FWC Bulletin

6 July 2023 Volume 7/23 with selected Decision Summaries for the month ending Friday, 30 June 2023.

Contents

Secure Jobs Better Pay changes starting from 6 June 2023

06 Jun 2023

From Tuesday 6 June 2023, a number of changes to the functions of the Fair Work Commission came into operation.

These include changes to bargaining, enterprise agreements, and disputes about flexible work arrangements and extensions of unpaid parental leave.

These changes are a result of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. Find out more about the Secure Jobs Better Pay Act – what's changing including the President's statements.

Bargaining changes

A number of changes to bargaining and industrial action have commenced.

The bargaining changes relate to:

- Protected action ballot orders
- Multi-employer bargaining
- Intractable bargaining declarations and determinations

Find out more about the bargaining changes.

We have updated a number of our forms for making bargaining applications. Other bargaining forms will be updated in the coming days and will be added to our website progressively. Form F1 – Application (no specific form provided) is available if necessary.

Our new Bargaining Support team can be contacted at bargainingsupport@fwc.gov.au.

Enterprise agreement making changes

There are a number of changes to making enterprise agreements. These changes relate to:

- The genuine agreement requirements including the new Statement of Principles on Genuine Agreement
- The Better Off Overall Test (BOOT)
- Multi-enterprise agreements

Find out more about changes to making agreements.

We have published a new tool to help you determine which tests apply to agreement applications lodged with the Commission from 6 June 2023 and have updated our existing date calculator and other agreement tools to assist you to lodge agreement applications:

- New: Understand the tests that apply to agreements
- Updated: Date calculator for single enterprise agreements
- Updated: Create the Notice of Employee Representational Rights

We have also updated our forms for making applications for approval of enterprise agreements (other than greenfields agreements). Other forms will be updated in the coming days.

Our Agreements team can be contacted at member.assist@fwc.gov.au.

We thank the members of our Enterprise Agreement and Bargaining Advisory Group for their engagement so far and we look forward to continuing to collaborate with them over the coming months.

Flexible work and unpaid parental leave disputes

We can now deal with disputes about requests for flexible working arrangements and extensions of unpaid parental leave.

Two new forms are now available:

- A new Form F10B – Application to resolve a dispute about extension of a period of unpaid parental leave
- A new Form F10C – Application to resolve a dispute about flexible working arrangements

We welcome your feedback

We are committed to implementing these changes in an open and transparent way and with the needs of our users in mind. As part of this commitment, we will continue to review our processes over the coming months.

We welcome ongoing feedback in relation to materials and processes. Please send any feedback to consultation@fwc.gov.au.

Eligible protected action ballot agents

21 Jun 2023

Following changes to the *Fair Work Act* 2009 that commenced on 6 June 2023, we have now approved the first three eligible protected action ballot agents.

We have also received a new application for the approval of an eligible protected action ballot agent.

The names of the eligible protected action ballot agents as well as the applications in process will continue to be published to our website.

You can find more information about changes to the Fair Work Act relating to industrial action and our protected action ballot order process in the President's 5 June statement.

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

Increase to the application fee for 2023-24

26 Jun 2023

From 1 July 2023 the application fee will increase to **$83.30**.

The fee applies to dismissal, general protections, bullying and sexual harassment at work applications made under sections 365, 372, 394, 773 and 789FC of the *Fair Work Act 2009*.

There is no fee to make an application to deal with a sexual harassment dispute under section 527F of the Fair Work Act.

Also effective from 1 July, the high income threshold in unfair dismissal cases will increase to **$167,500** and the compensation limit will be **$83,750** for dismissals occurring on or after 1 July 2023.

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 Friday, 30 June 2023.

1 MODERN AWARDS – variation – ss.134, 157, 158 Fair Work Act 2009 – Full Bench – application by Ms Treves to vary the *Horticulture Award 2020* – Ms Treves claimed to be an employee covered by the Award with standing to make the application on that basis – Ms Treves sought to delete clause 21.4 of the Award so as to remove the current overtime penalty rate entitlement for casual employees – Ms Treves contended that the overtime entitlement should be removed because, while it was intended to benefit employees, it has in fact left them worse off – further contended employers cannot afford to pay overtime rates and as a result once casuals reach 304 hours in an eight-week period they are not given any further work until the next eight-week period begins – she said this has led to a loss of work and income – matter determined 'on the papers' – Ms Treves resides in North Queensland and has worked in packing sheds as a casual harvest employee since 2003 – until the end of 2021, she moved around to different sheds in Queensland, the Northern Territory and earlier in Western Australia to keep working all year, often returning to the same farms for some years – from the end of 2021, Ms Treves stopped moving around and worked as a casual employee in her 'home area' only – she has worked under the Award since it was introduced for the majority of her employment – at the end of the second week of June 2022, Ms Treves' said her employer told her that she would have to take time off during the next two weeks (12-25 June 2022) because she had worked almost 304 hours with two weeks of the then-current eight week period yet to run and the business could not afford to pay overtime rates throughout the next two weeks – Ms Treves says that 'the new 8-week period' started on 26 June 2022, and she started working again – on 30 June 2022, picking was completed for the year, and packing finished on 1 July 2022 – Ms Treves finished work in the shed on 7 July 2022 – Ms Treves submitted that she had standing to make her application – as to her work history, although she was not working on 9 August 2022 when she made her application, she had worked under the Award for the majority of her employment – she also submitted that 6 July 2022 should be taken to be the date of her application because on that date she wrote a letter to the Commission asking for clause 21.4 of the Award to be removed – she did not make a formal application to vary the Award at that time because she did not know such a process existed, and made one after the Commission informed her of that process – the National Farmers' Federation, Australian Industry Group, Northern Territory Farmers Association, Fruit Growers Victoria, Bundaberg Fruit and Vegetable Growers Ltd and 13 individual horticultural businesses supported the application – the Australian Workers' Union and the United Workers' Union opposed the application – the AWU submitted that Ms Treves did not have standing to make her application under s.158(1) of the FW Act since, on her own evidence, she was not an employee under the Award at the time

