# FWC Bulletin

5 December 2024 Volume 12/24 with selected Decision Summaries for the month ending Saturday, 30 November 2024.

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## Obstructing the administration of the CFMEU Construction & General Division

03 Dec 2024

On 3 December 2024 we published our new factsheet called Obstructing the administration of the CFMEU Construction & General Division (pdf).

The factsheet is available on our Report a concern about the CFMEU Construction and General Division webpage.

## 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 week ending Saturday, 30 November 2024.

**1** GENERAL PROTECTIONS – dismissal dispute – certificate – s.365 Fair Work Act 2009 – appeal – Full Bench – Dr Kirkham (appellant and first instance applicant) made general protections (GP) application against Monash University (respondent in both instances) and a number of other respondents including NTEU and 17 others, alleging dismissal in breach of GP provisions – Full Bench noted application substantially incoherent, but apparently alleging dismissal in breach of ss.340, 341, 343, 346-248 and 351 – applicant claimed non-Monash University respondents had been 'complicit' in dismissal – at first instance respondents did not raise any jurisdictional objection – at first instance Commission identified potential jurisdictional issue relating to non-Monash University respondents of its own motion – Commission subsequently held Dr Kirkham had not been dismissed by any respondents other than Monash University, dismissed application against all respondents other than Monash University – Commission issued certificate under s.368(3)(a) stating all reasonable attempts to resolve dispute other than by arbitration had been unsuccessful – appeal lodged on three grounds: that the Commission erred in law by misunderstanding jurisdiction and issuing certificate when it had not taken reasonable steps to resolve dispute, that Commission should not have issued certificate before Dr Kirkham had a chance to appeal decision, and that Commission erred in law by failing to involve other respondents to matter, based on 'asserted lack of jurisdiction to do so' – Dr Kirkham submitted that while s.365 requires a dismissal to have occurred to enliven Commission' dispute resolution power, it is silent regarding parties to dispute about dismissal, and that Commission treated issue of certificate as a formality and ensured dispute would not be resolved by 'not involving the true actors' – Dr Kirkham submitted that Commission should require dispute resolution process conducted for each respondent other than the University; if no resolution reached, further certificates should be issued in relation to each respondent – Monash and other respondents submitted that 'dispute' in ss.365 and 368 is solely about whether relevant person dismissed in contravention of Part 3-1 of the Act; only the employer of a dismissed employee can take 'adverse action' as defined in Act – respondents concurred with suggestion of Commission at first instance that disputes regarding respondents other than Monash might have been dealt with under s.372 – respondents submitted no requirement under s.368 for Commission to hold a conference; s.595(2) imparts 'broad discretion' as to how Commission deals with a dispute – certificate issue requirement that Commission be 'satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful' involves broad evaluative judgement – respondent submitted permission to appeal should be refused, noting that Dr Kirkham has since commenced proceedings in Federal Circuit and Family Court of

Australia; mediation or further discovery should be dealt with in Court proceedings, and Dr Kirkham should not be permitted to take benefit of certificate whilst challenging its validity – NTEU submitted it was not involved in Dr Kirkham's dismissal and no cause of action had been disclosed against it, urged that the appeal against NTEU be dismissed – Full Bench considered appeal – Full Bench firstly considered recusal application: at outset of hearing, Dr Kirkham applied for presiding member of Full Bench to recuse himself, on basis that an email from presiding member's chambers contained diversity flag – Dr Kirkham alleged this was an inappropriate political statement from an impartial tribunal – Full Bench (assuming that recusal application founded on contention of reasonable apprehension of bias) applied 2-step test: that Dr Kirkham identify that which might lead the Commission to decide case other than on legal and factual merits, and articulate the logical connection between the identified matter and the feared deviation from the case being decided on its merits [*Ebner*] – Full Bench held no logical connection between concerns about diversity flag and subject matter of appeal, declined to recuse presiding member – Full Bench considered whether to grant permission to appeal – observed submissions of respondent had a degree of force, but granted permission to appeal, finding Commission's decision at first instance inconsistent with approach taken by other members of Commission – determination of appeal therefore desirable and in public interest to prevent future divergence in approach taken by Commission in respect of s.365 applications – appeal merits considered – Full Bench observed entitlement to make s.365 application as previously characterised by Federal Court: that s.365 contains two objective criteria, that a person has been objectively dismissed, and that an allegation has been objectively made that the dismissal was in contravention of a provision is Part 3-1 of the Act [*Milford*] – observed that Dr Kirkham's application clearly met these criteria, and that it also was made in accordance with applicable procedural rules as required by s.585 – Full Bench observed first instance decision appeared to proceed on premise that a s.365 application cannot name a respondent that is not the employer that dismissed applicant – Full Bench noted this premise was advanced without a source, and precedent referenced by Commission at first instance did not deal with issue of whom a s.365 applicant may name as respondent – Full Bench cited Federal Court discussion on meaning of 'dispute' in s.365, which is not legislatively defined, and noted Act does not prescribe 'content, essential inclusions or level of detail' required for s.365 application [*Shea*] – Full Bench did not consider anything in ss.365 or 368 as imparting jurisdictional impediment to identification of parties in addition to employer in valid s.365 application – noted however that inclusion of additional parties in application would not bind Commission to deal with dispute with those parties; s.368(1) non-prescriptive as to means by which Commission may resolve dispute – noted valid reasons as to why additional parties may be named in s.365 application, for example to make those entities party to conciliation at Commission [*Yang*] – Full Bench therefore found Commission at first instance erred in treating inclusion of additional respondents in Dr Kirkham's application as 'involving an excess of the jurisdiction to deal with the dispute' – Full Bench considered whether this error had any consequences – identified two consequences: that Commission's error constrained it from giving proper consideration as to whether to exercise discretionary power under s.592(1) to require additional respondents' attendance at conference as requested by Dr Kirkham, and secondly, Commission's discretionary consideration

of whether all reasonable attempts to resolve dispute had been or were likely to be unsuccessful miscarried, as erroneous view of jurisdiction confined consideration of scope of dispute and reasonable methods to resolve it – Full Bench considered appropriate remedy, noting Dr Kirkham's position that Full Bench should not quash the certificate, but remit matter to single member of Commission to undertake dispute resolution process under s.368 with respondents excluded by first instance decision and that after such a process, if unsuccessful, Commission should issue certificates with respect to each respondent – Full Bench considered Dr Kirkham's position on remedy to be founded on flawed understanding of s.368 jurisdiction, and noted that dispute process is a singular process, not divisible amongst different respondents or involving separate proceedings, and that s.368(3)(a) does not contemplate multiple certificates being issued in relation to s.365 dispute – Full Bench declined to make remedy proposed by Dr Kirkham – Full Bench quashed first instance decision and certificate, and referred matter back to first instance decision maker – Full Bench noted this may cast doubt on validity of current Federal Court proceedings, and expressed doubt, without excluding possibility, that inclusion of additional respondents would lead to different outcome of dispute – Full Bench observed that due to miscarriage of s.368 process at first instance, certificate should be quashed, as miscarriage would vitiate force and effect of s.370 [*Ward v St Catherine's School*] – Full Bench further noted that remittance of matter back to Commissioner would not require Commission to order attendance of excluded respondent, but merely due consideration of matter with wide discretion as how dispute should be dealt with – Full Bench ordered as follows: permission to appeal granted, appeal upheld, first instance decision and certificate quashed, dispute remitted to first instance Commissioner.

