FWC Bulletin

1 May 2025 Volume 5/25 with selected Decision Summaries for the month ending Wednesday, 30 April 2025.

Contents

New resources about unfair deactivation

02 Apr 2025

We have a new 2-minute video about unfair deactivation.

The video explains what deactivation is, who may be eligible to make an unfair deactivation claim, and what remedies are available if they do.

It answers some common questions and is made to help everyone understand these new rights.

Visit www.fwc.gov.au/deactivation to access the new animation and information on this topic.

Gender-based undervaluation – priority awards review decision published

16 Apr 2025

The Expert Panel for pay equity in the care and community sector has issued its initial decision in the Gender-based undervaluation – priority awards review (the Review). The Review considered whether making changes (variations) to certain classifications and minimum wage rates in 5 priority awards was necessary on work value grounds to remedy potential gender-based undervaluation.

The Expert Panel has found that:

- pharmacists covered by the *Pharmacy Industry Award 2020*
- health professionals, pathology collectors and dental assistants covered by the *Health Professionals and Support Services Award 2020*
- social and community services employees, crisis accommodation employees and home care employees in disability care covered by the *Social, Community Home Care and Disability Services Industry Award 2010*
- dental assistants and dental/oral therapists covered by the *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020,* and
- children's services employees covered by the *Children's Services Award 2010*

have been the subject of gender-based undervaluation and these findings constitute work value reasons justifying the variation of the modern award minimum wage rates applying to each category of employees.

The Expert Panel has determined the terms of the award variation to rectify the identified gender-based undervaluation in the *Pharmacy Industry Award 2020*. This will involve a total increase in minimum wage rates of 14.1 per cent, to be implemented in three phases from 30 June 2025, 30 June 2026 and 30 June 2027 respectively.

The decision sets out provisional views relating to variations to remedy the gender-based undervaluation found to have occurred for the remaining 4 priority awards.

Next steps

A Determination implementing the first phase of variations to the minimum rates for pharmacist classifications in the *Pharmacy Industry Award 2020*, operative from 30 June 2025*,* is published with the decision.

The Expert Panel invites interested parties to consider the *provisional views* in the decision for the remaining 4 priority awards and the Expert Panel will list conferences to establish the nature and scope of any issues raised. These will be listed after 3 May 2025.

The Expert Panel will program the Review for further hearing based on the responses provided by interested parties at the conferences. The hearings will finalise the variations to the awards necessary to rectify the gender-based undervaluation found to have occurred.

You can read:

- the Decision Summary of the Gender-based undervaluation decision (pdf)
- the Decision [2025] FWCFB 74 (pdf)
- the Determination for the Pharmacy Industry Award 2020 PR786095 (pdf)
- information on the proceedings Gender-based undervaluation – priority awards review

Overview of the Review

The Review by the Expert Panel for pay equity in the care and community sector was initiated on 7 June 2024 to consider whether making changes (variations) to certain classifications and minimum wage rates in 5 priority awards was necessary on work value grounds to remedy potential gender-based undervaluation. The 5 priority awards considered by the Review are:

- *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*
- *Children's Services Award 2010*
- *Health Professionals and Support Services Award 2020*
- *Pharmacy Industry Award 2020*
- *Social, Community, Home Care and Disability Services Industry Award 2010*.

Decisions of the Fair Work Commission

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

Summaries of selected decisions signed and filed during the month ending Wednesday, 30 April 2025.

1 CONDITIONS OF EMPLOYMENT – flexible working arrangement – ss.65A, 65B, 604 Fair Work Act 2009 – appeal – Full Bench – appellant teacher at Sacred Heart Primary School Pymble (school) since 2016 – appellant promoted to executive role as Religious Education Coordinator (REC) in 2023 – appellant took parental leave in 2024 due to birth of her child – appellant due to return from parental leave at beginning of 2025 – appellant made flexible working arrangement (FWA) request to work part time upon return to work to assist in balancing work commitments and parental responsibilities – respondent refused appellant's FWA request to return to work part time unless she agreed to return only as classroom teacher and not to return to REC role until she returned to full time work – dispute regarding compliance with clause 10 of *Catholic Schools Broken Bay Enterprise Agreement 2023* (Agreement) – on 4 February 2025, Commission decided refusal of FWA should stand – appellant sought permission to appeal first instance decision per s.604 – grounds of appeal considered – (1) Commission erred by refusing to admit an expert report – (2) Commission erred by failing to resolve dispute concerning respondent's failure to consult – (3) Commission erred by mistaking facts and failed to take into account relevant considerations in concluding respondent had reasonable business grounds to refuse request – Full Bench considered permission to appeal and appeal grounds – in consideration of ground (1) – Full Bench did not consider refusal to admit statement of expert witness warranted permission to appeal – found Commission refused to admit statement into evidence since it was filed late, not sufficiently directed to particular circumstances of dispute to be relevant, had potential to prejudice respondent and was not reply material – no error in approach taken by Commission – in consideration of ground (3) – Full Bench did not consider Commission mistook facts, took into account irrelevant material or failed to take into account relevant material – however, permission granted to appellant to amend her appeal to include third basis in support of ground 3, that Commission acted on wrong principle by applying wrong test to assessment of matters raised by s.65A(5) – correct test was said to include a consideration of object of Act which includes promoting gender equality, and Commission found there were reasonable business grounds notwithstanding was unable to conclude impacts of FWA were either 'likely' to occur or would be 'significant' – respondent claimed third basis was not raised in first instance – Full Bench satisfied argument raised on appeal was not put to Commission and did not propose to grant permission to allow it to be argued on appeal – in consideration of ground (2) – Full Bench granted permission to appeal since Commission erred by failing to resolve dispute over respondent's failure to consult under s.65A(3) – Commission did not take into account consequences of refusal for appellant – Full Bench accepted appellant's submission that in simply determining dispute over reasonable business grounds, the Commission did not resolve important questions raised in dispute

about failure of respondent to meet other requirements in s.65A(3) – found a failure to meet any of requirements per s.65A(3) meant respondent could not refuse appellant's request – acknowledged Commission did make findings in relation to s.65A(3)(a) and (b) – Full Bench not satisfied with how s.65A(3)(c) dealt with in relation to whether respondent had regard to consequences of refusal for appellant – acknowledged fact appellant did not fulsomely describe consequences of refusal is not an answer to requirement or prohibition on employer refusing a request unless requirement was met – found requirement to consider consequences of refusal for employee is placed on employer – evidence established discussions which were held were about alternatives offered by respondent based on its business needs and did not include consideration of consequences of refusing arrangement on appellant – found Commission did not appreciate significance of finding and did not take it into account when resolving dispute – observed written reasons for refusal also made no mention of consequences of refusal for appellant – found significance of finding that requirement in s.65A(3)(c) not met is that respondent could not refuse request – Commission incorrect to regard question of whether refusal was based on reasonable business grounds as only matter of substance in resolution of dispute – each of the matters in s.65A(3) must be satisfied before employer entitled to refuse a request for FWA – Full Bench noted Commission heard and determined a complex dispute involving evidence from numerous witnesses and issued a considered and comprehensive decision in a short space of time on an urgent basis – Full Bench held permission to appeal granted and appeal allowed – decision and order of 4 February 2025 quashed – concluded respondent not entitled to refuse appellant's request for FWA and required to implement FWA for term 2 of 2025 in accordance with appellant's request made on 21 September 2024.

