FWC Bulletin

6 February 2025 Volume 2/25 with selected Decision Summaries for the month ending Friday, 31 January 2025.

Contents

First applications to vary ECEC Multi-Employer Agreement Approved

28 Jan 2025

The first applications to vary the Early Childhood Education and Care Multi-Employer Agreement to add employers and their employees to the coverage were approved on 28 January 2025. This has added an additional 33 employers to the coverage of this agreement.

To see all the employers now covered by this agreement visit our Early Education and Care supported bargaining webpage.

Minimum wage increases for aged care employees in the Nurses Award 2020

03 Feb 2025

From 1 March 2025, there will be an increase to minimum wages and changes to the classification structure for enrolled nurses and registered nurses covered by the Nurses Award 2020.

The changes come as part of the Work value case – nurses and midwives major case and the now concluded Work value case – aged care industry major case.

Increases to minimum wages

In a decision issued on 6 December 2024 [2024] FWCFB 452, an expert panel for pay equity in the care and community sector determined to increase minimum wages in the award that apply to:

- enrolled nurses working as aged care employees
- registered nurses working as aged care employees

The award defines an aged care employee as:

> 'an employee engaged in the provision of:
>
> - services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility; or
> - services for an aged person in a private residence.'

The expert panel determined that for these direct care workers the increases were justified for work value reasons. The panel had previously found that the work of aged care employees was historically undervalued because of assumptions based on gender.

The increases will take effect from the first full pay period starting on or after **1 March 2025**.

The amount of the increase for enrolled nurses and registered nurses varies according to an employee's current classification. The minimum rates of pay are increasing for almost all registered nurse classifications. Further increases will apply from the first full pay period starting on or after **1 October 2025** and **1 August 2026**.

New employee classification structures

The increases to minimum wages will apply as part of new employee classification structures for enrolled nurses and registered nurses working in aged care.

The previous 5 level pay classification structure for enrolled nurses working in aged care will change to one single level, with one minimum wage.

The classification structure for registered nurses working in aged care has also changed – from 27 pay points spread across 5 levels to 8 pay points spread across 5 levels.

Updated award

The updated version of the award will be published on 28 February 2025. You can also view the determination varying the award to see the changes before they take effect.

Employees other than aged care employees

These changes only affect enrolled nurses and registered nurses who are aged care employees under the award. Changes to the award for other employees, including to classification structures and minimum wages, are being considered in the Work value case – nurses and midwives matter.

Further information

The Fair Work Ombudsman has more information on the changes and how they may affect you. See on the Ombudsman's site: Changes to minimum pay rates in the Nurses Award .

Read:

- 6 December 2024 decision of the expert panel: Decision [2024] FWCFB 452
- 15 March 2024 decision of the expert panel: Decision [2024] FWCFB 150
- Determination varying the Nurses Award 2020, operative 1 March 2025
- Work value case – nurses and midwives
- Changes to minimum pay rates in the Nurses Award

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 month6 ending Friday, 31 January 2025.

1 GENERAL PROTECTIONS – identity of employer – ss.365, 368 Fair Work Act 2009 – appeal – Full Bench – Civmec Construction & Engineering P/L (appellant) applied for permission to appeal first instance jurisdiction decision – at first instance Commission dealt with appellant's jurisdictional objection it was not employer of Mr Minchin (respondent) – appellant claimed respondent's employer was a wholly owned subsidiary, Multidiscipline Solutions P/L (MSP) – in this context appellant claimed no dismissal for purposes of s.365 – Commission found MSP was respondent's employer – Commission concluded it needed to determine the "fact of the [respondent's] purported dismissal" and dismissed appellant's jurisdictional objection – appeal lodged – appellant claimed Commission erred in fact and law (1) appellant was not respondent's employer, erred in finding this was not a complete defence to application – (2) incorrectly interpreted s.590 to inform itself in relation to "any matter before it in such manner as it consider appropriate" and defining "matter" as whether it possessed authority to deal with the application under s.368 – (3) not dismissing the application when Commission determined appellant was not respondent's former employer – respondent claimed there was no error in first instance reasons and permission to appeal should be refused – Full Bench found appeal raised a novel question concerning the Commission's jurisdiction to deal with s.365 applications – appeal raised questions regarding proper construction of s.365 and had potential implications as to when the Commission's jurisdiction has been properly invoked under s.365 – Full Bench noted Commission must deal with s.365 applications under s.368 – Commission may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion – where disputes cannot be resolved by conciliation, the Commission must issue a certification (s.368(3)) – s.365 requires an applicant to be a person that has been dismissed (first criterion) and allegation made dismissal was in contravention of Part 3-1 addressing general protections (second criterion) [*Coles v Milford*] – Full Bench noted appellant's submissions raised question as to whether there is an additional prerequisite to a valid s.365 application; whether applicant must also name the correct employer as a respondent in order to make a valid s.365 application – Full Bench rejected this argument finding s.365 did not require an applicant name his or her employer as a respondent in order to make a valid application – noted "the dispute" is identified at a high level of generality by reference to a person's dismissal which is alleged to have been a contravention of Part 3-1 – per *Shea*, the Federal Court held 'the Act does not prescribe the content, essential inclusions or level of deal of the application which may be made to FWA under s.365' – Full Bench also noted s.365 did not prevent errors regarding the failure of an applicant to name the correct employer in their application from been remedied by later amendment [*Visionstream*] – held if

respondent received a s.368(3) certificate he would be able to apply to substitute MSP for the appellant or add MSP as an additional respondent in Federal Court proceedings – Full Bench found it was not necessary to determine whether first instance decision was correct in conclusion as to identity of respondent's employer – noted genuine confusion as to the employer's identity by respondent supported conclusion that the correct identification of the employer is unlikely to have been intended to be a prerequisite for a valid s.365 application – Full Bench considered a similar case where an applicant had named multiple respondents for a s.365 application – per *Kirkham*, no jurisdictional impediment under ss.365 and 368 from an applicant identifying persons as parties to the relevant dispute in addition to their employer – Full Bench noted Commission has a broad discretion when exercising its powers under s.368 – did not accept s.365(a) requires dismissal by respondent to the application or that application is itself not valid because it failed to name respondent's former employer – held Commission did not rely on s.590 as a separate source of power to determine the s.365 application – Commission at first instance identified that the matter with which the Commission left to deal with was dispute in accordance with s.368 – Full Bench concluded permission to appeal should be granted, but dismissed the appeal.

