FWC Bulletin

4 April 2024 Volume 4/24 with selected Decision Summaries for the month ending Sunday, 31 March 2024.

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Family and domestic violence general protections: new fact sheet published

13 Mar 2024

We have published a plain language fact sheet on some recent changes to the general protections under the *Fair Work Act 2009*.

General protections changes: family and domestic violence

The Fair Work Act prohibits an employer from taking adverse action against an employee, or potential employee, because of their protected attribute. These laws cover most employees and businesses.

From 15 December 2023, 'subjection to family and domestic violence' is a protected attribute.

Download: Changes to general protections: Family and domestic violence (pdf)

Find out more

Visit our website to learn more about the general protections including who the general protections laws cover.

Find out about other upcoming changes on our Closing Loopholes Acts – what's changing page.

Workplace delegates’ rights and general protections: new fact sheet published

14 Mar 2024

We have published a plain language fact sheet on some recent changes to the general protections under the *Fair Work Act 2009*.

General protections changes: workplace delegates’ rights

There are new protections for workplace delegates when they are carrying out that role.

A workplace delegate is a person appointed or elected by a union to be a delegate or representative for union members working in a particular enterprise. They have the right to represent the industrial interests of members and potential members.

These laws cover most employees and businesses in Australia.

Download: Changes to general protections: Workplace delegates’ rights (pdf)

Find out more

Visit our website to learn more about the general protections including who the general protections laws cover.

Find out about other upcoming changes on our Closing Loopholes Acts – what’s changing page.

Work value case – Aged care industry decision issued

15 Mar 2024

The Fair Work Commission has issued a decision in the Work value case – Aged care industry.

The decision concludes stage 3 of the Work value case for the Aged care industry. It also contains further steps needed to finalise the case.

Comments on the draft determinations

Draft determinations to vary the Aged Care Award, the Nurses Award and the Social, Community, Home Care and Disability Services Award were published with this decision for comment.

We invite interested parties to comment on the draft determinations **by 4pm (AEST) on Friday 26 April 2024**. Please email comments to awards@fwc.gov.au.

Marked up copies of the awards have also been published with the draft determinations to help in reviewing the proposed variations to the awards. These are available on the Decisions, statements and determinations for the Work value case – Aged care industry webpage.

Submissions on operative date and phasing in of the variations

Submissions from the Commonwealth on the operative date and phasing in of the variations are due by 4pm (AEST) on Friday 12 April.

Other parties can make submissions in response to the Commonwealth submission **by 4pm (AEST) on Friday 10 May 2024**. Please email submissions to awards@fwc.gov.au.

Outstanding issues

A conference of interested parties has been listed before Justice Hatcher for 2pm (AEST) on Thursday 4 April 2024 to consider outstanding issues concerning nurses.

These matters will be dealt with separately, in conjunction with ANMF's application in case AM2024/11. A separate webpage has been established for the Work value case – Nurses and midwives.

You can read:

- the Decision [2024] FWCFB 150 (pdf)
- a summary of the decision (pdf)
- draft determinations and marked-up awards on the Decisions, statements and determinations for the Work value case – Aged care industry webpage.

New Fair Work Commission Rules commence today

27 Mar 2024

The new *Fair Work Commission Rules 2024* commenced Wednesday 27 March 2024.

These replace the previous Rules made in 2013. The Rules regulate the practice and procedure of the Commission.

The Rules largely remake the old Rules, but with changes to update the old Rules and improve their usability and clarity, including rearranging and renumbering. Changes have also been introduced to accommodate changes to other legislation.

The Rules were remade following a review and a public feedback process to ensure they were still meeting the needs of the Commission and the people who use our services.

Further information about the changes is available in the Explanatory Statement .

A copy of the Rules is available on the Federal Register of Legislation .

Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the month ending Sunday, 31 March 2024.

1 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – ss. 394, 384, 388, 396 and 604 Fair Work Act 2009 – appeal – Full Bench – respondents dismissed on 4 February 2023 – respondents sought unfair dismissal remedy – at first instance, Commission found respondents dismissal was unfair – remedy awarded – appellant appealed decision – whether Commission adopted correct approach in dealing with a small business – whether Commission erred in finding there was no valid reason for dismissal – whether Commission failed to consider appellant's evidence in relation to reasons for termination – Small Business Fair Dismissal Code (Code) considered – Commission must decide four matters contained within s.396 before considering the merits of an unfair dismissal application – one includes whether the dismissal was consistent with the Small Business Fair Dismissal Code (s.396(c)) – at trial, appellant stated they were a small business but did not rely on the dismissal being consistent with the Code – Commission did not consider whether the appellant's statement was correct, and whether the respondent's dismissal were consistent with the Code – Full Bench held the failure to consider Code was an error of principle, and the failure resulted in non-compliance with the decision-making process required by the Act – whether the dismissals were consistent with the Code considered – when assessing whether the summary dismissal section of the Code has been complied with, the Commission must determine whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal [*Chen*] – Commission must then determine whether the employer's belief was, objectively speaking, based on reasonable grounds – respondents provided appellant with medical letter stating first respondent had multiple medical issues, resulting in hospital admissions and required a two week break from work – first respondent sought two weeks leave in accordance with medical advice – second respondent sought two weeks leave to care for first respondent – appellant refused second respondent's leave on the basis that they were not sick – appellant refused first respondent's leave on the basis they had allegedly lied about needing foot surgery on a previous occasion – Full Bench satisfied appellant held genuine belief that both respondents conduct were sufficiently serious to justify immediate dismissal – Full Bench not satisfied the belief, objectively speaking, was based on reasonable grounds in light of the medical letter – no evidence that the appellant investigated any alleged misconduct – Full Bench held respondents were summarily dismissed within the meaning of the Code – accordingly, dismissals were not consistent with the Code – valid reason to dismiss considered – Full Bench held that the Commission is bound to determine, whether on the evidence provided, facts existed at the time of termination that justified dismissal – the reason for dismissal need not be the one given by the employer and can be any reason underpinned by evidence provided to the Commission – an employee taking leave to care

for another person is, in and of itself, not a valid reason for dismissal – no evidence to demonstrate the respondents were not carrying out their duties during their scheduled working hours – Full Bench found first respondent previously taking leave to recover from foot surgery, whether planned or not, was not a valid reason for dismissal – whether surgery is necessary, the fact that it is planned does not establish a valid basis for an inference on a later occasion that further leave is not for a genuine reason – Full Bench held no valid reason for dismissal of either respondent – appeal upheld – first instance decision varied by inserting Full Bench consideration and conclusions in relation to the Code – first instance decision otherwise confirmed.