she made her application – as to the merits of the application, the AWU noted that it sought to overturn the relatively recent decision of the Full Bench made during the 4 yearly review to insert the casual overtime provisions into the Award – under item 1 of s.158(1), the persons who may make an application to vary the terms of a modern award (other than outworker or coverage terms) are an employer, employee or organisation that is covered by the modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award – s.133 defines 'employee' for the purpose of the provision as meaning a 'national system employee' – that term is defined in s.13 as follows: 'A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in s.14, by a national system employer, except on a vocational placement' – Ms Treves made her application purportedly in the capacity of an employee covered by the Award – however, on her own evidence, she was not employed in that capacity at the time she lodged her application on 9 August 2022 – she ceased her casual employment with the unnamed employer the subject of her witness statement on 7 July 2022, and she gave no evidence, nor did she assert, that she has performed any work covered by the Award at any time since – Full Bench found she was clearly not 'employed' at the time she made her application by a national system employer under the Award, and it cannot be said that she was 'usually employed' as such in the absence of any evidence of employment under the Award after 7 July 2022 – Full Bench did not accept Ms Treves' contention that the letter she sent to the Commission's Awards Team by email on 6 July 2022 should be treated as her application – s.585 requires that an application to the Commission be made in accordance with the procedural rules relating to applications of this kind, which relevantly prescribe the form in which an application to vary an award is to be made – Ms Treves' application filed on 9 August 2022 complied with the relevant procedural rules, but her letter of 6 July 2022, even if notionally treated as an application, plainly did not – s.586(b) empowers the Commission to waive an irregularity in the form or manner in which an application is made – however, even if it were applicable, the Full Bench would not exercise its power under s.586(b) to waive any 'irregularity' in respect of the 6 July 2022 letter because Ms Treves' subsequent application for variation, which fixed upon just one of the three suggested variations to the Award, is the basis upon which the matter proceeded from the outset – accordingly, the Full Bench found that Ms Treves was not entitled to make her application under s.158, and the application must be dismissed on that basis – however, the Full Bench determined that it would in any event set out its consideration of the merits of Ms Treves' application – s.157(3)(a) empowers the Commission to make a determination varying a modern award on its own initiative so, if the Full Bench were persuaded that the Award should be varied as Ms Treves proposed, it could do so notwithstanding that her application was not validly made – under s.157(1)(a), the Commission may vary a modern award if it is satisfied that doing so is 'necessary to achieve the modern awards objective' – variations to modern awards must be justified on their merits – the extent of the merit argument required will depend on the circumstances – the substantive decision where an entitlement to overtime penalty rates for casual employees was added to the Award was made in 2017 upon consideration of a substantive body of evidence, the terms of the entitlement were settled as a result of consultations between the AWU, what is now

the UWU, the NFF and the Ai Group, and the entitlement came into effect on 15 April 2019 – the comprehensiveness and recency of this decision-making process, and the industry consensus concerning the precise terms of the entitlement, place a considerable burden on any party agitating for change – Ms Treves' evidentiary case goes nowhere near meeting this burden – her case seemingly revolves around a single incident which occurred in July 2022 – the Full Bench did not consider that the variation proposed by Ms Treves was necessary in order for the Award to meet the modern awards objective – the addition of the overtime entitlement for casual employees caused the Award to meet the modern awards objective for the reasons stated in the 2017, 2018 and 2019 decisions, and it has not been demonstrated that the Full Bench's conclusions in those decision were wrong when decided or have been vitiated by subsequent events – application dismissed.

Horticulture Award 2020

AM2022/25 [2023] FWCFB 98
Hatcher J Melbourne 26 May 2023
Catanzariti VP
McKenna C

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2 CASE PROCEDURES – discontinuance – ss.240, 588 Fair Work Act 2009 – application by Construction, Forestry, Maritime, Mining and Energy Union-Mining and Energy Division (MEU) to deal with a bargaining dispute – in December 2022 parties agreed under s.240(4) that Commission may arbitrate dispute about bargaining – before hearing commenced MEU filed a Notice of Discontinuance in accordance with s. 588 – Peabody insisted that arbitration could and was required to proceed – Commission observed notice of discontinuance is self-executing and will immediately end application [*Mpinda*] – further observed s.588 grants an applicant almost unfettered rights to discontinue – Commission held that MEU's discontinuance was effective and bargaining dispute proceedings, including consent arbitration process, must cease – Commission rejected Peabody's submission that Commission must continue arbitrating present dispute because of December 2022 binding agreement between parties – further rejected Peabody's submission consent arbitration forms a 'joint process' – held consent arbitration could not be divorced from application lodged by MEU – Commission cited s.588 and Rule 10 of Fair Work Commission Rules 2013 in confirming that MEU entitled to discontinue application even if doing so was in contravention of its agreement with Peabody – no orders required to finalise this matter because it has already concluded in accordance with MEU's discontinuance.

