FWC Bulletin

2 March 2023 Volume 3/23 with selected Decision Summaries for the month ending Tuesday, 28 February 2023.

Contents

Appointment of President to the Commission

10 Feb 2023

Acting President Hatcher SC has been appointed as President of the Fair Work Commission.

The Hon Tony Burke MP Minister for Employment and Workplace Relations announced the appointment in a media release issued 9 February 2023.

The Acting President has also been appointed to the Federal Court. The appointments will officially commence 19 February 2023.

Read the Media release: Appointment to the Fair Work Commission and Federal Court for more information.

Registered Organisations Commission functions to transfer to the Fair Work Commission

07 Feb 2023

The *Fair Work Amendment (Secure Jobs Better Pay) Act 2022* transfers the functions of the Registered Organisations Commissioner to the General Manager of the Fair Work Commission on 6 March 2023.

Read the full media release

API for the Modern awards pay database coming soon

16 Feb 2023

Our new application programming interface (API) for the Modern awards pay database will be released in the week of 20 March 2023.

The API is a digital tool which will provide access to our Modern awards pay database's current and historical minimum rates of pay, allowances, overtime and penalty rates data in a digital format. It will mean that data from the database can be integrated into accounting software, payroll systems and other digital pay tools.

You can view a test version of the API and read the terms of use ahead of its release in our Developer Portal test site.

Users who would like to use the API from March 2023 can register their interest by sending us a letter of intent (doc). We will then provide registered users who have signed a letter of intent with access to the API when it's released.

We will hold webinars and provide educational materials for registered users, to support the release of the API in March.

- Read more in the President's statement (pdf)
- See our Modern awards pay database

If you have any questions please contact us at awards@fwc.gov.au.

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.

Decisions of the Fair Work Commission

Summaries of selected decisions signed and filed during the month ending Tuesday, 28 February 2023.

1 REGISTERED ORGANISATIONS – amalgamation – withdrawal – ss.94, 100 Fair Work (Registered Organisations) Act 2009 – Full Bench – applicant a member of CFMMEU and Central Council member of Mining & Energy (M&E) Division – Constituent Part identified as M&E Division – Alternative Constituent Part identified as those members who would have been eligible for United Mineworkers' Federation of Australia had it not been deregistered in 1992 when forming CFMMEU – application for secret ballot to decide whether constituent part, or alternative constituent part, of CFMMEU should withdraw from amalgamated organisation – application made more than 5 years after amalgamation – s.94A(2) factors relied upon – record of amalgamated organisation's compliance with workplace or safety laws and likely capacity of constituent part to promote and protect interests of its members both relevant – applicant submitted CFMMEU has extensive record of noncompliance with workplace and safety laws and that M&E division only negligibly contributed to this – Full Bench considered whether to accept application – Full Bench observed courts previously described CFMMEU as a 'recidivist organisation', and its conduct 'astounding… disgraceful and shameful' – Full Bench held fact and extent of CFMMEU's noncompliance record and minimal contribution of M&E Division weigh substantially in favour of conclusion application can be accepted in relation to Constituent Part and Alternative Constituent Part – Full Bench considered capacity to promote and protect economic and social interests of members – Full Bench observed, inter alia, M&E Division effectively operates autonomously and shares few resources with other divisions of CFMMEU – M&E Division is a reporting unit for purposes of the RO Act – M&E Division has diverse asset base and investments – held Constituent Part and Alternative Constituent Part will likely function effectively to promote and protect interests of its members – Full Bench held it could accept application under s.94A(1) RO Act – consideration whether material accompanying application complies with requirements – proposed name of new organisation Mining and Energy Union (MEU) – Full Bench found MEU name not so similar to other organisations as to cause confusion – found name of CFMMEU could be changed to remove reference to 'mining' and 'energy' as appropriate – consideration whether proposed eligibility rules of MEU reflect rules of amalgamated organisation in relation to M&E Division – observed consideration involves proper construction of CFMMEU rules regarding M&E Division and practices adopted in respect of eligibility immediately before application was made – Full Bench found eligibility rules appropriate in relation to Constituent Part – Full Bench not satisfied in relation to Alternative Constituent Part as proposed eligibility rules expand the class of persons eligible

for membership when compared to class of members prior to deregistration in 1992 – Full Bench requested further submissions on this – Full Bench expressed view requirements of application satisfied in relation to Constituent Part but not in respect of Alternative Constituent Part.

Application by Kelly for withdrawal from amalgamated organisation

D2022/10 [2023] FWCFB 33
Hatcher J Sydney 21 February 2023
Gostencnik DP
Masson DP