Appeal by Kirkham against decision of Hunt C of 10 July 2024 [[2024] FWC 1757] Re: Monash University & Ors

C2024/5180 [2024] FWCFB 429]
Hatcher J Sydney 13 November 2024
Masson DP
Allison C

**2** ENTERPRISE BARGAINING – single interest employer authorisation – ss.248, 249, 249A Fair Work Act 2009 – Full Bench – application for a single interest employer authorisation – the Australian Municipal, Administrative, Clerical and Services Union (the ASU) wishes to engage in collective bargaining for the purpose of making an enterprise agreement to cover two local councils in Victoria, the Central Goldfields Shire Council (Goldfields Council) and Ararat Rural City Council (Ararat Council) – Ararat Council does not oppose the application or otherwise wish to be heard – application opposed by Goldfields Council – Goldfields Council advanced two grounds which it contended meant a single interest employer authorisation cannot be made – first, that Goldfields Council and the Australian Nurses and Midwives' Federation (the ANMF) have agreed in writing to bargain for a proposed single-enterprise agreement for the purposes of s.249(1D)(b) of the FW Act; and that the Commission should not be satisfied that it is not contrary to the public interest to make the authorisation sought by the ASU for the purposes of s.249(3)(b) – employees of Goldfields Council who are eligible to be members of the ASU, the ANMF and Professionals Australia are

currently covered by an enterprise agreement known as the *Central Goldfields Shire Council Enterprise Agreement No. 8 2020* (the 2020 Agreement) – the 2020 Agreement passed its nominal expiry date on 30 June 2024 – the first issue in contention between the parties is whether Goldfields Council and the ANMF have agreed in writing to bargain for a proposed single-enterprise agreement that would cover Goldfields Council and the employees that will be covered by the agreement are substantially the same group of employees for the purposes of s.249(1D)(b) – the dispute between the parties concentrates on what is meant by the phrase 'agreed in writing to bargain for a proposed single-enterprise agreement' – a person may 'agree to bargain' in various ways, including in writing, orally or by conduct – the concept of a person having agreed to bargain in s.249(1D)(b) is distinct in two ways – first, agreement must be in writing – an agreement to bargain made orally or inferred from conduct will not be sufficient – second, s.249(1D)(b) does not refer to an agreement to bargain in a general sense – the employer and a relevant employee organisation must have agreed in writing to bargain for 'a proposed single-enterprise agreement' – uncontroversial that two persons may agree in writing in a number of ways – in the context of s.249(1D)(b), the agreement made in writing must be specific – the employer and the employee organisation must have agreed in writing to bargain for a proposed single enterprise agreement – necessary to turn to the communications relied on by Goldfields Council – first was the email dated 20 May 2024 – that email responded to the correspondence sent to the ANMF dated 15 May 2024 inviting the ANMF to participate in bargaining – the email included a letter which referred to an 'intent to start bargaining' and the opening sentence of the letter dated 15 May 2024 indicated that: 'I wish to invite the ANMF to participate in bargaining for a new Enterprise Agreement to cover employees of Central Goldfields Shire Council' – the reference to an 'intent to start bargaining' was not specific as to the form of agreement proposed – although the invitation contained in the letter of 15 May 2024 does refer to bargaining for a new agreement to cover employees of Goldfields Council, the language is somewhat equivocal – it did not expressly request that the ANMF agree to bargain for a single-enterprise agreement – even if the letter of 15 May 2024 was understood as disclosing an intention on the part of Goldfields Council to bargain for a single-enterprise agreement, that is not the end of the issue – the ANMF must have agreed in writing to do so – the response email of 20 May 2024 indicated a willingness to attend a meeting and discusses the possible timing of a meeting – it did not, expressly or otherwise, contain a written agreement to bargain for a single-enterprise agreement – Full Bench found the ANMF did not agree in writing to bargain for a proposed single-enterprise agreement through the email of 20 May 2024 – the second communication relied on by Goldfields Council was the preamble to the log of claims sent by email on 11 June 2024 – found the preamble to the log of claims provided by the ANMF was also insufficient to constitute an agreement in writing to bargain for a proposed single-enterprise agreement – the email attaching the log of claims expressly stated it was 'subject to change through the next members meeting dependent on the ASU's position moving forward' – found the ANMF had not reached a concluded agreement about the scope or nature of the bargaining – that email was sent towards the end of the meeting held on 11 June 2024 at which the position of the ASU that there should be multi-employer bargaining was discussed – found the reference to the 'ASU's position moving forward' can only be understood as a

reference to the ASU's preference for multi-employer bargaining – Full Bench found that was sufficient to dispose of Goldfield Council's reliance on the preamble to the ANMF's log of claims – Full Bench not satisfied that Goldfields Council and the ANMF at any time agreed in writing to bargain for a proposed single-enterprise agreement for the purposes of s.249(1D)(b) – the combined effect of ss.249(1)(b)(v) and 249(3)(b) is that, for the obligation to make an authorisation to arise, the Commission must be satisfied that it is not contrary to the public interest to do so – where an employer employed 50 employees or more at the time the application was made, s.249(3AB) means that it is presumed that the requirements of subsection (3) are met, unless the contrary is proved – this includes the public interest requirement in s.249(3)(b) – found both Goldfields Council and Ararat Council employed more than 50 employees when the ASU's application was made – as such, the starting point in dealing with the present application is that it is presumed that it is not contrary to the public interest to make an authorisation unless the contrary is proved – Full Bench not satisfied that the reasons relied upon by Goldfields Council, individually or taken together, prove that it is contrary to the public interest to make the authorisation sought by the ASU – the presumption in s.249(3AB) has not been displaced – Full Bench satisfied that it is not contrary to the public interest to make the authorisation for the purposes of s.249(3)(b) – Full Bench satisfied that the requirements of s.249 of the Act were met, and that s.249A does not apply – authorisation made.

Australian Municipal, Administrative, Clerical and Services Union v Central Goldfields Shire Council, Ararat Rural City Council

B2024/840 | [2024] FWCFB 444
Gibian VP | Sydney | 27 November 2024
Clancy DP
Connolly C

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**3** GENERAL PROTECTIONS – dismissal dispute – resignation – s.365 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – jurisdictional objection raised that application filed out of time and applicant not dismissed but voluntarily resigned – applicant accepted he resigned but submitted he was forced to do so – applicant disputed the application was lodged out of time – respondent submitted applicant's employment ended on day he resigned being 14 March 2024 because applicant alleged he was forced to resign (and thus dismissed) – applicant submitted employment ended on last day of employment with respondent being 14 May 2024 – Commission determined applicant's employment ended on 14 May 2024 and application not filed out of time – whether applicant was 'dismissed' considered – Commission to determine whether or not the conduct of respondent, or a course of conduct engaged in by respondent, forced applicant to resign – respondent alleged that sometime in August 2023 applicant was in a closed door (work) meeting with two male colleagues, at which he allegedly made an inappropriate comment about the female CEO of the Victorian Gambling and Casino Control Commission (Allegation) – at around 8:00am 14 March 2024, applicant attended respondent's Melbourne office to set-up and prepare for prescheduled Board Sub-Committee meetings that day, the first to commence at 8:30am but unbeknownst to applicant, the full respondent Board and legal representatives were separately meeting at 8:00am at another location – at 9:17am, applicant received a text message

