FWC Bulletin

4 July 2024 Volume 7/24 with selected Decision Summaries for the month ending Sunday, 30 June 2024.

Contents

Delegates' rights term in enterprise agreements

25 Jun 2024

Enterprise agreements must include a delegate rights term from 1 July 2024. This term provides for the exercise of the rights of workplace delegates.

This requirement is part of the Closing Loopholes Act amendments.

These amendments also set out a requirement for all modern awards to include a delegate rights term from 1 July 2024. We will publish the determinations to add these terms to modern awards by 28 June 2024.

From 1 July 2024 does my enterprise agreement need a delegates' rights term?

Where employees are asked to vote from 1 July 2024 all enterprise agreements must include a delegates' rights term.

If the agreement does not include a delegate rights' term, the delegates' rights term set out in the relevant modern award will be included.

Existing agreements and those already lodged with us for approval **do not** need to include a delegate rights term.

In addition, enterprise agreements **will not** need to include a delegates' rights term if:

- employees were asked to vote on the agreement before 1 July 2024, and
- by that vote, the employees approve the agreement (this can happen on or after 1 July 2024).

Writing a delegates' rights term

You can use the delegates' rights term that's in the relevant modern award.

Alternatively, you may choose to write your own delegates' rights term. If you write your own term, it must be no less favourable than the delegates' rights term in the relevant modern award.

The modern awards will all be updated to include the delegates' rights term after 1 July 2024. We recommend you subscribe to keep up to date.

If the term is less favourable than the modern award

If an enterprise agreement contains a delegates' rights term that is less favourable than the term in the relevant modern award, the modern award term will apply and the delegates' rights term in the enterprise agreement will have no effect.

The determinations that add the delegates' rights term to modern awards will be published by 28 June 2024.

You can read about the Variation of modern awards to include a delegates' rights term case.

Workplace delegates' rights in awards and agreements: changes from 1 July

28 Jun 2024

We have published a statement from Vice President Asbury with the final workplace delegates' rights term to be inserted into modern awards.

Determinations inserting the new term into all 155 modern awards will be published on our website as they become available. The determinations come into operation from 1 July 2024.

We are required to insert a delegates' rights term into all modern awards by 30 June 2024. This is due to changes arising from the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023.* Publication of the determinations is in accordance with the timetable set out in Justice Hatcher's 30 January 2024 statement.

The new term was finalised following extensive public consultation and engagement conducted by a Full Bench this year. We received 27 submissions from interested parties commenting on the draft term, which was published on 10 May 2024.

Updated modern awards will be published on our website as soon as possible.

Enterprise agreements must include a delegates' rights term from 1 July 2024

Under the Closing Loopholes Act, a workplace delegates' rights term has also been added to the terms that must be included in an enterprise agreement. This change applies where employees are asked to vote on an agreement from 1 July 2024.

If the agreement does not include a delegates' rights term, the term set out in the relevant modern award will be included. We have published a fact sheet to help explain these changes to agreement making.

We will continue to provide you with new resources in the coming weeks.

Read:

- the Vice President's Statement [2024] FWC 1699 – including the finalised term (pdf)
- about the Variation of modern awards to include a delegates' rights term case
- our Fact sheet: Delegates' rights terms in Enterprise Agreements fact sheet (pdf)
- more about terms and dates to put in an agreement

Increase to the application fee for 2024-25

01 Jul 2024

From 1 July 2024, the application fee increased to **$87.20**.

The fee applies to dismissal, general protections, bullying and sexual harassment at work applications made under sections 365, 372, 394, 773 and 789FC of the *Fair Work Act 2009*.

There is no fee to make an application to deal with a sexual harassment dispute under section 527F of the Fair Work Act.

Also effective from 1 July 2024, the high income threshold in unfair dismissal cases increased to **$175,000** and the compensation limit is now **$87,500** for dismissals occurring on or after 1 July 2024.

Changes to right of entry exemption certificates from 1 July 2024

01 Jul 2024

From 1 July 2024, we have a new ground on which we can issue an exemption certificate.

An exemption certificate allows a permit holder to enter a workplace or business premises without prior notice if they are investigating a suspected contravention. We can now issue an exemption certificate if:

- the suspected contravention involves the underpayment of wages to a member of the union who works on the premises, and
- we reasonably believe that advance notice of the entry would hinder an effective investigation.

Find out more

Read our Right of entry changes: Exemption certificates relating to suspected underpayments (pdf).

Visit the Fair Work Ombudsman's website to learn more about right of entry and the rights and responsibilities of permit holders, employers and other persons on the premises.

Visit our website to learn more about powers to issue entry permits and how we can help to resolve a dispute about right of entry.

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

Download our online courses

03 Jul 2024

You can now download our courses directly from our Online Learning Portal.

This gives you the flexibility to embed them directly into your organisation's learning management system.

Topics currently available include:

- Workplace sexual harassment
- Preparing for an unfair dismissal conciliation
- Interest-based bargaining – a collaborative approach to enterprise bargaining.

More resources will be added to our Online Learning Portal throughout 2024.

Decisions of the Fair Work Commission

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

Summaries of selected decisions signed and filed during the month ending Sunday, 30 June 2024.

