FWC Bulletin

7 November 2024 Volume 11/24 with selected Decision Summaries for the month ending Thursday, 31 October 2024.

Contents

General Manager’s statement on the Administration of the CFMEU Construction and General Division

03 Oct 2024

The General Manager has issued a statement about his role in relation to the administration of the Construction and General Division (C&G) of the Construction, Forestry and Maritime Employees Union (CFMEU), and what the C&G Division, the Administrator and the Australian public can expect in relation to regulation of the CFMEU during the period of administration.

Read here: General Manager’s Statement

New resources about pay and conditions, enterprise agreements and bargaining

21 Oct 2024

Together with the Fair Work Ombudsman, we have launched new resources to help you better understand the Fair Work system.

Visit our Online Learning Portal to access new animations and supporting resources on:

- **Understanding employee pay and entitlements:**
  - learn where employee pay and entitlements come from
  - find out how awards, enterprise agreements and contracts interact
  - know which of the two Fair Work agencies can help
- **Understanding enterprise agreements:**
  - learn what an enterprise agreement is, how they are made and when they apply
  - find a case study about a small business's experience of making an enterprise agreement.
- **Understanding bargaining:**
  - learn about the key steps in good bargaining processes
  - understand who is involved and their roles and responsibilities.

The captions for the animations are also available in Arabic, Hindi, Simplified Chinese, Japanese and Spanish.

Read our joint media statement with the Fair Work Ombudsman:

- New resources about pay and conditions, enterprise agreements and bargaining (pdf)
- New resources about pay and conditions, enterprise agreements and bargaining (docx)

Stay up to date

Stay up to date about other new resources by subscribing to Announcements or follow us on Facebook, Instagram and LinkedIn.

Guidelines for regulated labour hire arrangement orders

31 Oct 2024

The Closing Loopholes Act has provided us with the power to make regulated labour hire arrangement orders. As part of these changes, we can also make written guidelines in relation to the operation of the regulated labour hire arrangement provisions.

Our President, Justice Hatcher, published draft guidelines on 14 October 2024 and encouraged interested parties to provide feedback by 25 October 2024.

Justice Hatcher issued a statement and made guidelines for regulated labour hire arrangement orders.

Read:

- President's Statement
- Guidelines for regulated labour hire arrangement orders
- Feedback received

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Annual Report 2023–24 published

31 Oct 2024

We published our annual report for the 2023–24 financial year today following its tabling in the Australian Parliament.

The report is now available from the Annual Reports page on our website.

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 Thursday, 31 October 2024.

1 TERMINATION OF EMPLOYMENT – valid reason – drug and alcohol policy – ss.604, 387 Fair Work Act 2009 – appeal – Full Bench – in first instance decision, respondent sought unfair dismissal remedy after he was terminated for breach of Sydney Trains' (ST or appellant) Drug and Alcohol Policy (DAP) – ST lodged appeal of decision in which Commission held valid reason for dismissal, but ordered reinstatement due to 26-year record of work and no risk of impairment – DAP requires ST employees to be 'drug free', with random drug or alcohol tests prescribing cut off limits for drugs specified in Australian Standard AS/NZS 4308:2008 – breaches of DAP will result in disciplinary action, up to and including dismissal – Full Bench discussed context of first instance decision: respondent (first instance applicant) absent from work on period of leave, undertook random drug screening on first day back which returned a positive result for benzoylecgonine, an inactive cocaine metabolite – presence of metabolite indicated previous cocaine use but not impairment – respondent formally suspended and made subject to investigation process – during investigation respondent remorsefully explained presence of metabolite as owing to a 'one off' consumption under peer influence during leave – consumption occurred four days prior returning from leave – respondent not aware that traces of metabolite would remain in system and did not feel impaired – respondent dismissed – expert evidence adduced in first instance decision – Commission cited authority that employees entitled to private life, and taking of drugs only relevant to employment insofar as it has connection to performance of work [*Rose v Telstra*] – in first instance decision, Commission held there was valid reason for the dismissal, but dismissal was harsh, unjust and unreasonable based on mitigating factors, ordered reinstatement and payment of lost earnings, less remuneration received elsewhere and a 20% deduction for conduct – ST lodged appeal of this decision – first instance order stayed by consent until appeal determined – appellant submitted grounds of appeal, as follows: (1) Commission erred in finding ST required to establish risk that respondent impaired at work, (2) Commission erred in finding no proper basis of risk that respondent attended work under impairment when ST adduced accepted evidence supporting such a finding, (3) Commission's decision that it could not be satisfied of risk that respondent attended work impaired was wrong as relevant question should have been whether a risk arose from respondent's use of cocaine, and accepted evidence before Commission did demonstrate risks of impairment associated with cocaine use, (4) Commission erred in finding no evidence that suggested anyone involved in investigation fairly considered respondent's response of considered possibility he could remain in employment, (5) certain matters relied on by Commission were irrelevant as they did not explain respondent's conduct in breaching DAP, and (6) Commission erred in finding mitigating factors that rendered dismissal unfair – ST contended errors made by Commission 'foundational' to finding of unfairness – Full Bench granted

permission to appeal, observed questions raised regarding DAP and impairment are of relevance to employers throughout Australia and therefore of public interest, appeal raised issues of general application to consideration required by s.387(a) and (h) – Full Bench considered first three appeal grounds simultaneously: respondent contended firstly Commission at first instance made an erroneous finding in deciding that 'the employer must establish that there was a risk that [respondent] was impaired at work', which was said to be a foundational finding in relation to the dismissal being unfair – appeal grounds 2 and 3 also concern findings made in relation to risk that respondent attended work impaired – Full Bench considered precedents concerning similar circumstances that were considered in first instance decision – noted previous Full Bench statement of principle that where serious misconduct and compliance with statutory fairness provide valid reason for dismissal, harshness can only be considered in light of significant mitigating factors [*Toms*] – Full Bench observed this statement was held as valid guidance by Federal Court – Full Bench noted distinction between impairment and breach of zero-tolerance DAP – observed lack of scientific test for impairment, and that mitigating factors relevant to whether a dismissal is harsh, unjust or unreasonable, but not to whether reason for dismissal was 'valid' [*Sharp*] – previous matter heard by Full Bench required assessment of importance of DAP in context of employer's operations and work duties of dismissed employee [*Hilder*] – noting previous matters [*Toms*, *Sharp* and *Hilder*], Full Bench observed no established principle that dismissals involving breach of DAP require employer to establish risk of impairment, rather, an employee attending for work and returning a positive test may in and of itself constitute valid reason for dismissal – Full Bench noted need to balance object of s.381(2) which recognises importance of employer's right to manage business with protections afforded by Act against unfair dismissal – Full Bench observed that in three previous matters, reason for dismissal was not that employee used cannabis outside of work – Full Bench noted reputational and legal risk of an incident occurring with employee testing positive for cannabis metabolites [*Toms*] – observed where valid reason for dismissal, dismissal may nonetheless be unfair on basis of broader context in workplace or the personal/private circumstances of employee, in the overall evaluation of whether the dismissal was harsh, unjust or unreasonable [*B, C and D v AusPost*] – from existing precedent, Full Bench elucidated principles for consideration – blanket 'zero tolerance' DAPs may be lawful and reasonable given lack of direct scientific test for impairment, despite indirectly regulating out of work behaviours of employees, particularly where employees are to perform safety critical work, or where impaired performance may jeopardise safety of self or others – such policies are a tool by which employer may manage risk at macro level – where employer asserts impairment or risk of impairment as reason for dismissal, this will generally fall under s.387(a); Commission then required to determine whether misconduct occurred or whether reasonable belief it will occur in future – where lawful DAP is reason for dismissal, Commission must consider whether breach simpliciter is of sufficient gravity to constitute valid reason for dismissal, considering mitigating circumstances – Full Bench considered finding in first instance decision that appeared to have been expressed as a principle to effect that employer must establish risk that employee impaired at work – noting that cited Full Bench decisions do not support principle – Full Bench agreed with ST's submission that this finding was wrong as matter of law, misapplication of decisions on