from respondent's Chairman, asking him to meet the other office location at 11:00am that day (11:00am Meeting) – applicant told nothing about the content or purpose of 11:00am Meeting prior to its commencement – at 11:00am 14 March 2024 applicant attended meeting where he was blindsided with Allegation and asked to respond to Allegation there and then, or within very short compass thereafter even though he was told Allegation was substantiated – Commission observed respondent's Board had already determined applicant's employment would not be continuing in any capacity and applicant's ability to respond to Allegation at 11:00am Meeting (or shortly thereafter) was severely constrained – Commission observed respondent Board members who attended 11:00am Meeting were only in attendance to put Allegation to applicant, advise him the full Board considered Allegation substantiated, and find out if applicant had any new and material information to provide, but had no authority (there and then) to make decisions, or enter into direct discussions or negotiations around alternatives to cessation of applicant's employment – at time applicant was formally advised that he had two options, resign or be terminated, it was 1:23pm and therefore was provided with only two hours to make his choice of the two options – applicant requested additional time to consider – request was rejected – respondent advanced its 'rush, rush, rush' approach by reference (in part) to its continuous disclosure obligations to ASX and an apparent threat or concern that Allegation was very 'shortly' about to be made public – Commission observed respondent's evidence and submissions were not clear as to, or did not engage with, what the continuous disclosure obligations to the ASX actually were, or otherwise entailed – Commission observed respondent evidence was equally unclear as to whether or not there was an actual or specific threat from an individual, or an organisation, to make the Allegation public – Commission concluded from evidence that strict and limited timeframe adopted by respondent's Board did not 'necessarily' flow from its continuous disclosure obligations to ASX, or because of the imminent likelihood of public disclosure, but because the respondent's Board had consciously and strategically determined that it was going to act, and (more importantly) wanted to be seen to act, quickly and conclusively – Commission observed whatever the reason for the strict and limited timeframe imposed upon applicant by respondent, and whatever way it might have been said to be justified, the application of this strict and limited timeframe formed part of the conduct, or course of conduct, that objectively weighed against a finding that applicant voluntarily determined (without pressure or compulsion) to resign – Commission did not accept there was an evidentiary foundation to support a finding that ending of applicant's employment by respondent on 14 March 2024 was something other than a forgone conclusion that day or the two options put to the applicant represented something other than an 'ultimatum' – Commission found the evidence clear that both of the options (or choices) put to applicant on 14 March 2024 were a means to same end – Commission noted respondent correctly pointed out applicant had no 'right' to procedural fairness, or legal advice/representation, prior to respondent exercising its contractual rights to terminate his employment, however, respondent's case was it did not exercise its contractual right to terminate applicant's employment – Commission observed it followed the issue before it did not require a finding, or involve a determination as to whether or not, for example, a breach of contract, or an absence of procedural fairness or natural justice, leading to applicant's resignation, or in effecting applicant's

termination, had occurred – Commission determined issue concerned whether or not conduct of respondent, or a course of conduct engaged in by respondent, forced applicant to resign. Commission highlighted such conduct may or may not be unfair or unjust, but that was beside the point – Commission found respondent's conduct on 14 March 2024 lead to the inescapable conclusion that such conduct caused, resulted directly or consequentially in, or had the objective probable result of, the termination of applicant's employment, and applicant did not voluntarily resign, or have any real or effective choice but to resign, and in overall circumstances was forced (or compelled) to resign – Commission observed such conduct consisted of; (1) without prior notice, cancelling applicant's work schedule on 14 March 2024, and directing him to attend a meeting that day at 11am, without advising him what meeting was about, and refusing to communicate with him prior to 11am meeting; (2) verbally confronting applicant with Allegation at 11am Meeting (absent any foundational documentation to support it), and framing issue arising from Allegation as simply an answer to a strict liability question; (3) advising applicant Allegation was serious, already considered substantiated, and respondent had lawyers in the building to advise and support respondent; (4) rejecting all alternatives to applicant's employment being brought to an end that day, and making it clear applicant would be terminated if he did not resign; (5) providing applicant with an option to resign, but placing a short and strict timeframe for him to make that decision, and refusing to extend timeframe to make a decision (and/or come up with new and material information) beyond 4pm that day; (6) telling applicant respondent had determined to make the fact that Allegation had been reported to it public at 4pm that day via an ASX statement, and when doing so would be detailing applicant had been terminated or resigned, putting into play potentially significant reputational risk and uncertainty for applicant, and necessitating him to guess and hypothesise as to whether it might 'look better' if he just resigned; (7) being ambiguous as to whether or not applicant was to be terminated without notice (or payment in lieu), creating a financial incentive for applicant to resign on the basis that he would at least get the benefit of a resignation notice period (as opposed to potentially no notice period) if he chose to resign – Commission determined applicant proved on the balance of probabilities that cessation of his employment was a 'dismissal' within the meaning of s.386(1)(b) – jurisdictional objection dismissed.

Rytenskild v Tabcorp Holdings Limited

C2024/3721 [2024] FWC 3129
Boyce DP Sydney 19 November 2024

**4** GENERAL PROTECTIONS – jurisdiction – Fair Work Commission Rules – ss.365, 366, 386 Fair Work Act 2009 – jurisdictional objection – application filed out of time – applicant commenced employment with respondent in December 2022 – applicant subsequently experienced harassment from supervisor, affecting wellbeing and performance – wrote to HR to raise "serious concerns" – applicant received no written response – on 14 March 2024, applicant requested meeting to discuss issues – advised found work environment hostile – applicant offered a new role that reported to same supervisor – on 21 March 2024, applicant advised respondent he viewed position as untenable and was

resigning with effect from 18 April 2024 – on 23 March 2024, applicant advised main reason for resignation was treatment by supervisor and lack of resolution – formal investigation initiated 4 April 2024 after applicant resigned – statement provided to investigation on 22 April 2024 – applicant later sought legal advice online before lodging a Form F1 with the Commission on 7 May 2024 – on 22 May 2024 applicant called Commission to follow up application and was informed he had lodged the incorrect form – applicant lodged correct Form F8 on same day – F8 substantively identical to previous F1 application – s.366(1) requires application be made within 21 days – Commission found applicant's employment ended on 18 April 2024 – to comply with timeframe application should have been made by 9 May 2024 – Commission considered whether F1 filed before 9 May 2024 constituted valid s.365 application – Commission held initial F1 filed within period prescribed by s.366(1) – considered whether F1 could be accepted having regard to the requirements set out at s.577(1)(a)-(b) and Fair Work Commission Rules 2013 (Rules) – considered Rule 6(1), that Commission may dispense with compliance of any provision at any point – Rules 8(2) and 8(3) provide that specific forms must be used for specific purposes, including F1 where no specific form is provided – Rule 8(5) requires that approved forms or documents "substantially in accordance with the approved form" be used – Commission found: "The effect of these rules when read together is that although [the applicant] was required to use Form F48 to lodge the application […] it was sufficient if the F1-Application was substantially in compliance with the Form F8" – Commission observed specific requirements in ss.585 and 586 with respect to procedural rules and amending or correcting documents – observed overlap in requirements between forms – noted applicant provided additional details about dismissal in F8, while the F1 did not refer specifically to dismissal – Commission found applicant's grounds to be "identical in terms" in both applications – Commission found no procedural errors with how application filed – noted applicant likely intended to make application under s.365, despite errors in application, noting evidence provided in both applications – held F1 constituted valid s.365 application – email received by applicant from Commission consistent with Rule 14(4) requirements – Commission noted: "There was no evidence to the contrary or indication that the Commission regarded the Form F1 as an inquiry or anything other than a valid application until [the applicant] called" – Commission allowed correction or amendment and waived Rules compliance to extent required under s.586 – if incorrect on previous conclusion, Commission also considered whether appropriate to grant additional time – respondent argued application made outside timeframe – claimed applicant resigned, rather than dismissed – applicant argued delay due to procedural confusion – submitted he should not be penalised for completing incorrect form – Commission satisfied reasons for delay were exceptional circumstances as defined at s.366(2) – Commission accepted applicant's evidence he was 'forced' to resign – noted there was limited material respondent contravened s.351 – before conducting conciliation conference or otherwise dealing with matter under s.368, Commission noted requirement to find dismissal occurred as established in [*Milford*] – Commission applied test set out in [*Bupa*] – applicant argued resignation forced by respondent's conduct – respondent denied applicant experienced discriminatory treatment – Commission found behaviour of supervisor "unreasonable and unacceptable" – found applicant dismissed within meaning of s.386(1)(b) – held, if required to determine jurisdictional objections, jurisdictional

