FWC Bulletin

4 February 2023 Volume 2/23 with selected Decision Summaries for the month ending Tuesday, 31 January 2023.

Contents

Publication of Modern Awards and other digital transformation projects

02 Feb 2023

Publishing modern awards

- Improvements we're making to our technology and cyber-security will change the way we do some things, including how we publish Modern Awards on our website.
- From **4 February 2023**, Awards will be published through our Document Search. You will be able to get there from the Find an award page on our website.
- You will still be able to:
- browse Modern Awards in alphabetical order
- navigate within each Award using a table of contents
- download a Word version of the Award
- copy and paste from the Award
- see the history of changes to each Award.
- You can watch this short video showing you how to navigate through the new versions of the Awards: Changing how we publish modern awards
- In the future, we'll begin to publish data from our Modern Awards Pay Database using graphs and dashboards, providing a visual representation of the information for the first time.
- We will continue to improve the way we publish Awards, and always welcome your feedback. We encourage you to email comments and suggestions to us at feedback@fwc.gov.au.

Other digital transformation initiatives

- Our Corporate Plan describes some of our key initiatives for 2022-23, which include a number of recent and planned projects aimed at improving access to justice while reducing regulatory burden and complexity.
- The genesis of these initiatives is independent client experience feedback and research that we have commissioned over recent years which identified opportunities to enhance our services through user-centred design.
- These initiatives are part of our ongoing commitment to transform the services we deliver to the Australian community.

Modern Awards Pay Database API

- In 2020 we developed the Modern Awards Pay Database to provide public access to calculated minimum rates of pay, allowances, overtime and penalty rates contained within Modern Awards.
- We have worked with payroll software companies, employer and employee peak bodies and government departments and agencies to co-design an Application Programming Interface (API) for the Database.
- The API is a digital tool which will enable access to the Database's current and historical data in a digitally consumable format. It means that data can be

integrated into software products, such as accounting products, payroll systems and other pay tools.

New online learning modules

- A new online learning module will be released in early 2023 which will focus on preparing for unfair dismissal conciliations.
- Research (including Unfair dismissal: User-experience research) indicates that users are often anxious, experience significant cognitive load, and find it challenging to prepare effectively for conciliations. The purpose of the module is to address such issues by providing practical information and targeted exercises to support preparation, with a focus on the needs of self-represented parties and small business.
- Our Online Learning Portal and Interest-Based Bargaining learning modules were successfully launched in February 2022. We also released a Sexual Harassment online learning module in December 2022. The module is a helpful resource for employers and employees to improve general awareness and understanding of sexual harassment at work, including about the Commission's jurisdiction.

New online smart forms – Form F2 and Form F3 (unfair dismissal)

- We are developing digitised smart forms for our most frequent application types, to help applicants, respondents, and their representatives by guiding them to provide all necessary information required for a complete application.
- The forms have been designed and tested by a range of users, including small businesses. We are aiming to launch the unfair dismissal application form (Form F2) soon, closely followed by the response form (Form F3).
- Online smart forms for other matter types will follow throughout the year.

Online portal for managing cases

- We are working on the design for an online user portal, which will empower parties to manage their application once it has been lodged.
- The portal will help users start online and stay online, with functionality to access case documents, upload correspondence and view important upcoming dates. We are working to launch the portal this year.

Unfair dismissal extension of time animations

- Two short animations about the statutory timeframe for lodging unfair dismissal cases will be released on our website after engagement with key stakeholders is finalised in the coming weeks.
- The purpose of the animations is to help users unfamiliar with our processes, including self-represented applicants and small businesses, by providing access to the right information, at the right time, in the right format. These animations are intended to be the first in a series of short mobile-friendly videos about a range of specific issues.

Enhancing information about our processes and timeliness

- On 1 January 2023, we launched a new suite of correspondence for most major case types to provide parties with more detailed information about the case management process and timeframes for each step.
- Applicants will be provided with this information within 3 days of lodging their application.
- We have undertaken this initiative in response to user experience research highlighting the importance of providing parties with meaningful information about their case from the outset, to promote transparency and accountability.
- Further information about these digital initiatives, and other capability-enhancing projects, will be made available in the coming months.
- If you wish to find out more, please email us at communications@fwc.gov.au.

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 month ending Tuesday, 31 January 2023.

1 TERMINATION OF EMPLOYMENT – high income threshold – ss.382, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appellant lodged appeal against jurisdictional decision of the Commission in relation to an unfair dismissal application made by an employee who commenced employment in November 2019 – at the time the employee was dismissed in July 2021, the high income threshold for the purposes of s.382(b)(iii) was $158,500 – Full Bench concluded that the appeal raised questions of general importance and significance to the Commission's unfair dismissal jurisdiction, especially the proper construction and application of ss.382(b)(iii) and 332 of the Fair Work Act and the approach to working out the sum of a person's annual earnings to determine if they are less than the high income threshold – permission to appeal granted – in relation to s.382(b)(iii), the time at which the annual rate of earnings must be ascertained is at the time of termination of the person's employment [*Zappia*] – what needs to be ascertained is the annual rate of earnings 'at' that time', not the annual rate of earnings 'to' that time [*Zappia*] – Full Bench accepted that 'amounts that have not been paid at the point an employee is dismissed may be considered as earnings for the purpose of the high income threshold, provided those amounts came within…s.332(1) and are payments, the amount of which can be determined in advance' – Full Bench held that for an amount to be included in the sum of an employee's annual earnings, 'amounts must be such that the entitlement of the employee to the amount is not reasonably able to be contested or is uncontested by the employer or is not contingent on an event or circumstance that is not certain' – where it is reasonably arguable that an employee is not entitled to an amount within s.332(1), the amount is not earnings for the purposes of the high income threshold – Full Bench did 'not accept that the mere fact an employer has made a concession that an amount is payable so that the employer may be estopped from denying the entitlement of the employee to the payment of the amount in a court, is sufficient to require the inclusion of the amount in the sum of the employee's annual earnings' – Full Bench rejected appellant's contention that at the time the employee was dismissed, he was entitled to an annual salary of $170,000 excluding superannuation (which would be above the high income threshold) – Full Bench concluded there was no binding contract for payment of that amount when employment commenced – employee's evidence was that he did not see the written contract until late 2020 or early 2021, when appellant sent it to him – Full Bench found no evidence to contradict employee on this point – prior to receiving the written contract, employee's understanding was that the salary excluded superannuation – employee managed appellant's bank accounts and paid himself according to his understanding – the written contract subsequently signed by the employee and the appellant states that the annual salary is inclusive of superannuation – Full Bench found that there was no contract of

employment entitling the employee to be paid $170,000 per annum exclusive of superannuation – the contract of employment was the written contract signed in January 2021 which confirmed the oral agreement that was in place (except that the written contract varied the employee's salary and his superannuation by stating that his salary was inclusive of superannuation instead of exclusive of superannuation) – permission to appeal granted – appeal dismissed – a Full Bench will proceed to determine appellant's appeal against the Commission's merits decision that the employee was unfairly dismissed. .