which it was based – Full Bench considered wider context of finding and found erroneous principle did not affect consideration of whether there was a valid reason for dismissal – appeal ground 1 upheld due to erroneous finding, though Full Bench accepted it did not infect or vitiate other findings by Commission at first instance, including ultimate conclusion that dismissal was unfair – Full Bench considered appeal ground 2 and did not accept that Commission erred by concluding no proper basis for finding there was no risk respondent attended work impaired – Full Bench noted implication in finding that Commission had found respondent was not impaired, a finding reasonable to make on basis of evidence – expert evidence heard that level of benzoylecgonine in respondent's urine could not be correlated with any 'hangover effect' and was well below threshold of impairment or active effect – Full Bench did not accept ST's argument that finding of no risk of impairment was inconsistent with valid reason finding – determined finding of no impairment only relevant for s.387(h) (other relevant matters) – breach of DAP was valid reason for purposes of s.387(a) – evidence of respondent cited, Full bench did not accept that 'general risk of employee downplaying conduct' applied to this case – Full Bench rejected ground 3 of appeal as inextricably linked to grounds 1 and 2 – considered appeal ground 4, in which ST challenged fact that there was no evidence to suggest anyone involved in the process of dismissal fairly considered response to the allegations or was open to the possibility that respondent could remain in employment – Full Bench rejected contention that unrejected evidence before Commission suggested otherwise – Full Bench assessed evidence before Commission and found no error in Commission's observations about evidence – Full Bench observed, on evidence before Commission, that little if any consideration given to detailed responses of respondent to allegations – also noted as relevant remorse of respondent, and noted 'summary' sent to dismissal decision maker, which contained no reference to mitigating actors raised by respondent in response to allegations – no evidence that presence of inactive cocaine metabolites four days after drug usage was explained to respondent – Full Bench also rejected appeal ground 5, that it was not relevant to respondent's case that his conduct occurred because he did not know or understand expectations – while respondent understood DAP, he did not understand that test could indicate non-active metabolites in his system, asserting honest mistake – ST agreed in cross examination that training contained little information on Australia New Zealand Standard for drug testing, no discussion on effect of metabolites – Full Bench rejected appeal ground 6, in which ST claimed the Commission erred by finding that mitigating factors rendered dismissal unfair – Full Bench observed the Commission should not lightly interfere with operation of a lawful DAP, simply due to mitigating factors, though Full Bench cited specific applicable factors in this matter, such as lengthy unblemished period of service and previous 40 negative drug tests taken by respondent – Full Bench stated that their decision should not be viewed as accepting that for UD matters concerning breach of DAPs, it is necessarily appropriate for Commission to undertake analysis and make finding on impairment, given legal and reputational risk for employer of employees with prohibited substances in their system, regardless of actual impairment – Full Bench concluded that while decision at first instance contained error of law, it did not vitiate finding that dismissal was harsh and unreasonable, nor was Full Bench satisfied that discretion exercised by Commission at first instance miscarried or was manifestly unjust – noting no challenge by ST to the remedy

awarded to respondent, Full Bench affirmed decision of Commission at first instance and dismissed appeal.

Appeal by Sydney Trains against decision of Easton DP of 21 October 2024 [[2024] FWC 3209] Re: Goodsell

C2023/8091 [2024] FWCFB 401
Asbury VP Brisbane 21 October 2024
Beaumont DP
Roberts DP

2 TERMINATION OF EMPLOYMENT – misconduct – ss. 387, 394, Fair Work Act 2009 – applicant claimed dismissal was harsh, unjust or unreasonable and sought compensation – respondent manages a catering and hospitality business – applicant worked as second in charge for Estate Management and Operational Services (EMOS) – primary responsibility was for delivery of hospitality and catering services for Defence base at Woomera – respondent had responsibility for providing catering and hospitality services to Defence bases in South Australia – respondent's contract for providing services to Defence was substantial and material to respondent's business operations – respondent was engaged in competitive tender for renewal of contract – applicant had a friendship with a former colleague, Wayne Parker (Parker), who had assisted him in applying for his role with respondent – Parker operates his own hospitality services business – previously worked for respondent as its National Hospitality and Catering Manager – applicant had a lunch with Parker – during lunch applicant allegedly conveyed commercially sensitive information about operations at Woomera – applicant knew Parker operated his own business in the same industry as respondent – applicant also knew respondent was engaged in competitive tender for Defence contract – two days after lunch Parker sent an email to respondent's competitors that contained commercially sensitive information referring to the EMOS position applicant held as source of information – respondent came into possession of email – respondent's HR manager reviewed email and formed view applicant was source of information – applicant suspended with pay – respondent sent applicant letter outlining allegations but not mention email – allegations identified confidential information leaked – applicant informed he could not discuss the investigation with anyone except his advisor or his wife – applicant called Parker and informed him of investigation – applicant denied respondent's allegations via email – applicant was informed during the meeting of Parker's email – in following days applicant had brief text exchange with Parker but did not say what occurred during meeting – applicant had no further contact with Parker until 8 weeks after dismissal – respondent concluded investigation finding on balance of probabilities applicant had disclosed confidential information – applicant given a show cause letter and repeated his denial of the allegations – respondent terminated applicant on 2 May – applicant filed unfair dismissal claim 9 May with assistance of paid agent – applicant secured alternative employment on 30 July – Commission heard evidence from applicant, respondent HR advisor and respondent's operations manager – evidence included hearsay, opinion, assumption and commentary – Commission refused to draw adverse inference against applicant as applicant had not called Parker – observed applicant's evidence often vague and general – found this gave impression of evasiveness and selectiveness – found respondent witnesses evidence was credible – preferred evidence of

respondent compared to applicant when facts disputed – applicant claimed there was no valid reason for dismissal – alleged Parker email may be fake, was hearsay, applicant did not instruct Parker to send email to competitors, email contained factual inaccuracies – alternatively, alleged dismissal was a disproportionate response given that any unauthorised disclosure was inadvertent – respondent submitted dismissal was for two valid reasons – first because applicant disclosed confidential or commercially sensitive information – second because applicant breached his duty to be honest and not mislead investigators – applicant informed of this duty when he was told about allegations – respondent claimed applicant was afforded procedural fairness during its investigative process – applicant given opportunity to respond to allegations – respondent elected to pay applicant for four weeks in lieu of notice to ease impact of dismissal – Commission noted respondent required to have a valid reason for dismissal (s387(a)) – where employee dismissed for misconduct, onus of proof is that on the balance of probabilities misconduct occurred – Commission cited *Briginshaw* standard that a "proper level of satisfaction" be established that conduct did occur – considered first reason for dismissal – whether applicant disclosed confidential information to Parker considered – Parker email considered hearsay and was not relied upon as evidence – neither party called Parker as a witness – Commission considered applicant's direct evidence regarding misconduct allegations – applicant gave evidence that lunch was a social catch up with Parker – spoke about work 'in a general sense' and was asked if he wanted a job elsewhere – Commission considered what applicant could reasonably have expected to know regarding Parker's potential clients – clients could have been respondent's competitors – found applicant's evidence was evasive and selective – respondent claimed applicant provided confidential information about respondent's operations at Woomera – found on evidence there was possibility applicant did disclose this information, but was not satisfied to the *Briginshaw* standard that this occurred – considered applicant's duty of honesty and fidelity to be truthful during the workplace investigation – noted applicant was selective and somewhat evasive in some of his answers to investigator's questions – held not open to respondent to make a finding of dishonesty because it did not have sufficiently reliable counterfactual information against which to assess applicant's denials – respondent chose not to speak to Parker and relied solely on Parker's email and applicant's response to it – Commission determined respondent had not established applicant had made a false denial – held no valid reason established for applicant's dismissal – assessed s.387 factors and found on balance applicant's dismissal was unfair – determined compensation was appropriate remedy – took into account applicant's actions led to his dismissal – Deputy President exercised his discretion to reduce compensation to 10% and that superannuation not be payable – ordered respondent pay applicant $25,773.82 to be taxed according to law.