objections dismissed – matter to be listed for conference.

Tomar v Swissport P/L

C2024/3342 [2024] FWC 2980
Wright DP Sydney 28 October 2024

**5** TERMINATION OF EMPLOYMENT – jurisdiction – statute bar – s.394 Fair Work Act 2009 – applicant employed by Department of Education for State of Victoria – letter sent by respondent to applicant on 2 August 2024 annulling probationary employment, terminating employment – applicant lodged annulment complaint on 15 August 2024 – applicant filed application for unfair dismissal remedy on 27 August 2024 – annulment complaint suspended by the Merit Protection Board (MBT) on 5 September 2024 – applicant withdrew annulment complaint on 13 September 2024 – respondent argued application for unfair dismissal remedy should be dismissed on basis applicant made application or complaint under another law relating to the dismissal pursuant to ss. 725 and 732 – law being clause 5.1.2 of *Ministerial Order 1388 – Teaching Service (Employment Conditions, Salaries, Allowances, Selection and Conduct) Order 2022* – Ministerial Order a legislative instrument as defined by *Subordinate Legislation Act 1994* (Vic) (SL Act) – applicant argued ss.725 and 732 did not apply as annulment complaint withdrawn – cited Explanatory Memorandum to the *Fair Work Bill 2009* and argued applicant will miss out on any remedy if respondent's jurisdictional objection not dismissed – firstly Commission considered whether annulment complaint related to dismissal – outcome sought by applicant in annulment complaint was to be employed and return to work – Commission found annulment complaint related to dismissal – secondly Commission considered whether annulment complaint was application or complaint under another law for purposes of s.732 – applicant argued Ministerial Order had purely administrative character and lacked legislative character – Commission held that provision or instrument could be a "law" for purposes of s.725 even if not piece of legislation made by Parliament – "The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases" [*Grunseit*] – s.26(2) of FW Act defines State or Territory industrial law, includes instruments made under a law in so far as instrument is of legislative character – Commission did not agree Ministerial Order purely administrative as its scope was broader than criteria listed in s.3(2) of SL Act which provides examples of instruments of purely administrative character – applicant argued Ministerial Order exempt from particular provisions of SL Act and is thus deprived of legislative character – Commission not persuaded by applicant's submission – Commission found Ministerial Order had legislative character and was legislative instrument for purposes of SL Act – legislative character assists proposition that it is law for purposes of s.732 but not determinative – Commission stated existence in relevant provision of remedy which has binding force imbues it with character of a law for purposes of s.732 – if granted, decision of MBT binding upon Department of Education – Commission found Ministerial Order is law for purposes of s.732 – thirdly Commission considered whether applicant allowed to pursue unfair dismissal application – Commission concluded that for purposes of ss.725 and 729, unfair dismissal application cannot be made if another

complaint relating to dismissal of employment exists at the time – first complaint must be withdrawn before second complaint is made – this approach consistently held by Commission – annulment complaint not withdrawn before unfair dismissal application made – application dismissed.

Troutbeck-Noy v Department of Education (State of Victoria)

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| U2024/10033 | | [2024] FWC 2811 |
| Redford C | Melbourne | 25 October 2024 |

## Other Fair Work Commission decisions of note

Appeal by "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) against decision of Colman DP of 18 June 2024 [[2024] FWCA 2260] Re Sublime Infrastructure P/L and Anor

ENTERPRISE AGREEMENTS – genuinely agree – ss.185, 604 Fair Work Act – appeal – Full Bench – appeal by Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) against decision to approve *Sublime Infrastructure P/L and CEPU – Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023-2027* (Agreement) – at first instance, Commission approved Agreement on 18 June 2024 – Agreement covered single employer, Sublime Infrastructure P/L (Sublime Infrastructure or employer) – voting conducted on 4 June 2024 involved 2 employees – application to approve Agreement made by Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) on 7 June 2024 – AMWU filed appeal on 9 July 2024 after members notified them of unexplained changes to pay rates and allowances, change of employer's name on pay slip from Sublime Air Site P/L (Sublime Air) for 10-16 June 2024 to Sublime Infrastructure for 17-23 June 2024 and new enterprise agreement on work app – AMWU sought permission to appeal and order to produce documents relating to bargaining process (order) – Full Bench made order on 9 August 2024 – employer declared that Sublime Infrastructure employed 2 employees and Sublime Air employed 29 employees at date of vote on 4 June 2024 – declared that Sublime Infrastructure employed 31 employees and Sublime Air employed 0 employees at date of order on 9 August 2024 – employer submitted they intended to establish a CEPU enterprise agreement because AMWU would not renegotiate a nominally expired enterprise agreement with another Sublime Group entity – submitted they did not intend to disadvantage any employees – employer and CEPU did not oppose permission to appeal being granted or appeal being upheld – Full Bench considered s.188 requirement that Commission must be satisfied enterprise agreement has been genuinely agreed to by employees – considered appropriateness of admission of further evidence on appeal [*Atkins*] – noted AMWU was not aware of bargaining until after Agreement was approved – noted employer chose to bargain for a new enterprise agreement to apply to only 2 employees – noted AMWU's members worked for a different Sublime entity at the time of bargaining and employees of that entity were transferred to employment of Sublime Infrastructure after Agreement was made – Full Bench held further evidence was capable of affecting approval by Commission at first instance and was appropriate to be admitted – permission to appeal granted – held that events demonstrated that agreement-making process lacked authenticity and moral authority [*One Key Workforce*] – noted that employer's conduct deprived bulk of employees to be covered by Agreement an opportunity to participate in bargaining or voting – held that if further evidence had been available at first instance, Commission could not have been satisfied that Agreement was genuinely agreed to under s.188 – Full Bench not satisfied that Agreement was genuinely agreed to by employees – further not satisfied that the 2 employees who voted on Agreement were sufficiently representative of employees to be covered by Agreement – appeal upheld – approval of Agreement quashed – application for approval of Agreement dismissed.

