FWC Bulletin

1 August 2024 Volume 8/24 with selected Decision Summaries for the month ending Wednesday, 31 July 2024.

Contents

Implementation Report for new functions published

05 Jul 2024

We have published an Implementation Report about new functions relating to unfair deactivation and unfair termination for regulated workers, and unfair contracts for independent contractors.

These new functions are given to us by Part 16 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*. The new functions will start on 26 August 2024 or a date to be proclaimed.

We invite your feedback on how we plan to implement these new functions.

Regulated workers are:

- 'employee-like' workers performing digital platform work, and
- regulated road transport contractors.

About the report

The Implementation Report sets out how we plan to implement the new functions, which include:

- employee-like worker disputes about unfair deactivation from a digital platform
- regulated road transport worker disputes about unfair termination of a contract
- independent contractor disputes about unfair contract terms

We will also publish a further implementation report soon that will deal with the right to disconnect commencing under Part 8 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.

In his 27 February 2024 Statement, our President, Justice Hatcher, noted the significant nature of the changes relating to regulated workers.

These reports are part of our commitment to engage and consult with our stakeholders on how we implement these new functions.

Read:

- President's statement: Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024
- Implementation Report – Unfair deactivation, unfair termination and unfair contracts
- Preparing for new regulated worker functions

Workplace delegates' rights terms in enterprise agreements

10 Jul 2024

A workplace delegates' rights term must be included in all enterprise agreements.

Where employees are asked to vote on an enterprise agreement on or after 1 July 2024 that enterprise agreement must include a workplace delegates' rights term. This is due to changes arising from the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

A workplace delegates' rights term is about the exercise of the rights of workplace delegates. The term provides entitlements to:

- communication with employees that the delegate can represent
- access to relevant workplaces and workplace facilities
- training for delegates.

A statement from Vice President Asbury with the final workplace delegates' rights term was issued on 28 June 2024. The new term has been inserted into all 155 modern awards.

You can find the updated awards from the Find an award page on our website.

How to write the term

You can either:

- use the workplace delegates' rights term in the modern award that covers the workplace delegates (if more than one modern award covers the workplace delegates, use the most favourable delegates' rights term from those awards)
- write your own term that is no less favourable than the delegates' rights term in the modern award (or awards) that covers the employees.

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

This will be noted in the decision approving the agreement.

If the term is less favourable

The most favourable workplace delegates' rights term from the modern award (or awards) that cover the workplace delegates will apply AND the delegates' rights term in the agreement has no effect.

See our Delegates' rights terms infographic (pdf) to understand these changes to agreement making.

Fair Work Commission statement on the CFMEU

17 Jul 2024

The General Manager of the Fair Work Commission (the Commission), Murray Furlong, is the independent statutory regulator of federally registered organisations under the *Fair Work (Registered Organisations) Act* 2009 (RO Act).

It is the Commission's role to promote the efficient management of organisations and high standards of accountability of organisations and their office holders to their members.

The Commission is currently undertaking careful analysis of the extensive media reporting involving the Construction and General Division of the CFMEU in relation to alleged non-compliance under the RO Act.

To find out more read the Fair Work Commission statement on the CFMEU that was published on 17 July 2024.

Modern Awards Review 2023-24: Final Report published

18 Jul 2024

We have published the Modern Awards Review 2023-24 (the Review) Final Report from the Full Bench. The Final Report finishes the Modern Awards Review 2023-24.

The Review considered 4 priority topics: award coverage in the arts and culture sector, job security, work and care and making awards easier to use. The Final Report notes that this was a targeted review, which provided parties an opportunity to identify award provisions for consideration. In these circumstances, the Full Bench did not consider it appropriate to finally determine the issues raised.

Based on suggestions made in the Review, we have identified some priority issues and we will start new cases concerning the following modern awards and/or issues:

(1) *Amusement, Events and Recreation Award 2020* (coverage of arts workers).

(2) *Live Performance Award 2020* (correcting errors and deficiencies).

(3) *General Retail Industry Award 2020* (further considering parties' proposals).

(4) *Clerks Award – Private Sector Award 2020* (working from home provisions).

(5) *Higher Education Industry – Academic Staff – Award 2020* and *Higher Education Industry – General Staff – Award 2020* (fixed term contracts).

(6) Part-time employment.

Proceedings (3) and (4) will start in August 2024. Proceedings (1), (2) and (5) will begin in September 2024. Proceedings concerning part-time employment will not start until a suitable time in 2025.

Further information on each of these cases, including how parties can be involved, will be released in due course.

Our President, Justice Hatcher has also issued a statement about the findings of the Review and the Final Report published by the Full Bench. The statement provides a short summary of the Final Report and the key outcomes, being the 6 new cases identified above.

We thank everyone who was involved in the Modern Awards Review 2023-24 for their contributions.

Read:

- President's Statement about the findings of the Review and the Final Report (pdf)
- Modern Awards Review 2023-24 Final Report
- More information about the Modern Awards Review 2023-24.

Implementation Report for new functions published

19 Jul 2024

We have published an Implementation Report about new functions relating to the right to disconnect.

These new functions are given to us by Part 8 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 202*4. The new functions will start on 26 August 2024 and on 26 August 2025 for small business.

We invite your feedback on how we plan to implement these new functions.

About the report

The Implementation Report sets out how we plan to implement the new functions, which include dealing with disputes between employers and their employees about the right to disconnect, including by issuing a stop order and/or otherwise dealing with the dispute (in addition to the Commission's functions under the general protections provisions in Part 3-1) (ss.333N-333V).

In his 27 February 2024 Statement, our President, Justice Hatcher, noted these new functions will require significant case management support to be established prior to implementation.

This report is part of our commitment to engage and consult with our stakeholders on how we implement these new functions.

Send us your feedback

Interested parties are invited to send us feedback on the report. Email your feedback to consultation@fwc.gov.au **by 5pm (AEST) on Friday 2 August 2024**.

Read:

- Implementation Report – Right to disconnect
- President's Statement: Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (published 27 February 2024)
- The Closing Loopholes Acts – what's changing.

New regulated worker functions information resources

22 Jul 2024

We have published new information resources to help workers and businesses understand our new functions relating to minimum standards for regulated workers.

The new resources include:

- video presentation by Commission Members providing an overview of our new minimum standards functions
- animation explaining the changes coming for regulated workers on digital platforms
- animation explaining road transport contractual chain functions
- updated website content and graphics including a new infographic on the collective agreement process

These resources are part of our commitment to engage and inform our stakeholders on our new functions. We continue to engage with regulated workers and businesses including through our Regulated Worker User Group.

Our regulated worker functions will start on 26 August 2024 or a date to be proclaimed. These functions are given to us by Part 16 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.
Regulated workers are:

- employee-like workers who perform digital platform work, and
- regulated road transport contractors.

We encourage you to subscribe and follow us on LinkedIn to stay up to date.

Read:

- Preparing for new regulated worker functions

Report a concern about the CFMEU

29 Jul 2024

As the independent regulator of registered organisations under the *Fair Work (Registered Organisations) Act 2009*, we are **inviting further information** from those with knowledge of any non-compliance with the law by Construction, Forestry and Maritime Employees Union (CFMEU) officials or representatives, as recently reported in the media.

We have created an online form for you to share this information with us. See Report a concern about the CFMEU. We invite information relating to any Branch of the CFMEU.

We have also set up a dedicated phone line if you would prefer to provide information over the phone. To report a concern regarding the CFMEU, please call +61 3 9063 7633 (Monday to Friday 9am to 5pm).