1 ENTERPRISE BARGAINING – single interest employer authorisation – legal professional privilege – s.248 Fair Work Act 2009 – a respondent in primary proceeding, Peabody Energy Australia Coal P/L (Peabody), applied per s.590(2)(c) for orders requiring the primary applicant (Association of Professional Engineers, Scientists and Managers of Australia) to produce documents related to the applicant's single interest employer authorisation application – applicant seeking authorisation in respect of bargaining for an enterprise agreement to cover certain employees in black coal mining industry – in primary proceeding applicant seeking to commence multi-employer bargaining with four employers including Peabody (respondents) – respondents opposed primary application – Commission ordered applicant to produce documents concerning communications with employees regarding the multi-employer bargaining application – applicant claimed legal professional privilege over two documents produced and claimed relevant parts of two documents should not be provided to respondents – two documents comprised an internal email and a PowerPoint presentation – Commission noted that Act does not exclude the operation of legal professional privilege regarding Commission proceedings [*Kirkman*] – Commission cited *Seahill Enterprises* principles regarding assessment of legal privilege – Commission further observed Commission has "traditionally been cautious in ordering any party to produce documents which would reveal internal deliberations as to its industrial policy" [*Clermont Coal*] – applicant claimed internal email was an exchange between a senior organiser and a delegate that conveyed legal advice provided by external lawyers – PowerPoint slides were prepared by applicant's Senior Legal Officer to convey advice provided by external lawyers – Peabody claimed relevant parts of email was not 'legal advice' and was instead paraphrasing of legal advice by someone not qualified to do so – Peabody claimed privilege was lost over relevant PowerPoint slide because the slides ceased to have requisite character of confidentiality and/or as a consequence of issue waiver – PowerPoint slides communicated to at least 204 employees – Full Bench noted context of applicant's application, Commission needed to assess whether applicant demonstrated that a majority of relevant employees from each respondent wished to bargain for proposed multi-employer agreement – applicant relied upon a combination of meetings and employee petitions to support claim that majority of employees supported application (except for at one respondent) – Commission found email duplicated legal advice provided to applicant regarding its application – email conveyed internal deliberations and applicant's decision making – no indication email was communicated more generally – Full Bench held while email not privileged in its own right, relevant parts fell into a category of documents that the Commission has previously exercised caution releasing (see *Clermont Coal*) – Commission noted relevant parts of PowerPoint

slides contained dot point summary of legal advice provided to applicant – Commission found legal advice provided to applicant for dominant purpose of conveying information to its members – found information being conveyed to relatively broad group of people was inconsistent with the maintenance of privilege over communication – held internal email was covered by privilege and only redacted version to be produced – held applicant waived privilege over relevant PowerPoint slide – slide to be provided to respondents in an unredacted form.

Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy P/L T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal P/L, Ulan Coal Mines Ltd

B2023/1339 [2024] FWCFB 266
Hampton DP Adelaide 28 May 2024
Wright DP
Matheson C

2 TERMINATION OF EMPLOYMENT – unlawful termination – s.773 Fair Work Act 2009 – Application to deal with an unlawful termination dispute – application made on the ground of alleged unlawful termination of employment (on 20 December 2023) for reasons of 'political opinion' – Application amended on 10 January 2024 to include 2 further alleged unlawful reasons for termination, namely political opinion and 'race' (Lebanese and/or Arab and/or Middle Eastern) and/or 'national extraction' (Lebanese and/or Arab and/or Middle Eastern heritage, based upon the applicant, at least in part, being a descendent of a foreign born person) – applicant was employed by the ABC for a 5 day engagement as a casual employee – the ABC had spoken to the applicant about not making any social media posts that could be considered 'controversial' whilst employed by them – this conversation was prompted by complaints from 'pro-Israel lobbyists' – applicant said she would only make posts related to 'completely factual information from reputable sources' – applicant was dismissed for breaching ABC social media policy on day 3 after sharing a post on Instagram from Human Rights Watch in relation to starvation being used in the Israel-Gaza war – the ABC has raised 2 separate jurisdictional objections to the Application – first objection is that the ABC did not terminate the applicant's employment – amended employer response included second ground for objection, that the Amended Application makes or includes distinct allegations as to conduct based upon 'race' and/or 'national extraction', because the applicant was (at the time she originally filed her Application) entitled to make a General Protections Involving Dismissal Application in relation to such conduct under s.365 of the Fair Work Act – under s.773(a) of the Act, for an application based upon an alleged 'unlawful' termination of employment to proceed, an employee must have been 'terminated' from their employment – any contract of employment, and the employment relationship arising from same (no matter how short or long, permanent or casual) can be prematurely brought to an end – decision concerns whether the applicant's employment was, or was not, terminated at the ABC's initiative, it does not concern the reason/s as to 'why' her employment was terminated – whether or not an employee was dismissed for the purposes of s.386(1)(a) of the Act (and thus terminated for the purposes of s.773(a)) requires focus upon the circumstances of the employment relationship, as opposed to (only) the employment contract – the circumstances of the employment relationship (including the rights and duties of the

parties to that relationship) are at all times directly referrable (and in many cases deferrable) to the terms and conditions contained in the applicable employment contract [*WorkPac P/L v Rossato*] – Commission found in its most simple terms, the bringing of an employment relationship to an end concerns the ending of an employee's 'service', such that (for whatever reason) it is, or becomes, no longer necessary for the employee to perform any work for the employer – found that the employment relationship between the applicant and the ABC, was terminated at the ABC's initiative – in relation to the second objection, in *Krcho*, the Full Bench held that the prohibition under s.723 of the Act does not extend to allegations as to conduct that are caught by the prohibition, where at least one ground of the combined grounds of alleged conduct is not caught by the prohibition – applicant submitted the Amended Application alleged termination for the unlawful reasons of political opinion, or political opinion 'and' race 'and/or' national extraction, such that political opinion (which is not caught by the s.723 prohibition) is an essential integer in every way the applicant puts her case – Commission did not accept that the use of the words 'and/or' have a disjunctive effect upon the ground of political opinion – rather their disjunctive effect concerns the grounds of race and national extraction, noting that all of the grounds still have a conjunctive effect, or remain aggregated with, political opinion – consistent with the Full Bench decision in *Krcho*, Commission found that the allegations as to unlawful conduct made by the applicant in her Amended Application were not caught by the prohibition under s.723 of the Act – both of the ABC's jurisdictional objections dismissed.