Appeal by Komeyui Management P/L against decision of Crawford C of 5 June 2024 – [[2024] FWC 1445] Re: Goonewardena

TERMINATION OF EMPLOYMENT – valid reason – evidence – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – appellant dismissed respondent on performance grounds – unfair dismissal application made – at first instance dismissal found to be unfair and order for compensation made – employer appealed the decision challenging finding of unfairness and the compensation order – appellant sought to submit fresh evidence in appeal – fresh evidence in the form of eleven declarations – appellant submitted evidence should be admitted as they did not have sufficient understanding of what was required at the hearing, and a language barrier meant their position was not adequately communicated and understood – respondent submitted evidence may lack authenticity, contained allegations never put to him and could not be relied upon without being tested – whether to admit new evidence considered – Full Bench observed appeals are not a second opportunity for an unsuccessful party to run their case – noted new evidence may be admitted under s.607(2) in limited circumstances only – may be admitted if it can be shown evidence could not have been obtained or adduced with reasonable diligence in the first instance; evidence is of such a high probative value there is a probability the result at first instance would be different; and evidence is credible [*Akins*] – Full Bench considered fresh evidence against factors – noted if credible, the fresh evidence would constitute material of probative value particularly on s.387(a) – Full Bench noted possibility that different result may then ensue, however determined this not probably so as unfairness assessment weighs all s.387 factors – finding of procedural unfairness made at first instance – Full Bench determined nothing in new evidence likely to disturb that finding – first instance finding capable of sustaining overall conclusion of unfairness – Full Bench noted new evidence not obtained or adduced with reasonable diligence for use in the first instance – some persons simply not called to give evidence at first instance – appellant's reasons for not gathering and submitting evidence was not sufficient to warrant exercise of s.607(2) discretion – directions in first instance were clear and parties had sufficient time to prepare, no adjournment requests were made – Full Bench considered potential language barrier – no interpreter was requested – in-person proceeding was not requested – some communication difficulty was noted however Full Bench satisfied appellant's case was expressed and understood in sufficiently clear English in the first instance – thresholds of conducting a fair hearing were met at first instance – held fresh evidence would not admitted by Full Bench in determining appeal – whether appealable error considered – appellant did not submit a specific appealable error – Full Bench took relevant first instance material into account – found appellant's first instance evidence fell short of establishing a sound, defensible or well-found reason for dismissal – no error in consideration and calculation of the compensation order – Full Bench considered errors in construction of the decision, primarily application of s.387(c) – subsection concerns the reason advanced at or prior to dismissal, not only a reason that is objectively valid – a narrow construction was evidently applied – narrow construction of s. 387(b) also applied – both eliminate from the fairness consideration – found although narrow construction was applied, the findings of fact were correct – Full Bench disagreed with decision in first instance concerning s. 387(e) – warnings given by employers to employees concerning underperformance or to improve performance are relevant considerations irrespective of them being accompanied by a specific statement that dismissal may be a consequence of failure to address concerns – weight of evidence in first instance was unclear – exposed the reasoning to potential error – Full Bench held no appealable error on the face of the decision – permission to appeal granted – construction and application of s.387 relevant – found it was not appropriate to admit fresh evidence – no appealable error, no redetermination – appeal dismissed – compensation previously ordered

immediately payable.

C2024/3839 [2024] FWCFB 425
Clancy DP Melbourne 8 November 2024
Anderson DP
Masson DP

Yates v Stephanie Muir Ridge

TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009 – applicant challenged dismissal from Director of Operations role with respondent – respondent provides home care and NDIS services – respondent objected on the ground applicant voluntarily resigned – respondent contended applicant resigned verbally and in text message – relationship between parties strained – applicant believed he and respondent had agreement they would become business partners – at that time of starting business there were insufficient funds to start company – applicant agreed to work at a lower rate to save the necessary funds – applicant suggested each time it seemed enough money had been saved, the money would disappear from the account because respondent had withdrawn the funds – respondent later increased her weekly pay – applicant sought equal pay to respondent, suggesting he did vast majority of work – respondent did not provide increase – applicant upset and sent text message reading: 'Will be making a report to fair work and contacting a lawyer today. There's a reason staff talk to me, not you. Good luck doing it by yourself.' – approximately hour later respondent advised staff applicant had resigned – respondent relied on conversation and text message, suggesting evidenced applicant's resignation – whether applicant dismissed considered – observed 'dismissal' occurs where person's employment terminated at their employer's initiative, or where person resigns but was forced to do so because of conduct, or course of conduct, engaged in by employer: s.386(1) – noted prior authorities on meaning of 'dismissed' [*Tavassoli*; *Gunther & Daly*] – found applicant did not resign for number of reasons – reasons included text message ambiguous as to resignation, applicant expressly told respondent he had not resigned, and considered applicant had put significant work into building business and entering partnership therefore unlikely to resign in these circumstances – held termination occurred at initiative of respondent – dismissal established – whether dismissal unfair considered – respondent suggested applicant unilaterally increased pay, constituting serious misconduct – Commission rejected proposition, noting respondent agreed to payments now disputed – also rejected contention applicant's post-dismissal conduct created valid reason – observed applicant felt betrayed by respondent – Commission found no valid reason for the Applicant's dismissal – other s.387 factors considered – held dismissal was harsh, unjust and unreasonable, and therefore unfair – remedy considered – found reinstatement not appropriate – evidence and submissions did not address compensation factors – unable to determine – remedy directions to be issued.

U2024/6365 [2024] FWC 2973
Dean DP Canberra 11 November 2024

Rodrigues v Anglican Community Services

TERMINATION OF EMPLOYMENT – misconduct – conflict of interest – ss.387, 394, Fair Work Act 2009 – applicant worked as a retirement village manager – respondent provided aged care services running a retirement village – village manager responsible for dealing with residents and managing the facility (such as gardening and maintenance) – prior to commencing as village manager there was concern about polarisation between different residents – village manager tasked with managing the differences and creating an inclusive cohort – tension within the workplace lead coordinator (the position directly below the village manager) to resign – village manager hired a new coordinator 'Ms B' – village manager and Ms B were in non-romantic relationship prior to Ms B commencing as coordinator – Ms B is a single

