FWC Bulletin

8 May 2023 Volume 5/23 with selected Decision Summaries for the month ending Sunday, 30 April 2023.

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Implementing the new bargaining provisions

28 Apr 2023

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) amends the enterprise bargaining provisions in the Fair Work Act 2009 (the FW Act). Some of these amendments commenced on 7 December 2022 and further changes are due to come into effect on 6 June 2023. These amendments will have a significant impact on our work and those who use our services. We are proposing to implement a number of initiatives to assist users to understand and navigate the amendments.

As outlined in a statement by President Justice Hatcher on 8 December 2022, we are committed to implementing these amendments in an open and transparent way and have been listening closely to our users and other experts.

We have established the Enterprise Agreement and Bargaining Advisory Group (EAB Advisory Group) which will meet from early May 2023. This group consists of employer and employee organisations who represent their members interests. They will contribute feedback and advice as we work to design services that meet user needs.

The new provisions place more focus on our role in facilitating bargaining. The President has provided a commitment that we will ensure appropriate support is provided to parties during bargaining. In recognition of the need for increased support, Justice Hatcher recently appointed Deputy President Hampton as the National Practice Leader for Bargaining. See the President's Statement from 4 April 2023 for more information.

The new practice area will ensure functional separation between bargaining matters and applications for approval of enterprise agreements within the Commission. However, we recognise that for our users bargaining and agreement making are part of the same process. Accordingly, our proposed resources will support users across the whole process.

Bargaining initiatives to support you

We are proposing a series of bargaining initiatives to assist users understand and navigate the changes to bargaining We are currently consulting with the EAB Advisory Group on a range of proposed initiatives to ensure we are meeting the needs of our users. Some of the proposed initiatives include:

1. A Member led information video series
2. A Masterclass series
3. Information packs about the amendments and the Commission's processes
4. Promotion of the Cooperative Workplaces Program which has been renamed as the Collaborative Approaches Program

Over the coming weeks, we will be publishing further information about different aspects of the bargaining amendments, starting with an information pack about the new processes for protected action ballot order applications. All information and resources will be published on our website.

We encourage you to subscribe to our announcements and follow us on LinkedIn to stay up to date.

We will also be distributing information through employer and employer organisations. If you have any feedback, please email us at consultation@fwc.gov.au.

Overview of the new bargaining provisions

The Secure Jobs Better Pay Act amends the bargaining provisions of the *Fair Work Act 2009*. Key amendments include:

- removing the Australian Electoral Commission as the default agent to conduct protected action ballots
- giving the Commission the function of approving 'eligible protected action ballot agents', and requiring the Commission to review that approval at least every 3 years
- a requirement for all bargaining representatives involved in a proposed enterprise agreement to participate in a Commission conciliation conference during the protected action ballot period
- new 'intractable bargaining declaration' provisions
- new multi-enterprise bargaining streams.

See Secure jobs better pay – what's changing for more information.

Attachment A to the President's Statement from 4 April 2023 also provides an overview of the changes.

Registered Organisations interim compliance and enforcement policy issued

14 Apr 2023

The General Manager is the regulator of federally registered organisations established under the Fair Work (Registered Organisations) Act 2009 (RO Act).

We have published an interim Compliance and Enforcement Policy which sets out the General Manager's approach to promoting and monitoring compliance and the use of enforcement tools and activities.

The purpose of this Compliance Policy is to provide an overview of how we perform our statutory
compliance and enforcement functions under the RO Act.

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 Sunday, 30 April 2023.

1 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – consultation – s.739 Fair Work Act 2009 – dispute arising under the *University of Tasmania Staff Agreement 2017-2021* (2017 Agreement) – dispute concerned the decision of the University of Tasmania, to introduce a policy that required employees to be vaccinated against COVID-19 as a condition of entry to the university's premises – the applicant did not wish to become vaccinated – he found the policy to be unreasonable and considered that the university had failed to consult with him about it in the manner required by the 2017 Agreement – on 15 March 2022 the applicant filed his application asking the Commission to arbitrate the dispute – the application stated that the university had not complied with its obligation to consult with employees in relation to the introduction of significant change and that the university had now required him to show cause why his employment should not be terminated – it asked the Commission to determine whether the university's direction to comply with the policy was a lawful and reasonable direction – also sought an interim order that the applicant not be dismissed or disciplined until the application was determined – on 18 March 2022 the university terminated the applicant's employment – on 21 March 2022 Lee C made an ex-tempore decision declining to make interim orders – the application was listed for further hearing on 12 April 2022 – in a decision dated 27 May 2022, Lee C dismissed the application on two bases: first, the applicant was no longer an employee, which meant that the 2017 Agreement no longer applied to him; and secondly, the dispute did not fall within the scope of matters to which clause 15 applied, because the giving of lawful and reasonable directions was not a matter dealt with by the Agreement and the dispute was therefore not one about the application of the agreement – on 31 August 2022 a Full Bench of the Commission upheld the applicant's appeal against Lee C's decision [[2022] FWCFB 165] – the Full Bench concluded that the applicant's application had identified the subject matter of the dispute as being the question of whether the university had complied with its consultation obligations under clause 12 in respect of the introduction of the vaccination requirement, that this was clearly a dispute that fell within the scope of the dispute resolution procedure in clause 15, and that the question of whether the vaccination requirement was a lawful and reasonable direction followed from the applicant's contention that the consultation requirements in clause 12 had not been met – the Full Bench further determined that the applicant's dismissal had not deprived the Commission of jurisdiction to determine his application, because his employment had subsisted at the time the application was made, and consistent with Commission authority, the fact that the 2017 Agreement had later ceased to apply to him did not prevent the Commission from determining the dispute – the Full Bench quashed Lee C's decision and remitted the application to him for determination consistent with