Appeal by Civmec Construction & Engineering P/L against decision of Beaumont DP of 20 August 2024 [[2024] FWC 2204], Re: Minchin

C2024/5873 [2025] FWCFB 2
Gibian VP Sydney 8 January 2025
Clancy DP
Roberts DP

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2 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – power to inform – ss.392, 394, 604 Fair Work Act 2009 – permission to appeal – Full Bench – at first instance Commission found appellant café unfairly dismissed respondent employee and ordered compensation – compensation order later varied to allow instalment payments – appellant's stay application refused – appellant dismissed employee believing to have complied with Small Business Fair Dismissal Code (Code) – Commission considered four matters under s.396 and found employee's dismissal was inconsistent with Code and was harsh, unjust and unreasonable – Commission found employee likely to have continued employment for further 18 weeks – appellant's first appeal ground was that Commission failed to account for effect of a compensation order on the viability of the employer's enterprise under s.392(2)(a) by failing to direct appellant to adduce evidence of its financial circumstances – second appeal ground was that Commission erred in finding dismissal inconsistent with Code because it believed employee's behaviour constituted serious misconduct justifying summary dismissal – third appeal ground was alleged discrimination against appellant's director due to his gender, cultural background, and lack of English proficiency – appellant's director contended gender discrimination arose from Commission not finding employee verbally abused him and contended there was difficulty to think a woman perpetrated verbal abuse against a man – appellant contended racial/cultural discrimination arose from Commission's observation of 'cultural issues' from employee's evidence, and Commission erring by not considering employee's witness statement which was not replied upon by her in hearing – Full Bench found appellant's additional

evidence of financial records not provided at first instance incapable of demonstrating arguable case of appealable error – appellant submitted public interest in granting permission to appeal arose from difficulties small business owners face, the issue of women verbally abusing men, and relevance of cultural background to a Commission decision – Full Bench found reasons given did not demonstrate granting of permission to appeal would be in public interest, raised no issues of importance or general application – Full Bench found s.392(2) leaves open to Commission to determine weight or influence of considerations – Full Bench found Commission had expressly considered s.392(2) matters and effect on employer's viability – was open to Commission to not discount compensation on basis of effect on employer's viability noting no evidence regarding viability other than appellant director's assertion it could not afford compensation – Full Bench determined Commission not further inquiring as to state of employee's business not arguable case of appealable error – Full Bench noted administrative decision-makers not generally obliged to conduct further inquiries to supplement material before them [*SZIAI*; *DUA16*] or direct a party to their case's omissions – Full Bench noted an administrative decision-maker's failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could constitute failure to undertake review required by statute or could cause decision to exceed legal unreasonableness threshold – Full Bench considered such failures rare and exceptional such that mere failure to enquire does not equate to error – Full Bench noted Commission has some inquisitorial processes in which a failure to make an obvious inquiry about an easily ascertainable critical fact might constitute error – Full Bench noted *Fair Work Commission Rules 2024* reflect adversarial manner of unfair dismissal proceedings with respect to lodging application responses, evidence and submissions – Full Bench found Commission not required to independently inquire into each factor impacting quantum for an order for compensation in each case, and can ordinarily consider matters on basis for parties' material – lack of material as to employer's financial state beyond assertion of inability to pay compensation did not require Commission's further inquiry – open to Commission to request additional material but Commission entitled to rely on material presented – no arguable case of error on basis of Commission not inquiring further – appellant's second appeal ground merely asserted allegations the Commission found unsubstantiated at first instance after considering parties' evidence in detail – no reasonably arguable case of errant factual findings – not in public interest to permit appeal to revisit factual findings – appellant's third appeal ground asserted Commission's gender, language and cultural prejudice solely because employee's evidence accepted and based on generalised assertions about Commission's interactions with employee during hearing – open to Commission to make reference to 'cultural issues' employee raised as influencing dismissal – Full Bench noted Commission found any cultural considerations could not affect application's disposition – alleged error of disregarding a filed witness statement not admitted into evidence of no substance – permission to appeal refused.

Appeal by Gonva Group P/L against decision of Thornton C of 13 June 2024 [[2024] FWC 1522] Re: Lina

C2024/4469 [2025] FWCFB 4
Gibian VP Sydney 13 January 2025
Dean DP

3 TERMINATION OF EMPLOYMENT – remedy – reinstatement – ss.394, 604 Fair Work Act 2009 – appeal – Full Bench – application to appeal first instance decision reinstating first instance applicant (Macnish or first instance applicant) – Macnish, a cabin crew member, consumed one glass of prosecco at employer's Christmas party – he later volunteered to fill in on 'red-eye' flight from Perth to Sydney that night – shift commenced approximately seven and a half hours after prosecco consumed, in breach of employer's 'Eight Hour Rule' (Eight Hour Rule) in that alcohol was consumed less than eight hours prior to the shift sign-on time – Eight Hour Rule was set out in employer's manual entitled 'Volume A4: Cabin Crew Policy and Procedures Manual' (the A4 Manual) – A4 Manual itself referred to another policy document known as 'Volume SSM6: Drug and Alcohol Management Program' (the DAMP Manual) – Commission found DAMP Manual did not contain or articulate blanket prohibition on drinking eight hours prior to duty – Commission found Macnish had breached an aspect of employer's policies containing the Eight Hour Rule, but concluded no valid reason for his dismissal – Commission held Macnish understood the concept of not consuming alcohol eight hours prior to commencing duty was guideline rather than rule and was not unreasonable for him to have understood policy in that manner – Commission considered other relevant matters, including Macnish had self-reported error, treatment of other employees who had breached employer's drug and alcohol policies, and Macnish's employment record – Commission concluded dismissal was unfair and ordered Macnish be reinstated with continuity of employment but without backpay – employer filed a notice of appeal on 29 August 2024 which contained lengthy grounds of appeal – in relation to permission to appeal and public interest this included that (1) primary judgement raised issue of whether an employer in safety critical aviation industry could dismiss employees for breaches of fundamental safety instructions; and (2) judgment was unjust and counter intuitive – in relation to grounds of appeal this included 4 grounds which were: (1) employer alleged that in finding there was no valid reason for dismissal by way of Macnish breaching documented safety critical obligation, namely the Eight Hour Rule, Commission improperly considered, and/or placed weight on subjective understandings, interpretations and recollections of applicant (and others) about the Eight Hour Rule, rather than objective content and training records about the Eight Hour Rule – employer submitted logical and ordinary approach of Commission when determining what training had been received by employees should involve an analysis of training records, rather than reliance on recollections of employees – Full Bench concluded employer's submissions mischaracterised decision of Commission and misunderstood nature of considerations that were relevant to question of whether there was valid reason for dismissal – Full Bench held it was necessary for Commission to examine nature and circumstances of contravention of the Eight Hour Rule by first instance applicant – ground 1 rejected – (2) employer alleged in finding there was no valid reason for dismissal, Commission erred in finding that because the Eight Hour Rule was recorded in A4 Manual, and not DAMP Manual, it was reasonable for Macnish to have regard only to DAMP Manual – Full Bench determined Commission found correctly in light of documentary evidence, that DAMP Manual intended to consolidate employer's policies on management of drugs and alcohol and it applied to all employees