Dickman v Ventia Australia P/L

U2024/5278 [2024] FWC 2914
Anderson DP Adelaide 11 October 2024

3 GENERAL PROTECTIONS – dismissal dispute – consent arbitration – reverse onus – s.365 Fair Work Act 2009 – general protections application – applicant employed over two periods as a casual support worker for company providing services for people with

special needs – first period from 20 December 2021 to 19 February 2022, second 7 October 2023 to 1 March 2024 – applicant alleged she was dismissed in contravention of ss.340 and 351 for exercising workplace right to make a complaint or inquiry regarding employment and because of her disability – submitted she exercised workplace right by raising concerns between 30 January and 22 February 2024 – submitted she disclosed medical condition to respondent on 11 February 2024 – respondent alleged applicant was dismissed as a result of incidents on 31 January, 21 and 28 February 2024 – submitted incidents demonstrated recurring pattern of behaviour involving breaching professional boundaries, making unfounded assumptions and making decisions that posed risks to business and clients – submitted a performance improvement plan was drafted from 22 February but never given to applicant – applicant took personal leave from 22 to 29 February – respondent advised applicant on 1 March 2024 of decision not to provide more shifts – parties agreed to arbitration of dispute by Commission – Commission considered 3 issues – (1) did applicant exercise a workplace right – (2) did respondent take adverse action against applicant – (3) did respondent take adverse action because of prohibited reason or based on a discriminatory ground – Commission considered whether applicant's communications were an expression of grievance and inquiry that respondent should take notice of and rectify – satisfied that although complaints were often short comments embedded in long emails and reports, they constituted an exercise of workplace right pursuant to s.341(1)(c) – Commission considered whether respondent's actions were within meaning of 'adverse action' per s.342(1) – satisfied that by terminating applicant's employment when advising her no further shifts would be offered, respondent took adverse action against applicant – Commission considered whether adverse action was taken because applicant exercised workplace right or disclosed medical condition – noted reverse onus provisions of s.361 and determining principles *[De Martin & Gasparini]* – noted applicant's conduct during 2 of the 3 particular incidents went beyond her scope of duties, breached guidelines and put respondent at risk – satisfied that although chronology of events leading to termination may be seen to constitute relevant facts and circumstances that infer prohibited conduct, respondent established that reason for adverse action was supported by relevant facts, circumstances and inferences available – satisfied that applicant's disclosure of disability was not a factor in dismissal – Commission found that while a workplace right was exercised and adverse action was taken, respondent discharged onus of proving that no part of that adverse action was taken for prohibited or discriminatory reason – application dismissed.

Hastings v Platform To P/L

C2024/3038 [2024] FWC 2475
Cross DP Sydney 9 October 2024

4 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – varying agreement – ss.217, 739 Fair Work Act 2009 – decision dealt with two related matters: applicant (UWU) referred dispute about redundancy terms of enterprise agreement for Smeaton Grange worksite, respondent (Coles) made counterapplication to vary agreement to remove ambiguity or uncertainty – in 2018, Coles announced plans to build two new distribution centres (DCs) in QLD and NSW, leading to closure of

five existing DCs, including Smeaton Grange DC – requirement in Smeaton Grange agreement for Coles to give 16 weeks' notice of site closure, Coles argued that after doing so, it could give lesser period of notice of redundancy to employees retrenched during 16 week period – Coles argued in the alternative that agreement does not convey intended meaning, and Commission should therefore vary it – UWU argued anybody made redundant by site closure entitled to full 16 weeks' notice – Commission considered contested clauses of agreement: clause 15 (notice of termination provisions) and clause 34 (forced redundancy provisions) – Coles gave evidence that commitment to provide employees with 16 weeks' written notice of site closure was not an increase to maximum 5 week notice entitlement for termination, but rather for those forcibly retrenched as at the site closure date, and similarly was not intended to operate as employees' termination notice – UWU gave evidence that whilst bargaining, Coles would not commit to 16 weeks' notice for all forced redundancies, but was willing to provide 16 weeks' notice once a closure date announced, which was agreed upon in-principle – Coles submitted that textual and contextual construction of clauses support their contention, with cls 5.9 and 34.5.8 referencing phased downsizing process in lead up to full site closure, and need for UWU to provide flexibility in that situation – Coles relied on purposive construction, with 16 week closure notice an 'outer limit', allowing for phased downsizing in 16 week period – Coles argued further that processes applied at other DCs reflected common understanding of parties to agreements, with phased closure and staged redundancies during 16 week period; each agreement made in the understanding that DCs to which they pertained would be closing down – in alternative, Coles argued agreement should be varied due to ambiguity, with the ambiguity readily evidenced by the dispute before the Commission – UWU submitted that cl 15.6.4 (termination due to full site closure) related to individual employee's notice of termination, rather than collective entitlement, the purpose of which is to provide distinct notice period for each permanent employee made redundant for reasons relating to full site closure; to accept Coles' submission would result in the effective rewriting of the agreement – UWU contended phrasing of clause 'forced redundancy [relating] to full site closure' not confined to employees working on last day of site's operation, but applies to employees made redundant for reasons 'relating to' site closure, and inclusion of words 'to be worked' indicates notice period is intended to be worked in by employees – UWU contended that rejection of Coles' initial proposal for single redundancy agreement across five DCs demonstrated that conditions for Smeaton Grange separately considered during bargaining – UWU submitted no ambiguity in agreement as relevant clauses not capable of more than one meaning, Commission should not vary agreement due to 'objectively ascertained common intention of parties' to provide employees made redundant due to site closure with 16 weeks' notice – Commission considered whether to determine dispute or variation first – Commission reasoned it should determine variation first, as variation application should not be contingent on outcome of dispute application, and variation may clarify wording relied upon in dispute determination [*AFULE v Aurizon Operations Ltd*] – Commission noted breadth of variation powers under s.217, being strictly limited to removal of ambiguity or uncertainty and observed summary of principles relevant to doing so [*Re Monash*] – in using discretion to remove ambiguity or uncertainty, Commission must not 'give effect to new and substantive change' to agreement [*Specialist People*] – Commission considered

whether ambiguity or uncertainty in agreement; held mere existence of dispute between Coles and UWU not sufficient to evidence ambiguity or uncertainty – Commission took view that cls 15.6 and 34.4.10 capable of being read in more than one way, particularly when extrinsic evidence and industrial history taken into account – Commission observed uncertainty in clauses arose as operation of clauses at odds with operation of clauses in agreements for other DCs – Commission observed interpretation of UWU a 'stronger construction' than that advanced by Coles, and weaker interpretation should only be favoured if reflective of 'common intention' between parties at time of drafting – 'common intention' observed as nothing but a 'significant factor' in consideration [*Monash Appeal*], Commission tasked with 'placing parties in position they intended by agreement, insofar as wording of agreement does not reflect that intention' [*Re Australian and International Pilots Association*] – common intention to be derived from 'admissible evidence probative of intention' [*Monash Appeal*] – Commission not satisfied that parties shared common understanding with regard to retrenchment clauses, therefore distinct likelihood that variation sought would give effect to new and substantive change – Commission dismissed Coles' variation application – Commission proceeded to determine dispute, reiterated that UWU's construction is stronger: if intention of 16 week notice period in cl 15.6.4 was solely to give workers certainty about close of worksite, there would be no reason to include this provision in the notice of termination clause – Commission observed also that if an employee is given 16 weeks' notice of termination due to site closure, standard termination notice provisions no longer available in event of redundancy – Commission stated it reasonably clear that once full site closure announced, any retrenchments during 16 week period are related to full site closure – compared preferred construction of Coles wherein 16 weeks is maximum amount of notice to that of UWU, wherein 16 weeks is minimum required notice, held that Coles' preferred construction not supported by agreement as a whole, and cannot be displaced or read down by 'generalised commitment to flexibility in cl 5.9 of agreement – Commission observed understandable aggrievance on part of Coles, as it does not have access to flexibilities it thought it had bargained for, but noted its concerns related to notions of industrial fairness, which under precedent could not sway outcome of proceedings.