We are working closely with other regulatory and enforcement agencies that are assessing concerns raised about the CFMEU that fall outside of our jurisdiction.

If you report a concern, we may share this information with other Commonwealth, state or territory bodies where it could assist their activities or help with enforcement of relevant laws. Your contact details will not be shared without your express consent. You should report any emergencies, or immediate threats to the police.

You can ask to remain anonymous. However, the Commission and other regulatory or enforcement agencies may not be able to use the information provided.

In providing information to us, you may or may not be considered a 'protected discloser' (whistleblower) under the Registered Organisations Act. Read our fact sheet for more information about protected disclosures and how they are investigated:

- Protection for whistleblowers reprisals fact sheet (pdf)

President’s statement about CFMEU agreement applications

30 Jul 2024

The President of the Fair Work Commission, Justice Hatcher, has issued a statement in relation to the process for enterprise agreements where the Construction and General Division of the CFMEU is an applicant, employee bargaining representative, or signatory to an agreement.

Read the President’s statement (pdf).

Decisions of the Fair Work Commission

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

Summaries of selected decisions signed and filed during the month ending Wednesday, 31 July 2024.

1 ENTERPRISE AGREEMENTS – approval – consultation – ss.201, 205 and 604 Fair Work Act 2009 – appeal – Full Bench – Construction, Forestry and Maritime Employees Union appealed four separate enterprise agreement approval decisions – four enterprise agreements (Agreements) each covered one of DP World's stevedoring operations in Brisbane, Fremantle, Melbourne and Sydney – Agreements relevantly identical and no different issues were raised in the appeals with respect of approval of each agreement – appellant took issue with first instance notation of a model consultation term prescribed by Fair Work Regulations to be a term of the Agreements – at first instance Commissioner's associate sent email to all parties flagging opportunity to address potential issues Commission had raised – one issue was proposed consultation term did not meet requirements of s.205(1A) – Commission's provisional view was model consultation term would be taken to be a term of the Agreements and inserted into Agreements – following correspondence between parties no further submissions were made on model consultation term issue – Commission provided time and date Agreements would be approved unless submissions were made by parties – Commission approved Agreements and included model consultation term in each Agreement – appellant filed appeal claiming Commission denied them procedural fairness; erred in construction of ss.205(1) and/or 205(1A); and erred in determining consultation term did not meet ss.205(1) and/or 205(1A) – Full Bench cited ss.201 and 205 requirements for what matters need to be noted by Commission and that a consultation term must be included in an enterprise agreement – consultation term requires employers to consult employees regarding major workplace change that is likely to have significant effect on employees or a change to their regular roster or ordinary working hours – s.205(2) requires that if an enterprise agreement does not contain a consultation term, the model consultation term was taken to be a term of the agreement [*Teekay Shipping*] – Full Bench granted permission to appeal as it was satisfied it was in the public interest to do so – respondent opposed appeal – Full Bench considered appeal raised two matters of general application and importance – firstly appellant's submissions raised question as to the nature of s.205(1A)(b) requirement that an enterprise agreement include a term which requires employer to invite employees to give view about impact of change to regular roster or ordinary hours of work – second issue was proper approach to assessing inconsistency between enterprise agreement terms and award terms incorporated by reference to a provision that terms of agreement prevail to extent of any inconsistency – Full Bench noted this was a common drafting device used in enterprise agreements [*Crouch*] – Full Bench dismissed appellant's submissions about procedural fairness – appellant submitted Commission at first instance erred in including a notation in the decision for the purpose of s.201(1), that consultation clause is

taken to be a term of the Agreements by operation of s.205(2) – appellant submitted Commission misconstrued s.205 and erred in determining consultation term did not meet s.205(1) and (1A) requirements – appellant submitted clause 45 of the Agreements could be interpreted in conjunction with clause 32 of the *Stevedoring Industry Award 2020* (Award) that when read together constituted a consultation term that met requirements of ss.205(1) and (1A) – respondent disagreed claiming, per clause 5.2 of the Agreements, where there is an inconsistency between the Agreements and Award provisions, the Agreements shall apply to the extent of the inconsistency – respondent submitted Agreements clause 45 was inconsistent with Award clause 32 and could not be read together – Full Bench considered whether Agreements clause 45 constituted a consultation term meeting requirements of s.205(1) and (1A) – found Agreements clauses 45.2 and 45.3 dealt with respondent's duty to notify employees of changes that will have a significant effect and discuss the changes with employees that will be effected – clause 45.5 addresses roster changes – appellant accepted clause 45 did not directly deal with consultation about ordinary hours of work and, on its own, did not comply with s.205(1)(a)(ii) – appellant also accepted clause 45.3.1 did not require the respondent to invite employees to discuss how roster changes would impact their family or caring responsibilities as required by s.205(1A)(b) – Full Bench held clause 45 did not meet definition of a consultation term – Full Bench considered whether clause 32 of Award when read in conjunction with clause 45 of Agreements met definition of consultation term – respondent submitted Full Bench could consider approaches taken for s.109 *Constitution* cases where the law of the Commonwealth prevails over that of a State to the extent State law is inconsistent with Commonwealth law – Federal Court previously held that there were different considerations in application of inconsistency clauses in contracts compared to *Constitution* s.109 cases [*Maribyrnong City Council*] – appellant submitted that inconsistency arose only if Agreement provision and Award provision could not be fairly read together or Agreement terms demonstrated an intent to cover a subject matter to the exclusion of Award – Full Bench held where modern award terms are incorporated into an enterprise agreement and are subject to test of inconsistency, whether such inconsistency arises will turn on meaning of that term in the context and purposes of the relevant agreement – Full Bench noted that there were limitations to the extent to which it is possible to make general pronouncements about approach to be adopted – Full Bench considered clause 32 of Award and clause 45 of Agreements – issue arose where there were differences for the process of consultation between the Agreements and the Award – Full Bench held critical difference between Agreements clause and Award clause was when consultation obligations they imposed arise – Agreements clause 45 only operates when the employer has made a definite decision to introduce change while Award clause 32 operates where the employer proposes to change an employee's regular roster of ordinary hours of work – Full Bench held clause 32 required an employer to consult employees before a definite decision had been made to introduce a significant change [*Re Consultation clause in modern awards*] – held despite different consultation obligations regarding the timing of consultation when a significant change was made, this was not of itself an inconsistency [*Teekay Shipping*] – Full Bench did not accept alternative submissions made by respondent – Full Bench held Award clause addressed changes to a regular roster of ordinary hours of work for an individual employee – clause 45

concerned with changes in production, program, organisation, structure or technology that are likely to have significant effects on employees or roster changes arising from particular circumstances – Full Bench concluded no inconsistency arose between clause 45 of Agreements and clause 32 of the Award for purpose of clause 5.2 of the Agreements – further held the two provisions could be read together – Full Bench granted appeal and ordered the agreements be varied so as to delete the notation prescribing the model consultation term be taken as a term of the Agreements.