Lattouf v Australian Broadcasting Corporation

C2023/896 [2024] FWC 1441
Boyce DP Sydney 3 June 2024

3 ENTERPRISE AGREEMENTS – genuinely agree – labour hire – s.185 Fair Work Act 2009 – application for single enterprise agreement made – Commission noted concerns to applicant regarding agreement's signatories, pre-approval requirements, mandatory terms, National Employment Standards (NES) and Better Off Overall Test (BOOT) – applicant's response included draft undertakings – SDA and UWU notified that they wanted agreement to cover them, although SDA raised concerns – hearing conducted – Commission found that while agreement was not genuinely agreed to, it may be approved through provision of a further undertaking pursuant to s.190 – SDA lodged objection to application – first objection in relation to casual/labour hire clause for transport and distribution employees – clause 29 noted that applicant would not employ casual employees, but set their terms and conditions, and noted that said clause would apply to any labour hire workers so covered – SDA claimed clause was inserted to repugn "same job same pay" provisions of Act, by setting rates of pay for labour hire employees subject to future Arrangement Order pursuant to s.306E (AO) – argued that purpose of inclusion of labour hire clause in agreement was to set a rate of pay as a reference point for an AO, thereby setting a significantly reduced rate of pay for labour hire employees – SDA noted that if clause did not have operative effect, labour hire employees would be paid same as ALDI employees, subject to terms of any potential AO – SDA argued that labour hire clause would be repugnant to scheme of Act [*Toyota Motor Corporation Australia Limited*] –

Commission noted ss.186-187 invite determination on matters of agreement approval, and a "finding of repugnancy" would not bar agreement's approval – Commission drew link between repugnancy argument and s.186(4)'s proscription of unlawful terms, but noted no contention that labour hire clause was unlawful term, and did not make finding of repugnance as argued by SDA – SDA's second objection argued Commission unable to be satisfied that agreement genuinely agreed to as required by s.186(2) – objection argued that inadequate explanation was given to employees when asked to approve agreement, employees had insufficient interest in terms for approval, and were insufficiently representative of employees agreement was expressed to cover – Commission considered Statement of Principles on Genuine Agreement (Principles) – agreement made 27 February 2024, when 1397 out of 1984 employees voted in favour – with agreement application, applicant filed explanatory material including impact statements directed as various parts of workforce – Commission noted requirement to consider "content of any explanation and terms in which it was conveyed, having regard to all circumstances and needs of the employees and the nature of the changes made by the agreement" [*One Key Workforce P/L*] – obligation to take all reasonable steps to explain agreement in respect of employees employed at time who will be covered by agreement – distinction drawn between persons employed at relevant time, and those whose jobs may be covered at a later point [*ALDI Foods P/L*], but Commission noted limited utility of distinction for labour hire employees as they are not directly employed by applicant – considered wording of s.306F, noting that if an AO is made regarding labour hire employees, they would be entitled to equivalent agreement pay as if they were covered under proposed agreement, but would not actually be covered under agreement – found that proposed agreement will never cover labour hire employees – concern that those covered by agreement at time of application not sufficiently representative of those to whom provisions could apply – Commission found applicant's statement to employees not linked to an explanation of proposed labour hire clause; likely that some employees may have voted against agreement if this was done – Commission found employees denied an opportunity to vote against agreement whilst knowing that another future class of worker had potential to be paid less – labour hire clauses would have been easy to explain to employees – Commission found Principles 8, 9 and 10 not sufficiently met, not satisfied that agreement genuinely agreed to – as agreement not genuinely agreed to in only limited manner (relating to labour hire clauses), agreement not meeting requirements of s.186 can be cured through undertaking pursuant to s.190 – applicant had advised it would put forward an undertaking to effect that it would not rely on labour hire clauses – Commission not satisfied with this outcome, as only applicant bound to undertaking; third party subject to AO could rely on clauses – Commission proposed alternate undertaking, "deleting" labour hire clauses – Commission satisfied that with alternate undertaking, agreement meets BOOT – Commission to seek views of applicant and bargaining representatives pursuant to s.190(4) about proposed alternative undertaking and further undertaking offered by applicant.

Aldi Foods P/L As General Partner Of Aldi Stores (A Limited Partnership) T/A Aldi Stores

4 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – jurisdiction – s.739 Fair Work Act 2009 – application made in relation to applicant's classification under various enterprise agreements applying to him from 2012 to 2024 – amongst questions put to Commission for determination, respondent asked whether Commission had jurisdiction to deal with dispute as it pertained to matters predating the commencement of *Victorian Public Service Enterprise Agreement 2020* (current agreement); argued that Commission did not have jurisdiction – Commission's power to arbitrate disputes conferred by statute – s.739 allows Commission to deal with dispute where an agreement provides a procedure for settling the dispute, and s.739(3) limits Commission's scope to deal with dispute "by reference to any such limitations contained in the relevant dispute resolution term" [*Falcon Mining P/L*] – current agreement gives Commission power to arbitrate dispute if dispute not settled after conciliation, in accordance with Act – applicant submitted that he began his ongoing dispute about classification under then-operable agreement in 2011, and that he had been directed to perform higher duties since 2012 – respondent submitted that predecessor agreements had ceased to operate when dispute application was lodged, so dispute was not a matter arising under current agreement – clause 13.2 of current agreement requires dispute to be about "a matter arising under [current] agreement" – Commission found distinction artificial, noting that classification can span current and previous agreements – Commission held it had power to deal with classification dispute as it was a dispute or grievance being considered under predecessor agreements – clause 6 of current agreement (savings provision) notes that a dispute being considered under previous agreement may continue to be considered under current replacement agreement – applicant gave evidence that he had internally raised dispute in 2011, and at various times in 2013 and 2018 – respondent submitted that savings provision pre-supposes that the dispute must have been commenced in the Commission to continue in replacement agreement – Commission held that wording of savings provision inferred that dispute commenced when raised at workplace level, not at Commission – Commission ultimately determined it did have jurisdiction to determine dispute – despite finding that current agreement and 2016 agreement permit Commission to consider dispute from 2011, Commission of the view that dealing with pre-21 November 2017 portion of the dispute would be inconsistent with general time limits on applications pursuant to s.544, exactly 6 years prior to application's lodgement – Commission determination made regarding classification dispute should not predate the 6 years prior to lodgement of application – Commission also noted that it could not make orders relating to back-pay, as sought by applicant, but could only determine whether he was classified correctly in accordance with agreement – held jurisdiction established for post-21 November 2017 dispute, no jurisdiction for pre-21 November 2017 dispute.