Appeal by Pecker Maroo Verano P/L against decision of Lake DP of 31 July 2023 [[2023] FWC 1096] Re: Stevens & Anor

C2023/5135		[2024] FWCB 147
Asbury VP	Brisbane	14 March 2024
Binet DP		
Grayson DP		

2 ENTERPRISE AGREEMENTS – workplace determination – ss.266, 275 Fair Work Act 2009 – Full Bench – application for an industrial action related workplace determination by the Australian Rail Tram and Bus Industry Union (RTBU) and the Australian Municipal, Administrative, Clerical and Services Union (ASU) – two applicant unions were bargaining representatives for their members employed by the Australian Rail Track Corporation Limited (ARTC) – Commission required to make workplace determinations in certain circumstances, including when the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement – the employee bargaining representatives for the 2023 Agreement were the RTBU, ASU, The Association of Professional Engineers, Scientists and Managers, Australia, and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), one employee bargaining representative and three individual bargaining representatives – on 9 December 2022 ARTC issued a Notice of Representational Rights (NERR) to commence bargaining for the 2023 Agreement – on 16 and 21 June 2023 protected action ballot orders were made at the request of the RTBU, ASU and CEPU – on 28 June 2023 an access period commenced for the purposes of putting the 2023 Agreement to a vote – on 30 June 2023 the RTBU, ASU and CEPU served notices to take protected industrial action, including stoppages of work – on the same day ARTC applied to the Commission to make orders under s.424 to terminate or suspend the threatened protected industrial action – on 5 July 2023 Crawford C made an order terminating the protected industrial action in chambers and without a hearing (Termination of Industrial Action Instrument) [[2023] FWC 1636] – the relevant unions did not oppose the order – on 6 July 2023 voting for the 2023 Agreement commenced – 85% of eligible employees voted, and of those 64% voted to approve the 2023 Agreement – the new agreement (the *Australian Rail Track Corporation NSW Enterprise Agreement 2023*) was made on 7 July 2023 and approved by the Commission on 25 September 2023 – the RTBU and the ASU opposed the approval – RTBU and ASU argued that the Commission must nonetheless make a workplace determination because the bargaining representatives and the ARTC did not settle all the matters that were at issue

during the bargaining for the agreement made on 7 July 2023 – ARTC argued that the Commission has no jurisdiction to make a workplace determination in the circumstances because the making of the agreement necessarily meant that bargaining has ended – Full Bench minority found the Commission does not have any power or obligation to make a workplace determination in these circumstances – held that the FW Act confers significant rights and obligations upon bargaining representatives – those rights and obligations only relate to the bargaining process and to the agreement approval process – FW Act does not otherwise confer rights upon bargaining representatives that extend beyond the bargaining process – when the agreement was made the bargaining for that agreement necessarily ceased even though some bargaining representatives were not satisfied with the agreement made – s.266 cannot be divorced from the bargaining process and does not apply after the bargaining ceases – held dissatisfied bargaining representatives cannot make an application for a workplace determination after the agreement has been made – Full Bench majority found the question to be resolved in this case concerned whether the jurisdictional pre-requisites for the Commission to make an industrial action related workplace determination in s.266(1) of the FW Act were satisfied – principles of statutory construction are well-settled – *Advantaged Care* considered – no dispute in this case that a termination of industrial action instrument in relation to the relevant proposed agreement was made by the Commission on 5 July 2023 and that the 21-day post-industrial action negotiation period ended on 26 July 2023 – also no argument raised in these proceedings that the making of a termination of industrial action instrument prevents an employer from asking employees to vote for a proposed agreement – RTBU and ASU did not attempt to prevent the 2023 Agreement from being made or approved on the basis that a termination of industrial action instrument was in operation – Full Bench majority held the critical issue that was in dispute, and must be determined in this case was whether the actions of the relevant employees in voting to 'make' the 2023 Agreement on 6 and 7 July 2023 means that the 'bargaining representatives' for the 2023 Agreement had 'settled all of the matters that were at issue during bargaining' pursuant to s.266(1)(c) – if the answer was yes, there would be no jurisdiction for the Commission to make a determination because the jurisdictional pre-requisites in s.266(1)(c) were not satisfied – majority did not accept that the making of the 2023 Agreement had the effect of settling all matters that were at issue between the bargaining representatives during bargaining for the purposes of s.266(1)(c) – the text of s.266(1)(c) makes it plain that it is the lack of settlement of matters in issue by 'bargaining representatives' (as opposed to there being no enterprise agreement made by employees) that is the jurisdictional pre-requisite to an exercise of power by the Commission under s.266(1) – ARTC's submission ignored the express and unambiguous language of s.266(1)(c) which requires that 'the bargaining representatives for the agreement have not settled all of the matters that were at issue' – the use of the term 'bargaining representative' is significant – usage of this specific term places the emphasis on the role of bargaining representatives as opposed to 'the employees to be covered by a proposed agreement' – majority did not consider, on the evidence, that what occurred after the termination instrument was made could be described as the bargaining representatives having 'settled all of the matters that were at issue during bargaining' – no dispute that there were several outstanding matters between ARTC and the RTBU and ASU when the

instrument was made including: the scope of the agreement, wage rates, sick leave conditions, disputes procedure, workgroup leader conditions, public holiday conditions and long service leave – hard to see how any of these matters were 'settled' between the 'bargaining representatives' during the post-industrial action negotiating period that followed the making of the instrument – ARTC refused to meet with the RTBU and ASU to discuss these outstanding matters – what occurred was that ARTC put its positions on these matters to a vote of employees – while the positive vote by employees had the effect of making the 2023 Agreement, it did not settle the matters between ARTC and the RTBU and ASU, that can only occur by agreement between the bargaining representatives or via a determination by the Commission – if an Agreement had not been made, regular bargaining under the FW Act would not have continued – there is a final opportunity for the bargaining representatives to settle outstanding matters during the post-industrial action negotiating period and then the Commission is required to resolve any outstanding issues – the Federal Court observed in *Dorevitch* that a termination of industrial action instrument does not prevent an employer from requesting that employees vote for a proposed agreement, this right operates subject to the employee bargaining representatives having the right to settle issues during the post-industrial action negotiating period and to have outstanding matters arbitrated by the Commission – do not consider that the ongoing right of an employer to request that employees vote for a proposed agreement after a termination of industrial action instrument is made, means the same thing as bargaining still being ongoing, as submitted by ARTC – also rejected ARTC's submission that the Federal Court dealt with the same issue that is contentious here in *Dorevitch* – no dispute in this case that ARTC was entitled to have employees vote to approve and agreement and to have the agreement approved by the Commission – the contentious issue here was different and requires consideration of whether the act of employees making an agreement under s.182 also has the effect of settling all issues between bargaining representatives under s.266(1)(c) – majority considered that s.266(1)(c) needs to be considered within the context of the entire bargaining regime under the FW Act – clear from the wording in s.278(1A) that the FW Act intends to permit a workplace determination to operate to the exclusion of a previous enterprise agreement, even if the previous enterprise agreement has not nominally expired – also clear that s.278(1) is intended to permit a later enterprise agreement to operate to the exclusion of a workplace determination, even if the workplace determination has not nominally expired – Full Bench majority read these provisions as meaning that a workplace determination in this matter would replace the 2023 Agreement – equally, a new enterprise agreement 'made' after any workplace determination commences operating will displace the workplace determination – while it may be considered undemocratic to allow a decision of the Commission to override the terms of the 2023 Agreement that the relevant employees voted to approve, the Commission is granted significant power under the FW Act to set terms and conditions of employment – ARTC, RTBU and ASU (and the other employee bargaining representatives) would have an opportunity to argue for different conditions to those appearing in the 2023 Agreement via a workplace determination – as counsel for ARTC accepted during the hearing, this is not akin to a right of 'veto' over the terms – it is an opportunity to argue before the Commission about what should be included in the determination based on the factors identified in s.275 of the FW Act – all parties would have precisely