Construction, Forestry, Maritime, Mining and Energy Union-Mining and Energy Division v Peabody CHPP P/L

B2022/1534 [2023] FWC 1363
Easton DP Sydney 9 June 2023

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3 ENTERPRISE AGREEMENTS – ambiguity or uncertainty – s.217 Fair Work Act 2009 – applicant is a university covered by an enterprise agreement – applicant and National Tertiary Education Industry Union (NTEU) in dispute about payment of Teaching Associate Staff conducting 'contemporaneous consultation' with

students after certain classes they teach – dispute regarding entitlement to payment of associate teachers for consultation work – parties disagree whether consultation work is scheduled additional work or whether it is contemporaneous consultation and covered by an 'associated work' provision and therefore not entitled to additional pay – NTEU commenced underpayment proceedings in Federal Circuit and Family Court – the Court proceedings stayed until determination of application to vary the agreement to remove ambiguity or uncertainty – consideration of ambiguity or uncertainty involved two step approach – first step whether ambiguity or uncertainty exists – Commission satisfied that ambiguity exists as a number of alternate interpretations available for relevant provisions [*Bianco Walling*] – second step is whether it is appropriate in the circumstances to vary the agreement – Commission not required establish correct interpretation of agreement in the matter – common, presumed or mutual intention of the parties important factor in circumstances where correct interpretation not available [*Tenix*, *Codelfa*] – common intention for an agreement not lightly founded with significant evidentiary burden [*SDA v Woolworths*] – without common intention Commission risks improving or harming legal position of a party to agreement without anchor to any principled assessment of how they should be affected – Commission must exercise power in manner that is fair and just, promoting harmonious workplaces – Commission held while ambiguity existed it was not appropriate to exercise discretion to remove ambiguity or uncertainty – application dismissed.

Monash University Enterprise Agreement (Academic and Professional Staff) 2019

AG2022/4262 [2023] FWC 1148
Bell DP Melbourne 7 June 2023

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4 TERMINATION OF EMPLOYMENT – contract for specified season – extension of time – ss.394, 386 Fair Work Act 2009 – applicant worked as casual ski instructor during most winter ski seasons since 2011 – applicant suffered compensable injury late in 2022 ski season and unable to work for remainder of season – 2022 ski season ended 28 September 2022 – in early 2023 (off season) applicant participated in sporting event – respondent considered this inconsistent with WorkCover restrictions – on 7 February 2023 it advised it would not offer applicant work in upcoming 2023 ski season – unfair dismissal application lodged on 12 April 2023 – applicant submitted date of dismissal 7 February 2023 – respondent submitted date of dismissal 28 September 2022 – respondent raised two jurisdictional objections – suggested was not dismissed and, if dismissal found, that dismissal took effect on 22 September 2022 – whether dismissed considered – respondent suggested applicant not dismissed as his employment terminated at end of winter ski season in accordance with s.386(2)(a) – applicant employed casually for winter season with anticipated end date of 2 October 2022 – on 28 September 2022 applicant ceased working due to injury – Commission found applicant was a seasonal worker – found applicant did not work until end of the season as he was injured on 28 September (four days before season ended) – held to fall within s.368(2)(a) exception employment must terminate at the end of the season – held exception does not apply if termination arose prior from an unrelated matter, including being taken off of roster due to injury – held applicant dismissed – whether extension should be granted – applicant submitted there was reasonable expectation of

continuous service – Mount Hotham and Falls Creek Enterprise Agreement 2018 states seasonal employees and casuals will be asked to reapply for positions for following seasons – applicant not invited to reapply for position – Commission found reasonable expectation of a future contract does not create an ongoing employment relationship during off seasons – Commission satisfied applicant was terminated on 28 September 2022 – application filed 75 days out of time – Commission considered whether further period to lodge application allowed under s.394(3) – Commission found no exceptional circumstances for delay – application dismissed.