Clemann v Victorian Department for Energy, Environment & Climate Action t/a Arthur Rylah Institute for Environmental Research

C2023/7159 [2024] FWC 1448
Tran C Melbourne 4 June 2024

Other Fair Work Commission Decisions of Note

Appeal by Coogee Legion Ex-Service Club Ltd against decision of Deputy President Wright of 24 October 2023 [[2023] FWC 2785] Re: Giblin

TERMINATION OF EMPLOYMENT – valid reason – criminal allegation – ss.604, 387, 394 Fair Work Act 2009 – appeal – Full Bench – at first instance appellant found to have unfairly dismissed respondent – respondent engaged as Duty Manager at time of dismissal – respondent dismissed after appellant formed view respondent had consumed beverage without payment – respondent denied intentionally taking beverage without payment, suggested she thought she had already paid (evidenced by payment for drinks before and after unpaid drink in question) – at first instance Commission characterised dispute as whether respondent did not pay for drink deliberately – respondent considered an honest and credible witness – at first instance Commission found respondent received free drink but did not find respondent did so intentionally – no valid reason for dismissal – Commission critical of appellant's use of words 'fraud' and 'theft' during investigation – found language was intimidatory and observed those words have specific legal meaning such that employers should exercise caution before suggesting employee has engaged in criminal behaviour – opined appellant's claims of criminality unconscionable – appeal lodged, providing 8 grounds of appeal – grounds included challenge to Commission's finding appellant required to establish misconduct involving criminal allegations, to criminal standard of proof (Ground 4) – further that Commission erred in finding respondent genuinely believed she paid for drink (Ground 7) – permission to appeal required – Full Bench satisfied appeal raised issue of general application in respect of dismissals involving allegations of conduct of criminal nature – public interest established, permission to appeal granted – Full Bench considered Ground 7 – observed on appeal factual findings made at first instance should generally stand unless shown that member failed to use advantage hearing the evidence or acted on evidence inconsistent with facts incontrovertibly established by evidence or which was 'glaring improbable' [*Blagojevic*] – Full Bench observed first instance finding that CCTV footage did not establish respondent intended to take drink without paying was central to no valid reason finding – appellant contended it inconceivable respondent formed view she had already paid for drink – Full Bench watched CCTV footage – observed while other conclusions could be drawn from CCTV footage, held appellant did not establish first instance finding respondent did not deliberately take free drink was 'glaringly improbable' – Full Bench observed fact that all other drinks consumed by respondent were paid for weighed in favour of finding respondent genuinely believed she paid for drink and did not deliberately take it – Full Bench turned to first instance criticism of appellant's language of 'theft' and 'fraud' – held first instance conclusion this language was intimidatory was made without evidentiary basis – Full Bench did not consider this error to be significant – however, Full Bench critical of first instance suggestion that before an employer dismisses an employee for theft and asserts there is a valid reason for termination they must establish beyond reasonable doubt that theft occurred – Full Bench did not agree – Full Bench confirmed balance of probabilities remains required standard of proof and nature of issue affects process by which reasonable satisfaction is attained [*Briginshaw*] – despite this, Full Bench satisfied Commission applied correct standard of proof at first instance – Full Bench concluded by rejecting any suggestion arising from first instance decision that allegation of theft cannot be put unless it is established beyond reasonable doubt – if, when applying *Briginshaw* standard, employer conscientiously believes property has been taken by employee, there is nothing untoward in alleging employee's conduct constitutes theft – remaining grounds of appeal rejected – appeal dismissed.

C2023/6965 [2024] FWCFB 270
Clancy DP Melbourne 29 May 2024
Dean DP
Grayson DP

Yoon v Go Traveling P/L

GENERAL PROTECTIONS – workplace rights – arbitration – ss.341, 361, 365 Fair Work Act 2009 – application to deal with contraventions involving dismissal – matter did not resolve at conference before different Member – s.368 certificate issued – parties consented to Commission dealing with dispute by arbitration – applicant commenced employment on 5 September 2022 – part-time Apprentice/Trainee Content Producer – advised by Apprenticeship Support of entitlement to paid study leave ('PSL') – applicant raised entitlement and possibility of back pay with respondent on 25 August 2023 – respondent disagreed on amount of PSL claimed and applicant's calculations – applicant advised to "stay home" pending calculations of PSL – calculations provided on 21 September 2023 – respondent sought clarification on calculations – adjustment for paying applicant "above award" rates – applicant argued that respondent cannot offset money owed by relying on above award rates – applicant provided Apprenticeship Support contact to assist discussions – respondent advised applicant of redundancy on 30 September 2023 – applicant had not generated income for respondent, respondent operating at a loss – PSL discussions continued on 6 and 7 October 2023 – Fair Work Ombudsman involved to resolve PSL claim – applicant genuinely expressed grievance and inquired rectification of PSL [*Shea*] – Commission noted three issues for determination – firstly whether applicant exercised workplace right, second whether respondent took adverse action against applicant and third whether respondent took adverse action because of prohibited reason or reasons that included that reason – whether workplace right exercised considered – held applicant's request to access PSL was exercise of workplace right per s.341 – whether adverse action by terminating applicant's employment considered – not disputed termination of employment is adverse action – held adverse action taken against applicant per s.342 – whether adverse action taken because of workplace right considered – reverse onus on respondent as to whether adverse action was taken because of workplace right or exercise/purported exercise of workplace right (s.361 FW Act) – Commission considered whether termination was because of applicant's PSL grievance [*De Martin & Gasparini P/L*] – question of fact – assessment of respondent's reasoning having regard to all relevant facts and circumstances [*Barclay*; *BHP Coal P/L*] – respondent relied upon financial position of business as reason for adverse action – contended no adverse action taken because of applicant's PSL claim – respondent attempted to rectify outstanding payments including offer of 10 weeks' notice to compensate for PSL owed – Commission found respondent witnesses and evidence supported conclusion adverse action taken due to financial position of company rather than exercise of workplace right – Commission held respondent discharged reverse onus – no part of adverse action was taken for the prohibited reason alleged – application dismissed.