the same opportunity in these proceedings – further, the terms of the 2023 Agreement must be taken into account by the Commission when considering what terms should be included in the determination – Full Bench majority do not consider that the 'making' of the 2023 Agreement had the effect of 'settling all matters that were at issue between the bargaining representatives during bargaining' for the purposes of s.266(1)(c) of the FW Act – the Commission must proceed to make a workplace determination and ARTC's jurisdictional objection is dismissed.

Australian Rail, Tram and Bus Industry Union and Anor v Australian Rail Track Corporation Limited

B2023/783		[2024] FWCFB 152
Easton DP	Sydney	15 March 2024
Grayson DP		
Crawford C		

3 TERMINATION OF EMPLOYMENT – misconduct – vaccination status – religious status – ss.394, 387, 396 Fair Work Act 2009 – applicant dismissed by respondent, an incorporated association under NSW law – respondent operated self-managed community wellness clinics, in which applicant consulted with clients to discuss their health circumstances and orders of dispatch medical cannabis – respondent also operated as a quasi-religious organisation – applicant stated she was dismissed following COVID-19 vaccination, with respondent asserting vaccination contrary to its constitution and beliefs; refusing to employ anyone that had received it – respondent initially raised jurisdictional objection, stating applicant engaged as independent contractor by respondent's clinic, a purportedly different entity – in earlier decision Commission dismissed jurisdictional objection, found applicant to have been an employee of respondent's church entity [[2022] FWC 2947] – respondent appealed jurisdictional decision, Full Bench found no error but referred matter back to originating member to determine whether application lodged in time – Commission found original application had been made within 21 days from dismissal and amended by 2 later forms, also found exceptional circumstances justifying grant of further time – hearing then listed for merits of application – respondent sought to appeal extension of time decision, did not initially lodge notice of appeal – after applicant lodged submissions, respondent filed appeal under s.604, sought a stay of extension of time decision and order, and stated respondent had "no further legal requirement to engage with the fair work commission [sic] in this matter as the order is void ab initio" – stay refused, as permission to appeal would be determined shortly, and compliance with directions would ensure that substantive merits could be heard expeditiously if permission to appeal refused – differently constituted Full Bench denied respondent permission to appeal, grounds advanced did not disclose arguable error in extension of time decision – respondent then advised Commission that they would not engage with matter, until it came to a "competent court of law" – respondent did not file material before merits hearing, seeking to rely on submissions made months earlier for jurisdictional hearing, and refused to appear – Commission required to consider whether dismissal consistent with Small Business Fair Dismissal Code (Code) by considering evidence from merits and jurisdictional hearings as follows – respondent's President had apparently informed employees that by working

there, they were also members of "the Church of Ubuntu" and COVID-19 vaccinations were contrary to church's beliefs and constitution – respondent told employees via voice message in Facebook group chat that if vaccinated they could not work for respondent – in earlier hearing respondent cross-examined on assertion that applicant was full member of church, stated that he believed applicant was a member and had not indicated otherwise, and a "very different" set of circumstances dispensed with typical requirement to apply to become a member – respondent alleged that all employees invited to a prior discussion if they were considering vaccination – applicant received letter of termination after receiving COVID-19 vaccination – letter stated respondent's position disavowing members that consciously chose to receive COVID-19 vaccination – respondent's affidavit in jurisdictional proceedings termed NSW's public health directions on COVID-19 vaccination a "medical apartheid," likening it to the Holocaust, with the vaccine itself "demonic" and contrary to "God's teachings", though respondent's constitution makes no reference to vaccination – applicant maintained that she was never told that COVID-19 vaccination would result in termination, citing comments made by respondent to media following her dismissal to the effect that respondent held a "pro-choice" policy regarding COVID-19 vaccinations – applicant denied claim she was a member of church, citing respondent's own Constitution – termination letter offered alternative subcontract employment with affiliate of respondent, this did not interest applicant due to treatment by respondent – Commission found it unreasonable that respondent's position on vaccination adopted in October 2021 and applied retrospectively – Commission drew principles from *Hozack*: Commission not to assess utility or worth of religion's tenets, Commission required to determine whether a valid reason for dismissal by applying principles relevant to s.387(a), where dismissal related to employee's conduct or capacity, conduct that would ordinarily not justify dismissal may do so where employee is reasonably required to comply with doctrine while employed at a religious institution – Commission satisfied that applicant summarily dismissed under Code – Commission unable to accept that respondent believed applicant's vaccination was sufficiently serious to justify instant dismissal; respondent did not advance objectively reasonable grounds for belief – Commission dismissed respondent's argument that God's creation of seed bearing plants rendered certain medications contrary to Bible, noting respondent's sale of medicinal cannabis – respondent's argument that vaccination contrary to s.51(xxiiiA) of the *Constitution* similarly dismissed, having been previously rejected [*Kassam; Henry*] – respondent's "genuine concern" for health effects of vaccination no basis to dismiss vaccinated employees, and requiring employees to refrain from vaccination not a lawful and reasonable direction – respondent's belief that applicant's vaccination serious enough to justify dismissal also formed after applicant had been vaccinated, with no forewarning to applicant – applicant's dismissal not consistent with Code, Commission considered whether dismissal unfair – Commission found no valid reason for dismissal that was sound, defensible and well-founded [*Selvachandran*] – applicant not notified of valid reason prior to dismissal nor provided opportunity to respond [*Crozier*], respondent's claim that applicant knew of policy prior to dismissal contradicted by Facebook voice message explaining position and dismissal – size of respondent's enterprise considered; while small and lacking dedicated HR resources, as a church professing to follow Christian faith it would be expected applicant would have been shown greater fairness and compassion – Commission

satisfied that dismissal unfair: applicant made vaccination decision in own interests with no knowledge of consequences, no reasonable basis for respondent to conclude misconduct – Commission considered appropriate remedy, reinstatement not appropriate – Commission accepted applicant would have remained employed for at least 12 weeks, and that applicant earned no money in 12 weeks following dismissal – Commission noted it may have awarded a higher amount, but for applicant consistently maintaining claim of $8,000 – compensation awarded.

