FWC Bulletin

6 June 2024 Volume 6/24 with selected Decision Summaries for the month ending Friday, 31 May 2024.

Contents

Annual Wage Review decision 2023-24 announced 2

New Compliance and Enforcement Policy for registered organisations published 3

Decisions of the Fair Work Commission 4

Other Fair Work Commission decisions of note 13

Subscription Options 24

Websites of Interest 24

Fair Work Commission Addresses 26

Annual Wage Review decision 2023-24 announced

03 Jun 2024

The Annual Wage Review 2023–24 decision was announced at **10.30am AEST Monday 3 June 2024**.

Read the:

- Announcement of the decision (pdf)
- Annual Wage Review Decision 2023-24 [2024] FWCFB 3500 (pdf)

Watch a replay of the hearing:

- replay of the Annual Wage Review 2023–24 decision .

New Compliance and Enforcement Policy for registered organisations published

22 May 2024

Our General Manager, Murray Furlong, has published a new Compliance and Enforcement Policy for registered organisations.

The independent external review of registered organisations functions by former Commission Members Anna Booth and Jonathan Hamberger identified the need for a new policy that ensures a positive regulatory culture that encourages voluntary compliance and supports the democratic functioning of organisations and is aligned with the interests of their members.

This policy sets out our General Manager's commitment to providing a positive regulatory culture through a focus on assistance, education, and collaboration.

The policy also outlines how new enforcement powers granted to the General Manager in March 2023 under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* will be used.

We thank the registered organisations who provided feedback to the external review. It is because of their feedback that we can continue to improve our services, such as with the development of this new policy.

Read

- the new Compliance and Enforcement Policy (pdf)
- the Registered Organisations Review Report (pdf)

Decisions of the Fair Work Commission

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

Summaries of selected decisions signed and filed during the month ending Friday, 31 May 2024.

1 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – underpayment – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – HSU has appealed a decision made in resolution of a dispute arising under the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* – dispute concerned the proper construction of clause 29.3 of the Agreement which deals with 'Underpayment' and whether certain employees were entitled to a penalty payment provided for in that clause, because Mercy delayed in paying Nauseous Work Allowance (NWA) and Educational Incentive Allowance (EIA) under the Agreement – at first instance the Commission found that Mercy was not required to make a penalty payment – grounds for appeal included that the Commission erred by construing the phrase 'take steps to correct the underpayment within 24 hours' in clause 29.3(c) of the Agreement as meaning no more than 'to do something' or 'begin a course of action' with a view to rectifying the underpayment, or in the alternative erred by concluding that an email between the parties on 5 May 2022 (5 May reply) was '[taking] steps to correct the underpayment within 24 hours', because, as a matter of characterisation, the 5 May reply was not doing something or beginning a course of action with a view to rectifying the underpayment – Full Bench was satisfied that permission to appeal should be granted on the basis that the appeal raises issues of construction of an important Agreement applying to a sizeable workforce of approximately 41,000 workers and 87 different employers in the Victorian public health system – Full Bench also considered that the disputed provision in clause 29.3 raises novel questions around rights and obligations in relation to the payment of wages and potential liability arising from underpayments for all employers covered by the Agreement and that these matters are of significance so as to engage the public interest in the grant of permission to appeal – HSU submitted that the debate was narrow and concerned the proper construction of clauses 29.3(c) and (d) – that the 24-hour period in subclause 29.3(c) runs from the point of the underpayment, being when the obligation to make a payment crystallises – further submitted that the steps required to be taken must be such that the error is corrected within 24 hours – HSU submitted that from 5 May 2022 until the eventual payment of the allowances, its officials consistently made demands to Mercy for the payment of the allowances to eligible employees – Mercy submitted that in interpreting industrial instruments, the desirable construction is one that contributes to a sensible industrial outcome, and gives effect to the instrument's evident purpose – in Mercy's view, the HSU's approach would produce an enormous, potential liability that could not have been intended – the task of the Full Bench in the appeal is to determine whether the construction of the Agreement adopted by the Commission, and the answers to the questions posed for determination that

follow from that construction, are correct – common ground that the resolution of the dispute requires the construction of subclauses 29.3(c) and (d) of the Agreement – *Berri* considered – subclause 29.3(c) of the Agreement, upon which the dispute centres, provides that 'Where the underpayment exceeds 5% of the employee's fortnightly wage, the employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the employee of the correction.' (our emphasis) – common ground that the term 'Wages' in the heading of clause 29.3 and elsewhere in the clause, encompasses allowances including the NWA and EIA – the parties also accepted that to the extent that clause 29.3 is applicable in this case, subclause 29.3(c) applies, on the basis that the quantum of the underpayment exceeded 5% of the fortnightly wages of the relevant employees – the Full Bench disagrees with the Commission on the interaction between subclauses 29.3(a) and (c) – on this point the Full Bench agreed with the submission of Mercy that the making of a 'request' as provided in subclause 29.3(a) that an underpayment be corrected or a payment validated, is a precondition for engaging subclauses (b) and (c) of clause 29.3 of the Agreement – held the Commission's rejection of that submission was erroneous – the relationship between the various subclauses of clause 29.3 is evident from the text of the clause read as a whole – subclause 29.3(a) refers to underpayment as a result of error on the part of the employer – subclause 29.3(b) also refers to an employee underpaid because of employer error and clearly describes an error of the kind referred to in subclause (a) – subclause (b) applies to underpayments less than 5% of the relevant employee's fortnightly wage and subclause (c) to those that are more than 5% of that amount – both subclauses (b) and (c) refer to 'the underpayment' – on the plain words of those subclauses, 'the underpayment' is an amount an employee has requested the employer rectify or validate, pursuant to subclause 29.3(a) – Full Bench held that if subclause (c) is construed as standing alone, there is no reference point from which the 24-hour period referred to in that subclause commences – read in the context of clause 29.3, the only points in time referred to in other provisions of clause 29.3 are the making of the request in subclause (a) and 'the date of the entitlement arising' in subclause (d) – Full Bench did not accept the HSU submission that the 24-hour period referred to in subclause (c) runs from the date the entitlement to the amount underpaid, arose – if that was the intention of those who drafted the Agreement, subclause (c) would have included the same wording as was included in subclause (d) – Full Bench held that a request consistent with subclause (a) of clause 29.3 is a precondition for engaging subclauses (b) or (c), and accepted that the HSU, as a party to the Agreement may make such a request on behalf of a group or class of employees, and that it is not necessary that the HSU identify each individual employee concerned, in that request – Full Bench agreed with the Commission's observation at first instance that the existence of an underpayment is a matter of fact, and it is sufficient that there is an alleged underpayment of an employee or employees who can be identified with sufficient specificity for the provisions in clause 29.3 to be triggered – Full Bench next considered the requirement in subclause 29.3(c) to take steps to correct an underpayment within 24 hours and to provide confirmation to the employee of the correction – held that this provision does not require that the underpayment be corrected within 24 hours and nor does it require that the steps taken are sufficient to correct the underpayment from the employer's end, within 24 hours, subject