Howard v Falls Creek Ski Lifts P/L

U2023/3109 [2023] FWC 1317
Bell DP Melbourne 7 June 2023

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5 ENTERPRISE BARGAINING – protected action ballot – ballot agent – s.468A Fair Work Act 2009 – application for approval as an eligible protection action ballet agent (PAB Agent) – application arises from amendments to FW Act (FW Amendments) – amendments effective from 6 June 2023 – impact making protected action ballot orders (PABOs) and approval of PAB Agents who may conduct a ballot – PAB Agents integral to PABOs and general protected industrial action – PABO provides bargaining representatives capacity to take protected industrial action in support of bargaining for enterprise agreements – protected action by employees or employers is designed to advance claims or persuade parties to consider their positions (*Holland; Richards*) – protection depends on legislative and notification compliance and whether action is within meaning of FW Act – applicant's PAB Agent application lodged 7 June 2023 – Commission website stated applicant made application – interested parties provided time to make submissions – no submissions received – Commission to consider whether applicant is fit and proper person – consider whether applicant is entitled to apply – consider approval of PAB Agent – Commission referred to Explanatory Memorandum associated with FW Amendments – Commission empowered to 'pre-approve' a person as eligible PAB Agent – Commission may approve multiple people – reassessment of eligible PAB Agent(s) every three years – Commission held meaning of 'person' for the purposes of a PAB Agent may include a natural person or body corporate – applicant therefore is eligible to apply and be approved as a PAB Agent as they are a corporation – applicant provided declaration from Managing Director for fit and proper person assessment – applicant previously considered fit and proper person in earlier matters relating to conducting ballots – Commission satisfied applicant is fit and proper person – Commission concluded that applicant is entitled to apply and be approved as an eligible PAB Agent – application approved.

Democratic Outcomes P/L t/a CiVS

B2023/541 [2023] FWC 1400
Hampton DP Adelaide 20 June 2023

Other Fair Work Commission decisions of note

Appeal by Rizvi against decision of Bissett C of 7 March 2023 [[2023] FWC 562] Re: Salini Australia P/L T/A Webuild

CASE PROCEDURES – application dismissed on FWC's own initiative – s.604 Fair Work Act 2009 – appeal – Full Bench – appellant's unfair dismissal application dismissed for failing to pay application fee or file fee waiver form – application had been unpaid for over two weeks and several attempts made to contact appellant – appellant tendered evidence at appeal not before the Commission at first instance, being bank statements demonstrating appellant had sufficient funds to pay fee at relevant time – Full Bench allowed the documents into evidence – Full Bench found that the appellant's circumstances could be distinguished from the usual category of cases in which applicants are unresponsive to communications from the Commission – variety of matters set appellant's circumstances apart – appellant overseas for vast majority of time between filing and dismissal of application – appellant had informed Commission at time of lodgement he would be out of country with limited access to emails and phone calls – appellant made continual effort to contact Commission through period he was overseas although options for communication limited – appellant tried to pay on at least one occasion but payment declined due to unknown error – in email to Commission appellant had requested extension for payment of fee until second week of March and that Commission did not respond to his specific request – appellant had sufficient funds at time of attempting to make the payment – appellant did not have access to his Australian phone number while he was overseas – Full Bench noted that appellant could have filed a fee waiver however did not consider this detrimental to his case given that appellant was ready willing and able to pay the fee – Full Bench considered that fact that applicant dismissed two days prior to travel meant he could not complete all steps before departure and could not wait until return due to 21-day timeframe – Full Bench made no criticism of decision at first instance based on evidence available to Commission at that time – permission to appeal granted – appeal upheld.

C2023/1671 [2023] FWCFB 89
Catanzariti VP Sydney 26 May 2023
Binet DP
Wright DP

Appeal by Lipa Pharmaceuticals Ltd against decision of Anderson DP of 28 February 2023 [[2023] FWC 493] Re: Jarouche

GENERAL PROTECTIONS – dismissal dispute – certificate – ss.365, 368, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance, Commission rejected appellant's contention that respondent's dismissal application was not valid due to resignation – appellant sought permission to appeal the Commission's decision – while conduct of CEO of respondent on 29 September 2022 and days following was intended to bring the respondent's employment to an end, appellant contended that it did not result in respondent having no real choice other than to resign – Full Bench found that CEO's conduct could only be understood as conveying a decision that employment would end and it was not possible to identify any alternative the respondent had – respondent's subsequent accession to proposal for a 'managed resignation' was within the context of employment having already ended – no need to pursue whether respondent terminated at initiative of employer or forced to resign at later date because Deputy President was correct in concluding respondent had been dismissed as a matter of jurisdictional fact and issuing a certificate accordingly – permission to appeal refused – Full Bench observed Commission conducted staff conciliation prior to determination of jurisdictional objection, with consent of parties – Full Bench determined this was inconsistent with *Milford*, and jurisdictional objections must be determined prior to the Commission 'dealing' with a dispute under s.368.

