

## **NAVIGATION**

\*Unfortunately, the product's efficient navigation system with the index to the left of screen cannot be contained in this preview. Just use the scroll mechanism to the right and make sure you see the incredible depth of this publication by perusing the tables/index from p. 3.

# **KIDD'S FAIR WORK LAW & ANNOTATED ACT**

**(This preview contains cases from Sept. 2013 ...)**

**Extensive Statements of the Law concerning Many Issues  
and Sections of the Legislation Included**

Index : Keyword headings

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**This guide aims to point the subscriber to all the relevant cases, and to provide helpful 'judicial' commentary stating the general principles, but it is no substitute for carefully researched legal consideration or advice.**

The author is available on **0408 802 212** to answer any queries or for orders.

Every effort has been and will be made to keep the statements of law contained herein up-to-date, but please be careful to check the latest legislation and decisions yourself before relying on an older decision.

**I thank my assistants Patricia Lee and Mark Nemstas for their assistance in the preparation of the  
Hardcover Loose Leaf and Web versions.**

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# USERS' GUIDE \*\*\*\* NOTE : Check Very Recent Cases for Appeals

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## Please Note:

Where a quote in a précis contains bold emphasis it was highlighted by the author for your assistance.

Re Section Annotations - any letters and numbers in brackets after case ref. refer to the sub-sections.

**Precedential value only** - decisions not considered of precedential value are not included.

## Scope of publication:

*The following FWA/FWC decisions are considered for publication in this service:*

- FWA/FWC termination of employment/redundancy cases *Australia-wide*
- Cases of the Full Bench of FWA/FWC on all issues
- Full Federal Court appeals from FWA/FWC decisions
- Cases of the SA branch of FWA/FWC on all issues
- Federal Circuit Court cases and appeals \*starting from July 2014
- Academic articles of interest are also included
- Major legislative changes in the form of repeals or substitutions will be noted for sections that are included in this publication. Users are advised to check legislative history thoroughly.

**Citations** - decisions recorded as unreported may since have been reported. Case name citation:

FCA.....Federal Court Australia  
FCAFC.....Federal Court of Australia Full Court  
FCCA .....Federal Circuit Court of Australia  
FWA.....Fair Work Australia - Now cited as FWC  
FWAFB .....Fair Work Australia Full Bench - now cited as FWCFB  
FWC.....Fair Work Commission  
FWCFB .....Fair Work Commission Full Bench  
HCA .....High Court of Australia  
SADC.....South Australia District Court  
SAIRC.....South Australian Industrial Relations Court  
SASC.....South Australia Supreme Court

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## Abandonment of employment

[2013] FWC 7026 **Vic** *Lloyd v Alexander M* (abandonment of employment where **A “never provided his employer with any answers to a legitimate set of questions** about the running of the business, which went to issues which were central to the profitability of the business, to the conduct of Mr.Lloyd, and to issues of overpayment of wages. ... [A] never contacted the employer except to collect his possessions from the premises. **Not only did he not contact his employer as he had implicitly agreed to do, but when the employer tried to contact him, he did not answer his mobile phone, and did not return messages.** He did not answer other messages. He did not return to work or attempt to do so. His actions indicate that he had decided not to continue the employment relationship in any form” @11)

[2013] FWC 9041 **WA** *Sayoun v Aurora Stone* (the A was on leave and heard it was **alleged he had stolen company property - A decided not to return to work - A found to have abandoned his employment** - A should have discussed the issue with R, whose subsequent investigations exculpated A)