C2024/384 [2024] FWC 840
Cross DP Sydney 6 June 2024

Szentpeteri v Serco Australia P/L

TERMINATION OF EMPLOYMENT – misconduct – sleep – ss.394, 387 Fair Work Act 2009 – applicant commenced employment as Detention Service Officer on 1 March 2023 – respondent dismissed the applicant on 13 December 2023 due to serious misconduct – applicant claimed dismissal was harsh, unjust or unreasonable and sought remedy for unfair dismissal – an incident occurred on 23 November 2023 in which applicant was alleged to have fallen asleep on a sofa while on duty, intentionally wore sunglasses to prevent CCTV capturing his eyes being closed and failed to maintain a constant line of sight of a vulnerable detainee he was responsible for monitoring – further alleged applicant failed to notice or react to two detainees entering the room and taking items from a table in close proximity – question of whether sleeping at work constitutes a valid reason for termination depends on the circumstances – relevant to consider issues such as frequency and duration of sleep, nature of work being performed and responsibilities of employee concerned – applicant initially denied being asleep during a meeting with his manager on the same day – applicant later submitted the incident was due to a medical condition being

PTSD which caused him to fall asleep without realising – applicant suspended from duties with pay while under investigation from 24 November 2023 – applicant issued notice of formal disciplinary meeting on 28 November 2023 and had an opportunity to respond – respondent issued notice of termination on basis of serious misconduct on 13 December 2023 – valid reason for dismissal related to applicant's failure to take reasonable steps not to fall asleep when responsible for looking after a vulnerable detainee – found applicant moved from a chair which provided a direct line of sight of the vulnerable detainee to a sofa which did not – applicant failed to comply with the fatigue management policy and put himself, other employees and the vulnerable detainee he was charged with protecting at serious risk to health and safety – whether PTSD a mitigating factor considered – applicant suggested he previously received medical advice to cease working due to diagnosed PTSD – applicant threatened legal action in response to respondent enquiries regarding applicant fitness to return to work prior to 10 October 2023 – observed if applicant had been advised to cease work he had duty to advise respondent – instead applicant continued work and started second security role with another employer – held fitness for work not a mitigating factor – determined applicant's action of putting on sunglasses represented wilful and deliberate conduct – found applicant engaged in serious misconduct which caused serious and imminent risk to the health and safety of a person – held dismissal was not harsh, unjust, or unreasonable – application dismissed.

U2024/258 [2024] FWC 1523
Dobson DP Brisbane 12 June 2024

Lennie v Department of Education

TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009, Education and Training Reform Act 2006 – applicant challenged end of her employment as ongoing teacher – jurisdictional objection raised: whether dismissal at the initiative of employer or operation of *Education and Training Reform Act 2006* (Vic) (ETRA) – s. 2.4.34 of ETRA provides that where employee absent for 3 months without leave granted employment ceases – applicant granted leave without pay for period between August 2021 and 26 January 2023 primarily on compassionate grounds – during absence applicant gained outside employment – respondent considered this misconduct – misconduct investigation commenced during period – leave without pay period lapsed – applicant did not return to work on 27 January 2023 – applicant did not apply for further leave – no authorised leave between 27 January 2023 and 26 April 2023 (3 months) – preliminary finding of misconduct investigation provided 5 June 2023 – investigation recommended termination, applicant granted extension of time to respond – in July 2023 applicant made further request for unpaid leave – request granted – Commission found delegate did not consider whether applicant's employment had ceased due to unapproved absence of 3 months absence nor that further leave request amounted to request or grant of reinstatement – applicant submitted further leave granted implicitly while misconduct investigation underway – found applicant not suspended through period of investigation – found applicant not on approved leave for 3 month period ending 26 April 2023 – held words 'cease' and 'ceases' in ETRA operate to automatically end employment without action of employer – found that employment ceased due to ETRA – held grant of further leave in July of no effect as employment had ceased – held delegate's July leave approval could not retrospectively approve earlier 3 month absence – whether July leave approval reinstated applicant considered – held reinstatement not sought or granted as both applicant and delegate considered July leave request on basis employment was continuing – held no dismissal at initiative of employer – jurisdictional objection upheld – application dismissed.

