FWC Bulletin

6 October 2023 Volume 10/23 with selected Decision Summaries for the month ending Saturday, 30 September 2023.

Contents

President’s statement announcing a new modern awards review

15 Sep 2023

Our President, Justice Hatcher, has issued a statement starting a new review of modern awards following a request from the Hon. Tony Burke, Minister for Employment and Workplace Relations.

During the review, the Commission will:

- consider whether the terms of modern awards appropriately reflect the new object of the *Fair Work Act 2009* and modern awards objective regarding job security and the need to improve access to secure work across the economy

- commence a consultation and research process considering the impact of workplace relations setting on work and care, including early childhood education and care, having regard to relevant findings and recommendations of the Final Report of the Senate Select Committee on Work and Care, and

- investigate existing award coverage and minimum standards for the arts and culture sector, including potential coverage gaps.

The Commission will also invite interested parties to advance any proposals to make modern awards easier to use without reducing entitlements for award-covered employees. The proposals should be confined to the 7 most commonly used awards listed in the President’s statement.

The President’s statement also outlines the process for the review, and notes that a draft timetable will be published by the end of September 2023.

Read the:
- President’s Statement (pdf)
- Minister’s letter (pdf)

Piloting new conference technology for conciliations

20 Sep 2023

We will be piloting new virtual conference technology in some staff led conciliations and conferences. The new technology has the potential to provide a more user-friendly experience by streamlining the conciliation and conference process. The pilot will start from Thursday 28 September 2023 and run for about 1 month.

The current conciliation model has been in place since 2009. In that time, we have conducted most staff led conciliations and conferences by phone. The current process requires staff conciliators to dial parties and representatives into a conference or conciliation. Last financial year alone, more than 13,000 staff led conciliations and conferences were held, most by phone. The new technology has the potential to improve the process for parties and representatives.

Benefits of the new technology

The new technology is a Microsoft product called Advanced Virtual Appointments. It enables us to send parties a link to the conciliation or conference. This will provide users with a modern experience like joining an online meeting or webinar. There will be some benefits to using this technology:

- Users will no longer need to wait for a conciliator to call them, they can simply join the conciliation or conference at the allocated time and wait in the virtual lobby for the Conciliator to admit them.
- Parties and their representatives will be placed in virtual rooms when shuttle negotiations begin rather than being disconnected from the call.
- Parties and their representatives can discuss the case in the virtual room in private without needing to call each other separately.

How the pilot will work

We will start allocating unfair dismissal and general protections cases to the pilot at random from Thursday 21 September 2023. The conciliation or conference for these cases will be scheduled during the pilot period which commences Thursday 28 September.

In pilot cases, the parties will receive a different notice of listing with instructions on how to join their virtual conciliation or conference. We will send a Microsoft Teams invite (with the link) 3 days prior to the scheduled conciliation or conference. The parties can simply click the link in the invite to join the virtual meeting at the allocated time.

The conciliation or conference remains private and confidential. Although we will be using virtual meeting technology, the meeting itself is audio only, just like a phone call and not recorded in any way.

Regular users and representatives

If you use our services regularly, it is possible that you will be involved in both processes through the pilot period. We encourage you to read your notice of listing closely. The notice will explain whether you need to join via a link or whether you will need to provide you phone number to be called by a staff conciliator.

What to do if you cannot access the technology

We are committed to providing access to justice to all people who access our services. If you cannot use the new technology for any reason, please contact us as soon as possible. Our staff conciliators will be able to dial you in by phone if we are given enough notice.

Next steps

The pilot is an example of our ongoing commitment to improving service delivery through digital transformation. If it is successful, we will introduce the new technology in all staff led conciliations and conferences over the coming months.

We recommend you subscribe to our announcements and follow us on LinkedIn to keep up to date

Registered Organisations Governance & Compliance External Review: Final report and General Manager's response

28 Sep 2023

On 6 March 2023, the functions of the Registered Organisations Commissioner transferred to the General Manager of the Fair Work Commission.

In late March 2023, the General Manager engaged two external reviewers to undertake an independent review to identify opportunities to improve service delivery. The terms of reference for the review were published Commission's website.

The reviewers, Anna Booth and Jonathan Hamberger, were agreed upon by each member of the Registered Organisations Commission Transitional Advisory Committee, consisting of senior representatives of the ACTU, ACCI, AiGroup and the General Manager.

Last month, the General Manager received a report outlining the findings of the independent review.

The reviewers made around 25 recommendations. The Commission has begun work on over half of the report's recommendations. Read about how we are implementing these recommendations, as well as a brief history of the review process, and steps from here, in the General Manager's response.

Download:

- Registered Organisations Governance and Compliance External Review report (pdf)
- General Manager's response to the review findings and recommendations (pdf)

Related news*:* Registered organisations governance and compliance review.

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 Saturday, 30 September 2023.

1 ENTERPRISE AGREEMENTS – genuinely agree – sham – ss.185, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance the Commission approved, with undertakings, the *Workforce Logistics P/L Enterprise Agreement 2022* – in the first instance proceedings concerning the application for the approval of the Agreement, no party opposed the application – no union had been appointed as an employee bargaining representative and none were covered by the proposed agreement – the application was dealt with on the papers and, in the decision under appeal, the Commission only found it necessary to make very limited findings as to the undertakings provided by Workforce Logistics – 3 grounds for appeal: that the agreement was genuinely agreed to by the relevant employees; that the sole employee bargaining representative during bargaining for the Agreement was not free from the control or improper influence of the employer; and that the Agreement passed the better off overall test – in relation to the issue of whether it had standing to bring the appeal, the AWU submitted that, given its rules permit the enrolment of employees of Workforce Logistics who could become covered by the Agreement, the AWU is 'a person who is aggrieved by [the] decision' for the purpose of s.604(1) of the FW Act – Workforce Logistics did not dispute that the AWU has standing to appeal – in relation to the first and second appeal grounds, the AWU submitted the Commission could not be satisfied that the Agreement had been genuinely agreed to by employees covered by it, because the Agreement was voted on by a cohort of employees who were not performing work that was covered by the Agreement, and the employees would not in future be covered by it, once approved, due to the four-week terms of their contracts – it was further submitted that the Agreement was intended to subsequently cover a much larger workforce, including in a different industry (the hydrocarbons industry), and that the Agreement was a contrivance or sham intended to avoid the requirements of the FW Act in relation to the making of enterprise agreements – the AWU also submitted that another basis for determining that the Agreement had not been genuinely agreed was that the nominated bargaining representative was not free from control by the employee's employer or another bargaining representative or free from improper influence from the employee's employer or another bargaining representative – in relation to the third appeal ground, the AWU submitted that the Commission had erred in concluding that the Agreement passed the BOOT as the material before it did not permit the Commission to be satisfied that Workforce Logistics employees would be better off overall – this was because Workforce Logistics nominated the 'Building, metal and civil construction' or 'Construction and Maintenance' industries as the ones in which it operates, and it did not identify that the *Hydrocarbons Industry (Upstream) Award 2020* was a required comparator for the purpose of applying the BOOT – as the AWU's appeal relied upon the new evidence adduced in the appeal, it was necessary to assess that evidence and make findings of fact in order to determine the appeal