Chait v Church of Ubuntu

U2021/9704		[2024] FWC 703
Asbury VP	Brisbane	18 March 2024

4 TERMINATION OF EMPLOYMENT – valid reason – harsh – remedy – ss.394, 400 Fair Work Act 2009 – applicant, custody officer at Fremantle Justice complex (FJC), dismissed by respondent after involvement in an incident with a Person in Custody (PIC), wherein applicant headbutted PIC's cell door and later stated to colleague that it was a "shame" he had headbutted door and not PIC – investigation conducted into applicant's behaviour, resulting in his termination – Commission considered whether dismissal harsh, unjust or unreasonable – for consideration of whether respondent had valid reason for dismissal related to applicant's capacity or conduct, applicant submitted his behaviour was not directed at PIC to strike or intimidate but a venting of frustration, limited to a single short interaction – applicant described mitigating factors [*Smith*] of undue pressure in role with insufficient support from respondent, significant turnover of staff and inexperienced and hesitant new staff, though applicant conceded this was personal rather than official opinion – applicant contended respondent had failed to provide safe working environment, and that applicant was stressed, tense as a result – applicant and other witnesses submitted PIC and another Person of Interest (POI) had been abusive, difficult and highly threatening prior to incident – witnesses for applicant gave evidence that respondent ought to have employed additional corrective officers (COs) – respondent submitted valid reason for dismissal based on 2 breaches of code of conduct by applicant, relating to maintenance of safe and healthy workplace, integrity and zero-tolerance towards bullying and harassment – respondent submitted mitigating factors put forward by applicant did not excuse conduct, and that FJC was appropriately staffed at the time, with staffing allocated to cope with a "dynamic and fluid environment" – evidence from a decision-maker in investigation indicated some relevant issues predetermined; decision-maker was told applicant had intended to strike or intimidate PIC – Commission considered whether incident, uncontested by applicant, was a valid reason for dismissal – Commission considered post-incident comment of applicant to be ill-advised, but not evidence of violent intention, nor deserving of gravitas attributed by respondent's HR – following comment, applicant later assisted transport of PIC without incident – with regard to headbutt, Commission found that it did escalate situation as contended by respondent, and contradicted respondent's training and code of conduct – therefore, applicant's headbutt did provide valid reason for dismissal – Commission found applicant notified of valid reason, given opportunity to respond through course of investigation – Commission considered whether termination

disproportionate to gravity of misconduct [*Byrne*, *Raj Bista*] – in response to mitigating circumstances noted above, respondent noted applicant's work involving regular contact with aggressive persons but Commission thought it "unlikely that [COs] become so inoculated that they have no emotional reaction" to circumstances – Commission found applicant, as a larger male and one of the most experienced COs at FJC was likely required to assist with a greater share of difficult POIs and PICs – Commission found that FJC did not receive additional requested staff, and applicant had become frustrated repeatedly raising the issue – Commission noted respondent's routinely dangerous and stressful workplace, Commission considered understaffing clearly "most significant factor in applicant's mind," noting it unfair to "apply the standards expected of angels to mere humans" – Commission satisfied dismissal harsh in circumstances; applicant unfairly dismissed – remedy considered – reinstatement not appropriate – compensation considered – Commission held applicant's employment would have continued for further 12 weeks, given applicant's stress at workplace – misconduct and mitigating factors cited in deducting 10% of compensation to be awarded.

Rodney-Hansen v Ventia Australia P/L

U2023/6532		[2024] FWC 615
O'Keeffe DP	Perth	13 March 2024

Other Fair Work Commission Decisions of note

Transport Workers' Union of Australia v Cleanaway Operations P/L T/A Cleanaway Operations P/L

INDUSTRIAL ACTION – intractable bargaining declaration – ss.234, 235A and 240 Fair Work Act 2009 – Full Bench – Transport Workers' Union (applicant) applied for intractable bargaining declaration in relation to new enterprise agreement for Cleanaway Operations P/L's (respondent's) employees – declaration in relation to employees at Unanderra depot covered by Cleanaway Solid Waste Services (C&I) Wollongong Enterprise Agreement 2020 (Unanderra EA) – respondent opposed declaration – applicant a bargaining representative for respondent's employees – Full Bench cited s. 235 and considered the test for making an intractable bargaining declaration – Commission cited *United Firefighters Union of Australia v Fire Rescue Victoria* noting that Commission requires finding of fact that it has dealt with the dispute under s. 240 (required by s. 235(2)(a)) – Full Bench noted that it needed to make an evaluative judgment that there was "no reasonable prospect of agreement being reached if an intractable bargaining declaration is not made" (s. 235(2)(b)) – satisfaction for s. 235(2)(c) required Commission make an evaluative judgment that it is reasonable in all of the circumstances to make the declaration sought, taking account of bargaining representative's views – Full Bench cited s. 235A which allows the Commission to determine a post-industrial action negotiation period when a termination of industrial action instrument has been made – Full Bench noted that each application for an intractable bargaining declaration will turn on its own facts – Commission will have regard to history of negotiations to assess whether there is no reasonable prospect of an agreement being reached – objective test to determine whether Commission is satisfied of s. 235(2) despite subjective views of those involved in bargaining – Commission held that the purpose of s. 235(2)(a) was to give Commission opportunity to assist parties to reach a resolution to their bargaining dispute by agreement – respondent cited one of the objects of the Act is provide clear rules for governing industrial action and ensure enterprise level collective bargaining underpinned by good faith bargaining obligations – Commission cited Secure Jobs, Better Pay Bill 2022 Revised Explanatory Memorandum – noted Commission had ability to determine any outstanding matters by arbitration where there is otherwise no