C2023/1492 [2023] FWCFB 101

Hatcher J Sydney 31 May 2023
Catanzariti VP
Binet DP

Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, WA Divisional Branch

RIGHT OF ENTRY – application for permit – criminal history – s.512 Fair Work Act 2009 – applicant applied for an entry permit for the proposed permit holder; an organiser of the applicant – proposed permit holder is responsible for construction sites, ancillary yards, paint shops and mobile crane hiring industry in Perth metropolitan area – Fair Work Ombudsman did not file any materials in relation to the application – Commission relied on materials filed and evidence adduced by applicant at conference on 2 June 2023 – whether proposed permit holder is a fit and proper person to hold an entry permit – Commission noted that each of the permit qualification matters in s.513(1) must be considered and given appropriate weight [CFMEU] – permit qualification matters must be considered in the context of whether a proposed permit holder is a fit and proper person to hold an entry permit, not whether they are fit and proper person per se [ASMOF] – jurisdiction under s.512 is not punitive and temporal focus is on present fitness and propriety of a permit holder to hold an entry permit [CFMEU] – Commission accepted proposed permit holder had successfully completed appropriate training about rights and responsibilities of a permit holder in accordance with s.513(a) and additional training provided by Mr Lacy AO – noted he has not completed training relating to Textile Clothing and Footwear right of entry provisions under Subdivision AA of Division 2 of Part 3-4 FW Act – satisfied there was no evidence that he had been convicted of any offence against an industrial law – satisfied he was open and honest about his antisocial and criminal behaviour and that he had submitted his complete criminal record – satisfied that although his past offences and convictions were adverse to his assessment they do not necessarily militate against a conclusion that he is presently a fit and proper person to be issued an entry permit – satisfied there was no evidence that a penalty had been imposed on him or CFMMEU under FW Act or other industrial law in relation to action taken by him – satisfied he had not previously held a state or federal entry permit – satisfied that although his significant criminal record weighs against a finding that he is a fit and proper person to hold a permit, he is unlikely to confront previous reasons for offending when discharging his duties as a permit holder – satisfied he clearly understood scope, limitations and responsibilities of his duties – satisfied he was remorseful, has atoned for prior offending and not reoffended since 2016 – Commission held that proposed permit holder is a fit and proper person to hold an entry permit, with the condition that he must not exercise rights under Subdivision AA of Division 2of Part 3-4 FW Act until he has completed appropriate training in relation to that subdivision and he has filed a copy of the training completion certificate in the Commission.

RE2023/32 [2023] FWC 934
Binet DP Perth 13 June 2023

United Firefighters' Union of Australia v Ventia Australia P/L

ENTERPRISE BARGAINING – protected action ballot – bargaining representative – ss.437, 176. 443 Fair Work Act 2009 – application for protected action ballot order (PABO) made in relation to respondent's range operator employees – range operators perform tasks on and around Defence Force firing ranges including responding to fires – respondent opposed making of PABO – suggested both applicant not a bargaining representative for range operators and applicant had not been genuinely trying to reach agreement – Commission noted under s.176 a union cannot be bargaining representative of employee unless it is entitled to represent industrial interests of employee in relation to work that will be performed under agreement – whether applicant eligible to represent industrial interests of employee – respondent suggested range operators perform range of tasks and that fire response was a small fraction of duties – suggested this not sufficient to be captured by applicant's industry

eligibility rule – applicant contended fire prevention and response duties comprised substantial and important part of range operator's duties – Commission observed industry eligibility rule requires consideration of industry company operates via consideration of substantial character of company – found respondent's substantial character is service provider to private and public sectors – held company operates in contracting industry – observed mere fact a business provides a service to a particular industry does not identify that business so as to make it part of that industry [*Thiess*] – held company not in industry of firefighting and prevention – further determined if company's substantial character was industry of firefighting and prevention, range operators would still not be employed 'in or in connection with prevention, suppression or extinguishment of fires' – held range operators perform variety of tasks, one of which includes firefighting and prevention – held range operators not captured by applicant's industry eligibility rule – held applicant not bargaining representative of an employee who will be covered by proposed agreement because it is not entitled under its registered rules to represent industrial interests of range operators – s.443 requires application be made under s.437 – s.437 application can be made by a bargaining representative of an employee who will be covered by a proposed enterprise agreement – no valid PABO application before Commission – not necessary to consider respondent's second objection – application dismissed.

B2023/459 [2023] FWC 1329
Colman DP Melbourne 5 June 2023

Health Services Union v Menarock Aged Care Services (Claremont) P/L t/a Menarock

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – overtime – rapid antigen tests – s.739 Fair Work Act 2009 – application to deal with dispute under *Menarock Aged Care Services (Claremont) P/L Non-Nursing Enterprise Agreement 2018-2021* (Agreement) – respondent adopted COVID-19 infection control measures in aged care facilities in January 2022 – measures included rapid antigen testing for staff – applicant sought determination that respondent directed staff to attend workplace 15 minutes prior to rostered shifts to undertake rapid antigen tests – whether employees entitled to overtime under Agreement for pre-shift attendance – Commission not satisfied that direction was issued to staff – residential manager who sent message to staff lacked authorisation to issue directions regarding attendance or infection control measures – message communicated on platform not downloaded by all staff members – Commission found that tone of message, 'please aim to be at work 15 min prior' did not amount to unequivocal statement requiring early attendance – Commission not satisfied that alleged direction was subsequently confirmed in writing – timekeeping records did not establish evidence of overwhelming compliance by staff – no evidence that any employees raised payroll queries regarding pre-shift attendance – conduct of respondent not consistent with having issued direction – no overtime payable – Commission commented that respondent should have done more to clarify the position for staff.