– much in this matter turned on the credibility of the witnesses – necessary to state that the Full Bench did not consider that 3 of the 4 witnesses were credible witnesses, and the Full Bench did not accept much of the evidence they gave – found numerous inconsistencies, contradictions, omissions, improbabilities and evasions across the evidence – considering the question of whether the Agreement was genuinely agreed within the meaning of s.188, the Full Bench did not consider that, having regard to the evidence adduced in the appeal, it was reasonably available for the Commission to be satisfied that the any of the elements of genuine agreement in s.188(1)(a)(i), (b) or (c) were satisfied – the evidence before the Full Bench made it clear that the 6 employees who voted to approve the Agreement were, first, not covered by it at the time they voted and, second, were never going to be covered by it once the Agreement had been made – the 6 employees were never engaged in any work of the type covered by the Agreement and the employment of the 6 employees terminated almost immediately after the Agreement was made – no reason to think, in the circumstances described, that it was ever contemplated that the Agreement would ever cover any of the employees – the Agreement was therefore not made in accordance with s.182(1) of the FW Act – only conclusion available on the evidence is that the approval of the Agreement by the 6 employees was entirely lacking in authenticity and moral authority in the sense discussed in the Federal Court Full Court decision in *One Key Workforce P/L v CFMMEU* and was therefore not genuinely agreed – Full Bench considered that the Commission erred in being satisfied that the requirement for genuine agreement in s.186(2)(a) of the FW Act was met – the evidence before the Full Bench, which established the true picture, made it clear it was not reasonably open for the requisite state of satisfaction to be reached – appeal grounds 1 and 2 upheld – not necessary to determine appeal ground 3 – because grounds 1 and 2 of the appeal were upheld the decision to approve the Agreement must be quashed – Workforce Logistics did not contend that, on a rehearing of the application for approval of the Agreement, the Agreement was capable of being approved in accordance with s.186 on any basis – given the findings made by the Full Bench, it was clear that the Agreement could not meet the 'genuine agreement' requirement for approval in s.186(2)(a), and this was not a matter which can be rectified pursuant to ss.188(2) or 190 – accordingly, the application for approval of the Agreement was dismissed – Full Bench observed persons involved in sham exercise here had also been involved in making of other approved enterprise agreements in Western Australia – those other matters referred to General Manager for further inquiry to ascertain whether there has been any wider-scale abuse of enterprise agreement-making facility in FW Act.

Appeal by the Australian Workers' Union against decision of Gostencnik DP of 26 October 2022 [[2022] FWCA 3757] Re: Workforce Logistics P/L

C2023/3473
Hatcher J
Asbury VP
Grayson DP

Sydney

[2023] FWCFB 157
6 September 2023

2 TERMINATION OF EMPLOYMENT – remedy – ss.387, 400, 604 Fair Work Act 2009 – appeal – Full Bench – appeal sought against first instance decision where Commissioner found dismissal unfair and awarded reinstatement, compensation for lost remuneration, reimbursement of other amounts for wages not paid prior to the

dismissal, correct rate for annual leave, deductions from annual leave and superannuation – Full Bench considered whether there was an appealable error and whether public interest was enlivened [GlaxoSmithKline] – permission to appeal granted as Full Bench satisfied appeal was in the public interest due to errors relating to monetary orders of Commissioner – errors included award of backpay to compensate for reduction of salary prior to dismissal and reimbursement of annual leave deducted from entitlements prior to dismissal – Full Bench satisfied Commissioner exceeded jurisdiction – Full Bench satisfied that there was no loss or likely loss of income for respondent between period of dismissal and reinstatement – permission to appeal granted – Full Bench observed Commission does not have jurisdiction to award backpay for a period prior to dismissal – award of backpay and potential loss set aside – appellants raised nineteen grounds of appeal, which Full Bench categorised into four areas: alleged error of Commissioner to deal with evidentiary issues, how the Commissioner dealt with the remedy, decision of the Commissioner to grant reinstatement, and process appellants followed after termination – per s.38, determining whether dismissal was harsh and determining remedy is discretionary to the decision-maker – Full Bench only authorised to set aside a decision if error by the Commissioner is established (House v The King) – Full Bench noted appealable error is not demonstrated by appellant's view that Commissioner should have had regard to submissions with more weight to a particular consideration – Full Bench undertook detailed analysis of evidence provided at first instance – appellants submitted in ground two Commissioner failed to regard evidence that reinstatement may lead to resignations – Full Bench considered four witness statements – mental health concerns of employees or resignations likely to be caused due to respondent's reinstatement not established – Full Bench noted evidence not compelling and largely hearsay, which Commissioner assessed throughout lengthy hearing – appellants did not point to errors of fact in Commissioner's decision to award reinstatement – ground two rejected – appellants contend in ground three Commissioner failed to consider earning capacity of respondent following dismissal – Full Bench reject this ground as Commissioner assessed s.387(h), considering respondent's commitment and contribution to the company and personal circumstance of being sole income earner at the time of dismissal – appellants contend Commissioner erred by distinguishing role of respondent as employee, director and shareholder – Full Bench agreed with Commissioner's assessment to regard respondent's involvement with appellants and reject ground four – ground ten and eleven relate to the 'Gustavo incident', which appellants allege Commissioner did not regard the "vital safety and mental health evidence" – Full Bench disagreed with submission that Commissioner inappropriately disregarded this evidence – other evidence disregarded by Commissioner were external to the matter and not relevant – appellant's evidence of text message exchange did not evidence alleged discomfort of employees, or bullying and interrogation by respondent in this incident – Full Bench instead observed exchange showed respondent's concern about Mr Gustavo – Mr Troughton (CEO of appellant) failed to investigate this issue and could not respond at the Merits Hearing – Full Bench indicated reinstatement of respondent unlikely to impact Gustavo and no error was made by Commissioner – Full Bench highlighted this incident was exaggerated by appellants and not serious enough to constitute valid reason for dismissal – grounds ten and eleven rejected – appellants contend that Commissioner failed to consider evidence of warnings to respondent – appellants allege warnings were made