its reasons – Lee C listed the matter for conference – efforts to conciliate the matter were unsuccessful – the applicant then asked Lee C to recuse himself from determining the application on the basis that certain observations that the Commissioner had made during conciliation might raise an apprehension of basis – in a decision dated 30 November 2022 Lee C decided to recuse himself – the application was subsequently reallocated – at [36] of its decision, the Full Bench stated the following: 'It seems to us that the resolution of the dispute would require the determination, at least potentially, of the following questions: (1) Was the introduction of the vaccination requirement a "significant change" to which the consultation requirements in clause 12 applied?; (2) If so, did the University comply with clause 12?; (3) If the University did not comply with clause 12, is the Agreement to be construed as invalidating the vaccination requirement such that it is not lawful or reasonable?; (4) If so, what, if any, remedial orders should be granted?' – although the Full Bench said that these were 'potentially' the questions that needed to be answered, neither party suggested that this was not the case – both parties' submissions addressed these questions – necessary first to deal with a jurisdictional objection raised by the university – on 30 January 2023, some 5 months after the Full Bench decision was handed down, the Commission approved the *University of Tasmania Staff Agreement 2021 – 2025* (2021 Agreement), an agreement with the same coverage as that of the 2017 Agreement – the university contended that the power of the Commission to continue to deal with the present dispute under the 2017 Agreement was extinguished at that time – *Falcon Mining* considered – university's jurisdictional objection inconsistent with the decision of the Full Bench in the applicant's appeal – Commission was therefore required by the FW Act to reject it – Questions 1 and 2 – at both first instance and in the appeal, the university contended that the introduction of the vaccination policy was not a 'significant change', and that therefore clause 12 did not require the university to consult about it – in the hearing before the Commission, the university conceded that, in light of the decision of the Full Bench of the Commission in *CFMMEU v Mt Arthur Coal* [[2021] FWCFB 6059], this had in fact been a significant change to which the consultation requirements in clause 12 applied – Commission held the answers to questions 1 and 2 are not in dispute – parties now agree that the introduction of the vaccination requirement was a significant change to which the consultation requirements in clause 12 of the 2017 Agreement applied, and that the university did not meet its obligations under that clause – Commission considered that the parties were correct in both respects – the answers to questions 1 and 2 are 'yes' and 'no' – Question 3 – the third question posed by the Full Bench was whether, in the event the university had not complied with clause 12, the 2017 Agreement was 'to be construed as invalidating the vaccination requirement such that it is not lawful or reasonable' – this question requires some modification because the applicant was very clear in his submissions that he did not challenge the lawfulness of the vaccination requirement – his contention was rather that the requirement was not reasonable, and for this reason it was not a 'lawful and reasonable direction' with which he was required to comply – the Agreement does not deal with the question of lawful and reasonable directions, but that does not mean that the Agreement, properly construed, cannot invalidate directions – very common for enterprise agreements to contain a 'status quo' provision which prohibits an employer from implementing change, pending the determination of any dispute

that is raised about the matter – Commission considered that clause 12 was not to be construed as invalidating the vaccination requirement in light of the university's failure to comply fully with that clause, nor was clause 7, clause 15, or any other provision of the 2017 Agreement to be construed in this way – the university contended that despite the shortcomings in its consultation process, it had given employees an opportunity to express their views so that they could be taken into account – the applicant repeatedly indicated his opposition to the vaccination requirement on the basis of vaccine safety and efficacy – he was told that the university had considered and rejected his proposal that his alternative working arrangements should continue – whether an employer's direction to an employee is reasonable is a question of fact that must be determined objectively having regard to all the circumstances – the assessment of reasonableness will include whether there is a logical and understandable basis for the direction (see *Mt Arthur* at [259]) – commission found that in this case there was such a basis – the deficiencies in the university's consultation process did not render the vaccination requirement unreasonable – relevant to take into account whether the university's full compliance with its consultation obligations under clause 12 could reasonably have been expected to make any difference to the outcome – Commission found it highly unlikely that further consultation would have led to some accommodation between the parties, either in relation to the introduction of the vaccination requirement generally, or special working arrangements for the applicant – the university took a very cautious approach to safeguarding the health and safety of its community – this approach placed he applicant, and others who held similar opinions to him, in a difficult position – however, Commission found the university's approach was clearly within the bounds of reasonable decision-making, if for no other reason than to protect the safety of vulnerable persons with special susceptibilities to COVID-19, including students with disabilities and older persons – the university did not consult with the applicant to the full extent required by clause 12 of the 2017 Agreement – it should have done so – however, in all the circumstances, the Commission did not consider this failure rendered the vaccination requirement unreasonable – the answer to question 3, either as a question of construction, or as a broader question going to the reasonableness of the direction, is 'no' – Question 4 – in light of the answer to question 3, the Commission felt it was not necessary to answer question 4 – however, in the interests of achieving finality in this long-running matter, it was appropriate for the Commission to determine question 4 (in the event that, contrary to its conclusion, the answer to question 3 was 'yes') – the applicant contended that the Commission should make 3 compensation orders – he sought an order that the university pay to him the wages and entitlements that he would have expected to receive had he not been dismissed, assessed from the date of his termination on 18 March 2022 until the commencement of his new job with the University of Sydney on 25 July 2022 – secondly, he sought an order that the university pay him an amount of $5000 in 'general damages' for the hurt and distress that he suffered as a consequence of his dismissal – and thirdly, he asked the Commission to order the university to pay him a further amount of $5000 in order to secure greater awareness of and compliance with the FW Act – the applicant submitted that the Commission had power to issue all 2 orders because s.595(3) allows the Commission to deal with a dispute by arbitration 'including by making any orders it considers appropriate' – s.739(4) is the provision of the FW Act under which