reasonable prospect of parties reaching agreement – Commission summarised history of bargaining between parties since Unanderra EA's nominal expiry date in July 2022 – bargaining commenced November 2022 – 27 February 2023 respondent communicated a proposal to change the ordinary working hours provision of enterprise agreement – change would require employees to work ordinary hours from Monday to Sunday – purpose was to future proof enterprise agreement to ensure business could continue to meet client requirements and attract new clients by offering a service that included weekends – applicant contended that bargaining employees wanted to retain the existing ordinary hours of work provision – applicant sought a protected action ballot order – Commission made order on 11 April 2023 – protected industrial action occurred from 17 to 18 May 2023 – respondent sought a vote on proposed enterprise agreement that included new ordinary hours of work provision on 21 July 2023 – majority of employees voted 'no' – applicant made s. 240 application for a new enterprise agreement to replace Unanderra EA – applicant noted two outstanding clauses not agreed to between parties were ordinary hours of work clause and spread of hours clause – Commission conducted a conference regarding applicant's s. 240 application – no progress made at conference or two subsequent meetings – parties exchanged a position paper that outlined outstanding claims and Commission conducted a conference to facilitate discussion on 28 September 2023 – applicant filed for an intractable bargaining declaration on 16 October 2023 – Commission held another conference on 18 October 2023 where parties discussed idea of 'grandfathering' of ordinary hours for existing employees – applicant rejected idea – it wanted one set of terms and conditions for all employees – applicant discontinued s. 240 application on 13 November – 20 bargaining employees signed petition indicating they would not vote for changes to ordinary hours of work clause in November 2023 – respondent filed s. 240 application with Commission on 24 January 2024 – Commission conducted conference in relation to s. 240 application on 15 February – parties were not able to reach agreement – respondent made another proposal about ordinary hours of work to applicant and bargaining employees on 21 February – employees signed another petition rejecting this proposal – Commission held another conference 23 February – parties again did not reach agreement however Commission kept file open with no further listings – applicant claimed Commission had dealt with the dispute under s. 240 on two occasions – respondent rejected this claim and submitted applicant had discontinued its s.240 application – respondent claimed its s. 240 matter was still open before Commission – Commission held that it had dealt with both s. 240 applications – applicant submitted there was no reasonable prospect of an agreement being reached unless Commission makes an intractable bargaining declaration – respondent claimed that there was still a reasonable chance of an agreement being made because it had made concessions regarding ordinary hours of work – Full Bench held that it was satisfied there was no reasonable prospect of an agreement being reached if the Commission did not make the declaration – Full Bench noted bargaining had been ongoing for over a year and 15 bargaining meetings and five conferences were held before two different Commission Members – Commission noted both proposed agreements had been voted down in a resounding manner by employees – significant number of employees signed two petitions – applicant claimed it was reasonable in all the circumstances for the Commission to make the declaration sought per s. 235(2)(c) – respondent contended applicant had been intransigent during bargaining and it had made multiple concessions – respondent contended it had reached similar agreements with employees represented by applicant in other depots – Full Bench held it was satisfied that it was reasonable in all circumstances to make the declaration sought by applicant – Full Bench found applicant had not been intransigent and also took into account that employees had not had a pay rise since July 2021 – Full Bench held it was satisfied that a post declaration negotiating period be ordered under s. 235A – Full Bench made intractable bargaining declaration – in a separate order the Full Bench specified a post-declaration negotiating period of 21 days – a Commission member would be made available, if requested by parties to assist them during the 21 day post negotiation period.

B2023/1106		[2024] FWCFB 127
Saunders DP	Sydney	7 March 2024
Wright DP		
Crawford C		

Son Tra v Prodigy Holding P/L

TERMINATION OF EMPLOYMENT – application to dismiss by employer – deed of settlement – ss.394, 399A, 587 Fair Work Act 2009 – application by respondent to dismiss s.394 application under s.399A or s.587 on basis parties entered into binding settlement agreement – earlier in proceedings applicant found to have been unfairly dismissed [[2023] FWC 1514] – parties directed to Member Assisted Conciliation (MAC) before Commissioner Lee to attempt to resolve question of remedy – MAC conducted 23 August 2023 – undisputed that parties agreed some terms during MAC, including that respondent would pay applicant sum of money, mutual release and settlement agreement conditional on separate agreement for sale of applicant's shares in respondent – disputed whether agreed terms included provision that applicant would not be restricted from defending an ongoing Supreme Court of Western Australia proceeding and whether settlement subject to execution of formal and fully executed deed of release – after MAC Commissioner Lee sent note to Deputy President: 'settled your mac. subject to finalisation of deed. [applicant] doing first draft. bit complicated but it should be OK' – draft settlement deed sent between applicant and respondent from 23 August to 31 August – deed sent by respondent on 30 August signed and left request for applicant to sign – applicant did not sign – further deed sent 31 August, proposed applicant's amendment to release clause to ensure applicant not prevented from making claims in specific Supreme Court of Western Australia proceeding involving respondent – Deputy President dubious of applicant's reasons for late amendment in context where applicant's concerns emerged after respondent signed the deed – Deputy President held he was not required to determine that issue – issue before Commission was whether binding settlement agreement reached at MAC or when respondent sent signed deed on 30 August – issue whether agreement reached is intended to be immediately binding is determined objectively having regard to presumed or inferred intention of parties – objective intention is factual inquiry with regard to surrounding circumstances including words and conduct of parties – ultimate question is 'whether each party, by their words or conduct, led a reasonable person in the position of the other party to believe there was an immediately binding agreement at the time the alleged agreement was made' [*Air Great Lakes*] – observed where parties agree written document would be prepared setting out terms agreement falls in one of the three *Masters v Cameron* categories: 1) parties reached finality on all terms and intend to be immediately bound with written agreement in later precise document of same effect; 2) parties agree all terms and intend to be immediately bound but a particular clause or term delayed or conditional on execution of formal document; 3) parties do not intend to make concluded agreement unless and until formal document executed – further observed emerging fourth category where parties intend to be bound immediately and exclusively by agreed terms while additional terms expected in further contract [*Balkham Hills Private Hospital*] – noted first two categories of *Masters v Cameron* and fourth category contemplated by *Balkham* all result in binding agreement – held no binding agreement after MAC or when respondent sent signed deed on 30 August – found conclusion of MAC was, at best, agreement in principle on some key terms with no agreement terms would be immediately binding – observed settlement agreement conditional on agreement for sale of shares, rather than operation of, or compliance with, particular clause of term – found this strongly suggested parties did not intend to be immediately bound – sale of shares was condition precedent of settlement agreement – found Commissioner's note was consistent with there being no binding agreement – observed to finalise a deed means to complete or finish definitive deed including execution – found applicant's conduct would not lead reasonable person in position of respondent to believe immediately binding agreement on 23 August – further held no concluded agreement when respondent signed deed on 30 August when regard had to circumstances – found applicant's prior 29 August email containing draft deed no more than part of negotiation between parties – observed even if 29 August email was an offer, when read with provisions, it was conditional and have no effect until signed by both parties – held no concluded and binding settlement agreement – no bases to support respondent's ss.399A and/or 587 applications – respondent's applications dismissed.