Appeal by Naden against decision of Matheson C of 4 February 2025 [[2025] FWC 317] Re: Catholic Schools Broken Bay Limited atf the Catholic Schools Broken Bay Trust

C2025/1113 [2025] FWCFB 82
Asbury VP Brisbane 22 April 2025
Gibian VP
Slevin DP

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2 CASE PROCEDURES – non-compliance with directions – ss.394, 587, 604 Fair Work Act 2009 – appeal – Full Bench – appellant applied to appeal decision of Commission dismissing her s.394 application for non-compliance with directions – appellant employed by respondent for 18 years as catering assistant at Villawood Immigration Detention Centre in Sydney – appellant's first language Mandarin Chinese and speaks limited English – appellant terminated on 15 October 2024 – respondent claimed appellant's literacy levels did not permit her to meet inherent requirements of catering assistant role – appellant filed unfair dismissal application on 28 October 2024 – on 11 December 2024, Commission issued directions for filing of material and Notice of Listing for hearing on 28 February 2025 – appellant's materials due to be filed by 23 December 2024 – on 20 December 2024, appellant sought additional time for preparing materials since she was seeking legal advice from Legal Aid NSW – appellant indicated Legal Aid NSW closed for two weeks over Christmas break and to reopen on 6 January 2025 – on 23

December 2024, Commission wrote to appellant and confirmed extension request not granted since parties do not have right for legal representation or advice, request based on absence of legal representation was not reason for extension to be granted, no evidence provided of steps taken to obtain legal representation and appellant sought extension one business day prior to date materials due – Commission confirmed appellant's materials due by 4pm that day – respondent's legal representative not copied in email – on 24 December 2024, respondent's legal representative indicated respondent would file its materials per the directions, however, if appellant sought an extension the respondent would ask for commensurate extension – on 30 December 2024, Commission issued decision dismissing appellant's application per s.587 – on 2 January 2025, appellant wrote to Commission and apologised for her extension request, noted English not her first language, her older age, not being proficient with technology and being unable to understand what she was reading regarding providing material prior to the hearing, and sought 'another chance' for hearing – Commission replied noting appellant's case dismissed, file closed and indicated no further steps could be taken in respect of her case – on 7 January 2025, appellant lodged appeal of decision – appellant's grounds of appeal considered – (1) limited English and comprehension skills – appellant showed email from Commission to niece on 21 December 2024, who alerted her of directions to file material – (2) application for Legal Aid – expected to take another three weeks before notified of eligibility and unable to find another lawyer or family member to assist prior to Christmas – Full Bench satisfied appropriate to grant permission to appeal per s.604(1) – appellant wrongly denied opportunity to pursue case – appellant's application dismissed without reasonable grounds and without being afforded procedural fairness – observed issue of general application as to approach to be adopted by Commission when considering whether proceedings should be dismissed at preliminary stage on grounds of non-compliance with directions in context of unfair dismissal proceedings should be considered – Full Bench considered errors in case – (1) denial of procedural fairness – party must have reasonable opportunity to present their case and need to look at whole of circumstances including nature of jurisdiction exercised and statutory provisions governing its exercise [*Manebona*] – procedural fairness requires a party to be heard prior to Commission taking step to determine an application contrary to their interests, including a decision to dismiss application at a preliminary stage without hearing or determination on merits – Full Bench denied email of 23 December 2024 was a 'show cause email' as described by Commission in its decision, since it did not ask appellant to show cause why her application should not be dismissed or provide any opportunity for her to do so – email instead requested appellant to file her materials by 4pm that day – observed email converted the original direction into a 'guillotine order' – appellant had 5 hours and 11 minutes to prepare and file written submissions and evidence or her application would be dismissed – Commission did not invite appellant to make submissions as to whether her application should be dismissed, did not conduct a hearing prior to dismissing application and did not afford appellant opportunity to be heard – found appellant was not asked by Commission to explain non-compliance in email of 23 December, if she had been there was a realistic possibility of a different outcome – (2) no reasonable basis to dismiss application for want of prosecution – Full Bench found it incorrect that appellant made no attempt to comply with directions and email of 23 December, and that non-

compliance was unexplained – acknowledged appellant's email of 20 December explained she needed additional time to prepare her materials and obtain legal advice from Legal Aid NSW, with her attempts to obtain legal assistance being delayed due to closedown of Legal Aid over Christmas – email of 23 December did not impose separate obligation on appellant nor seek separate explanation – found might be inferred from email of 23 December that Commission did consider appellant's explanation, if so, the reasons given for refusing extension to timetable were 'unsound' – observed although no right to representation at a hearing before Commission, a person is entitled to seek legal advice [*Murrihy*] – found Commission was wrong to regard attempts by appellant to obtain legal advice or representation as being incapable of justifying variation to timetable – 'overwhelmingly likely' appellant would have been granted permission to be represented given appellant's limited English skills, lack of legal training and respondent being represented by large law firm – found appellant not asked to provide evidence as to steps taken to obtain legal advice and unclear how such evidence could have made a difference to decision to refuse extension – dismissal on grounds of want of prosecution was serious step that should not have been taken lightly and required balancing various considerations [*Hoser*] – respondent did not complain of any prejudice or suggest it could not contest application by reason of appellant's default – no immediate threat to hearing date and no disruption caused to Commission if extension granted – acknowledged dismissal of proceedings before Commission not a step that should be taken merely to punish a non-compliant party – (3) power relied upon by Commission to dismiss application did not support order made – Commission referred to s.587(3)(a) to dismiss on own initiative – Full Bench found that to extent reasons for dismissal included failure to comply with directions, s.587 must be considered in conjunction with s.399A – subject to conditions, appellant must have 'unreasonably' failed to comply with a direction or order of Commission per s.399A(1) – found non-compliance 'without unreasonableness' does not enliven power to dismiss – s.399A(2) indicates power only exercisable on application by employer and not on Commission's own motion – s.399A(3) specifies section does not limit when Commission may dismiss an application – Full Bench acknowledged not possible to imply into s.587(1) a power to dismiss for an unfair dismissal remedy solely because of non-compliance with directions in light of specific requirements of s.399A [*Anthony Hordern & Sons*] – found not possible to rely on s.587(1) to dismiss an unfair dismissal application simply because of failure to comply with directions in circumstances where such a power is expressly conferred in s.399A and is subject to conditions – FW Act only intends that capacity of the Commission to dismiss an unfair dismissal application on grounds of non-compliance with directions is only to be available on application by employer and where applicant has behaved unreasonably – respondent did not make application to dismiss application – in appeal, respondent made application to dismiss appellant's application under s.399A(2) by reason of failure to comply with directions – Full Bench not satisfied appellant acted 'unreasonably' in failing to comply with directions, even if she did, not persuaded appropriate to exercise discretion to dismiss having regard to whole of circumstances – Full Bench held permission to appeal granted and appeal allowed – decision and order of Commission quashed – appellant's application to be remitted to another member of Commission.