parent and more than one of her children have an autoimmune disease – Ms B's caring responsibilities meant she had to often be home or bring a child with her to work – three days after commencing coordinator role, Ms B informed applicant she was resigning due to caring responsibilities – prior to resignation applicant provided Ms B with letter outlining arrangements to help her manage her parenting requirements – respondent had policy requirements for when children were at retirement village – this included children would "not have any exposure to any clients or client-related materials" – evidence proved Ms B's oldest child participated in delivering mail and rubbish removal – respondent received complaints from residents regarding Ms B's children – respondent suspended applicant and conducted investigation into complaints – respondent provided applicant with list of 10 allegations – 1) did not declare conflict of interest during recruitment of Ms B – 2) making the workplace unsafe for Ms B by pursuing a 'personal friendship' with her despite being her manager – Ms B did not feel comfortable with applicant's approaches to her such as asking to watch a movie with her and her children on a weekend – 3) applicant failed to demonstrate appropriate boundaries with children when applicant authorised Ms B to bring children on site – this included requesting Ms B's child to complete tasks in the workplace, such as taking out the garage or delivering mail – respondent considered it was inappropriate for child to complete such tasks – 4) applicant failed to adhere to respondent's Child Safe Child-Friendly Organisation Policy – an example was allowing Ms B to have children accompany her on visits to client's homes – 5) failed to adhere to the respondent's flexible working arrangement process by not having HR approval, completed relevant form and document the length of the flexible working arrangement – 6) failed to follow lawful direction not contact Ms B when applicant was suspended – 7) applicant brought respondent into disrepute – 8) applicant amended minutes of a meeting without approval – 9) inappropriate workplace conduct towards respondent's clients by making unprofessional comments – 10) failed to bring relationship with Ms B to the attention of respondent and raise it as a conflict of interest – applicant responded to allegations during a meeting with respondent – respondent terminated applicant finding that applicant lacked insight in relation to his actions – applicant claimed respondent's examples did not demonstrate he engaged in 'serious misconduct' – applicant claimed he recommended someone he knew for the job because he was specifically asked to – applicant admitted to forming a personal relationship with Ms B – applicant claimed he was not aware of the flexible working arrangement policy and as Ms B's manager was empowered to give her permission to work from home – applicant claimed he complied with the child policy when he granted Ms B permission to bring her children to work – applicant also submitted respondent did not provide substantive evidence to support their claims – applicant claimed he had not been provided with procedural fairness – no prior disciplinary actions and dismissal had a profound impact on applicant causing financial hardship and distress – respondent submitted applicant had committed serious breaches of his duties as a manager – respondent submitted there were no issues of procedural fairness in applicant's dismissal – respondent submitted applicant was in a management role and committed serious breaches of his responsibilities – this included allowing Ms B's children to attend the retirement village whilst children were sick – allowing Ms B's children to become involved in various tasks on the premises without any regard to child safety, insurance concerns or residents' wellbeing – unliterally amending Ms B's employment conditions to allow her not attend retirement homes during afternoons – applicant's serious misconduct justified summary termination due to the wilful and deliberate nature of applicant's conduct – applicant though his actions would not become apparent to respondent – Commission preferred the evidence of respondent's witnesses over that of applicant's witnesses – found respondent had valid reason for dismissing applicant – found respondent's evidence demonstrated applicant sought a closer relationship with Ms B – found applicant established work from home arrangement due to his relationship with Ms B – this was despite Ms B being hired to be on site to engage with female and male residents alongside applicant – Commission critical of applicant's conduct to allow Ms B to bring her children to the retirement village when the children were sick – found applicant allowed children to attend the retirement home in breach of respondent's child policy – found applicant had not proactively identified and addressed risks required by child's safety policy – this included providing constant supervision to the children and ensuring children,

residents and respondent were not put at risk – Commission found applicant had not followed reasonable and lawful direction – held reasonable respondent expected more of applicant as a senior employee and was entitled to expect, loyalty, trustworthiness and honesty from applicant – found allegations made by respondent against applicant had actually occurred and demonstrated serious and wilful misconduct – applicant's claim of an exemplary record was rejected as Commission noted applicant actively hid his conduct to avoid respondent becoming aware of its existence – concluded respondent had valid reasons for applicant's dismissal – did not find applicant's dismissal was harsh, unjust or unreasonable – application dismissed.

U2024/5845 [2024] FWC 2137
Cross DP Sydney 14 November 2024

McDonald and Anor v Northern Rivers 4WD P/L

TERMINATION OF EMPLOYMENT – genuine redundancy – relationship breakdown – s.394 Fair Work Act 2009 – Ms McDonald's and Mr Phelp's employment ended on 27 May – applicants made applications for an unfair dismissal remedy – jurisdictional objection raised that both dismissals were genuine redundancies – Commission considered if consultation provisions in relevant award were complied with – held that as there was no consultation, dismissals were not genuine redundancies – Commission considered whether the dismissals were harsh, unjust or unreasonable – held that there was a valid reason: employer had decided to stop trading at the site at which the applicants worked and positions were therefore redundant – applicants submitted that employer's motivation to close the site was out of spite relating to marriage breakdown between directors – held evidence supported a reasonable business case for the closure of the site as it was not receiving funds – held applicants not notified of valid reason, no opportunity to respond – found there was a lack of human resources management expertise in favour of employer – found that dismissals were unreasonable and unfair due to procedural unfairness – Commission considered remedy – held that reinstatement inappropriate – Commission applied *Sprigg* – employment unlikely to have lasted for longer than two or three further days – held applicant's losses significantly mitigated by workers' compensation benefits – $960 less taxation compensation ordered for Ms McDonald – $1,080 less taxation compensation ordered for Mr Phelps.

U2024/6644 and Anor [2024] FWC 3017
Easton DP Sydney 30 October 2024

Taghizanjani v Harkola P/L

TERMINATION OF EMPLOYMENT – misconduct – direction – s.394 Fair Work Act 2009 – respondent family-owned produce supplier – applicant employed as nut roaster – applicant lodged unfair dismissal claim after employment terminated on 13 May 2024 – respondent submitted applicant refused reasonable direction to perform work duties – submitted applicant had breached workplace health and safety guidelines by being on mobile phone – applicant subject to workplace injury on 14 December 2023 – Operations Manager (OM) informed of applicant's injury and workers compensation claim – OM failed to inform Chief Operations Manager (COM) of injury and related claim – COM directed applicant to use tumbler machine on 10 May 2024 – tumbler machine required lifting 25 kilogram bags of nuts – applicant unable to complete directed work – applicant attempted to explain injury to COM – COM informed applicant could leave if applicant refused to complete directed work – on 13 May 2024 COM directed applicant to complete work outside of usual duties – applicant refused – COM asked applicant to leave work premises – advised applicant would receive written notice of termination from OM – OM did not provide written notice of termination – applicant returned to workplace on 16 May 2024 – COM informed applicant no longer employed – applicant provided letter of termination dated 13 May 2024 – reasons for termination were repeated use of mobile phone during work hours, miscommunication with management, and refusal in completing required work – Commission considered whether dismissal was harsh unjust or unreasonable –

found termination letter referred to multiple reasons for termination while only one event immediately preceded applicant's dismissal – respondent submitted evidence of written warning for unauthorised use of mobile phone dated 8 July 2021 – written warning not signed by applicant – applicant denied receiving written warning – Commission found applicant unable to complete directed work due to workplace injury – OM knew of workplace injury – reasonable for applicant to assume COM knew of workplace injury – Commission found direction by COM to operate tumbler machine unreasonable – applicant's refusal to operate the tumbler machine not unreasonable – use of mobile phone did not warrant more than a verbal warning – Commission not satisfied valid reason for dismissal – held respondent did not offer procedural fairness to applicant – applicant experiencing greater difficulty finding new employment due to workplace injury – Commission satisfied dismissal was harsh unjust and unreasonable – held dismissal unfair – remedy considered – reinstatement inappropriate – order for compensation appropriate – amount to be determined after receiving further evidence and submissions.