– Full Bench held it was not unreasonable that Macnish examined document which purported to be a consolidation of policies with respect to management of drugs and alcohol in order to ascertain requirements employer imposed with respect to alcohol consumption – ground 2 rejected – (3) employer alleged Commission made significant errors of fact when found Macnish 'self-referred' his breach of the Eight Hour Rule and found the Eight Hour Rule was a guideline – employer submitted Commission erred by taking into account he came forward and disclosed contravention of the Eight Hour Rule to his credit because it was only once Macnish became aware he was about to be caught he owned up – Full Bench observed it was open to Commission to find first instance applicant self-reported, and to treat that as a relevant matter in considering whether dismissal was harsh, unjust or unreasonable – ground 3a rejected – employer clarified in oral submissions that it contended, in ground 3b, Commission erred by accepting first instance applicant's evidence as to his understanding of Eight Hour Rule – Full Bench determined there was no basis for Full Bench to interfere with Commission's finding that first instance applicant genuinely believed the Eight Hour Rule was a guideline in circumstances in which those findings were likely to have been influenced by Commission having seen and heard Macnish give evidence – Full Bench did not agree with employer submission that Commission erred in finding it was reasonable for Macnish to have understood the Eight Hour Rule to be a guideline – Full Bench stated it could not detect any error in Commission's findings that Macnish genuinely understood the Eight Hour Rule to be a guideline and that it was reasonable for him to do so – ground 3b rejected – (4a) employer alleged Commission erred in exercising discretion to reinstate Macnish, in that the order to reinstate was unreasonable and/or unjust having regard to Commission's positive findings that he breached an important safety rule – Full Bench did not agree with employer's submission which relied on a contention that it was unjust or unreasonable for applicant to be reinstated in circumstances in which he had breached an important safety rule – Full Bench observed safety is of critical importance in aviation and employer appropriately said it adopted a strong stance with respect to safety, however, whether the decision to reinstate Macnish was within the range of permissible legal outcomes must be considered in light of the whole of circumstances – Full Bench determined it was open to Commission to order reinstatement – (4b) employer contended Commission failed to give adequate consideration to a range of matters raised which weighed against a decision to reinstate Macnish – Full Bench did not agree and observed the ground had no merit – Full Bench observed ten matters were set out in ground 4b which alleged Commission failed to consider, or give adequate reasons for rejecting, and most matters concerned allegations made with respect to first instance applicant that employer either did not seek to substantiate by leading any evidence or, having put forward such evidence as it could uncover, were found to be unsubstantiated – Full Bench observed the assumption underlying employer's submissions was, when considering reinstatement, Commission was required to separately consider and give weight to its alleged concerns in relation to Macnish's conduct even where Commission had found those concerns to be without foundation or employer had not attempted to substantiate its concerns – Full Bench determined the assumption was unsound and must be rejected – Full Bench noted Commission considered allegations and found they were either not supported by any evidence or made findings allegations were not substantiated –

finally, employer contended Commission failed to consider, or give adequate reasons for rejecting, its concerns that Macnish would engage in repeated conduct of a similar nature to the breach of the Eight Hour Rule and was safety risk, that he was dishonest about his understanding of the Eight Hour Rule and that the decision would convey to cabin crew that they could breach the Eight Hour Rule and 'get away with it' – Full Bench observed Commission did not fail to consider those matters and Commission in first instance concluded that the decision would not cause staff to think they could 'get away' with breaches of drug and alcohol policies, but rather assisted in staff clearly understanding employer's policies – Full Bench held there was no error in Commission's approach to question of reinstatement – grounds 4a and 4b rejected – permission to appeal granted – appeal dismissed.

Appeal by Virgin Airlines Australia PL against decision of Commissioner Lim of 13 August 2024 [[2024] FWC 2154] Re: Macnish

C2024/5936 [2025] FWCFB 6
Gibian VP Sydney 14 January 2025
Saunders DP
Slevin DP

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4 TERMINATION OF EMPLOYMENT – merit – reinstatement – ss.387, 394 Fair Work Act 2009 – applicant employed as a works officer dealing with construction and maintenance works in rural and urban settings – role involved operating various trucks and machinery – in 2020 applicant suffered a workplace injury – applicant was prescribed medicinal cannabis for management of pain – respondent was informed by applicant of his use of medicinal cannabis – applicant's medical practitioner advised respondent on request that it was safe to perform usual duties while taking medicinal cannabis – applicant subsequently subjected to random drug test under the respondent's drug and alcohol policy – applicant screened as non-negative for cannabinoids – applicant stood down pending an investigation – respondent engaged an independent medical practitioner to assess whether applicant could safely perform his role – independent medical practitioner conducted assessment and determined the applicant was not fit to perform safety critical duties while taking medicinal cannabis – recommended a reassessment for fitness for work be appropriate if the applicant found an effective alternative treatment – respondent issued letter to applicant advising it was considering termination of employment due to inability to perform inherent requirements of role – ASU representative responded advising it would be premature to terminate without allowing time to pursue alternate treatment – respondent terminated applicant's employment on basis of inability to perform inherent requirements of role – respondent considered there was no evidence of alternate medication or an expected timeframe to reassess fitness for duty – Commission held the evidence did not support a finding that the applicant would not be fit to work without effective pain management – Commission acknowledged the applicant informed respondent about his use of medicinal cannabis but found respondent was not informed about a switch in medication to one that contained THC – Commission held the failure to notify of the use of THC breached the respondent's drug and alcohol policy – Commission held the applicant was not notified of the valid reason for termination because the applicant was notified of a different

reason – Commission considered other relevant matters including length of service, the applicant's workplace injury and that the applicant worked in a regional area – Commission found matters raised in mitigation can be taken into account in whether dismissal harsh, unjust or unreasonable [*Hilder*] – Commission held applicant acted without malevolence in failure to comply with drug and alcohol policy – applicant did not appreciate significance of switch to medicinal cannabis containing THC – Commission held respondent proceeded to termination without considering terms of its drug and alcohol policy – held the respondent was not open to giving applicant a chance to resume duties while not using medicinal cannabis – took into account applicant's good character – determined the dismissal was not proportionate to conduct in question and the dismissal was harsh, unjust and unreasonable – Commission found reinstatement was appropriate remedy with order for lost remuneration of 31 weeks' pay – Commission also made orders to restore continuity of service, including annual leave and long service leave accruals – Commission critical of the ASU legal team and their decision to withdraw from representing the applicant in the proceedings, particularly as applicant was not literate and case had considerable merit – described decision of ASU legal team to leave one of its members 'high and dry' as a disgrace – suggested ASU legal team 'should perhaps reflect upon the reasons for its existence'.