Appeal by Xue against decision and order of Boyce DP of 30 December 2024 [[2024]

3 REGISTERED ORGANISATIONS – certificate – employed or engaged – ss. 323MC, 323MD Fair Work (Registered Organisations) Act 2009; s.177A Fair Work Act 2009 – former Assistant Secretary of Queensland and Northern Territory Divisional Branch (QNT) of the Construction and General Division (C&G) of the Construction, Forestry and Maritime Employees Union (CFMEU) applied to Commission for certificates under ss.323MC, 323MD of *Fair Work (Registered Organisations) Act 2009* (RO Act) and s.177A of *Fair Work Act 2009* (FW Act) to permit him to, respectively, hold office in a registered organisation, be employed or engaged by an organisation and be a bargaining representative for a proposed enterprise agreement – applicant needed to apply to do so following commencement of Part 2A of RO Act, which placed all branches of the C&G of CFMEU under administration once an administration scheme (scheme) determined and an administrator appointed – administration scheme included provisions for 'suspension and removal of officers' and 'declarations that offices are vacant'; annexures A and B of scheme declared applicant's position as vacant – notice of vacation of office subsequently provided to applicant and other vacated officials – as consequence, applicant now defined as 'removed person' under both RO Act and FW Act and prohibited from becoming a candidate for or being appointed to office of a registered organisation, being employed by any part of a registered organisation and acting as a bargaining representative for a proposed enterprise agreement – applicant recently offered part time employment within Electrical Trades Union (ETU) division of Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), conditional on obtaining a certificate from Commission that he is a fit and proper person to be employed or engaged by an organisation – Commission noted it sent copies of application to C&G of CFMEU administrator (Administrator), the Fair Work Ombudsman and Minister for Employment and Workplace Relations – Administrator initially sought to be heard in relation to application and was included in directions, but ultimately decided to not appear – Commission subsequently expedited matter, acceding to request of applicant whose employment was conditional on receiving certificate – Commission noted applications for certificates the first of their kind to be determined – Commission considered statutory context, noting restrictions imposed on 'removed persons' to be substantial, given their potential to interfere with a person's capacity to earn a living and pursue chosen line of work – restrictions enacted by Parliament as a result of serious concerns identified about conduct of certain CFMEU C&G officials – Commission noted implication within statutory scheme that a person being a 'removed person' does not necessarily mean it is not appropriate for them to hold offices, be employed by an organisation or act as a bargaining representative; a person being removed from their office or employment as a natural consequence of scheme does not entail any adverse finding made about that person – Commission considered meaning of a 'fit and proper person' under ss.323MC(2) and 323MD(2) of RO Act and s.177A(7) of FW Act –

Commission observed no precise definition of a 'fit and proper person' within legislation and observed expression takes meaning depending on context [*Bond*] – Commission observed evidence relating to past conduct, general character and individual reputation likely to be relevant to 'fit and proper' assessment [*Edwards*] – Commission also observed significance of nature of rights and responsibilities enlivened by permission sought, such as in right of entry permit consideration in s.512 – Commission considered intention of RO Act and FW Act, and passage from revised explanatory memorandum to *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* disclosing particular concern that a culture of non-compliance and poor governance alleged to have existed in C&G division of CFMEU is not 'transferred elsewhere' – Commission observed that determining a 'fit and proper person' is 'necessarily individual' and directed at an assessment of applicant's personal characteristics – Commission turned to applicant specifically, observing s.323MD(2) requires consideration of whether applicant is fit and proper to be employed by an organisation generally and not the specific offered role – Commission observed no evidence before it that applicant not a fit and proper person, having been a union official for over 26 years, and having made an affidavit affirming so – Commission observed applicant has held multiple right of entry permits and was repeatedly found to be a fit and proper person to hold a permit – no evidence before Commission that applicant's removal from office reflected any personal finding of wrongdoing – Commission considered terms of reference of Administrator's investigation regarding conduct concerning the QNT, where applicant held a senior position from 2019 to 2024, which indicated allegations of violence, threats of violence and menacing conduct – Commission ultimately held existence of investigation not enough to persuade itself that applicant not a fit and proper person, particularly as Administrator chose not to present material in relation to application – Commission noted granting certificate per s.323MD(1) would only permit applicant to be employed or engaged by an organisation and not to hold elected office or act as a bargaining representative – Commission decided to delay determination of other two certificates sought under careful consideration, until completion of Administrator's investigation into QNT branch – Commission observed applicant currently has no intention of running for office within the CEPU, and will not be required to act as a bargaining representative as part of his role, therefore no prejudice is actioned upon applicant by delaying the determination of those certificates – Commission therefore satisfied applicant a fit and proper person for purpose of s.323MD(2), granted certificate to be employed or engaged by a registered organisation per s.323MD(1) – consideration of applications for certificates under s.323MC(1) of RO Act and s.177A(7) of FW Act to be deferred pending completion of investigation into QNT.

Applications by Lowth

R2025/15 and Ors [2025] FWC 1095
Gibian VP Sydney 17 April 2025

4 TERMINATION OF EMPLOYMENT – contractor or employee – ss.15AA, 365 Fair Work Act 2009 – applicant contended she was dismissed by first respondent and second respondent was involved in contravention per s.550 of FW Act – first respondent claimed applicant was an independent contractor – applicant did

not attend hearing or file evidence – respondents' evidence was uncontested – first respondent operated live entertainment venue with nightclub license and adult entertainment permit – applicant performed as a dancer at venue – parties entered into agreement – applicant required to pay fees to first respondent: reservation fee, door fee (depending on arrival time), fixed price per lap dance and a fine if she did not attend her reservation or provide sufficient notice – first respondent not required to pay applicant remuneration, superannuation, provide sick or annual leave or any other employment entitlements – applicant not provided with a uniform and was required to supply her own clothing, equipment and props – first respondent did not enforce minimum shift requirements or specific work periods – dancers rostered themselves by choosing time slot on a mobile application – applicant responsible for approaching clients, had discretion as to who she performed for and was paid directly by her clients at a price she was free to negotiate – applicant required to maintain her own insurance and income tax – applicant's right to use venue ceased at end of each reservation – Commission considered whether applicant was an employee or contractor on basis of the totality of the relationship per s.15AA, [*Hollis* and *Stevens*] – held real substance, practical reality and true nature of relationship was one of principal and independent contractor – noted significance that first respondent did not pay applicant any remuneration and that applicant paid directly by her clients – applicant bore financial risk for each attendance at venue – first respondent's control was limited to ensuring it complied with *Liquor Act 1992* (Qld) and Adult Entertainment Code – applicant not presented as an emanation of first respondent's business – applicant had control and independence as to timing, duration and rates of her work, who she performed for and how she performed – Commission noted finding made without applicant's evidence – jurisdictional objection of respondents upheld – application dismissed.