Appeal by Low Latency Media P/L t/a Frameplay, Frameplay Holdings Corporation against decision of Yilmaz C of 28 October 2021 [[2021] FWC 6152] Re: Rossi

C2022/6140 [2023] FWCFB 14
Catanzariti VP Sydney 24 January 2023
Asbury DP
Lake DP

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2 REGISTERED ORGANISATIONS – amalgamation – ballot – ss.94, 100 Fair Work (Registered Organisations) Act 2009 – Full Bench – Maritime Union of Australia (MUA) and Textile, Clothing and Footwear Union of Australia (TCFUA) deregistered in March 2018 – deregistration part of scheme to amalgamate with Construction, Forestry, Mining and Energy Union (CFMEU) – three unions amalgamated in 2018 to form Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU) – former TCFUA members merged into pre-existing Forestry, Furnishing, Building Products and Manufacturing Division (FPPD or Manufacturing Division) of CFMMEU – Mr O'Connor applied under Fair Work (Registered Organisations) Act (RO Act) in September 2022 for a secret ballot concerning whether Manufacturing Division should withdraw from CFMMEU – CFMMEU opposed application – jurisdictional objection – CFMMEU contended TCFUA amalgamation altered composition of pre-existing Manufacturing Division rather than Manufacturing Division becoming part of CFMMEU as required by s.94(1) (RO Act) – Mr O'Connor contended Manufacturing Division was separately identifiable constituent part of CFMMEU and it exists as a result of 2018 amalgamation with the TCFUA – history of CFMEU and constituent bodies considered – effect of TCFUA amalgamation into FPPD considered – held rule alterations and structural changes to FPPD rules almost entirely made to accommodate TCFUA membership – application for secret ballot to decide whether a constituent part of amalgamated organisation can be made if, inter alia, the constituent part became part of the organisation as a result of an amalgamation: s.94(1) RO Act – held Manufacturing Division is a separately identifiable constituent part as defined in the RO Act – issue for determination whether Manufacturing Division became part of CFMMEU as a result of 2018 amalgamation – Mr O'Connor contended Manufacturing Division did result from the 2018 amalgamation as evidenced by changes to rules, structure and governance of FPPD – Full Bench held Manufacturing Division did not become part of CFMMEU as a result of 2018 amalgamation – held not all separately identifiable constituent parts are able to apply for secret ballot to withdraw due to other conditions in s.94(1) RO Act – held phrase 'as a result of' connotes constituent part becoming part of amalgamated organisation because of or as a result of the particular amalgamation and that this applies to the whole constituent part and not some element of constituent part – found parts of Manufacturing Division had been part of CFMEU since

amalgamation of Building Workers Industrial Union of Australia and Australian Timber and Allied Industries Union in the early 1990s – 2018 amalgamation merged TCFUA into pre-existing Manufacturing Division rather than created a new division – observed same finding would not be made regarding MUA's amalgamation as the Maritime Union of Australia Division became part of CFMMEU as a result of 2018 amalgamation – observed changes made to Manufacturing Division in 2018 amalgamation conducted on basis that the division would continue unaffected except that it would also cover textile, clothing and footwear industry arrangements with expanded members and officers – it was open to create a new division as part of 2018 amalgamation but scheme drafters opted to expand membership of an existing division – held FPPD was modified and renamed as a result of 2018 amalgamation but did not become part of amalgamated organisation as a result of 2018 amalgamation because it was already a constituent part of that organisation – application dismissed.

Application by O'Connor for withdrawal form amalgamated organisation

D2022/11 [2023] FWCFB 8
Hatcher AP Sydney 13 January 2023
Gostencnik DP
Masson DP

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3 TERMINATION OF EMPLOYMENT – valid reason – consultation – ss.387, 394 Fair Work Act 2009 – applications for unfair dismissal made by 25 former employees of DP World Sydney Limited (DP World Sydney) and DP World Brisbane P/L (DP World Brisbane) (collectively, the Respondents/DP World/Company) – Respondents are subsidiary companies wholly owned by DP World Australia Limited (DP World) – DP World is the holding company of a national container stevedoring business which operates at 4 different shipping container terminals in Sydney, Brisbane, Melbourne and Fremantle with each terminal operated by a separate and wholly owned subsidiary – from 21 October 2021, the *DP World Australia COVID-19 Vaccination Mandate* (Mandate) was adopted, requiring that employees be vaccinated against COVID-19 by dates specified in the Mandate, which varied, depending on their location – employees were also required to inform DP World of their vaccination status and provide evidence of this – each of the Applicants was dismissed for non-compliance with the Mandate – this decision concerns only the question of whether, as provided in the statutory criterion in s.387(a) of the FW Act, there was a valid reason for the dismissal of the Applicants – the Construction, Forestry, Maritime, Mining and Energy Union – Maritime Union of Australia Division (MUA) represented 22 Applicants – 4 of the Applicants were self-represented – the Applicants represented by the MUA contended that the Mandate was not reasonable direction because the Respondents failed to comply with consultation requirements in the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Act 2011* (Qld) (collectively the WHS Acts) – the MUA also contended on behalf of those it represented that the Respondents failed to comply with consultation requirements in relevant enterprise agreements concerning changes to workplace health and safety matters and that the Mandate was inconsistent with the intent of the Agreements – the MUA did not contend that the Respondents failed to meet obligations to consult under the general consultation provisions in the Agreements – the MUA

