FWC Bulletin

31 July 2014 Volume 30/14 with the Decision Summaries for the week ending Friday, 25 July 2014.

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Promoting productive enterprise agreements project
The Fair Work Commission is inviting all employers, employees and their representatives to submit enterprise agreement clauses that they believe are productivity enhancing or innovative to be considered for inclusion in a Commission research project.

A selection of submitted clauses, including findings from interviews with submitting parties, will be part of a report to be published by the Fair Work Commission this year.

To participate, the relevant clauses (or the entire agreement with the relevant clauses clearly identified) should be submitted via the online nomination form by 8 August 2014. More information is available on the Fair Work Commission website.

2014 Workplace Relations Education Series, lecture, mock hearing
The August events in the Commission’s 2014 Workplace Relations Education Series will be held in Perth.

For more information about the events please visit:

- the mock hearing at the Fair Work Commission in Perth on Tuesday, 12 August 2014
- the lecture by Professor Russell Lansbury, held at University of Western Australia on Wednesday, 13 August 2014.

For more information about the series go to the 2014 Workplace Relations Education Series page.

To sign up for updates about events and other engagement activities, visit the Subscribe to updates page.
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 July 2014.

1  MODERN AWARDS – award modernisation – Sch. 6, Item 4 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – application by Together Queensland, Industrial Union of Employees to make modern award to replace enterprise instrument (DHS Award) – wording of scope clause raises question whether DHS Award is an enterprise instrument – given conclusion reached in this decision no final view on this issue expressed – despite doubts about validity of application Full Bench considered factors in item 4(5) of Sch. 6 to TPCA Act and modern enterprise awards objective – DHS Award was not made as an enterprise award – Health Professionals and Support Services Award 2010 (Health Professionals Award) would apply (other than to employees in classifications that are generally award free) if modern enterprise award not made – no significant difference between respondent and other hospitals covered by Health Professionals Award to provide justification for continuing enterprise award approach – terms of DHS Award manifestly not of enterprise specific nature – enterprise agreement currently applies to affected employees – respondent gave undertaking regarding any applicable award entitlements while agreement is in place – unlikely that employees will be adversely affected by failure to make modern enterprise award – overall fairness and equity considerations, availability and utilisation of enterprise bargaining, scope of operations beyond public hospital function and desirability of simplicity and consistency in award safety net mean continuation of enterprise award is not necessary or of great utility – ongoing dispute as to application of public hospital terms and conditions by way of award coverage – this is best pursued in terms of agreements and/or in terms of the relevant industry award with broad application – case not made out to make modern enterprise award – application dismissed – DHS Award terminated at date of decision.

District Health Services Employees' Award – State 2003

Watson VP Melbourne 23 July 2014
Smith DP
Lee C

2  MODERN AWARDS – award modernisation – Sch. 5, Item 3 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – application by Australian, Municipal, Administrative, Clerical and Services Union (ASU) to make a modern enterprise award – cross-application by Carlson Wagonlit Australia P/L t/a Carlson Wagonlit Travel (CWT) to terminate transitional instrument – CWT opposed application to make modern enterprise award on ground that it was not an enterprise instrument – ASU
discontinued application to make modern enterprise award – ASU
did not oppose cross-application to terminate – satisfied
Traveland group was fragmented in 2009 – award does not apply
to a single enterprise – not an enterprise instrument –
Commission required to terminate any modernisable instruments
as soon as practicable after completion of award modernisation
process – instrument terminated given circumstances now
brought to Commission’s attention – order issued.

Travel Industry – Traveland/CMAT Award 1999

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3 **TERMINATION OF EMPLOYMENT – costs** – s.394, 400A, 611 Fair
Work Act 2009 – application for costs – unfair dismissal remedy
application dismissed [([2014] FWC 2646)] – found applicant
engaged as labour hire casual employee – respondent seeks
recovery of costs incurred in defending the claim on grounds that
the claim was made without reasonable cause, was vexatious and
had no reasonable prospect of success – matter at first instance
determined on evidence not known at time of application –
application for unfair dismissal not made without reasonable
cause, not vexatious or without reasonable prospect of success –
discretion to award costs not exercised – application dismissed.