Appeal by Construction, Forestry and Maritime Employees Union (105N) against decisions of Commissioner Matheson [[2024] FWCA 1358] and Ors Re: DP World Melbourne Ltd T/A DP World Melbourne and Ors

C2024/2831 and Ors | [2024] FWCB 317
Gibian VP | Sydney | 23 July 2024
Wright DP
Slevin DP

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2 CONDITIONS OF EMPLOYMENT – regulated labour hire arrangement – s.306E Fair Work Act 2009 – Full Bench – application for regulated labour hire arrangement order (RLHAO) applying to Batchfire Callide Management P/L (host) as regulated host and WorkPac P/L and WorkPac Mining P/L (collectively, WorkPac) as employers in respect of employees performing work at Callide Mine operated by host – application not opposed by host or WorkPac – host workplace an open-cut coal mine, employing a number of staff covered under *Callide Mine Union Enterprise Agreement 2021* (agreement), covering employees of the AMWU, CEPU and applicant – WorkPac provides roughly 324 production workers as labour hire contractors to host – production workers of host and WorkPac both eligible to be members of applicant and significant number of production workers are members of applicant – Full Bench noted various shared duties and attributes of host and WorkPac employees: attending same meetings, centralised allocation, management and training from host, performance of identical work, wearing same host uniform – Full Bench considered statutory scheme for RLHAOs, noted intention of legislation to "[protect] bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than those minimum rates" [Revised Explanatory Memorandum to *'Closing Loopholes' Bill*] – noted s.306E as key provision, observed 8 requirements of provision, and considered matter with those requirements in mind – Full Bench satisfied applicant entitled to represent employees of host and WorkPac, thereby had standing to make application – Full Bench satisfied of its requirement to make RLHAO under s.306E, finding that as WorkPac supplies their employees to perform production work for host, the relevant agreement would apply to those workers if directly employed by host, and host not a small business employer – Full Bench satisfied that performance of work by WorkPac employees for host not provision of service but instead supply of labour for the following reasons: no evidence that WorkPac employees involved in work other than production work, no person on behalf of WorkPac directs supervises or controls contracted production employees, WorkPac employees exclusively utilise host's systems, are subject to same industry standards and obligations as host workers, and finally, production work at mine not of a specialist nature – Full Bench also satisfied that it was fair and reasonable to make the RLHAO, pursuant to

s.306E(2) – no submissions made in relation to matters contained in s.306E(8) – Full Bench required to make RLHAO, but noted that s.306F requires host to pay no less than 'protected rate of pay', despite applicant's draft order containing schedule of pay rates from agreement – Full Bench published draft order with decision, operative date of order 1 November 2024 – order does not specify date of cessation, as no submissions made to this effect – Full Bench to provide a period of 2 week for interested parties to comment on draft order, being the first of its kind made by Commission.

Application by the Mining and Energy Union

C2024/1506 [2024] FWCFB 299
Hatcher J VP Sydney 1 July 2024
Asbury VP
Saunders DP

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3 GENERAL PROTECTIONS – jurisdiction – maximum term contract – s.365 Fair Work Act 2009 – application to deal with contraventions involving dismissal – jurisdictional objection raised that applicant not dismissed – Commission to consider whether applicant was dismissed in order to deal with general protections dispute [*Milford*] – applicant alleged was dismissed because she made complaint or inquiry in relation to employment and/or exercised various workplace rights and/or had mental health issues that constituted a disability – respondent's jurisdictional objection was applicant not dismissed and applicant's employment ended pursuant to terms of her employment contract – applicant commenced employment in November 2022 on fixed or maximum term contract as Training and Programs Facilitator (First Contract) – First Contract was initially for 6 month period and prior to the end date applicant was offered and accepted a 12 month maximum term contract as Community Engagement Officer (Second Contract) – respondent identified repeated performance concerns with applicant regarding lateness and failure to follow procedure in November 2023 which continued into December – applicant issued with written warning on 15 February 2024 following a letter of allegation and disciplinary interview – respondent's concerns with applicant's performance and reliability continued after 15 February 2024 – respondent determined applicant would not be offered contract renewal or extension post end date of Second Contract – applicant contacted respondent on 27 February 2024 to organise a time to discuss further employment contract – respondent notified applicant it had determined not to offer further employment contract or ongoing employment upon expiration of Second Contract (7 March Letter) – applicant remained employed until end date of Second Contract (14 March 2024) – applicant contended employment was continuing based on discussion with respondent and requested respondent give at least one month notice if employment not continued or extended – respondent contended applicant understood terms of Second Contract and was not promised contract renewal or ongoing employment – Commission found no evidence to support applicant's contention as to representations or agreements Second Contract would be extended or replaced beyond end date or applicant being promised notice – Commission followed decision of Raper J in *Alouani-Roby* and preferred it to decision of the Full Bench majority in *Navitas* – Commission observed the reasoning that led to the majority conclusion in *Navitas* in relation to s.386(2)(a) FW Act was directly considered

in *Alouani-Roby* and rejected – Commission found it appropriate to adopt and follow reasoning set out in obiter remarks in *Alouani-Roby* – Commission applied two *Alouani-Roby* findings: a) a contract for a "specified period of time" not to be treated with caution or undermined by mere fact it contains term enabling termination during or within specified term, and b) express terms of contract must be given effect to unless contrary to statute, past conduct does not provide legitimate basis for going behind terms of relevant contract – Commission determined *Alouani-Roby* would be applied to extent contrary to majority decision in *Navitas* about operation and application of s.386(2)(a) to an employment relationship governed by a written outer limit or maximum term employment contract containing an early termination clause on specified grounds – Commission observed the starting point began with the following principles: (1) the employment relationship is both referrable and deferrable to the terms of the applicable employment contract; (2) 'unless some law provides otherwise, parties are free to contract as they see fit' [*Chappel*] – the provisions of the FW Act operate against the background of the fundamental doctrines of the common law, with one of those doctrines being the 'freedom to contract'; (3) it is the function of courts and tribunals to enforce legal obligations under a contract, and the express terms of a contract must be given effect to unless contrary to statute [*Personnel Contracting*; *Jamsek*] – Commission found s.386(2)(a) applied to a maximum term employment contract even if such a contract provided for early termination as long as contract terminated on its specified end date – s.386(2)(a) exclusion applies in this case – s.386(1)(a) not applicable where s.386(2)(a) applies – s.386(3) not applicable to s.386(2)(a) where a dismissal is alleged under Part 3-1 of the FW Act – Commission held applicant's employment came to an end on 14 March 2024 pursuant to the express terms of the Second Contract and s.386(2)(a) applied – held applicant was not dismissed within the meaning of s.386 – jurisdictional objection upheld – application dismissed.

Doku v BlaQ Aboriginal Corporation

C2024/2182 [2024] FWC 1815
Boyce DP Sydney 11 July 2024

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15 ANTI-BULLYING – bullied at work – s.789FC Fair Work Act 2009 – applicant, a Fair Work Commission (FWC) Conciliator, sought order against her manager (Director) to stop bullying – applicant alleged she experienced victimisation, humiliation, intimidation, harassment, abuse, insults, unjustified criticism, denial of professional development opportunities and unequal treatment – applicant suggested alleged behaviour began as result of approaching Director seeking support about difficult cases – Commissioner identified three key questions: 1) whether applicant reasonably believed she was bullied at work, 2) whether applicant has been bullied at work by Director, 3) whether behaviour created risk to health and safety – Commissioner identified only necessary to deal with question 2 to determine matter – whether applicant bullied at work considered – noted meaning of 'bullied at work' set out in s.789FD and that 'bullied at work' does not apply to reasonable management action carried out in reasonable manner – satisfied FWC met description of 'constitutionally-covered business' for purpose of s.789FD(3) and that applicant was worker and alleged behaviour took place while applicant at work at FWC – applicant made eight specific allegations of