Murray v 239 Brunswick P/L and Anor

C2025/221 [2025] FWC 978
Roberts DP Sydney 7 April 2025

5 TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – Merits – compensation – ss.387, 394 Fair Work Act 2009 – applicant worked as receptionist on casual basis at a sex work venue in Ringwood VIC since mid-2009 – applicant initially took a month off work to undergo facelift cosmetic surgery on 16 July 2024 – applicant's recovery period took longer than expected and applicant returned to work on 12 September 2024, which was approved by respondent – upon return to work, Director approached applicant and said 'how are your boobs?' – applicant replied 'you know that's not what I had' – later that day, applicant asked coworker where the tissues were, who ordered them and whether Director or Manager ordered them – Director again approached applicant and said 'you're always bitching and moaning. If you opened your eyes you'd find where they were' – Director later yelled at applicant in front of client and said she was 'trying to sabotage the joint' after she answered a query from a client – later that day, coworker approached applicant and stated Director called her in to take over applicant's shift and requested applicant hand over her keys and leave – applicant handed over keys, said goodbye to staff and left premises following summary dismissal – applicant lodged application for unfair dismissal

remedy on 2 October 2024 – respondent failed to comply with directions and attend proceedings in matter – matter determined in absence of respondent per s.600 of FW Act – applicant presented evidence during hearing of another incident which occurred two weeks prior to her surgery when Director ran downstairs and yelled 'you are nothing but a backstabbing cunt' to her, following discussion about bookings and business – Director then said 'I don't care whether you stay or leave, but as far as I'm concerned you can fuck off' – applicant was not terminated then, since she kept working as normal for following two weeks until she took time off for surgery – Commission considered whether minimum employment period met – found applicant worked same days and hours for 15 years as a regular casual and there was reasonable expectation of ongoing employment on regular and systematic basis – respondent found to be small business employer with under 15 employees per s.23 – held minimum employment period met – Commission considered whether respondent complied with Small Business Fair Dismissal Code (SBFDC) – found applicant's dismissal effected through coworker and dismissed without notice or warning – no evidence of any conduct that was 'sufficiently serious' to justify immediate dismissal – satisfied respondent did not comply with SBFDC – Commission considered whether dismissal harsh, unjust and unreasonable – held no valid reason for dismissal per s.387(a) – no reason for dismissal communicated by coworker, hence no valid reason provided – held applicant not notified of reason for dismissal per s.387(b) – held applicant not afforded opportunity to respond to dismissal per s.387(c) – held respondent's lack of HR expertise did not excuse use of 'proxy' to terminate a long-term employee by communicating 'give me your keys and leave' per s.387(g) – other relevant matters per s.387(h) considered – observed applicant employed with respondent for 15 years and given her years of loyal service she deserved better than immediate dismissal communicated through a coworker – Commission satisfied dismissal harsh, unjust and unreasonable – held dismissal unfair – reinstatement not sought by applicant due to unsafe work environment – compensation considered as appropriate remedy [*Sprigg*] – two weeks deducted from compensation cap of 26 weeks' pay, due to absence of evidence applicant took reasonable steps to mitigate loss suffered from dismissal – Commission ordered compensation of $8,400 gross, taxed as required by law, together with superannuation.

Grose v J.F.B. Investments P/L

U2024/11887 [2025] FWC 1126
Perica C Melbourne 23 April 2025

Other Fair Work Commission decisions of note

Newbon v Aorta P/L and Ors

ANTI-BULLYING – bullied at work – s.789FC Fair Work Act 2009 – applicant sought orders to stop bullying at work against first respondent (Aorta) and second respondent – Aorta registered in June 1999 and is a small family run business that provides marketing and educational services to pharmaceutical industry – second respondent Managing Principal/Director of Aorta for 25 years – applicant and second respondent were married since September 2008, applicant began working for Aorta shortly after – in 2019, second respondent experienced prolonged symptoms of fatigue and stepped down from leading Aorta – on or around March 2021, applicant became Aorta's CEO – second respondent returned to lead Aorta full time in early 2023 – applicant and second respondent separated as married couple in May 2023 –

applicant Director of Aorta for two years until December 2023, otherwise second respondent Director of Aorta – applicant continues working as employee of Aorta with second respondent – since marriage separation, applicant and second respondent involved in litigation in Family Court matter regarding property and custody of children, and Local Court of NSW regarding AVO and other issues – applicant amended application for orders to stop bullying four times – applicant claimed second respondent bullied her on 5 July 2023 during family holiday in Fiji with their children and applicant's parents ('Fiji incident') – applicant working on a pitch for work in her room and found out Aorta had lost a major account – applicant asked second respondent about account – second respondent stated in front of applicant, their children and applicant's parents: 'this account has been poorly managed' and 'I'm going to punch you in the face' – second respondent apologised the next day – other alleged bullying conduct by second respondent included: making comment during leadership meeting in November 2023 that applicant's Father did not need to hold applicant's hand 'every minute of the day'; requesting applicant provide a medical certificate for a sick day taken on 3 November 2023 despite applicant claiming she worked that day; preventing applicant from performing her role as CEO; denying applicant access to Xero accounting records; closure of office due to office being under-utilised; not consulting applicant regarding recruitment of external HR consultant; causing applicant to feel 'belittled, intimidated and bewildered' by changing her direct reports and not involving her in recruitment; limiting applicant's access to Aorta systems; and denying applicant was CEO of Aorta – Commission found applicant made unfounded accusations against second respondent – observed in circumstances of matter and recognising animosity between parties, it would be entirely inappropriate that application for orders be left to discussion between parties – noted applicant's orders to stop bullying lacked sufficient clarity – Commission recognised core issue being second respondent's return to hands on management of Aorta, being a company set up, solely owned and operated by second respondent – found applicant undertook CEO duties and continues to do so – second respondent resumed full time duties with Aorta at time when company suffered economic hardship, if orders sought made second respondent would be 'impermissibly restrained' in conduct of his company – Commission found that but for 'Fiji incident', second respondent's conduct involved reasonable management action and unfortunately his decisions and actions were often met with resistance and obstruction from applicant – orders sought addressed only a small proportion of incidents relied upon by applicant – found allegations regarding Xero accounts system and Aorta systems were without substance – other orders sought 'so vague as to be beyond contemplation' – Commission preferred evidence of second respondent to that of applicant, due to being more candid and responsive in answering questions during hearing – Commission acknowledged 'Fiji incident' was clearly unreasonable behaviour by second respondent towards applicant that created risk to her health and safety and was bullying behaviour – however, no prospect of repetition of conduct, for which second respondent promptly apologised, although not accepted by applicant – Commission held, but for 'Fiji incident', applicant was not bullied at work as alleged and no risk of repetition of 'Fiji incident' [Amie Mac] – no power to make orders sought – application dismissed – Commission considered respondents' application for costs regarding expedition of hearing – respondents claimed applicant's request for expedition of hearing was vexatious and made in order to have matter heard before Family Court proceedings in September in order to seek collateral advantage – applicant claimed expedition sought to have allegations of bullying and harassment at workplace dealt with expeditiously in light of ongoing risks to health and safety – Commission observed notwithstanding whether application for expedition was vexatious, made without reasonable cause or had no reasonable prospects of success, it did not consider it a matter where discretion to award costs would be exercised – costs order would not adjust position between parties as they have matrimonial pool of assets that will eventually be divided on presumably proportional grounds – costs order sought would not compensate respondents – costs application dismissed.