[2014] FWC 7098 **NSW** *Johnston v The Trustee for the MTGI Trust* (failure to return to work of 6/1/14 after approved leave had expired - **“for termination of employment to be at the initiative of the employer, it needs to be proved that the employer’s conduct intended to bring the employment to an end, or ‘on any reasonable view, would probably have that effect’.** A consideration of the facts of this matter suggests that the respondent initiated the end of the



employment relationship. The respondent was aware of the request for the applicant to take personal/carer's leave and knew the circumstances in which such leave was sought. The respondent was aware that **the applicant was having a family crisis brought on by the premature birth of his son and the need for the prolonged hospitalisation of his wife and baby ...** The respondent was also aware ... [A] had four children to care for at home. Although it was claimed ... [R] had advice that the applicant was not entitled in the circumstances to access his accrued personal/carer's leave, the **respondent never advised the applicant that the request for personal leave was denied** or indeed that he was not entitled to take such leave ... [T]he suggestion that the applicant had abandoned his employment was only raised after he returned to work on 16 January 2014 and after he queried the pay received for that month" @33-35 - **A's "return to work some 10 days after the completion of his annual leave did not provide a valid reason for dismissal"** @50 - A given no prior **notice** that he'd be treated as having abandoned his employment - dismissal harsh etc)

### **Absenteeism/Attendance**

[\[2014\] FWC 328](#) **WA Baker v Patrick Projects** (the A claimed he was dismissed because of his worker's compensation issues - however, "[t]he overall reason for Mr Baker's dismissal was primarily his **absence from work and his non attendance at meetings to discuss these absences**" @67 - A's absences were numerous - dismissal not harsh etc - appeal dismissed 1/5/14 in [\[2014\] FWC FB 2293](#))

[\[2014\] FWC 1497](#) **ACT McIntosh v Australian Federal Police** (the A's dismissal for **failing to comply with the hours of work he was assigned** not harsh etc - "While the applicant's personal situation was unfortunate, the attitude of the applicant towards his employer is almost incomprehensible. It was readily apparent that the applicant expected the AFP to provide him with every possible concession to assist him with managing his personal circumstances, though conversely he seemingly deemed it unnecessary to honour even the most basic work requirements such requesting authorisation for his absences, notifying his supervisor of his repeated late attendances or attending work in a regular manner. The applicant seemed to operate under the misapprehension that he was in a position to determine his own hours of work and was able to refuse to do work if he had no interest in it" @124 - Appeal dismissed 8/10/14 in [\[2014\] FWC FB 6662](#) - errors of fact found, but they were not significant)

[\[2014\] FWC 1890](#) **NSW Riley v Go Electrical** (the A was **late for work on a number of occasions and was informally warned about it** - on the last occasion A was to open the business, but was about two hours late - despite their being no formal written warnings and despite A being **informed of the decision to dismiss him without any opportunity to respond**, dismissal not harsh etc)

[\[2014\] FWC 3385](#) **NSW Harris v Parmalat Food Products** (the A was dismissed due to a **pattern of unreliability regarding his attendance** despite various warnings - the final incident was a relatively minor one on **Melbourne Cup day** when he **exceeded his allotted break time** of 20 minutes by about 18 minutes)

[\[2014\] FWC 3857](#) **Vic Phan v Somerville Retail Services** (the **A arrived at work, but when he could not find a car park decided to go home** - a car park would have become available within five minutes - A did not adequately notify R before leaving and he had a history of warnings, including a final warning for other misconduct - dismissal not harsh etc)

[\[2014\] FWC 4150](#) **Vic Kemp v Railway Sand Supplies** (the A had about **nine unexplained absences in four months** - A had been given a warning - dismissal not harsh etc)

[\[2014\] FWC 7441](#) **Vic Holliday v Coca-Cola Amatil** (the A's "**disregard of his obligation to advise** his employer of his non attendance is in breach of Coca Cola's policy. However, there is **no evidence that Mr Holliday had a history of unauthorised absenteeism**. Of itself, this conduct did not warrant the termination of his employment" @81)

[\[2014\] FWC 7108](#) **SA Reid v Broadspectrum Australia** (whilst placed by R to work with BHPB, A had suffered a non-work related injury for which he needed significant time off work - A informed his supervisors at BHPB, but did not inform R - "the actual reason for dismissal was that **in the context of the casual employment relationship, Mr Reid had been absent without notifying**

his employer and when contacted by the client seeking an ongoing replacement, a replacement employee was provided by Broadspectrum. By the time that Mr Reid was fully fit to resume work, which was a requirement of BHPB, the replacement employee had been in place for a period and BHPB, as the client, had indicated that they were happy with that employee. As a result, by the time of the 24 March 2014 meeting, the NPI **work was no longer available for assignment to Mr Reid** and this was the reason for the dismissal” @74-75 - dismissal not harsh etc)