bullying by Director, starting October 2022 but primarily between September 2023 and October 2023 – applicant alleged: 1) Director dismissed her problems with FWC IT systems; 2) Director discouraged her participation in a pilot program; 3) Director scoffed at suggestion for debriefings and said words to effect 'maybe the job is not for you'; 4) Director threatened applicant's job and referred to her as failure; 5) Director gave her misleading information, impacting professional development; 6) Director made false and aggressive allegations about her; 7) Director made four simultaneous and inappropriate calls while applicant conducting offline conciliation; and 8) Director subjected applicant to excessive scrutiny – Commissioner considered each of applicant's eight allegations – rejected allegation 1, found Director (who at relevant time was applicant's colleague, rather than manager) attempted to resolve applicant's IT issue while introducing himself to a new colleague – found Director's behaviour not unreasonable – rejected allegation 2,not satisfied Director was 'very discouraging' of applicant's potential involvement in pilot – rejected allegation 3, not satisfied Director scoffed at applicant's suggestion for debriefings and/or said words to effect 'maybe the job is not for you' – found conversation took place shortly after Director started in position and having 'meet and greet' sessions with each individual FWC Conciliator which included inviting improvement suggestions – found context seemed incongruous with one where Director scoffed at suggestion for debriefings – observed applicant tended to read more into conversations than was objectively available – further found while applicant may not have agreed with Director's method for moving on from difficult cases that did not mean his description of those methods was unreasonable or bullying behaviour – allegation 4 considered – relevant conversations resulted from applicant not completing administrative steps following a conciliation – file was inactive for approximately nine months – applicant spoke with Director concerning inactive file – applicant suggested Director was extremely aggressive and called her 'a failure' – Director suggested he listened to applicant, who was distressed and 'all over the shop' for a while before taking more direct role in conversation to focus applicant on relevant points – Director suggested he told applicant words to the effect he would handle the matter and deal with the Regional Coordinator's Chambers – Commissioner rejected assertions Director was aggressive – found Director acted as any reasonable manager would have by seeking to understand what had happened, identify the problem(s), explain how things could have been done differently and then took responsibility – Commissioner accepted Director's denial he called applicant 'a failure' and observed Director may have said applicant failed to do certain things in relation to file – further observed not improper for Director to mention possible consequences for applicant's mistakes relating to inactive file – found within Director's remit to discuss performance issues with applicant – noted while applicant genuinely felt raising of consequences was threat to job, it was necessary and appropriate for Director to explain potential consequences of mistake and failure to do so may be denial of procedural fairness – held discussion was reasonable management action carried out in a reasonable manner – allegation 5 rejected, found issue arose from misunderstanding of provisions within then-applicable FWC enterprise agreement – allegation 6 considered – allegation related to interrupted EAP session and performance management process – urgent exchange initiated by applicant as EAP session was running over time and she contacted Director seeking to have imminent conciliation reallocated to

another Conciliator – found not unreasonable for Director to contact applicant during her EAP session as Director dealing with late-made, urgent request from applicant – Commissioner rejected contentions regarding performance management plan – noted performance concerns were not fabricated and questions about actions of personnel other than Director outside scope of this proceeding – allegation 7 rejected, found it reasonable for Director to contact applicant to ascertain whether a scheduled conciliation was taking place – allegation 8 considered – determined not unreasonable for Director to review applicant's case files – noted this was reasonable management action and no evidence action was not carried out in reasonable manner – Commissioner noted applicant's contention that psychological hazards can arise for FWC Conciliators relating to support, workload and isolation due to remote working – Commissioner recommended FWC undertake or revisit risk assessment on workplace psychological hazards to ensure, as far as practicable, a safe working environment for FWC Conciliators – held applicant not bullied at work, consequently no orders to stop alleged bullying could be made – application dismissed.

Murdock

AB2024/93 [2024] FWC 1742
McKinnon C Sydney 10 July 2024

Other Fair Work Commission decisions of note

Appeal by Clinical Laboratories P/L t/a Australian Clinical Labs against decision of McKenna C of 27 March 2024 [[2024] FWC 787] re Health Services Union

MODERN AWARDS – dispute about matter arising under award – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – whether Clinical Laboratories (ACL) is a medical practice for purposes of clause 27.5 of *Health Professionals and Support Services Award 2020* (Award) – at first instance Commission determined that ACL was not a medical practice for purposes of provisions dealing with directions to take annual leave during a shutdown in dental and medical practices (clause 27.5 of Award) but was a pathology practice – concluded that a pathology practice was ordinarily understood to be different to a medical practice – found clause 27.5 not available to ACL to give direction to employees to take annual leave during a shutdown period – ACL sought permission to appeal decision re interpretation of clause 27.5 – Full Bench held that parties' agreement to arbitration under clause 36 of Award included appellate process in s.604 – Full Bench concluded that decision at first instance was correct but granted permission to appeal for 2 reasons – first, dispute involved construction of modern award applying to many employers and employees in the health industry as defined and decision could affect other employers and employees – second, Full Bench reasons for arriving at same outcome as at first instance differed to reasons at first instance – Full Bench considered definition of "private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice" in clause 2 – noted that definition indicated a distinction between medical practice and pathology practice – noted that clauses 11.3 and 27.5 make specific provision for "medical practice" without reference to "pathology practice" – agreed with observation at first instance that "medical practice" was not being used as a collective term which encompassed a pathology practice – determined that definition was not able to be directly read into clause 27.5 because full phrase did not appear in clause 27.5 but demonstrated an intention in Award to distinguish between a medical practice and a pathology practice which supported conclusion at first instance – appeal dismissed.

C2024/2368 [2024] FWCFB 296
Gibian VP

Appeal by PHI (International) Australia P/L t/a HNZ Australia P/L against decision of O'Keeffe DP of 26 June 2024 [[2024] FWC 1795] Re: Nash and Ors

CASE PROCEDURES – stay order – representation – ss.596, 604, 606 Fair Work Act 2009 – appellant's application for permission to be represented in first instance proceeding refused – reasons for representation decision not published at time stay application heard – reasons issued following publication of this stay decision – representation decision was based on operation of clause 22 of *Karatha Helicopter Pilots MPT Operations Agreement 2017* – appellant sought urgent stay of representation decision – stay application principles considered [*Kellow-Falkiner Motors v Edghill*] – whether arguable case on appeal – respondent submitted that in absence of published reasons the Commission could not be satisfied that appellant could demonstrate arguable case of error – Commission held although detailed reasons not yet published, basis of reasoning 'tolerably clear' – Commission held Deputy President must have refused permission because of operation of Agreement, not criteria at s.596 of the Act and therefore possible to form a view as to arguable case – clause 22.1.4 of Agreement said 'A person(s) initiating a dispute may appoint and be accompanied and represented at any stage by another person, organisation or association, including a Union representative or Company association in relation to the dispute. Ready access to Pilots shall be provided to the Pilot's nominated representative so that relevant information and instructions can be provided. However not at a time such that it will impact with the Company's normal contracted operations' – respondents submitted cl. 22.1.4 of the Agreement impliedly prohibits parties who did not 'initiate the dispute' from being represented – appellant submitted clause is focused on ensuring a pilot has access to representation and not the representation of other parties – Commission found that positions of both parties sufficiently arguable – whether relief sought is available or appropriate considered – practical relief sought by appellant was to vacate substantive hearing pending determination of appeal – position then altered to seek a stay of decision of Deputy President refusing permission to be represented and as a term or condition of the stay, an order vacating the hearing – whether Commission can stay proceedings [*CFMEU v Collinsville*; *Woodside v AWU*] – stay order can only be of an operative decision with ongoing effect – stay must be directed at the decision subject of the appeal – request for adjournment not a condition of a stay order but entirely separate order and not available – whether balance of convenience favoured grant of a stay – appellant submitted if stay not granted it would be denied opportunity to be represented and which would result in procedural unfairness and the appellant being denied fundamental right of legal representation – held that possible prejudice to appellant did not justify stay – should substantive matter proceed the appellant retained right to appeal that decision and refusal of permission may be a ground of appeal – stay order refused.