2 TERMINATION OF EMPLOYMENT – contractor or employee – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – application for permission to appeal s.394 decision of 6 October 2022 (UD Decision) – Full Bench noted that s.400 of the Act would be the threshold for whether an appeal would be granted – Full Bench citing [*GlaxoSmithKline*] noted that the public interest test in s.400(1) of the Act would not be satisfied by mere identification of an error or a preference for a different result – Full Bench confirmed that public interest test satisfied as appeal considered the application of recent High Court decisions of [*Jamsek*] and [*Personnel Contracting*] – permission to appeal granted – in the UD Decision Commission considered the wholly verbal contract between appellant and respondent in September 2016 (Contract), the verbal variation towards increased working days from three days to five days per week in January 2017 (Variation), and the construction of the relevant express and implied terms of the Contract towards determining the status of appellant – in particular within the UD Decision, Commission balanced the characteristics pointing towards and away from an employment relationship – ultimately in the UD Decision, Commission found that the fact that respondent could not dictate how appellant's work was conducted, the likely retaining of intellectual property for work produced, and the fact he did not receive paid leave and income tax was not deducted from his pay pointed towards his status as a contractor – appellant raised 12 grounds of appeal in their Notice of Appeal – the first ground related to Commission having erred in the UD Decision so far as finding the appellant a contractor and not an employee (Ground 1) – the second ground related to Commission having erred by not finding that the express and implied terms in the Contract did not give rise to an employment relationship (Ground 2) – the third ground related to Commission having erred by not considering the post-contractual conduct of the parties for proof of terms in the Contract and the Variation (Ground 3) – the fourth ground related to Commission having erred by not considering the conduct after the Variation which showcased the imposition of wok practices that gave rise to a contractual right of control either at the time or subsequent to the Variation (Ground 4) – the fifth ground related to Commission having erred by finding that conduct or work practices did not manifest an assumption by respondent of a right of control over appellant (Ground 5) – the sixth ground related to Commission having erred by finding no express or implied term of the Contract where appellant was unable to reject a direction to perform duties, or a direction on how he should perform those duties (Ground 6) – the seventh ground related to Commission having erred by finding appellant a contractor despite also finding that appellant did more work for respondent's business and the fact that appellant worked for no other entities on days he was

working with respondent (Ground 7) – the eighth ground related to Commission having erred by not finding that the consequence and intended effect of the Variation was for appellant to cease operating his own business distinct from respondent (Ground 8) – the ninth ground related to Commission having erred by failing to find that the Variation materially increasing respondent's right of control over appellant and limited his capacity in his own work (Ground 9) – the tenth ground was contended in the alternative to Ground 9 in that Commission failed to consider and/or find a further variation to the Contract after January 2017 which gave rise to an employment relationship between appellant and respondent (Ground 10) – the eleventh ground related to Commission having erred by placing an unreasonably high regard to the labels assigned by the parties to their relationship (Ground 11) – the twelfth ground related to Commission having erred by using the tax, remuneration mechanisms, and lack of paid leave as indicative of a contractor relationship (Ground 12) – Full Bench considered each of the ground of appeal contended by appellant – Full Bench rejected Grounds 1 and 2 and found that reasoning in first instance was well founded with regard to the principles of [*Jamsek*] and [*Personnel Contracting*] – Full Bench agreed with respondent's submissions and rejected Grounds 3 and 4 noting that appellant had mischaracterised Commission's reasoning and noted that post-contractual conduct may only be relevant and available in limited circumstances; the terms of the Contract varied in January 2017 cannot be added to or subtracted from by reason post-contractual conduct, such an act would be tantamount to reverting to the obsolete multi-factorial test [*O'Dwyer*] – Full Bench rejected Grounds 5 and 6 noting that the factual matrix did not point towards a '*sufficiently different*' operation than the terms of the Contract originally agreed upon and that in both employment and contracting relationships, general guidance about when tasks were to be performed – Full Bench rejected Grounds 8 and 7 agreeing with respondent that outside of the contracted time which would be devoted to respondent, appellant was free to work elsewhere and with others – Full Bench rejected Grounds 9 and 10 by noting that they have substantively been dealt with earlier considerations of the grounds of appeal and namely that Ground 10 was without substance and did not disclose any error – Full Bench rejected Ground 11 noting that Commission in the first instances had applied appropriate caution as to not place too much weight on parties' own description of their contractual relationship – Full Bench rejected Ground 12 as the reference to remuneration mechanisms and paid leave was not the conclusive evidence relied upon by Commission in the first instance to determine the status of appellant; instead a myriad of evidence and aspects of the Contract was considered towards the aforementioned characterisation – appeal dismissed.

Appeal by Muller against decision of Bell DP of 6 October 2022 [[2022] FWC 1685]
Re: Timbecon P/L

C2022/7121 — [2023] FWCFB 42
Catanzariti VP — Sydney — 24 February 2023
Clancy DP
Yilmaz C

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3 GENERAL PROTECTIONS – workplace rights – arbitration – s.365 Fair Work Act 2009 – application to deal with contraventions of general protections involving dismissal – applicant commenced employment with the respondent, a manufacturer of paint and