only to something outside the employer's control preventing the funds from being in the employee's bank account – subclause 29.3(c) simply requires that the employer take steps that will result in the underpayment being corrected – Full Bench found that it would be sufficient for this purpose, if within a 24-hour period, an instruction was issued to the payroll department that the employee had been underpaid and that the correct payment should be made in the next pay period – however, that is not the end of the matter – subclause 29.3(c) also requires that the employer provide confirmation to the employee of the correction within 24 hours – for the employee to be provided with 'confirmation of the correction', on its plain meaning, requires the employee to be advised by the employer that the error has been accepted, an instruction issued for it to be corrected, and when the correction will take effect – Full Bench did not accept the argument that the use of the plural 'steps' indicates that more than one step must be taken to correct the underpayment – the steps are not limited to steps to correct the underpayment, but also include the provision of confirmation of the correction to the employee concerned – Full Bench also agreed with Mercy's construction of the calculation of the penalty in subclause 29.3(d) – the subclause provides for a penalty payment 'calculated on a daily basis from the date of the entitlement arising' – if the intention was that the penalty should be calculated in the manner contended for by the HSU, the clause would provide that a penalty equal to 20% of the underpayment is payable for each day, from the date of the entitlement arising, until the underpayment is corrected – Mercy's formula results in the penalty being calculated on a daily basis, consistent with the terms of subclause (d) – the approach contended for by the HSU results in an amount of 20% of the underpayment being paid for each day until all underpaid moneys are paid – Full Bench were of the view that the purpose of the clause is not to penalise the employer as a court might but rather to compensate employees for the funds to which they are entitled, not being available to them on a date when they were required to have been paid, and for the period of the underpayment – this was evidenced by the requirement in subclause (d) that the employer meet any associated banking, or other fees associated with the late payment, as a consequence of the error, where those fees exceed the 20% penalty payment – such fees would result from funds not being available to meet automatic deductions, late fees and other penalties banks may levy on employees because of insufficient funds in their accounts due to underpayment by the employer – the fact that subclause (d) describes the payment as a 'penalty' does not alter the view of the Full Bench – the term 'penalty' in the context of an enterprise agreement is a payment to compensate an employee for a disability associated with work or for working unsocial hours – it is not a penalty levied on the employer as punishment or deterrent – Full Bench satisfied that employees were entitled to the NWA and EIA and were underpaid for the periods as set out in the agreed facts – the parties agreed that the backdated amounts for NWA and EIA were payable from the first full pay period on or after 20 April 2023, based on the pay cycles of the relevant employees, and the Full Bench accept that position – found no satisfactory explanation for the failure to pay the allowances at or around the time the entitlement for employees to be paid arose – the evidence established that human resource management staff of Mercy were alerted to the need to backpay the allowances in question well before the Agreement was approved and before the expiration of the reasonable time frame that the HSU had accepted would be required for employers to process the backpay

– Full Bench left to surmise that the possible explanations for Mercy's failure to pay the relevant allowances in a timely manner, are that Mercy adopted a deliberate strategy of delay or that its human resource management and payroll staff were unable to communicate effectively, so that responsible payroll staff failed to respond to internal requests that the payments be made, and those making the requests failed to follow up to ensure that they were actioned – Full Bench agreed with the Commission's view at first instance that the four-month delay in rectifying the error does not reflect well on Mercy's internal processes, particularly those of its human resources team – the conduct of the human resources team in essentially ignoring correspondence from the HSU in which the Union made inquiries as to when the back payments would be made, or not responding with appropriate detail, was inappropriate – the failure to pay allowances to employees within a reasonable time frame, was reprehensible conduct, the effect of which is heightened by the fact that the allowances are respectively for undertaking nauseous work and an education incentive payment to encourage training and to replace a payment that was removed – Full Bench held that whether the failure to pay the allowances at the appropriate time was deliberate or the result of incompetence or a breakdown in communication between HR and payroll staff, they were satisfied that it was an error on the part of Mercy, of the kind contemplated by clause 29.3 of the Agreement – Full Bench did not accept that any of the general questions asked by officials of the HSU between 5 May 2022 and 9 August 2022 were requests of the kind described in subclause 29.3(a) that Mercy rectify an underpayment as a result of error – held that the first communication which could be described as a request of the kind referred to in subclause (a) is the email sent at 9.49 am on 9 August 2022 – that communication requested confirmation as to when all staff eligible to receive the allowances would be paid, and significantly, referred to subclause 29.3(d) of the Agreement – Full Bench held that email clearly invoked clause 29.3 and constituted a request for the purposes of subclause (a) of that clause – Mercy could have been in no doubt as to the identity of the employees the subject of the request – Mercy had 24 hours from 9.49 am on 9 August 2022, to take steps to correct the underpayment and provide confirmation to the employees of the correction – the steps taken to correct the underpayment after the 9 August email, were not commenced until 12 August 2022 – most significantly, there was no response to the email sent on 9 August 2022 – Full Bench held that even if it accepted, as the Commission at first instance did, that Mercy took steps to correct the underpayments that were sufficient for the purposes of subclause 29.3(c) of the Agreement, the Full Bench did not accept that Mercy took any step to confirm the correction to employees – as the evidence established, neither the HSU nor employees were given confirmation of the correction and only became aware that the allowances had been paid, when the amounts were received by employees into their bank accounts – accordingly, the Full Bench found that Mercy did not take the steps required by subclause 29.3(c) and the Commission's conclusion to the contrary was in error – permission to appeal granted – appeal ground 1 dismissed – appeal ground 2 upheld – decision at first instance quashed – on a redetermination, the Full Bench answered the questions for determination as follows: Question 1: Are each of the delayed payments by Mercy to eligible employees of: a. The nauseous work allowance under clause 11 (Section 2); b. The educational incentive allowance under clause 16 (Section 2); an 'underpayment' under clause 29.3 (Section 1) of the

Agreement? Answer: Yes – Question 2: If the answer to Question 1 is yes, is Mercy required to make a penalty payment and if so, how is the penalty payment calculated? Answer: Yes – the penalty is calculated as follows: [Value of the payment for the period it was not made] x 0.20 x ([Number of days delayed] / 365) = Penalty.

Appeal by Health Services Union of decision of Mirabella C of 3 November 2023 [[2023] FWC 683] Re: Mercy Hospitals Victoria Ltd t/a Werribee Mercy Health

C2023/7275 [2024] FWCFB 235
Asbury VP Brisbane 26 April 2024
Gostencnik DP
Millhouse DP

2 CASE PROCEDURES – confidentiality – ss.594(1), 604 Fair Work Act 2009 – appeals – Full Bench – appellant dismissed respondent on grounds of alleged sexual misconduct – appellant received report from a female apprentice (AB) of allegations of sexual harassment by respondent – respondent denied allegations – appellant ordered an investigation – respondent was dismissed based on investigation's findings – respondent made unfair dismissal application – in that matter appellant applied for confidentiality orders prohibiting and restricting publication and disclosure of any details that could identify AB – appellant also sought to prevent publication of personal information of witnesses – appellant claimed parts of investigation report it did not rely on in defending unfair dismissal application were irrelevant – Commission in first instance refused to grant confidentiality order – appellant lodged notice of appeal – Full Bench considered it was in the public interest to grant the appeal as satisfied Commission erred in two material respects and appeal also raised question of law about proper application of s.594 – found Commission erred first by concluding confidentiality orders could only be granted in exceptional circumstances – Full Bench found Commission made a jurisdictional error by asking the wrong question as to whether to grant order – second error that almost all evidence in support of application had come from the bar table meaning Commission did not consider evidence on which appellant relied upon – appellant advanced 7 appeal grounds – first Commission erred in failing to consider relevant evidence – did not afford appellant procedure fairness by failing to warn that he did not intend to take that evidence into account – second, third and fourth grounds concerned with decision to refuse to grant a non-publication order regarding AB name and identifying details – fifth, sixth and seventh grounds concerned with Commission's refusal to make confidentiality orders regarding investigator's witness statement – respondent claimed not a threat to AB – contended orders were trying to take away any form of accountability – sought 'a fair and transparent open day in court' – Full Bench found respondent submissions did not engage with appellant's submissions on appeal – Commission in first instance held s.594 only allowed confidentiality orders to be granted in exceptional circumstances – Commission found evidence was "from the bar table" and there was no evidence AB was at risk of psychological harm – Commission held principles of open justice and the public benefits that it provides meant any departure from said principles should be made cautiously – Full Bench noted s.594(1) vests Commission with power to make any order prohibiting or restricting the publication of certain things in relation to matters before the Commission if satisfied that it is desirable to do so – test is one of