#### **Adverse action**

See [s340](#), [s341](#) & [s342](#) etc

#### *Bullying*

[\[2014\] FCCA 1893](#) *De Blasio v Melba Support Services Inc.* (A’s claim she was dismissed for complaining about bullying and for taking personal leave not established - R dismissed her for serious misconduct because of **genuine concerns about a conflict of interest**)

#### *Carer’s responsibilities*

[\[2014\] FCCA 1553](#) *TWU of Australia v Atkins* (Mr Atkins refused Mr Vella’s request to take his daughter to a medical appointment and summarily dismissed him thereby **contravening s341 and s351** - “Mr Vella has suffered hurt and distress by reason of the refusal of carer’s leave and the dismissal from his employment because he exercised his entitlement to take leave. That hurt and distress was exacerbated by the **disgraceful conduct by Mr Atkins in threatening Mr Vella** when he took the matter to the Fair Work Commission and involved the TWU. Whether or not Mr Atkins also threatened other members of Mr Vella’s family, they have been inevitably affected by the threats Mr Atkins made against Mr Vella” @19 - this is a **most serious case involving hurt, distress and humiliation** of Mr Vella - W’s “wife has become fearful and has expressed a desire to move from their family home. Mr Vella has also sought to avoid contact with Mr Atkins” @33 - Mr Atkins apologised to Mr Vella and recognised “his need for treatment and offered an undertaking to the Court ... not to denigrate Mr Vella further” @21 - Mr Vella awarded **\$10,000 for pain and suffering** - two breaches dealt with as a **single course of conduct - pecuniary penalty of \$10,000** also awarded)

#### *Complaint in relation to employment*

See [s340](#) & [s341](#)

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* (see from paragraph 73 detailed consideration of the authorities on the **meaning of ‘complaint’** - the real reason for A’s dismissal were R’s concerns about her performance, not any complaint she may have made)

[\[2014\] FCCA 2317](#) *Hall v City Country Hotel Management Pty Ltd & Ors (No.2)* (see precis below at **Underpayment of wages** sub-heading)

[\[2014\] FCCA 613](#) *Heathcote v University of Sydney* (the A claimed adverse action had been taken against him when he was made redundant due to a **workplace complaint** and due to **discrimination on the grounds of political opinion** - “Dr Heathcote’s 2004 letter, in so far as it concerned Professor Garton, could be seen as indirectly connected to his employment. Dr Heathcote was **clearly expressing a grievance he had experienced in relation to harassment** and was implicating the inadequacy of Professor Garton’s actions in the resolution of his grievance. The University argues that Professor Garton was not the main individual being complained about, however, as Dean of Arts at that time, he did have a role in overseeing the way the complaint was investigated. Therefore, I find that Dr Heathcote’s complaint was the exercise of a workplace right for the purposes of [s.341\(1\)\(c\)\(ii\)](#)” @55 - **ideological division over characterisation of streams of philosophy was a political issue** - A put on redundancy list because he didn’t meet the stated publications criteria - on facts, redundancy process not found to have been undertaken for a prohibited reason)

#### *Exercising workplace right*

See [s341](#)

#### *Illness/disability*

[\[2014\] FCCA 1522](#) *McGarva v Enghouse Australia* (Reg. 3.01(5) “provides that an illness or injury is not a prescribed kind of illness or injury if the conditions in subregulation 3.01(5)(a) and (b) are satisfied. That is, if the applicant’s absence extends for more than three months, or, the total absences in a 12 month period have been more than three months. Given **Mr McGarva was absent for almost a year before his employment was terminated**, his illness was not prescribed and falls outside the purview of s.352 ... But that does not abrogate his rights under s.351 ... or s.15 of the Disability Discrimination Act” @21-22)