render, on 6 January 2020 as a part-time assistant accountant and was dismissed with effect from 5 July 2021 – applicant submitted respondent took adverse action against her by standing her down, investigating her conduct and dismissing her – applicant submitted adverse actioned occurred because she exercised a workplace right to inquire or complain about the terms and conditions of her employment and the remuneration of the respondent's CEO – respondent submitted applicant was dismissed because she discussed sensitive and confidential information about CEO's remuneration and leave entitlements with another employee, breached a lawful and reasonable direction not to discuss her stand down with other employees and misused confidential information not relevant to her work by sending that information to her private email address – Commission considered *Keep v Performance Automobiles P/L* and *Alam v National Australia Bank Ltd* – Commission considered ss. 340, 341, 342, 360 and 361 FW Act – Commission considered whether an employee can make a complaint or inquiry (or foreshadow the making of a complaint or inquiry) in relation to a claim that has no merit or lacks an intelligible or legitimate basis or is misconceived, noting applicant's assertions about CEO's remuneration arrangements being discriminatory and/or illegal were entirely misconceived – Commission concluded applicant's email on 18 May 2021 regarding CEO's benefits was not a complaint or inquiry in relation to her employment within the meaning in s. 341(1)(c)(ii), but a mere request for assistance – Commission concluded applicant's emails on 3 June 2021 regarding CEO's benefits were inquiries or complaints within the meaning in s. 341(1)(c)(ii), noting applicant expressed discontent to respondent about her conditions of employment and sought consideration, redress or relief about a matter that related to those terms and conditions – Commission rejected respondent's submission that threat to complain to Fair Work Commission or Fair Work Ombudsman did not involve the exercise of a workplace right under s.341(1)(c)(i) because the complaint was not of a type that the agencies can seek compliance – Commission considered that misconceived nature of applicant's complaint did not change that it was a complaint or inquiry – Commission not satisfied applicant complained within meaning in s. 341(1)(c)(ii) about respondent's participation in JobKeeper scheme as making of complaint to supervisor not substantiated – Commission found applicant had a workplace right to make a complaint or inquiry in relation to payment for excess hours she had worked and exercised that right by sending a series of emails to respondent between 8 and 20 April 2021 – Commission found applicant had a workplace right to complain or inquire about whether her employment was covered by the Clerks Award and exercised that right by emailing query to respondent on 30 June 2022 – Commission found that applicant's general protections non-dismissal application made on 15 June 2021 and her application made on 4 July 2021 seeking that the Commission deal with a dispute did relate to the her employment and, despite the applications being misconceived and questions existing about the Commission's jurisdiction, were complaints or inquiries within the meaning in s. 341(1)(c)(i) – Commission found respondent took adverse action within meaning of s.342 by inviting applicant to show cause, standing her down, and later dismissing her – Commission found respondent did not take adverse action against applicant for a prohibited reason or reasons that included the applicant's exercise of a workplace right – Commission found applicant's misconduct was so serious it swamped any other reason for dismissal – respondent's disciplinary action was

justified – application dismissed.

Hodgkins v Rockcote Enterprises P/L

C2021/5227 [2023] FWC 245
Asbury DP Brisbane 27 January 2023

4 TERMINATION OF EMPLOYMENT – misconduct – multiple actions – remedy – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy made by applicant who worked as an Estimator since 3 June 2019 – applicant dismissed for misconduct – applicant claimed dismissal was harsh, unjust or unreasonable – applicant provided with company vehicle in lieu of vehicle allowance from February 2021 – vehicle had been used by a former employee previously – applicant's renegotiated contract required annual declaration regarding personal use of vehicle for Fringe Benefits Tax purposes – applicant was not advised of company policies or procedures for vehicle maintenance or repair – applicant's contract also required him to "familiarise" himself with company policies and procedures as necessary – during 18 months of having vehicle, applicant did not have the vehicle properly serviced – only maintenance check was done in conjunction with his private vehicle – applicant was reminded to get the vehicle serviced in 2022 – in August 2022, vehicle had mechanical issues and became unroadworthy – mechanic required purchase order number from company to authorise towing and repair costs – applicant gave permission to tow vehicle and provided a plant number for a different vehicle rather than purchase number – applicant did not have authority to authorise purchase orders – vehicle required additional repairs with approval from applicant – applicant did not advise manager of additional vehicle issues – applicant picked up vehicle and mechanic had done extra repairs on top of the additional work approved by the applicant – these extra repairs were not conveyed to management – the respondent was then invoiced an "estimate" for repair costs – applicant attended meeting for misconduct regarding unauthorised repairs – applicant argued that whilst he agreed for the car to be repaired, he did not agree to additional works done on vehicle incurring additional costs – applicant subsequently dismissed – applicant argued that his dismissal was unfair due to both the repairs required and that there were mitigating factors to support harshness – the respondent reaffirmed failure to comply with company policy and that applicant had been dishonest in providing plant number and not purchase number for the vehicle – Commission considered harshness and valid reason for dismissal – applicant found to have failed to adequately maintain vehicle in accordance with contractual obligations – applicant failed to have reported severe mechanical issues to management – applicant failed to obtain authority to incur expenditures and did not provide correct purchase order – valid reason to dismiss – Commission considered whether dismissal was harsh, unjust or unreasonable [*Byrne*] – Commission considered all factors of case including mitigating circumstances [*B, C and D*] – Commission concluded that dismissal was not harsh, unjust or unreasonable [*Federation Training*] – no issue of remedy arose – application dismissed.