C2022/5641 [2023] FWC 1229
Masson DP Melbourne 26 May 2023

Deniz v Alvaro Transport P/L

TERMINATION OF EMPLOYMENT – valid reason – ss.394, 387 Fair Work Act 2009 – application for unfair dismissal remedy – applicant alleged respondent dismissed him from his role as a truck driver unfairly – respondent submitted applicant dismissed for misconduct comprised of breaches of its policies and acts of violence, bullying, harassment or discrimination – termination letter only referred to an incident involving an altercation between applicant and a customer in April 2022, following which customer complained applicant was aggressive – however, respondent relied on three reasons for dismissal – the April 2022 incident which it regarded as substantiated by subsequent conduct of applicant and in breach of its policies – the applicant's behaviour following a workplace injury sustained in May 2022 which made

him a risk to the safety and welfare its employees – the applicant's mental health which made him a risk to others, particularly if driving a truck – whether dismissal harsh, unjust or unreasonable – Commission satisfied applicant's behaviour following workplace injury demonstrated a pattern of threatening behaviour giving rise to valid reason for dismissal, however was not satisfied April 2022 incident or mental health of applicant constituted valid reasons – applicant was not notified of valid reason or given an opportunity to respond – Commission considered effect of dismissal on applicant's personal situation relevant under s.387(h) – applicant suffered substantial workplace injury in May 2022 and was in vulnerable position at time of dismissal – dismissal implemented in circumstances where applicant sought a gradual return to work or was medically unfit to work at all which would make it difficult for him, a 54-year old truck in a vulnerable position, to obtain suitable alternative employment – Commission satisfied dismissal therefore harsh – dismissal also unreasonable because applicant was not notified of or given an opportunity to respond to the valid reason – such an opportunity may have altered outcome – dismissal unfair within meaning of Act – directions to be issued to enable Commission to determine question of remedy.

U2022/9596 [2023] FWC 1273
Millhouse DP Melbourne 30 May 2023

Murimwa v David Jones P/L

TERMINATION OF EMPLOYMENT – minimum employment period – continuity of employment – ss.394, 382 Fair Work Act 2009 – application for unfair dismissal remedy – jurisdictional objection whether applicant met minimum employment period – Commission considered meaning of minimum employment period in the context of casual workers and irregular shifts – applicant employed at respondent's warehouse as casual worker for 7 years – respondent required applicant to be available three days per week and to indicate shift availabilities regularly through respondent's rostering system – applicant failed to attend rostered shifts and to regularly update respondent on shift availabilities – respondent submitted applicant not protected from unfair dismissal because applicant's employment in the 6 months before dismissal was irregular and applicant had no guarantee of shift allocations – respondent submitted for applicant to be protected from unfair dismissal they needed to be employed as a regular casual employee and have a reasonable expectation of continuing employment for the 6 months preceding the dismissal – Commission considered meaning of period of employment and whether applicant had reasonable expectation of continuing employment as a casual by the respondent on a regular and systematic basis – Commission found applicant had 7 years of regular and systematic employment, albeit on a less regular basis for the two years preceding dismissal, and this 'contiguous series of periods of service' counted toward the applicant's period of employment [*Shortland*] – Commission determined applicant had satisfied the minimum employment period – respondent submitted applicant's record of absenteeism, his failure to promptly notify respondent of the inability to attend rostered shifts, and unwillingness to follow the respondent's commands was a valid reason for dismissal – Commission accepted the respondent's submissions and found there was a valid reason for dismissal – Commission decided dismissal was not harsh and unjust – application dismissed.

U2022/11248 [2023] FWC 815
Cross DP Sydney 5 May 2023

Hinic v Safety Assembly Moulding P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – abandonment – ss.394, 387 Fair Work Act 2009 – application for unfair dismissal remedy – cessation of employment occurred on 19 October 2022 – applicant alleged to have abandoned employment – applicant injured at work on 17 December 2021, which was her last day of attendance – Certificate of Capacity provided on 22 June 2022 – applicant could undertake "some type of work" for 4 hours per day, 4 days per week – restrictions placed on applicant whilst recovering – applicant did not

attend capacity assessments with rehabilitation provider – rehabilitation provider attempted to contact applicant to rearrange appointments – respondent sent letter to applicant on 31 August 2022 detailing attempts to contact applicant and regarding capacity assessments and her welfare – letter advised if no response was given before 7 September 2022, applicant would be taken to have abandoned employment – applicant responded on 6 September 2022 confirming her desire to continue her employment and stating that she does not know how to use the computer or emails – applicant allegedly provided further evidence to the workers compensation insurer – applicant argued that as she had not received details of her return to work there was no failure on her part – respondent provided applicant additional appointment times with independent medical examiner for 29 September 2022 and 10 October 2022 – further communication issues occurred following 13 September 2022 between applicant and respondent – applicant did not attend follow up assessments but provided medical certificates for the relevant dates after her employment ceased – applicant's last contact with employer was via email on 27 September 2022 – Commission to consider issues surrounding abandonment of employment and whether termination was at initiative of employer – respondent submitted abandonment occurred as applicant ceased to attend work without proper excuse or explanation – Commission determined applicant's conduct was not such as to convey to a reasonable person in position of employer a renunciation of the employment contract [*4 Yearly Review of Modern Awards*] – Commission held that reasonable person could not conclude that applicant had abandoned employment, termination at initiative of employer – considered whether dismissal was harsh, unjust or unreasonable – Commission determined failure to attend work capacity assessments constituted a valid reason – applicant did not have opportunity to respond to dismissal – dismissal held to be harsh, unjust or unreasonable – compensation not granted.