U2022/11032		[2024] FWC 394
Gostencnik DP	Melbourne	6 March 2024

Searoad Shipping P/L v Construction, Forestry, and Maritime Employees Union

INDUSTRIAL ACTION – order against industrial action – unprotected industrial action – ss. 19, 418 Fair Work Act 2009 – applicant initiated application under s.418 of FW Act alleging unprotected industrial action was being organised by certain employees who are CFMEU members – application heard and *ex tempore* decision and order issued – order required CFMEU members stop unprotected action – no order against CFMEU itself – reasons for decision published – in February 2024, applicant dismissed an employee, who was also CFMEU delegate, summarily for serious misconduct following a disciplinary process – applicant alleged some employees started engaging in unprotected industrial action following that dismissal – applicant gave evidence which indicated that employees were adopting 'go-slow' practice, and that employees were refusing offers of overtime shifts which together resulted in significant drop in productivity – applicant's evidence also indicated 58 employees involved in the alleged unprotected industrial action were CFMEU members – Commission determined that 'go-slow' practice amounted to industrial action as per s.19(1)(a) as it resulted in restriction or limitation on, or a delay in, performance of work – Commission accepted applicant's evidence that the steep decline in overtime uptake indicated a departure from practice of accepting overtime requests, often with employees oversubscribing for the overtime available, to collective ban or limitation on acceptance of overtime shifts – Commission determined that refusal of overtime shifts qualified as industrial action per s.19(1)(b) – Commission found that industrial action occurred as per s.19, and that industrial action was not protected – applicant gave evidence suggesting CFMEU was involved in organising industrial action – CFMEU gave evidence that, at applicant's request, Victorian Branch Secretary spoke with members at the workplace and requested them to cease any unauthorised industrial action, and to comply with the Enterprise Agreement – CFMEU gave evidence that it also issued official notice to members indicating that the industrial action is not authorised by the CFMEU and that members should cease industrial action – Commission rejected applicant's allegations of CFMEU involvement stating that evidence provided by applicant is inferential and is contrary to evidence provided by CFMEU – Commission ordered that unprotected industrial action by employees must stop and CFMEU should counsel its members to abide by Commission's orders – orders issued.

C2024/1610		[2024] FWC 712
Gostencnik DP	Melbourne	20 March 2024

Hobbs v The Salvation Army

TERMINATION OF EMPLOYMENT – jurisdiction – whether employee – s.394 Fair Work Act 2009 – applicant commenced service as a Salvation Army officer in 2009 – respondent an international Christian organisation with Australian presence – applicant had direct and indirect dealings with respondent prior to commencement as officer in 2009 – applicant made declaration, including undertakings, in 2007 – undertakings expressly disavowed any legal relationship between the parties – undertakings stated intention to disclaim any employment or adjudication of disputes in a secular court – applicant dismissed on 6 September 2023 – applicant sought unfair dismissal remedy – respondent raised objection that applicant was not an employee – Commission noted objection raised two issues: 1) whether any intention to create binding contractual relations between parties, and 2) if so, was the contract a contract of employment? – issue 1 considered – to determine an intention to create legal relationships as articulated in [*Ermogenous*] an objective consideration of the intention of the parties with regard to circumstances in which statements and actions happened is required – further, it will be relevant to consider the lack of intent to have the agreement subject to the adjudication of secular courts – respondent contended 2007 undertakings disavowed legal relationship and that relationship between parties was fundamentally spiritual – applicant advanced three reasons

employment relationship should be found – first, applicant suggested undertaking inconsistent with reality of arrangement between parties, submitting parties could not 'create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck' [*Re Porter*] – applicant contended attempt to deny legal relationship was self-serving given respondent's hierarchical structure along military lines – second, applicant contended if employment relationship did not start when he commenced with respondent, it did when he started being paid [*Woldeyohannes*] – third, applicant contended undertakings concerned 'spiritual' relationship between parties and that such spiritual relationship can co-exist with employment relationship if objectively intended [*Woldeyohannes*] – Commission accepted applicant's various legal propositions, however noted issue for determination was whether any outcomes were objectively intended – found intention of parties expressly and unambiguously stated in 2007 undertakings – found intention disclaimed employment and noted surrounding circumstances consistent with that conclusion – held the officership within Salvation Army was a religious calling outside of employment – observed here critical term was not buried in fine print or presented on 'take it or leave it' basis, applicant gave express undertaking that disavowed legal relationship – observed no reason to doubt sincerity of parties and good reason to accept parties meant what solemnly committed to in accordance with their religious beliefs – held no intention to create binding contractual relations between the parties – held applicant not an employee – applicant was not an employee and not eligible to seek relief under s.394 – application dismissed.

U2023/9386		[2024] FWC 159
Bell DP	Melbourne	28 March 2024

Raskov v Adecco Australia P/L

GENERAL PROTECTIONS – dismissal dispute – ss.365, 15A Fair Work Act 2009 – applicant employed on casual basis by respondent (Adecco) – applicant worked at host employer (Amazon) site – applicant's employment covered by 'Candidate Declaration and Consent' (Declaration) which provided each client assignment was separate period of employment with Adecco – Declaration also stated length of assignment controlled by client, not Adecco, and that client, not Adecco, could vary or terminate client assignment – during employment applicant queried when opportunity to be employed directly by Amazon would be offered next – in June 2023 the Amazon HR team contacted Adecco to inform it of misconduct allegations against applicant – alleged misconduct included applicant staring at another employee in intimidating manner and making inappropriate comments – Adecco suspended applicant while investigation undertaken – during investigation Adecco was served with applicant's application for an order to stop bullying at work – on conclusion of investigation applicant informed by Adecco her casual assignment with Amazon had ended effective immediately – applicant told she remained employed with Adecco and her profile would return to Adecco's recruitment team for further assignments – during hearing Adecco unable to advise what efforts recruitment team had made to reassign applicant – applicant filed s.365 dispute contending constructive dismissal by respondent – respondent objected on basis applicant not dismissed from her employment – whether applicant dismissed considered – common law position on casual employment is that each time employer offers work to employee and employee accepts work a new contract of employment is created – observed common law position modified by s.15A which provides person's casual employee status is assessed on basis of offer and acceptance of employment, not on basis of subsequent conduct – Deputy President considered where ending of contract of employment could be considered dismissal – under *Khayam* 1) analysis of whether termination at initiative of employer is to be conducted by reference to termination of employment relationship and 2) focus of inquiry is whether action on part of employer was principal contributing factor which results, directly or consequentially, in termination – found while each shift applicant performed for Adecco could be considered separate contract, when viewed together those created ongoing employment relationship – found applicant not removed from assignment by Amazon, *Jayleen Kool* and *Patrice Tait* distinguished – found Adecco made decision to suspend applicant and Amazon

not involved with investigation – held applicant removed from Amazon site by Adecco – observed Declaration did not permit Adecco to terminate client assignment – held removal from Amazon site not in accordance with Declaration – held Adecco made no attempt to find alternative work for applicant – held no reasonable basis for Adecco to contend applicant remained employed and had not been dismissed – held applicant's employment terminated on initiative of Adecco – jurisdictional objection dismissed – application to proceed.