further contended that the Mandate was inconsistent with the provisions of the *Privacy Act 1988* (Cth) and that it infringed the rights of the represented Applicants to bodily integrity – these matters were said to 'buttress' the MUA's submission that the Mandate was not a reasonable direction – accordingly, a refusal on the part of the Applicants to comply with the Mandate was not a valid reason for dismissal – Central to that contention was the proposition that the decision of a Full Bench of the Commission in *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal P/L T/A Mt Arthur Coal* (Mt Arthur Coal) [[2021] FWCFB 6059] was dispositive of the issue for determination – The self-represented Applicants raised various additional issues relating to the lawfulness and reasonableness of the Mandate – these could be broadly categorised as: medical and scientific issues, going to the efficacy, effects and the approval of various vaccinations for use; legal issues said to arise under Australian and international law; and practical issues including the necessity of implementing the Mandate and whether other control measures could have been taken to mitigate the risks of COVID-19 to the Respondents' workforce – DP World contended that it properly adopted a requirement that all employees in stevedoring operations (among others) be fully vaccinated against COVID-19 by particular dates – each of the Applicants was dismissed following the adoption of the Vaccine Mandate because they: (a) either (i) indicated to their employer that they were not and would not be vaccinated against COVID-19; or (ii) would not advise whether they had been vaccinated; and (b) did not have a proper medical exemption – DP World submitted that the Mandate had 2 critical purposes – the first was to protect worker safety – the second, more specific to DP World's operations, was to protect operational continuity of DP World's stevedoring terminals – these terminals are a critical link in the Australian import/export supply chain, and their reduced or interrupted operation disrupts vessel transits and planned container exchanges – there was a clear public interest in these terminals continuing to operate without interruption, with sufficient labour to meet customer needs at all times – failure to comply with a requirement or policy imposed by an employer will 'often, if not usually' be a valid reason for dismissal, as a fundamental breach of the central duty implied in employment contracts (if not stated expressly) that employees must comply with the lawful and reasonable directions of their employer – failure to comply with a reasonable instruction or policy directed to the attainment of a safe workplace is therefore also a breach of both the relevant WHS Act and Enterprise Agreement – the allegation in this case by the Applicants was that DP World's Mandate was not a lawful and reasonable direction, and so the deliberate and knowing failure by the Applicants to comply with it was not a valid reason for dismissal – Commission held the Applicants were dismissed based on their conduct in failing to comply with the Mandate – noting however, the focus of the inquiry required by s.387(a) is whether, on the evidence provided, facts existed at the time a dismissal was carried out, that justified dismissal – *Hilder* considered – the question for determination in the present case was not simply whether the Mandate was a lawful and reasonable direction or whether the Applicants refused to comply with a lawful and reasonable direction – rather, the question required consideration of whether the refusal of the Applicants to comply with the Mandate was a matter of sufficient gravity to constitute a sound, defensible, well-founded, and therefore valid reason for dismissal – effect of the Full Bench decision in *Mt Arthur Coal* – the MUA's primary submission on behalf of the represented Applicants was that the

Full Bench decision in *Mt Arthur Coal* is dispositive in the present case and that if the Commission followed that decision, it was bound to find that there was not a valid reason for the dismissal of the Applicants with the result that 'DP World loses' – the Commission did not accept this submission – the decision in *Mt Arthur Coal* arose from an application under s.739 of the FW Act for the Commission to deal with a dispute arising under a dispute settlement procedure in an enterprise agreement – the issue for determination in *Mt Arthur Coal* and the statutory context in which it was determined, were fundamentally different to both the question the Commission was required to determine and the relevant statutory provisions governing the consideration of that question – the Full Bench in *Mt Arthur Coal* derived its powers to deal with the dispute from the dispute settlement procedure in the relevant enterprise agreement and was confined in its consideration to the question for determination agreed by the parties – the question for arbitration in that case was whether the Site Access Requirement (SAR) was a lawful and reasonable direction with respect to employees – the statutory provisions relevant to the issues to be determined in the present case do not confine the issue in this way – the question for the Commission in this matter was whether there was a valid reason for the dismissals of the Applicants – whilst the Commission is bound by Full Bench authority, and failure to follow it is an error, there are aspects of the findings in *Mt Arthur Coal* that are directly relevant and aspects that can be distinguished on the facts in the 2 cases – of particular relevance is that the factual findings about medical, scientific and epidemiological matters made by the Full Bench in *Mt Arthur Coal* were manifestly correct – those findings are not geographically or occupationally limited and have general application – the point at which the Full Bench made these factual findings is closely proximate to the dates the Applicants in the present case were dismissed – the Commission noted that these findings were not challenged on behalf of the represented Applicants and that to the contrary, the Commission was urged to accept the Full Bench Decision in *Mt Arthur Coal* in its entirety – accordingly, the Commission applied those factual findings in the present case – the Full Bench in *Mt Arthur Coal* concluded that the SAR was *prima facie* lawful – in this regard, the Mandate falls within the scope of the Applicants' employment and there was nothing illegal or unlawful about becoming vaccinated – secondly, but for the failure to comply with consultation obligations under the WHS Acts and any relevant provisions of the Enterprise Agreements, the Full Bench found that there were other considerations that weighed in favour of a finding that the SAR was reasonable – the Full Bench also in that case found that the content of a requirement to consult is determined by context and that circumstances may dictate a quick response and a truncated process – Commission held that in short, the Full Bench did not lay down a decision rule that a failure by an employer to consult or to comply with a requirement associated with the introduction of a workplace policy, will result in that policy being unreasonable for the purposes of deciding whether the policy is a lawful and reasonable direction with which employees are required to comply consistent with the duty described in *Darling Island Stevedores* and later cases – Consultation requirements under WHS Acts – the Commission accepted the submissions of the MUA on behalf of the represented Applicants that DP World did not comply with the consultation requirements under the WHS Acts – did not accept the MUA submission that if BHP did more than DP World and was found not to have complied, that *ipso facto* DP World did not comply – the content of any specific requirement to consult is