U2022/10789 [2023] FWC 1006
Cross DP Sydney 28 April 2023

Enthoven v Darktrace Australia P/L

TERMINATION OF EMPLOYMENT – extension of time – date dismissal took effect – s.394 Fair Work Act 2009 – unfair dismissal application lodged 13 days outside of statutory timeframe – respondent raised jurisdictional objection that applicant was not dismissed as applicant resigned – applicant submitted they were dismissed but asked for resignation after dismissal – Commission accepted applicant's submission and found employment relationship ended at respondent's initiative, applicant was dismissed – respondent raised second jurisdictional objection that application made outside of statutory timeframe – question as to when the dismissal took effect – Commission found date dismissal took effect was date employment relationship ended, notwithstanding that the contract continued until applicant accepted repudiation [*Sautner*] – application not made within 21 days – whether exceptional circumstances apply – applicant had sought legal advice before end of 21-day period but did not engage firm as he did not want to put money in trust – applicant later sought unpaid representation however organisation declined to represent him – Commission found delay in seeking representation not a good explanation for delay – Commission found applicant's pre-litigation steps not a credible or reasonable explanation for delay – applicant's negotiations with respondent after dismissal were only about quantum of outstanding commission payments, not the dismissal – applicant submitted mental health reasons as contributing factor to delay – Commission rejected submission as no medical evidence provided and it was contrary to evidence in proceedings – Commission found applicant was notified of the dismissal of the same day it took effect where applicant had benefit of the full 21-day period to lodge application – Commission found reasons for delay and contributing factors did not constitute exceptional circumstances – held no exceptional circumstances – extension of time declined – application dismissed.

U2023/2860 [2023] FWC 1282
Easton DP Sydney 31 May 2023

Perrins v Ben Browne t/a Oz Gazebos & Huts P/L

TERMINATION OF EMPLOYMENT – contractor or employee – ss.365, 386 Fair Work Act 2009 – application to deal with contraventions involving dismissal – jurisdictional objection whether applicant was an employee or an independent contractor – dispute whether applicant was dismissed – applicant was a carpenter who performed work for the respondent – applicant submitted they only worked for respondent and no other entity – respondent submitted applicant worked at their own accord and disengaged applicant's services due to having no work left – respondent submitted applicant was performing work for other companies prior to agreement made in 2019, applicant used his own tools for work, controlled working arrangements, able to engage external services and delegate work to others without consent from respondent, and respondent did not provide payslips to applicant – Commission determined there was no written or verbal agreement between the parties, therefore necessary to consider the nature of the relationship – Commission considered principles in [*Jamsek*], [*Personnel Contracting*] and found [*Stevens v Brodribb*] indicia must be considered – applicant provided own ABN to respondent at the beginning of the relationship – Commission found applicant had great degree of control over the work being accepted or refused, manner in which work was performed, hours of work, and delegation; respondent had little control and their approval not required – although respondent may remunerate applicant for work performed, Commission found income tax not deducted, no paid leave or sick leave was provided to applicant, and applicant able to run a business and be paid directly by clients under no prohibition by respondent – Commission found applicant supplied their own tools to complete work – Commission found applicant's work involves a profession and applicant engaged as a qualified carpenter – Commission determined applicant was at all times an independent contractor and not an employee of respondent – application did not satisfy s.365(1)(a) – jurisdictional objection upheld – application dismissed.

C2023/1413 [2023] FWC 1223
Dobson DP Brisbane 25 May 2023

McCormack v Diamond Valley Pork P/L

TERMINATION OF EMPLOYMENT – demotion – ss.365, 386 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – applicant commenced permanent employment with respondent in June 2021 as 'Human Resources Administrator' – employment contract included clause stating that title, objective, responsibilities, and line of reporting may vary at respondent's discretion – respondent acquired by third party in January 2022 – after the acquisition applicant prepared new organisational chart indicating her title as 'Human Resources Manager' and changed her email signature to indicate her title as 'Human Resources Manager' – respondent released new organisational chart which listed applicant's title as 'Human Resources Administrator' in October 2022 while applicant was on leave – applicant sent letter to respondent asserting respondent has taken adverse action against applicant by demoting her to 'Human Resources Manager' – applicant asserted demotion amounted to dismissal, that respondent had repudiated the contract by demoting applicant, and she accepted repudiation – respondent sent letter to applicant indicating applicant's position was not changed by respondent, that applicant's letter indicated that applicant wished to repudiate the contract, and respondent accepted repudiation – applicant submitted that contractual clause should be read down to only allow variations based on mutual consent – applicant submitted that through subsequent conduct undertaken by both parties the contract was varied to allow applicant to perform role of 'Human Resources Manager' and this variation amounted to variation of contract by mutual consent – respondent submitted that applicant did not perform role of 'Human Resources Manager', that the contract was not varied, and that there were no communications to the applicant about the change in position as per standard processes – respondent submitted that there was no repudiation of the employment contract and applicant terminated employment of her own accord – Commission reviewed subsequent conduct by parties and whether

subsequent conduct varied employment contract – Commission affirmed general principle against use of subsequent conduct in contract construction unless an exception applies [*Personnel Contracting*] – noted organisational chart was inaccurate and prepared by the applicant – Commission found applicant had promoted herself without agreement of respondent – Commission determined that none of the subsequent conduct by the parties gave rise to variation of the contract – Commission determined no contract existed for role of 'Human Resources Manager' and respondent did not repudiate applicant's contract by affirming applicant's true title and responsibilities – Commission determined applicant was not demoted and was not dismissed – Commission observed even if applicant had been promoted to Human Resources Manager her contract of employment allowed significant changes such that change to reporting line, responsibilities and title would not have been repudiatory conduct – application dismissed.