C2024/4398 [2024] FWC 1735
Gibian VP Sydney 2 July 2024

Rimland v Baldwin's Plumbing and Gas (SA) P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – personal communication – s.394 Fair Work Act 2009 – applicant commenced employment as full-time administrative officer on 30 August 2022 – applicant summarily dismissed on 2 April 2024 on basis of misconduct relating to offensive out-of-hours communication with business owner – applicant claimed dismissal was harsh, unjust or unreasonable and sought remedy for unfair dismissal – respondent small business as defined – problematic behaviour began in 2023 where applicant sent personal emails and texts late at night to one of the owners which caused discomfort – applicant stated these communications sent while intoxicated and directness due to autism – respondent issued written warning to applicant on 23 December 2023 – following personal conversation at work, applicant sent out-of-hours email to the owner on 28 March

2024, causing distress – time provided for applicant to retract comments or apologise, which did not occur – applicant summarily dismissed with formal email of termination – applicant lodged unfair dismissal application – Commission outlined principal test for applying Small Business Fair Dismissal Code ('Code') – 'First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly, it is necessary to consider whether that belief was based on reasonable grounds' [*Pinawin*] – Commission found first element met – Commission elaborated second element – 'Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of the dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer considered' [*Pinawin*] – Commission found second element met due to repeated nature, lack of retraction, warning received, and purposeful nature of last email – applicant submitted conduct not serious enough to warrant dismissal – Commission did not accept applicant's submission – Commission found personal conversation at work did not provoke the communication received – applicant argued emails not work-related – Commission found emails sufficiently connected to work – applicant submitted emails sent with good intent – Commission did not accept this as the warning ought to have made unwelcomeness of emails apparent – applicant submitted autism contributed towards bluntness in emails – Commission took this into account but noted no medical evidence provided on impact to conduct – Commission found dismissal consistent with Code and was therefore not unfair, was not unfair on other grounds – application dismissed.

U2024/3911 [2024] FWC 1656
Anderson DP Adelaide 27 June 2024

Vassallo v Lutheran Church Of Australia Queensland District t/a Redeemer Lutheran College and Ors

GENERAL PROTECTIONS – dismissal dispute – ss.365, 386 Fair Work Act 2009 – application to deal with general protections dispute involving dismissal – jurisdictional objection that applicant was not dismissed – applicant contended forced resignation – applicant employed as Business Manager on full-time basis for first respondent – Deputy Principal of first respondent erroneously placed complaint about applicant in Dropbox accessible by nine other staff members, stating that applicant treated him with 'contempt,' believed to be linked to Deputy Principal's sexuality and applicant's Roman Catholicism – applicant made complaint about incident – first respondent engaged independent investigator, Deputy Principal was stood down – investigation found incident accidental – no issues raised while Deputy Principal stood down for 245 days – 11 August 2023, Acting Principal of first respondent met with applicant to discuss Deputy Principal returning to work – applicant stated Acting Principal asked him to consider resignation or he would be required to meet with Deputy Executive Director, People & Business Services, (Deputy ED) and Deputy Principal – Acting Principal phoned applicant's wife suggesting applicant would be stood down if he did not meet with Deputy ED and Deputy Principal – emails then exchanged between applicant and Deputy ED – Deputy ED recommended they meet with Acting Principal on return to work to discuss issue – applicant increasingly 'combative' in emails – applicant took personal leave and WorkCover claim was accepted – applicant resigned on 18 October 2023, stating no option but to resign due to first respondent's imposed requirement to tolerate public discrimination – whether applicant forced to resign under s.381(1)(b) considered – Commission noted prior interpretation of forced resignation – must be element of compulsion [*Megna*], critical action/s of employer intended to end employment relationship [*Boulic*], action/s intended to bring employment to an end would reasonably have that effect [*Bupa*], and employer's conduct oppressive or repugnant to ordinary course such that resignation a reasonable response [*Hastie*] – Commission satisfied no evidence of forced

resignation because of first respondent's conduct – noted forced resignation did not turn on applicant's belief of situation, but objective assessment of conduct by parties – first respondent's handling of applicant's complaint considered – first respondent engaged independent investigator within 14 days, applicant not compelled to work with Deputy Principal for 245 days – Commission found steps taken were appropriate – Acting Principal's conduct considered – Acting Principal assessed Dropbox incident was accidental and Deputy Principal's complaint not widely distributed or accessed – reasonable decision to stop show cause process as issue not live – phone call to applicant's wife poorly handled, but even if implied applicant should resign, applicant still had option to follow first respondent's procedure to determine if complaint would be addressed – conduct not determinative given first respondent's subsequent conduct – assessment of Deputy ED's conduct – reasonable emails to applicant, open to addressing concerns – applicant and Acting Principal were on leave so no imminent requirement for Deputy ED to address situation – applicant not put in position to communicate or work with Deputy Principal at time, did not let first respondent undertake its procedure before resignation – assessment of applicant's conduct – phone call probative in demonstrating whether first respondent's conduct contributed to resignation – WorkCover claim and medical certificate not sufficient to show forced resignation – medical certificate stated applicant not impeded to make decisions about employment – applicant had a lot of leave remaining and only resigned when new employment secured – conclusion – no indication applicant would be stood down or forced to resign – meeting with Deputy ED was still open – no conduct of first respondent determinative of dismissal – Commission observed applicant's argument would have been more persuasive if he attended meeting – applicant only resigned once another role secured, indicating resignation was an option; would have otherwise remained on leave until able to follow first respondent's process – held resignation did not meet forced resignation threshold in s.386(1)(b) – jurisdictional objection upheld – application dismissed.

C2023/6939 [2024] FWC 1450
Lake DP Brisbane 4 July 2024

Ridings v Fedex Express Australia P/L t/a Fedex

CONDITIONS OF EMPLOYMENT – flexible working arrangements – s.65B Fair Work Act 2009 – applicant made series of flexible working arrangement requests – from 1 July 2019 applicant worked two 2 days at home and 2 days in officer per week under approved arrangement (first request) – applicant applied for modified arrangement on 10 January 2024 to 3 days at home and one day in office per week (fourth request) – respondent refused fourth request on 23 February 2024 – respondent confirmed applicant could continue previous arrangement of 2 days at home and 2 days in office – applicant lodged dispute on 23 February 2024 – respondent offered applicant to work 3 days at home and one day in office until dispute resolved – applicant did not attend office as directed – Commission considered the 5 requirements of s.65 to determine if application validly made – applicant has a present circumstance caring for wife and children – is a carer under s.65(1A)(b) – worked for longer than 12 months with reasonable expectation that permanent part-time employment will continue – made request in writing – provided reasons for seeking arrangement – respondent refused request under s.65B(1)(b)(i) – Commission satisfied application validly made – Commission noted employer can refuse request only if particular criteria under s.65A are met – noted employee cannot work new flexible arrangement until request is approved by employer or order is granted by Commission – held it was inappropriate for applicant to refuse respondent's lawful direction to work one day only per week in office until dispute was resolved – noted employer cannot genuinely consider a request without being properly informed of all relevant information – noted applicant did not clearly give respondent information about increased carer demands – noted respondent could not have been properly informed of applicant's circumstances when refusing request – Commission satisfied respondent genuinely tried to reach agreement – Commission considered whether reasonable business ground for refusal – noted respondent made out the benefits of working in office but did not make out any detriment – noted

respondent failed to consider applicant's personal circumstances in their reasoning for refusing his request and failed to consider how approving request would be detrimental to business operations – Commission not satisfied respondent provided a sufficient explanation for refusing request on reasonable business grounds – Order issued under s.65(1(f)(ii) – applicant's modified flexible working arrangement made on 10 January 2024 not granted – respondent to change working arrangements so that applicant is required to work in office one day per week and may work from home 3 days per week – if applicant does not satisfy certain criteria respondent may lawfully and reasonably request applicant to work in office on days he is permitted to work from home – order valid for 3 months from 12 July 2024.