satisfaction as to the desirability of a confidentiality order – principles of open justice and administration of justice are relevant to exercise of s.594(1) – considered in context of express power to prohibit or restrict publication of certain material if it is desirable to do so – Full Bench found Parliament intended to give Commission a wider scope of power for exercising discretion to make disclosure orders compared to common law test – other considerations included when person that could be identified in the proceeding is not a party and/or refused to participate as a witness – Full Bench found principle of open justice should be weighed differently regarding persons who opted not to subject themselves to litigation – default position for unfair dismissal applications were to be determined in a private conference rather than open hearing; suggesting legislative intent to water down open justice principle – Commission did not consider appellant's evidence outlining why AB reluctant to make complaint – AB feared backlash, retaliation, damage to relationships with work colleagues and her professional reputation – AB made complaint to ensure AB did not have to work with respondent after AB was rostered to work at same time as respondent – AB initially refused to take complaint further – appellant's officers determined to formally investigate complaint and treat complaint as a disciplinary matter – respondent sought to impugn AB's character via social media posts – Full Bench also flagged concern Commission's orders did not protect witness' names or redact transcripts of recordings which would be contrary to the proper administration of justice – Full Bench indicated it would grant confidentiality orders in an amended form to first address information that could identify AB and second to address the unredacted transcripts, audio and video recordings – Full Bench held s.594(1) power exercisable if it is desirable to do so because of confidential nature of evidence – found orders restricting publication and disclosure of AB identity desirable as not a party to proceedings – found AB negatively impacted already by investigation and identification likely to negatively impact AB's career – held respondent's proposal to lead evidence about AB's character did not serve any legitimate forensic purpose – observed personal information such as names, phone numbers or residential information should be kept confidential as individuals have a right to privacy regarding their personal information when they are not parties to proceedings nor called to give evidence – found non-publication and non-disclosure order attaching to irrelevant material not contrary to principle of open justice – observed AB's concerns not confined to embarrassment or distress – stated public interest in ensuring complainants of sexual harassment encouraged to speak up – held respondent not prejudiced by orders sought – Full Bench declined to determine the issues raised by appellant whether the decision under appeal was not a discretionary one – Full Bench issued a confidentiality order concerning AB made orders – Full Bench ordered confidential transcripts not to be disclosed except to people named in the order.

Appeal by Santos WA Energy Ltd against unpublished decision of O'Keeffe DP of 14 March 2024 Re: Whittaker

C2024/1408 [2024] FWCFB 231
Gostencnik DP Melbourne 29 April 2024
Anderson DP
Tran C

3 INDUSTRIAL ACTION – suspension of protected industrial action – third party – s.426 Fair Work Act 2009 – application by Shoalhaven Starches P/L t/a Manildra Group (Manildra) for an order that protected industrial action currently being taken by members of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU) who are employed by Endeavour Energy be suspended for 72 hours – suspension sought to enable the 'unlocking' of power switches at Manildra's site at Nowra/Bomaderry (Site) to enable Manildra to fully utilise 2 large gas turbines which it recently installed at the Site to generate power for the Site – this work can only be carried out by employees of Endeavour Energy – Endeavour Energy has agreed to carry out this work however it was unable to do so because of protected industrial action currently being taken by members of the ETU who work for Endeavour Energy (Protected Action) – Endeavour Energy and the ETU (as bargaining representative for its employed members) are currently bargaining to replace the *Endeavour Energy Enterprise Agreement 2021* – Endeavour Energy has informed Manildra that it cannot perform this work because of the Protected Action and that it will require the Protected Action to be suspended for 3 days in order to prepare for and undertake the required work – *CFMEU v Woodside Burrup P/L* considered in relation to the proper construction of the expression 'significant harm' in s.426(3) of the FW Act – Protected Action is being notified by the ETU on a 'rolling' or ongoing basis – no dispute between the parties, Commission satisfied on the evidence, that the Protected Action was adversely affecting Endeavour Energy – Manildra is not a bargaining representative for the enterprise agreement being negotiated by the ETU and Endeavour Energy, nor is it an employee who will be covered by that agreement – Manildra is a third party which may be considered within the scope of s.426(3) – whether protected industrial action is threatening to cause significant harm to Manildra – bargaining for the proposed enterprise agreement between the ETU and Endeavour Energy commenced in September 2023 – numerous bargaining meetings have taken place but it was clear from evidence that there is a significant gulf between the parties' current bargaining positions on a number of key matters – Protected Action has been happening since 1 February 2023 and the ETU recently obtained another protected action ballot order for a wide range of industrial action – Commission found that bargaining and protected industrial action which affects Manildra was likely to be ongoing for at least 3-4 months, as a minimum, and perhaps up to 6 months or more – the net cost to Manildra of importing from the grid electricity which it could otherwise have produced by the turbines on the Site was, during the period of 9 April 2024 to 6 May 2024, an average of almost $19,000 per day plus a loss of approximately $8,220 per day due to not obtaining Carbon Credit Units – if price spikes on 7 and 8 May 2024 are taken into account, the net excess cost was about $40,000 per day plus a loss of approximately $8,220 per day due to not obtaining Carbon Credit Units – also relevant to have regard to the fact that Manildra has invested a large capital sum ($250,000,000) to purchase the turbines for the Site, and as a result of the protected industrial action being taken, it was only being able to partially use these very expensive assets – repayment costs being incurred by Manildra on the turbines are about $6,000,000 per quarter – Commission satisfied that the protected industrial action which is likely to be taken in the future in this case threatens, and is very

likely, to cause economic loss to Manildra (s.426(4)(d)) – the economic loss will take the form of higher costs for Manildra to purchase electricity from the spot market than it would have incurred if it had been able to run its turbines to their capacity and use the turbines to power the Site – found the fact that Manildra was likely to incur ongoing additional costs of at least about $190,000 per week as a result of protected industrial action being taken by members of the ETU was significant – Commission found this was one of the very rare cases where the impact on a third party (Manildra) of protected industrial action is above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action – satisfied that the protected industrial action in this case is threatening to cause significant harm to Manildra – Commission satisfied that the proposed suspension of the protected industrial action for 3 days is appropriate, is not contrary to the public interest, and is not inconsistent with the objects of the Act – the fact that only a very short period of suspension (3 days) will resolve Manildra's problem is relevant to the Commission's assessment of the appropriateness of ordering a suspension – also held that a short suspension of 3 days was unlikely to cause significant disadvantage to the ETU and its members employed by Endeavour Energy in their bargaining for a new enterprise agreement because they will be able to resume their protected industrial action after 3 days, and broaden the action if they wish to continue to put pressure on Endeavour Energy during the balance of the negotiations – Commission considered that a period of 3 days for a suspension to be appropriate rather than 72 hours – it will give the relevant employees all day on Friday, Saturday and Sunday to complete the required work – suspension ordered.