Mills v Glamorgan Spring Bay Council

U2024/7491		[2025] FWC 116
Clancy DP	Melbourne	15 January 2025

Other Fair Work Commission decisions of note

Application by the Mining and Energy Union re Rix's Creek

CONDITIONS OF EMPLOYMENT – regulated labour hire arrangement – s.306E Fair Work Act 2009 – Full Bench – application for regulated labour hire arrangement order (RLHAO) made by MEU on 11 June 2024 – proposed RLHAO to apply to employees of WorkPac Mining P/L (WorkPac or Respondent) performing work at mine site in Rix's Creek, NSW, operated by Rix's Creek P/L (Rix's or host) – WorkPac accepted in written submissions dated 24 September 2024 that a RLHAO could be made, but contended order could and should only apply to relevant WorkPac employees that work roster arrangements permitted under host's agreement – WorkPac submitted employees engaged at host categorised in two groups: those working Monday to Friday on 8-hour and 10-minute roster pattern contemplated by cl 7.1 of host's agreement, and those that can work weekend roster that employees of host are prohibited from working – WorkPac contended first group of employees may be subject to RLHAO, second group may not – WorkPac opposed making of order including second group of employees on following grounds: no jurisdiction for Commission to make order extending to or operating to cover those employees, and additionally or alternatively, it would not be fair or reasonable to make such order within meaning of s.306E – draft RLHAO proposed by MEU would simply cover all WorkPac employees who perform work at Rix's Creek Mine, and who would be covered by Rix's agreement if employed by host – host communicated position that it supports RLHAO in terms sought by WorkPac and made brief submissions in support – MEU submitted absence of specific rostering arrangements provided for in host employment instrument does not preclude making of RLHAO covering all WorkPac employees performing work for host, and making such an order would be consistent with purposes and policy considerations underlying enactment of Part 2-7A of Act – Full Bench considered firstly whether to make RLHAO at all, noting no party disputed that requirements in s.306E were met – Full Bench satisfied MEU is an employee organisation entitled to represent industrial interests of employees of WorkPac working at host as well as employees of host, therefore entitled to apply for RLHAO –

Full Bench satisfied for purposes of s.306E(1) that WorkPac supplies own employees to perform work at host, and that host agreement applies to all employees undertaking work at host site – as a consequence, agreement would apply to employees of WorkPac supplied to host if they were directly employed by host – Full Bench satisfied for purposes of s.306E(1A) that: no evidence WorkPac involved in matters relating to performance of work by its employees at host, evidence indicated host directs, supervises and controls work of supplied WorkPac employees, supplied WorkPac employees operate same equipment as host employees and are subject to same policies, and procedures as host employees, no evidence that WorkPac is or will be subject to industry or professional standards or responsibilities relating to work of its supplied employees and work undertaken by supplied employees not of specialist or professional nature – Full Bench satisfied performance of work by WorkPac supplied employees not for provision of service but for supply of labour, per s.306E(7A) – Full Bench considered s.306E(2), not satisfied that it was not fair and reasonable in circumstances to make RLHAO at least with respect to WorkPac employees undertaking work in accordance with rostering arrangements in host agreement – Full Bench similarly noted lack of submissions in relation to matters specified in s.306E(8) – Full Bench accordingly satisfied Commission required by s.306E to make RLHAO to at least cover WorkPac employees undertaking work in accordance with rostering arrangements in host agreement – Full Bench considered WorkPac contention; whether Commission has jurisdiction to make RLHAO with respect to all WorkPac employees supplied to host – cl 7.1 of host agreement provides for different rostering arrangements, cl 7.2 states that casual employees will not be engaged on roster (c) (7-day, rotating day and night 12 hour roster) and (permanent) production employees can only work roster (a) (Monday to Friday, 8 hours and 10 minutes roster) – WorkPac contended exercise of s.306E(1)(b) therefore has no implication to WorkPac employees working at host mine other than those working in accordance with roster (a) – Full Bench observed s.306E(1)(b) requires Commission be satisfied that covered employment instrument applying to regulated host would apply to employees 'if the regulated host were to employed the employees to perform work of that kind' – Full Bench noted reference to 'work of that kind' referred to nature of work performed by employees, rather than conditions of employment associated with that work – Full Bench found WorkPac to be making unsupported assumption that hypothetical exercise required by s.306E(1)(b) incorporated the hours of work, or roster pattern, of the employees concerned; noted it asks only whether an employee employed by regulated host would be covered by industrial instrument applicable to that host – Full Bench observed that a production employee supplied by WorkPac to work at Rix's mine would in fact be covered by Rix's agreement, and that restrictions on rostering imposed by cl 7 do not alter coverage of agreement but regulate rostering arrangements applicable to covered employees – WorkPac made submission of difficulty in calculating 'protected rate of pay' for employee working roster pattern not contemplated by agreement – Full Bench rejected this submission, noting clauses in agreement and mechanism for disputes in relation to protected rate of pay for regulated employees in Part 2-7A – Full Bench observed WorkPac's construction of s.306E(1)(b) to be inconsistent with purpose of statutory scheme, which is ultimately to ensure that practice of sourcing employees through labour hire employee cannot be used to undercut rates of pay prescribed in host's industrial instruments – Full Bench observed that if WorkPac's construction were correct, labour hire companies could use rostering arrangements to avoid making of a RLHAO, and that no 'strained construction' of s.306E(1)(b) [*Newcastle City Council*] needed to reject WorkPac submissions – Full Bench considered WorkPac submission in alternative, whether not fair and reasonable to make order – in support of contention, WorkPac submitted: firstly, host and its employees have chosen to regulate relationship precluding production work by permanent employees on terms other than on the Monday to Friday Roster, with no "bargain" as to what rate of remuneration should apply if production work is undertaken on a weekend roster – second, there is no reason under objects and purposes of Part 2-7A to disturb "bargain" which WorkPac and its employees have reached via the terms of the WorkPac agreement, it would be unfair to do so – third, WorkPac again relies on submission of no basis in the host agreement to calculate protected rate of pay for production work on anything other than roster (a) – Full Bench noted under s.306E(2) prohibiting Commission from making RLHAO if satisfied

it is not fair and reasonable in all circumstances to do so, with regard to matters in s.306E(8) to extent they have been pursued in submissions – Full Bench rejected each submission of WorkPac, were not satisfied that it was not fair and reasonable in all circumstances to make order in form sought by MEU – Full Bench held it was required by s.306E to make RLHAO sought by MEU, applicable to all WorkPac employees supplied to host – operative date of order to be made consistent with s.306E(9)(e)(i), as no party made submitted otherwise – RLHAO similarly to not contain date on which it will cease.