the Commission is authorised to arbitrate the present dispute – that section states that if in accordance with a term of the kind referred to in s.738 (which includes a dispute resolution provision in an enterprise agreement), 'the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.' – s.739(5) then states that, despite s.739(4), the FWC 'must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.' – the Commission is not free to do whatever it thinks is fair and just – the role that it plays under the dispute resolution procedure depends on the agreement of the parties, as objectively manifested in the text of the agreement – the ordinary meaning of a dispute resolution clause that requires or allows the Commission to arbitrate a dispute about the application of an agreement is that the Commission is expected to determine how the agreement applies – this may require the Commission to determine the meaning of a disputed provision, to apply the terms of the agreement to the facts of a dispute, to make findings about factual disputes, or to undertake some combination of these things – the orders sought would not determine how the 2017 Agreement applied to the applicant – he was not entitled to compensation, or to a process that would lead to an award of compensation – instead of determining how the 2017 Agreement applied to the applicant, the orders he seeks would create new rights – the Commission held that the 2017 Agreement did not authorise the Commission to make the compensation orders sought – but if such power existed, it would plainly be discretionary, and the Commission would not exercise the discretion in this case – appropriate to affirm in this decision that the university was required to comply with each of the obligations imposed on it by clause 12 of the Agreement and that it did not do so – the applicant maintained throughout the dispute that the university had not met its consultation obligations – he was correct – the applicant's position on this matter has been vindicated.

Mitchell v University of Tasmania

C2022/1761		[2023] FWC 810
Colman DP	Melbourne	4 April 2023

2 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – valid reason – s.394 Fair Work Act 2009 – applicant was employed as a bakery manager, barista and bookkeeper – Commission provided context that respondent is a small family owned business with all family members speaking predominantly Vietnamese – at the time of the hearing, many of the witnesses provided evidence over the telephone as they had relocated to Vietnam – Commission confirmed the Small Business Fair Dismissal Code ('the Code') was a relevant consideration – applicant was engaged on a full-time basis – applicant submitted it was agreed with respondent that he would work 3 days per week at home, due to a drop in sales – applicant continued to receive the same wage despite reduced duties – respondent submitted they did not agree to applicant working from home or reducing his duties – respondent submitted applicant had abandoned his employment – respondent submitted they had tried to 'convince' applicant to return to working from the premises – respondent further submitted applicant concealed accurate passwords and misappropriated respondents' monies – Commission preferred evidence of respondent, finding respondent did not agree applicant could partially work from home –

Commission did not agree applicant had abandoned his employment, but did find applicant had repudiated his employment contract in unilaterally deciding to work from home claiming a full-time wage – Commission clarified the Code does not require the Commission be *satisfied* serious misconduct was the basis of dismissal, rather that the employer held a belief, on reasonable grounds, that the employee's conduct was sufficiently serious to warrant dismissal – Commission found applicant’s conduct of unilaterally changing his place of work and scope of duties, irrespective of contrary instruction, was a breach of an essential term of his employment contract and was therefore sufficiently serious misconduct – Commission found applicant was not afforded procedural fairness – Commission found the lack of procedural fairness was affected by respondent’s size and lack of internal human resources specialists – Commission observed the employer, because of their language barrier and lack of familiarity with the running of a business in Australia, was reliant on applicant – Commission found the traditional power imbalance between employer and employee was resultantly reversed and applicant exploited this – Commission characterised the actions of applicant, including unilaterally changing work location and claiming a full-time wage for part-time work was exploitative – notwithstanding clear procedural deficiencies, on balance the dismissal was not unfair – application dismissed.

Bailey v TC TL VU Nguyen P/L t/a Nannup Family Bakery

U2022/10905		[2023] FWC 304
Beaumont DP	Perth	6 April 2023

3 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – applicant employed as a Station Duty Manager – applicant failed to report that he had been charged with criminal offences – code of conduct included obligation to report charges – respondent became aware of charges by anonymous tip-off a year after charges laid – earlier undisclosed conviction discovered by respondent – applicant charged with supply of cannabis and firearms offences – applicant pleaded guilty to amended charges in Paramatta Local Court – applicant convicted on some, but not all, charges – respondent decision to dismiss relied on both failure to report and disposition of criminal charges – applicant conceded non-reporting of charges amounted to error of judgment but was guided by legal advice and did not justify dismissal – Commission held that at least some of the charges against the applicant could be described as serious within meaning of code of conduct – Commission held failure to immediately notify manager of charges was breach of code of conduct – valid reason for dismissal having regard to conduct – disposition of charges not necessarily sufficient to ground valid reason – Commission had regard to witness evidence – applicant’s role involved facilitating drug testing of other staff – supply of drugs conviction led to lost confidence applicant could deliver positive message about respondent values – applicant afforded procedural fairness – other matters taken into account – applicant relied on legal advice not to report charges to employer until they had been settled by prosecutor – reliance on advice did not undermine valid reason for dismissal – applicant had clear obligation to report charges but placed own interests ahead of those of respondent – applicant’s atypically lengthy period of relatively untarnished service taken into account – Magistrate’ remarks regarding stability of employment as a positive rehabilitation factor considered –

Commission weighed factors and held dismissal proportionate to applicant's conduct – dismissal not harsh, unjust or unreasonable – application dismissed.