U2022/9377 [2023] FWC 367
Anderson DP Adelaide 15 February 2023

Other Fair Work Commission decisions of note

Appeal by GHD P/L t/a GHD against decision of Yilmaz C of 15 September 2022 [[2022] FWC 2467] Re: Black

GENERAL PROTECTIONS – extension of time – ss. 365, 366, 604 Fair Work Act 2009 – appeal – Full Bench – respondent lodged a general protections application 168 days late – at first instance Commissioner held that there were exceptional circumstances in relation to the period from the expiration of the 21-day time limit to the date of the conciliation conference – whether the Commissioner erred in granting the respondent an extension of time – appellant submitted that a permission to appeal is appropriate because the reasoning of the Commissioner's decision was counterintuitive – appellant further contended that the Commissioner's decision manifested an injustice – respondent contended that the matters advanced by the appellant are minor or otherwise taken out of context – Commission must grant permission to appeal only if it is satisfied it is in the public interest to do so – public interest is not satisfied simply by the identification of error, or a preference for a different result [*GlaxoSmithKline*] – whether the relevant decision-maker has acted on the wrong principle, mistaken the facts, has taken into account an irrelevant consideration or failed to take into account a relevant consideration, or has made a decision which is unreasonable or manifestly unjust [*House*] – appeal tribunal is not authorised to set aside a discretionary decision based on a preference for a different outcome from that of the first decision-maker [*Norbis*] – Full Bench held that the Commissioner expressly considered the delay in a manner which reflects an erroneous approach to the statutory task – Full Bench also noted that the Commissioner erred by concluding that the routine management of the application amounted to an "unusual or exceptional circumstance" – Full Bench concluded that the Commissioner's decision manifests an injustice – whether extension of time should be granted – the test for exceptional circumstances in the context of an application for an extension is a stringent one [*Stogiannidis*] – Full Bench satisfied that respondent did not provide an acceptable reason for the 168-day delay in lodging the application – Full Bench accepted appellant's contention that the 168-day delay gave rise to a material and relevant prejudice to it – matters raised by the respondent did not amount to exceptional circumstances either when the various circumstances were considered individually or together – Commissioner's initial decision quashed – respondent's application for an extension of time dismissed.

C2022/6735 [2023] FWCFB 38
Catanzariti VP Melbourne 15 February 2023
Millhouse DP
Ryan C

Appeal by Church of Ubuntu against decision of Asbury DP of 7 November 2022 [[2022] FWC 2947] Re: Chait

TERMINATION OF EMPLOYMENT – identity of employer – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appeal of decision – respondent dismissed from position with appellant after receiving COVID-19 vaccination – COVID vaccination contrary to appellant's beliefs and appellant refused to hire anyone who has received the vaccine – jurisdictional objection at first instance that respondent was not an employee of appellant – Dean DP issued brief jurisdictional decision on 29 August 2022 – August decision ordered that jurisdictional objection be dismissed with reasons for decision to be issued separately – reasons for decision issued 10 weeks later on 7 November 2022 – appellant and respondent did not have written contract of employment – multi-factorial test [*French Accent*] applied – analysis of totality of

relationship found employment relationship – relationship of employment found – decision appealed – appeal grounds in three broad categories: reasons for decision being (1) issued late, (2) errors in Deputy President's conclusions, and (3) suggestion Commission does not have jurisdiction given appellant's religious character – Full Bench observed it is desirable for adequate reasons to be provided when issuing a decision – however issuing a decision and later issuing reasons does not establish appellate error – Full Bench rejected submission that Deputy President's conclusions were flawed – found correct principles were applied at first instance and appellant simply urged a different result based on extremely limited assertions – appellant suggested first instance decision was attempt by Commission to dictate appellant's canons and beliefs [*Church of New Faith*] – Full Bench rejected submission – observed 'whether parties to a religious relationship intended to create legal relations is to be assessed objectively in light of all of the evidence, like in any other case' – Full Bench agreed with Deputy President's finding that appellant and respondent had clear intention to create legal relations – Full Bench noted further jurisdictional issue whether the first instance application was filed within time was not dealt with in first instance decision – Commission required to determine matters before it in the proper order [*Herc*] – first consideration should have been whether application was made within time – ordered matter be referred to Deputy President to determine whether first instance application filed within time.

C2022/6387 [2023] FWCFB 20
Catanzariti VP Sydney 30 January 2023
Cross DP
Ryan C

Appeal by Airservices Australia against decision of Wilson C of 22 August 2022 [[2022] FWC 2171 Re: Crouch

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – appeal against decision concerning s.739 application to deal with a dispute – dispute regarded the operation of the termination provisions at clause 50 of the *Airservices Australia (Air Traffic Control and Supporting Air Traffic Services) Enterprise Agreement 2020-2023* (Agreement) and the termination provisions at clause 4 of Schedule 1 to the Agreement specific to Ab Initio Trainees – in February 2021 appellant, a provider of air traffic control services and training, informed respondent, an air traffic control trainee classified as Ab Initio Trainee (trainee) under the Agreement, that it had formed the view that his training should be terminated because he failed to achieve the required mark in end-of-module examinations on 22 July 2020 and 14 August 2020 related to his training – primary decision-maker accepted respondent's submissions that appellant contravened clause 50 of the Agreement in terminating his employment and decided respondent should receive a further training opportunity because terminating his training was disproportionate in the circumstances – appellant submitted that primary decision-maker erred in finding no inconsistency, within the meaning of clause 2 of Schedule 1 of the Agreement (clause 2), between clause 4 of Schedule 1 of the Agreement (clause 4) and clause 50 of the Agreement (clause 50) (first ground); erred in finding clause 50 applied to respondent as a trainee (second ground); and the relief granted by the primary decision-maker was beyond the powers conferred on the Commission pursuant to clause 10 of the Agreement, inconsistent with the Agreement and beyond power by reason of s.739(5) of the FW Act (third ground) – Full Bench considered ground 1 – appellant submitted that clauses 50 and 4 are inconsistent because clause 50 fetters the exercise of discretionary power in clause 4 to terminate the employment of a trainee and, as a result of this inconsistency, clause 2 excludes the appellant from having to comply with clause 50 – respondent submitted there is no inconsistency between clauses 50 and 4 because clause 4 simply identifies that failure to satisfactorily complete an essential training component allows the appellant to invoke its performance management processes in clause 50 – Full Bench considered the content and operation of Schedule 1 of the Agreement and the object unpinning the employment of a trainee – found clause 4 permitted appellant to terminate employment of trainee for failing to satisfactorily complete an