C2023/5620		[2024] FWC 584
Wright DP	Sydney	4 March 2024

Wetzler v Australian Taxation Office

CASE PROCEDURES – procedural and interim decisions – extension of time – s.394 Fair Work Act 2009 – applicant worked for the Australian Taxation Office (the respondent) – applicant filed an unfair dismissal application on 6 December – respondent objected on the basis applicant had resigned voluntarily and objected because applicant made application outside the 21 day time limit – applicant claimed he was dismissed on 19 September 2023 – applicant accepted deadline for filing expired 10 October 2023 – applicant requested Commission exercise discretion under s.394(3) to extend time limit – applicant was advised March 2023 Victoria Police was reopening an investigation into disappearance of his defacto partner – disappearance occurred in 2004 – 6 September 2023 applicant was arrested and charged with murder of defacto partner – respondent suspended applicant without pay 6 September 2023 – applicant advised respondent his wife and lawyer were granted power of attorney to act on his behalf – 15 September 2023 applicant was remanded in custody – 18 September 2023 applicant's wife spoke to respondent and on 19 September emailed respondent that applicant wished to resign – 18 October 2023, applicant released on bail – 23 October applicant's lawyers emailed respondent seeking applicant's reinstatement and claimed constructive dismissal – 6 November 2023 respondent rejected this request – 6 December 2023 applicant filed an unfair dismissal application – applicant contended that when wife emailed his resignation she had acted in the heat of the moment and in extreme emotional distress – respondent claimed that there was no dismissal and applicant resigned voluntarily through his wife who had power of attorney – Deputy President considered factors regarding exceptional circumstances for granting an extension of time – applicant claimed reason for delay due to his incarceration and representative error – lawyers were advised of letter from respondent suspending applicant's employment – lawyers indicated that they would deal with the letter on a later date – lawyers and applicant became aware of resignation letter on 8 October – lawyer noted to applicant this may be constructive dismissal – lawyer considered he was only instructed to address criminal charges facing applicant – applicant claimed if his lawyers did not intend to act for him in employment matter, should have told him this on at least 8 October when lawyers became aware of his resignation letter – respondent claimed applicant's incarceration did not explain entirety of delay – Deputy President noted period of delay from 10 October to 6 December 2023 – Deputy President held applicant had authorised his lawyer in relation to employment matters as well as criminal matters on 11 September – Deputy President noted unusual circumstances leading to the applicant's delay due to his incarceration and this was a reasonable explanation – representative error accounts for overwhelming period of delay by applicant's lawyers – lack of an acceptable explanation for a solicitor's own inaction supports rather than negates existence of exceptional circumstances (*Qantas Ground Services t/a QGS v Simon Rogers*) – Deputy President accepted applicant became aware of his wife's actions on 8 October – given the expiry of deadline on 10 October applicant had limited time to file an application – where an applicant disputes termination and puts employer on notice decision may be contested this may weigh in favour of extension – applicant did take steps to dispute termination albeit after expiration of time weighed in applicant's favour – Deputy President did not consider respondent identified any relevant prejudice to it – Deputy President considered this was a neutral consideration – Deputy President noted applicant did not point to other persons in a similar position – Deputy President considered this a neutral consideration – Deputy President considered merits of applicant's case – Deputy President held applicant's case on the question of dismissal,

was at best, arguable – Deputy President noted exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon (*Nulty*) – Deputy President found having regard to all of the circumstances that he was satisfied there were exceptional circumstances to warrant an extension of time – extension granted.

U2023/12120		[2024] FWC 492
Roberts DP	Sydney	23 February 2024

Edwards v Eastern Guruma P/L

TERMINATION OF EMPLOYMENT – misconduct – compensation – s.394 Fair Work Act 2009 – applicant sought unfair dismissal remedy – applicant terminated from role of Site Administrator by initiative of respondent due to misconduct, being alleged fraudulent payment of Respondent's 'Site Uplift Allowance' – Commission must determine if there was a valid reason for dismissal – applicant submitted no valid reason due to procedurally flawed investigation into alleged misconduct, company culture and unclear rules regarding the allowance – applicant relied on *Selvanchandran* submitting the reason for dismissal was not well founded or practical – applicant submitted *Briginshaw* principles must apply as respondent did not have clear evidence but rather a belief of fraud occurring – applicant highlighted process of applying for the allowance remained the same throughout three years of employment, used by other employees and endorsed by project managers – applicant directed to apply for allowance on days of flying to site locations – respondent submitted reason for dismissal was valid as HR Manual and contract of employment stated that allowance could only be accessed when on site and allocated to site, therefore timesheets were inaccurate – submitted role of Site Administrator requires honesty and integrity as it impacted expenditure and business – respondent cited *Rosser* and *Tu Noanoa* where falsifying timesheets represented serious misconduct, and *Newton* where dishonesty was of such gravity to warrant termination – Commission concerned with lack of evidence by respondent and noted policies were unclear and work practice had shown managers approved allowance to be used on fly-in days and work from home days, contradicting the "rules" relied on by respondent – Commission found no valid reason for termination and satisfied applicant unfairly dismissed – Commission considered reinstatement an inappropriate remedy – Commission considered s.392(2) and found if not terminated applicant would have remained in employment for nine months, applicant did mitigate loss by securing full time employment, applicant would have earned $28,594 between dismissal and time of making the order, and earned further $3,364 between making order and actual compensation payment date – Commission calculated compensation using 4 step approach in the "Sprigg formula" and the compensation cap, finding the total amount of remuneration to which applicant was entitled during 26 weeks immediately before termination to be $66,532.56 – Commission ordered respondent ordered to pay $40,528.09 less taxation within 14 days.

U2023/10570		[2024] FWC 569
O'Keeffe DP	Perth	1 March 2024

Jackson v Bulk Frozen Foods P/L T/A Tasfresh Foodservice, Tasfresh Fresh And Specialty Foods, No Frills Foodmarket And Robbies' Wholesale

TERMINATION OF EMPLOYMENT – termination at initiative of employer – notice period – ss. 385, 386(1), 390, 392 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as Delivery Driver and Storeman since 15 August 2022 – applicant resigned via email on 9 October 2023 – dispute on 12 October 2023 regarding when applicant would finish his employment – applicant intended to work two weeks' notice period – applicant concerned about suffering 'penalty' if full notice was not served – respondent advised applicant he would finish up on 13 October 2023 instead – no further discussion held with applicant regarding notice – applicant did not receive payment from respondent until 26 October 2023 and amended annual

leave payment on 9 November 2023 – applicant submitted he was dismissed at the initiative of the respondent on 13 October 2023 during the notice period – respondent raised jurisdictional objection that applicant voluntarily resigned employment and suggested mutual agreement to reduce notice period – jurisdictional objection rejected – Commission found that applicant intended to work out notice as stated in resignation and no agreement to reduce notice – found respondent unilaterally acted to reduce notice period by one week – applicant terminated by respondent's initiative – no valid reason for dismissal – no opportunity to respond – Commission held dismissal was unreasonable and unfair – reinstatement inappropriate [*Rex Airlines*] – Commission held compensation appropriate remedy – application allowed.