Fuller v Madison Branson Lawyers P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – applicant employed as practising solicitor with respondent since 11 January 2023 – applicant summarily dismissed on 4 August 2024 – applicant claimed sick leave on 5 April and 8 April 2024, during which time he travelled from Melbourne to Adelaide to meet with friends and watch Australian Football League 'Gather Round' games – applicant attended office on 2, 3 and 4 April 2024 before taking sick leave – applicant did not provide medical certificate for 5 April 2024, however he made statutory declaration on 28 April 2024 asserting he was sick and unable to speak with his regular doctor on 5 April 2024 – applicant provided medical certificate for absence on 8 April 2024 – respondent initially unaware applicant had travelled to Adelaide – respondent later sought assistance from human resources consultant for unrelated performance issue – consultant undertook review of applicant's social media accounts and found evidence from relevant weekend – respondent considered applicant had acted dishonestly and misleadingly – applicant suspended on pay – initial allegations meeting held on 26 July 2024 – email sent to applicant on 29 July 2024 including full list of allegations – applicant denied having engaged in conduct harmful to reputation of firm – further email sent on 1 August 2024 alleging applicant acted dishonestly and made false statements – letter included evidence from applicant's social media accounts – applicant summarily dismissed 4 August 2024 on basis he had lied about being sick and his whereabouts – applicant also provided medical certificate dated 9 October 2024 which noted he missed a day of work on 5 April 2024 due to 'feeling unwell' – Commission did not require applicant to answer questions about statutory declaration during hearing – made no conclusions applicant knowingly made false declaration – however, Commission found based on the evidence, applicant made 'false representations' to employer and gave 'false evidence' to Commission – found applicant did not speak with his doctor on 4 April 2024 to discuss his mental state and prepare a medical certificate, as was claimed in his witness statement – observed this was an 'extremely serious conclusion to reach, particularly in relation to an individual who holds a legal practicing certificate and ought to be acutely aware of the seriousness of such matters' – acknowledged 'real reason' applicant unable to attend work on 5 April 2024 was because he was in Adelaide, pursuant to a trip he planned and partly paid for four days earlier – found sick leave email of 5 April which conveyed reason applicant unable to attend work was 'misleading' and omission of any reference to Adelaide or his trip with friends was 'deliberate, not inadvertent' – Commission not satisfied applicant sick or unfit to work – no evidence of illness beyond applicant's own evidence and a later medical certificate – Commission found medical certificate dated 9 October 2024 so far as it concerned applicant's capacity to work on 5 April 2024, was based solely on what he 'told the doctor in October 2024' and not on any assessment at the time – found medical certificate provided for 8 April 2024 did not demonstrate applicant was unfit for work that day due to illness and was obtained in a 'purely online forum' without direct consultation by practitioner who signed certificate, which diminished evidentiary value – Commission accepted respondent a small business employer within meaning of s.388 – acknowledged Small Business Fair Dismissal Code (SBFDC) applied – dismissal consistent with Code if employer believes on 'reasonable grounds' that employee's conduct 'sufficiently serious to justify immediate dismissal' – satisfied dismissal consistent with SBFDC – Commission had 'no hesitation' in concluding employer held belief that applicant's conduct was sufficiently serious to justify immediate dismissal – found respondent's belief based on reasonable grounds – held valid reasons for dismissal in relation to false statements applicant made to respondent in emails of 5 and 8 April 2024 and wrongly claiming paid sick leave when not entitled to – held applicant not unfairly dismissed – Commission noted 'more nuanced issue' was whether applicant knowingly claimed sick leave he was not entitled to – noted applicant submitted he was entitled to 'mental health day' – Commission observed label unhelpful and revealed little as 'there are not many people whose outlook on life, health or work would not be improved by taking a paid day off and spending it with friends. But that does not elevate those circumstances to unfitness for work because of an illness or injury' – observed applicant's conduct and attitude was 'utterly incompatible' with his ongoing

employment as solicitor 'where integrity and honesty are paramount' – held applicant notified of reasons for dismissal – application dismissed.

U2024/10086 [2025] FWC 784
Bell DP Melbourne 7 April 2025

Rasko v Centenary Institute of Cancer Medicine and Cell Biology and Ors

GENERAL PROTECTIONS – jurisdiction – employment – definition of employment – ss. 365, 386 Fair Work Act 2009 – applicant made general protections (dismissal) claim – respondent claimed it had never employed applicant – applicant is a research scientist who works in areas of gene and stem cell therapy, experimental haematology and molecular biology – respondent is a medical research organisation affiliated with two Sydney Universities and Sydney Local Health District (SLHD) – applicant commenced employment with SLHD since 1999 as Staff Specialist in gene therapy and haematology, and also worked as head of Gene and Stem Cell Therapy Programme for respondent – in June 2023, applicant invited to apply for new Deputy Director role with respondent – on 14 July 2023, applicant made a successful application and parties engaged in discussions regarding employment contract terms, however no contract was signed between parties – in late January 2024, respondent became aware of allegations against applicant – allegations were subject to investigation and respondent decided not to progress with employment contract discussions – respondent subsequently suspended applicant's access to its premises – applicant submitted he commenced role as Deputy Director on 1 August 2023 on basis of discussion with second respondent (Executive Director of respondent) – applicant also referred to successful application and public representations by respondent that he occupied role – respondent submitted documentary evidence to demonstrate ongoing employment negotiations with applicant which were never settled – respondent acknowledged announcement of applicant's appointment at 'townhall' staff meeting on 26 July 2023 – respondent submitted announcement occurred on basis of expectation of parties that contract would be concluded – respondent accepted applicant had undertaken Deputy Director duties such as attending meetings, although respondent disputed what work applicant was required to undertake – respondents accepted applicant occupied Deputy Director role via statements on respondent's website and media appearances – second respondent demonstrated applicant had not completed 'onboarding' paperwork – no payments were made to applicant for work he did – applicant submitted termination of a person's employment on employer's initiative taken to refer to termination of employment relationship and not employment contract [*Khayam*] – considered Full Bench in *Khayam*, held termination of employment may be analysed in reference to employment relationship and not contract when termination has occurred after a sequence of time limited contracts – respondent submitted there was no contract in place, whereas in *Khayam* there were a series of short term contracts – Commission acknowledged termination of employment can include bringing an end of either the employment relationship, the employment contract or both – applicant submitted there was an employment relationship and coexisting employment contract – applicant claimed oral and/or implied contract between parties – Commission noted four essential elements of employment contract – (1) an intention to enter into binding contractual relations; (2) capacity to contract; (3) offer and acceptance; and (4) consideration in form of mutual promises by parties – Commission found evidence did not support conclusion that parties' conduct demonstrated they intended or had entered into a binding employment contract commencing on 1 August 2023 – applicant in subsequent correspondence flagged concerns with proposed contract clauses and proposed deletion of four other clauses – further correspondence between SLHD and parties highlighted outstanding matters to be resolved before applicant commenced employment – Commission found there was no clear offer and acceptance of contract terms on 1 August 2023 – found evidence did not demonstrate an oral contract was created by discussions between parties – observed terms of offer and acceptance must coincide – applicant's correspondence demonstrated he considered there was a process to be followed and finalised before he considered he was bound by contract – an inference of respondent's acceptance of contract due to applicant's conduct was