essential component of training and discretion under clause 4 unfettered by any other precondition or procedural step – found clause 50 dealt with management of an employee whose performance and/or conduct is unsatisfactory – concluded clauses 4 and 50 are inconsistent because requirement to comply with clause 50 interfered with unfettered discretionary power conferred by clause 4 to terminate trainee's employment in the circumstances specified – found primary decision-maker's conclusion that there was no inconsistency between clauses 4 and 50 was incorrect – found clause 50 does not govern the exercise of power to terminate trainee's employment if trainee fails to satisfactorily complete an essential training component – found primary decision-maker's reservation about whether respondent's failure to pass exams constituted a failure to satisfactorily complete an essential training component misconceived – found respondent's failure of supplementary examination on 14 August 2020 was a failure to satisfactorily complete essential component of training and engaged clause 4 – found Ground 1 of appeal made out – Full Bench ordered appeal upheld – primary decision quashed – dispute determined according to findings that: appellant was not required to comply with clause 50 because respondent's failure to pass the supplementary exam on 14 August 2020 engaged clause 4; and it was not necessary to consider whether respondent be re-coursed and/or provided with other remedial training in accordance with clause 50 of the 2020 – primary application dismissed.

C2022/6245 [2023] FWCFB 21
Gostencnik DP Melbourne 13 February 2023
Millhouse DP
Simpson C

Australian Maritime Officers' Union v Solstad Australia P/L t/a Solstad Offshore ASA

ENTERPRISE BARGAINING – protected action ballot – ss.437, 443 Fair Work Act – application by Australian Maritime Officers' Union (AMOU) on 20 January 2023 for protected action ballot order on behalf employee members employed as Deck Officers (employees) by Solstad Offshore ASA (respondent) – respondent operates in the offshore oil and gas industry performing tasks that are key to its clients being able to safely undertake their operational tasks – respondent opposed application on the basis that AMOU had not recently, including at the time of application, been genuinely trying to reach agreement – also argued that inclusion of exemptions from proposed industrial action made the nature of action unclear and rendered application invalid – respondent submitted that parties had been genuinely trying to reach agreement since bargaining began in March 2020 – alleged that AMOU representative acting since November 2022 had significantly changed negotiations – submitted that an updated log of claims presented on 9 December 2022 went beyond matters previously contemplated by parties and suggested AMOU was not genuinely trying to reach agreement – AMOU submitted meetings between parties had occurred sporadically since June 2022 – submitted that after bargaining on 8 December 2022 they provided a revised log of claims – submitted that further bargaining was held on 13, 19 and 20 December 2022 – submitted that they had put a full log of claims to respondent on multiple occasions over past 18 months – submitted that on 20 December 2022 respondent advised it would provide a full response to AMOU's log of claims and a revised pay offer at next bargaining on 20 January 2023 – submitted that they had tried to contact respondent multiple times before 20 January 2023 to confirm meeting and that an offer would be made but received no response – Commission satisfied that s.443(1)(a) FW Act met – Commission considered whether there was a proposed enterprise agreement within the meaning of ss.437 and 443 FW Act [*Maersk Crewing*] – satisfied that at the time of application there was a 'proposed enterprise agreement' as evidenced by multiple spreadsheets submitted by respondent – Commission considered the temporal components s.443(1)(b) and whether parties were 'genuinely trying' under s.443(1)(b) [*CSBP*] and [*TMP*] – noted that FW Act does not proscribe parties from changing position on claims but parties' conduct is not immaterial to deciding whether they were genuinely trying to reach agreement – satisfied that AMOU's conduct regarding revised log of claims and input at bargaining meetings was part of the natural course of bargaining and not an act to

deliberately frustrate the process – satisfied that state of negotiations and conduct of AMOU were sufficient to meet all conditions of s.443(1)(b) – Commission considered whether content of order conformed with ss.443(3)-(5) – observed that compliance with s.437(3)(b) requires that ballot questions must describe the industrial action in a way that employees are capable of responding to them [*John Holland*] – respondent submitted that the ballot questions give rise to ambiguity and were littered with exceptions – Commission satisfied that compliance with s.437(3)(b) was met and the questions were capable of being responded to by relevant employees – determined that proposition that application must be dismissed because it is invalid cannot be sustained – AMOU conceded that 'question 3 might be open to interpretation and should be adjusted – Commission satisfied that adjustment not only permitted but also justified [*Curtin*] – Commission considered request to vary order to extend notice period – respondent submitted the nature of the offshore oil and gas industry and distances and logistical considerations give rise to exceptional circumstances – AMOU took no issue with respondent's evidence – Commission satisfied that exceptional circumstances justify extension of period of notice of protected industrial action to 7 working days – Commission satisfied that all requirements of s.443(1)(b) met – Order as amended issued.