about bullying, inappropriate behaviour, and disparagement of managers, which ultimately lead to dismissal – Full Bench rejected Mr Troughton's oral evidence of issuing warnings, as it was not coherent or credible and appellants could not show record – termination letter referred to assessment by Mr Troughton of respondent's performance on 31 May 2021, however Mr Troughton's evidence confirmed that respondent did not receive these – Full Bench unable to find error in Commissioner's consideration of evidence of warnings and agreed that evidence provided was mere assertion – ground fourteen rejected – appellants contend that Commissioner failed to properly regard serious allegations that respondent dishonestly dealt with JobKeeper – appellants failed to explain how Commissioner did not deal with this ground – Full Bench agreed with Commissioner to not accept that the appellants did not have oversight or control of respondents financial dealings of accounts – Full Bench noted respondent's personal loan to help fund appellant's employee wage payments – ground fifteen rejected – appellants allege Commissioner inaccurately considered submissions of incident reports relating to respondent's conduct – appellants submitted that incident reports were not used for purpose of drafting termination letter but ultimately resulted in the reasons for termination – Full Bench not satisfied that the incident reports were communicated to respondent, nor was any performance management conducted after incident reports were established, as alleged by appellant – Full Bench noted inconsistency of incident reports from 28 July 2020 to 31 March 2021, where some reports were not dated – Full Bench rejected appellant's contention that Commissioner's findings failed to properly consider evidence and highlighted that respondent was not notified or provided with an opportunity to reply – ground sixteen rejected – appellants submitted in ground seventeen that Commissioner failed to record or regard evidence to alleged sexism by respondent – Full Bench assessed Commissioner's determination of evidence provided by Ms Tilds and Ms McCord, that did not indicate sexism, disrespect or aggressive behaviour towards the opposite sex from respondent – Full Bench unable to identify cogent evidence that Commissioner failed to consider and determined no error of fact by Commissioner, rejecting ground seventeen – Full Bench highlighted that remaining grounds of appeal are not relevant to the Commissioner's order – determined inappropriate to assert that Commissioner took into account irrelevant considerations without identifying asserted errors – Full Bench noted concern that appellants raised serious allegations towards respondent but failed to verify allegations or evidence what warranted the summary dismissal – Full Bench agreed with Commissioner that reinstatement is the most appropriate remedy – per *Vietnamese Community*, the embarrassment that may arise from reinstatement does not indicate a loss of trust and confidence to restore a working relationship – Full Bench rejected appellant's submission that respondent views employees in a negative manner – noted appellant's hiring of a qualified Human Resource Manager, respondent's reinstated position as Chief Technical Officer, and change of the appellant's Board Members would likely not result in easy working relationships with appellants and other employees – Full Bench agreed with Commissioner's determination that respondent worked for the interest of the appellants by lowering his salary, going without wages for extended periods of time, personally securing a loan, and loaning appellants from personal savings – diminishing professional reputation of respondent and value for respondent to continue to work for a company he created were important factors in Commissioner's order of reinstatement –

appellants to comply with Items A and B of Order by reinstating respondent – Items C and D of the Order, which related to payment of entitlements said to have been lost in the six months prior to respondent's dismissal and compensation for lost income, set aside – appeal dismissed.

Appeal by Low Latency Media P/L T/A Frameplay, Frameplay Holdings Corporation against decision of Yilmaz C of 12 August 2022 [[2022] FWC 2133] Re: Rossi

C2022/5655 [2023] FWCFB 156
Catanzariti VP Sydney 6 September 2023
Asbury VP
Lake DP

---

3 TERMINATION OF EMPLOYMENT – valid reason – self-defence – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision and order that termination was harsh, unjust and unreasonable – respondent dismissed for serious misconduct following violent interaction with a member of the public – at first instance, Commission considered it appropriate to measure whether appellant had valid reason to dismiss by reference to law of self-defence – at first instance held appellant did not properly take into account respondent was (or may have been) acting in self-defence – concluded no valid reason for dismissal at first instance – ordered reinstatement with back pay less any income earned from other work prior to reinstatement – permission to appeal sought – Full Bench considered granting of appeal in the public interest – raised issues of general importance concerning test to be applied where self-defence is raised in response to misconduct allegations – permission to appeal granted – whether appellant had onus or burden in the proceedings to establish that respondent had acted in self-defence – appellant submitted that party that asserts self-defence had legal onus of establishing that conduct was taken in self-defence – respondent submitted that appellant had evidentiary onus to establish a valid reason and that common law did not establish any hard rule in relation to establishing onus of establishing self-defence – submitted that correct test for self-defence was applied at first instance – Full Bench found that Commission at first instance had incorrectly assigned the burden of proof on appellant – Full Bench considered difference between the common law test for self-defence and the test under the *Crimes Act 1900* (NSW) [*Doran*] – held Commission should have applied common law test for self-defence – appeal upheld – decision and orders at first instance quashed – parties to advise within seven days of decision whether they consent to further conciliation prior to rehearing.

Appeal by NSW Trains t/a NSW Trainlink against decision and order of Boyce DP of 24 July 2023 [[2023] FWC 1517] Re: Al-Buseri

C2023/4773 [2023] FWCFB 165
Saunders DP Sydney 21 September 2023
Cross DP
Grayson DP

---

4 TERMINATION OF EMPLOYMENT – termination at initiative of employer – repudiation – ss.386, 394 Fair Work Act 2009 – applicant was employed as a security officer at Royal Adelaide Hospital – applicant taken into custody by SA police, placed in cells at police station and had phone confiscated – while in custody

applicant had no access to his phone and contacts or to the internet – applicant permitted to contact a friend – applicant requested friend inform relevant persons, including respondent, that applicant was in custody – friend did not contact respondent – applicant then ordered into remand – applicant only permitted to make calls to persons authorised by the authorities – applicant had been scheduled for but could not attend for shifts – while in remand applicant made written request to contact employer – request neither approved nor denied by remand centre – applicant released from remand after charges against him dropped – applicant had been in remand for 23 days – applicant had not been permitted to make contact with respondent while in custody – applicant's written request remained 'pending' at time of release – the respondent made unsuccessful attempts to contact applicant – a person claiming to be applicant's wife reported that applicant was overseas – respondent considered unexplained absence was repudiation of contract – and respondent accepted repudiation – respondent asserted no dismissal at its initiative as a consequence of the repudiation – repudiation only brings rights and obligations to an end if subject party accepts the repudiation (*Visscher*) – repudiation refers to conduct of a party which evinces unwillingness or inability to substantially perform contract (*James)* – unnecessary to show intention to repudiate and question of fact not law (*Balgowan)* – Commission held applicant failed to attend multiple shifts without approval or explanation – obligation to attend work an essential feature of employment – reasonable steps taken by respondent to contact applicant – failure to attend struck at heart of contract and objectively signified inability to render substantial performance of contract – Commission held applicant's conduct was repudiatory – Commission held acceptance of repudiation does not amount to dismissal at initiative of employer – respondent's acceptance terminated employment contract – applicant's earlier repudiation already ended the employment relationship (*Abandonment Case)* – held applicant not dismissed – Commission considered in the alternative that if a dismissal was found it would not have been unfair – Commission expressed observations on matter – noted dismissal here occurred due to circumstance rather than employment-related fault of applicant or respondent – further observed sensitivity of custodial authorities to an incarcerated person's employment was 'less than acceptable' – observed there appeared to be no good public policy reason why a person taken into remand is not asked about employment matters – Commission requested General Manager refer findings and observations to the Department of Correctional Services (SA) regarding detention practices and notifications to employer.