#### *Industrial action (involvement in)*

[\[2014\] HCA 41](#) *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (an employee, Mr Doevendans, who was a member of the CFMEU, engaged in a lawful protest and held and waved a sign supplied by the CFMEU at passing motorists - the **sign read ‘No principles SCABS No guts’** - non-striking workers felt intimidated - the primary judge accepted that Mr Doevendans had been dismissed because this behaviour “was inappropriate, offensive, humiliating, harassing, intimidating, and flagrantly in violation of BHP Coal’s workplace conduct policy (that policy required courtesy and respect to be accorded to fellow employees)” @3 *per French CJ & Keifel J* - “Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action. In *Bendigo*, French CJ and Crennan J pointed out that it is **erroneous to treat the onus imposed on the employer by s361 as being heavier, or different, if adverse action is taken while an employee happens to be engaged in industrial activity**. Their Honours said that it is incorrect to conclude that, because **the employee’s union position and activities were inextricably entwined with the adverse action**, the employee was therefore immune, and protected, from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s361. In the present case, the reasons found by the primary judge to actuate Mr Brick’s decision did not include Mr Doevendans’ participation in industrial activity, or his representing the views of the CFMEU. To the contrary, his Honour found that Mr Brick had not been motivated by such considerations. ... His Honour ... wrongly added a further requirement to s361, namely that the employer dissociate its adverse action completely from any industrial activity” @19-22 *per French CJ & Keifel J* - “the word ‘because’ in s346 ... connotes the existence of a particular reason as an operative and immediate reason for taking adverse action. Where the adverse action taken is in consequence of a decision made by a responsible individual within a corporation, the existence or non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual ... The fact that Mr Doevendans held and waved the signs while participating in the protest organised by the CFMEU was not an operative part of Mr Brick’s reasoning. Nor was the fact that the signs represented or advanced the views or interests of the CFMEU. The correct answer to the question presented by s346(b) in those circumstances was that given by the majority in the Full Court: BHP Coal’s dismissal of Mr Doevendans was not because he had engaged in industrial activity within the meaning of s347(b)(iii) and (v) and therefore did not contravene s346(b)” @85-90 *per Gageler J* - appeal from Full Court dismissed by majority)

#### *Joinder*

[\[2014\] FWC 4133](#) *Vic NUW v Caterpillar ... & NUW v Hoban Recruitment* (see [precis](#) at Joinder)

#### *Onus/standard of proof*

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* (See Miller at [s346\(b\)](#) & [s361](#))

[\[2014\] FCCA 2257](#) *The Director of the Fair Work Building Industry Inspectorate v Robko Construction Pty Ltd & Anor* (the standard of proof required in determination of civil remedy provisions considered from para.16 - **matters to be determined on balance of probabilities**)

#### *Political opinion*

[\[2014\] FCCA 613](#) *Heathcote v University of Sydney* (see [precis](#) above at sub-heading *Complaint in relation to employment*)

#### *Single course of conduct*

[\[2014\] FCCA 1553](#) *TWU of Australia v Atkins* (see [precis](#) above at sub-heading Carer's responsibilities)

#### *Underpayment of wages*

[\[2014\] FCCA 2317](#) *Hall v City Country Hotel Management Pty Ltd & Ors (No.2)* ("CCHM contravened s.340. First, the removal of Mr Hall from the roster, and his **not being included in the roster constituted 'adverse action'** within the meaning of s.342 ... It constituted a dismissal of Mr Hall's employment, or an injury to Mr Hall in his employment or an alteration of Mr Hall's position to his prejudice. Second, the **reason for which Mr Hall claims CCHM took the adverse action against him was Mr Hall's investigating with CCHM the underpayment of his wages**. That was an **inquiry 'in relation to his . . . employment'**, and thus constituted the exercise of a workplace right within the meaning of s.341 ... Third, Mr Hall alleges that the reason CCHM took adverse action against him was because he made an inquiry in relation to his employment, and he has taken proceedings against CCHM in relation to a contravention of Part 3.1 ... That means that, because of s.361 ... CCHM is deemed to have taken the adverse action against Mr Hall for the reason, or for reasons that includes as a substantial reason, Mr Hall's having exercised a workplace right" @18)