United Workers' Union v Coles Group Supply Chain P/L and Application by Coles Group Supply Chain P/L

C2024/3893AG2024/2466 [2024] FWC 2721
Easton DP Sydney 30 September 2024

5 CASE PROCEDURES – costs – lawyers and paid agents – ss.365, 376 Fair Work Act 2009 – application for costs against respondent – respondent was representative of applicant in earlier s.365 application brought by Ms McBride – jurisdictional objection raised in s.365 proceeding, suggested McBride not dismissed – allocated to member for jurisdictional hearing – two extension requests for filing granted to McBride representative – representative was before the Commission in unrelated matter and not available at commencement of jurisdiction proceeding – proceedings delayed for two hours – representative still unavailable, hearing did not proceed – Commission concerned s.365 application was ill-conceived as no evidence of termination – parties given opportunity to provide further submissions – jurisdiction

determined on the papers [[2024] FWC 1839] – held no evidence of termination by the McBride's labour hire employer named nor collusion by host business – jurisdictional objection upheld, application dismissed – application for costs order against McBride and respondent – costs order amended to remove McBride – s.376(2) relied on by applicant – applicant submitted respondent encouraged McBride to begin or continue application with no prospect of success (s.376(2)(a)) – applicant also submitted an order should be made 'on the basis of the unreasonable acts and omissions in connection with the conduct and continuation of the dispute' (s.376(2)(b)) – respondent submitted matter was not pursued in a frivolous or vexatious manner nor without a genuine belief in its merits – applicant noted encouragement requires a definite act not merely absence of discouragement to satisfy s.376(2)(a) [*Nanakhon*] – Commission considered if respondent had encouraged McBride to commence or continue application where apparent no reasonable prospects of success – objective test of belief of 'reasonably apparent that there were no reasonable prospects of success' [*Salva*] – Commission considered prospects of success in a s.365 application – put to the respondent that a s.372 would have been more suitable – respondent submitted he was following instruction – in jurisdiction proceeding no evidence provided regarding termination, no evidence regarding collusion between employer and host – only evidence at time of application was an email stating McBride was still an employee – observed respondent's behaviour in simply following client instruction should be discouraged, proper consideration of prospects needed – despite this Commission not satisfied respondent encouraged McBride; s.376(2)(a) not satisfied – Commission satisfied that respondent's behaviour met test for unreasonable act in connection with the continuation of the dispute – noted respondent's submission he wanted to help McBride – Commission rejected this, stating 'Advocates who wish to appear at the FWC must apply more rigour to the cases they run and not be swayed by emotion or sentiment but rather focus on the evidence and the law and ensure they are pursuing an application that is appropriate to the circumstances' – unreasonable act in not advising to withdraw claim and continuing representation – held s.376(2)(b) satisfied – s.376(2) can be satisfied even without s.376(2)(a) being enlivened – Commission noted failure to consider, or properly consider, prospects can be abuse of process[*Levik*] – Commission also considered representative may run an arguable case with weak evidence [*Ashby v Slipper*] – not applicable here as even modest evidentiary requirement not met – costs awarded – further proceeding to determine amount of costs.

Flexy Services P/L v Newman

C2024/2298 [2024] FWC 2840
O'Keeffe DP Perth 14 October 2024

Other Fair Work Commission decisions of note

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

CASE PROCEDURES – representation – enterprise agreement – ss.596, 604 and 739 Fair Work Act 2009 – appeal – Full Bench – application made pursuant to s.739 for Commission to deal with dispute in accordance with 'Disputes and Grievance Procedure' in clause 22 of *Karatha Helicopter Pilots MPT Operations Enterprise*

Agreement 2017 (Agreement) – dispute concerned entitlements of casual employees and at time of this decision is yet to be determined by Commission – employer raised jurisdictional objection suggesting Commission did not have jurisdiction to deal with dispute because steps in Agreement weren't followed – matter programmed for jurisdictional hearing – employees represented by AFAP and employer sought permission to be legally represented – employees opposed permission for employer to be legally represented – employees contended the Agreement prohibited employer from being legally represented – on 19 June 2024 Commission at first instance indicated provisional view that permission should be granted for employer to be represented and on 26 June 2024 parties were advised permission to be represented was not allowed as the dispute resolution procedure in the Agreement, particularly at clause 22.1.4, only permitted the party who initiated a dispute to be represented – employer filed notice of appeal and sought a stay to the effect that jurisdictional hearing be vacated but was refused – notice of appeal set out one ground – ground noted Commission erred in law in finding that it did not have jurisdiction to grant employer right to be represented by lawyer – Full Bench observed permission to appeal not required due to wording in Agreement that decision of Commission would bind the parties 'subject to either party exercising a right of appeal against the decision to a Full Bench of FWC' – this created independent right of appeal for which permission to appeal was not required [*Silcar*] – Full Bench noted first instance conclusion Agreement could limit powers ordinarily available to Commission, including removing power to give permission to party to be legally represented, was correct – question raised by appeal was whether the Agreement, properly construed, does Commission from granting permission for a party other than the initiator of a dispute to be represented by a lawyer if a dispute is referred to Commission – Full Bench observed clause 22.1.4 conferred a right on the initiating party to appoint and be accompanied and represented but purpose of clause 22.1.4, when read within clause 22 as a whole, was to ensure that from the inception of dispute the initiator of dispute had access to representation – Full Bench noted clause 22.1.4 must also be read in context – clause 22.2.3 expressly provided if arbitration was necessary Commission 'may exercise the procedural powers in relation to hearings, witnesses, evidence and submissions which are necessary to make the arbitration effective' – clause 22.4.1 provided Commission 'shall have the power to do all such things as are necessary for the just resolution of the dispute' and clause 22.4.3 provided Commission 'may give all such directions and do all such things as are necessary for the just resolution and determination of the dispute' – Full Bench observed usual procedural powers include s.596 power to grant permission to party to be represented – further noted both subclauses indicated intention to confer the broadest possible powers on Commission to do such things as are necessary for just resolution of a dispute – those aspects of clause 22 were inconsistent with construing clause 22.1.4 as preventing Commission permitting a party, other than the initiating party for the dispute, to be represented if Commission considered it appropriate – employees submitted that capacity of Commission to do 'all such things as are necessary for the just resolution of the dispute' did not permit Commission to create, or imply, rights that did not exist in dispute procedure under the auspices of 'just resolution of the dispute' – employees suggested that reference to Commission being able to do 'all such things' related only to procedural powers to facilitate a hearing – Full Bench observed that this submission misunderstood significance of clauses 22.1.3, 22.4.1 and 22.4.3 – Full Bench considered provisions of clause 22, read as a whole, did not preclude parties to a dispute other than the initiator of the dispute from being granted permission to be represented in proceedings before Commission – Full Bench concluded the clause permitted Commission to exercise power to grant permission for representation if satisfied appropriate to do so in accordance with s.596 – appeal upheld – decision quashed – question of whether employer should be granted permission to be represented in the arbitration over the dispute raised by the employees referred to the Deputy President to be determined.