difficult to accept when parties were disputing contract terms – Commission held evidence demonstrated parties did not intend to enter into a contract from 1 August 2023 – concluded applicant was not employed by respondent -applicant was not dismissed per s.386 – concluded Commission does not have jurisdiction **–** application dismissed.

C2024/6997 [2025] FWC 832
Roberts DP Sydney 25 March 2025

Application by Mining and Energy Union

CONDITIONS OF EMPLOYMENT – regulated labour hire arrangement – s.306E Fair Work Act 2009 – application for a regulated labour hire arrangement order (order) by Mining and Energy Union (MEU) to apply to employees of Skilled Workforce Solutions (respondent) who perform work at Mt Arthur Coal P/L t/a BHP Mt Arthur Coal (host) – Programmed Skilled Workforce (Programmed) contracted to supply labour to operate haul trucks at Mt Arthur coal mine – respondent employs labour supplied in accordance with contract – host employees at mine site covered by *Mt Arthur Coal Enterprise Agreement 2023* (2023 Agreement) – respondent employees covered by either *Skilled Workforce Solutions (NSW) P/L Enterprise Agreement 2019* (2019 Agreement) or *Black Coal Mining Industry Award 2020* (Award), depending on classification – respondent and host amenable to making of order, however, sought orders that description of regulated employees be restricted to haul truck operators – further, order should provide for an exclusion for future haul truck operators engaged by respondent for provision of services to host – Commission satisfied performance of work is not or will not be for provision of a service, rather than supply of labour per s.306E(1A) – considered criteria per s.306E(7A) – observed there was no evidence respondent involved in matters relating to performance of work by its employees working at mine per s.306E(7A)(a) – found that while there is some supervision by respondent employed supervisors, host arranges, assigns and oversees work of respondent employees who are supplied to perform work at mine per s.306E(7A)(b) – found management of respondent employees occurs predominately at discretion of host and respondent and host employees work alongside one another and use same plant and equipment supplied by host per s.306(7A)(c) – indicated no evidence respondent is or will be subject to industry or professional standards or responsibilities in relation to work of its employees supplied to host per s.306(7A)(d) – found work undertaken by respondent's employees at mine involves operation of plant and equipment and appropriate training, however, does not involve work of specialist or professional nature per s.306E(7A)(e) – Commission satisfied respondent supplies labour to host – regulated employees to be covered by order per s.306E(9)(c) considered – respondent and host asserted that as evidence submitted by applicant only identified haul truck operators, regulated employees should be specified as such in any order made – Commission refuted characterisation of evidence as being confined to haul truck operators – found use of expression 'haul truck driver' would be departure from manner in which parties have described employees, limit order 'impermissibly' and depart from manner in which relevant industrial instruments describe employees – respondent's request to exclude future haul truck operators employed for provision of services considered – found proposed exclusion could create confusion over coverage of order – observed if arrangement was made in future which caused uncertainty as to coverage of order, an application may be made to vary order [*Boggabri*] – respondent's and host's request to confine terms of regulated employees to 'haul truck operators' and include future exclusion for provision of services rejected – order made [PR784646], published 21 February 2025, effective 7 March 2025.

LH2024/10 [2025] FWC 866
Slevin DP Sydney 27 March 2025

Fabbro v Tocco Italiano P/L atf B&D Family Trust

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – genuine

redundancy – remedy – ss.389, 394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent raised jurisdictional objections that dismissal was consistent with Small Business Fair Dismissal Code (SBFDC) and was a genuine redundancy – applicant commenced employment with respondent on 31 October 2022 as Pizza Chef – applicant injured shoulder in April 2024 but was able to keep working – applicant's shoulder pain came back prior to dismissal and prompted physiotherapy sessions and medical investigations – applicant took sick leave and provided medical certificate to respondent – applicant claimed this was second time he needed to take sick leave during employment with respondent – on 15 August 2024, applicant and respondent had text message exchange regarding applicant's injury – respondent sought a copy of ultrasound report that had been taken of applicant's shoulder, however applicant declined to provide it on basis that medical certificate already provided was sufficient – on 19 August 2024, respondent provided written notification to applicant that his employment was terminated by reason of redundancy – Commission satisfied that dismissal was not consistent with SBFDC as the stated reason for termination was redundancy and not serious misconduct, misconduct, or lack of capacity – found *Restaurant Industry Award 2020* (Award) applied to applicant's employment – respondent conceded it had not complied with clause 32 of Award – consultation requirement must be met for an employer to establish dismissal was for 'genuine redundancy' – Commission satisfied subsection 389(1) of FW Act was not made out – Commission considered merits and accepted respondent reorganised its business and that was primary reason for dismissing applicant – Commission observed it was possible respondent had more than one reason for dismissing applicant – respondent denied applicant's sick leave was reason for dismissal – observed respondent notified applicant of his dismissal on 19 August 2024, very shortly after text exchange about ultrasound report on 15 August 2024 – Commission found respondent had not engaged in any consultation with applicant about redundancy in advance of notifying him of his dismissal and there was no objective evidence that decision had been made before 15 August 2024 – Commission inferred that respondent's decision to give effect to restructure was contemporaneous with, or was made shortly after, the exchange with applicant on 15 August 2024 – Commission observed decision to dismiss applicant was at least in part made because of his shoulder injury or issues connected with it – Commission held although shoulder injury was a reason for termination, it was not a valid reason – Commission indicated there was nothing to indicate applicant's absence or expected absence, as consequence of his shoulder injury, had been more than temporary, as he was seeking a week's sick leave at time of dismissal – Commission accepted respondent sought a copy of ultrasound report but did not pursue this request after applicant indicated it was confidential – Commission found size of respondent's enterprise was likely to impact on procedures followed in effecting dismissal in that it had scant resources to devote to re-organising its business and effecting the dismissal – Commission satisfied applicant was unfairly dismissed and compensation appropriate because dismissal was unjust and unreasonable, and applicant suffered loss as a consequence – Commission satisfied order for compensation would not have an effect on viability of respondent's enterprise – Commission determined applicant's employment would have continued at least long enough to exhaust consultation obligations and redeployment opportunities being a further month after the date dismissal took effect – applicant did very little to mitigate loss – no evidence applicant earned income between date notified of dismissal and date he took up his new job – Commission estimated remuneration applicant would have received, or would have been likely to have received, if respondent had not terminated employment to be $6,666.70 – Commission held no monies to be deducted on basis of monies earned, but reduced amount in light of applicant's limited attempts to mitigate loss – Commission reduced compensation amount by 10% – Commission ordered respondent pay $6,000 gross less taxation as required by law to applicant in lieu of reinstatement.