determined by the context, including factual matters relevant to the business and whether the circumstances dictate a quick response – notwithstanding the urgency, the date by which employees were required to receive their first vaccination was not until some 4 weeks after the announcement and this should have been enough time to consult with employees in the way required by the WHS Acts – instead, the decision to implement the Mandate was announced as a *fait accompli* and the communication of the announcement made clear that the Respondents were open to discuss the details of the policy rather than whether it would be implemented at all – DP World could, and should, at least, have given HSRs and the MUA notice that the Mandate was under contemplation and issued an announcement to that effect – consultation requirements under Enterprise agreements – clause 21.4 of the Enterprise Agreements constitutes a commitment by the Company to consult with employees and HSRs about matters which affect, or which are likely to affect, the health and safety of employees – the use of the term 'likely to affect' makes clear that the clause is triggered prior to a decision being made in relation to a health and safety matter – Commission found that whilst the clause was aspirational in some respects, the Mandate was a matter that was likely to affect the health and safety of employees and consultation should have occurred prior to the announcement and at the very least HSRs should have been given an opportunity prior to the announcement to express their views – this did not occur – Commission accepted that after the decision to implement the Mandate had been announced, DP World engaged in some consultation – however, it was arguable that the steps taken by the Company were not sufficient to meet its obligations under clause 27 of the Agreements – not appropriate to reach a concluded position in relation to clause 27 in circumstances where the matter was not pressed by the MUA in relation to its argument about valid reason and the Respondents reserved their position on this point – bodily integrity – as set out in *CFMEU v BHP*, the Full Bench in *Mt Arthur Coal* dealt with a contention by Union Interveners (including the AMWU and the CEPU) that the Mt Arthur SAR 'at least impacts upon the choice of an individual to undergo a medical procedure' and hence engaged the common law right to personal and bodily autonomy and integrity – while the economic duress place on employees deciding not to comply with the Mandate was a relevant matter in assessing the reasonableness of the direction, it was not determinative of the question of reasonableness, but rather a consideration to be weighed in the balance with the other relevant considerations – Commission found it was appropriate to apply the conclusions of the Full Bench in *Mt Arthur Coal* to the present case – the effect of the Mandate on the rights of employees to bodily integrity was not of itself determinative of whether the SAR is unreasonable – Privacy Act – the Commission did not accept that DP World failed to comply with the provisions of the Privacy Act – did not accept that employees being informed that failure to provide information to establish their vaccination status will result in disciplinary action up to and including termination of employment, vitiates consent to provide that information – the Full Bench in *Mt Arthur Coal* confirmed this is so when it determined that economic and social pressure applied to employees in relation to the SAR and the provision of sensitive information to their employer, was not coercion that vitiated consent on the part of employees, to provide sensitive information to their employer – Commission found DP World has a comprehensive privacy policy – the requirement that employees provide sensitive medical information

in the circumstances of this case does not render the Mandate unreasonable – after considering at length the evidence and submissions in this case, the Commission concluded that the Mandate was objectively a valid, sound, and defensible response to the circumstances confronting the Respondents in September 2021 – also concluded that any failure on the part of the Respondents to consult employees as required by the WHS Acts and the terms of the relevant Enterprise Agreements, did not of itself necessitate a conclusion that a failure on the part of employees to comply with the Mandate was not a valid reason for the dismissal of the Applicants – the Full Bench decision in *Mt Arthur Coal* does not necessitate that the Commission reach the conclusion advocated by the MUA on behalf of the represented Applicants – contrary to the submissions of the MUA the relevant point for considering whether there was a valid reason for dismissal is the date on which the Applicants were dismissed and not the date the Mandate was announced or implemented – in the case of the Sydney Applicants no dismissal took effect before 25 October 2021 with the majority taking effect on that date – in the case of the Brisbane Applicants no dismissal took effect before 8 November 2021 with the majority taking effect on 17 November 2022 – the Commission accepted the comprehensive evidence advanced by the witnesses for DP World about the factual scenario that existed at the time the dismissals were effected – found that there were compelling reasons for DP World to introduce the Mandate and it was not to the point that other stevedoring companies did not take similar steps – also the case that consistent with the medical, scientific and epidemiological findings of the Full Bench in *Mt Arthur Coal*, vaccination was the most effective control to manage the adverse impacts of the virus – whilst consultation did not meet the requirements of the WHS Act and arguably the Enterprise Agreements, this was swamped by the contextual and factual circumstances demonstrated in the evidence – any deficiencies in consultation were not determinative of whether there was a valid reason for the dismissal of the Applicants – this does not preclude a subsequent conclusion that all or some of the dismissals were unfair for other reasons based on procedural fairness and various potentially mitigating factors which will fall for consideration under ss.387(b)-(h) – this matter will be listed for a further mention to program subsequent proceedings and issue any necessary directions.

Pintley and Ors v DP World Sydney Limited and Ors

U2021/10151 and Ors [2023] FWC 65
Asbury DP Brisbane 10 January 2023

4 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – flexible working arrangements – s. 739 Fair Work Act 2009 – application to deal with a dispute in relation to flexible working arrangements (FWA) – applicant applied to the Commission to deal with a dispute regarding *Ambulance Victoria Enterprise Agreement 2020* (Agreement) – applicant employed as a paramedic since 2015 – applicant is a young mother with three children – submitted flexible work request to respondent – applicant sought to adjust night shift times to accommodate care responsibilities – request was rejected – Commission to decide whether respondent had reasonable business grounds to refuse request – Commission considered the ordinary meaning of 'reasonable business grounds' in relation to the Agreement [*Berri*] and whether the respondent had reasonable business grounds to

refuse an application for FWA [*Victoria Police No.1; Victoria Police No.2*] – 'reasonable business grounds' assessed objectively [*Emery*] – respondent argued FWA was refused as it was unable to provide start and finish times out of the respondent's roster configuration – applicant submits that the reason was not a reasonable business ground as the shifts she proposed aligned with the normal afternoon start and finish times of respondent's branch – applicant submitted second FWA (FWA 2) – applicant to work as 'spare' filling vacant shifts across LGA branches to fulfil requested rostered hours – respondent rejected FWA and FWA 2 as requests did not meet operational demands and provided operational difficulty – Commission assessed clause 23 Agreement in line with s.65(5A) Fair Work Act – Commission satisfied applicant had 12 months continuous service, made application as required under clause 23 Agreement, qualified for special circumstances under clause 23 and was entitled to apply for changes to working arrangements – Commission satisfied that clause 23 Agreement intended that employees have a 'genuine and substantive right to seek alternative flexible arrangements' – Commission not required to balance applicant's circumstances against the respondent's grounds [*Azmi*] – Commission considered that FWA allows working parents to balance work and family satisfactorily, reduces staff turnover and improve employee well-being [*Brimbank*] – onus on respondent to establish reasonable business grounds – Commission held that respondent did not have reasonable business grounds to refuse applicant's FWA and FWA 2. .