C2024/1129 [2024] FWC 1845
Lake DP Brisbane 12 July 2024

Mojanovski v BlueScope Steel Limited

TERMINATION OF EMPLOYMENT – misconduct – valid reason – reinstatement – ss.387, 394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant dismissed without payment in lieu of notice – applicant paid five weeks' ordinary pay in recognition of service length – applicant alleged to have threatened physical violence towards another employee – respondent alleged applicant seriously breached workplace code of conduct and behaviour polices – alleged threat occurred approximately four months after applicant was issued final warning regarding previous behaviour issues – applicant moved to another department with respondent after prior incident – applicant contended no threat of physical violence occurred – Commission observed respondent did not formally interview complainant about allegation of threats – respondent made preliminary findings that allegations against applicant were true – applicant issued show cause letter – credibility of applicant considered, noted applicant's emotional evidence explainable by dismissal from position of 31 years based on disputed allegations – absence of complainant's evidence considered – observed while Commission not bound by Evidence Act 1995 (Cth), complainant not 'unavailable' for purposes of s.4 Evidence Act, instead complainant chose not to participate and not compelled by respondent – weight of hearsay evidence considered – found unfair for complaint to be advanced as hearsay evidence without allowing applicant to test such evidence – applicant alleged threat did not occur thus no valid reason – applicant sought reinstatement, continuity of employment and income loss – responded alleged circumstantial evidence existed supporting allegation despite lack of key witness evidence – respondent alleged reinstatement not appropriate citing health and safety risks – Commission to consider whether dismissal harsh, unjust or unreasonable per s.387 – found complete absence of evidence to substantiate thread was made – found no threat of physical violence – found no valid reason for dismissal – found culmination of circumstantial evidence did not prove threat occurred – found circumstantial evidence only proved complaint was made – applicant's credibility found more favourable than respondent's witness – found applicant denied substantive fairness as no grounds of dismissal were fair – Commission also found procedural unfairness as applicant's exculpatory points not considered by respondent – dismissal found to be harsh, unjust and unreasonable – reinstatement considered – reinstatement strongly opposed by respondent – Commission found reinstatement appropriate in the absence of valid reason – reinstatement ordered – lost remuneration ordered from date of dismissal to date of reinstatement less five weeks' notice paid and monies earned in mitigation of losses with order to maintain continuity of applicant's employment as if dismissal had not occurred.

U2024/2763 [2024] FWC 1473
Cross DP Sydney 5 July 2024

Egginton v Focus (NSW) P/L

GENERAL PROTECTIONS – dismissal dispute – notice – ss.365, 386 Fair Work Act 2009 – jurisdictional objection – applicant commenced employment with respondent

on 26 June 2023 – applicant unhappy in his employment, particularly concerning his direct manager – resigned on 20 March 2024 – argued manager 'pushed [him] out' – claimed resignation 'mainly due to psychosocial hazards' in workplace – one month's notice provided with finish date of 19 April 2024 – applicant claimed during phone conversation on 28 March 2024 respondent's owner/director dismissed him prior to resignation taking effect – respondent maintained applicant resigned, not dismissed within s.386 meaning – claimed applicant not performing as required – manager cited safety concerns about working with applicant – Commission observed applicant showed little interest in working out notice period – noted he discussed this with other employees – offensive language, animosity and 'problematic' behaviour towards manager potentially escalated to avoid working notice period – Commission noted applicant's employment could have been terminated at any time with one week's notice or immediately with misconduct – 'most important event' was conversation between applicant and owner/director – owner/director unable to be cross-examined – Commission 'reluctantly received' owner/director's witness statement into evidence – little difference found in accounts of phone conversation – Commission found 'no discussion at all' about working or paying balance of notice period – Commission observed 'whether [owner/director] deliberately chose not to talk about payment […] [is] not particularly relevant. What is more relevant is the words used by the employer and the employee and what a reasonable person would understand those words to mean about the end of the employment' – Commission found no evidentiary basis applicant agreed to resign immediately without payment – instead discussion initiated with intent to finish applicant's employment early – no agreement to bring forward date resignation would take effect – Commission observed: 'Disputes often arise when employers and employees "agree" to end the employment early after the employee has given notice to resign. Such "agreements" often fall apart when the final pay is drawn because of misunderstandings about what was agreed' – to determine whether applicant dismissed, Commission applied test established in [*Tavassoli*] – reinforced that resignation given in 'heat of moment' and accepted without clarification may be characterised as termination at initiative of employer – satisfied employment ended in respondent initiated phone conversation intended to finish applicant's employment earlier than date specified in resignation – held applicant an employee who was dismissed for purposes of s.365(a) – jurisdictional objection dismissed – conference to be convened.

C2024/2196 [2024] FWC 1872
Easton DP Sydney 17 July 2024

Wetzler v Australian Taxation Office

TERMINATION OF EMPLOYMENT – jurisdiction – resignation – ss.386, 394 Fair Work Act 2009 – applicant a Commonwealth public servant – applicant charged with serious criminal offence and spent time in custody awaiting a bail application – respondent raised possible breaches of Australian public service code of conduct arising out of the charges and associated media reporting – applicant suspended without pay – while applicant was in custody his wife resigned on the applicant's behalf utilising her power of attorney to act on his behalf – applicant contended there was a termination at the respondent's initiative because resignation was in the 'heat of the moment' and the applicant's wife was experiencing significant emotional distress and mental confusion – applicant contended in the alternative he was forced to resign – Commission acknowledged the applicant's wife was confronting difficult circumstances during the time she tendered the applicant's resignation – when first prompted about a potential resignation by the respondent the applicant's wife's initial response was that applicant would not resign any time soon – the applicant's wife had subsequent conversation with respondent about the breach code of conduct process – applicant alleged respondent made comments to the effect that the respondent would decide to terminate the applicant's employment and therefore he should resign – Commission held it was more probable respondent had simply enquired about whether applicant had considered resignation and had discussed possible consequences if a breach of the code of conduct were established – following resignation the applicant's wife had subsequent telephone conversations with the respondent – at the time of the

resignation the applicant also supported the decision to resign and was not contested until the applicant's lawyer became aware of it – Commission held the applicant's wife was not in such a state or heightened stress or mental confusion that she could not reasonably be understood to have conveyed the resignation [*Tavassoli*] – further held the resignation was not tendered in the 'heat of the moment' – Commission held the applicant's employment was not terminated on the initiative of the employer within the meaning of s.386(1)(a) FW Act – applicant contended the respondent's decision to suspend the applicant without pay was unreasonable and placed the applicant under additional financial stress – Commission held the question of suspension did not resolve the question of whether the applicant was forced to resign – Commission considered proper approach to determine whether respondent engaged in course of conduct with intention of eliciting the resignation – Commission held after suspension the applicant was offered access to paid leave entitlements and the employee assistance program and offered general assistance as required – Commission determined suspension decision was not engaged in with the intention of bringing applicant's employment to an end or that it was the probable result – held even if applicant correct about validity of suspension decision it would not alter Commission's conclusion on effect of the respondent's conduct or the voluntariness of the applicant's resignation – line between voluntary resignation and conduct which leaves employee no real choice to resign is narrow and must be 'closely drawn and vigorously observed' [*ABB Engineering*] – held the resignation was not forced within the meaning of s.386(1)(b) – Commission held applicant was not dismissed within the meaning of the FW Act – application dismissed.