U2024/11315 [2025] FWC 910
Butler DP Brisbane 1 April 2025

Wood v The Schoolhouse Education Australia P/L

TERMINATION OF EMPLOYMENT – high income threshold – jurisdictional objection – ss. 332, 382, 394 Fair Work Act 2009 – applicant claimed he was unfairly dismissed – respondent made jurisdictional objection that applicant's earnings were above high-income threshold ($175,000 per annum) – respondent claimed applicant was not covered by an award or enterprise agreement – applicant and two colleagues started respondent company – applicant was a shareholder and for time director of respondent company – applicant received $190,000 salary – applicant regularly 'salary sacrificed' by loaning his salary back to the respondent's business – applicant informed respondent's directors in February 2024 that he had advised respondent's accountants to reduce his salary by $30,000 per annum – $30,000 would be loaned to respondent – respondent's directors agreed and characterised salary reduction as 'salary sacrifice/loan' – in July 2024 applicant directed respondent not to pay funds for period of 1 July to 31 July 2024 and credit wage as loan to applicant – applicant went on leave from August to October 2024 – respondent claimed leave comprised of both annual and unpaid leave – applicant advised respondent's directors he was to commence new employment to supplement his income because his income had been significantly reduced – applicant intended to be on unpaid leave – respondent dismissed applicant on 22 November 2024 – Commission noted a person is protected from dismissal if their earnings are below the high income threshold (s.382) – earnings definition includes an employee's wages, agreed money value of non-monetary benefits and amounts prescribed by regulation (s.332) – earnings do not include payments the amount of which cannot be determined in advance, reimbursements and superannuation contributions (s.332) – respondent agreed applicant had not been repaid money he had loaned as part of salary sacrificing arrangement and agreed to make repayments – respondent claimed irrespective of actual monies received by applicant his annual rate of earnings remained at $190,000 – applicant submitted his total earnings from November 2023 through to November 2024 was $103,833 – Commission considered question for determination was whether applicant's salary sacrifice wage loan amounts could be considered 'earnings' (per s. 332(1)(b)) – Commission found applicant's wage loans were 'debt' rather than 'earnings' for purpose of s.332 – found wage loans were not applied or dealt with on employee's behalf as they were not for employee's benefit – loans made to support respondent's financial position – held appropriate time to determine applicant's rate of earnings was at time of termination – held applicant's rate of earnings were below high-income threshold – Commission found respondent agreed to repay loans when respondent had sufficient financial liquidity – contingency on repayment introduced uncertainty about when and if loans would be repaid – time of repayment could not be determined in advance – jurisdictional objection that applicant's earnings exceeded high income threshold of $175,000 dismissed.

U2024/15024 [2025] FWC 957
Simpson C Brisbane 4 April 2025

Nugent v Queensland Rail

TERMINATION OF EMPLOYMENT – Misconduct – s. 394 Fair Work Act 2009 – applicant employed as Senior Traction Linesperson from 29 October 2018 – on 8 December 2021, respondent raised concerns with applicant over emails he sent and covert recordings he made following complaint made by another employee – applicant argued covert recordings not illegal in Queensland, could not see how actions breached respondent's *Code of Conduct and Equity, Diversity, Harassment and Discrimination Standard* (Code of Conduct) but said he would delete recordings – on 2 February 2022, during disciplinary process, applicant gave undertaking that he would not send further harassing emails – applicant also raised bullying complaint in May 2022 about incident that occurred in February 2020 regarding employee of another employer – on 14 September 2022, applicant issued final warning letter for sending repeated intimidating, harassing emails to multiple personnel of respondent between 1 October 2021 and 19 April 2022 – if substantiated, constituted breach of respondent's Code of Conduct – on 28 July 2023, respondent sent email to employees, including applicant, which indicated its position on unacceptability of covert recordings of meetings and discussions – applicant considered he did not

harass or intimidate colleagues and believed final warning letter not warranted – applicant covertly recorded telephone discussion with colleague in August 2023 – applicant forwarded disrespectful email he sent to Workers' Compensation officer to several employees of respondent – in June 2024, applicant sent management covert recordings he had made and forwarded an email he had received from management to other employees – on 26 June 2024, applicant was issued a show cause letter for sending inappropriate emails and recordings to personnel and acting disrespectfully and unprofessionally – applicant provided six responses to show cause letter, some sent after response deadline – respondent considered applicant's responses – on 15 July 2024, applicant invited to meeting where applicant terminated with immediate effect – applicant submitted dismissal was harsh, unjust and unreasonable for four reasons – (1) he was not provided with sufficient evidence of alleged misconduct – (2) he was not given proper opportunity to respond to allegations – (3) covert recordings were made by him for protection and to ensure discussions accurately documented – (4) respondent did not follow internal disciplinary processes – applicant sought reinstatement and payment of lost wages – Commission considered whether dismissal valid – found secret recording undermined trust and confidence required in employment relationship and action was grounds for summary dismissal [*Schwenke*] – observed secret recordings 'potentially corrosive of a healthy and productive workplace environment' and was inappropriate conduct [*Gadzikwa*] – secret recording of meetings contradicted duty of good faith and fidelity, undermined trust and confidence, constituted well-founded reason for dismissal [*Dylan Thomas*] – Commission acknowledged applicant's actions constituted serious misconduct and was a 'considerable betrayal of the trust and confidence one expects from their colleague' – applicant submitted respondent had tolerated covert recordings previously – Commission rejected argument, stating senior management not aware of applicant's conduct in 2023 – Commission concluded applicant did what respondent alleged and evidence was clear – Commission rejected applicant's four reasons – Commission held dismissal was in accordance with internal disciplinary process – Commission stated even if it was not made clear to applicant that covert recordings breached Code of Conduct, applicant ought to know it lacked honesty and integrity and was 'sneaky, deceitful and unfair conduct' – Commission satisfied applicant did not act in ethical, professional and honest manner – held there were valid reasons for applicant's dismissal per s.387(a) – held applicant notified of reasons for dismissal per s.387(b) – satisfied applicant provided opportunity to respond to reasons per s.387(c), noting applicant sent six responses to show cause letter – held dismissal not disproportionate to conduct engaged in by applicant – satisfied if applicant not dismissed, highly likely behaviour would have continued – Commission held dismissal not harsh, unjust or unreasonable – application dismissed.