Shoalhaven Starches P/L t/a Manildra Group v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

B2024/530		[2024] FWC 1282
Saunders DP	Sydney	16 May 2024

4 TERMINATION OF EMPLOYMENT – jurisdiction – foreign state immunity – s.394 Fair Work Act 2009, s.12 Foreign States Immunities Act 1985 – 18 applicants claimed unfair dismissal by employer – applicants had worked for respondent for 9-15 years, finishing in 2022 – respondent raised 2 primary jurisdictional objections: immunity from Commission's jurisdiction as a sovereign foreign state per Foreign States Immunities Act 1985 (FSI Act), and second, application lodged during notice period, prior to alleged dismissals – regarding first objection, respondent argued 4 limbs: that they had not waived foreign immunity, none of the exceptions to immunity in FSI Act applied to applications at hand, FSI immunity exceptions could only apply to a "court", which the Commission is not, and that exceptions to immunity contained in s.12 FSI Act did not apply – regarding final limb of objection, respondent argued all applicants independent contractors and therefore not dismissed, written contract provisions inconsistent with employment exclusion (s.12(4) FSI Act), some applicants were not permanent residents when engaged (s.12(6) FSI Act), the six applicants who were permanent residents barred from s.12 FSI Act exception through savings provision in s.6 FSI Act – evidence led by parties not extensive due to Commission hearing predominantly legal matters at this stage – Commission considered evidence – each applicant engaged under a standard contract written in Arabic, with near-

identical terms – article 21 of contract noted that contractual disputes between parties to be presented to Ministry of Civil Service in Kingdom of Saudi Arabia – in 2014, each applicant provided a declaration to respondent retrospectively declaring status as independent contractors, wish to receive future dues as a regular payment, and undertaking full responsibility to deal with any legal requirements including taxation, superannuation – applicants labelled declaration a "sham", alleged that respondent did not provide any consideration for this declaration, did not explain nature and consequences of declaration, and did not provide applicants with adequate time to consider or obtain legal advice in relation to declaration – applicants alleged they were required to sign declaration as a condition of continuing employment – after signing declaration, respondent ceased payment of superannuation – Commission satisfied that declaration was procured by respondent and not sought by applicants, but case does not turn on force or credibility of declaration – Commission considered key provisions of FSI Act – as respondent a foreign state under FSI Act, afforded immunity "except as provided by or under [FSI] Act" per s.9 FSI Act – Commission noted in s.12 FSI Act legislative expectation that for foreign state entering into employment contract in Australia, interest in allowing a local forum to resolve disputes outweighs interest of foreign state having exclusive jurisdiction [*Firebird Global Master Fund II Ltd*] – Commission noted applications must be dismissed pursuant to provisions of FSI Act if: Commission not a FSI Act-defined "court", applicants engaged as contractors, employment contract contained term consistent with respondent maintaining immunity, or applicants not permanent residents at time of engagement – all exclusions claimed by respondent – Commission held that Commission can be considered a "court" under FSI Act, as its functions are of a similar kind to judicial functions as required by s.3 FSI Act [*Hussein*] – Commission considered whether applicants engaged as independent contractors – respondent's reliance on initial contract and contractor declaration forms rejected by Commission – Commission noted terms of contract consistent with employment, such as probation period, fixed monthly salary, entitlement to paid leave and workers' compensation – title of contract used word "contractor", which in Arabic refers to a party to a contract, rather than an independent contractor, per evidence submitted – Commission satisfied that each applicant engaged under contract of employment – regarding 2014 contractor declarations, respondent submitted that they were retrospective, declaring something that had always been so, and therefore conduct under contract – Commission rejected submission, noting declarations altered applicants' payment arrangements – Commission considered whether article 21 of contract was inconsistent with loss of immunity per s.12(4) FSI Act – Commission noted that article 21 used language "shall" instead of "must", regarding referral of dispute to Saudi Arabian Ministry – for exclusion of immunity due to contract term inconsistent with Australian law, Commission noted it not sufficient that contract dispute "could" be heard by foreign state [*Benvenuto*] – Commission also noted that article 21 referred to disputes about contract itself, whereas unfair dismissal applications not seeking to enforce a contractual term – Commission rejected argument, noting inability to contract out provisions of Fair Work Act [*Josephson*] – Commission considered fourth limb of respondent's argument in reliance of s.12(3) and (7) FSI Act: that applicants were not permanent residents at time of engagement – respondent accepted 6 applicants were permanent residents of Australia at relevant time, but all others

were third state nationals, neither Australian nor Saudi – Commission noted ALRC report preceding FSI Act, purpose of exclusion for permanent residents in FSI Act was to reserve immunity for foreign states when employing nationals from their own state – permanent resident of Australia defined in s.12(7) FSI Act as a resident of Australia whose presence in Australia not subject to time limitation – Commission noted this definition to be understood in context that a foreign state not immune from Australian jurisdiction where employment contract has a defined nexus with Australia, considered it appropriate to treat third state nationals' contracts as local employment contracts – Commission considered whether sufficient evidence to establish permanent residency for each third state national – for lack of evidence, Commission unable to be satisfied that 2 applicants were permanent residents at time of engagement, those applications could not continue – Commission considered final objection, that applications made prematurely, prior to dismissals taking effect – Commission noted ability to waive such irregularity under s.586(b) Fair Work Act [*Mihajlovic*], rejected objection – Commission to make orders dismissing 2 of the applications as those applicants not permanent residents at time of engagement, remaining 16 applications to proceed – Commission noted that respondent's pursuit of jurisdictional objections, almost all rejected, may have incurred costs on applicants, possibly enlivening costs orders pursuant to s.400A, 401 and 611.

Saleh and Ors v Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia and Anor

U2022/4348 and Ors		[2024] FWC 1152
Easton DP	Sydney	2 May 2024

Other Fair Work Commission decisions of note

Appeal by Surveillance Australia P/L against decision of Connolly C of 24 October 2023 [[2023] FWC 2427] Re: Australian Federation of Airline Pilots

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – annual leave – ss.88, 604 Fair Work Act 2009 – appeal – Full Bench – dispute between appellant and respondent about fly in and fly out (FIFO) arrangements – appellant sought to institute an arrangement for 16 days 'on swing', including14 work days and 2 transit days to/from work – a 12 day 'off swing' where employee not required to work – acquit annual leave during off duty period so employees have 12 days off rather than 8 days entitled under *Surveillance Australia Pilot and Observer Agreement 2016* (Agreement) – respondent claimed rostering schedule inconsistent with Act and Agreement – respondent applied under s.739 for Commission to deal with dispute – dispute only concerned contractual arrangements with FIFO employees – at first instance Commission determined annual leave arrangements (rostering arrangements) which vary or seek to vary employee's annual leave entitlement not permissible by either Individual Flexibility Arrangement (IFA) or any other instrument – Commission determined arrangements inconsistent with s.88(1) and clause 6.1.3 of Agreement – on appeal appellant claimed Commission erred in proper construction of s.88(1) and clause 6.1 of Agreement – Commission erred in finding agreements between an employer and employee planning to take multiple future periods of time as annual leave over extended period were not consistent with National Employment Standards (NES) and Agreement – subject of appeal was whether annual leave arrangements found in rostering terms made between appellant and employees not consistent with NES and Agreement annual leave provisions – Full Bench observed *House v King* principles apply to appellate review of a 'discretionary decision' – discretionary decision one where legal criterion allows a range of outcomes – Full