Strangio v Sydney Trains

U2022/11462		[2023] FWC 730
McKenna C	Sydney	5 April 2023

4 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – rapid antigen tests – s.739 Fair Work Act 2009 – applicant applied to Commission to deal with dispute under *Johnson Stenner Aged Care Enterprise Agreement* (Agreement) – dispute regarded payment for time spent by registered nurses, enrolled nurses and assistants in nursing (nursing staff) undertaking Rapid Antigen Tests (RAT/s) in accordance with respondent's directions – since July 2022 respondent required all staff to complete a RAT prior to every shift and send proof of completed task before attending workplace – respondent supplied RATs to employees free of charge – nursing staff not paid for time spent undertaking a RAT prior to start of rostered shift – applicant submitted that nursing staff were required by respondent to do certain things and while doing those things they were working [*Seo*] – respondent submitted they did not direct or require nursing staff to undertake a RAT at any particular time or to be at any specific place and the elements for the task to be considered 'work' were absent – applicant submitted that primary indicator of performance of work was whether employee was under instruction from their employer while performing the task and whether task is consistent with employee's employment – submitted that respondent directed nursing staff to complete the task at a certain time (before start of rostered shift) and at a certain place (away from usual workplace) – submitted that nursing staff must paid be overtime penalty rates because rosters did not include time spent by nursing staff in complying with RAT direction and work was performed in excess of rostered ordinary hours on each shift – respondent contended that time required to undertake test would be *de minimis* – applicant submitted that task was de minimis but was a 19-step process – Commission considered question of 'what constitutes work' – rejected respondent's assertion that 'work' must be a duty required to be undertaken by the employee at a certain place and at a particular point in time – noted that central issue was whether Agreement applied to undertaking RATs in these particular circumstances [*Aldi*] – considered that Agreement did not cover duties performed remotely from the workplace, outside a shift or other specified work period, except when receiving an on-call allowance – satisfied that Agreement does not encompass payment for certain incidental duties – satisfied that when nursing staff undertake a RAT as directed by respondent at a time of their own choosing before prior to their rostered hours they are not 'performing work' as contemplated by clause 4 of Agreement and are not covered by Agreement at that time – concluded that Agreement did not apply to disputed activity and nursing staff were not entitled to be paid wages for the time spent complying with the direction.

Australian Nursing and Midwifery Federation v Johnson Stenner Aged Care P/L t/a New Auckland Place

C2022/8153		[2023] FWC 943
Simpson C	Brisbane	21 April 2023

5 TERMINATION OF EMPLOYMENT – valid reason – performance – remedy – ss.394, 392 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed after 11.5 years of service – applicant met with General Manager to discuss another employee's performance – General Manager dismissed the other employee and suffered significant stress due to increased workload and was hospitalised – General Manager is the respondent's owner's daughter – applicant submitted there was no valid reason for her dismissal and contended her dismissal was harsh, unjust and unreasonable – respondent submitted the reasons for dismissal were that applicant gave General Manager an ultimatum to dismiss the other employee or she would leave which significantly impacted General Manager's mental health and resulted in her hospitalisation – further that a group of employees didn't like applicant and voted she should be dismissed – also submitted applicant's job costings were unprofitable – Commission found that none of the reasons submitted by the respondent constituted a valid reason for dismissal – Commission considered the main reason for dismissal to be that respondent blamed applicant for his daughter suffering a nervous breakdown – Commission found there was insufficient evidence to draw a causal connection between applicant's conduct and General Manager's hospitalisation – found vote of other employees organised by owner concerning whether applicant should be dismissed was a 'shocking' thing for respondent to do – observed course of action was 'a disturbing, primitive act, unacceptable in the 21st century' – held vote did not amount to a valid reason – found applicant's job costings were not so poor as to justify dismissal and applicant could not be held responsible for all jobs that did not result in a profit – held applicant was not afforded an opportunity to respond to any of the reasons for dismissal relating to her conduct and did not receive any prior warnings of unsatisfactory performance – Commission also had regard to the applicant's length of service and 'the very sudden and spiteful way' she was dismissed – Commission found the dismissal to be harsh, unjust and unreasonable – Commission determined appropriate remedy was compensation – Commission considered the applicant would have remained employed for at least one year and took into account her length of service, the fact she secured new employment 6 weeks after dismissal and the relative small size of the respondent's business – Commission ordered compensation in the amount of $23,410 plus superannuation.

Duncan v PKK Transport P/L atf the PKK Family Trust t/a Ashtons Removals

U2022/10822		[2023] FWC 444
Hunt C	Brisbane	28 March 2023

Other Fair Work Commission decisions of note

Robson v Ranstad P/L

TERMINATION OF EMPLOYMENT – extension of time – exceptional circumstances – s.394 Fair Work Act 2009 – applicant considered herself dismissed with effect from 9 February 2023 – applicant believed she filed application on 28 February 2023 by email – email application received by Commission on 8 March 2023 – application six days outside statutory time frame – respondent raised jurisdictional objection that applicant was not dismissed and opposed extension of time – applicant suggested she

filled out application form on 28 February (day 19 of time frame) using her daughter's laptop – applicant suggests she sent application via email from daughter's laptop that afternoon – did not check email sent items – laptop taken to repair shop due to battery issues later same day – malware discovered on laptop – eight days later (8 March 2023) laptop returned to applicant having been repaired – email application dated 28 February received by Commission that day (8 March 2023) – application out of time – to proceed applicant needed to demonstrate 'exceptional circumstances' in support of extension of time – whether exceptional circumstances considered – Commission found reason for delay attributable to malware preventing email being sent from daughter's laptop – malware unknown to applicant at time of application and no indication email had not been received by Commission when sent – Commission stated an applicant has ongoing responsibility to be attentive to status of their application – Commission found applicant had reasonable explanation for not checking email sent items and not calling Commission to check status of her application – held applicant had not been inattentive to her interests – held reason for delay weighed in favour of finding exceptional circumstances – ss.394(3)(c) and (d) factors neutral – observed applicant may face significant jurisdictional impediment should application proceed; weighing somewhat against granting extension – considered overall held exceptional circumstances exist – held applicant made genuine attempt to file within time and believed she had done so – delay caused by compromised technology – extension of time granted – application to proceed.