U2023/12120 [2024] FWC 1878
Roberts DP Sydney 17 July 2024

Nash & Ors v PHI (International) Australia P/L

INDUSTRIAL DISPUTE – dispute resolution procedure – representation – ss.186, 739, 596 Fair Work Act 2009 – applicants brought pay-related issues to Commission – respondent contended Commission did not have jurisdiction as alleged *Karratha Helicopter Pilots MPT Operations Enterprise Agreement 2017* (Agreement) dispute resolution procedure not followed – respondent sought to be represented per s.596 – applicants objected to Respondent's representation request on basis Agreement did not permit respondent to be represented – Agreement stated 'A person(s) initiating a dispute may appoint and be accompanied and represented at any stage by another person, organisation or association, including a Union representative or Company association in relation to the dispute' – Agreement otherwise silent on representation – Commission determined whether dispute resolution procedure provided for representation and, if so, whether procedure prevailed over statutory provisions on representation – affirmed *Berri* approach of considering ordinary meaning of words to interpret agreement – found Agreement's provisions plain and unambiguous – clear applicants entitled to representation as initiating party – rejected respondent's contention that wording did not specify/imply limitation on representation for non-initiating party – affirmed general principle in *Berri* that 'all words in enterprise agreement must prima facie be given some meaning and effect' – Commission found only initiating party entitled to representation under Agreement's dispute resolution procedure – noted clause's operation in reversed circumstances would fall foul of s.186(6) – observed in that circumstance Agreement may not have been capable of approval, but not presently matter for Commission – no weight given to respondent's submission comparing relevant enterprise agreement to respondent's other enterprise agreement – Commission determined approach of interpreting agreement is not to consider other agreements' wording to impute meaning – Commission considered dispute resolution clause specific, therefore overriding general clause allowing Commission to 'do all things as are necessary' for dispute's just resolution – held representation clause prevailed over any discretion for Commission to permit respondent's representation under general clauses – Commission considered interaction with s.596 – affirmed parties could impose limitations on Commission's role [*MC Labour*] – dispute resolution procedure expressed agreed limits on Commission's arbitral role and powers – affirmed *DP World* ratio that parties take

Commission 'as they find it' subject to self-imposed limits, for example that parties' agreed automatic right of appeal to Full Bench prevails over statutory requirement to seek Full Bench's leave – Commission bound to observe parties' self-imposed limits and rights within a dispute resolution procedure even where contrary to statute but subject to limitations – held where parties impose limitations or grant themselves rights in dispute resolution procedure, Commission bound to observe even where doing so would be contrary to how Commission would ordinarily operate under the Act – held respondent's request for permission to be represented could not be granted.

C2024/1934 & Ors [2024] FWC 1795
O'Keeffe DP Perth 9 July 2024

Krizay v Life Without Barriers

TERMINATION OF EMPLOYMENT – misconduct – ss.387, 394 Fair Work Act 2009 – application for an unfair dismissal remedy – applicant was initially employed by the Department of Health and Human Services from April 2001 – her employment was transferred to the respondent on 1 January 2021 – applicant employed by respondent as a Disability Development and Support Officer at a disability accommodation house – applicant was responsible for the support and care of four clients – investigation substantiated allegations the applicant had physically and emotionally abused two separate clients in July and September 2023 – July allegation concerned removing a sleeping client from his bed against his will – September allegation concerned slapping a client's head and locking him outside – applicant dismissed on 12 January 2024 without notice for serious misconduct – applicant acknowledged the conduct in part but contested that it amounted to serious misconduct – whether the dismissal was harsh, unjust or unreasonable – whether respondent had a valid reason for termination – whether conduct amounted to serious misconduct within the meaning of reg 1.07 or the *Fair Work Regulations 2009* – Commission must determine whether the alleged conduct took place and what it involved [*Edwards*] – elevated standard of proof applied to alleged serious misconduct [*Briginshaw*] – Commission found July incident constituted misconduct but did not amount to serious misconduct – Commission found September incident constituted serious misconduct – July and September incidents taken together were a valid reason for terminating employment – applicant's 22 years of service with the respondent and its predecessor did not make the dismissal harsh given the second allegation was serious misconduct of a significant scale – applicant's conduct involved both personal risk to the client and significant reputational risk to the respondent – dismissal was not harsh, unjust or unreasonable – application dismissed.

U2024/625 [2024] FWC 1738
Wilson C Melbourne 3 July 2024

Hourigan v Australian Financial Complaints Authority Ltd

CASE PROCEDURES – revoke or vary decision – ss.365, 368 Fair Work Act 2009 – applicant applied to deal with contraventions involving dismissal pursuant to s.365 – Commission issued s.368 certificate as satisfied all reasonable attempts to resolve the dispute had been, or were unlikely to be, unsuccessful – reasons for certificate issued concurrently – reasons noted applicant alleged respondent had 'injured' her employment, her manager bullied her and discriminated due to applicant's mental disability – matter listed for conciliation conference on 8, 12 March, 23 April and 17 May – all were vacated due to applicant's ill-health – Commission held listing the matter over four separate occasions over an extended period was extraordinary, notwithstanding matters of illness applicant set out – noted s.577 requirement that Commission perform its functions and exercise powers in manner that is fair and just and is quick, informal and avoids unnecessary technicalities – applicant contested issuance of certificate – applicant applied for Commission to revoke certificate per s.603 – applicant claimed she had an agreement with respondent to adjourn application – applicant stated she would be available for conciliation from 21 August

2024 – applicant claimed she was not provided with opportunity to respond to Commission concerns before decision was made to close the file and issue a certificate – respondent objected to revocation application as a further attempt to relitigate question of whether further adjournment should be granted – respondent cited *Grabovsky* to explain s.603 provided a "power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision or, where the initial decision was based on incomplete or false information, fraudulently procured or otherwise" – Commission accepted two instances where it may have relied on incomplete information before issuing the certificate – applicant's medical certificate of 18 June 2024 was different from previous medical certificates – medical certificate stated applicant was "unfit to participate in any conciliation for her work related issues, or make decisions related to it until she is cleared by the cardiologist to do so" – previous medical certificates stated applicant was unfit for work and did not address conciliation – respondent claimed 18 June medical certificate contemplated a 'further indefinite adjournment of the matter in the manner which the Commission has previously identified is not appropriate' – Commission also noted applicant not previously told her view was required for the purpose of the Commission determining whether to issue a s.368 certificate – held original decision was made on the basis of incomplete information – revoked s.368 certificate and relisted matter for a conciliation conference.