Bench distinguished *House v King* to determine that the Commission's decision permits only one correct outcome; known as the correctness standard (per *Minister for Immigration and Border Protection v SZVFW*) – therefore if Commission's decision was correct any errors in reasoning process will not mean appeal will succeed – for this reason Full Bench did not consider in detail Commission's reasoning – Full Bench considered appellant advanced an arguable case of appealable error – in public interest to grant appeal due to interaction between employment contract terms within an agreement and NES – employment contract outlined rostered days off agreement and annual leave clauses – rostering terms assumes 16 days on after which employee will spend 12 days at home – s.88 deals with taking paid leave at a time of employee's choosing so long as request is not unreasonable for employer – NES provisions allow employees to take paid annual leave and recognises employees have different needs about when they take leave – NES further prescribes how employers are permitted reasonable refusal of an employee's annual leave request due to business, operational or organisational needs – NES also prescribes what is an unreasonable refusal of an employee's annual leave request – rostering terms limit capacity of employees to choose when they take leave – no scope for employees to take annual leave when they are rostered on – central to operation of s.88 is notion paid leave is to be taken for period agreed between employee and employer – this meant employment contract outlining when leave is to be taken is not contrary to terms of s.88(1) – s.88(1) states *paid annual leave may be taken for a period agreed between an employee and his or her employer* – Full Bench interpreted "period agreed" to also mean multiple periods of annual leave – Full Bench cited s.23(b) of *Acts Interpretation Act 1901* to explain *"that unless contrary intention appears in the Act, words in the singular number will include the plural number"* – held Commission erred in finding annual leave proposed in rostering terms varied or sought to vary employee's annual leave entitlements provided by NES – FIFO employees who want to take extra leave required to perform extra work to accrue additional leave – Full Bench noted extra leave provisions concerned with additional leave which was distinct from leave conferred by NES – Full Bench acknowledged rostering terms restrict flexibility to choose time, duration or banking of leave – rostering terms do not prevent FIFO employees to request period of paid leave other than a period provided by work roster – Full Bench noted appellant was prohibited from unreasonably refusing request for leave from employee – refusal based solely on what was required by roster would likely be unreasonable – Full Bench found cl 6.1 of Agreement replicates key aspect of annual leave entitlements under NES – respondent claimed FIFO employees subject to rostering agreement could never make application for leave – respondent claimed FIFO employees would never accrue enough leave under rostering agreement requirements – Full Bench acknowledged respondent's argument – Full Bench considered respondent's argument did not demonstrate rostering terms inconsistent with Agreement – cl 6.1 operates on basis annual leave will be taken at times agreed between an employee and appellant – Full Bench upheld ground one of appellant's notice of appeal – Commission had erred in proper construction of s.88(1) and cl 6.1 – first instance decision quashed – Full Bench dismissed respondent's application.

C2023/6948 [2024] FWCFB 234
Gostencnik DP Melbourne 3 May 2024
Millhouse DP
Bell DP

Appeal by OSM Australia and Tidewater Ship Management (Australia) P/L against decisions of Binet DP of 31 July 2023 [[2023] FWC 2597]; [[2023] FWC 2638] Re: Construction, Forestry and Maritime Employees Union

INDUSTRIAL ACTION – payments relating to periods of industrial action – annual leave – ss.472, 604 Fair Work Act 2009 – appeal – Full Bench – CFMEU members employed by the appellants engaged in partial work bans – the appellants issued payment reduction notices advising pay of employees would be reduced by 90% for each day they engaged in protected industrial action and that leave accrual for each day would be reduced by 90% for each day they engaged in protected industrial

action – CFMEU sought variation of reduction in proportion of payments and leave accruals of employees arising from protection industrial action – at first instance, Commission found that the payment reductions were not reasonable having regard to the nature and extent of the work ban – Commission further considered it appropriate, for the purposes of s.472(3)(a), to vary the proportion by which employee leave accruals were reduced to 0% – appeal lodged – Full Bench considered arguable case of appealable error established – appeal also raised question of proper approach for application of s.472 – permission to appeal granted – matters listed under s.472(3)(a)-(b) FW Act are mandatory considerations – appellants argued Commission erred in merely engaging in a temporal assessment to encompass consideration of qualitative aspects of the partial work ban – Full Bench disagreed – however, Full Bench found Commission erred in disregarding submissions and some of the evidence that went to the qualitative assessment – First Instance Decision stated a CFMEU witness 'was not available for cross examination and the CFMMEU (sic) withdrew [their] statement' – Full Bench found the CFMEU witness was in fact cross examined as demonstrated in the transcript – accordingly, Commission erred in failing to consider evidence that went to qualitative assessment – considering reduction in leave accrual – s.472(1) FW Act empowers the Commission to make orders varying the proportion by which an employee's payments are reduced – the provision does not grant power to vary the proportion by which an employee's leave accruals might be reduced – payment in respect of leave accrued is made when leave is taken on termination of employment – accordingly Commission exceeded its power conferred by s.472 FW Act – appeal upheld – first instance decisions quashed and remitted to first instance member for redetermination.

C2024/91 and C2024/93 [2024] FWCFB 237
Gostencnik DP Melbourne 3 May 2024
Bell DP
Hampton DP

Elecnor Australia P/L

REGISTERED ORGANISATIONS – representation rights – s.137A Fair Work (Registered Organisations) Act 2009 – Full Bench – applicant, large construction contractor, applied for order under s.137A granting AWU right to represent industrial interests of employees engaged in construction project, to the exclusion of CEPU – Full Bench noted that orders would displace CEPU's right to represent eligible employees, and rights of employees to be represented – CEPU applied for order under s.587(1)(c) Fair Work Act 2009 to dismiss the application on basis it had no reasonable prospect of success (CEPU order) – CEPU order sought on two grounds: applicant did not have standing as not an employer of employees to which the order would apply, second, grounds for application insufficient basis for making an order under s.137A – Full Bench considered whether applicant had standing to bring application – considered statutory construction of s.137A – s.137A permits Commission to, on application, make orders in relation to a dispute about a registered organisation's entitlement to represent the industrial interests of employees – Full Bench noted evident purpose of power, enabling Commission to settle demarcation disputes between registered organisations, taking into account mandatory considerations such as history of representation, wishes of affected employees, consequences of inaction – Full Bench noted that to apply for an order pursuant to s.137A, the employer need not employ employees concerned in dispute, but must employ one or more employees in "workplace group" concerned with dispute – making of order under s.137A requires actual, threatened, impending or probable dispute about entitlement to represent employees' industrial interests – between May and August 2023, CEPU gave several right of entry notices, dispute arose regarding CEPU's representation of "linesman" – CEPU eligibility rules allow representation of linesman "peculiar to the electrical industry", while applicant contended CEPU's linesmen not so – evidence demonstrated that term "workplace group" as defined in s.6 may not aptly cover all employees engaged at work for applicant, given geographic dispersal of project, but this does not affect applicant's standing, application may require multiple orders if successful – Full Bench held that applicant

had standing, noting that it identified the project as a relevant workplace group in which it has employees – Commission considered whether reasonable grounds of success – applicant contended conduct of CEPU inimical to good industrial practice, listed conduct constituting "guerilla tactics designed to cause delay and damage" to project – CEPU rebutted contention, denying that exercise of statutory rights such as right of entry, and "hypothetical concerns" cannot form basis for s.137A order – Full Bench noted "strong case" of right of entry misuse and misconduct required to make orders sought, as to deprive an eligible employee the right to be represented by a registered organisation a "serious matter" [*ResMed*] – Full Bench held while some issues agitated by applicant appear weak, arguable that certain alleged conduct may justify making of order, such as disruptive demarcation disputes, repeated unlawful industrial action, right of entry abuse, unlawful conduct causing significant damage to legitimate interests – Full Bench held that application cannot be said to have no reasonable prospects of success – CEPU's application pursuant to s.587(1)(c) Fair Work Act 2009 dismissed – applicant, CEPU and AWU directed to confer and timetable filing of further material as necessary to prepare for hearing.