Shelton v Ultra NDT atf The O & A Kavanagh Family Trust t/a Ultra NDT P/L

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<th>U2013/16351</th>
<th>Brisbane 22 July 2014</th>
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4 **INDUSTRIAL ACTION – order against industrial action** – s.418 Fair
Work Act 2009 – alleged industrial action occurring at the K1 RNA
Showgrounds site in Bowen Hills, Qld – activity on same site in
June addressed by Commission – no order made against CFMEU –
employees of Lend Lease and various sub contractors attended a
meeting conducted by a CFMEU organiser – following that meeting
employees withdrew their labour from the site – CFMEU concerned
about site access – Work Health and Safety and Other Legislation
Amendment Act 2014 (Qld) requires a permit holder to provide 24
hours notice in writing before they can enter a site – Lend Lease
contends there had been an increase in CFMEU site visitation and
repeated incidents of site entries without the required notice –
Lend Lease seeking orders that CFMEU be stopped from
organising industrial action that has yet to occur but which is
threatened, impending or probable (on the available evidence) –
concept of ‘organising’ not limited to unprotected industrial action –
scope of meaning of ‘to organise’ considered by the Queensland
Supreme Court in R v Alif; R v Amin; R v Zolmin – Commission
found order sought by Lend Lease jurisdictionally competent – at
time of hearing there was no industrial action happening – found
there is a probability that unprotected industrial action may occur
again in the future – order must be made – no finding that CFMEU
is organising unprotected industrial action that is happening, nor
in a prospective sense – given finding that there is a probability
that unprotected industrial action may again take place, an order
under s.418 FW Act must be made – order will cover or apply to
5

TERMINATION OF EMPLOYMENT – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – employer elected not to attend proceedings – applicant dismissed for absence from workplace – Commission satisfied employer was aware that absence was due to illness – no valid reason for dismissal – no notification of reason – no opportunity to respond – absence of dedicated human resource management – dismissal arose as direct consequence of illness – reinstatement not sought – compensation considered – no submissions on compensation criteria from employer – applicant had nine months left of apprenticeship – Commission found applicant would have at least completed apprenticeship – applicant has aggravated illness as result of dismissal and has been unable to secure further employment – 26 weeks’ pay awarded to applicant.

Preston v Hume Investments t/a Alpha Fresh Foods

U2014/3693 [2014] FWC 4903

Smith DP Melbourne 25 July 2014

6

TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed for breaching policy by failing to secure cash and attend rostered shift – applicant received final warning in terms that showed similar lack of care and diligence – issue for determination was whether applicant’s failure to attend rostered shift in combination with final warning was sound, defensible or well founded reason for dismissal connected to capacity or conduct of applicant – applicant was cavalier in her approach to rosters soon after previous disciplinary action – demonstrated lack of diligence regarding work requirements – was open to employer to consider final warning when considering whether to dismiss applicant – employer lost trust and confidence in capacity of applicant to be an effective employee – determined there was valid reason for dismissal – Commission found that there was differential treatment between applicant and another employee – applicant had received final warning whereas other employee had not – dismissal not harsh, unjust or unreasonable – application dismissed.

Punitam v The Salvation Army South Australia Property Trust t/a Salvos Stores

U2014/955 [2014] FWC 4929

Bartel DP Adelaide 24 July 2014

7

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute regarding termination of employment – payment during notice period – employee was on extended period of leave when employment was terminated due to inability to perform inherent requirements –
AWU submitted that at the time of employee’s termination employee was in receipt of 80% of his ordinary 38 hour week wage – employer paid for notice period that rate – AWU submitted that if employee was not on leave he would have been paid at the 50 hours per week rate plus an additional shift loading – employer submitted that provisions of the Act dealing with payment in lieu of notice do not apply payments for a notice period – found that if employee was fit for work during notice period the employer must pay difference between 38 hour week and 50 hour week plus loading – if employee was unable to work and had no accrued personal leave the employer need not may further payment – if employee was unfit for work but had accrued personal leave the employer must pay difference between 38 hour week and 50 hour week plus loading.

The Australian Workers' Union v Barro Group P/L

C2014/4212 [2014] FWC 4543
Lewin C Melbourne 25 July 2014

8 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant required to hold Top Secret security clearance – respondent made request for review of security clearance after a number of reports about applicant’s behaviour were determined a serious security concern – matter warranted more serious action than code of conduct process – following review the applicant’s security clearance was revoked – lower level of clearance not considered – future security clearance application cannot be considered for five years – applicant given opportunity to respond to decision to terminate employment – applicant’s employment subsequently terminated on the ground of the loss of an essential qualification – applicant contended behavioural concerns should have been dealt with in accordance with the APS Code of Conduct and Defence policies – that the security review process was misused to deny protections attached with code of conduct matters and avoid unfair dismissal processes – that the termination was predetermined – that dismissal letters were an attempt to coerce the applicant to resign – Commission satisfied the security concerns were of paramount importance and in the circumstances Code of Conduct process was unnecessary – satisfied valid reason for dismissal – security clearance an essential requirement for employment – satisfied termination was not harsh, unjust or unreasonable – application dismissed.