C2024/174 [2024] FWC 1769
Wilson C Melbourne 8 July 2024

Budhwani v Infosys Technologies Limited

TERMINATION OF EMPLOYMENT – misconduct – remote work – ss.387, 394, Fair Work Act 2009 – applicant engaged as a senior systems engineer in 2018 – respondent implemented COVID-19 vaccination policy in 2021 – applicant lied about being vaccinated so that he could attend office – under cross-examination, applicant stated that he was caught lying about vaccination status when asked to produce a vaccination certificate – despite dishonesty, respondent allowed applicant to work from home – in November 2023, applicant advised that vaccination no longer a requirement for office entry – applicant required to attend office from December 2023 unless he could provide detailed information and evidence preventing return – applicant sent medical certificate from a QLD doctor stating that he was unfit for work – in response, respondent requested that applicant apply for leave and queried whether applicant was working from QLD – respondent asked applicant to provide approvals that we obtained to relocate – applicant did not respond to requests – upon following-up request, respondent received automated email reply stating that applicant was on leave – following telephone conversations, meetings and further email correspondence regarding unauthorised leave, applicant invited to respond to show cause letter – applicant failed to respond to show cause letter – dismissed for failing to follow lawful and reasonable directions to recommence work from respondent's Sydney office, for working from Queensland without approval and failing to disclose details of location and approval to work from location – following dismissal, applicant accessed respondent's asset management system and deallocated three laptops assigned to him during employment – Commission considered whether there was a valid reason for dismissal – regarding matters in show cause letter, Commission satisfised that applicant was notified for reason for termination and given an opportunity to respond [*Crozier*] – Commission not satisfied that applicant was notified in relation to leave policy and deallocation, however, procedural defects not sufficient to weigh in applicant's favour – given that applicant refused to attend meeting, unreasonable refusal to have a support person weighed neutrally in Commission's consideration – Commission rejected applicant's submission that dismissal was harsh because he should have been given a second chance, noting that applicant failed to provide medical certificate and respond to show cause letter – Commission considered that applicant's failure to return respondent's laptop reflected poorly on him – each of the reasons relied on by respondent was a valid reason for dismissal – Commission not satisfied that dismissal was harsh, unjust or

unreasonable – application dismissed – noting that applicant knowingly gave false and misleading evidence, matter will be referred to General Manager of the Commission to consider whether applicant's conduct should be referred to Australian Federal Police.

U2024/222 [2024] FWC 1714
Ryan C Sydney 1 July 2024

Kabbara v Settlement Services International Ltd

TERMINATION OF EMPLOYMENT – termination at initiative of employer – conflict of interest – ss.385, 387, 394 Fair Work Act 2009 – applicant lodged for unfair dismissal under s.394 – respondent partners with NDIS providers to provide local services around Sydney – following internal investigation, respondent dismissed applicant due to non-disclosure of conflict of interest involving an NDIS service provider (Advance Minds) – applicant's personal email listed as contact for Advance Minds – applicant did not adhere to local area coordination protocols whilst employed by respondent, referred participants to Advance Minds rather than multiple NDIS provider options – during investigation, applicant failed to declare they had been client of Advance Minds for two years – breached NDIA guidelines by sending emails from NDIS account to work email containing confidential records without authorisation – applicant asserted respondent investigation did not establish serious misconduct, evidence failed to substantiate applicant favoured Advance Minds over other NDIS providers – applicant conceded they should have disclosed relationship, yet not wilful or deliberate – suggested transferred NDIS information between email accounts was on advice of respondent's IT staff – applicant submitted they were unaware of email listed as contact for Advance Minds, assumed mistake after previously assisting provider with NDIS application process – when applicant received official emails intended for Advance Minds they contacted NDIS to rectify but did not follow up with further information as requested, failed to notify respondent or Advance Minds to resolve – Commission found applicant's connection to Advance Minds extended beyond professional relationship and created at least perception of conflict of interest – applicant aware of code of conduct, should have disclosed connection whether actual or perceived – found applicant initially dishonest during investigation – observed applicant may have been uncomfortable disclosing prior status as client of Advance Minds – held connection should still have been disclosed given importance of managing conflicts of interest in NDIS environment – Commission noted applicant did not take adequate steps to ensure their email was removed as contact for Advance Minds on NDIS website, continued to refer participants to Advance Minds without internal record of providing alternative NDIS provider options to clients – Commission not persuaded applicant instructed by respondent IT department to send sensitive participant information between NDIS and work email accounts – Commission held applicant in breach of respondent requirements for managing conflicts of interest, therefore valid reason for dismissal related to conduct – Commission satisfied applicable s.387 considerations were afforded to applicant by respondent, therefore dismissal was not harsh, unjust or unreasonable per s.385 – application dismissed.

U2023/10611 [2024] FWC 1654
Matheson C Sydney 24 June 2024

Sullivan v United Media Group P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – ss.388, 394 Fair Work Act 2009 – application for an unfair dismissal remedy – jurisdictional objection dismissed in earlier proceeding; Commission found applicant was dismissed on 6 October 2023 – applicant was Media Sales Representative – on 2 October 2023 Mr S Fielding (HR) phoned applicant, 'yelled' about alleged underperformance, and hung up on her – HR later contacted Mr D Fielding (CEO), HR's father concerning applicant – on 3 October CEO emailed applicant, reprimanding her for poor performance and cost to business – applicant responded disputing performance claims and stated HR had acted 'like a petulant child' and 'ran to his daddy

complaining' – on 4 October applicant emailed CEO medical certificate for 4 to 11 October – applicant not paid usual wages on 5 October and noticed email access was revoked; emailed respondent querying missing pay – on 6 October CEO responded stating that applicant's 3 October email was grounds for immediate termination of employment – applicant engaged assistance of FWO and respondent denied terminating employment – unfair dismissal application filed – was dismissal consistent with Small Business Fair Dismissal Code (Code) per s.388? – compliance with summary dismissal section of the Code is assessed by determining whether employer held genuine belief, on reasonable grounds, that employee's conduct was sufficiently serious to justify immediate dismissal [*Ryman*]; Commission does not need to make finding on whether the conduct occurred nor whether belief was correct [*Khammaneechan*] – Commission satisfied of CEO's belief that applicant engaged in conduct serious enough to warrant immediate dismissal, though not satisfied belief was reasonable due to 'high bar' of serious misconduct – Commission found dismissal not compliant with the Code – was dismissal harsh, unjust or unreasonable? – found applicant's 3 October email constituted misconduct, though not serious misconduct given context of respondent's phone call and email – evidence of underperformance not severe enough to justify dismissal – Commission found no valid reason for dismissal – Commission considered lack of notice of reason for dismissal and lack of opportunity to respond, warnings concerning performance, and that respondent was a small business with no HR specialists – Commission concluded dismissal was unfair; absence of valid reason and procedural fairness outweighed other factors – noted dismissal would have been unfair even if there was a valid reason due to lack of procedural fairness – applicant awarded compensation equivalent to anticipated earnings for five weeks' employment, less monies earned in that period, less one week's anticipated earnings for misconduct [*Sprigg*].

U2023/10261		[2024] FWC 1719
Lim C	Perth	1 July 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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The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a monthly publication that includes information on the following topics:

- summaries of selected Fair Work Decisions
- updates about key Court reviews of Fair Work Commission decisions
- information about Fair Work Commission initiatives, processes, and updated forms.

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