U2024/8181 [2025] FWC 835
Hunt C Brisbane 26 March 2025

Khan v Step Up Disability Services P/L

TERMINATION OF EMPLOYMENT – Merit – ss.387, 394 Fair Work Act 2009 – applicant employed as part-time assistant mentor under Supported Wage System – Commission previously determined applicant was dismissed on 1 September 2024 ([2024] FWC 3335) – applicant was dismissed following dispute involving applicant's legal guardian and respondent over the signing of a new Services Agreement – applicant's legal guardian raised concerns about applicant's employment in relation to respondent's request for applicant to enter into a new Services Agreement – respondent indicated if new Services Agreement was not signed by applicant's legal guardian, the applicant's services would cease – applicant's legal guardian did not enter into new Services Agreement by final deadline of 30 August 2024 – applicant's legal guardian ultimately provided signed copy of new Services Agreement on 9 September 2024 – Commission found direction to enter into new Services Agreement to be signed by applicant's legal guardian was 'lawful and reasonable' – failure to sign new Services Agreement was a valid reason for dismissal – Commission found applicant was notified of reason for dismissal and was given an opportunity to respond – Commission did not identify any procedural fairness considerations relevant

to determination of matter – Commission considered other relevant matters – Commission found applicant's employment was terminated due to 'no fault of his own' – legal guardian had refused to sign new Services Agreement on applicant's behalf – observed it would be difficult for applicant to find comparable role – Commission considered applicant's personal situation and impact of dismissal weighed in favour of finding dismissal unfair – Commission determined dismissal was harsh in the circumstances and unfair – applicant sought reinstatement – respondent opposed reinstatement on basis that applicant's role had been filled and it could not accommodate the applicant with its current resources – Commission found insufficient evidence there were operational reasons which made reinstatement inappropriate – Commission held reinstatement was appropriate remedy – Commission indicated compensation order not appropriate as applicant did not seek a compensation order – Commission ordered reinstatement with continuity of service.

U2024/11256 [2025] FWC 922
Crawford C Sydney 2 April 2025

Clark v The Trustee For Pausco Trust

TERMINATION OF EMPLOYMENT – extension of time – effective date of dismissal – s.394 Fair Work Act 2009 – applicant terminated by email at 7.39pm on Friday, 20 December 2024 – applicant not aware of termination email until around 4pm on Saturday, 21 December 2024 – applicant lodged unfair dismissal application on 11 January 2025 – application lodged 1 day outside 21-day statutory time limit – Commission considered date termination took effect – observed effective date of dismissal does not take effect until employee is aware they have been dismissed or had reasonable opportunity to become aware of dismissal [*Ayub*] – there may be a range of circumstances where an employee has a legitimate explanation for not reading an email communicating a dismissal immediately upon delivery, and whether or not employee has had reasonable opportunity to become aware will tun on facts of matter [*Foyster*] – Commission satisfied applicant did not have reasonable opportunity to become aware of termination on 20 December 2024 for following reasons – (1) termination email was sent at 7.39pm on a Friday night, outside working hours – applicant paid dayshift rates and time termination letter was emailed to him was also a considerable time after end of dayshift working hours – sending termination letter outside of standard work hours does not automatically mean there is no reasonable opportunity for an employee to become aware of dismissal – observed right to disconnect provisions in FW Act per s.333M(1) make clear employer should not assume correspondence sent to employee after hours will be monitored or read – Commission accepted applicant was at local RSL for dinner on Friday night and reasonable for applicant to assume he was not required to check work correspondence significantly after dayshift hours – (2) applicant was not given prior notice decision would be made on Friday – observed applicant had no reason to believe decision would be made urgently as other decisions relating to his employment had not occurred urgently – applicant had also been off work for over five months at time of termination and was not required to return to work until 19 December 2024 – (3) applicant not in habit of checking his phone for emails – Commission accepted applicant viewed termination email the next day on his home computer, since he did not regularly check his phone for emails – observed matter distinguished from facts in [*Luca*], where applicant was put on notice that employer would provide notification of outcome that particular day, email was sent at 5.38pm being only marginally outside standard working hours and applicant was in habit of checking phone for emails – Commission held applicant not aware of dismissal and did not have reasonable opportunity to become aware of dismissal on 20 December 2024 – Commission held termination took effect on 21 December 2024 and application was lodged within 21-day timeframe – Commission noted factors such as reasons for delay and when Applicant became aware of termination would have weighed in favour of finding exceptional circumstances, if required to consider an extension of time request – application to proceed.

U2025/383 [2025] FWC 901

Allison C | Melbourne | 31 March 2025

Walker v Plumbtrax P/L

TERMINATION OF EMPLOYMENT – Misconduct – remedy – ss.388, 394 Fair Work Act 2009 – applicant employed from 7 September 2021 as qualified registered plumber – applicant summarily dismissed on 17 December 2024 for serious misconduct – respondent a small business with 7 employees – respondent raised jurisdictional objection that dismissal was consistent with Small Business Fair Dismissal Code (SBFDC) – respondent met with applicant on 17 December 2024 and presented termination letter detailing allegations amounting to serious misconduct – alleged applicant had registered business similar to respondent's business and promoted new business during working hours using respondent's resources – further alleged applicant breached employment contract – applicant submitted he advised respondent in early October 2024 that he intended to establish his own business – respondent denied knowledge of applicant's intentions – alleged applicant had created an Instagram account and website for purpose of soliciting clients and work for his new business – applicant submitted Instagram account was a trial only and website in development and not visible to anyone prior to termination on 17 December 2024 – Commission considered whether dismissal consistent with SBFDC per s.388 – found there was no evidence before it that applicant conducted a business while employed by respondent – satisfied applicant did not breach employment contract – acknowledged respondent's belief about applicant's conduct genuine but not reasonable due to lack of investigation – satisfied no reasonable grounds for immediate dismissal – found applicant was not provided procedural fairness – Commission held dismissal not consistent with SBFDC – Commission considered whether dismissal was harsh, unjust or unreasonable per s.387 – found allegations of serious misconduct lacked substance – held reasons for immediate dismissal not sound, defensible or well-founded and therefore not valid – held applicant was not notified of reason for dismissal and not given opportunity to respond before decision made – satisfied dismissal was harsh, unjust and unreasonable – Commission concluded applicant was unfairly dismissed – compensation remedy considered [*Sprigg*] – Commission ordered compensation to applicant of $11,726.14 gross plus superannuation of $1,348.51.

U2025/159 [2025] FWC 872
Redford C | Melbourne | 2 April 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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