C2024/4398 [2024] FWCFB 396
Gibian VP Sydney 16 October 2024
Dean DP
Slevin DP

Appeal by United Firefighters' Union of Australia against decision of Wilson C of 24 September 2024 [[2024] FWC 2619] Re: Fire Rescue Victoria

CASE PROCEDURES – stay order – s.606(1) Fair Work Act 2009 – appellant (UFU) appealed against decision and order requiring production of the trust deed for a discretionary trust established by or on behalf of UFU (Trust Deed) – UFU applied for order to be stayed pending hearing and determination of substantive appeal – background – Commission previously made orders requiring respondent (FRV) to reimburse employees a specified amount for cost of income protection insurance (IP insurance) premiums pursuant to FRV Enterprise Agreement (Agreement) – FRV sent UFU correspondence on 1 May 2024 containing 'preliminary assessment' that a significant portion of reimbursements would be subject to Fringe Benefits Tax (FBT), as only a small portion of member contributions to relevant Discretionary Trust was used for IP insurance – FRV, a public entity, expressed concern about additional FBT liability and lack of visibility of reimbursements made for Discretionary Trust, and stated it would likely be necessary to reduce reimbursements to reflect amount it could access as referrable to IP insurance – UFU lodged s.739 application on 7 August 2024 for Commission to deal with a dispute pursuant to the Agreement – on 27 August 2024, FRV lodged application for order of production of Trust Deed, opposed by UFU – at first instance Commission granted FRV's application and made order on 24 September 2024 for production of Trust Deed, with controlled and limited access, by 1 October 2024 (later varied to 8 October 2024) (the Order) – Commission was satisfied Trust Deed plainly had relevance to proceedings and was concerned that without its production, further conciliation and/or arbitration would be ineffective – UFU lodged appeal notice on 7 October 2024 at 4.54pm – at 5.45pm, UFU requested the Commission stay the Order until appeal was determined – UFU did not produce Trust Deed by 10.00am on 8 October 2024 as required by Order – stay application hearing listed on 10 October 2024 – applicable principles – s.606(1) confers discretionary power to order the stay of the operation of a decision under appeal, on terms and conditions the Commission considers appropriate, until the appeal is determined or the Commission makes a further order – in determining whether to grant a stay application, the Commission must be satisfied of two elements: 1) there is an arguable case, with some reasonable prospect of success, in respect to both the question of leave to appeal and the substantive merits of appeal; and 2) the balance of convenience must weigh in favour of stay being granted [*Kellow-Falkiner Motors*] – whether arguable case with reasonable prospects – UFU firstly submitted that the Trust Deed did not bear upon interpreting relevant clauses of the Agreement and terms of the orders made by the Commission in setting amounts required to be paid by FRV, and that reliance on FRV's concerns about FBT liability was a distraction from the proper function of the Commission – UFU submitted secondly that the decision was 'unreasonably or plainly unjust' as it required production of a 'private commercial document' which had no apparent relevance to determination of obligations of the Agreement or the Commission's orders – Commission found prospects of appeal appeared less than reasonable, as relevance of documents may be established if likely to assist a party's case, or give rise to relevant line of enquiry, or can plausibly be seen to relate to issue in proceedings, or cast light on issue – Trust Deed was a keystone feature of FRV's position that it may be paying far in excess of cost of IP insurance and attracting FBT liability – FRV seeks document for purposes of confirming what benefits it is reimbursing employees for and in attempt to resolve FBT liability issue – found document plainly relevant to, firstly, conciliation of dispute, as resolution of FBT issue may dispose of need for FRV to consider reduction in reimbursement amounts, and secondly, the arbitration of the dispute, which would likely require consideration of quantum of reimbursement – found contention regarding it being a 'private commercial document' lacked merit – held characterisation of document as 'commercial' does not bar its production with appropriate confidentiality provisions, and it was not explained why a document intended to facilitate a scheme agreed with FRV should not be accessible to FRV – balance of convenience considered – UFU submitted appeal would be rendered nugatory if stay not granted, and production of Trust Deed could not be undone if substantive appeal successful – Commission accepted this only in narrow sense that

Trust Deed will have to be produced and disclosed to single person nominated by FRV if a stay is not granted – Commission made no determination as to whether the Trust Deed should be admitted into evidence or otherwise used in proceedings – it was not explained what about Trust Deed is confidential or how its production might prejudice UFU – found strong public interest considerations in FRV resolving potential FBT liability issue as soon as possible and obtaining transparency of scheme it entered – held balance of convenience weighed against granting of stay – Commission also considered UFU's failure to comply with Order relevant to exercise of discretion, noting chronology of events and UFU waiting until last minute to file a straightforward notice of appeal – no practical possibility that its stay application could be heard before amended time for production of Trust Deed, and UFU elected to disregard requirement imposed by the Order – observed contravention of an Order is offence under s.675(1) FW Act – held stay should not be granted to retroactively validate UFU's failure to comply with the Order – application dismissed.

C2024/7078 [2024] FWC 2839
Hatcher J Sydney 11 October 2024

Klothos v Niugini Arabica P/L

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – ss.385, 388, 394 Fair Work Act 2009 – applicant was café manager in respondent's coffee roasting business – respondent received employee testimony of unacceptable behaviour by applicant – testimony suggested applicant engaged in bullying conduct toward subordinates – applicant lodged unfair dismissal after employment terminated following internal company investigation – respondent contended dismissal complied with Small Business Fair Dismissal Code as misconduct was serious threat to health and safety of staff, the small business and its charity partnership – Commission considered s.12 definition of serious misconduct, noting phrase has its ordinary meaning – Commission queried if respondent had reasonable grounds to determine applicant's conduct serious to warrant immediate termination – Commission did not need to determine if respondent's view was correct [*Pinawin*] – determined respondent held reasonable view applicant's conduct was serious misconduct warranting immediate dismissal – found dismissal consistent with Code for reasons including respondent had no reason to believe employee testimony fabricated – testimony of other employees corroborated testimony of first employee – as other staff refused work with applicant, rostering difficult for respondent – respondent found to reasonably view unwillingness of staff to work with applicant serious threat to business – found respondent took steps to understand their workplace obligations – observed no prior complaints made regarding applicant – therefore no prior reason to discuss applicant's conduct – Commission agreed inappropriate workplace conduct caused threat to person's health safety and employer obligated to take steps to minimise – found respondent's investigation not perfect, noting show cause letter invited response to allegations but covering email suggested dismissal decision already made – Commission determined respondent provided applicant opportunity to respond and provided allegations (though with limited specificity to applicant) – held respondent carried a reasonable investigation to reach reasonable conclusion in circumstances [*Pinawin*] – Commission emphasised its decision not a finding applicant did engage in serious misconduct, focus of Code on respondent's reasonably held belief misconduct occurred; not whether misconduct actually occurred – determined applicant's dismissal consistent with Small Business Code – application dismissed.

U2024/5164 [2024] FWC 2315
Dean DP Canberra 8 October 2024

Cioffi v Murray Bridge Basketball Association Incorporation

TERMINATION OF EMPLOYMENT – genuine redundancy – warning – ss.389, 394 Fair Work Act 2009 – applicant only employee of not for profit regional basketball association – respondent governed by voluntary elected members – applicant employed as stadium manager and cleaner under two casual contracts – applicant

covered by both *Cleaning Services Award 2020* and *Clerks Private Sector Award 2020* – repeatedly worked over contracted hours – respondent recorded loses in two financial years preceding – to address costs respondent attempted to reduce applicant's contracted hours – reengaged applicant under reduced hour contracts – warning letter issued on 27 June 2024 for alleged breach of obligations – warning letter revoked on 19 July 2024 after complaint from applicant – respondent acknowledged proper warning process not followed – applicant made redundant on 22 July 2024 due to financial pressure – applicant submitted was not genuine redundancy – respondent submitted no redeployment options as applicant was only employee – Commission found financial pressure genuine reason for redundancy – respondent's wage costs were material item of expenditure – Commission noted applicant aware of respondent's financial pressure – applicant submitted redundancy was tainted by allegation of unfair performance – Commission found timing of redundancy infers redundancy preferable to dismissal because of contested conflict of performance – Commission satisfied financial pressure was primary reason for dismissal – considered consultation requirements under s.389(1)(b) – respondent did not consult with applicant on redundancy decision – redundancy was pre-determined in executive meeting on 18 July 2024 – applicant unable to discuss mitigation options short of redundancy – respondent submitted consultation requirement should apply flexibly for small community association – Commission found small business employers not excluded from consultation requirements – respondent failed to comply with award obligations to consult – Commission held redundancies were not a sham – redundancy based on respondent's financial circumstances; objectively reasonable and primary reason for redundancy – timing of redundancy tainted by respondent's unreasonable view applicant underperforming – found overall valid reason for dismissal except to extent timing unreasonably influenced by performance and conduct concerns – absence of opportunity for applicant to meaningfully respond was unfair – held dismissal unfair – remedy considered – reinstatement inappropriate – compensation considered – found applicant would have earned eight weeks remuneration if proper redundancy consultation undertaken per s.392(2)(c) – deductions for limited mitigation effort, payment in lieu of notice received and contingencies – two weeks compensation ordered.