#### *Whether action taken for proscribed reason*

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* ("the High Court confirmed [in *Board of Bendigo ... v Barclay*] that the question of whether a particular action or decision was taken because of a proscribed reason, or for reasons which included a proscribed reason, is **a question of fact** to be determined on the whole of the evidence" @66)

#### **After-acquired knowledge**

See also [Dismissal – Post-dismissal material/matters/information](#)

[\[2014\] FWC 4534](#) *Vic Painter v Equiset Construction* (see [precis](#) at Dismissal – Sexual/pornographic issues)

[\[2014\] FWC 2244](#) *Qld Dillon v Knight Chiropractic* (see [precis](#) at Small Business Fair Dismissal Code)

#### **Aged Care Award 2010**

[\[2014\] FWCFB 129](#) *Leading Age Services Australia NSW-ACT* (variations - clause 10.3 regarding **part-time employees** and its interrelationship with clause 22.6 regarding **rosters** considered - "part-time employees could not be required to work additional hours without their written consent" @16 - clause 15.4(a) regarding **meal allowances** and clause 28.2 defining **shift workers** and dealing with the **quantum of their annual leave** considered)

#### **Annual leave**

[\[2014\] FCAFC 34](#) *United Voice v Valspar (WPC)* (**employer directed annual leave be taken contrary to EA** - A, an employee organisation, sought relief for contravention of s50 on behalf of employees whose entitlements were in issue - A "made out a clear case of **breach of s 50** of the FW Act by establishing a contravention of cl 34 of the Agreement with respect to the requirement to take annual leave" @65 - matter remitted re question of relief)

[\[2014\] FWC 6823](#) *SA White v Broken Hill Musicians Club* (**termination of employment can occur during period of annual leave**)

#### **Annual wage review**

[\[2014\] FWCFB 3500](#) *Annual wage review 2013/2014* ("A number of considerations have led us to award a higher increase than that determined in last year's 2012–13 Review decision. The economic outlook remains sound, with GDP growth expected to ease in 2014–15 before increasing to just below trend in 2015–16. Employment growth is expected to be stronger in 2014–15, and the unemployment rate is expected to increase only slightly over the forecast period. Inflation has been contained, and is anticipated to slow in the period ahead, approaching the mid-point of the RBA's target band. Annual growth in the WPI has declined each year from the December quarter 2010,



and average weekly ordinary time earnings (AWOTE) recorded its lowest annual growth in a decade in the year to the December quarter 2013. Wages growth is forecast to increase only moderately from current low levels. The outlook for contained inflation growth and relatively low aggregate wages growth provide scope for increasing minimum wages without inflationary consequences. The real value of award minimum wages and the NMW would decline if no adjustment were awarded. The CPI increased by 2.9 per cent over the past year. The rise in labour productivity together with the low growth in wages has meant that nominal unit labour costs barely rose over the past year and real unit labour costs remained at an historically low level. In aggregate, there are no signs of cost pressures arising from the labour market” @48-51 - **possible legislative changes to carbon tax not factored in** - exemption from minimum wage increases for **employers affected by natural disasters** such as drought rejected as insufficient material to warrant a finding of exceptional circumstances - “The outcome of the Review in relation to modern award minimum wages is that **from the first full pay period on or after 1 July 2014 minimum weekly wages are increased by 3 per cent**, with commensurate increases in hourly rates on the basis of a 38 hour week. The increase applies to minimum wages for junior employees, employees to whom training arrangements apply and employees with disability, and to piece rates through the operation of the methods applying to the calculation of those wages. Wages in the NTWS will be adjusted by 3 per cent” @619 - “The national minimum wage order will contain: (a) a **national minimum wage of \$640.90 per week or \$16.87 per hour**, (b) two special national minimum wages for award/agreement free employees with disability: for employees with disability whose productivity is not affected, a minimum wage of \$640.90 per week or \$16.87 per hour based on a 38 hour week, and for employees whose productivity is affected, an assessment under the supported wage system, subject to a minimum payment fixed under the SWSS, (c) wages provisions for award/agreement free junior employees based on the percentages for juniors in the *Miscellaneous Award 2010* applied to the national minimum wage, (d) the apprentice wage provisions and the NTWS in the *Miscellaneous Award 2010* for award/agreement free employees to whom training arrangements apply, incorporated by reference, and a provision providing transitional arrangements for first year award/agreement free adult apprentices engaged before 1 July 2014, and (e) a casual loading of 25 per cent for award/agreement free employees” @622)