Applicant v Department of Defence

U2013/13307 [2014] FWC 4919
Deegan C Canberra 22 July 2014

9 TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – s.12 Foreign States Immunities Act 1985 – application for relief from unfair dismissal – respondent sent note concerning the matter to the Department of Foreign Affairs and Trade, copied to the Commission, advising that it did not submit to the jurisdiction of the Commission and would not be taking any further steps in the matter – hearing proceeded in the absence of the respondent – application lodged more than 21 days after dismissal (107 days after date respondent claims as date of
dismissal) – reasons for late lodgement included ill health (supported by medical certificates), limited ability to speak English, minimal capacity to read in Spanish and having her visa cancelled by the Embassy – Commission satisfied the combination of matters, with special reference to the applicant's visa status, amounts to exceptional circumstances – additional time for filing of application allowed – Commission noted however that ss.12(3) and 12(5) of Foreign States Immunities Act 1985 may present an insurmountable jurisdictional bar to further dealing with the application by the Commission.

Mori v Embassy of Peru

U2014/4658  
Deegan C  
Canberra  
25 July 2014

10 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed for failure to make sales budget, failure to show progress and not meeting expectation of improvement following two written warnings – applicant dismissed after eight months of formal and informal meetings – in response to employer’s concerns, applicant engaged in definitional issues, required clarification and made comparisons with other employees – lack of demonstrable effort led to employer issuing warnings – Commission satisfied employer had a sound and defensible reason to terminate employment – dismissal was not unfair – application dismissed.

Jurisic v ABB Australia P/L

U2013/15883  
Cloghan C  
Perth  
25 July 2014

11 TERMINATION OF EMPLOYMENT – remedy – ss.392, 394 Fair Work Act 2009 – application for relief from unfair dismissal – decision at first instance that applicant was unfairly dismissed and appropriate remedy was compensation [2014] FWC 4030 – further submissions requested regarding terms of s.392(2) – when dismissed, applicant paid $12,147.32 in lieu of notice and unused annual leave – had applicant not been dismissed he would have been eligible for a genuine redundancy payment – Commission determined the appropriate amount of compensation as $58,835.23 – compensation cap for the purposes of s.392(5) and (6) would be $58,540.04 – amount of compensation determined to be appropriate exceeds the compensation cap and therefore is reduced to the compensation cap of $58,540.04 – to be taxed as ETP.

Salazar v John Holland P/L t/a John Holland Aviation Services P/L

U2014/3774  
Ryan C  
Melbourne  
22 July 2014

12 ENTERPRISE AGREEMENTS – varying agreement – ambiguity or uncertainty – s.217 Fair Work Act 2009 – application by Uniting Church in Australia Synod of Victoria and Tasmania, Commission for Mission, Uniting Church Camping Unit – a clause of the
enterprise agreement made provision for an annual incremental increase of 2% – pay rates set out in a schedule of the agreement – amounts in schedule contained a 2.5% increase for number of the incremental increases – relevant principles in Beltana Highway Mining considered – Commission found uncertainty as to whether employees are to be paid in accordance with the 2% increase or in accordance with rates set out in schedule – additional uncertainty in relation to specific employees not made out – agreement varied to correct schedule of rates in accordance with 2% increase.

Uniting Church Camping Lay Staff Collective Employment Agreement 2013

AG2014/1649 Melbourne [2014] FWCA 4862
Roe C 22 July 2014

13 CASE PROCEDURES – confidentiality – anti-bullying – ss.593, 789FC Fair Work Act 2009 – respondent in anti-bullying matter made application that parties be de-identified – argued publication not conducive to good governance – anti-bullying applicant opposed respondent’s application – in previous cases no detailed reasons given for de-identifying parties – appeared de-identification not contested – principle of open justice considered – necessary to balance open justice principle against effects of identification on ongoing employment relationship – mere embarrassment, distress or damage by publicity not sufficient basis to grant respondent application [Smidmore] – airing employer’s performance management system may lead to greater confidence in system – identification at this time would be limited to applicant – hearing list will not identify respondent – decision does not preclude further application being made as matter proceeds.

Corfield

AB2014/1113 Melbourne [2014] FWC 4887
Bissett C 21 July 2014

14 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent had some concerns over safety issues and safety records – applicant responded to issues raised – applicant dismissed following response – Commission found responses could have been more fulsome but overall satisfied most issues raised – termination letter disconnected from issues raised – Commission not satisfied that manner of applicant’s response or paperwork errors provided a valid reason for dismissal in the circumstances – dismissal harsh, unjust, unreasonable – evidence of breakdown of employment relationship – compensation ordered.