Fyfe v Ambulance Victoria

C2022/3750		[2023] FWC 49
Johns C	Melbourne	6 January 2023

Other Fair Work Commission decisions of note

Appeal by Transport Workers' Union of Australia against decision of Deputy President Dean of 30 November 2022 [[2022] FWC 3136] re Cleanaway Operations P/L

ENTERPRISE BARGAINING – protected action ballot – ss.437, 604 of Fair Work Act 2009 – appeal – Full Bench – appeal against decision concerning s.437 application for ballot of employees of respondent who are members of and represented by appellant for proposed enterprise agreement that would cover truck drivers and plant operators employed at a NSW site – respondent opposed order sought on basis appellant not entitled to represent industrial interests of plant operators at site – Commission at first instance upheld respondent's contention – correctness standard of appellate review applies – whether conclusion correct – consideration requires application of appellant's eligibility rules to facts of matter – where union eligibility referable to industry, relevant industry is that of employer – whereas an occupational rule refers to work activities of employees – appellant's eligibility rule has a hybrid industry and occupational nature – breadth of rule expanded by use of words "in connexion with" in preamble, connoting relationship between work of employee and industry or occupation in question – the purpose of a business and its industry may be characterised in multiple ways [*Isaac & Cohen*] – indicators of requisite connection may include operational integration, physical proximity, identity of employer and unity of control and management [*Isaac*] – Full Bench found respondent's business at site operates in road transport industry and plant operators at site engaged to work in connection with that industry – to characterise respondent's business as having substantial character of waste processing does not exclude proposition it operates in transport industry – respondent operates fleet of trucks to conduct business – essential feature of service is removal of waste from clients' premises to site for

processing – requisite connection demonstrated by facts of matter – plant operators operate under same management at same site as truck drivers, in an integrated business, in close physical proximity, performing functionally integrated work – appellant entitled to represent industrial interests of plant operators because they are employed by respondent in connection with transport industry – were it necessary Full Bench would also find plant operators employed in connection with occupation of driving – Commission at first instance erred by concluding otherwise.

C2022/7913 [2023] FWCFB 11
Hatcher AP Sydney 19 January 2023
Bissett C
Simpson C

Association of Professional Engineers, Scientists and Managers Australia T/A Collieries Staff Division v Ensham Resources P/L

ENTERPRISE BARGAINING – majority support determination – union advocacy – s.236 Fair Work Act 2009 – the applicant sought to bargain with respondent for a collective agreement – respondent declined this request, preferring to engage with employees on individual contracts – applicant conducted an electronic vote to indicate majority support, and once again requested the respondent engage in bargaining – the respondent once again declined to bargain – applicant made an application for a majority support determination – most employees indicated majority support via electronic vote, some indicated support in writing after vote was conducted – the vote was therefore contacted on a retracted time frame between May and October 2022 – the respondent engages workers both in underground and open cut mines however the applicant submitted the proposed Group would only include underground workers – the applicant submitted the electronic ballot was appropriate method to indicate majority support – the applicant used industry naming conventions, rather than official job descriptions when describing the group for the purposes of the electronic ballot – applicant submitted this was not misleading as the employees were a highly experienced workforce with understanding of industry naming conventions – applicant submitted they continued to seek support from workforce after the ballot was conducted and after application was filed with the Commission – the applicant submitted that the result of the ballot and other indications of support evince majority support – the applicant submitted for the purposes of s.237(2)(c) the group was fairly chosen and was geographically, operationally or organisationally distinct and made reference to the employers organisational charts – the applicant submitted distinctiveness is only one factor to be considered in determining whether the group is 'fairly chosen' – the respondent argued the Group nominated were not distinct and therefore not 'fairly chosen' for the purposes of s.237(2)(c) – the respondent submitted as an employer they make no operational or organisational distinction between its underground and surface workforce – further, the respondent submitted the work of the Group nominated is integrated both geographically with other workers – the respondent submitted there were a number of workers performing similar roles who were not included in the nominated Group, pointing away from it being 'fairly chosen' – the respondent submitted the protracted voting window does not satisfy the requirements in s.237(2)(a)(i) that stipulate the majority of employees support bargaining at 'a time' – the respondent submitted the applicant's electronic ballot did not properly inform workers of scope of the agreement – the respondent submitted there had been significant change from the applicants nominated Group over the course of voting – the Commission found no dispute that the respondent is the employer that will cover the proposed agreement, and they have not agreed to bargain – although the voting process was protracted and the method of voting varied the Commission found this does not evince any irregularity in the voting process – the Commission found the union was entitled to contact its members and encourage them to vote in support – the Commission found electronic petition an appropriate method and the petition is not required to contain detailed and specific information about the scope of the proposed agreement – Commission satisfied a majority of employees wished to bargain – in considering the 'fairly chosen'

requirement of s.237(2)(c), the Commission applied *QGC P/L v The Australian Workers' Union* in order to determine whether the group was 'geographically, operationally or organisationally distinct' – although the group were not geographically distinct, the Commission found they were operationally distinct – the Commission rejected submissions by the respondent and found the fact that there were alternative groups performing similar roles did not preclude the proposed group from being 'fairly chosen' – the Commission found it immaterial the chosen group aligned with the membership of the union – majority support determination ordered.