U2023/1877		[2023] FWC 831
Anderson DP	Adelaide	6 April 2023

Drake v Melba Support Services Australia Ltd

TERMINATION OF EMPLOYMENT – misconduct – ss.387, 394 Fair Work Act 2009 – applicant employed as disability support worker at a supported independent living home – allegation of misconduct – alleged applicant placed his lips on a naked resident's stomach and 'blew a raspberry' while assisting dressing – alleged breach of code of conduct – applicant denied allegation – applicant maintained he blew a raspberry on his own arm in attempt to distract resident who was banging on the walls – applicant sought reinstatement – respondent relied primarily on evidence of one witness – witness heard resident banging on the walls and went to investigate – witness opened door and observed applicant engaged in conduct alleged – witness did not intervene but immediately reported incident – applicant contended witness account was mistaken or formulated maliciously – third witness gave evidence that the door was never opened – on balance of probabilities Commission accepted respondent witness testimony [*Brigginshaw*] – held that witness had specific knowledge of applicant and resident that could only have been known if door had been opened – Commission held applicant's evidence was not mistaken and there no evidence or motive to support contention that witness acted maliciously – Commission held applicant's conduct amounted to serious misconduct – valid reason for dismissal – allegation of shortcomings in investigation and failure to comply with enterprise agreement not accepted – procedural fairness afforded to applicant – other matters taken into account – age, financial impact, ability to find another role, applicant's denial of allegation – dismissal was fair – application dismissed.

U2022/11835		[2023] FWC 677
Colman DP	Melbourne	21 March 2023

Hutton v Evolution Support Services

TERMINATION OF EMPLOYMENT – valid reason – remedy – ss.387, 394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant dismissed for misconduct – whether valid reason – applicant one of two Disability Support Workers regularly caring for participant with intellectual disability who could become violent, the other worker was Mr Probert – an incident occurred on 30 October 2022 when participant became violent during welfare check – applicant and Mr Probert physically restrained participant during incident – Mr Probert alleges applicant deliberately

struck participant in the head with his knee and swore at participant during this restraint – applicant denies allegations – on balance of probabilities and having regard to *Briginshaw* standard, Commission found applicant deliberately kneed and swore at participant during incident – this conduct, a failure to report the extent of force used and not informing the participant's mother of the force used found to constitute valid reason for dismissal – dismissal not harsh, or unjust – however respondent did not comply with its internal appeals process before dismissing applicant – manager in show cause meeting told applicant there was no appeal process – managers in meeting not aware of appeal process – respondent should have informed applicant of right to lodge appeal –dismissal therefore unreasonable – if applicant not dismissed on 19 December 2022, Commission satisfied he would have remained employed until 15 February 2023 by which time internal appeals process would have concluded – compensation ordered for this period less 20% on account of applicant's misconduct.

U2023/199		[2023] FWC 919
Saunders DP	Newcastle	19 April 2023

Pitt v Wentworth Area Chaplaincy Association Incorporated

TERMINATION OF EMPLOYMENT – termination at initiative of employer – ss.386, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as hospital chaplain – applicant had not worked since September 2021 because she did not meet mandatory vaccination requirements applying to hospitals – discussions about her employment had occurred from then until employment ended – on 23 August 2022 applicant emailed respondent and requested her "final pay (holiday pay)" (applicant's email) – on 25 August 2022 respondent emailed applicant and said "As you have requested your final pay, we wish to clarify that this will be an end to your employment with [the Respondent] because we cannot place you in a public hospital due to your vaccination status" (respondent's reply email) – applicant submitted her email on 23 August 2022 intended to request payment of her owed annual leave and respondent's reply email was a dismissal – respondent submitted it did not dismiss applicant and raised jurisdictional objection – respondent submitted applicant's request for "final pay" was a request to end her employment and respondent's reply email merely confirmed receipt of request – Commission considered whether respondent's conduct had probable result of ending applicant's employment – *Mohazab*, *Mahony* and *Rheinberger* considered – Commission considered email communications between applicant and respondent about her employment intentions and leave entitlements from September 2021 to September 2022 – Commission found content of applicant's email ambiguous as to whether it reflected a resignation and noted applicant did not provide notice of her purported resignation – Commission found content of respondent's reply email did not seek to clarify either applicant's email or her intentions regarding her continued employment, but rather clarified its own position that it wanted applicant's employment to end – Commission found respondent's reply email was the principal contributing factor leading to end of applicant's employment – found respondent dismissed applicant within meaning of s.386(1)(a) on 25 August 2022 – Commission dismissed jurisdictional objection – matter to be listed for mention and directions regarding remaining issues.

U2022/9281		[2023] FWC 797
Boyce DP	Sydney	12 April 2023

Simonovski v Fonterra Brands (Australia) P/L

GENERAL PROTECTIONS – dismissal dispute – renunciation – ss.365, 386 Fair Work Act 2009 – application to deal with contraventions involving dismissal – respondent raised jurisdictional objection on grounds that applicant was not dismissed – applicant was a senior executive – respondent announced business restructure and disagreement ensued as to how restructure would apply to applicant – respondent

submitted that applicant was given a lawful and reasonable direction to perform new duties and applicant evinced an intention not to perform them – respondent submitted applicant repudiated his employment contract by renunciation which was accepted by the respondent and this did not constitute dismissal within the meaning of s.386 – applicant submitted he was made an offer to perform new role – Commission found there was a clear direction given on 15 August 2022 when respondent's lawyer sent applicant a letter requiring him to confirm that he will perform amended duties and if he declined to do so or otherwise respond, respondent will consider that applicant no longer considers himself bound by the terms of the contract and is bringing his employment to an end – Commission found employment contract was sufficiently broad to accommodate the proposed changes to applicant's role – Commission satisfied that by not responding to the letter, applicant evinced an intention not to perform the new role at the time performance was required which amounted to renunciation [*Koompahtoo*] – Commission found it was open to respondent to accept renunciation and elect to terminate employment contract however Commission rejected respondent's submission that renunciation constituted termination at the employee's initiative – despite applicant's renunciation which at common law entitled respondent to terminate the employment contract, Commission found this constituted a dismissal for the purpose of s.386 – jurisdictional objection dismissed – application referred to conciliation.