U2024/8735 [2024] FWC 2761
Anderson DP Adelaide 3 October 2024

Baharom v Master Butchers Co-operative Ltd

TERMINATION OF EMPLOYMENT – genuine redundancy – remedy – s.394 Fair Work Act 2009 – applicant employed as casual factory hand in October 2022, working 37.5 hours per week – work partly involved using a forklift – as condition of employment factory hands required to secure Australian forklift licence – condition could be satisfied after recruitment – applicant had a Malay forklift licence which was not recognised – at worksite, applicant was allowed to use forklift under supervision while working towards obtaining required forklift licence – applicant failed Australian test on two occasions – most recent failed test in September 2023 – management decided in April 2024 to reduce workforce size by three factory hand positions due to financial losses – one factory hand retired, another resigned – in late May 2024, decision made to select applicant for redundancy – applicant dismissed in meeting on 11 June 2024 – applicant not provided notice of meeting or consulted with – reason provided to applicant was that it became necessary due to impact of avian flu crisis on the business – applicant queried why more junior colleague not selected for termination – applicant informed he did not yet have forklift licence and his skills more limited than junior employee – applicant lodged unfair dismissal application on 13 June 2024 – on 29 July 2024 applicant received Employment Separate Certificate from employer with reason for separation being put as dismissal rather than redundancy – in proceeding applicant argued not a genuine redundancy as another casual factory hand was hired at the time of applicant's dismissal – respondent maintained dismissal was a genuine redundancy – respondent argued that new employee had a broader skill set than applicant and it also intended on making this new employee a supervisor in the future – Commission found applicant's job still required to be done by someone –

respondent failed to comply with consultation obligations under the Manufacturing Award and was therefore not a genuine redundancy within meaning of Act – Commission turned to whether dismissal was harsh, unjust or unreasonable – found redundancy of applicant was not sound, rational or defensible because new employee hired at site – found reason provided by respondent, that applicant did not have forklift licence, carried some weight but not overwhelmingly so – regarding applicant's supposed narrow skill set, found carried limited weight as applicant not dismissed for performance reasons – Commission found no valid reason for dismissal given new employee was recruited as factory hand at same time – found denial of procedural fairness – found applicant had no meaningful opportunity to discuss respondent's decision – Commission found other relevant factors weighed in favour of finding of harshness such as applicant's vulnerability as migrant worker which respondent did nothing to mitigate – paperwork could have made it clearer this was a no fault redundancy which would have been more useful for Centrelink as well as trying to obtain alternate employment – no pay in lieu of notice provided despite this being raised with respondent – Commission found dismissal was unfair – Commission ordered remedy of $19,786 less taxation – Commission provided concluding observation it may be appropriate Australian policy makers consider mutual recognition of industrial qualifications including from nations where Australia sources labour.

U2024/6824 [2024] FWC 2706
Anderson DP Adelaide 27 September 2024

Panchal v Bulla Mushrooms (Aust) P/L

TERMINATION OF EMPLOYMENT – remedy – ss.387, 392, 394 Fair Work Act 2009 – applicant sought unfair dismissal remedy following dismissal from harvest team leader role at mushroom farm – contended dismissal unfair and without valid reason – prior to dismissal employer appointed new farm manager who discovered applicant's alleged 'manipulative streak' – investigation commenced – became aware of alleged mistreatment or bullying by applicant towards other staff – other staff reportedly afraid to raise with management fearing retribution from applicant – employer enquired and was advised by a company supplying contract workers (MatchWorks) that over 20 of MatchWorks' former employees had complained of applicant's conduct – employer reminded applicant of zero tolerance for bullying and stood Applicant down pending investigation – during investigation employer conducted anonymous survey querying if employees had been bullied at work – several employees gave evidence of mistreatment (but not all that had given accounts of mistreatment) – respondent stood down applicant pending investigation of eight staff bullying allegations – applicant provided written response to each allegation contending allegations unfounded – employer concluded on balance of probabilities all allegations substantiated – proposed employment be terminated – sought applicant's response within 24 hours – applicant requested an extension of time to respond but was terminated the next day – employer contended there was compelling evidence of applicant's bullying and discrimination of employees and that it subsequently dismissed applicant in a fair process which was not harsh, unjust unreasonable or unfair – whether dismissal unfair considered – Commission observed where employee dismissed for misconduct, is role of Commission to determine whether on balance of probabilities if misconduct actually occurred – found all allegations unsubstantiated and merely assertions – described respondent's evidence as scanty, conclusory and hearsay – noted respondent appeared to believe sheer number of allegations demonstrated applicant's guilt, but stated no single allegation was substantiated – determined unsubstantiated misconduct allegations favoured unfair dismissal finding – Commission held no valid reason for applicant's dismissal – noted applicant provided compelling response to allegations – other s.387 factors noted – Commission found on balance of s.387 considerations dismissal was unjust, unreasonable and therefore unfair – remedy considered – Commission found compensation only available remedy given no power to order statement of service or outstanding entitlement claims sought by applicant and given reinstatement neither appropriate nor sought by applicant – Commission found applicant likely would have

continued employment at employer for another six months but considered 'very substantial reduction' required due to applicant making no effort to seek re-employment following dismissal – Commission found applicant's fear of seeking new employment due to fear of former employer's bad reference and alleged threat against applicant's husband was irrational – Commission noted employers at liberty not to provide references for former employees and some jobs do not require references – Commission noted compensation scheme under Act is to compensate for loss – observed that at some point absence of income becomes attributable to applicant's failure to seek new employment – Commission considered necessary to estimate likely point at which applicant likely would have secured new employment with reasonable effort and that absence of income from that point would have been caused by applicant's inaction – Commission considered agricultural industry's low unemployment and determined applicant was reasonably likely to have obtained work with similar income within 8 weeks post-dismissal – 2 weeks' payment in lieu of notice deducted from 8 week estimate – Commission awarded 6 weeks compensation as being causatively connected to unfair dismissal rather than applicant's failure to seek reemployment – Commission ordered the compensation sum of $7,269.24 less applicable tax and $835.96 in superannuation calculated on 11.5%.

U2024/7078 [2024] FWC 2784
Colman DP Melbourne 7 October 2024

Zanoni v INA Operations Trust No. 1

GENERAL PROTECTIONS – jurisdiction – resignation – ss.365, 386 Fair Work Act 2009 – applicant alleged dismissal by respondent on 15 April 2024 – respondent contended applicant resigned – applicant asserted resignation was in heat of the moment under s.386(1)(a) and forced by conduct of respondent under s.386(1)(b) – respondent operates caravan park with 15 elderly permanent residents – applicant contacted by Resident X twice on 25 March 2024 requesting welfare check on Resident Y – applicant failed to conduct welfare check or delegate welfare check to maintenance staff – applicant alleged she was unable to understand the request of Resident X – Resident Y found by Assistant Manager on 26 March 2024 after medical episode – Resident Y taken to hospital and admitted for a number of days – applicant approached by management to discuss events of 25 March 2024 – applicant denied any wrongdoing – refused to engage further in investigation process – applicant on stress leave from 28 March to 15 April 2024 – applicant advised on 5 April 2024 respondent's People & Culture team were investigating Resident Y incident – respondent prepared letter inviting applicant to interview as part of disciplinary proceedings – applicant verbally resigned on 15 April 2024 at 9AM without receiving letter – applicant received no disciplinary action – applicant provided formal resignation email on 15 April 2024 at 2:29PM with two weeks' notice – respondent made payment in lieu of notice – whether applicant forced to resign considered – Commission rejected applicant contention she resigned in heat of the moment – no 'sizzle' or 'heat' in verbal resignation conversation – Commission found respondent was wholly within its rights to investigate incident – no evidence applicant was going to be dismissed for her conduct on 25 March 2024 – both verbal and formal resignation from applicant clear and unambiguous – not unreasonable for respondent to accept without further question – applicant did not attempt to retract resignation at any point – Commission found employment ended at the hand of the applicant – applicant's resignation was not forced or coerced [*Tavassoli*] – conduct of respondent did not force applicant to resign – applicant had choices open other than resignation – applicant not forced to resign or dismissed within meaning of s.386(1)(b) – Commission had no further jurisdiction – application dismissed.