B2022/713 [2023] FWC 217
Asbury DP Brisbane 24 January 2023

Weston v Coal & Allied Mining Services P/L

TERMINATION OF EMPLOYMENT – valid reason – conduct – harshness – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed by respondent as a drill operator at the Mount Thorley Warkworth open cut coal mine – applicant dismissed on 7 September 2022 because he made a verbal threat to harm a co-worker during an altercation on 13 August 2022 – applicant contended his dismissal was harsh, unjust and unreasonable – applicant sought reinstatement – respondent submitted dismissal was not unfair and opposed reinstatement due to loss of trust and confidence in the applicant given the safety critical nature of role and requirement to work safely independently – particulars of altercation between applicant and co-worker were disputed – Commission considered *Briginshaw*, *B, C and D v Australian Postal Corporation T/A Australia Post*, *Bostik (Australia) P/L v Gorgevski (No 1*), *Darvell v Australian Postal Corporation*, *Byrne v Australian Airlines Ltd*, *Nguyen and Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* – Commission found altercation on 13 August 2022 instigated by co-worker and applicant responded aggressively by threatening to cut co-worker's throat -satisfied respondent had a valid reason to dismiss on basis of applicant's aggressive conduct because it was inappropriate and breached his obligations under codes of conduct applying to his employment and the Work Health and Safety Act 2011 (NSW) – satisfied applicant notified of reason for dismissal and received opportunity to respond – Commission found dismissal harsh considering applicant's unblemished 12 year employment record with respondent; that his conduct was uncharacteristic; that applicant was contrite, remorseful and apologised for his conduct; that applicant immediately reported his conduct to supervisor; that applicant's PTSD contributed to his conduct and he was in treatment; impact of co-worker's provocation on seriousness of conduct; applicant' age; family responsibilities; financial circumstances and employment prospects – Commission considered applicant's conduct more serious than co-worker's conduct on 13 August 2022 – differential treatment of co-worker given final warning did not render applicant's dismissal harsh, unjust or unreasonable – Commission found dismissal was unfair due to harsh personal and economic consequences and disproportion to the gravity of the misconduct – dismissal of Mr Weston was unfair – Commission accepted applicant understood his conduct on 13 August 2022 was unacceptable and must not be repeated – accepted conduct was uncharacteristic and the likelihood of further angry behaviour in the workplace was very low – satisfied based on history of otherwise positive working relationships that level of trust and confidence is sufficient to enable viable and productive employment relationship – ordered applicant be reinstated to his position and continuity of employment maintained – Commission did not order lost pay in recognition of applicant's unacceptable conduct and his responsibility for the financial consequences of his conduct.

U2022/9468 [2023] FWC 93
Saunders DP Newcastle 13 January 2023

Mandelson v Invidia Foods P/L and Ors

GENERAL PROTECTIONS – dismissal dispute – s.365 Fair Work Act 2009 – application to deal with contravention involving dismissal – jurisdictional objection whether applicant was an employee or independent contractor – in early 2021 applicant entered a business sales agreement (BSA) with respondent which *inter alia* included the delivery and execution of an employment agreement (Agreement) attached within the BSA – applicant was to duly execute and deliver the Agreement back to respondent as part of her obligations under the BSA – On 29 January 2021 respondent executed the Agreement and delivered it up to applicant – applicant at no point executed or delivered up an executed copy of the Agreement to respondent – applicant submitted that the Agreement was binding and enforceable – respondent submitted applicant was never an employee of respondent as Agreement will not be a concluded bargain unless and until formally executed by applicant – respondent further submitted that at no point was applicant's work conducted as would be expected of an employee as she was entirely autonomous in her work, had no reporting obligations, had irregular working hours, did not request or report her working days, and conducted substantial work for other entities other than respondent Commission found that per the explicit requirements of the BSA, no Agreement was ever entered into and was therefore not binding or enforceable – Commission considered whether applicant was an employee of respondent or merely an independent contractor – Commission considered the principles expressed in [*Personnel Contracting*] and made findings as to the terms of the Agreement that existed between applicant and respondent – Commission found that there was no express contractual terms specifying how, when and where applicant was to perform her work at respondent's business as is expected of an employment arrangement; applicant although required to liaise or confer with respondent from time to time, was never under the direction and control of respondent – Commission commented that the 'blanket approach' to pay little heed to job titles often emphasised by decision-makers post [*Personnel Contracting*] should be rejected; specifically on these facts the continued self-characterisation of applicant's work as 'consultancy' was a relevant factor as it appeared contradictory to applicant's assertion in her evidence of the presence of an employment relationship – Commission concluded that upon considering applicant's work in respondent's business in totality it was clear that she was pursuing her own interests as an independent contractor as opposed an employee of respondent on a subordinate basis – application did not satisfy s.365(1)(a); a jurisdictional prerequisite towards making an application pursuant to s.365 – application dismissed.

C2022/1319 [2023] FWC 50
Boyce DP Sydney 16 January 2023

Construction, Forestry, Maritime, Mining and Energy Union v Sydney International Container Terminals P/L t/a Hutchinson Ports

ENTERPRISE AGREEMENTS – ambiguity or uncertainty – dispute about matter arising under *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* (Agreement) – dispute about interpretation of clause concerning staff allocation requirement – dispute concerned at what point a Rail Senior Clerk must be allocated under clause 8.1.4 – clause 8.1.4 reads: "Rail Senior Clerk allocated on a shift only when there are more than two trains with a combined exchange greater than 54 containers. For clarity when there is over 54 containers, a Senior Rail Clerk will be allocated." – applicant contended Rail Senior Clerk required if more than 54 containers arrived at port, regardless of number of trains transporting those containers – respondent contended Rail Senior Clerk only required when three or more trains expected in single shift and more than 54 containers exchanged – *Berri* principles applied – Commission observed clause unambiguous when each sentence read in isolation but clause becomes ambiguous when both sentences read together – first sentence sets two preconditions for allocation of Rail Senior Clerk whereas second sentence sets only one – Commission satisfied clause is ambiguous or susceptible of more than one meaning – surrounding circumstances considered – evidence of bargaining negotiation of limited forensic value [*Ballarat Health Services*]

– observed submissions of both sides that Commission consider intention of each party would be contrary to all of the authorities – Commission objectively considered representations of each side to consider if any representations assist in giving Agreement meaning consistent with general intention of parties to be gathered from the whole instrument [*Geo A Bond & Co*] – observed communication between applicant's negotiator and respondent's CEO support applicant's interpretation of clause 8.1.4 – observed other surrounding material support respondent's interpretation, but not as strongly – surrounding provisions of Agreement clause 8.1 considered – noted other allocation triggers in clause 8.1 do not refer to number of trains expected – held more consistent and harmonious way to read clause 8.1.4 is to apply same trigger of 54 containers without reference to number of trains – observed a generous construction of agreement is preferred over strictly literal approach: [*Ridd*] – found most cautious approach to resolve ambiguity is to apply lower, single trigger for allocation of Rail Senior Clerk – held respondent required to allocate a Rail Senior Clerk when there is over 54 containers expected to be exchanged in a shift – dispute determined.