C2022/6242		[2023] FWC 429
Bell DP	Melbourne	5 April 2023

Zhong v Hawthorn Resources Limited

GENERAL PROTECTIONS – dismissal dispute – ss.365, 386 Fair Work Act 2009 – application dealing with contraventions involving dismissal – concern as to whether applicant was employee of respondent – issue as to whether applicant can make claim in her own name or as an employee – applicant argues sham contracting – applicant is part-shareholder and director of Austic a P/L company – respondent is a mining company – applicant provided liaison services to respondent since on or around 2013 via Austic – applicant relies on multi-factorial test to determine she is an employee of respondent [*Stevens; Hollis*] – Commission considered 2013 contract [*Nurisvan*] – element of control relates to subservient and dependent nature of work of employee [*Personnel Contracting*] – putative employee's work to be seen as part of the business rather than an independent enterprise [*JMC*] – Commission assessed totality of relationship [*Personnel Contracting*] – Commission determined that 2013 contract was between Austic and respondent only – all invoices from respondent were to Austic and not applicant – demonstrates contracting party was Austic and therefore not a relationship of 'employer and employee' nature [*Personnel Contracting*; *Avert*] – Commission determined applicant's liaison services were provided by independent contracting arrangement – no evidence of sham contracting on evidence – applicant not an employee – application dismissed.

C2023/123		[2023] FWC 736
Bell DP	Melbourne	20 April 2023

Application by Jephcott

CASE PROCEDURES – apprehension of bias – ss.592, 789FC Fair Work Act 2009 – application by person named for Deputy President to recuse herself – considered whether fair minded lay observer might reasonably apprehend that the Deputy President did not bring an impartial mind to the resolution of the question [*Ebner*] – important that Deputy President discharge duty to sit and does not encourage parties to believe that by seeking recusal, they will have their case heard by someone thought to be more likely to decide the case in their favour, circumstances include what was done by Deputy President subsequently, which may be sufficient to eradicate any reasonable apprehension of bias [*Re JRL; Ex Parte CJL*] – s.592 makes clear that

conducting of conferences by Members, including expression of views, contemplated by Act – line drawn between forthright and robust indications of provisional views on matters of importance and an impermissible indication of prejudgment – Deputy President prefaced views expressed in conference as preliminary, made on basis of material before her, likely to be changed by evidence and cross-examination – Deputy President found representative of person named misconstrued attempts to draw his attention to weaknesses in claim – Commission required to proceed informally and without unnecessary technicality – expressing preliminary view an accepted case management tool – rejected claims that Deputy President said in joint session that an email was sexual harassment and that she viewed allegations of bullying as substantiated – claim that Deputy President's tone overtly negative and that offers met by long pauses misconstrued Deputy President's intention to pause to allow time for reflection – claim that Deputy President rejected first offer and admonished him for making it rejected, Deputy President had noted offer was put and rejected at previous conference and she did convey the offer – rejected assertion that she asked person named to compromise position on basis that employer was considering lodging an application, merely conveying the information provided to her by employer – representative of person named characterised offers made by applicant and employer as Deputy President's views – evidence that Deputy President had already made decision as to outcome at odds with opening statement, evidence of applicant and employer, and Deputy President's recollection – reference to reputational damage made to both parties and was not indicative of a concluded view – assertion that Deputy President informed representative of person named that he was obliged to pressure his client to accept offer rejected, circumstances were such that there could not be another conference before hearing – person named granted permission to be represented where he was legally qualified and applicant strongly objected – rejected assertion that opening statements with 'I put it to you' descended into the arena of advocacy – given opening statement, no factors identified that would lead Deputy President to decide case other than on factual and legal basis – given opening statement, no logical connection between comments and actions during conference and possibility that Deputy President might depart from impartial decision making – not satisfied that a fair minded lay observer might reasonably apprehend that Deputy President might not bring an impartial mind to resolution of questions for determination – recusal application refused.

SO2022/609		[2023] FWC 843
Dobson DP	Brisbane	6 April 2023

Jacobs v Moonta Health Aged Care Services T/A Parkview Aged Care

TERMINATION OF EMPLOYMENT – misconduct – valid reason – s.394 Fair Work Act 2009 – applicant was a personal care worker at aged care facility – respondent dismissed applicant alleging serious and wilful misconduct which occurred during a night shift – this included misconduct in documenting safety checks; negligence involving a failure to conduct pressure care and safety checks; and a breach of infection control by failure to wear PPE during a Covid-19 outbreak – a resident of the facility had a medical episode, fell out of bed, and was left unattended for some time – resident admitted to hospital and after a subsequent medical episode the resident passed away – Commission emphasised its role is not to determine whether the events relevant to the dismissal contributed to this outcome – several facts relating to the applicant's conduct and responsibility of this conduct were contested – applicant submitted dismissal was unfair because alleged misconduct did not occur as alleged – applicant submitted she was not properly advised of increased care requirements for particular resident and the facility was understaffed during the shift – with respect to allegation she failed to wear PPE, applicant submitted she did not breach any facility policy – applicant submitted the procedure adopted by the respondent was not fair and breached its own policies – respondent submitted applicant erroneously documented safety checks but in fact failed to perform them – respondent further submitted applicant's failure to wear correct PPE at specific times was in breach of policy and applicant had no reasonable excuse to not do so – the Commission

preferred the evidence of the respondent – the Commission found the applicant failed to perform all the required safety checks and pressure care – the Commission found this was partially mitigated by understaffing and context of the Covid-19 outbreak – the Commission found the applicant provided false accounts of the safety checks – however the Commission was not satisfied the applicant deliberately and substantially breached the PPE requirements – further, the Commission stated it was not clear whether the applicant was solely responsible for the resident in question at critical times – on balance the Commission found the applicant's conduct constituted a valid reason for dismissal for the purposes of s.387(a) – the Commission gave consideration to the other relevant matters raised by the applicant under s.387(h), including impact to the applicant – ultimately the Commission found dismissal not harsh, unjust or unreasonable – application dismissed.