U2023/12691 [2024] FWC 1281
O'Neill DP Melbourne 6 June 2024

Molokac v Evolving Support Services P/L

TERMINATION OF EMPLOYMENT – misconduct – valid reason – ss.387, 394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant dismissed without notice for alleged serious misconduct – allegations made that applicant trespassed onto property of client of respondent and taking property not belonging to her – respondent alleged applicant risked health and safety of disabled clients and risked putting employer in disrepute – respondent asserted applicant's actions were criminal and that applicant accessed workplace outside of operational times without permission – applicant asserted only her personal property was taken and she had permission to attend client's house – Commission to consider whether dismissal harsh, unjust or unreasonable per s.387 – observed primary reason for termination was applicant entering client's house when not rostered to and without express permission – held ancillary issues like performance and bullying allegations not probative to valid reason consideration – observed decision to terminate applicant whilst on sick leave inconsistent with decision not to contact applicant with reasons for dismissal whilst on sick leave – no allegations provided to applicant before termination – held no opportunity to respond to allegations – whether valid reason for dismissal considered – respondent made no efforts to substantiate allegations of theft – insufficient evidence to suggest applicant removed items not belonging to her from property – found respondent's evidence that property was missing was hearsay – observed applicant attended client's house as was custom – found no direction from respondent to restrict applicant from attending client's house – no evidence before Commission to substantiate allegation applicant engaged in criminal conduct – Commission found no valid reason for termination – held no opportunity to respond to reasons as applicant summarily dismissed – held respondent expected to arrange human resources advice due to company size – observed considerable distress and impact on applicant – Commission found dismissal harsh, unjust and unreasonable – remedy considered – found reinstatement not appropriate – compensation ordered – observed applicant found comparable work and pay six weeks after termination – held applicant would have remained with respondent for further 12 weeks – compensation amount reduced as applicant found alternative employment within six weeks of termination.

U2024/3071 [2024] FWC 1538
Simpson C Brisbane 14 June 2024

Robinson v Wulguru Steel P/L

TERMINATION OF EMPLOYMENT – misconduct – vandalism – ss.387, 394 Fair Work Act 2009 – application for an unfair dismissal remedy – applicant terminated after respondent received a complaint of inappropriate graffiti being drawn on equipment belonging to a client – applicant advised of allegation – applicant initially denied allegation of alleged misconduct – Commission considered whether there was a valid reason for dismissal – applicant contended inconsistencies between respondent's allegation and staff of respondent who witnessed the alleged conduct [*Horan*] – allegation considered on balance of probabilities and noted applicant bared onus – balance of probabilities requires a subjective belief in a state of facts on the part of the Commission and a party bearing the onus will not succeed unless the entirety of the evidence establishes a "reasonable satisfaction" on the preponderance of probabilities [*Lehrmann*] – Commission held no evidence provided by applicant which confirmed applicant had not engaged in alleged conduct – held applicant engaged in alleged conduct – whether applicant's conduct equated to a valid reason for dismissal – respondent contended applicant's conduct amounted to serious misconduct – respondent further noted applicant's conduct resulted in a loss of a lucrative contract with a client – Commission agreed with respondent's contention and noted respondent's reputation had been damaged as a consequence of applicant's conduct – Commissioner held applicant's conduct was valid reason for dismissal – held dismissal not unfair – application dismissed.

U2023/10605 [2024] FWC 1126

Hawken v Patrick Stevedores Holdings P/L

TERMINATION OF EMPLOYMENT – misconduct – employer policies – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – termination arose from return of positive confirmatory test for presence of amphetamine and methamphetamine in oral fluid sample provided on 23 October 2023 – respondent alleged applicant breached numerous policies including Fitness for Work (Drugs and Alcohol) Standard Operating Procedure (D&A Procedure) – applicant previously returned three positive confirmatory tests on separate occasions for the presence of amphetamine and methamphetamine: (1) first breach recorded 14 October 2022, applicant issued with first warning on 26 October 2022, (2) second breach recorded 24 October 2022, applicant issued second and final warning on 10 November 2022 and (3) applicant recorded negative on-site drug test result on 23 October 2023, positive confirmatory test of applicant's sample returned on 25 October 2023 – applicant submitted respondent was not entitled to send the on-site negative sample on 23 October 2023 for confirmatory testing – parties disputed appropriate interpretation of Clause 4.6.5 of the D&A Procedure which noted when a breach has occurred and specifically stated 'A warning shall remain on file and current for a period of 12 months from the date of issue such that a second warning shall remain in force for 12 months after the date of issue regardless of the date of issue of the first warning (except that the second warning must have been issued no longer than 12 months after the first warning)' – applicant submitted that pursuant to clause 4.6.3 of the D&A Procedure, which related to a third breach, the respondent was required to issue a third written warning before initiating a show-cause process – respondent submitted reason for applicant's dismissal was that applicant returned a positive confirmatory test for the presence of amphetamine and methamphetamine in oral fluid sample within 12 months of having received a second and final warning – further reason suggested that applicant took a 'pill' on the morning of 23 October 2023, which the applicant did not know the content of, and in attending for and performing work the same evening, applicant created a 'risk that he was impaired when he came to work' and was in breach of numerous policies – Commission observed a failure of an employer to comply with its own policies and procedure has to be considered in the particular circumstances of each case and weighed against all of the other factors – held seriousness of applicant's conduct outweighed respondent's failure to comply with its own policies and D&A Procedure – Commission noted applicant was not terminated for one breach of the D&A Procedure but rather whilst on his second and final warning, applicant tested positive for amphetamine and methamphetamine on a third occasion – noted respondent operated in an environment with hazardous conditions – Commission found applicant attended work on 23 October 2023 knowing he had taken a 'pill' that morning of unknown contents and that applicant was on a second and final warning for testing positive to amphetamine and methamphetamine whilst at work – found applicant's conduct in that regard breached the respondent's D&A Procedure – found the warning given to applicant on 26 October 2022 had not lapsed as at the date of the confirmatory test on 25 October 2023 nor the date of the show cause letter of 30 October 2023 – Commission held notwithstanding the respondent deviating from its D&A Procedure in sending applicant's sample for confirmatory testing, the respondent's decision to terminate applicant's employment after three breaches of the D&A Procedure was not harsh and was an action that a reasonable employer might impose in the circumstances – dismissal not unfair – application dismissed.