C2023/6590 [2024] FWCFB 245
Gostencnik DP Melbourne 3 May 2024
Saunders DP
McKinnon C

Lapidos and Anor v Commonwealth of Australia represented by The Commissioner for Taxation

RIGHT OF ENTRY – dispute over right of entry – ss.491, 505 Fair Work Act 2009 – application to deal with a right of entry dispute – applicants officials of the Australian Municipal, Administrative, Clerical and Services Union (ASU) – applicants were entry permit holders under s.512 – respondent has a requirement for entry permit holders, including applicants, to wear a visitors pass and to be escorted by an employee, or other authorised person of the respondent to and from the room or area relevant entry permit holder agrees discussions with relevant employees are conducted – requirement outlined in respondent's visitor guidelines – requirement applied to all visitors of respondent's premises – respondent contended requirement arose on security basis and as an OHS requirement – guidelines purported for entry permit holders to be escorted to bathroom, kitchen, and meal areas – whether respondent's escort requirement on entry permit holders is an OHS requirement for the purposes of s.491 – respondent submitted that it is bound by security protocols as authorised by the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) – protocols required Commonwealth government agencies, including respondent, to have policies which implement and integrate protective security measures in visitor guidelines – Deputy President held respondent's guidelines aligned with purposes and requirements of security protocols prescribed by PGPA Act – further noted control of visitor access is protective of physical safety of respondent's staff; indicating it is an OHS requirement for the purposes of s.491 – whether respondent's request that applicants comply with escort requirement reasonable – applicants submitted respondent's guidelines should give way to statutory entry rights exercised by entry permit holders – Deputy President considered practical example of an entry permit holder being required to be escorted to a bathroom as per respondent's guidelines – noted when such conditions attached to respondents request, respondent's guidelines unreasonable – held request to comply will only be reasonable if respondent amends request in a manner which does not involve an escort hindering, delaying, or obstructing the exercise of entry permit holders' entry rights on respondent's premises – further held respondent must amend request to not require entry permit holders at respondent's premises be escorted to attend bathroom, staff kitchen, or meals area – held request to comply will be reasonable if respondent incorporates proposed amendments – Commission held that no orders would be made due to lack of necessity.

RE2023/599 [2024] FWC 1215
Gostencnik DP Melbourne 13 May 2024

Azevedo v The Trustee For The Harley Family Trust

GENERAL PROTECTIONS – dismissal dispute – s.365 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – jurisdictional objection raised that applicant not dismissed on employer's initiative – Commission to consider whether applicant was dismissed in order to deal with general protections dispute [*Milford*] – applicant employed as sales consultant for four months – employment relationship in serious disrepair after altercation in office on 6 February 2024 – employment had ended by 13 February – applicant called in sick and provided medical certificate for 7 to 9 February inclusive – on 8 February disciplinary meeting scheduled for 12 February – applicant request to defer meeting ignored by respondent – applicant instructed to bring all company property to 12 February meeting – applicant sent text in response stating she would return property on Saturday [10 February] and "there's no need to prolong this any further" – respondent interpreted applicant's text message on 8 February as a resignation – by 8 February applicant's access to quotation system disengaged – by 9 February applicant's role re-advertised – on 10 February and 13 February applicant returned company property – applicant did not attend workplace after 13 February – applicant not paid salary or commission after 7 February – Commission found no single act conclusive of resignation or dismissal – no express communication of dismissal or resignation – employment not abandoned – conduct of each party must be viewed in context – found that applicant's 8 February text message fell short of statement of resignation – observed applicant foresaw likely demise of her employment and via text sought not to prolong 'unpalatable dance of termination' – found respondent's conduct supported termination finding despite no singular act of dismissal – termination of employment initiated by respondent, inter alia, removing access to quotation system and readvertising role – Commission held applicant was dismissed by respondent – jurisdictional objection dismissed – application to proceed.

C2024/1283 [2024] FWC 1149
Anderson DP Adelaide 3 May 2024

Dos Santos v Fafelu Constructions Group P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – repudiation – ss.394, 386 Fair Work Act 2009 – applicant's full-time employment ended after not being paid – contended respondent repudiated employment contract and he accepted breach giving rise to dismissal – respondent, a small business employer, denied it dismissed applicant and, if there was a dismissal, application out of time – respondent suggested it had practice of asking employees take leave, being annual leave or unpaid leave, during work shortages – agreements to take leave not documented in writing – respondent denied it repudiated applicant's contract, suggested agreement applicant would take unpaid leave from 27 April 2023 until work became available – respondent suggested this was a favour to applicant so as to avoid redundancy – applicant denied any such agreement, suggested he had no choice but to go along with (or not openly object to) arrangement – applicant contended non-payment constituted breach of express and implied terms of employment contract – argued this represented repudiation of contract – applicant accepted repudiation and brought contract of employment to an end, constituting dismissal within s.386 – Commission considered repudiation case law – summarised as if one party to contract considers other has engaged in fundamental breach of contract the non-breaching party can elect to continue contract under new terms set by breaching party or accept repudiation (breach) and elect to terminate contract – observed repudiation on its own does not automatically terminate contract [*Koompahtoo Local Aboriginal Land Council*] – if employee accepts repudiatory breach by employer this will amount to termination at employer's initiative per s.386(1)(a) [*Visscher v Guidice*] – whether agreement to take unpaid leave in April considered – found respondent contacted applicant in April to advise no work available and requested he take unpaid leave for up to two weeks, applicant yielded to request and no mention of redundancy as alternative – observed for agreement at law to come into effect an offer and its

acceptance must precisely correspond – rejected respondent argument applicant agreed to unpaid leave 'until further notice' or that that entering the unpaid leave agreement on the basis of applicant keeping his job and avoiding redundancy was a form of consideration – found while applicant agreed to enter agreement, better descriptor of applicant's conduct was 'acquiescence' – held unpaid leave agreement existed for maximum period of one to two weeks (ending 12 May 2023) – no agreement for unpaid leave beyond 12 May 2023 – applicant entitled to full-time wage after 12 May 2023 – respondent's failure to pay wage after that date sufficiently serious breach of contract to give applicant a right to terminate – applicant did not accept breach at time – applicant's subsequent rectification demand rejected by respondent – applicant then opted to end contract of employment – held applicant dismissed within meaning of s.386(1)(a) – no dismissal jurisdictional objection dismissed – held application filed within time – out of time jurisdictional objection dismissed – application to proceed.