U2023/10848		[2024] FWC 697
Cirkovic C	Melbourne	19 March 2024

Application by Whiteford

ANTI-BULLYING – reasonable management action – ss.789FC, 789FD Fair Work Act 2009 – application for FWC order to stop bullying in the workplace – applicant employed by Apple P/L (employer) – application initially listed four persons named, later amended to single person named – remaining person named was applicant's former manager - applicant's allegations arose in part from an internal investigation by employer into applicant's performance – employer raised jurisdictional objection on two grounds – first, alleged bullying was reasonable management action, carried out in a reasonable manner – second, applicant no longer at ongoing risk of bullying – employer submitted applicant and person named no longer in direct contact at workplace and person named was directed not to interact with applicant during course of duties – employer contended that there was no order Commission could make – requested application be dismissed on the basis of no reasonable prospect of success – employer submitted it started workplace investigation on receipt of complaint from applicant's colleague – investigation included period of monitoring by person named – applicant submitted behaviour of person named before and during investigation was not reasonable management action – applicant submitted he was at risk of ongoing bullying by person named despite employer's contentions to the contrary – Commission noted applicant worked entirely from home and interacted primarily through online communication – noted interaction via this method was easily monitored and remedied where issues arose – noted applicant and person named have had limited direct contact with each other in last 12 months – noted person named was not involved in outcome of workplace investigation conducted by employer and not involved in any disciplinary action involving applicant – Commission not satisfied that conduct of person named could be construed as bullying as contemplated by FW Act – noted it was not impossible for person named to change roles leading to increased proximity to applicant – noted possibility of person named changing roles did not lead a finding of ongoing risk – Commission held that person named engaged in reasonable management action conducted in a reasonable manner – observed not uncommon for managers to have different management styles and that different management styles can upset employees who do not take well to particular management style due to their own personality – further observed incompatibility of personality styles in workplace does not constitute bullying under FW Act – Commission not satisfied bullying occurred – not satisfied of ongoing risk of bullying by person named – application dismissed.

AB2023/394		[2024] FWC 552
Schneider C	Perth	3 March 2024

Gardner v Piacentini & Son P/L

TERMINATION OF EMPLOYMENT – misconduct – ss. 387, 394 Fair Work Act 2009 – applicant employed as production supervisor at a mine site – applicant dismissed for sleeping at work and for being uncontactable on his two-way radio – first incident respondent alleged applicant had parked his vehicle on the subsoil and was observed by supervisor lying back in the driver's seat – respondent also alleged applicant was

uncontactable on his radio – second incident the applicant's supervisor observed him in the crib room sleeping – applicant denied the allegations – Commission rejected Respondent witness evidence applicant was asleep in relation to first incident – Commission accepted applicant's evidence that he was preparing pit inspection report in his vehicle – Commission accepted applicant's evidence that he did not deliberately turn his radio to the incorrect channel – accepted corroborated evidence radios in vehicles could accidently be bumped to incorrect channel – Commission held applicant was asleep in crib room for a short amount of time – Commission held while misconduct occurred behaviour did not rise to bar of valid reason for dismissal – Commission held applicant given an opportunity to respond verbally at show cause meeting – Commission found applicant had been previously warned in relation to safety incident – Commission rejected respondent claim that applicant was previously performance managed at his previous site due to lack of evidence – Commission considered other matters relevant to termination – Commission found significant deficiencies in respondent's investigation process – Commission found respondent reached conclusion without putting precise allegations to applicant – respondent failed to retrieve dash cam footage before it was automatically erased despite being requested to do so by the applicant – respondent failed to interview key witnesses and only allowed the applicant an opportunity to respond at the show cause meeting – Commission held dismissal was harsh because there no valid reason and that a warning would have been sufficient for the crib room incident – Commission held dismissal also unjust due to significant deficiencies in investigation – dismissal unfair – remedy to be determined separately.

U2023/9309		[2024] FWC 211
Lim C	Perth	19 March 2024

Plew v The Trustee for the Cristol Family Trust

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – whether dismissed – ss.394, 385 Fair Work Act 2009 – applicant worked as beauty therapist – respondent suspected applicant stole product and money from business – respondent a small business as defined – applicant filed application for unfair dismissal remedy prior to receiving notice of termination – respondent raised jurisdictional objections, being no dismissal and, in the alternative, if there was dismissal it was consistent with Small Business Fair Dismissal Code (Code) – applicant's manager took leave in September 2023 – prior to leave manager asked each employee if they wanted to purchase stock and have cost deducted from wages prior to her absence – manager stated employees directed not to purchase product while she was on leave – during period of leave manager became aware applicant took several product items – applicant admitted to co-worker she took items during manager's leave – upon return from leave manager became aware of EFTPOS discrepancy involving client of applicant – EFTPOS records showed no payment by client for September 2023 treatment – applicant suggested to manager she forgot to process payment, manager recommended applicant contact client to pay over the phone – at time applicant suggested she could not reach client – manager contacted client by email to follow up payment – client advised treatment paid for on the day in cash – respondent had advised staff as of July 2023 cash payments no longer accepted and clients required to pay by EFTPOS – respondent attempted to contact applicant on 25 and 26 September to discuss potential theft – applicant did not respond to contact – applicant filed application 27 September, suggesting she was dismissed as her appointments had been cancelled in client appointment application – respondent formally notified applicant of dismissal on 5 October 2023 – jurisdictional objections considered – Commission accepted respondent's evidence client appointment application not used for advising employees when to attend work or function as roster – applicant was regular, permanent part-time employee expected to attend fixed shifts unless contrary instruction – held no dismissal at time application filed – found notification of dismissal on 5 October by respondent was principal contributing factor leading to termination of employment relationship – held applicant dismissed 5 October 2023, noted termination could not have occurred earlier as termination cannot take effect until conveyed – no dismissal jurisdictional objection dismissed –

whether dismissal consistent with Code considered – Code provides 'It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal' – found respondent genuinely held belief applicant stole products and cash, that this was sufficiently serious to justify immediate dismissal and that belief was held on reasonable grounds – found dismissal consistent with Code – held applicant not unfairly dismissed – Commission considered, if incorrect applicant not unfairly dismissed, whether prematurely filed application should be dismissed – noted Commission to determine whether application should be dismissed or for date of filing irregularity to be waived so application can proceed [*Mihajlovic*] – held application should be dismissed as applicant did not engage in proceedings following initial directions hearing – further noted as dismissal found not to be unfair, application had no prospects of success – held, if required to do so, irregularity would not have been waived and application would be dismissed – not required due to earlier findings – respondent's no dismissal objection dismissed – Code objection upheld – dismissal not unfair – applicant's application dismissed.

U2023/9368		[2024] FWC 699
Thornton C	Adelaide	18 March 2024

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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 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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