Qureshi v Spotless Services Australia Ltd

U2023/4369 [2023] FWC 2411
Anderson DP Adelaide 19 September 2023

Other Fair Work Commission decisions of note

Appeal by Steed against decision of Deputy President Boyce of 25 January 2023 [[2023] FWC 15] Re: Active Crane Hire P/L

TERMINATION OF EMPLOYMENT – remedy – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – at first instance Deputy President held appellant had been unfairly dismissed notwithstanding valid reason for dismissal – Deputy President held that reinstatement was not appropriate because of lack of contrition or remorse and clear animosity between parties – appellant awarded compensation at first instance – appeal

filed suggesting remedy of reinstatement had not been properly considered – Full Bench held appeal raised questions of general importance in relation to discretion with respect to remedy and the need to afford parties procedural fairness – Full Bench satisfied in public interest to grant permission to appeal on three bases – first that Deputy President failed at first instance to adequately address appropriateness of reinstatement – Full Bench observed appellant sought reinstatement throughout first instance proceeding and respondent did not submit it had lost trust and confidence – Deputy President's consideration of reinstatement comprised single paragraph with sentence noting appellant sought reinstatement or compensation in the alternative – Full Bench observed s.390(3) requires compensation not be ordered unless Commission finds reinstatement inappropriate and compensation would be appropriate – Full Bench found Deputy President did not consider reinstatement evidence and submissions before finding reinstatement inappropriate – held jurisdictional error or alternatively significant error of fact – second basis was the finding by Deputy President of animosity between parties – no evidence adduced regarding animosity – Commission bound to act judicially and afford procedural fairness [*Kioa*] – where finding on critical issue or factor adverse to party being considered by Commission and finding does not follow from the evidence, parties to be given opportunity to respond [*Newton*] – held appellant not afforded procedural fairness in relation to significant aspect of his case, alternatively held significant error of fact concerning remedy – final ground related to valid reason, Full Bench held no proper basis on the evidence for finding appellant was sleeping on duty in light of evidence appellant may have finished work at the time – observed this significant error of fact cast doubt on whether valid reason for dismissal existed – Full Bench granted permission to appeal – first instance decision quashed – matter remitted to another Member for redetermination.

C2023/557 [2023] FWCFB 152
Asbury VP Brisbane 1 September 2023
Bissett C
Johns C

Appeal by Howard against decision of Bell DP of 7 June 2023 [[2023] FWC 1317] Re: Falls Creek Ski Lift P/L t/a Falls Creek Ski Lift Group

TERMINATION OF EMPLOYMENT – contract for specified season – ss.386, 394, 604 Fair Work Act 2009 – appeal – Full Bench – application for an unfair dismissal remedy – appellant was employed by respondent as a Snowsports Instructor and had worked each winter since 2011 – appellant agreed to work for the 2022 winter season – appellant suffered a knee injury four days before the conclusion of the 2022 winter season – appellant was unable to work for reminder of the 2022 winter season – appellant's subsequent WorkCover claim was approved – around two weeks after date of injury, appellant participated in a running race – respondent became aware of the appellant's involvement in the race as part of discussions with a WorkCover assessor – respondent subsequently advised appellant he would not be offered a new employment contract for the 2023 winter season – at first instance the Deputy President held appellant was dismissed within meaning of s.386 – Deputy President held the appellant was employed pursuant to a contract of employment for the duration of a specified season – the Deputy President also held the employment relationship ended on the day of the appellant's injury as the appellant was subsequently removed from the roster – the Deputy President further held the application was lodged out of time and dismissed application at first instance – appeal lodged – Full Bench must grant permission to appeal if there is an error on the part of the primary decision maker and if it is in the public interest to do so – public interest might be attracted where a matter raises issues of importance and general application [*GlaxoSmithKline*] – permission to appeal granted because the appeal raised issues of general importance regarding the circumstances in which seasonal employment contracts give rise to a dismissal – whether Deputy President erred in finding appellant was dismissed within the meaning of s.386 – appellant submitted he was not employed under a contract of employment for the duration of a specified season within the meaning of s.386(2) because his contract was terminable at any time on one hour's notice – appellant also submitted that mere act of removing a casual employee from a roster because that employee had

suffered an injury cannot lead to a finding that the employer terminated the employment relationship – appellant contended he remained in an employment relationship with respondent until he was advised that a new employment contract would not be offered – appellant further contended Deputy President erred in refusing an extension of time to file his application because the Deputy President failed to consider whether he was employed for the minimum employment period and that there was a failure to conduct an analysis of the merits of the application – respondent submitted Deputy President's decision did not disclose any arguable appealable errors and permission to appeal should be refused – Full Bench considered the terms of the appellant's contract of employment – if a contract of employment for a maximum term contains an unqualified right on the part of either party to terminate the contract at any time on notice, then the contract will not be for a 'specified period of time' within the meaning of s.386(2)(a) [*Khayam*] – appellant's employment contract contained an express term which permitted either party, at any time and for any reason, to terminate the Appellant's employment on one hour's notice – Full Bench held that appellant was not employed under a contract of employment for the 'duration of a specified season' – Full Bench considered whether contract of employment was terminated and noted this must be determined objectively – evidence provided did not indicate that there was any communication from or on behalf of the respondent to the appellant on the date of the injury, or at any later time, to the effect that the contract of employment or relationship had been terminated – Full Bench noted that a reasonable person in appellant's position would not have believed contract of employment or the relationship with respondent terminated on date of the injury – Full Bench held the Deputy President erred by concluding the employment ended on the date of the injury – Full Bench instead held that the appellant's contract of employment and relationship with respondent ended at the conclusion of the 2022 winter season in accordance with terms of the contract – Full Bench noted terms in the contract of employment made it clear the appellant was employed for the 2022 winter season only – Full Bench further held there was no termination at the initiative of the respondent and that the appellant was not dismissed within the meaning of s.386 – ultimately Full Bench agreed with the Deputy President's decision, albeit for different reasons – appeal dismissed.

C2023/3737 [2023] FWCFB 154
Asbury VP Brisbane 5 September 2023
Saunders DP
Wright DP

Application by Lofte Australia P/L

ENTERPRISE AGREEMENTS – greenfields agreement – s.182(4) Fair Work Act 2009 – Lofte Australia P/L (Lofte) was establishing a new enterprise involving vessel loading, discharge solutions and port operations in Western Australia (WA) – Lofte sought approval of a Greenfields Enterprise Agreement (the Agreement) – intended that the Agreement apply across Australia and not be limited to WA – Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) was the employee organisation with which the Agreement was proposed to be made – CFMMEU contended that there had not been a notified negotiation period as required by s.182(4)(b) and that it was not given written notice as required by s.178B – CFMMEU submitted Agreement was not in the public interest – CFMMEU contended Agreement did not provide for pay and conditions that were consistent with the relevant industry (stevedoring) – Lofte Director contacted CFMMEU's WA Division Branch in June 2022 – Lofte provided CFMMEU WA Division with a notice to commence bargaining – in July 2022 Lofte provided CFMMEU WA Divison with a draft agreement – Lofte contended the WA Division was not a distinct legal entity from the CFMMEU – Lofte contended that for purposes of FW Act and Rules per s.793(1) that any conduct engaged in on behalf of a body corporate by an official of the body corporate within the scope of their apparent authority – Commission noted Lofte did not advise how CFMMEU was specifically provided with notice – noted that the CFMMEU is an employee organisation under the Fair Work (Registered Organisations) Act 2009 – CFMMEU and each of its divisions and branches have own rules that govern how it operates – the CFMMEU's rules outline who has authority to enter into an agreement on its behalf – Persons in WA Division notified did not have the authority to

enter into a national industrial agreement – Commission held service is important and that giving written notice to the correct officials is necessary to draw attention of an employee organisation as to when a negotiating period commences – found that Lofte did not indicate that there would a national agreement in its meetings with the CFMMEU – therefore, the Agreement could not be made because notified negotiating period absent – ss.182(4)(b) and (c) requirements could not be met – Commission not satisfied that Lofte had met the requirements of s.187(6) – prevailing pay conditions of the Agreement when considered on an overall basis not consistent with pay and conditions of stevedoring industry – Lofte proposed four principal industry enterprise agreements from four different companies in the stevedoring industry – CFMMEU highlighted that two of the companies (Qube Ports P/L and Linx) had multiple different enterprise agreements for the different port cities they operated in – this was comparable to the Agreement because Lofte planned to eventually expand its operations to the same ports across Australia – CFMMEU used Linx as an example – highlighted that Linx offered better rates of pay in comparison to what Lofte was proposing – Commission found Agreement had lower rates of pay – Commission concluded Agreement's pay and conditions compared were substantially inferior to, and not consistent with, prevailing pay and conditions in the industry – Commission dismissed application for approval of Greenfields Agreement.