U2022/9272		[2023] FWC 330
Hampton DP	Adelaide	30 March 2023

Montana v DP World Sydney Limited

TERMINATION OF EMPLOYMENT – remedy – reinstatement – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – in June 2021 applicant suffered serious injury outside of workplace – injury impacted applicant's capacity to complete workplace duties – on 2 August 2022 respondent informed applicant that he was required to attend an independent medical examination (**IME**) with Dr McGlynn, to determine whether he was able to perform the inherent requirements of his role – previous attempt to receive report from applicant’s doctor not successful – on 8 August 2022 applicant attended IME with Dr McGlynn – IME prematurely terminated after a series of events transpired between applicant and Dr McGlynn – the factual matrix surrounding these events was contested – on 11 August 2022 respondent alleged a breach of its Code of Conduct being applicant was aggressive after being touched by Dr McGlynn during the IME appointment, that applicant’s conduct resulted in Dr McGlynn terminating the IME appointment, and that applicant made a complaint of assault to the police (collectively, **Allegations**) – applicant afforded opportunity to respond to the Allegations – Dr McGlynn provided written account of the events to respondent – on 15 August 2022 applicant responded to the Allegations by noting *inter alia* that he attended the IME in good faith, that Dr McGlynn had breached respondent’s Code of Conduct, and he is committed to the process of returning to work and attending an IME appointment with any other doctor – applicant invited to and attended 23 August 2023 show cause meeting – applicant allegedly made an ‘*abusive*’ comment to his supervisor during a break in the show cause meeting – 10 to 30 minutes after show cause meeting concluded applicant was informed he had been summarily dismissed for serious misconduct by way of substantiation of the Allegations – applicant received written correspondence which confirmed the summary dismissal (**Post-Dismissal Letter**) – Post-Dismissal Letter included reference to applicant’s conduct history and the alleged ‘*abusive*’ comment as reasons for to the summary dismissal; these reasons were not discussed in the show cause meeting or previously raised in the Allegations – Commission first considered whether there was a valid reason for applicant’s summary dismissal – respondent relied upon two grounds towards dismissing applicant, namely the Allegations and the allegedly ‘*abusive*’ comment made to his supervisor – Commission first dealt with the Allegations – Commission found allegation relating to applicant being ‘*aggressive*’ to Dr McGlynn could not be made out – evidence provided by respondent to this effect was largely hearsay and with consideration to the factual matrix could not be regard as a valid reason for dismissal for serious misconduct – Commission found allegation relating to termination of the IME appointment could not be made out as Dr McGlynn, for his own reasons, terminated the IME appointment; allegation could not be a valid conduct-related reason for dismissal for serious misconduct – Commission noted that it ‘*almost defies belief*’ that an allegation leading to the dismissal of applicant included making a police complaint; such an allegation does not provide for a valid conduct-related reason for summary dismissal for serious misconduct – Commission held that neither individually or collectively did the Allegations constitute a valid reason for

dismissal whether in the context of respondent's Code of Conduct or otherwise – Commission next addressed alleged '*abusive*' comment – applicant allegedly said words to the effect of '*are you still here…does the company still want you here…you set people up*' – Commission found that even if these words were taken at their highest and accepted without qualification, objectively they would not provide a valid conduct-related reason for the dismissal – Commission next considered whether applicant notified of reason for dismissal – Commission found respondent had not been notified the reasons for dismissal given discrepancy between the Allegations raised and reasons for dismissal in the Post-Dismissal Letter – Commission next considered whether applicant was provided with opportunity to respond to any capacity/conduct related reasons leading to dismissal – found applicant not afforded this opportunity with reference to the discrepancy between the Allegations, the discussion at the show cause meeting, and the Post-Dismissal Letter – Commission considered whether the dismissal related to unsatisfactory performance and if so whether applicant had been warned prior to dismissal – found dismissal was conduct-related not performance-related and despite apparent reliance of respondent on applicant's previous unsatisfactory performance, nothing before the IME-related concerns had led respondent to actually dismiss applicant – Commission next considered procedural fairness in light of respondent's size and human resources capacity – found more procedural fairness should have been afforded to applicant given respondent's size and dedicated human resources personnel – other matters considered including *inter alia* respondent's apparent pre-conceived perceptions relating to the physical threats to Dr McGlynn and applicant's reluctance to attend the IME – on balance Commission found the dismissal was harsh, unjust and unreasonable; therefore unfair – remedy considered – applicant sought reinstatement with no break in service – respondent submitted reinstatement not an appropriate remedy due to (a) no medical evidence being provided as to whether applicant was fit to return to work, (b) applicant's alleged breaches of respondent's Code of Conduct with his own actions on 8 August 203 and 23 August 2023, (c) the fact that applicant was already on a reinforced final warning, and (d) applicant's alleged remark to his supervisor on 23 August 2023 making their working relationship was no longer tenable – Commission dismissed respondent's submission and found in favour of reinstatement with no break in service period as the appropriate remedy.