U2023/5770 [2024] FWC 1047
Boyce DP Sydney 23 April 2024

O'Donnell v The Trustees Of The Roman Catholic Church For The Diocese Of Wilcannia-Forbes

GENERAL PROTECTIONS – dismissal dispute – priest – s.365 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – jurisdictional objection raised that applicant not dismissed – Commission to consider whether applicant was dismissed in order to deal with general protections dispute [*Milford*] – applicant a retired catholic priest and received retirement stipend from Catholic Diocese of Wilcannia-Forbes – stipend significantly reduced in 2023 – applicant ordained as a priest of the Catholic Church on 3 December 1980 and held various positions within and outside of the Diocese of Wilcannia-Forbes – applicant retired in 2013 and specific arrangements were made by the then Bishop regarding applicant's sustenance in retirement over a period of approximately 33 years – applicant alleged during his retirement he remained an employee of respondent and in September 2023 he was unlawfully dismissed from his employment – applicant claimed to have exercised a 'workplace right' in 2023 when he filed a complaint regarding an alleged privacy breach – applicant argued dismissal arose from the Trustees' decision to significantly reduce the monthly retirement stipend paid to him once he was eligible for a Commonwealth aged care pension – respondent contended that applicant was not an employee in 2023 or at any earlier time, and its relationship with the applicant was 'covenantal and spiritual [and] incapable of recognition as one of temporal employment' – Commission observed that there were only two matters that required determination: (1) whether applicant was an employee of the Trustees in September 2023 as alleged, and if so (2) whether he was dismissed from his employment in September 2023 when his stipend was unilaterally and significantly reduced – applicant carries the burden of providing a proper evidentiary basis for his claim that his relationship with the Diocese in 2023 was contractual [*Ermogenous*] – Commission held applicant had failed to do so – Commission found Applicant not employed by Trustee in 2011 – applicant was not primarily engaged to perform services of a non-religious nature – applicant's retirement concluded any possible contract of employment – agreement reached on applicant's retirement in 2013 concerning stipend did not make or vary a contract – applicant did no relevant work for the Trustees after 2013 – applicant not an employee for life – applicant's relationship with diocese in retirement was personal and spiritual but not contractual – Commission held no contract between the parties in 2023 – held applicant not an employee who was dismissed – application dismissed.

C2023/6208 [2024] FWC 1223
Easton DP Sydney 9 May 2024

Lansdell v Gladstone Ports Corporation

TERMINATION OF EMPLOYMENT – termination at initiative of employer – jurisdictional

objection – vitiating factors – s.394 Fair Work Act 2009 – application made seeking reinstatement and compensation for lost wages and damages – applicant had been employed for over a decade as company secretary and deputy company secretary – at time of alleged dismissal, applicant substantively employed as deputy company secretary, but seconded to acting company secretary role – after raising concerns regarding workload, applicant was offered 2 options: relinquishing permanent substantive role and keeping temporary acting role until it was re-advertised, or ceasing acting role, maintaining permanent substantive role with the option of applying for permanent company secretary role once advertised – applicant chose first option, relinquishing permanent substantive role for temporary acting role – applicant then accepted offer for temporary role of Senior Corporate Advisor to Board (SCA offer) – on 15 December 2023, near end of temporary contract, applicant was encouraged to apply for other internally advertised roles – applicant contended that SCA offer letter did not indicate that employment would expire on 31 December 2023, while respondent asserted that applicant's employment ended as per period specified in contract – application for unfair dismissal remedy made – respondent objected to application on jurisdiction grounds, Commission considered whether applicant dismissed – respondent submitted parties had agreed SCA role would end by 31 December 2023, and respondent acted within prerogative by letting it expire, and applicant had no substantive permanent role at company – applicant's position that SCA role, not applicant's employment, was to expire on 31 December 2023 per letter of offer, submitted that none of the other temporary appointments were time limited – distinguishing between her role and her employment, applicant asserted that underlying employment continued from initial permanent employment contract signed in 2013, and this was not superseded by applicant's acceptance of temporary appointments – respondent denied advising applicant that she could return to permanent position if first option chosen; SCA letter of offer made temporary nature of employment clear – applicant denied being told that employment would end at conclusion of temporary role – applicant had relinquished substantive permanent role as she felt role had a high workload, and was advised that respondent could not advertise for additional support as the role belonged to applicant – Commission found applicant's secretary role required workload of two people – concluded both options put to applicant were problematic and inherently unreasonable – first option required applicant to forgo some salary and take a junior role, second option required applicant reapply for substantive role, albeit with 9 years of experience on her side – Commission noted respondent could have offered other options, but created a dilemma where, without apparent reason, applicant had to relinquish substantive role under duress exacerbated by heavy workload, personal difficulties – Commission view that respondent's conduct leading to SCA offer created vitiating factors in offer [*Khayam*] – no cogent explanation for applicant to relinquish substantive role for additional support, Commission found such conduct unconscionable – respondent had also downplayed risk of relinquishing substantive position by suggesting that there would be "plenty of positions… down the track" – Commission found that respondent's actions rendered SCA offer void ab initio, therefore applicant's employment was not subject to end date – as a result Commission view that respondent's actions brought about end of employment, jurisdictional objection dismissed – merits of matter to be dealt with.

U2024/689 [2024] FWC 1060
Dobson DP Brisbane 23 April 2024

Camenzuli v Companion Systems P/L

TERMINATION OF EMPLOYMENT – valid reason – remedy – ss.587, 394 Fair Work Act 2009) – applicant claimed he was dismissed by respondent – applicant alleged dismissal harsh, unjust or unreasonable – respondent claimed applicant was made redundant – 5 June 2023 applicant met with the respondent's external HR consultant who informed him his position was being made redundant – HR consultant stated respondent was experiencing a downturn – offered applicant an additional $5000 if he accepted voluntary redundancy – HR consultant required applicant return office property including laptop and mobile phone – applicant offered to take a pay cut – HR

consultant rejected offer and stated "you're a cost cutting exercise" – applicant had used laptop and mobile phone in personal capacity, with permission, for years – applicant informed HR consultant he needed more time to organise a new phone and SIM card as company phone had personal contacts he wished to remove – applicant also informed HR consultant he had been locked out of laptop, preventing him from removing personal information – HR consultant sent applicant email containing deed of release and required applicant sign – applicant was requested to sign the deed and return company items (laptop and phone) by midday 9 June 2023 – deed contained incorrect statements including date of meeting, that applicant had accepted voluntary redundancy and agreed to return company items – deed also stated "employee acknowledges that before signing deed he has been advised to seek independent legal advice" – HR consultant advised applicant to be ready to return company items in his possession (including mobile phone and laptop) at next meeting – applicant was informed if he failed to handover company items this may result in summary dismissal – applicant informed HR consultant he was busy trying to set up phone and meet with lawyers – applicant emailed owner and general manager evening 8 June 2023 – applicant requested an extension of time to address redundancy package and organise setting up his phone – 9 June 2023 HR consultant advised applicant he would be made redundant when company property returned – applicant provided HR consultant with laptop, but advised he needed more time to set up phone – applicant was informed after meeting he had until 14 June 2023 to return phone to office – respondent offered to reassess employment separation terms and adjust payout amount, but also threatened to refer matter to police in respect of not returning phone – HR consultant also noted he would handover to management all other company items and respondent reserved "our right to reclassify or relabel the separation of employment" – applicant emailed respondent's management that night – applicant explained he intended to return all company items – applicant requested an additional 24 hours to return company mobile phone and noted respondent considering whether to provide an extension to return phone until COB 14th June 2023 – respondent's owner and general manager did not respond to applicant's email – at midday 14 June applicant sent company mobile phone to respondent's office via registered post – applicant sent an email to respondent that evening with the Australia Post tracking number – on 15 June 2023 HR consultant informed applicant he was summarily dismissed for not returning phone by 14 June and claimed applicant had emailed malware to respondent's managers (referring to email with AusPost tracking number) – applicant commenced new employment on 28 August 2023 – applicant submitted dismissal was unfair as well as harsh, unjust and unreasonable – applicant claimed redundancy was a 'sham', respondent failed to provide a valid reason for dismissal and respondent failed to provide reasonable time to return phone (taking account 12 June was a public holiday) – respondent in its submissions claimed it had gone through a genuine redundancy process with applicant and had extended time to return phone – respondent blamed applicant for delay in returning phone and sending it malware – respondent also submitted applicant had not followed reasonable directions to engage only with HR consultant by emailing respondent's management – Commission considered s.387 criteria – Commission considered when and why applicant was dismissed – found HR consultant was callous and unprofessional in his meeting with applicant – found respondent's management was 'spectacularly callous' in how they handled the redundancy – noted respondent did not try to engage with applicant but relied on HR consultant instead – found HR consultant understood applicant's reasonable requests to seek legal advice and to have more time to transfer data from his phone – respondent was allowed by law to require applicant deal with HR consultant, however it was not a reasonable course of action given applicant's standing and service – found applicant dismissed on 9 June 2023 because he did not return phone to HR consultant – rejected respondent's contention applicant had engaged in "harassing and unstable" conduct – held no valid reason for dismissal (s. 387(a)) – found applicant was not informed of all of reasons for dismissal (s. 387(b)) – applicant not informed by respondent he had engaged in "harassing and unstable" conduct – found applicant had an opportunity to respond to request he return mobile phone (s 387(c)) – found respondent had placed its faith in HR consultant as it did not have an internal HR function – found HR consultant gave 'astonishingly poor advice' that impacted on procedures followed by respondent (s 387(f)) – Commission cited *Shepherd* regarding applicant's post