C2022/8403 [2023] FWC 785
Johns C Melbourne 7 June 2023

Eaves v Orkin Australia P/L

TERMINATION OF EMPLOYMENT – application to dismiss by employer – non-compliance with directions – ss.394, 399A, 587 Fair Work Act 2009 – unfair dismissal application – representative ceased acting on behalf of applicant prior to filing date – applicant failed to file material by first filing date – Commission granted extension on submission from applicant that they were ignorant to process – applicant's filed documents were not in expected form and applicant did not provide material to respondent – respondent filed application to dismiss under ss.399A and 587 – Commission determined that failing to accept applicant's materials would not accord with objects of Act – not satisfied that applicant unreasonably failed to comply with directions – respondent submitted in its s.587 application that unfair dismissal application was 'frivolous or vexatious and/or has no reasonable prospects of success' – Commission observed generally conclusion an 'application has no reasonable prospects of success' should be reached with extreme caution – further commented only arises where application 'manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable' – insufficient evidence to suggest frivolous or vexatious – applicant's statements to Commission and advice from representative did not evidence that applicant believed he had no reasonable prospect of success – ss.399A and 587 applications dismissed – unfair dismissal application to proceed as programmed.

U2023/1174 [2023] FWC 1047
Wilson C Melbourne 9 May 2023

Taprell v Boyle & Bouris

GENERAL PROTECTIONS – dismissal dispute – sole trader – ss.365, 386 Fair Work Act 2009 – jurisdictional objection made by respondent – respondent claimed applicant abandoned her employment – applicant did not attend work for two days prior to termination – Commission must determine whether an applicant is dismissed before it can exercise it functions in relation to general protections dismissal disputes [*Milford*] – was the applicant dismissed at the respondent's initiative – applicant submitted she was dismissed by her supervisor's partner via text message – applicant also claimed she was absent on the two days prior to date of termination as the shop was shut and that she was stressed by the ongoing events – respondent submitted applicant had abandoned her employment by not attending work for two days – respondent further claimed the supervisor's partner had numerous cognitive deficits following a medical incident which affected his judgment and that the supervisor was embarrassed by her partner's conduct – respondent conceded that the supervisor's partner had financial stake in the business – termination at the employer's initiative refers to a termination that is brought about by the employer and which is not agreed to by the employee [*Khayam*] – a termination at the initiative of the employer occurs when the employer's action directly and consequentially results in the termination of

employment and had the employer not taken this action, the employee would have remained employed [*Mohazab*] – the test for whether an abandonment of employment has occurred is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it [*Abandonment of Employment*] – where the conduct of the employee amounts to a renunciation of the contract of employment, it is the conduct if the employee that terminates the employment relationship [*Visscher*] – Commission held applicant did not abandon her employment on the basis the supervisor made no effort to contact the applicant and inquire as to her whereabouts on the days the applicant was absent – Commission also held the dismissal text message was clear and unequivocal – Commission further considered whether conduct of the supervisor's partner amounted to the employer's conduct – supervisor's partner held a financial interest in the business – a company is bound by an act purporting to bind it not only when the person who does the act has the company's authority to bind it by that act but also when that person is held out by the company as having that authority and the party dealing with the company relies on that person's ostensible authority [*Northside Developments*] – ostensible authority is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract [*Freeman and Lockyer*] – Commission held applicant was entitled to treat the communication as that from the respondent on account of the supervisor's partner having apparent or ostensible authority – neither the owner or the supervisor sought to assure the applicant that there had been a mistake – Commission satisfied that the applicant was dismissed from her employment – jurisdictional objection dismissed.

C2023/961 [2023] FWC 1352
Hunt C Brisbane 14 June 2023

Heffernan v Canberra Health Services

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – unfair dismissal application lodged six days outside of statutory timeframe – whether to grant extension of time – applicant claimed force resignation – jurisdictional impediment as applicant had sought voluntary redundancy – steps taken to resolve dispute while employed – initially made a choice not to apply for unfair dismissal, instead emailing a complaint to the Commission – Commission responded to complaint with information about lodging an application and the timeframe for lodgement – applicant's evidence was that she did not see the email until one month later, the day prior to lodging her application – no active steps taken to dispute dismissal until she saw the information from Commission over a month later – Commission found exceptional circumstances due to combination of factors affecting applicant: under sufficient financial pressure that she sold her property and relocated, the mother of two children one of whom has special needs, receiving treatment from psychiatrist, and did not see the information from the Commission until one month later – Commission determined not to extend time for filing due to significant jurisdictional hurdle in relation to her alleged resignation, and that it appeared the applicant only decided to make an application when she viewed the email from the Commission – Commission did not accept the applicant could not have commenced an application on 19 February 2023, rather than 27 March 2023 – extension of time denied – application dismissed.

U2023/2615 [2023] FWC 1165
McKinnon C Sydney 17 May 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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