C2024/3832 [2025] FWCFB 12
Gibian VP Sydney 17 January 2025
Saunders DP
Grayson DP

Appeal by Kurtev against decision of Commissioner Johns of 26 August 2024 [[2024] FWC 2374] Re. KCB Australia P/L and Anor

GENERAL PROTECTIONS – extension of time – medical condition – ss.336(1)(a), 365, 604 Fair Work Act 2009 – appeal – Full Bench – first instance decision found appellant lodged general protections dismissal claim out of time – appellant experienced health deterioration up to dismissal from role – appellant had consulted with doctors, symptoms inconclusive – 17 July 2024 appellant diagnosed with Parkinson's disease – immediate treatment commenced – Commission at first instance found appellant's circumstances were not exceptional circumstances – Full Bench considered reason for delay in appellant's application – found Commission erred by misconstruing reason for appellant's delay; Commission believed appellant could have made application prior to receiving diagnosis – Full Bench found Commission failed to take into account s.366(2)(a) mandatory consideration – first instance decision quashed – Full Bench satisfied exceptional circumstances taking into account each matter per s.366(2)(a)-(e) – allowed further period for appellant make application – accepted appellant needed to receive diagnosis prior to lodging application – during 21 day period following appellant's dismissal, appellant received medical treatment for recent and sudden health deterioration – appellant contended reasons given for dismissal corresponded with symptoms of health condition – Full Bench found formal diagnosis not given until after time limit – found appellant acted promptly after receiving diagnosis – appellant accepted he did not dispute dismissal immediately after it occurred – Full Bench unsurprised as appellant needed diagnosis to determine if he had dismissal claim – respondent did not allege any prejudice caused by application delay – Full Bench stated absence of prejudice not determinative of exceptional circumstances but was consideration for overall assessment – found on available information appellant's claim had some merit; weighed in favour of exceptional circumstances, only marginally so – Full Bench had no material regarding fairness between appellant and others in like position – considered appellant's circumstances highly unusual – satisfied of exceptional circumstances – most significant feature was appellant could not be expected to file claim he was dismissed as result of Parkinson's disease symptoms until received medical diagnosis – permission to appeal granted and appeal upheld – first instance decision quashed – further period granted to make application to 24 July 2024 – application remitted to first instance Member to manage.

C2024/6489 [2025] FWCFB 13
Gibian VP Sydney 21 January 2025
Saunders DP
Slevin DP

Application by the United Nurses of Australia

CASE PROCEDURES – confidentiality – open justice – s.18 Fair Work (Registered Organisations) Act 2009; s.594 Fair Work Act 2009 – application to become registered as organisation filed by United Nurses of Australia (UNA) – application opposed by multiple other organisations including Australian Nursing and Midwifery

Federation (ANMF) – UNA filed written response to objections (Response Document) – ANMF sought confidentiality (non-publication) order over Response Document – suggested Response Document contained serious allegations regarding ANMF – interim non-publication order issued pending this determination – Commission thoroughly considered power to make non-publication orders – noted s.594 power to make non-publication orders potentially conflicts with open administration of justice – open justice described as venerable and indispensable part of justice system [*Farrell*] – open justice also ensures public confidence in justice system – observed s.594 power grants Commission different standard than courts at common law concerning confidentiality orders – test is satisfaction of desirability of confidentiality order, not of necessity [*Whittaker*] – question simply whether Commission satisfied desirable to make non-publication order because of confidential nature of document or evidence or for any other reason – recognised principle of open justice significant in context and while Commission cannot undertake judicial role, many functions are carried out in quasi-judicial manner involving process akin to judicial process – courts previously observed consequence of open justice was untested embarrassing or potentially damaging allegations may become public [*John Fairfax Group P/L*] – mere embarrassment or distress not sufficient to justify non-publication order [*Mac v Bank of Queensland*] – whether to make non-publication order over Response Document considered – ANMF contended unparticularised allegations of fraud and similar serious misconduct in Response Document should not be made without reasonable basis – suggested non-publication order would ensure protection against serious allegations of impropriety – Commission noted prior recognition that serious allegations made in document would not, of itself, justify non-publication order – Commission queried whether circumstances of this matter and nature of allegations warranted different course – described UNA's Response Document as lengthy, rambling and intemperate – Commission stated it understood why ANMF made non-publication order application, but nevertheless stated not persuaded to make order over Response Document – Commission highlighted five significant considerations – first, UNA's registration application potentially of interest to large number of employees – consequently undesirable proceeding be conducted in manner other than fully transparent – second, Commission noted ANMF's submission close to relying on embarrassment or reputational damage; not previously regarded as sufficient justification – third, allegations in Response Document relate to conduct of industrial organisation and its officials – industrial organisations and officials will be subject of criticism from time to time as is reality for any democratic body – fourth, adequacy of ANMF representation to members relevant to question posed by s.19(1)(j) RO Act – fifth, various allegations made in Response Document not sufficient to justify non-publication order in light of other considerations – held not desirable to make non-publication order – Commission proposed direction granting ANMF leave to file further response to correct any assertions in Response Document – interim order revoked.

D2024/8 [2025] FWC 239
Gibian VP Syndey 28 January 2025

Lambert v Ducala P/L trading as Northpoint Toyota

TERMINATION OF EMPLOYMENT – incapacity – inherent requirements – harshness – ss.352, 387, 394 Fair Work Act 2009 – applicant commenced full-time employment as trades assistant – role required, per Position Description, applicant hold driver's licence – applicant involved in motor vehicle accident while working due to medical episode on 20 April 2024 – licence automatically suspended for 6 months in accordance with South Australian law until 20 October 2024 – reinstatement of licence to be considered by licencing authority, contingent on applicant furnishing certification from medical professional confirming fitness to drive – respondent granted applicant leave without pay while applicant sought diagnosis and recovered – parties met where applicant advised, in absence of diagnosis, he would be fit to drive at conclusion of 6 month period – requested alternate work arrangements put in place – respondent unable to find suitable position – unable to contact applicant for previously agreed upon review – show cause notice sent – parties met, respondent requested applicant consider resigning as unable to confirm ability to drive, therefore