C2024/2934 [2024] FWC 2737
Boyce DP Sydney 2 October 2024

Crawford v John R Keith (NSW) P/L

GENERAL PROTECTIONS – jurisdiction – repudiation – ss.365, 368 Fair Work Act 2009

– application to deal with dispute arising from dismissal – jurisdictional objection raised – respondent asserted applicant was not dismissed but resigned – Commission required to determine if applicant was dismissed before dealing with application under s.368 [*Milford*, *Jarouche*] – applicant commenced employment with respondent as a plumber, then leading hand – employment covered by *John R Keith (NSW) P/L & CEPU Plumbing Division NSW Branch Plumb Enterprise Agreement 2019-2023* (2019 Agreement) then *John R Keith (NSW) P/L & CEPU Plumbing Division NSW Branch Plumb Enterprise Agreement 2023-2027* (2023 Agreement) – assumed role as site manager without employment contract – paid hourly rate, fixed at 40 hours per week – applicant questioned additional hours worked, requested pay review – concerned increased pay rates under 2023 Agreement would leave him worse off as he was under salaried arrangement – advised by respondent overtime factored into pay rates – pay review not conducted – applicant submitted letter standing down as site manager – requested re-commencement with respondent as plumber – advised of cessation of employment relationship as no position available – whether respondent's conduct was principal contributing factor in termination of employment considered – respondent asserted applicant resigned, then claimed applicant repudiated contract by standing down as site manager – Commission refuted this characterisation – found applicant's letter did not use unambiguous language of 'resignation' [*Tavassoli*] – found respondent's verbal assurances applicant's salary included overtime rates amounted to terms of contract – consistent with contract drafted, but not provided to, nor signed, by applicant – observed reasonable to assume agreement changes would necessitate review of applicant's salary – found applicant worse off under salary arrangement when increases to pay and overtimes rates of 2019 Agreement (in the event applicant worked overtime) and further pay increase under 2023 Agreement (irrespective of overtime worked) came into effect – found respondent breached terms of contract by failing to revise applicant's salary in light of increases to account for overtime worked – found constituted a repudiation of contract by respondent – applicant entitled to accept repudiation and relinquish Site Manager role – found this amounted to termination at respondent's initiative – no evidence provided demonstrating exemptions per s.386(2)(a)-(c) applied – found applicant dismissed within definition of s.365 – jurisdictional objection dismissed – matter to be listed for conference.

C2024/2682 [2024] FWC 2831
Wright DP Sydney 10 October 2024

Samad v Phosphate Resources Ltd T/A Christmas Island Phosphates

TERMINATION OF EMPLOYMENT – misconduct – valid reason – ss. 385, 387, 394 Fair Work Act 2009 – applicant was truck driver in respondent's phosphates business – business located on Christmas Island – respondent received evidence applicant made inappropriate comments about coworker – applicant allegedly made inappropriate comments and hand gestures regarding coworker – when asked to stop by coworker, applicant continued inappropriate comments – coworker challenged applicant over comments and resulted in altercation where applicant displayed aggression – applicant's behaviour reported to respondent – after investigation by respondent's HR, applicant dismissed for breaching company policies – applicant lodged unfair dismissal claim – Commission considered if dismissal harsh, unjust or unreasonable – found applicant made inappropriate comments about coworker – inappropriate comments continued when coworker asked for these to stop – applicant demonstrated no remorse when challenged by coworker, HR and respondent's Mining and Haulage Manager – Commission considered whether inappropriate comments constituted sexual harassment – applying principle found in [*Mac*] found applicant engaged in bullying not sexual harassment – found no evidence that coworker's health and safety placed at serious risk by bullying – Commission noted finding not seeking to minimise stress felt by coworker, rather in absence of evidence Commission could not be satisfied applicant's behaviour created serious and imminent risk – Commission found respondent had valid reason to terminate applicant's employment – satisfied applicant notified of reason for termination and given opportunity to respond – applicant submitted his age and remote Christmas Island

employment market meant challenging prospects gaining alternate employment – applicant had no prior history poor behaviour in twenty years' service at company – Commission found respondent's policies were not suitably communicated to Christmas Island staff – observed remote work locations not fully implementing company policies not unusual – further observed employer does not need policy for everything and some behaviour so extreme no need to codify as reasonable person knows not to engage in such behaviour – expressed hope this extended to bullying and sexual harassment, acknowledged experience this not the case – found well communicated company policy may have altered applicant's behaviour – Commission found valid reason for termination – found dismissal harsh in circumstances, taking into account no prior history of discipline for similar issues, age, employment prospects and lack of exposure company policies – Commission determined applicant unfairly dismissed – remedy to be considered separately.

U2024/7715 [2024] FWC 2868
O'Keeffe DP Perth 16 October 2024

Soorley v The Trustee For The Gunnebah Operating Trust

GENERAL PROTECTIONS – workplace rights – arbitration – ss.340, 341 and 361 Fair Work Act 2009 – application to deal with a general protections dispute involving dismissal – applicant raised concerns about heavy workload, terms and conditions of her employment and classification – applicant discussed concerns with employer, including performance issues – changes made post discussions to assist applicant – further performance and conduct issues arose – applicant denied allegations – disciplinary meeting held – applicant's representative attended on her behalf – all allegations found to be substantiated by respondent – applicant terminated summarily – applicant later contacted by Health Care Complaints Commission (HCCC) regarding allegation that applicant advocated use of psychedelic drugs to patients – HCCC concluded insufficient information to support allegation – application filed in Commission – not resolved in conference – parties agreed to consent arbitration by Commission – applicant sought compensation, damages, apology and cessation of further adverse action – Commission considered ss.340 and 341 – observed employer can contravene s.340 if employee's exercise of workplace right a 'substantial and operative factor' in reason for taking adverse action – further noted reverse onus established by s.361 – summarised task before Commission in consent arbitration as requiring determination of three factual questions: 1) was employee exercising workplace right per s.341; 2) did employer take adverse action against employee per s.342; 3) did employer take adverse action against employee because of prohibited reason or reasons including that prohibited reason [*Keep*] – respondent accepted exercise of workplace rights in three out of twelve occasions – respondent accepted it took adverse action by dismissing the applicant – Commission observed 'real contest' was whether causal nexus between exercise of rights and dismissal – respondent contended reason for dismissal unrelated to exercise of workplace rights – Commission found exercise of workplace rights existed on ten occasions – two occasions found to be exercised after dismissal, therefore no causal nexus with dismissal – Commission found no causal nexus between decision to dismiss and exercise of workplace rights after dismissal – Commission found respondent formed opinion misconduct occurred, being applicant's advocacy of psychedelics to patients in respondent's rehabilitation facility – found relevant inquiry not whether opinion formed fairly or properly, but whether opinion formed at all and whether it moved respondent to dismiss – found respondent successfully rebutted presumption in s.361 – found reason for dismissal was applicant's conduct – respondent found to have not contravened Part 3-1 of the Act by dismissing applicant – application dismissed.