### **Associated entities**

[2014] FWC 4565 **Qld Collie v Metropolitan Caloundra Surf Life Saving Club Inc** (“**the Club and the Supporters Club are associated entities** as defined in s.50AAA of the *Corporations Act 2001* - “the Club is the principal and ... it controls the Supporters Club as an associate. The Supporters Club is an Auxiliary Organisation accepted as such in accordance with the rules of the Club. The legal and practical effect of this relationship is that by virtue of the Constitution of the Club, the Supporters Club can be an auxiliary organisation only on the basis that it subscribes to the constitution of the club, and is bound by that constitution and the by-laws. The Supporters Club is established to conduct activities in support of the Club. That is the reason for its existence” @44-45)

[2014] FWC 6325 **Vic Nittos v Mitchbiz Nominees** (“The mere fact that the two companies operate under the **same trading name, and share resources** does not mean that one company controls the other. There were no formal arrangements between the two companies” @18)

### **Back pay**

[2013] FWC 8557 **DP World Brisbane v MUA** (method of determining back pay to be paid to supplementary employees under EA considered)

### **Bankruptcy/Liquidation**

See *Corporations Act 2001*

[2013] FWC 1642 **Qld Wiederroth v Alegna Health Centre** (the **R was declared bankrupt and her business was in the hands of the Public Trustee** - she did not appear in these proceedings, but relied on redundancy as a jurisdictional objection - such not established as there was a **clear dismissal by email for alleged misconduct** - dismissal found and compensation awarded - see *Blunt* at [2013] FWC 1583 involving the same R and similar circumstances leading to the same conclusion)

[\[2013\] FWC 8173](#) *Vic Hutchinson v Monash Health* (the right of an undischarged bankrupt to bring unfair dismissal proceedings considered - *Dubow* not followed re remedy - "it would be perverse if a decision was made that a person was dismissed harshly, unjustly or unreasonably and reinstatement was not appropriate, then for the Commission be barred from considering compensation in lieu of reinstatement" @30 - employment is not 'property' - "the Bankruptcy Act should not be read as having a purpose of displacing the statutory remedy provided in the Fair Work Act for persons who are dismissed and are eligible otherwise to make an application" @33 - A's application to proceed)

[Dubow] "[23] I see **no bar to an applicant who is bankrupt making an application for a remedy of reinstatement (or reappointment to an alternative position) only (inclusive of continuity of service)**. This is not a concern in which a trustee will have an interest (or be able to act in respect of on behalf of the bankrupt applicant). Nor will it constitute divisible property in which the bankrupt's beneficial creditors will have an interest.

[24] However, in so far as an application might seek an order for 'lost pay' (s.391 of the Act) or compensation (s.392(1) of the Act), the Commission would have no jurisdiction to entertain such a claim, as the claim for lost pay or compensation would constitute after-acquired property and would vest in the trustee (pursuant to s.58 or s.116(1) of the Bankruptcy Act). [**\*But see Hutchinson above**] That is, neither the lost pay order nor the compensation order would be wages earned before the termination by the efforts of the Applicant and owed to her as a consequence.