C2022/1521 [2023] FWC 88
Easton DP Sydney 12 January 2023

Ross v Bridgewood P/L

TERMINATION OF EMPLOYMENT – costs – incomplete evidence – ss.394, 400A, 611 Fair Work Act 2009 – respondent became aware of matters that caused doubt to the accuracy of the evidence provided by applicant during the initial hearing – evidence concerned the remuneration applicant earned after his dismissal from his employment – respondent applied to the Commission to reopen the hearing seeking costs – respondent claimed that applicant's omission to provide evidence was in connection with the conduct or continuation of the matter – applicant objected to the respondent's request to reopen the hearing – respondent submitted that it should have been reasonably apparent to applicant that his opposition to the application had no reasonable prospect of success because of the evidence which he provided – the relevant question to determine is whether a proceeding had reasonable prospects of success at the time it was instituted, not whether it ultimately failed [*Leighton Contractors*] – a conclusion that an application has no real prospect of success should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or lacking in merit or substance as to be not reasonably arguable [*A Baker*] – Commission reopened the hearing – during the reopened hearing, applicant acknowledged that the incomplete evidence he provided was a mistake – giving false or misleading evidence could result in a costs order under s.400A of the Fair Work Act [*Armstong*] – Commission noted that the evidence applicant provided in the costs hearing included numerous relevant facts that he would have known at the time of the initial hearing – Commission did not accept that applicant's failure to give full and frank evidence was a mistake – Commission held that the applicant's opposition to reopen the hearing was an unreasonable act that unnecessarily caused costs to be incurred by respondent – applicant ordered to pay respondent's costs.

U2020/14705 [2023] FWC 40
Williams C Perth 9 January 2023

XRF Labware P/L and AWU Enterprised Based Agreement 2019-2022 XRF Labware P/L

ENTERPRISE INSTRUMENTS – termination of instrument – misleading or inaccurate information – s.222 Fair Work Act 2009 – application by employer to terminate *XRF Labware P/L and AWU Enterprised Based Agreement 2019-2022 XRF Labware P/L* (Agreement) – Agreement nominally expired on 30 June 2022 – application made within 14 days after termination agreed to – consideration whether all reasonable steps taken to notify employees of vote and particulars as required – employer

provided voting slip with two questions – first question asked if employee wanted to negotiate a new agreement – second question stated "If you answered NO to question 1, do you wish to terminate the current EBA…" – Commission observed question 1 was irrelevant in deciding if employees wanted to terminate the Agreement – further observed that other employees cannot vote to stop bargaining, rather those employees can vote to not approve any resulting agreement from the bargaining – observed voting process not confidential – despite concerns Commission found employer took all reasonable steps to notify employees of vote and particulars as required – consideration whether employees had reasonable opportunity to decide – should be considered objectively against particular facts and circumstances of the application – employer suggested it followed voting process outlined in Commission's Enterprise Agreements Benchbook – Commission observed the Benchbook does not deal with process for conducting a vote to terminate bargaining (there is no such process) or terminate an enterprise agreement – observed employer confused about process and applied approach for a majority support determination – consideration whether employees advised of advantages/disadvantages of terminating Agreement – employer conceded it had not explained advantages/disadvantages to employees – employer suggested it would preserve Agreement terms and conditions despite seeking to terminate the Agreement – Commission found no evidence of this intention and noted removing entitlements will make it harder for employees to bargain for them in future – employer attempted to file six statements from employees in support of terminating Agreement but did not call those employees to give evidence – employer did not accept opportunity to call when invited by Commission – Commission made *Jones v Dunkel* inference – despite not formally receiving statements Commission noted employees appeared to have mistaken belief that being covered by the Agreement meant they needed to be a member of the union, could not be paid more than in the Agreement, were precluded from negotiating better terms, could not be rewarded for individual performance and would not be recognised for their skill – employer conceded it was aware of these misapprehensions but did nothing to correct the misunderstandings – Commission observed this was an "extraordinary admission" – Commission found employees exercised vote with misleading or inaccurate information – this cannot be a valid vote – held employees did not have a reasonable opportunity to decide whether they wanted to approve termination of the Agreement – application dismissed.

AG2022/4031 [2023] FWC 63
Johns C Melbourne 19 January 2023

Chalk v Ventia Australia P/L

TERMINATION OF EMPLOYMENT – valid reason – misconduct – s.394 Fair Work Act 2009 – unfair dismissal application – applicant employed as Strategic Asset Manager by facility management services company – dismissed for breach of confidentiality – applicant contended he advised a client of concerns about operation of their service agreement (Agreement) in accordance with requirements of Agreement – respondent alleged that applicant disclosed confidential information to client – contended that further investigation had been required before contacting client and premature sharing of confidential information with client was a breach of applicant's confidentiality obligations in his employment agreement – submitted they lost trust and confidence in applicant's ability to perform his role – applicant submitted he was only keeping the client informed – submitted he was responsible for data integrity and this was a data integrity issue not a confidentiality issue – submitted he would have breached Agreement if he had not raised concerns with the client – maintained that no misconduct had occurred – respondent submitted that after applicant's dismissal they discovered applicant had also breached confidentiality obligations by sending Agreement to an ex-employee months earlier – applicant submitted that he wanted to manipulate an image on a Macintosh computer and that he deleted the confidential document from their computer after working on it – Commission questioned whether applicant's particular communication with client was required under the terms of the Agreement – not persuaded that information about charge-out

rates amounted to a data breach – considered that applicant's actions were ill-considered for a person of his experience and seniority – noted there were other options available to applicant before sharing confidential information with client – considered that applicant's conduct breached confidentiality obligations and duties owed to respondent – considered that applicant's action and subsequent responses provided a proper basis for respondent to lose trust and confidence in applicant's ability to adequately perform role – Commission also questioned whether sending confidential document to ex-employee's Macintosh computer would be valid reason for dismissal – found there were other options available to manipulate document that did not breach confidentiality obligations and found explanation for breach unconvincing – Commission found applicant's breach of confidentiality and poor exercise of discretion as an experienced and senior employee a valid reason for dismissal – found applicant's previous breach of confidentiality in sending confidential document to ex-employee also a valid reason for dismissal – Commission satisfied that dismissal was not harsh, unjust or unreasonable – not satisfied applicant was unfairly dismissed – application dismissed.