AG2023/114		[2023] FWC 2178
Gostencnik DP	Melbourne	5 September 2023

Ferber v Orana Australia Ltd

TERMINATION OF EMPLOYMENT – misconduct – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant commenced employment with respondent in 2021 as supervisor – applicant's job included driving respondent's clients (persons living with disability) to different locations using respondent's car – on 17 May 2023, applicant was driving three clients when he was distracted and clipped a wheelie bin which had been left approximately five metres onto the road – applicant was driving at low speed and there were no other cars on road – there were no injuries, no damage to car, and applicant did not report incident to respondent – applicant's manager learned about incident from clients and discussed with applicant – applicant acknowledged incident, agreed to provide written statement, but considered the matter trivial – applicant informed that he would be suspended pending investigation – letter sent to applicant on 23 May requesting response to serious misconduct allegation – respondent gathered statements from clients and took photographs of road where incident occurred – allegation meeting occurred on 25 May in which applicant acknowledged the incident and that he was distracted before hitting wheelie bin, but reasserted that incident was not serious since he was driving at low speed, there were no injuries, and car was not damaged – respondent considered incident in comparison to previous incident with another employee where respondent dismissed that employee for distracted driving – respondent decided similar sanction should apply to applicant – applicant was summarily dismissed on 29 May – applicant submitted there was no valid reason for dismissal because incident was accidental and so minor that it could not have resulted in loss of trust in his ability to carry out his employee obligations – alternatively, applicant submitted that dismissal was harsh and disproportionate considering his employment record with respondent, his age and difficulty in obtaining alternative employment, and mitigating factors such as tiredness – applicant submitted that dismissal was procedurally unfair because he was not given opportunity to view or comment on client statements and photographs before decision was made – respondent submitted there was valid reason because they considered the incident was serious and that seriousness is determined by risk rather than outcome – respondent submitted applicant's carelessness caused a reputational risk for respondent, that applicant's failure to self-report incident and to acknowledge its seriousness led respondent's loss of trust in applicant being able to fulfill obligations with due care and safety – respondent submitted dismissal was not procedurally unfair since decision was not made until after investigation was concluded and applicant had opportunity to explain – Commission found that applicant's conduct was careless and was in breach of employment code of conduct – Commission accepted respondent's submission that

seriousness is assessed by risk created by conduct rather than outcome, but found that incident was not serious – Commission affirmed that breach of code of conduct or employment obligations is serious matter for any employer but will not necessarily constitute valid reason for dismissal – Commission determined the incident and applicant conduct afterwards not valid reasons for dismissal – Commission rejected applicant's submission that he was not given opportunity to comment on the evidence gathered by respondent, but found this to be a neutral consideration – Commission found lack of warning given to applicant weighed in favour of unfairness finding – Commission found summary dismissal to be disproportionate considering conduct was not serious and weighed in favour of harshness finding – found even if there was valid reason for dismissal, summary dismissal would still have been disproportionate response leading to finding of harshness – Commission found dismissal to be harsh, unjust, and unreasonable – considered reinstatement as remedy – Commission affirmed that reinstatement is inappropriate if employment relationship is irretrievably broken and there no prospects of restoration – Commission affirmed that such consideration is assessed in objective manner regardless of respondent's assertions that trust and confidence had been eroded – Commission found reinstatement to be appropriate in the circumstances, and applicant should be given discounted backpay – Commission directed parties to confer and discuss appropriate remedy.

U2023/4889 [2023] FWC 2098
Anderson DP Adelaide 28 August 2023

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Civmec Construction & Engineering P/L T/A Civmec Construction & Engineering

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – ss.186(6), 739 Fair Work Act 2009 – Australian Manufacturing Workers Union (AMWU) and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU) referred dispute to Commission – dispute concerned withdrawal of rostered overtime for Civmec Construction & Engineering P/L (Civmec) employees – Civmec is a Singaporean-Australian company involved in construction engineering and shipbuilding – Civmec employees subject to conditions of *Civmec Construction & Engineering P/L Kwinana Greenfields Project Agreement 2022* (the Agreement) – at issue was cl. 8.4(a) which *states "employer shall not, without good reason and without a minimum of two (2) hours' notice withdraw rostered or additional overtime on any days Monday to Friday. Periods of notice shall be within the rostered working day or for the minimum period at commencement of work on an overtime shift"* – 31 May at around 1:00 PM Civmec employees informed that they were being sent home due to inclement weather – rostered hours could not be worked due to the weather – Civmec employees standard hours are from 6:30 AM to 5:15 PM – working 10.25 hours per day – Project hours break down to 7.2 Ordinary Hours, 0.8 Rostered Day Off (RDO) and 2.25 hours (rostered overtime) – 1 June Civmec informed employees that they would not be paid for the full 10.25 hours – instead would be paid only for Ordinary Hours (7.2 hours) worked – AMWU and CEPU disputed this because the required 2 hours' notice of overtime was not provided per cl. 8.4(a) – Deputy President held Commission had jurisdiction to hear the dispute – AMWU and CEPU covered by the Agreement – Agreement allowed for a dispute arising under the Agreement to be referred to the Commission for conciliation and arbitration if necessary – employee witnesses gave evidence they were told after 1:00 PM to go home due to heavy rainfall making it dangerous to continue working – employer witnesses gave evidence that decision to advise employees that no work could take place was made at 12:45 PM – AMWU claimed that Civmec was required to pay rostered and additional overtime because they did not notify employees before 1:00 PM (as overtime commenced at 3:00 PM) – CEPU submitted that the Commission should take into account the history of particular clause [*Hercus*] – CEPU deconstructed clause 8.4(a) to highlight that the words 'period of notice shall be' indicated the sentence is directed to an essential or necessary quality of a valid notice period – contended notice must be within the rostered working day or at the commencement of working an overtime shift – Civmec submitted that the interpretation task called for an examination of the

'ordinary meaning' of the relevant words within the context and purpose of the Agreement – submitted it had acted with a 'good reason; to withdraw the overtime shifts due to the inclement weather – two hours' notice provided to ensure fairness to employees – Civmec did not concede that the 2 hour notice was not provided – noted employees received payment for their 30 minute meal break that was normally unpaid – Deputy President considered starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context [*Workpac*] – Deputy President held the distinction between rostered or additional overtime was that rostered overtime referred to scheduled overtime – additional overtime meant work performed in excess of regular rostered overtime – overtime withdrawn on 31 May was rostered scheduled overtime – cl. 8.4 required that two conditions be met – first there must be a good reason for withdrawal of a rostered overtime shift – second the withdrawn shift must not be made without a minimum of two hours' notice – Deputy President accepted inclement weather was a good reason to withdraw the overtime shifts – considered application to the evidence – held Civmec's first witness had given persuasive evidence demonstrating that his employees were informed to leave at 1:00 PM – Civmec's second witness was not persuasive in their evidence that employees were informed prior to 1:00 PM – Civmec's third witness was not called – Deputy President considered for drawing inferences from evidence [*Jones v Dunkel*] – drew the inferences from the evidence that two of Civmec's supervisors had given notice to leave shortly after 1:00PM – inferred that the three AMWU and CEPU witnesses had been advised to leave prior to 1:00 PM based on swipe card exit time evidence – Deputy President ordered that for the relevant employees overseen by the first supervisor that they were not to be paid rostered overtime because they were informed prior to 1:00 PM – further ordered that the remaining employees who worked under the two other supervisors were to be paid rostered overtime.