U2022/9219		[2023] FWC 439
McKenna C	Sydney	28 March 2023

Eureka Operations Fuel and Convenience Team Member Agreement – 2011

TRANSFER OF BUSINESS – enterprise agreement – s.319 Fair Work Act 2009 – Viva Energy Retail P/L applied for order in relation to instrument covering employer and non-transferring employees – applicant set to acquire the 'Coles Express' business (New Business) from ownership group including Coles Group Limited (Former Employer) – applicant had offered employment governed by the *Eureka Operations Fuel and Convenience Team Member Agreement 2011* (Agreement) to all transferring employees from the Former Employer – the Shop, Distributive and Allied Employees Association (SDA) and the Australian Workers Union (AWU) were covered by the Agreement and had standing to make submissions – applicant sought to have all non-transferring employees (i.e., incoming new employees) to the New Business covered by the Agreement as opposed to the *Vehicle Repair, Services and Retail Award 2020* (Award) by way of an order from the Commission pursuant to s.319 (Order) – applicant submitted that it did not seek to have both Award and Agreement applying to employees performing the same work in the New Business based on their status as either transferring or non-transferring employees – applicant submitted it *inter alia* wanted standardised terms and conditions of employment, a harmonious workplace culture and to avoid costs associated with implementing two separate industrial instruments – applicant further submitted non-transferring employees would not be disadvantaged under the Agreement as both transferring and non-transferring employees would be paid the above Agreement rates of the Former Employer – SDA and AWU contested this and submitted non-transferring employees working afternoon

and night shifts would be worse off under the Agreement than they would be under the Award – Commission considered relevant s.319(3) factors to determine whether Order sought would be appropriate – considered s.319(3)(b) – rejected applicant's contention non-transferring employees would not be worse off overall under Agreement with particular reference to afternoon and night shifts when compared to Award; pointing away from Order – considering s.319(3)(c) noted that if Order was granted both transferring and non-transferring employees will be working under the terms of the Agreement which expired 10 years ago; pointing away from the Order – in considering s.319(3)(d) was satisfied that should Order not be granted it would have a negative impact on applicant given complexities of navigating two industrial instruments; pointing towards the Order – considering s.319(3)(e) was not satisfied that applicant would suffer a significant economic disadvantage if two instruments operated simultaneously given its position as '*one of Australia's leading energy companies'* and its vision of becoming '*Australia's leading convenience retailer*'; pointing away from the Order – found regarding s.319(3)(g) was not satisfied that granting of Order would be in the public interest as guaranteed safety net for employees receiving below Award wages would be eroded in favour of some employees receiving above Award wages – on balance, granting of Order not warranted – application dismissed.

AG2023/735		[2023] FWC 812
Bissett C	Melbourne	14 April 2023

Chen v Right2Drive P/L

CASE PROCEDURES – costs – unreasonable act or omission – s.400A Fair Work Act 2009 – respondent claims it incurred legal fees in applying to dismiss an application for unfair dismissal made by the applicant pursuant to s.399A Fair Work Act – respondent made s.399A application that the unfair dismissal proceedings be dismissed on the basis that a settlement agreement had been concluded – applicant failed to discontinue unfair dismissal proceedings – did the applicant's conduct amount to an unreasonable act or omission – respondent submitted that the settlement agreement was binding on the parties – respondent also argued that the applicant was notified of his obligations under the settlement agreement several times – applicant submitted that he believed that the settlement agreement was made on the basis that the respondent conceded that it breached the law in respect to the applicant's unfair dismissal protections – applicant conceded that a concluded settlement was reached between the parties – Commission held that the respondent is entitled to make a costs application – were costs incurred because of an unreasonable act or omission by the applicant – respondent claims that a failure by the applicant to discontinue his unfair dismissal application constituted an unreasonable act or omission – costs may be awarded where a party has performed an unreasonable act or omission and that the act or omission caused another party to the proceeding to incur costs in connection with the proceeding [*Clarke*] – an application for costs based on a party's unreasonable act or omission is to be determined by reference to a situation of each of the parties concerned assessed prospectively, when the relevant offer was made, not judged by the ultimate outcome of the case itself [*Adamczak*] – Commission's power to award costs is discretionary and is only exercisable where the offending party causes the other party to incur costs because of an unreasonable act or omission [*Explanatory Memorandum*] – Commission held that costs were incurred by an unreasonable act by the applicant in connection with the continuation of the unfair dismissal proceedings – should costs be awarded – costs associated with the respondent's discontinuance application awarded – applicant ordered to pay respondent $5,123.25.

U2022/9330		[2023] FWC 627
Bissett C	Melbourne	30 March 2023

Lloyd Helicopters P/L ta CHC Helicopter (Australia) v Australian Licensed Aircraft

Engineers Association and Anor

INDUSTRIAL ACTION – suspension of protected industrial action – endangering life – s.424 Fair Work Act 2009 – application to terminate protected industrial action ('PIA') – parties in dispute over enterprise bargaining – contention regarding wage increases – 48 hour work stoppage and communication bans outside of work hours as forms of PIA by employees – applicant conducts different flight operations including 'Onshore' emergencies and 'Offshore' base and rescue assistance to multiple locations and organisations – aforementioned operations are subsidiary to applicant's overall business – applicant suggested PIA endangered life, safety, health or welfare of part of the population – unions contested that applicant's argument could not be established – Commission to consider s.424 FW Act – Commission has discretion to terminate or suspend PIA – applicant concerns regarded public welfare and safety implications from PIA impacting emergency evacuation capacity (*RFDS; Svitzer*) – unions reiterated PIA is only 48 hours and medical or search duties could be completed if required – unions provided data evidence that few flights would be disrupted as result of PIA – Commission to consider all relevant circumstances – test to determine threat must be done on basis of probability of PIA doing so and not possibility – PIA not extreme and for defined period of time – alternative operations available should emergency arise – PIA only imposes inconvenience on applicant and clients – Commission concluded insufficient evidence on the balance of probabilities that PIA would threaten to endanger within scope of Act – Commission declined to issue orders regarding termination or suspension of PIA – application dismissed.

B2023/237 and B2023/238		[2023] FWC 721
Schneider C	Perth	24 March 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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