B2023/45 [2023] FWC 221
Beaumont DP Perth 1 February 2023

City of Stirling Inside Workforce Agreement 2022

ENTERPRISE AGREEMENTS – approval – jurisdiction – ss.185, 587 Fair Work Act 2009 – on 2 December 2022 initial application for Agreement made by applicant – Australian Municipal, Administrative, Clerical and Services Union (ASU) raised a number of objections towards the Agreement's approval – on 19 December 2022 parties informed that matter would proceed to hearing in February 2023 – on 19 December 2022 applicant sent correspondence to Commission contending that Commission no longer had jurisdiction from 1 January 2023 given its transition from a national systems employer to being governed by the Industrial Relations Act 1979 (WA) – applicant sought to file written submissions in reply to ASU's objections and for the matter to be determined on the papers – Commission refused this request noting that the any determination could be procedurally unfair given the extent of the ASU's objections – despite conciliation being offered to parties, ASU submitted that its concerns could not be addressed via conciliation and further submitted its consensus with applicant's position regarding the Commission's jurisdiction – on 3 January 2023 Commission informed parties that it would consider the dismissal of the application pursuant to s.587 of the Act – on 5 January 2023 applicant informed Commission that it did not seek to withdraw its application – applicant also submitted that pursuant to Schedule 1, regulation 6.07F(5) of the Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employer and Employees) Regulations 2022 (Transitional Regulations) Commission was no longer able to deal with the application, including dismissing it – applicant further submitted in the alternative that the operation of the Transitional Regulations had the effect of 'automatically dismissing' the application such that there would be no application for the Commission to dismiss pursuant to s.587 of the Act – ASU submitted *inter alia* its consensus with applicant regarding the lack of jurisdiction, however qualified their submissions by maintaining that Commission retained its power to deal with the matter in so far as dismissing it for want of jurisdiction – Commission referred to [*Plaintiff M47/2012*] noting that a subordinate legislation must not be repugnant to the Act that empowers it – Commission found the Transitional Regulations a subordinate legislation to be read and construed subject to the Act – Commission considered the Transitional Regulations and noted that contrary to applicant's submissions it could not 'order' for a discontinuance of the application, nor was the application automatically discontinued as it would be contrary to the operation of s.588 of the Act – Commission noted that applicant's interpretation of the Transitional Regulations had the effect of fettering the powers of the Commission pursuant to ss.587, 589 and 590 contrary to the logic aforementioned – Commission found that in light of the Transitional Regulations it was unable to deal with the matter following 1

January 2023 with any reasonable prospects of success, the application was therefore dismissed pursuant to s.587(1)(c) of the Act – In the alternative, Commission noted that if the above ruling was found to be incorrect it accepts applicant submissions that the Transitional arrangements had the effect of automatically dismissing the application.

AG2022/5068		[2023] FWC 305
Beaumont DP	Perth	7 February 2023

Henderson v Northern NSW Helicopter Rescue Service Limited

TERMINATION OF EMPLOYMENT – performance – harshness – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant employed as a as a Line Pilot for a period of 6 months and 26 days – respondent provides 24/7 emergency aeromedical services to 1.5 million people in the communities across northern New South Wales – respondent operates 4 AW139 helicopters from 3 bases at Belmont, Lismore and Tamworth – applicant had extensive experience in flying helicopters, including during her service as a helicopter pilot in the Australian army for 17 years – but applicant did not have any experience in flying the type of helicopters used by the respondent (AW139) to conduct its rescue and other services in northern New South Wales – respondent was aware that it would have to train the applicant to operate an AW139 aircraft – training was provided but it took longer than had been anticipated – the applicant arrived at work to complete her scheduled final summative assessment, the line check, only to be told that a decision had been made on the previous day that she should not proceed to line check because she had not met company standards in all areas of her training – a show cause process took place and the respondent made a decision to dismiss the applicant as a result of 'a narrow area of concern' relating to her ability to accurately position the AW139 aircraft during precision handling and then to maintain a stable hover on a consistent basis – Commission satisfied on the evidence that the respondent had a valid reason to terminate the applicant's employment on the basis of her inability to consistently maintain a stable hover of the AW139 aircraft in all conditions and circumstances – accepted the position of Line Pilot is a safety critical position and the requirement for a Line Pilot to be able to consistently maintain a stable hover is an essential element of the role – Commission satisfied the respondent's reason for termination related to the capacity of the applicant because the reason was associated or connected with the ability of her to do her job as a Line Pilot – Commission found there were significant mitigating factors for consideration when assessing the amount, quality and cost of the training provided to the applicant during the first 6 months of her employment – the respondent was aware when it made the decision to employ the applicant that she had no previous experience with 'glass' instrumentation or the AW139 aircraft, had not undertaken any flight hours in the past 3 months and had achieved approximately 70 flight hours in the 6 months prior, and had limited Helicopter Emergency Medical Services (HEMS) experience – the respondent knew that there would be a significant training cost difference between employing a qualified and experienced AW139 pilot with extensive HEMS experience and employing the applicant – the applicant was also was given the wrong simulator training course by Toll Helicopters at the commencement of her employment – she should have undertaken the single-pilot course in the AW139 aircraft, not the multi-pilot course – this error was not detected until late November 2021 which delayed the completion of her training and put her at a disadvantage at the commencement of her conversion training – the applicant was not provided with an initial flight to allow her to adapt to the AW139 aircraft – the Lismore Base Trainer made inappropriate comments to the applicant during her initial training flight, including that he was keeping a 'paper trail' for the purposes of her dismissal – conduct which damaged the applicant's confidence – Commission found on the balance of probabilities that, at the time of her dismissal, the applicant required a further period of training of about 2 weeks and if she was provided with such further training, it was likely that she would have met the standard required by the respondent in relation to consistently maintaining a stable hover – Commission found that the respondent's dismissal of the applicant was not unjust, but it was harsh and unreasonable in all the circumstances – found the respondent's dismissal of