C2023/3586 and Anor [2023] FWC 2093
Beaumont DP Perth 28 August 2023

King v NHN Group P/L

TERMINATION OF EMPLOYMENT – jurisdiction – multiple actions – ss.394, 725 Fair Work Act 2009 – applicant was employed by NHN as Responsible Service of Alcohol Marshall – respondent received a criminal history report for applicant on 23 May 2023 – applicant's employment was terminated on same day – 24 May 2023 applicant completed an online complaint form on the Australian Human Rights Commission (AHRC) website – NHN listed as 1st respondent in complaint – insurance company listed as 2nd respondent – AHRC requested further particulars concerning complaint – 8 June 2023 applicant lodged unfair dismissal application with Commission – 4 September 2023 AHRC emailed applicant stating the complaint had not yet been accepted as requested particulars not provided – respondent submitted applicant's Commission application should be dismissed under s.725 of the Act – s.725 establishes rules prohibiting multiple dismissal applications or complaints under different laws – Commission observed legislation establishing AHRC is a law of Commonwealth relevant to s.725 consideration – applicant submitted AHRC complaint did not meet description of a complaint under another law made in relation to dismissal – applicant submitted complaint not active and had not been accepted by AHCR – Commission observed applicant had not withdrawn the complaint with AHRC – further noted AHRC complaint had not failed for want of jurisdiction – Commission satisfied that the online complaint was in relation to the applicant's dismissal – Commission found complaint made against NHN not the insurance company – Commission found applicant had made a complaint under another law in relation to the dismissal – Commission found applicant barred from pursuing unfair dismissal application by the general rule against multiple actions – application for unfair dismissal remedy in Commission dismissed.

U2023/5065 [2023] FWC 2419
Saunders DP Newcastle 19 September 2023

Budgen v Verifact Traffic P/L

TERMINATION OF EMPLOYMENT – misconduct – time fraud – s.394 Fair Work Act 2009 – applicant worked as Traffic Controller – required to accurately complete time dockets – respondent twice notified all staff of importance of accurate dockets – three separate signatures required for each docket – applicant identified as having left work site 2.5 hours earlier than time reported on her docket – investigation undertaken – discrepancies in applicant's docket identified between November and December 2021 – identified 25 hours and 45 minutes total additional time claimed – respondent considered this time fraud to be misconduct – show cause process undertaken – applicant dismissed – applicant suggested no valid reason for dismissal – whether valid reason considered – observed misrepresenting timesheets has previously been considered valid reason for dismissal [*Mckeown*; *Thein*] – found while docket system required three signatures that did not exonerate applicant's involvement in the misconduct – found applicant was complicit in misconduct and benefited by being paid for work not undertaken – found there was valid reason for dismissal – observed it was no denial of procedural fairness for human resources practitioner who investigated misconduct to participate in show cause process – Commission considered applicant's submission she left early on occasion as she could not take required 30-minute break – found even if that was true it would not explain misconduct – time discrepancy exceeded 1 hour in most instances – found photographs relied on by respondent during show cause should have been provided to applicant – held despite this applicant was provided opportunity to explain time discrepancies and applicant gave insufficient reasons – held termination was proportionate response to gravity of breach – dismissal not unfair – application dismissed.

U2022/611 [2023] FWC 2224
Lake DP Brisbane 7 September 2023

Burneikis v NGS Super P/L

TERMINATION OF EMPLOYMENT – genuine redundancy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent raised defence dismissal a case of genuine redundancy – applicant employed by respondent as graphic designer – respondent decided to outsource graphic design work – determined it no longer needed graphic design role and terminated applicant's employment – no other positions affected – whether dismissal a case of genuine redundancy – whether applicant's job no longer required to be performed because of changes in operational requirements – not relevant whether different decision open to employer, only whether employer decided role no longer required based on changes in operational requirements [*Adams v Blamey*] – Commission found respondent decided role no longer required for genuine operational reasons – whether employer complied with any obligation to consult – Commission found modern award consultation obligations not enlivened – consultation requirements under award conditional upon relevant change being "major" with "significant effects on employees" – no requirement to consult about individual redundancies – considered consultation adequate even if obligations did apply – whether redeployment would have been reasonable – reasonableness to be assessed at time of dismissal [*Honeysett*] – in assessing reasonableness, it is necessary to determine the position to which an employee could have been redeployed – applicant submitted she should have been redeployed to Strategy / Product Team but failed to identify specific roles available at time of dismissal – Commission found this failure fatal to Applicant's contention – redeployment not reasonable in all the circumstances – objection regarding genuine redundancy upheld – application dismissed.

U2022/4734 [2023] FWC 2128
Boyce DP Sydney 25 August 2023

Walkerden v Oncall Language Services P/L

TERMINATION OF EMPLOYMENT – contractor or employee – high income threshold – ss.332, 357, 394 Fair Work Act 2009 – applicant established company (GDC) in August 2022 – in August 2022 GDC entered contract with respondent to provide services –

applicant formed GDC for purpose of forming contract with respondent – contract was subject to negotiation between parties – applicant engaged as designated personnel in contract – contract allowed applicant to conduct work externally – over course of engagement applicant at least considered other avenues of work externally – late March or early April 2023 respondent offered applicant contract of employment – applicant made changes to contract and signed it before returning it to respondent – no evidence provided respondent accepted or signed counter offer – applicant was dismissed by respondent on 28 April 2023 – applicant lodged unfair dismissal application – respondent submitted contract was contract for service – respondent submitted applicant was not employee – applicant was free to deliver services as he saw fit – contract allowed GDC to nominate another designated person – GDC was free to take on other clients – cost of providing service was borne by applicant – applicant submitted contract was sham contract – Commission found contract wholly written – negotiations which took place after signing were not variations to actual terms or additional terms –Commission found complaints of hours or lack of specificity of services were not relevant to determination of actual relationship – Commission found at time of making contract there was not attempt to misrepresent contractual relationship – Commission found applicant was not employee of respondent – respondent submitted had applicant been found to be employee he exceeded high income threshold and would not be protected from unfair dismissal – applicant was engaged for eight month period – applicant received $134,537.55 – did not consider expenses in applicant's earnings as these would otherwise be met by employer – applicant's annual earnings found to be $182,630.14 – Commission found this to be in excess of high-income threshold – application for unfair dismissal was dismissed.