dismissal conduct (s 387(h)) to determine if this added to whether dismissal was harsh, unjust or unreasonable – *Shepherd* authority for proposition that facts justifying dismissal, which existed at time of dismissal, should be considered, even if employer was unaware of facts and did not rely on them at time of dismissal – found applicant provided tracking number via email on 12 June 2023 (3 days after dismissal) – found email did not contain malware as respondent claimed – held applicant's dismissal was harsh, unjust and unreasonable – remedy considered – compensation appropriate remedy – Commission took account of applicant's 14 years of service – Commission made a *Jones v Dunkel* inference against respondent as owner (applicant's cousin) did not give evidence – found it likely owner would have given evidence of family falling-out that he would preferred not give and this constituted a reason for the dismissal – calculated compensation to be $34,660.93 taking account applicant mitigated his loss by securing new employer – Commissioner condemned HR consultant's (and another associate) false representation to applicant's new employer that they had his permission to conduct a reference check 'in the strongest possible terms'.

U2023/5840 [2024] FWC 489
Hunt C Brisbane 17 May 2024

Lake v Wildwalks

TERMINATION OF EMPLOYMENT – jurisdiction – volunteer – s.394 Fair Work Act 2009 – the respondent operated a free online bushwalking and camping guidebook – applicant an avid and experienced bushwalker – applicant offered to sub-edit the respondent's online magazine – applicant initially engaged without payment – applicant subsequently negotiated payment of $1 per year – applicant's engagement subsequently terminated – dispute about whether applicant was an employee capable of being dismissed under the FW Act – Commission determined that the rights and obligations between parties not reduced to writing before relationship commenced – totality of relationship to be considered [*Brodribb Sawmilling*] – neither party contended an independent contracting relationship existed – applicant initially offered services as volunteer to improve quality of the magazine – Commission held the applicant was motivated by a shared interest in bushwalking and environmental conservation – motivations of parties altruistic and remuneration was not a motivator – introduction of nominal payment sought by applicant to acknowledge the work he performed – production of magazine a free service available and not an integral part of the respondent's business – Commission held there was no legally binding employment conditions agreed at any stage and that the nominal payment can be best described as an honorarium [*Walker*] – Commission considered that the applicant did not provide labour for the hours worked and that there was no financial or business benefit to the labour – Commission held that no valuable consideration was evident – the Commission considered that there were no clear terms and conditions and that the honorarium was not a condition of the relationship nor did the applicant require it as a reward – Commission held there was no material gain for either party in the relationship – Commission held there was no certainty as to terms of the agreement and no conditions of employment identifiable – Commission satisfied the applicant entered into service of his own free will to perform his services without financial gain – Commission held applicant was a volunteer and not an employee and consequently was not dismissed – Commission held the applicant not subject to unfair dismissal protections – application dismissed.

U2024/1163 [2024] FWC 1344
Yilmaz C Melbourne 22 May 2024

Johnson v Faulkner Farming P/L

TERMINATION OF EMPLOYMENT – valid reason – evidence – ss.387, 394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant dismissed for alleged misconduct – applicant allegedly attended work after consuming alcohol – resulted in breach of respondent's alcohol and drug policy – Commission to consider

whether dismissal harsh, unjust or unreasonable per s.387 – observed applicant consumed substantial amount of alcohol night before morning shift – applicant aware of and signed respondent's alcohol and drug policy – held alleged breach of alcohol and drug policy primary reason for termination and other reasons suggested by respondent would not have resulted in dismissal but for alleged policy breach – whether valid reason for dismissal considered – analysis conducted whether conduct occurred and justified termination [*Edwards v Giudice*] – held insufficient evidence to conclude applicant under influence of alcohol when attending morning shift – submissions made by respondent considered hearsay evidence and not reliable to establish applicant's impairment during shift – no expert opinion evidence led by respondent to demonstrate impairment – Commission held assumption cannot be made on applicant's impairment based on admission of alcohol consumption on previous evening and does not constitute valid reason – held no breach of alcohol and drug policy or WHS policy – Commission found no valid reason for termination – termination found unjust and unreasonable – remedy considered – reinstatement inappropriate – compensation ordered – anticipated future employment considered – observed while applicant found alternative work within two weeks, this was not local – found significantly longer amount of time required to find local alternative work – held applicant would have remained with respondent for further three months – amount of compensation reduced as application found alternative employment within two weeks of termination.

U2024/411 [2024] FWC 1052
Crawford C Sydney 22 April 2024

Michalitsis v Dig Dig Demolition P/L

TERMINATION OF EMPLOYMENT – misconduct – safety – ss.394, 386 Fair Work Act 2009 – applicant commenced employment as a truck driver on 28 June 2022 – respondent dismissed the applicant on 16 October 2024 on the basis of misconduct relating to a serious occupational health and safety incident – applicant claimed dismissal was harsh, unjust or unreasonable and sought remedy for unfair dismissal – on commencement of employment, the applicant held a valid white card to certify the completion of industry health and safety training to work on construction sites and a heavy vehicle driving licence – an incident occurred on 28 June 2023 in which an excavator machine reversed quickly towards the applicant who was sitting with his back towards the excavator (the excavator incident) – the parties contested the degree of seriousness of the excavator incident – on 29 June 2024, the applicant made a bullying complaint against another employee and commenced a period of absence due to an injury – an external independent investigator was engaged on 4 July 2024 to investigate both the excavator incident and bullying complaint – investigator emailed applicant in relation to an "investigation into allegations of misconduct" and requested his attendance at a meeting – the applicant was on a period of leave and stated that he was unable to attend a meeting due to medication he was taking – the applicant stated he understood the investigator to have sought his involvement regarding the bullying complaint only, with the excavator incident to be discussed at a later date – on 1 August 2023, a report found allegations of bullying to be unsubstantiated – on 25 August 2023, a further report found the applicant had engaged in unsafe conduct concerning excavator incident – respondent issued show cause letter on 26 September 2023 and proceeded to issue on 6 October 2023 notice of termination on the basis of gross misconduct which related to 'a potentially fatal near-miss incident' – show cause letter not received until 19 October 2023; taken to be effective date of termination – held while the applicant did not have an opportunity to respond, such procedural deficiencies did not render the dismissal harsh unjust or unreasonable – held excavator incident was serious occupational health and safety incident – held the applicant failed to take reasonable care of his own health and safety, and of others by choosing to sit in close proximity to an operational excavator with his back turned – held the conduct justified dismissal and summary dismissal was an option reasonably open to the respondent – held dismissal was not harsh, unjust, or unreasonable – application dismissed.

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 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 11, 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: (03) 9655 0420
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) 8410 6205
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
Level 12,
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.