unable to fulfil duties – following consideration applicant confirmed he would not resign – applicant dismissed on 22 August 2024 – provided two weeks' pay in lieu of notice – whether dismissal valid per s.387(a) considered – observed determining valid reason for dismissal based on capacity to perform inherent requirements of the job [*Neeteson-Lemkes*], not modified role [*J Boag*], as proffered by applicant – found dismissal valid as holding a driver's licence an inherent requirement of job – whether dismissal harsh on basis it was premature considered – applicant requested consideration under s.352 precluding a dismissal occurring due to a temporary absence stemming from illness or injury, limited to 3 months per r.3.01(5)(i) *Fair Work Regulations 2009* – observed if an absence from work exceeds 3 months, it requires assessing the likelihood of returning to duties within the short to medium term [*Shortland*] – regulation applied in assessment despite applicant not being on personal leave as prescribed by r.3.01(2) *Fair Work Regulations 2009* – applicant asserted dismissal at 4 months, considering potential reinstatement of driver's licence at 6 months, unreasonable – found applicant's absence caused considerable disruptions to respondent's operations and reinstatement of driver's licence at 6 months not assured – found respondent afforded applicant procedural fairness and did not dismiss applicant prematurely – observed while other employers may have waited longer before dismissal, respondent open to act when it did – Commission does not stand in shoes of employer and decide what it could or should have done [*Miller*] – found dismissal not harsh, unjust or unreasonable – application dismissed.

U2024/10865 [2025] FWC 27
Anderson DP Adelaide 6 January 2025

Arachchi v Adecco Industrial P/L

CONDITIONS OF EMPLOYMENT – casual employment – utility – s.66M Fair Work Act 2009 – applicant commenced employment as casual business analyst on 23 June 2023 – on 19 September 2024, respondent informed applicant about respondent's requirement to assess applicant's eligibility for casual conversion – applicant informed not eligible as not working regular pattern of hours in preceding 6 months – applicant raised dispute, requested internal review on 20 September 2024 – applicant's position became redundant on 15 November 2024, employment ceased – on 27 November 2024, applicant applied to Commission to deal with casual conversion dispute – at this point, no response from respondent regarding internal review – conference held between parties at Commission on 20 December 2024 – Commission observed casual conversion dispute application made after employment ceased, invited parties to make submissions regarding jurisdiction and utility – applicant submitted respondent did not have lawful or reasonable grounds under FW Act to refuse conversion – submitted application within jurisdiction – argued redundancy did not extinguish rights applicant had prior to termination – regarding utility, applicant submitted matter significant as applicant's rights on redundancy would have been greater if converted – respondent submitted application fell to be dealt with under pre-amended s.66M of FW Act as application concerned dispute of "continuing casual employee" – second, at time of application applicant not employed by respondent – third, fair work instrument applied to applicant and applicant failed to utilise dispute resolution procedure in that instrument – respondent submitted no meaningful remedy could be ordered, therefore no utility in proceeding matter – Commission rejected respondent's first argument as Commission has jurisdiction to deal with casual conversion dispute in pre-amended s. 66M of FW Act – held that pre-amended provisions at s.66M of FWC Act had the meaning of dispute between employee and employer at time application made – Commission agreed with respondent's second jurisdictional objection as no employment relationship existed between parties at referral of dispute – no jurisdiction existed to deal with dispute – not necessary to deal with respondent's other objections – while not required to do so, Commission provided further reasons to show no utility in dealing with dispute – remedies sought by applicant could not be meaningfully ordered, declaration of terms sought by applicant could have no practical or meaningful effect, only courts with judicial powers can make binding declarations as to past rights – Commission stated even if empowered to do so, would be inappropriate to make declaration sought by applicant as could

materially compromise Commission's charter, to exercise multiple jurisdictions efficiently and justly to all applicants and respondents, if proceedings were conducted to opine on rights that may or may not have existed at earlier stage – application dismissed.

C2024/8544 [2025] FWC 72
Anderson DP Adelaide 9 January 2025

Merry v Swisstec Investment Holdings

TERMINATION OF EMPLOYMENT – termination at initiative of employer – resignation – s.394 Fair Work Act 2009 – jurisdictional objection, applicant not dismissed – applicant joined Board of the respondent in 2020 – offered and accepted a contract of employment in December 2022 – September 2023, applicant acknowledged in an email to the Board members the company's financial issues, including being a month behind on salary payments (including applicant's) – 10 October 2023 applicant resigned as a director of respondent – stated in resignation he was resigning from the 'board of directors and any other subsidiaries I am a director of' – respondent believed the resignation was as a director and as an employee – applicant maintained he remained employed by respondent and continued to work in the business – two former directors of respondent gave evidence that applicant remained an employee after 10 October 2023 – 6 November 2023 applicant wrote to respondent regarding non-payment of salary since August 2023 and unpaid expenses claims from May 2023 – follow up emails were sent on 13 November 2023, 12 December 2023 and 31 January 2024 – respondent replied on 12 December 2023 that the 'matter is not being ignored' and that they would contact the applicant – no further correspondence or communication from the respondent directed to applicant – 26 February 2024 applicant sent an email summarising his work for the last six months and asked respondent advise what his new focus should be – no response from respondent – 19 March 2024 the applicant sent an email resigning – the applicant had been given no work by the respondent and had not been paid his for six months, nor had expense claims been reimbursed – whether the applicant was dismissed is a threshold issue in an unfair dismissal application – noted two elements to s.386(1) definition of dismissal per *Bupa* – applicant submitted he was within the second limb, that he resigned but was forced to do so because of conduct or a course of conduct engaged in by the respondent – applicant submitted the non-payment of salary and lack of reimbursement, failure to provide directions regarding duties to be performed and lack of communication by the respondent was a course of conduct that forced his resignation – respondent rejected this argument and sought to characterise the applicant's 10 October 2023 resignation as a resignation from the Board and as an employee – Commission held it was not a resignation from both positions – the resignation email made no reference to resigning from his position as an employee – Commission was satisfied the 19 March 2024 resignation was forced as a result of the employer's conduct and that the applicant had no effective or real choice but to resign – held applicant was dismissed within the meaning of s.386(1) – uncontested that the respondent is a small business – s.388(1) applies to small business employers – dismissal not consistent with the Small Business Fair Dismissal Code – Commission considered s.387 – found dismissal was harsh, unjust and unreasonable – applicant was unfairly dismissed – found reinstatement is not appropriate – compensation appropriate – found applicant would have remained employed for two months – compensation reduced as applicant failed to take reasonable steps to mitigate loss – respondent ordered to pay $15,750 gross.