U2024/5853 [2024] FWC 3153
Wright DP Sydney 14 November 2024

Samad v. Phosphate Resources Ltd T/A Christmas Island Phosphates

TERMINATION OF EMPLOYMENT – remedy – reinstatement inappropriate – compensation ordered – ss.390(3), 392 Fair Work Act 2009 – applicant resides and worked on Christmas Island – prior decision found applicant unfairly dismissed by respondent [[2024] FWC 2868] – remedy not yet determined – parties unable to agree remedy following two conferences – parties invited to make written submissions – applicant contended reinstatement appropriate – respondent argued reinstatement inappropriate due to irreparable working relationship and because Commission found valid reason for termination – Commission considered precedents [*Ngyuen*], [*O'Connor*] and [*Colson*] to determine if respondent's reliance of loss of trust and confidence in applicant sufficient opposition against reinstatement – found although some at company based away from Christmas Island had lost trust and confidence in applicant, were unlikely to cross paths should reinstatement occur – found unreasonable to return applicant to workplace where they may interact with co worker applicant accused of taunting and bullying, given limited size of Christmas Island site and workforce – considered impact of applicant's age, service and employment prospects and respondent's unjustness, relying on policies not satisfactorily rolled out to workforce – did not change finding – found reinstatement inappropriate – compensation considered – Commission determined weekly renumeration rate of applicant was $2,832.74 derived from consideration respondent's payroll records – assessing compensation, considered all circumstances of case, using [*Sprigg*] formula – estimated due to applicant's health concerns, would have worked additional twelve months before retirement – found applicant would have earnt $147,300.92 – likely applicant would find re-employment difficult although not impossible, especially likely well known fact on Christmas Island applicant was dismissed – deducted $16,388.00 for likely earnings – neither party made submission for contingencies – Commission observed applicant had health concerns – may have been relevant in period between issuing of decision and end of anticipated employment period – found deduction of 15% appropriate – Commission proposed amount of 10% be added reflect applicant's twenty year tenure with respondent's company – Commission remained consistent with past practice, left compensation amount payable as gross figure with calculation of taxation to respondent – found applicant's failure seek work between dismissal and hearing on 30 September 2024 merited deduction of 50% – compensation figure now $99,327.71 – made no deduction for viability of respondent – found applicant's conduct contributed to dismissal – compensation figure reduced by two-thirds to $33,076.13 – found amount of $33,076.13 under compensation cap, calculated to be $73,651.24 – no adjustment required by Commission – noted that amount excluded shock, distress, humiliation or hurt – Commission ordered respondent pay applicant $33,076.13 within fourteen days of order.

Cairns v Oceaneering Australia P/L

TERMINATION OF EMPLOYMENT – misconduct – ss. 387, 394 Fair Work Act 2009 – applicant employed as advanced non-destructive testing technician – applicant was dismissed for alleged serious misconduct, being unparticularised humiliation and intimidation of other employees – allegations of misconduct denied by the applicant – applicant argued his actions were part of his lawful union activities – the respondent argued valid reason for dismissal for breach of policy – alleged breaches concerned applicant's conduct in sending a spreadsheet of employee names, numbers and union membership status ("Yes" or blank) to a WhatsApp group – respondent further considered such conduct had effect of targeting or marginalising employees – the applicant contended his actions were part of his duties as an delegate of the union and the list was circulated to track union density – Commission rejected the respondent's assertion that list contained personal or confidential information and held that there was no breach of policy in that regard – Commission observed table did not state whether people were not members of union, noted where cell blank the person's union membership status was unknown – Commission found applicant did not marginalise or target any employee of the respondent in the WhatsApp chat – held there was no valid reason for the termination of the applicant's employment because none of the respondent's allegations were substantiated – observed applicant was not given the particulars of the allegations against him – held if there had been a valid reason the applicant was not properly notified of the reason for his termination – found respondent failed to particularise all allegations and that the applicant was not given the opportunity to respond – Commission concluded the applicant's dismissal was unfair – remedy considered – reinstatement not sought by Applicant and not appropriate remedy due to applicant's family circumstances and the nature of the FIFO work – compensation an appropriate remedy – determined the applicant would have remained in employment for another 3 years – applicant partially mitigated loss and obtained other employment at a lesser salary – amount calculated in excess of high-income threshold – Commission ordered total amount be reduced to the compensation cap – Commission ordered respondent pay the applicant an amount of $83,750.

U2024/3475 [2024] FWC 2611
Johns C Melbourne 28 October 2024

Brown v Port Produce P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – ss.368(1), 394 Fair Work Act 2009 – applicant, a regular and systematic casual employee, lodged application for unfair dismissal remedy on 10 April 2024 – respondent raised jurisdictional objection that applicant had 'walked off job' on 20 March, and if he had resigned, he was not forced to do so – events of 20 March – applicant considered his work was completed, with no more to do by 9.00am – applicant told his manager, Brunsdon, he would be leaving for the day, which Brunsdon was unhappy about – applicant gave evidence he also mentioned to Brundson his arm was sore – Brunsdon gave evidence that he responded to applicant that there was plenty of work to do, to which applicant replied 'there's not anything to do, I'm going' – applicant then queried Brunsdon about a previously discussed pay increase, and Brunsdon suggested applicant would only find the amount requested at another job – applicant then left premises – Brunsdon gave evidence that he considered applicant had resigned – events of 21 March – while driving to work, applicant had issue with his vehicle, and was unable to contact Brunsdon due to a broken phone – applicant decided to go to medical centre and was issued medical certificate for one-week period – applicant then drove to work, and gave evidence that he intended to explain to Brunsdon he needed time off due to his arm being sore – Commission accepted evidence that anger of Brunsdon was high when applicant attended work, and that a heated

exchange occurred in which Brunsdon asked applicant to hand in his work keys, which applicant did – applicant then took belongings and left premises – consideration – whether resignation was forced is a jurisdictional fact [*Bupa*] – termination at initiative of employer involves conduct (or course of conduct) engaged in by employer as the principal constituting factor leading to termination; there must be sufficient casual connection between the conduct and resignation such that it was 'forced' – conduct must have been intended to bring the employment relationship to an end or have that probable result – considerable caution should be exercised in treating resignation as other than voluntary – objective analysis of employer's conduct is required [*ABB Engineering*] – Commission noted that in final moments of 20 March, applicant and Brunsdon were still discussing pay increase, and no return of keys for premises was requested – there was no direction for applicant to remove personal belongings from premises – on 21 March, personal belongings were removed – held applicant did not resign on 20 March, and applicant was terminated on 21 March – considered whether dismissal was harsh, unjust or unreasonable – noted applicant was attempting to explain required absence from work due to injury, but Brunsdon was convinced he had resigned the day before – held Brunsdon acted out of anger, impatience and frustration – held no valid reason – held applicant was unfairly dismissed – remedy – applicant was injured from 21 March, the day of dismissal, hence as a casual would not have received any remuneration from wages if not dismissed – applicant's worker's compensation claim was accepted, and he was in receipt of weekly payments from 4 April – held no compensation to award applicant on account of remuneration he would have likely received if not dismissed – pursuant to *Food, Beverage and Tobacco Manufacturing Award 2020*, applicant would have received superannuation on workers' compensation payments for up to 52 weeks – held applicant to be awarded superannuation from period 4 April until 11 November, pending evidence of further workers compensation payments.