U2022/7847 [2023] FWC 121
Platt C Adelaide 17 January 2023

Kennon v Telstra Corporation Ltd

TERMINATION OF EMPLOYMENT – misconduct – employer policies – s.394 Fair Work Act 2009 – respondent introduced a policy requiring its employees to receive COVID-19 vaccinations – applicant refused to adhere to the policy and was consequently dismissed from employment – whether the policy was a lawful and reasonable direction – applicant contended that the policy was not lawful and reasonable – applicant argued that the enforcement of the direction constituted coercion – applicant further contended that he was not adequately consulted about the policy by the respondent – applicant also submitted that the word "vaccine" refers to a complete immunity from a disease and therefore it was impossible to comply with the policy – respondent submitted that the policy was a lawful and reasonable direction – respondent contended that the policy was reasonable given the nature of applicant's work – respondent also submitted that the policy was introduced to fulfil work health and safety requirements – respondent further contended that a thorough consultation process was engaged prior to the policy being implemented – consultation of a policy must involve employees being given an opportunity to be heard and needs to be real [*Mt Arthur*] – the right to be consulted is not a right of veto and management has the right to make the final decision [*Mt Arthur*] – Commission held that the respondent's approach to the development and consultation of the policy was compliant – Commission also held that the applicant was not coerced by the respondent – an "overly technical" approach should not be taken when interpreting enterprise agreements [*Berri*] – Commission held that policies drafted by an employer should be construed in the same manner as enterprise agreements – Commission also held that the respondent provided adequate consultation to the applicant in regards to the policy – Commission further noted that the respondent was entitled to direct an applicant to comply with the policy – direction was lawful and reasonable in the circumstances – valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

U2022/8949 [2023] FWC 227
Platt C Adelaide 25 January 2023

Steel v CD Australia P/L T/A Diablo Co

TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant challenged dismissal from sales executive role – respondent is alcohol manufacturing company – respondent submitted jurisdictional objection that it is a small business employer – respondents'

associated entities taken to be one entity – Commission found respondent not a small business employer as per ss.50AA AND 50AAA of the *Corporations Act* – respondent alleged applicant made comments that constituted 'harassment and racial comments' in a telephone call – Commission heard several competing versions of precise wording of comments – all accounts agree comments relate to applicant mistakenly referring to a colleague as Brazilian when colleague has Argentinian and Italian heritage – respondent conducted a meeting with applicant alleging the applicant made racial slurs against colleague – respondent offered applicant the opportunity to resign or be terminated – applicant declined to resign and was terminated – termination letter confirmed reason for termination was 'harassment and racial comments based on employee's country of birth', citing the *Racial Discrimination Act 1975* (Cth) – respondent provided several witnesses who gave evidence on the telephone call – respondent provided evidence on several other comments previously made by the applicant deemed to be racialised and unprofessional – respondent explained they had limited HR expertise but acted on the information they had at the time – respondent submitted they did not give applicant any previous warnings – applicant outlined her comments in the telephone call and explained she intended no malice, but was genuinely mistaken about colleagues' heritage – applicant submitted comment was an offensive remark but does not constitute racial discrimination or justify termination – applicant gave evidence on unrelated hostility she has received from marketing manager of company that predates telephone call – Commission found applicant was dismissed for several reasons, although not all reasons were provided to applicant – reasons included racialised and unprofessional comments and disrespect towards the marketing manager – Commission not satisfied comments were 'purposely or even casually racist' – Commission found comment made on the telephone call to be unsophisticated, but did not consider them racist, nor a valid reason for dismissal for the purposes of s.387(a) of the FW Act – Commission found respondent grossly exaggerated when accusing applicant of contravening the law in saying such comments and dismissing applicant was an 'extraordinary reaction' – Commission made comment that educating or counselling applicant would have been a more appropriate course of action – Commission found respondent utilised the comments as an opportunity to dismiss applicant because of an unrelated issue, namely her deteriorating relationship with marketing manager – in accordance with other subsections of s.387, Commission found applicant was not properly notified of all the reasons for dismissal, was not given an opportunity to respond to reasons, was not given opportunity for a support person and was not provided warnings of unsatisfactory performance – further, Commission found respondents' lack of HR department impacted procedural fairness – Commission concluded no valid reason for dismissal – dismissal determined to be harsh, unjust and unreasonable – Commission relied on *Sprigg* to determined compensation – calculated lost earnings and deducted renumeration since dismissal – compensation of $13,557.69 gross, less tax plus superannuation ordered.

U2022/6917 [2023] FWC 26
Hunt C Brisbane 4 January 2023

Hill v Boeing Defence Australia Ltd

TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – vaccination policy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant's employment with respondent commenced on 18 August 2014 – applicant's contract required he comply with respondent's standards, policies and procedures – on 14 October 2021 respondent introduced a COVID-19 vaccination policy effective from 3 December 2021 (Policy) – the Policy divided workforce into 'Group 1' and 'Group 2' employees – 'Group 1' employees required to be fully vaccinated against COVID-19 or otherwise have a valid medical exemption – applicant's role considered a 'Group 1' role – on 9 December 2021 respondent requested any medical evidence which exempted applicant from the Policy – on 14 December 2021 applicant replied noting *inter alia* that he had a medical condition and was seeking to consult with an immunologist on 16 February 2022 prior to being vaccinated; applicant also conceded

that he is not eligible for a medical exemption from the COVID-19 vaccine – respondent agreed for applicant to take a period of leave and to work from home until after his immunologist consultation – on 18 February 2022 applicant informed respondent he did not intend to be vaccinated against COVID-19 – on 25 February 2022 applicant applied for a 'Group 2' role – on 7 March 2022 respondent requested in writing for applicant to show cause as to his failure to comply with the Policy (Show Cause Letter) – on 11 March 2022 applicant responded to the Show Cause Letter by reiterating *inter alia* his medical condition and the lack of safety data for COVID-19 vaccinations in light of his medical condition – on 15 March 2022 applicant attended a meeting with respondent to discuss his responses to the Show Cause Letter – on 17 March 2022 applicant's employment terminated due to repeated failure to follow lawful and reasonable directions to comply with the Policy – outstanding Group 2 role application not successful as applicant did not make candidate shortlist – Commission satisfied respondent had valid reason to dismiss as direction to comply with the Policy was lawful and reasonable, despite easing of restrictions and vaccination requirements by government bodies – Commission also satisfied that the dismissal was procedurally fair with regard to s.387(b)-(g) of the Act – Commission found however that despite there being no obligation to redeploy applicant, it was harsh and unreasonable to terminate his employment whilst he was still being considered for the 'Group 2' role – applicant unfairly dismissed – insufficient material to address remedy – matter to be listed for mention/directions in relation to remedy.

U2022/4056 [2023] FWC 2
Ryan C Sydney 3 January 2023

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Websites of Interest

Department of Employment and Workplace Relations - https://www.dewr.gov.au/workplace-relations-australia - 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 and Family Court of Australia - https://www.fcfcoa.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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