the applicant was unfair – appropriate remedy in this case is an order reinstating the applicant to the position in which she was employed immediately before the dismissal: Line Pilot based at Lismore – Commission satisfied that a sufficient level of trust and confidence can be restored to make an employment relationship viable and productive – also appropriate to make an order to maintain the continuity of the applicant's employment with the respondent – no order for backpay.

U2022/5722		[2023] FWC 314
Saunders DP	Newcastle	7 February 2023

Mckeown v The Smith's Snackfood Company P/L

TERMINATION OF EMPLOYMENT – misconduct – theft – ss.387, 394 Fair Work Act 2009 – applicant employed by the respondent as a maintenance technician – respondent alleged applicant exceeded his allotted break time on 10 different occasions spanning 5 days, in contravention of the enterprise agreement – respondent also cited the applicant's use of swearing and disrespectful behaviour when questioned about his excessive breaks, as further reasons for dismissal – the Commission first asked to determine whether the respondent should be granted permission to have representation – industrial officer representing the applicant argued the matter was not overly complex and the respondent did not require external representation and should instead rely on in-house HR representatives – the Commission granted permission, stating in-house representatives for the respondent did not have the equivalent level of industrial experience as the industrial officer – the applicant submitted there had been procedural errors in the process leading up to the termination and the reasons provided for the termination were disproportionate – the applicant submitted he did not deliberately take extended breaks – the applicant submitted alternative explanations as to his whereabouts during these extended breaks – the applicant acknowledged his use of swearing and apologised for this behaviour – the applicant submitted, given his age, skills and the potential for this to impact on his future employment, the dismissal was harsh, unreasonable and disproportionate – the respondent submitted there was a valid reason for dismissing applicant, pointing to the applicant's extended paid breaks and disrespectful actions of walking out of meetings and swearing – the respondent submitted this conduct was repeated, deliberate and amounted to serious misconduct – the respondent submitted the disciplinary process was properly undertaken and met the requisite standards – with respect to the allegation of extended breaks, the Commission preferred the evidence of the respondent – Commission found applicant's alternative explanations as to whereabouts lacked credit – the Commission found the applicant had been undertaking extended paid breaks – with respect to the swearing allegation, Commission preferred evidence of the respondent finding the applicant had engaged in swearing and was generally inappropriate and disrespectful – the Commission found no procedural unfairness – the Commission found the compounding conduct of swearing, abruptly leaving a meeting early and taking excessive breaks in contravention with the enterprise agreement were valid reasons for dismissal for the purposes of s.387(a) – the Commission found the deliberate, repeated and excessive examples of time fraud and/or time theft constituted misconduct of a serious nature, justifying a summary dismissal the Commission noted theft in many instances has constituted serious misconduct – the applicant was notified of the allegations by email and in two meetings in which allegations were specified, satisfying the notification requirements of s.387(b) for the purposes of s.387(c), the applicant was given opportunity to respond – the applicant was allowed a support person and representation at the disciplinary meeting, satisfying the requirement of s.387(d) – the Commission found the respondent had afforded the applicant procedural fairness – the personal circumstances of the applicant, including his age, potential difficulties in finding a new role, his tenure and claim he is the sole breadwinner for his household, all weigh in favour of an unfair dismissal remedy – despite this, Commission not satisfied the dismissal was harsh, unjust or unreasonable and stated the trust and confidence between the applicant and respondent had been broken – application dismissed.

U2022/7668 [2023] FWC 91
Lake DP Brisbane 10 February 2023

Ellis v GPC Asia Pacific P/L

TERMINATION OF EMPLOYMENT – valid reason – ss. 387(a), 394 Fair Work Act 2009 – unfair dismissal application – applicant dismissed for multiple instances of misconduct – applicant intimidated colleague through two letters threatening legal action – that first letter described as 'personal' and written as 'fellow citizen' did not take it outside of employment relationship – letters clearly likely to have serious effect on recipient's health and welfare – letters constituted misconduct whether considered individually or cumulatively – conduct breached respondent's code of conduct and policies – applicant breached lawful and reasonable direction to not contact complainant – inappropriate comments previously made to colleague added to gravity of conduct but would not individually justify dismissal – applicant alleged procedural unfairness as inappropriate comments were not investigated at time they were made – found colleague requested it be let go at the time – Commission satisfied misconduct occurred – Commission required to determine whether conduct justified dismissal – valid reason for dismissal established – applicant notified of reason for dismissal – given opportunity to respond – permitted to bring support person – observed employer took extraordinary steps to engage with applicant in investigation – applicant refused to participate in disciplinary process – treated disciplinary process as a game – no procedural unfairness – application dismissed.