U2023/11593 [2024] FWC 1595
Cirkovic C Melbourne 19 June 2024

Doherty v Defend Fire Services P/L T/A Defend Fire

TERMINATION OF EMPLOYMENT – misconduct – ss.387, 394 Fair Work Act 2009 – applicant employed as fire technician – respondent relied on a number of issues for termination – alleged applicant used a work vehicle for personal travel, failed to

return work equipment, poor presentation, sending an abusive text message to his supervisor and unreasonable lengthy absences from work without reasonable grounds – Commission held precise reasons relied upon by respondent did not amount to a valid reason – Commission considered reason for dismissal need not be the reason given to the applicant at time of termination [*Shamir*] – Commission found applicant committed serious safety breach by attending a worksite and performed work contrary to the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) – found applicant attended for work while mentally ill and created a substantial safety risk for himself and other employees – Commission considered safety breach to be serious misconduct – Commission held valid reason for dismissal – held applicant was not notified of reason for dismissal – held applicant was not given an opportunity to respond to the valid reason – observed respondent was a reasonably small business and that procedural deficiencies could be attributed to lack of human resources specialists – in relation to other relevant matters, Commission took into account applicant's serious mental illness – Commission also took into account evidence applicant was overworked – held despite procedural deficiencies a finding of unfair dismissal not inevitable [*Sheehan*] – held applicant's serious misconduct outweighed procedural deficiencies – held even if dismissal was unfair the Commission would decline to award compensation `due to post employment conduct sending aggressive and threatening text messages – respondent had not paid applicant's leave entitlements – Commission recommended the respondent pay the entitlements – dismissal not unfair – application dismissed.

U2024/74 [2024] FWC 1444
Crawford C Sydney 3 June 2024

Brownson v Australian International Islamic College Ltd

TERMINATION OF EMPLOYMENT – valid reason – reinstatement – ss.387, 391, 394 Fair Work Act 2009 – applicant worked as a teacher and Year 9 Pastoral Coordinator – applicant dismissed for alleged serious misconduct – alleged misconduct included four allegations of unprofessional behaviour and one allegation of breaching confidentiality – applicant applied for unfair dismissal remedy – respondent requested names of students who had made complaints against applicant not be published – Commissioner determined names of students would not be published – respondent relied on investigation into five allegations of misconduct for dismissing applicant – first allegation contained students' complaint about unjust punishments and overall disregard for their well-being and emotional development – an example was Student A outlined applicant screamed at students for not completing homework – second allegation claimed applicant's conduct amounted to physical and emotional harm of students – third allegation applicant's conduct put student's health and safety at risk – example provided was applicant denied a student food during a detention period – fourth allegation applicant breached confidentiality requirements by disclosing to fellow staff that she had been suspended – finally applicant alleged to have threatened and intimidated staff and students – applicant responded by flagging concerns about procedural fairness – applicant noted that there had been a long delay in raising of first allegation – claimed allegations lacked specific details and context about complaints – denied making alleged statements to students or preventing students from eating during detention – applicant acknowledged telling colleagues she had been stood down but denied disclosure of specific details in breach of confidentiality policy – applicant admitted to alleged statements and yelling at students – suggested respondent's decision to dismiss was unreasonable and disproportionate to gravity of misconduct – emails and documents of students complaints about applicant were provided – applicant also included emails she had sent to fellow staff outlining how she had taken disciplinary action against students who had misbehaved – applicant sought staff support to address what she considered to be escalating misbehaviour of Students B and E who had made complaints – other emails outlined how school had disciplined students who had made complaints about applicant for ongoing misbehaviour including short suspensions – applicant admitted to raising her voice with students, but had apologised when she had done so – staff member who was witness in support of applicant gave evidence applicant was firm,

but fair in her teaching in a difficult classroom environment – respondent's evidence included notes of meetings between staff regarding applicant's behaviour towards students, student complaints and notes from investigation into allegation – respondent's staff and principal were cross-examined during hearing – students who made complaints were not called as witnesses – Commission considered whether applicant had been unfairly dismissed – considered s.387 factors whether dismissal was harsh, unjust, or unreasonable – respondent decision not to call students as witnesses impacted reliability of evidence – applicant truthful and credible witness – applicant made reasonable admissions about yelling at students, but had apologised where she had been too harsh – Commission expressed surprise respondent considered evidence of Students B and C to be reliable when students had previously behaved poorly and had motive to cause applicant trouble – accepted applicant's evidence about allegations – considered whether there was a valid reason for applicant's dismissal – Commission must be satisfied where a dismissal involves misconduct that alleged conduct occurred and justified termination – found applicant did make statements to students such as 'why are you making my life a miserable hell' – statements made by students and staff not serious enough to provide valid reason for dismissal – alleged breach of confidence by applicant was minor – found it was reasonable applicant informed colleagues of her departure – held this was a technical breach of College's policies, not sufficiently serious to provide valid reason for dismissal – notification of reason for dismissal and opportunity to respond was not relevant in circumstances – Commission held dismissal was unjust and unreasonable because dismissal was disproportionate in circumstances – considered whether reinstatement was appropriate – applicant sought reinstatement and respondent opposed this remedy – Commission cited *Nguyen* that the "question is whether there can be sufficient level of trust and confidence restored to make the relationship viable and productive" – Commission accepted applicant's evidence she was an experienced and competent teacher – applicant able to manage awkwardness will arise between some students and staff – held appropriate and consistent with FW Act objects that applicant be reinstated – ordered respondent restore applicant's lost pay in accordance with s.391(4) – took account applicant sought to mitigate her loss by applying for work and had difficulty finding work because she had been terminated for serious misconduct – amount of lost pay to be determined between parties.