U2024/4032 [2025] FWC 58
Masson DP Melbourne 8 January 2025

Conicella v MSS Strategic Medical and Rescue P/L T/A MSS

TERMINATION OF EMPLOYMENT – valid reason – misconduct – emergency – ss.385, 387, 394, 397, Fair Work Act 2009 – applicant engaged as an emergency response supervisor at a mine site – following fire emergency call, applicant drove vehicle

113km per hour in a 60km limited area and 90km per hour in a 60km limited area – respondent's client withdrew applicant's site access – respondent terminated applicant's employment on the grounds of frustration of contract and serious misconduct – application for unfair dismissal remedy – Commission considered that there was a valid reason for the dismissal – applicant gave evidence he elected to drive while a paramedic emergency officer (PEO) was getting dressed – gave evidence he was unaware whether PEO was wearing seatbelt and was operating handheld radio while driving – gave evidence he had not been trained as an emergency driver and it was normally the PEO's job to drive – gave evidence that he had been advised through the radio that there was no threat to human life and that fire had been extinguished – Commission found that applicant should have been aware of strict speed limits on site – considered applicant's conduct unacceptable for someone in his position, particularly given recent fatality on site due to another vehicle exceeding speed limit- Commission accepted evidence applicant declined an alternative job offer after respondent's client revoked site access – Commission found applicant was notified of reason for dismissal – applicant issued letter detailing allegations and was provided opportunity to respond – after declining alternative job offer, applicant issued with termination letter – in considering other relevant matters, Commission did not consider 20 months service to be a lengthy period of service, particularly where applicant had breached site policy a month prior – unreasonable for applicant to drive at high speeds given passenger was getting dressed – applicant was advised there was no threat to life and no fire – Commission did not accept that possible reignition of fire amounted to an emergency situation – Commission satisfied that dismissal was not harsh, unjust or unreasonable – Commission noted that if it had found that the dismissal was unfair, reinstatement would have been inappropriate given that applicant's site access was revoked – if it had found dismissal was unfair, Commission would not have ordered financial remedy given that applicant held a second job in breach of his contract with respondent – application dismissed.

U2024/10687 [2025] FWC 169
Dobson DP Brisbane 17 January 2025

Australian Rail, Tram and Bus Industry Union v Transdev Sydney P/L t/a Transdev Sydney, Great River City Light Rail P/L

CASE PROCEDURES – correction of error – protected action ballot order – ss. 586, 602 Fair Work Act – application by Australian Rail Tram and Bus Industry Union, NSW Branch (RTBU) to correct Protected Action Ballot Order (PABO) and associated decision issued on 8 May 2024 – PABO made in relation to bargaining for an enterprise agreement for employees working on Light Rail Services operated by either Transdev Sydney P/L (Transdev Sydney) or Great River City Light Rail P/L (Great River) (together, Employers) – RTBU listed Transdev Sydney only as employer on PABO application – PABO made in relation to employees of Transdev Sydney only – on 16 July 2024 Employers advised RTBU that Notices of Protected Industrial Action dated 11 and 15 July did not comply with s.414 – on 21 July 2024 Employers advised RTBU that only Transdev Sydney employees could take protected industrial action in accordance with PABO and industrial action taken by Great River employees had not been authorised by PABO – RTBU applied to correct PABO and associated decision to include Great River to ensure that industrial action taken by Great River employees would be protected industrial action – RTBU submitted that they were unaware that Great River was involved in bargaining and failure to include both employers in PABO application was an inadvertent error – submitted that if error had been drawn to Commission's attention initially, PABO would have been made correctly – submitted that failure to make correction meant Great River employees would be deprived of right to take action under PABO – Employers contented that application was in substance an application under s.603 rather than s.602 – submitted that RTBU sought a variation expressly prohibited by s.603(3)(f) – submitted that s.602 was not capable of permitting retrospective addition of a separate and distinct legal entity to application, decision or order – submitted that orders sought do not fall within ambit of s.602 because there was no obvious error, defect or irregularity to correct – submitted that neither mandatory precondition identified in s.443(1) had been met in

respect of Great River – submitted that even if Great River was added to PABO application by way of s.602, Commission could not make any retrospective finding to satisfy requirement in s.443(1)(b) – finally, submitted that requirement in s.440 to provide a copy of PABO to employer did not occur with respect to Great River and s.441(2) prohibited Commission from determining any PABO application unless this step has occurred – Commission considered 'slip rule' [Robometrics] and [Esso] – Commission held that given error was identified well after closing date of ballot, application under s.447 or s.448 was not possible and application under s.603 was not available -considered when s.602 can be relied upon to overcome requirements of Division 8 FW Act to retrospectively amend PABO [Elyard] – held that omission of employer from PABO application is significant given that Transdev Sydney and Great River employ different cohorts of employees covered by proposed agreement – held that although managing director is same for both entities, it was reasonable for him to believe on plain reading that PABO was only intended to cover employees of Transdev Sydney only – found that requirements of s.440 were not met with respect to Great River – found that Commission does not have jurisdiction to make a PABO in relation to Great River because of s.441(2) – noted that circumstances different to those in *Elyard* – found that s.602 cannot be relied upon by RTBU to overcome requirements of Division 8 to retrospectively amend PABO – declined to make corrections.

ADM2024/6 [2025] FWC 83
Wright DP Sydney 9 January 2025

Martins v Wallace Medical Systems P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – resignation – ss.386(1), 394 Fair Work Act 2009 – applicant alleged forced resignation from respondent's company – contended this was unfair dismissal – respondent claimed applicant's departure consistent with Small Business Fair Dismissal Code – applicant covered by Professional Employees Award 2010 – applicant protected from unfair dismissal – applicant's salary and superannuation unpaid over extended period – respondent provided evidence suggesting its viability was impacted by dispute with ATO -applicant discussed employment concerns with respondent – applicant formally resigned citing lack of wage payment on same day – applicant proposed working for respondent as independent contractor, contingent being paid outstanding entitlements, to improve likelihood of being paid owed entitlements – applicant sent letter of demand requesting immediate payment outstanding wages, annual leave, superannuation – respondent replied same day, immediate payment impossible – applicant noticed LinkedIn advertisement for similar, lower paying position to replace her role – respondent contended advertised position not comparable with applicant's former role – Commission considered whether applicant resigned in heat of moment or forced to resign after employer's conduct [*Bupa*] – found no heat of moment resignation – considered if resignation forced [*Tao Yang*] – found when applicant's employment ended she had not been paid for two months, nor paid superannuation for more than a year – continued working for respondent's company for two months when realised not being paid – observed fundamental aspect of employment contract is employee compensated via wages for labour – applicant's original contract specified payment on the 30th day each month – while respondent's new advertisement indicated it never intended applicant's dismissal, did not overcome fact applicant unpaid for some time – applicant's resignation letter indicated sole reason for resignation was respondent's failure to pay wages – found applicant dismissed per s.386(1)(b) – found Small Business Fair Dismissal Code irrelevant – found respondent did not hold valid reason for dismissal at the time of applicant's forced resignation – found no evidence regarding size of respondent's enterprise impacted procedures followed effecting applicant's dismissal – dedicated HR team absence was no impact on respondent's procedures – found dismissal unreasonable – held applicant unfairly dismissed – considered remedy – reinstatement inappropriate – considered compensation – unable to determine whether compensation order would affect respondent's business viability – no adjustment made for applicant's length of service – found applicant would likely work at company another six weeks – satisfied

applicant took reasonable steps to mitigate loss incurred following dismissal – no adjustment for income likely have been earnt by applicant – short time between dismissal and decision issued – calculated compensation [*Sprigg*] – found applicant would have received $18,462 if not dismissed plus $2,163 superannuation – applicant unemployed since dismissal – no deduction made for monies earnt – whole anticipated period employment passed – no deductions for contingencies – no deductions for other employment or post termination earnings – no deduction regarding applicant's misconduct as there was none – respondent ordered to pay applicant $18,642 subject to tax and $2,123 as superannuation within 14 days of decision.