U2022/7658 [2023] FWC 261
Cross DP Sydney 21 February 2023

Community Accommodation and Respite Agency Inc T/A CARA v United Workers' Union

RIGHT OF ENTRY – dispute over right of entry – judicial power – ss.484, 493, 505 Fair Work Act 2009 – application for Commission to deal with a dispute about Part 3-4 – whether relevant premises were 'residential premises' within the meaning of s.493 – whether permit holders prohibited from entering the homes of clients of in-home care services provided by the respondent for purposes of discussions pursuant to s.484 – whether enterprise agreement prohibits permit holders from entering homes – whether permit holders prohibited from entering homes in light of concerns for health and safety of clients – whether permit holders prohibited from entering homes at times when staff are actively providing support – jurisdictional objection that dispute involves exercise of judicial power – determination as to existing legal rights an exercise of judicial power, opinions formed in course of determining what rights should exist in future fall within arbitral power of Commission [*CFMEU v BHP Billiton Nickel West*] – whether characterisation of 'residential premises' a step in process or answer to question – Commission found determination of characterisation would determine dispute – would be an exercise of judicial power – noted term of agreement inconsistent with part 3-4 of the Act unenforceable by virtue of s.194(f) – application dismissed for want of jurisdiction.

RE2022/1385 [2023] FWC 354
Platt C Adelaide 22 February 2023

Evison v PROCLOZ P/L

GENERAL PROTECTIONS – extension of time – merit – s.365 Fair Work Act 2009 – applicant employed by Procloz as Agency Partner Manager, Australia – applicant performed work for client of Procloz based in the United States (TapCart) – applicant took day to day direction from TapCart but was paid by Procloz – applicant made report to TapCart on 30 September 2022 that he was being bullied and harassed by the VP of Sales and commenced 1 month of stress leave from 10 October 2022 –

applicant's employment with Procloz terminated on 20 October 2022 after TapCart withdrew services from Australia – respondent suggested applicant terminated after TapCart closed its business in Australia and no longer required respondent's services – respondent denied knowledge of bullying complaint or that dismissal was for a prohibited reason – applicant filed general protections dismissal application on 18 November 2022 – application lodged 8 days after statutory time limit – consideration of extension of time – test of exceptional circumstances [*Nulty*] applied – credible reason for delay required – applicant suggested medical reason behind delay – submission not accepted by Commission given applicant's other correspondence with respondent at the time – reason for delay did not weigh in favour of extension – steps taken to dispute termination and prejudice to employer considerations neutral – merits of application considered – Commission found TapCart notified respondent on 19 October 2022 it was ceasing its "people operations" in Australia and ongoing business would be conducted remotely from the United States – sudden timing of this decision aligned closely with applicant commencing period of stress leave following bullying complaint about TapCart's VP of Sales – observed this called into question whether redundancy was genuine – applicant suggested a causal link between his workplace right, his complaint to HR, his temporary absences and his termination of employment – Commission held it could not conclude applicant's application was without merit – held this weighed in favour of an extension – found despite TapCart's decision to withdraw people operations from Australia, respondent's employment obligations to applicant continued – applicant not afforded care or responsibility for his workplace complaint – held this weighed in favour of extension – on balance Commission satisfied exceptional circumstances exist – extension of time to file granted.

C2022/7683 [2023] FWC 328
Yilmaz C Melbourne 9 February 2023

Davoren v Pejr Business Aviation P/L

TERMINATION OF EMPLOYMENT – merit – ss.394, 396 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as flight attendant since on or about 2 May 2019 – applicant summarily dismissed for failure to follow lawful and reasonable directions – failed to move hotels in Los Angeles – failed to comply with rest requirements and attended for flight duty fatigued – applicant's employment contract required they follow 'reasonable and lawful instructions to ensure the work of the employer is done' – contract described 'reasonable instruction' as 'physically undertaken, reasonable and not a threat to health and safety' – Flight Operations Manual specified fatigue management and rest policies – respondent operates Gulfstream 550 ('Aircraft') as part of its enterprise – Aircraft was to travel to London, New York, Los Angeles and return to Sydney on November 2021 – following absence, applicant flown via commercial airline to London to join remaining flight schedule – Los Angeles hotel had construction which could impair required 12-hour rest period per Flight Operations Manual – Chief Pilot attempted to make alternate arrangements – applicant did not change hotel rooms – applicant conducting arrangements in preparation for return Sydney flight – Chief Pilot complained to respondent regarding applicant's 'refusal' to change rooms and issue of rest time – issue was to be dealt with back in Sydney – applicant attended meeting to discuss 'serious issues' with respondent on 11 November 2021 – respondent argued applicant failed to comply with operational procedures and did not follow reasonable direction – respondent believed applicant 'did not appreciate seriousness' of issue – applicant summarily dismissed on 12 November 2021 – applicant refuted wrongdoing – applicant contested that request to move hotels was not a reasonable direction per her contract – Flight Operations Manual does not apply to flight attendants specifically – Commission to consider merits -Commission observed that direction to move hotels was within scope of employment and lawful [*Mt Arthur Coal*] – Commission held 12-hour rest period does not apply to applicant – no valid reason for dismissal – no other relevant circumstances required consideration – dismissal harsh, unjust and unreasonable – remedy considered – reinstatement inappropriate due to irreparable damage to working relationship [*McLauchlan*] – compensation deemed appropriate –

listed for hearing regarding compensation.

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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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