Stewart v Riverside Marine Gladstone P/L

U2014/4066 Brisbane [2014] FWC 3898
Simpson C 25 July 2014

15 TERMINATION OF EMPLOYMENT – performance – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed due to breach of safety policies,
procedures and regulations – applicant also on performance improvement plan following previous breaches of same nature – satisfied of valid reason for termination – support person not denied however prohibition on their participation inappropriate and misguided – respondent a large employer with dedicated HR expertise – investigation by respondent deficient but not fatally flawed – applicant’s length of service and personal circumstances taken into account – applicant had not sought alternative employment since dismissal – applicant’s decision to bypass safety car unacceptable – applicant showed reckless indifference to safety of fellow employees – performance improvement plan went to issue of applicant being conscious of surroundings – incident showed applicant had taken no notice of that performance improvement plan requirement – applicant did not have clean performance record – repeated breaches of safety policies by applicant put respondent’s statutory obligation to provide a safe workplace at an unnecessary risk – applicant did not fulfil obligation to safety – applicant exhausted his ‘fair go’ – dismissal not harsh, unjust or unreasonable – application dismissed.

Gomes v Qantas Airways Limited t/a Qantas

U2014/4055
Riordan C
Sydney
23 July 2014

16 TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application lodged two days late – applicant suffering medical condition – medical certificates provided – Nulty considered – Commission found applicant’s illness an intervening factor which stalled the application process – exceptional circumstances exist – extension of time granted.

Monk v Careers Australia College of Healthcare P/L

U2014/6710
Riordan C
Sydney
24 July 2014

17 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute related to company proposal to install inward and outward facing camera and audio systems into its vehicles – union opposed to inward facing cameras being installed – alleged cameras will invade privacy of drivers, will not increase safety and may be used for disciplinary reasons against drivers – Commission satisfied there are no legal or contractual barriers that prevent Toll doing what it proposes – Commission satisfied system can contribute to better safety outcomes and should be considered by parties in that context – any proposal to install the system should only occur after employees have been provided with structured training about operation of system and guidelines that apply to its use – this should occur before the employees required or expected to drive a vehicle with system in place.

Toll North P/L; Toll Transport P/L v Transport Workers' Union of Australia

C2013/6851
Gregory C
Melbourne
22 July 2014
TERMINATION OF EMPLOYMENT – costs – ss.394, 400A, 611 Fair Work Act 2009 – application for costs order against applicant in unfair dismissal matter – application for unfair dismissal dismissed [2014] FWC 2481 – application for costs incurred by respondent in defending unfair dismissal application – applicant in dismissal matter rejected offer of settlement in conciliation – difference between contingent entitlements an employee would have received and amount offered as settlement may be so great as to make it reasonable for applicant to refuse offer, notwithstanding applicant’s prospects of success only modest or even poor [Brazillian Butterfly] – settlement made in conciliation cannot be relied upon on question of costs [I McKenzie] – refusal to accept settlement offer in conciliation cannot be treated as an unreasonable act or omission for purposes of s.400A(1) – whether a ‘reasonable person’ would have rejected settlement offer – Commission in dismissal matter determined applicant’s conduct was not ‘out of hours’ conduct – applicant had more than reasonable prospects of being reinstated if his argument in relation to ‘out of hours’ conduct had succeeded – although applicant lost on all counts that does not mean his case was without merit – Commission not satisfied applicant acted unreasonably in rejecting settlement offer – applicant’s continuing assertion of authorisation to remain in rent-free accommodation resulted in respondent being required to call witness evidence to rebut it – Commission allowed respondent’s application for costs in relation to witness evidence and attendance at hearing – parties directed to confer about quantum of costs and submit draft order to be issued by consent – failing agreement, matter will be relisted for submissions on issue of costs.

Bradshaw v BHP Coal P/L

U2013/11809                [2014] FWC 4871
Johns C                  Sydney           23 July 2014

TERMINATION OF EMPLOYMENT – contractor or employee – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected to the application on jurisdictional grounds and asserted that at all times applicant was a contractor and not an employee – Commission considered French Accent – based on indicia determined by Full Bench in French Accent the Commission found substantive nature of the relationship between the applicant and respondent was one of principal and contractor – applicant not protected from unfair dismissal and not able to pursue application – application dismissed.

Spiers v Bodycraft Tattoo Belmont

U2014/4210                [2014] FWC 5009
Stanton C                  Newcastle       24 July 2014
Websites of Interest

**AUSTRLLI** - [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 -


range of online Australian legal information.

Western Australian Industrial Relations Commission -

Workplace Relations Act 2009 -
## Fair Work Commission Addresses

### Australian Capital Territory
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  - Newcastle, 2300

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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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