C2024/1509 [2024] FWC 2754
Slevin DP Sydney 3 October 2024

Tearne v Civil Group (Aust) P/L

TERMINATION OF EMPLOYMENT – high income threshold – ss.332, 394 Fair Work Act

2009 – applicant employed as a project manager – not covered by award or enterprise agreement – applicant sent resignation letter to respondent with immediate effect – respondent confirmed acceptance following day – applicant challenged end of employment, contended forced to resign – respondent raised high income threshold jurisdictional objection to applicant's unfair dismissal application but did not raise out of time objection – Commission considered application possibly filed out of time and heard both jurisdictional issues – whether to grant extension considered – application found to be one day late – respondent contended applicant's accounts of initially being unaware of time limit and subsequently attributing delay to medical issues and a solicitor who declined to take carriage of matter contradictory and did not justify delay or favour granting extension of time – Commission accepted applicant's medical evidence of issues constituted exceptional circumstances and granted extension – high income threshold objection considered – applicant's base salary exceeded high income threshold – applicant submitted medical conditions resulted in him being placed on leave for treatment constituted enforced leave without pay and prevented him earning the salary which purportedly exceeded threshold – respondent submitted leave was mutually agreed – applicant submitted leave without pay was enforced given he had medical clearance to work – contest at hearing regarding whether leave enforced or mutually agreed – leave granted for parties to file material after hearing addressing respondent's assertion that leave was mutually agreed – respondent filed such material, applicant did not – Commission found consideration of whether leave mutually agreed was unnecessary – Commission neither compelled applicant's compliance to file material regarding mutually agreed leave nor considered respondent's material regarding same – Commission followed precedent [*Zappia; Solgen* Energy] that the annual rate of earnings 'at that time' is relevant to considering high income threshold and not the annual earnings 'to that time' – applicant's annual rate of earnings exclusive of superannuation as stated in contract clearly higher than threshold – held applicant's assertion respondent failed to comply with annual rate of earnings under contract irrelevant – accepted evidence that applicant's medical conditions necessitated leave but found leave did not amount to respondent's conduct lowering the applicant's rate of earnings as established in employment contract – Commission applied *Zappia* and found unpaid leave in preceding 12 months did not reduce rate of earnings at time of purported dismissal – Commission found applicant exceeded high income threshold, upheld jurisdictional objection and dismissed application.

U2024/6438 [2024] FWC 2886
Simpson C Brisbane 17 October 2024

Josey v OS MCAP P/L

TERMINATION OF EMPLOYMENT – valid reason – sexual harassment – ss.387, 394 Fair Work Act 2009 – Ms Evelyn Josey (applicant) fly-in fly-out Production Technician employed by OS MCAP P/L (respondent) since 12 March 2019 – long-term relationship ended in December 2021 – applicant was experiencing alcohol problems and mental health issues by July 2023 – applicant due to begin next rostered shift at mine site on 19 July 2023 – on 18 July, applicant drinking heavily prior to flight and was "extremely intoxicated" before entering airport – applicant had additional alcoholic drinks in Qantas airport lounge – witnesses observed applicant appeared under the influence of alcohol or other drugs – respondent contended applicant inappropriately touched another employee in lounge and during flight – applicant seated next to co-worker on flight – this employee later lodged formal complaint about applicant's conduct during the flight – following day applicant self-identified that she was impacted by effects of alcohol and commenced period of personal leave for 5 weeks – applicant later returned to employment with respondent – respondent investigated applicant's conduct – investigation found conduct amounted to harassment – applicant provided written response on 18 December that disputed findings and set out employment history and record – applicant dismissed on 21 December 2023 following investigation and disciplinary procedures – applicant disputed conduct occurred as described by respondent – further argued conduct in lounge occurred out of hours and as such did not constitute valid reason for dismissal

– respondent submitted applicant's conduct constituted valid reason – observing criteria in [*Bobrenitsky*], applicant argued any conduct not subject to employer regulation as she and other employees not required or remunerated for attending airport lounge, the lounge was not worksite, was indistinguishable from the general public, and the alleged victim was friend in addition to co-worker – respondent argued there was clear and sufficient connection to applicant's employment – Commission accepted this rationale, stated: "it is well established that out of hours conduct can be a valid reason for dismissal where the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employer and the employee, damage the employer's interests, or is incompatible with the employee's duties as an employee" [*Bobrenitsky*] – Commission confirmed investigation findings – applicant's code of conduct stated employees should never engage in harassment, sexual harassment or sexual assault, among other behaviours – applicant's contract of employment referenced responsibility to be familiar with policies including code of conduct – Commission found applicant's conduct was harassment according to code – applicant argued she was asleep on flight so could not have made conscious decisions – co-worker submitted applicant made repeated movements and touched him inappropriately in "intimate and sexual way" – this version of events corroborated by other witnesses, including during the investigation – Commission accepted this version of events – found applicant sexually harassed co-worker during flight – found conduct amounted to serious breach of code of conduct and charter of values – noted s.387(b) requires finding of whether applicant notified of reason – applicant "clearly notified" via termination letter dated 12 December 2023 – applicant claimed denied opportunity to respond – Commission found applicant provided opportunity to respond prior to decision to dismiss – dismissal not harsh, unjust or unreasonable as set out at s.387 – dismissal valid – application dismissed.

U2024/386 [2024] FWC 2731
Durham C Brisbane 2 October 2024

Smith v Adcon Admin P/L

TERMINATION OF EMPLOYMENT – jurisdiction – valid reason – remedy – ss. 385, 387, 394 Fair Work Act 2009, Corporations Act 2001 – on 25 January 2024 respondent advised applicant of redundancy from Safety and Environmental Manager role as business would soon cease operations – confirmed applicant would be paid notice period and advised of re-employment opportunity with respondent's new company – on 31 January 2024 applicant's employment was terminated – leave entitlements paid out but applicant was not paid notice or redundancy payments, nor advised of other employment opportunities – applicant became aware some former colleagues had continued to be paid by the respondent, and some had lodged unfair dismissal applications and had been reinstated subsequent to 31 January 2024 – applicant lodged unfair dismissal application – Commission issued directions for parties to lodge submissions – respondent did not comply – respondent's liquidator advised the respondent had been placed into liquidation by court order – respondent's liquidator contended, per s.471B *Corporations Act 2001*, proceedings against respondent could not commence without leave of court – further, did not possess the means to participate in proceedings – Commission identified three central issues in case: 1) whether application could proceed given respondent's liquidation; 2) if yes, was applicant unfairly dismissed; 3) if unfairly dismissed, how to compensate in circumstance where reinstatement not possible – first issue considered – found as Fair Work Commission is not a court, s.471B not applicable [*Trollope*] – noted this equally applied to s.440D of *Corporations Act 2001* regarding stay of proceedings against a company in liquidation – held Commission had jurisdiction to hear applicant's unfair dismissal application – Commission noted determination of matter difficult given circumstances of respondent – respondent did not file any material or contest application – Commission considered it appropriate to make *Jones v Dunkel* inference that respondent had no evidence to contradict applicant-examined if applicant was unfairly dismissed under s.385 – commission first considered s.396 to determine if dismissal was a case of genuine redundancy – respondent provided no evidence justifying redundancy – held s.386 requirements met – whether applicant's

dismissal was harsh, unjust, or unreasonable considered – noted, per applicant's uncontested evidence, applicant dismissed on 31 January 2024 while respondent continued to operate, employing staff and trading, until late March 2024 – found applicant had not been provided a valid reason for dismissal under s.387(a) – held not a case of genuine redundancy – held dismissal harsh, unjust or unreasonable – application upheld, applicant unfairly dismissed – remedy considered as reinstatement unsuitable – found applicant incurred financial loss as they would have continued employment for further 8 weeks and 2 days until date respondent ceased operations – compensation remedy ordered under s.392.

U2024/1618		[2024] FWC 2775
Connolly C	Melbourne	4 October 2024

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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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For urgent industrial action applications outside business hours, please refer to our Contact us page for emergency contact details.

The address of the Fair Work Commission home page is: www.fwc.gov.au/

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

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

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