed - rejected applicant's argument that because she had worked from home during lockdown and performed sales work including appraisals at this time, she should have been allowed to work from home again - Commission found the lockdown was an exceptional situation that has now been lifted and the respondent's offices were open, as were the offices of the respondent's competitors - Commission accepted respondent's evidence that the core elements of applicant's role required her to attend the workplace - it was reasonable of respondent to expect applicant to do all of her job properly, especially her core duties, after the lockdown was lifted - applicant decided not to provide proof of vaccination and rendered herself unable to do her job - respondent had a valid reason for dismissing applicant that related to her capacity - applicant was given ample time to respond to the warnings and rectify the issue by providing proof of vaccination but chose not to - respondent complied with Code - even if respondent had not complied with the Code, Commission would have found applicant's dismissal was not unfair - applicant had a support person with her at the 21 October meeting - applicant contended she was treated differently from another employee who was unvaccinated but was not dismissed and was allowed to work from home - Commission accepted respondent's

evidence that the other employee's role was to assist managing director in administering day to day affairs and that employee could perform her duties from home – the other employee was also undertaking a licensed estate agent traineeship – any involvement the other employee had in selling properties was in her capacity as a trainee and she was not able to perform the same duties as the applicant – in relation to applicant's argument that her dismissal was unfair because respondent did not provide any alternative, such as working on reduced hours, Commission noted that applicant was employed to work full-time as a sales consultant – respondent needed its senior salesperson 'at work and in the field, not at home on restricted duties' – applicant's dismissal was consistent with the Code – application dismissed

Pope v Bacchus Marsh Realty P/L

U2021/9856
Colman DP

Melbourne

[\[2022\] FWC 619](#)
21 March 2022

- 4** TERMINATION OF EMPLOYMENT – misconduct – breach of duty of fidelity – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant was a trainer and assessor – applicant's husband previously worked for respondent – applicant commenced a period of parental leave during which she was made the CEO of her husband's newly created training business – new business was direct competitor to respondent – applicant commenced process to resign as CEO and contended no competitive work took place during her tenure – respondent dismissed applicant for serious misconduct as she did not declare a conflict of interest – respondent cited clause in employment contract and Code of Conduct – applicant had signed Code of Conduct – applicant contested validity of contract, suggesting it was never agreed to and was not valid – Commission found the applicant was involved in developing a competitor business whilst employed by respondent – forensic analysis of laptop showed documents created for competitor business whilst employed by respondent – found the respondent faced a risk given the applicant had access to its business documents and intellectual property while creating a competitor business – Commission did not determine which employment contract was binding on parties – found significant breach of Code of Conduct as applicant had not immediately disclosed the potential/actual or perceived conflict of interest – common law duties of loyalty and fidelity fundamental to employment relationship and implied into employment contract – cited *Adidem P/L t/a The Body Shop v Suckling* – held the fact that as CEO the applicant had not performed work for the competitor was immaterial; she was the CEO of a competitor and this is fundamentally at odds with the employment relationship and her common law duties – held valid reason for dismissal and dismissal not unfair – application dismissed.

Moniz v E I M Training P/L

U2021/10191
Lake DP

Brisbane

[\[2022\] FWC 640](#)
23 March 2022

- 5** GENERAL PROTECTIONS – contractor or employee – ss.365, 386, 394 Fair Work Act 2009 – respondent operates building and construction company – applicant 1 and applicant 2 performed work for the respondent, including selling building contracts –
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applicant 1 filed a general protections application involving dismissal under s.365 of the Fair Work Act – applicant 2 filed an application for an unfair dismissal remedy under s.394 – applicant 2 was sole director and shareholder of company (Jamrok) who performed work for the respondent's benefit, pursuant to an agreement between Jamrok and the respondent (Jamrok Agreement) – respondent raised jurisdictional objections that applicants 1 and 2 were not employees – respondent contended both applicants were agents of Jamrok who had performed work for the respondent's benefit on Jamrok's behalf – Commission considered nature of employment relationship – rights and obligations of the parties in accordance with orthodox principles of contractual construction – where relationship comprehensively committed to written contract, relationship characterised by that contract [*CFMMEU v Personnel Contracting*] – applying this to applicant 1, Commission found the Jamrok Agreement comprehensively set down the terms of the relationship – applicant 1 contended Jamrok Agreement was a sham – Commission considered meaning of 'sham' – claims of sham cannot be made by stealth under the guise of a search for the 'reality' of the situation [*ZG Operations v Jamsek*] – Commission found applicant 1 had not sought to challenge the Jamrok Agreement as a sham under the general law or statute – found no other evidence to suggest respondent made any statement it knew was false to influence applicant 1 to enter into the Jamrok Agreement – Commission concluded Jamrok Agreement not a sham – Commission found subsequent conduct of parties consistent with Jamrok Agreement – concluded the parties to the Jamrok Agreement were Jamrok and the respondent – found no contract of employment between applicant 1 and the respondent – Commission considered whether applicant 2 was contractor – observed there was no written contract between applicant 2 and respondent – appropriate to consider the totality of relationship where parties have not committed terms of their relationship to a written contract [*CFMMEU v Personnel Contracting*] – accepted evidence that payments made to Jamrok, not applicant 2 personally – considered respondent's right to exercise control over applicant 2 – observed focus of enquiry is on the existence of the right, rather than its actuality [*CFMMEU v Personnel Contracting*] – found right to exercise control was limited – surveying the totality of relationship between applicant 2 and the respondent, Commission not satisfied applicant 2 was an employee of the respondent – applicant 1's s.365 application was dismissed – applicant 2's s.394 application was dismissed.

Chambers and Anor v Broadway Homes P/L

C2021/3763 and Anor
Williams C

Perth

[\[2022\] FWC 332](#)
24 March 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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