U2023/4118 [2023] FWC 1996
Bissett C Melbourne 24 August 2023

Orora Cartons Heidelberg Enterprise Agreement 2020 and others

ENTERPRISE AGREEMENTS – termination of agreement – standing – ss.225, 226, 313 Fair Work Act 2009 – application to terminate eight separate agreements after respective nominal expiry dates – Australian Manufacturing Workers Union (AMWU) objected on basis that applicant did not have standing to make application – submitted that because applicant did not employ an individual in the fibre industry, it was not a national system employer – AMWU submitted that applicant was no longer covered by fibre packaging agreement due to transfer of applicant's fibre packaging business in 2020 – relied on language in s.313 of the Act, submitting that use of the present tense 'covers' had the effect of extinguishing applicant's coverage following transfer – Commission found that applicant was a national system employer, noting that whether applicant employed individuals in the fibre packing business did not determine whether applicant was a national system employer – whether transfer of business affected applicant's standing to make application considered – Commission observed relevant Division of FW Act concerns transfer of rights and obligations, not transfer of transferable instruments – noted that AMWU's interpretation of s.313 would have the effect that non-transferring employees would cease to be covered by an agreement and that a new employer assumes no obligations for non-transferring employees – Commission rejected AMWU's submission on transfer of business provisions – found applicant was covered by agreement – Commission satisfied that applicant covered by agreement and had standing to make application – satisfied that agreements should be terminated – agreements terminated.

AG2023/1445 and Ors [2023] FWCA 2617
Bissett C Melbourne 28 August 2023

Major v Strata Management Group P/L

TERMINATION OF EMPLOYMENT – misconduct – remote work – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as Business Development Associate since 22 March 2022 – respondent operated in real estate industry – applicant terminated for misconduct – show cause letter sent to applicant on

21 March 2023 – first allegation involved sending confidential information to personal email and then deleting them – applicant argued no confidential information disclosed and is entitled to keep information 'for her own records' – applicant's employment contract expressly prohibited use of confidential information particularly for personal or non-company purposes – respondent argued emails forwarded without authority and contravened employment contract – allegation substantiated – second allegation involved failure to attend office to perform work – applicant did not attend Sunshine Coast office as required – applicant argued employment agreement was 'outdated' and previous flexible working arrangements should apply – respondent stated employment contract was valid, no flexible arrangements were approved or agreed and applicant required to work from the office full time – respondent relied on key fob access data and telephone records – allegation substantiated – third allegation related to working from home part-day without permission on 7 and 9 February 2023 – phone records indicated applicant was in Noosa on alleged dates – applicant argued she lives in Noosa and was working on sites in that area but could not provide any supporting evidence – respondent argued applicant had left the Sunshine Coast Office on 7 and 9 February without approval – telephone records showed applicant was in different location (near applicant's home) in the afternoon of 7 and 9 February – applicant argued in show cause process she was not afforded natural justice – suggested lack of natural justice impaired any show cause response – respondent argued that allegations did not require access to company server information or documents – Commission considered s.387 FW Act – Commission confirmed first allegation – no proper basis for applicant to forward work related material to her email – conduct conflicted with employment contract regarding confidential information – Commission confirmed second and third allegation – evidence indicated applicant was not at Sunshine Coast Office as required – found applicant was not complying with lawful and reasonable direction concerning work location – per s.387, respondent had valid reason for dismissal – applicant notified of reason and had reasonable opportunity to respond – neutral considerations for circumstances in s. 387 (e)-(h) – Commission held dismissal was valid – dismissal was not harsh, unjust or unreasonable – application dismissed.

U2023/3223 [2023] FWC 2276
Simpson C Brisbane 7 September 2023

Lim v QL Co Group P/L

TERMINATION OF EMPLOYMENT – misconduct – Small Business Fair Dismissal Code – ss.394, 396 Fair Work Act 2009 – unfair dismissal application – respondent acquired company and applicant's employment transferred to respondent on 20 December 2021 – respondent opened additional store and applicant managed both store locations for 4 months – applicant's employment terminated on 27 March 2023 – respondent objected to applicant's materials being filed out of time – Commission found application did not fail threshold tests in ss.399, 587 and required determination – applicant submitted she worked beyond her regular hours and took on additional tasks to manage both stores and assist new owners – respondent submitted applicant had not worked hard enough and had bullied staff – submitted applicant was dismissed for serious misconduct relating to racial discrimination of another employee as well as unsatisfactory conduct, performance or capacity to do the job – submitted that dismissal was consistent with Small Business Fair Dismissal Code (Code) – applicant submitted that reason for dismissal was not serious misconduct – Commission confirmed respondent was a small business employer – noted that, in relation to 'summary dismissal' element of Code, respondent did not take immediate action when learning of alleged racial discrimination, waited 10 days to raise employee's complaint with applicant, failed to explain that the racial comments were a reason for dismissal and failed to raise with applicant other racial comments she made – noted that, in relation to 'other dismissal' element of Code, evidence showed there was tension between the parties and dissatisfaction was communicated to applicant twice prior to dismissal – noted respondent did not warn applicant she risked being dismissed and did not give applicant opportunity to rectify perceived problems – Commission found applicant's dismissal was not consistent with Code – found dismissal was harsh because it was disproportionate to the misconduct or performance – further found dismissal was

unreasonable because respondent did not put critical matters to applicant for response and did not give applicant a chance to improve her performance – found that dismissal was procedurally unfair and there was no valid reason for dismissal – held dismissal was unfair – reinstatement not appropriate – ordered compensation of $9,792 gross.

U2023/3110		[2023] FWC 2155
Wilson C	Melbourne	30 August 2023

Baweja v Capital Insurance Group Limited

GENERAL PROTECTIONS – jurisdiction – national system employer – s.365 Fair Work Act 2009 – application to deal with general protections dispute including dismissal – respondent raised jurisdictional objection – respondent incorporated entity in Papua New Guinea (PNG) – whether respondent was 'national system employer' – Commission observed 'national system employer' included 'constitutional corporation' (s.14 FW Act) including 'foreign companies' (s.12 FW Act, para 51(xx) Constitution) – but for FW Act to apply, employment relationship must have sufficient connection to Australia [*Valuair*] – in deciding whether employment relationship was sufficiently linked to Australia, Commission considered nature of legal relationship – determined by reference to any contract, not subsequent conduct [*Personnel Contracting*, *Jamsek*] – observed employment contract stated applicant would be employee of PNG company, would perform services in PNG and provided payment of salary into PNG bank, indexing of salary to PNG price rises, housing and car in PNG, and repatriation from PNG at conclusion of employment – observed the applicant's subsequent efforts to perform less work in PNG and more work in Australia did not alter rights and obligations created by contract – found insufficient connection with Australia and concluded respondent not 'national system employer' – jurisdictional objection upheld – application dismissed.