U2024/4187 [2024] FWC 3109
Hunt C Brisbane 11 November 2024

Concentrix Services P/L v Association of Professional Engineers, Scientists and Managers, Australia, The

INDUSTRIAL ACTION – suspension of protected industrial action – endangering life – s.424 Fair Work Act 2009 – applicant engaged by Commonwealth Government to provide the National Relay Service (NRS) to people who are deaf or find it hard to hear or speak to hearing people on the phone – the Video Relay Service (VRS) provides interpreter services as part of the NRS to deaf people who sign and understand Auslan – a portion of the calls to the NRS involve interpreting calls to emergency services – on 20 September 2024, respondent gave applicant notice under s.414 of the Act that its members would take 13 forms of protected industrial action commencing 7:00am (AEST) on 26 September 2024 – on 25 September 2024 applicant applied to under s.424 to terminate threatened, impending or probable protected industrial action because, if taken, it would endanger the life, the personal safety or health, or the welfare, of the population or part of it – protected action taken for two hours on 26 September until APESMA agreed to advise its members to stop taking action at a conference before the Commission at 9am – application amended on 4 October 2024 to seek a two month suspension of the protected action – five forms of protected action remained in dispute at hearing on 10 October 2024 – partial bans on (i) delaying taking Video Relay Service (VRS) calls until after two minutes and 30 seconds and (ii) extending welfare (long call) breaks from 10 to 15 minutes were of most concern to the respondent – application could not be determined within the 5-day statutory timeframe at s.424(3) – on 27 September, the Commission issued an interim order in accordance with s.424(5) suspending the protected action until the application was determined [PR779724] – two applicant and three respondent witnesses were cross-examined – applicant's Operations Manager and Director People Solutions gave evidence that the VRS receives approximately 4,500 calls each month, three calls between January and August 2024 were logged as a genuine emergency, the VRS is regularly used to access mental health services, unclear how many deaf people use the VRS exclusively, the combined impact of

delaying answering calls and extended breaks would be more delayed or unanswered calls, limited supply makes engaging more Auslan interpreters impossible and that the applicant does not have any other practical ability to mitigate the effects of the action – the interpreters gave evidence for the respondent that the VRS website already advises users that it's better not to use the VRS to make emergency calls, there are other options available including the NRS dedicated Triple Zero service, one interpreter had dealt with only 6 Triple Zero calls in 27 years and that the service often does not have 16 interpreters needed to fully roster a shift – parties agreed that the protected action is threatened, impending or probable and that members of the deaf community who are users of the VRS are a 'part of the population' – whether protected action threatens or would threaten the life, the personal safety or health, or the welfare, of VRS users that rely on it to access medical, legal and government services and emergency situations – applicant submitted each application under s.414 requires consideration of all the circumstances [*Serco*], it is not necessary for protected action to threaten to endanger life to be suspended or terminated under s.424 [*VHIA*], delayed NRS wait times during the two hours of protected action on 26 September confirmed that anticipated impact to services, and longer periods of protected action would exponentially exacerbate the impact – respondent submitted that *VHIA* also establishes orders cannot be issued under s.414 where the protected action is a 'mere inconvenience' to VRS users, which it suggests was case here – Commission found applicant could take mitigating actions including posting an on-screen notice when users call explaining the action and expected delays, sending users the same information by email with a link and notifying users without a registered email by post – protected action would threaten to endanger the lives, personal safety or health, or welfare of the VRS users, particularly those with low literacy levels without the mitigation – Commission satisfied none of the 5 disputed forms of protected action were a threat to VRS users based on APESMA's undertakings to modify some actions and the applicant taking appropriate mitigating steps – application dismissed.

B2024/1265 [2024] FWC 3013
Hunt C Brisbane 30 October 2024

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Fogo v Boeing Aerostructures Australia P/L

CONDITIONS OF EMPLOYMENT – flexible working arrangement – nexus between request and circumstances – s.65 Fair Work Act 2009 – applicant engaged by respondent as a Quality Assurance Planner (QAP) – applicant lived alone and was concerned that upcoming retirement would negatively impact his mental health – request for flexible working arrangement to work from home on Mondays and Fridays to transition to retirement – applicant submitted that there was a nexus between him transitioning into retirement and the request [*Quirke*] – applicant cited a 2023 decision of the Commission which found there was a sufficient nexus between being over 55 and seeking to accommodate work life balance approaching retirement [*CCL Label*] – respondent submitted that application was not valid because there was no sufficient nexus between the applicant being over 55 and working remotely on Mondays and Fridays – respondent submitted there was no evidence before Commission about which it could make a finding about applicant's mental health – respondent submitted that accommodating request would negatively impact efficiency, productivity and customer service – submitted applicant's circumstances were distinguished from those in *CCL Label* – submitted that applicant's QAP role required onsite collaboration – Commission found there was no objective rational connection between applicant's age and his flexible working request – found that applicant failed to advance evidence to support conclusion that his mental health would be negatively impacted by not being a work – Commission found there was a real potential for respondent to suffer significant negative impacts and costs – applicant's role required onsite collaboration with team members – applicant was one of two QAPs – refusal based on reasonable business grounds – application dismissed for want of jurisdiction.

C2024/3056 [2024] FWC 3037

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Singh v Imagine Hotels and Resorts P/L

TERMINATION OF EMPLOYMENT – misconduct – dishonesty – ss.385, 387, 394 Fair Work Act 2009 – applicant commenced full-time work with respondent as housekeeping manager on 25 July 2022 – became permanent part-time from July 2023, with additional casual shifts from November 2023 – applicant in Australia on student visa acquired with an Indian passport – expiration of passport imminent – applicant requested leave to travel to Hong Kong, where he was born, to obtain Hong Kong Special Administrative Region of China (HKSAR) passport, and amend details of student visa in order to stay in Australia – asserted he requested leave of three to five weeks – respondent claimed applicant requested three weeks leave, which was granted – applicant left Australia on 13 January 2024 – returned on 23 February 2024, including stopover in Bali from 16 February 2024 – claimed administrative delays in obtaining HKSAR passport caused extended absence – parties met on 26 February 2024 – applicant sent same-day dismissal letter – paid out leave entitlements but no payment in lieu of notice – respondent claimed applicant's failure to adequately inform them of delays and travel itinerary, despite attempts at contact, amounted to repudiation of contract justifying summary dismissal – respondent discovered further alleged conduct after dismissal – alleged wilful dishonesty from applicant in failing to disclose overseas holiday during 2023, for which he missed a shift, and theft of marijuana left by hotel guest – whether applicant's dismissal harsh, unjust or unreasonable considered – observed summary dismissal occurred on premise of serious misconduct – found insufficient evidence validating termination on basis of 2023 overseas holiday – proof on balance of probabilities regarding marijuana theft not met, therefore not justifiable reason for dismissal [*Briginshaw*] – observed dismissal justifiable on basis of applicant's failure to sufficiently update respondent regarding travel and return to work – noted applicant not wilfully dishonest – found conduct did not satisfy definition of serious misconduct per r.107 *Fair Work Regulations 2009* – found dismissal of applicant without notice disproportionate, therefore harsh under s.387(b) – held applicant unfairly dismissed per s.385(b) – reinstatement inappropriate – compensation considered per s.390(1) – Sprigg formula applied [*Bowden*] – respondent requested compensation inclusive of part-time hours only – found applicant would have remained employed for a further 6 months on part-time basis with additional casual shifts – compensation ordered to the amount of $4156.00, inclusive of casual shifts, minus applicable taxation.

U2024/3072 [2024] FWC 3090
Perica C Melbourne 8 November 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

## 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.

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