U2024/10019 [2025] FWC 24
Wilson C Melbourne 3 January 2025

Gao v Royal Crest Blinds P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – remedy – s.394 Fair Work Act 2009 – applicant employed as blind installer – respondent small business with seven employees – applicant's employment terminated on 16 October 2024 – unfair dismissal application filed – applicant alleged termination occurred after carer's leave request was made a day prior – respondent argued reason for dismissal was due to applicant's poor workmanship, being regularly late for work, not documenting jobs as requested and poor customer interaction – timing of dismissal due to applicant not attending work – respondent's discovery of negative review from client about applicant and applicant's failure to apologise was "the last straw" – respondent raised jurisdictional objection that dismissal was consistent with Small Business Fair Dismissal Code (SBFDC) – Commission found applicant was summarily dismissed for failure to attend work – noted respondent did not seriously contend applicant engaged in serious misconduct – respondent had no genuine belief that applicant's conduct was sufficiently serious to justify immediate dismissal on reasonable grounds – held dismissal not consistent with SBFDC – jurisdictional objection dismissed – held applicant was unfairly dismissed – no valid reason for dismissal – respondent's reason was prejudiced arising from frustration that applicant had taken legitimate leave – applicant not notified of reason for dismissal – applicant not afforded opportunity to respond nor any discussion relating to dismissal – respondent gave applicant written warning on 15 July 2024 for poor work performance – however reason for dismissal not related to work performance – remedy considered – reinstatement not sought – compensation appropriate [*Sprigg*] – applicant would have remained employed for a further month – monies earned since termination deducted – amount discounted by half for performance issues – compensation of $2,526.00 plus superannuation of $290.49 awarded – remedy granted.

U2024/12660 [2025] FWC 63
Redford C Melbourne 17 January 2025

Nagy v ProQuest Recruitment P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – labour hire – s.394 Fair Work Act 2009 – applicant commenced as casual labour hire worker with respondent (ProQuest) in 2015 -applicant worked exclusively on assignment to Sigma HealthCare (Sigma) for 37.5 hours per week – in July 2024, applicant mistakenly swapped labels on boxes, resulting in wrong deliveries – ProQuest phoned applicant on 21 July 2024 advising that Sigma requested her removal from site and that her assignment had ended – ProQuest advised she remained employed and it would seek other employment for her – applicant regarded this as terminating her employment – unfair dismissal application filed – Commission required to consider (1) whether applicant was dismissed, (2), if so, whether dismissal was unfair, and (3) if so, whether a remedy should be ordered – whether applicant was dismissed – ProQuest submitted the termination of applicant's assignment was consistent with applicant's employment agreement, and that applicant's employment relationship continued –

applicant contended that each new client assignment created a new employment contract, and that ProQuest's termination of assignment was the termination of the employment relationship – Commission held the employment agreement as a whole did not support contention of an ongoing employment relationship despite termination of assignment – whether the employment relationship between a labour hire company and its employees subsists between placement with clients depends on contractual arrangements and factual matrix – an employment relationship ends when an assignment ends if, under that contract, each assignment commences a new employment relationship [*WorkPac]* – employment agreement was explicit that employment ends on termination of assignment – agreement fell into abeyance pending reassignment – ProQuest's phone call was not evidence of ongoing employment relationship – held applicant was dismissed – whether dismissal was unfair – Commission recognised ProQuest had no contractual basis to question Sigma's instruction to remove applicant – despite this, Commission found ProQuest's lack of resistance to a direction that would end applicant's eight year employment relationship 'remarkable,' and that it should have attempted to secure applicant's ongoing employment – held dismissal was unreasonable – remedy – Commission has discretion to order remedy – applicant was unable to perform inherent requirements of the job as Sigma would not accept her services – ProQuest had no contractual right to refuse Sigma's instruction – any loss of applicant stemmed from Sigma's instruction to ProQuest – applicant had no entitlement to be paid while not performing services, even if ProQuest attempted to influence Sigma to change its position – compensation would be punitive, not compensatory – applicant did not suffer loss for which ProQuest should be held responsible – held not appropriate to order a remedy in respect of unfair dismissal.

U2024/8784 [2025] FWC 78
Sloan C Sydney 10 January 2025

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Websites of Interest

Department of Employment and Workplace Relations - https://www.dewr.gov.au/workplace-relations-australia - provides general information about the Department and its Ministers, including their media releases.

AUSTLII - www.austlii.edu.au/ - a legal site including legislation, treaties and decisions of courts and tribunals.

Australian Government - enables search of all federal government websites - www.australia.gov.au/.

Federal Register of Legislation - www.legislation.gov.au/ - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

Fair Work Act 2009 - www.legislation.gov.au/Series/C2009A00028.

Fair Work (Registered Organisations) Act 2009 - www.legislation.gov.au/Series/C2004A03679.

Fair Work Commission - www.fwc.gov.au/ - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

Fair Work Ombudsman - www.fairwork.gov.au/ - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

Federal Circuit and Family Court of Australia - https://www.fcfcoa.gov.au/.

Federal Court of Australia - www.fedcourt.gov.au/.

High Court of Australia - www.hcourt.gov.au/.

Industrial Relations Commission of New South Wales - www.irc.justice.nsw.gov.au/.

Industrial Relations Victoria - www.vic.gov.au/industrial-relations-victoria.

International Labour Organization - www.ilo.org/global/lang--en/index.htm - provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission - www.qirc.qld.gov.au/index.htm.

South Australian Employment Tribunal - www.saet.sa.gov.au/.

Tasmanian Industrial Commission - www.tic.tas.gov.au/.

Western Australian Industrial Relations Commission - www.wairc.wa.gov.au/.

Workplace Relations Act 1996 - www.legislation.gov.au/Details/C2009C00075

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