C2023/967		[2023] FWC 2401
Hunt C	Brisbane	21 September 2023

Southern Cross University

ENTERPRISE AGREEMENTS – better off overall test – pre-approval requirements – s.185 Fair Work Act 2009 – application for approval of Southern Cross University Enterprise Agreement 2021 (Proposed Agreement) – Community and Public Sector Union (CPSU) and the National Tertiary Education Industry Union (NTEU) were union bargaining representatives – NTEU opposed approval of the Agreement citing issues in making of Proposed Agreement – NTEU submitted Proposed Agreement was not genuinely agreed as casual employees were not employed during access period – casual employees employed for specific period with start and end date – each shift not considered separate period of employment – Commission considered certainty about period over which work will be offered and number of hours that will be required was analogous to *McDermott* – determined casual employees were 'employed at the time' – NTEU contended Proposed Agreement was not genuinely agreed due to a failure to establish validity of the voter roll – NTEU contended Applicant made a range of errors, such as including persons not covered on the roll, duplicate persons, and not including persons whose employment commenced during access period – upon consideration Commission satisfied that despite the errors on the roll the majority of employees who would be covered by the Proposed Agreement cast a valid vote – NTEU submitted Applicant did not take all reasonable steps to ensure employees were given a copy of, or access to, Proposed Agreement and incorporated material before vote – Applicant submitted that, similar to *Broome*, obligation is to ensure all relevant employees have access to the material throughout the identified period and cannot extend to all steps that are reasonably open in theory – Commission reiterated "the obligation is to take all reasonable steps to 'ensure' that employees are given a copy of, or have access to, the Referenced Material" – Commission satisfied Applicant complied with s.180(2) or, if incorrect, that any non-compliance was a minor procedural error unlikely to cause disadvantage – NTEU submitted employees were mislead by Applicant regarding statements about a '$750 sign-on bonus' should they agree to the Proposed Agreement – Commission not satisfied employees could have been mislead – further observed

even if assumed some employees were influenced by sign-on bonus this would not result in conclusion agreement was not genuine – NTEU contended Proposed Agreement could not pass 'better off overall test' (BOOT) as the removal of fixed term employment restrictions was not better off overall than the Higher Education Awards – Applicant submitted that there are further 'contingent benefits' to the Proposed Agreement – Commission determined the Proposed Award provides significantly higher rates of pay than the Award for the relevant employees – relevant employees better off overall under Proposed Agreement – NTEU submitted other issues arose from minimum engagement periods for casual employees, apprentice and trainee rates of pay, notice of termination for apprentices and Schedule 4 employees – Applicant agreed to undertakings for those terms in the Proposed Agreement – Commission satisfied that undertakings would resolve the issues – Commission determined Proposed Agreement, subject to undertakings, would pass the BOOT and requirements for the approval have been met – Commission ordered Applicant to file and serve undertakings, CPSU and NTEU to serve views on proposed undertakings.

AG2022/4745 [2023] FWC 2077
Ryan C Sydney 18 August 2023

Australian College of Optometry v Ng

CONDITIONS OF EMPLOYMENT – redundancy – alternative employment – s.120 Fair Work Act 2009 – in early 2023 applicant's business undertook significant restructure – respondent employee's position as Manager, Visual Services made redundant – respondent accepted redeployment to lower level position as Staff Optometrist – respondent otherwise entitled to 12 weeks redundancy pay – applicant made application to reduce redundancy entitlement by 100% (to zero) – Commission found respondent's position made redundant and respondent entitled to redundancy payment per s.119(1)(a) – per s.120 amount of redundancy pay can be reduced on application if employer obtains other acceptable employment for employee or employer cannot pay the amount – Commission can reduce entitlement to amount considered appropriate – approach outlined in [*Powell*] applied – Commission observed onus lies with employer – two-stage test, firstly whether applicant obtained employment by its conscious, intended acts, and second whether alternative employment acceptable – held applicant obtained alternative Staff Optometrist position as result of conscious, intended acts – whether Staff Optometrist position acceptable – whether alternative employment acceptable for purpose of s.120(1)(b)(i) to be determined objectively – relevant matters include pay level, hours of work, seniority, fringe benefits, workload and speed, job security and travel time [*Derole*] – found Staff Optometrist position would still utilise respondent's optometry skills, allow him to apply same clinical skills and services, part-time work arrangements would continue and other entitlements and continuous service would be maintained – in contrast, also found Staff Optometrist position did not include managerial/administrative duties, had increased prospect of travel for work and had approximately 13% lower salary level – held alternative position bore sufficient comparability to original work and not unreasonably removed from original position – observed removal of management duties justified reduction in salary and prospect of travel no different to former position – held, on balance, applicant had obtained acceptable alternative employment – whether appropriate to reduce redundancy pay considered – held as acceptable alternative employment was obtained, a reduction was appropriate – considering loss of seniority and salary reduction held redundancy should be reduced by 50% – order issued.

C2023/4148 [2023] FWC 2100
Connolly C Melbourne 23 August 2023

Subscription Options

You can subscribe to a range of updates about decisions, award modernisation, the annual wage review, events and engagement and other Fair Work Commission work and activities on the Fair Work Commission's website. These include:

> **Significant decisions** – This service contains details of recently issued full bench decisions and other significant decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed when decisions are published.
>
> **All decisions** – This service contains details of all recently issued Commission decisions with links to the complete decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed up to twice daily.

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

Fair Work Commission Addresses

Australian Capital Territory
Level 3, 14 Moore Street
Canberra 2600
GPO Box 539
Canberra City 2601
Tel: 1300 799 675
Fax: (02) 6247 9774
Email:
canberra@fwc.gov.au

New South Wales

Sydney
Level 10, Terrace Tower
80 William Street
East Sydney 2011
Tel: 1300 799 675
Fax: (02) 9380 6990
Email:
sydney@fwc.gov.au

Newcastle
Level 3, 237 Wharf Road,
Newcastle, 2300
PO Box 805,
Newcastle, 2300

Northern Territory
10th Floor, Northern Territory House
22 Mitchell Street
Darwin 0800
GPO Box 969
Darwin 0801
Tel: 1300 799 675
Fax: (08) 8936 2820
Email:
darwin@fwc.gov.au

Queensland
Level 14, Central Plaza Two
66 Eagle Street
Brisbane 4000
GPO Box 5713
Brisbane 4001
Tel: 1300 799 675
Fax: (07) 3000 0388
Email:
brisbane@fwc.gov.au

South Australia
Level 6, Riverside Centre
North Terrace
Adelaide 5000
PO Box 8072
Station Arcade 5000
Tel: 1300 799 675
Fax: (08) 8308 9864
Email:
adelaide@fwc.gov.au

Tasmania
1st Floor,
Commonwealth Law Courts
39-41 Davey Street
Hobart 7000
GPO Box 1232
Hobart 7001
Tel: 1300 799 675
Fax: (03) 6214 0202
Email:
hobart@fwc.gov.au

Victoria
Level 4, 11 Exhibition Street
Melbourne 3000
PO Box 1994
Melbourne 3001
Tel: 1300 799 675
Fax: (03) 9655 0401
Email:
melbourne@fwc.gov.au

Western Australia
Floor 16,
111 St Georges Terrace
Perth 6000
GPO Box X2206
Perth 6001
Tel: 1300 799 675
Fax: (08) 9481 0904
Email:
perth@fwc.gov.au

Out of hours applications

For urgent industrial action applications outside business hours, please refer to our Contact us page for emergency contact details.

The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a monthly publication that includes information on the following topics:

- summaries of selected Fair Work Decisions
- updates about key Court reviews of Fair Work Commission decisions
- information about Fair Work Commission initiatives, processes, and updated forms.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: subscriptions@fwc.gov.au.