U2024/314		[2024] FWC 1512
Crawford C	Sydney	14 June 2024

Hicks v Woolworths Group Limited and Woolworths (South Australia) P/L ('Woolworths') t/a Woolworths Supermarkets

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – jurisdiction – hypothetical position – s.739 Fair Work Act 2009 – application to deal with a dispute in accordance with the dispute settlement procedure of the *Woolworths Supermarkets Agreement 2018* (Agreement) – Commission to consider if it has jurisdiction to deal with dispute – applicant contended dispute between parties concerned correct classification for a duty manager under *General Retail Industry Award 2020* (Award) – applicant sought a determination under the Award that correct classification for a duty manager was Level 8 and relevant employees under Agreement were entitled to Award rate for that classification pursuant to s.206 – respondent contended Commission did not have jurisdiction to deal with dispute – respondent maintained there was no matter in dispute which might be subject of an exercise of arbitral power as applicant never performed role of duty manager and respondent did not employ anyone under the Agreement in position of duty manager making the dispute entirely hypothetical – respondent contended dispute resolution clause not followed by applicant and determination sought by applicant would involve exercise of judicial power outside of the Commission's jurisdiction – applicant contended they performed work as a duty manager on 12 August 2022, 7 October 2022 and 18 May 2023 and a duty manager should be classified as Level 8 in Award – Agreement does not contain a classification equivalent to Level 8 in the Award – applicant re-characterised argument in hearing and submitted when referring to duty manager he meant the 'common sense industrial reality' where the respondent still

had duty managers in practice – applicant maintained under the Award and in accordance with the higher duties clause, a person performing 'duty manager' duties should be paid at Level 8 under the Award based on description of positions under the Award – Commission accepted respondent had not engaged employees as duty managers since 2019 – Commission found where an employee performed duties that used to be contained within the duty manager role, they were not acting up in duty manager role, instead they were performing Retail Employee Level 6 duties and compensated for that by being paid at Retail Employee Level 6 rate in Agreement – Commission found applicant's argument as originally formulated was a hypothetical dispute and outside jurisdiction of the Agreement's dispute resolution clause – Commission found applicant's re-characterisation of dispute must be dismissed because Commission cannot make an arbitrated finding in this matter that would allow for payment of an allowance that went beyond the levels or rates contemplated in the Agreement – Commission noted applicant's re-characterised dispute pertained to a matter in the Agreement and is bound by the parameters of the Agreement – Commission held Retail Employee Level 6 is the highest classification in the Agreement, there is no Retail Employee Level 8 – Commission observed there was a Level 8 in the Award but the Award was expressly not incorporated into the Agreement – Commission not satisfied that clause 22 of the Agreement vested the Commission with the arbitral power to effectively make a s.206 assessment and determination – no jurisdiction – application dismissed.

C2023/7987 [2024] FWC 1425
Lim C Perth 30 May 2024

Ramirez v Gonva Group P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – ss.387, 388, 390, 394 Fair Work Act 2009 – respondent café employed applicant as hospitality supervisor – applicant queried whether she would be paid for café closures on public holidays – respondent found applicant's query disrespectful – employment relationship deteriorated – respondent's director alleged personal mobile phone use during work and non-consensual recording of conversations – respondent hired another employee to cover applicant's scheduled surgery – applicant's surgery rescheduled – respondent refused to re-arrange roster to return applicant to permanent shifts despite applicant's insistence – respondent reviewed Small Business Fair Dismissal Code (Code) and indicated on checklist applicant threatened or actually carried out violence against him, other employees, or clients – respondent specified on checklist applicant dismissed for some other form of serious misconduct being intimidation and 'illegal activity' of recording private conversations without consent, tendency towards anger, lack of respect, mobile phone use – respondent alleged applicant's actions constituted serious misconduct and summarily dismissed her – respondent's termination email stated applicant met all requirements but cited 'aggressive verbal behaviour' as being unacceptable and applicant's 'many inconveniences' – Commission found respondent held genuine but subjective belief applicant's conduct sufficiently serious to justify immediate dismissal – respondent could not have reasonably believed own contentions applicant threatened or actually used violence – respondent director directly participated in events deemed serious misconduct so reasonable investigation ordinarily relevant to establishing reasonable belief of serious misconduct warranting summary dismissal [*Pinawin*; *Ryman*] not necessary here – absent evidence, employers cannot rely on Code as jurisdictional bar by simply ticking an assertion on checklist and rely on same as a reasonably formed belief – Commission found respondent's belief not reasonably held – respondent non-compliant with Code – jurisdictional objection dismissed – Commission accepted applicant's version of events leading to employment's termination – misconduct contentions rejected, not established on respondent's evidence – not a valid reason for dismissal – no evidence of meetings to discuss alleged misconduct or formal counselling – Commission found respondent's examples of alleged "aggressive verbal behaviour' vague – applicant not given opportunity to respond to alleged misconduct leading to dismissal – small business respondent without dedicated human resource management relevant to termination of applicant's

employment having impacted response to applicant's enquiries and issues raised during employment – parties' cultural norms influenced employment relationship but did not override applicable industrial laws and protections protecting applicant querying employment conditions appropriately and lawfully – held termination harsh, unjust and unreasonable – applicant's querying of employment conditions appropriate and not amounting to misconduct – other alleged misconduct lacked merit – reinstatement inappropriate and financial loss justified compensatory remedy – applicant sought 13 weeks wages as compensation – Commission found applicant likely to have continued employment a further 18 weeks but for dismissal – awarded 18 weeks' wages compensation, deducting unpaid sick leave applicant would have taken following eventually rescheduled surgery if she had been employed.

U2023/10993		[2024] FWC 1522
Thornton C	Adelaide	13 June 2024

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Websites of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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