[25] Given this discussion, I would adopt the approach of Jarrett FM and accept and hear the application in relation to all matters in which a bankrupt applicant's creditors had no interest and in respect of which there would be no divisible property in which the relevant creditors would have a beneficial interest. This would extend to determining whether a dismissal was harsh, unjust or unreasonable, and whether, if so, a bankrupt applicant should be reinstated or reappointed to another position (if appropriate). But the balance of any application, in so far as it constituted property for the defined purposes, would be beyond jurisdiction." *Dubow v ATSILS* 4/9/13 [\[2013\] FWC 6171](#) SDP Richards, Brisbane  
Permission to appeal refused 15/4/14 in [\[2014\] FWC 2518](#)

[Millington] "[50] ... (1) A bankrupt's employment is not itself '*property*' for the purposes of the *Bankruptcy Act*. (2) Income from employment is not '*property*', or '*property divisible amongst the creditors of the bankrupt*' under the *Bankruptcy Act*, and therefore does not vest in the trustee. Consequently, the trustee cannot institute proceedings to recover earnings for work performed. (3) A statutory right for a dismissed employee to apply for reinstatement to his or her employment is one personal to the dismissed employee, and the determination of such an application involves an assessment of the person's suitability to be reinstated. The trustee does not have any interest in the reinstatement of a bankrupt employee; an order for the reinstatement of the employee could not be enforced by the trustee and would not result in any property being divisible amongst the creditors of the employee.

(4) An action for damages for wrongful dismissal is a chose in action which does however constitute "*property*" for the purposes of the *Bankruptcy Act*, and consequently vests in the trustee." ... [69] Having regard to the authorities ... we consider that **an application for an unfair dismissal remedy is not 'property' which vests in the trustee under s.58 of the Bankruptcy Act. It follows that we prefer the approach taken in *James Hutchinson* over the differing approaches taken in *Hampson* and *Dubow*.** [70] The critical question for the purpose of assessing whether s.58 of the *Bankruptcy Act* applies is whether Ms Millington's application constitutes property divisible amongst her creditors under s.116(1) of the Act. Her former employment is not itself property that belonged to her at the time of her bankruptcy or was subsequently acquired by her under s.116(1)(a); therefore the capacity under the Act for Ms Millington to commence unfair dismissal proceedings in respect of that former employment does not constitute property as defined in s.116(1)(b). That leaves therefore only the question of whether her application for an unfair dismissal remedy is itself property divisible amongst her creditors under s.116(1)(a). [71] As earlier discussed, the right under the Act to make an application for an unfair dismissal remedy is personal to the dismissed employee. The Act does not confer a right to a remedy, but only a right to make an application and have it heard according to law. The right is therefore best characterised as a bare, non-assignable right of action. Such rights of action are not, outside the constitutional context, usually regarded as being in the nature of '*property*'. ... **The capacity to seek the remedy of reinstatement is not something that can be turned to the benefit of creditors by the trustee.** The trustee



could not by process of law require the dismissed employee, if a reinstatement order is made, to re-commence employment and continue in such employment thereafter as envisaged by such an order. The earnings that the dismissed employee would receive as the result of a reinstatement order would not constitute property divisible amongst the creditors under s.116(1) and therefore vesting in the trustee under s.58, although such earnings would be subject to the scheme of provisions contained in Division 4B of the *Bankruptcy Act*. ... [77] We agree with and respectfully adopt the conclusion of Smith DP in *James Hutchinson* that **the concepts of reinstatement and compensation are 'joined' and may not be 'segmented'**. ... [79] Because Ms Millington's application does not, we conclude, constitute property divisible amongst her creditors under s.116(1) of the *Bankruptcy Act*, it follows that it does not fall within the definition of 'the property of the bankrupt' in s.5(1) of the Act, and so does not vest in the trustee under s.58(1). That conclusion means that it is unnecessary for us to determine to finality whether Ms Millington's application would fall within the exception in s.116(2)(g)(i); but we observe that Dixon J's dictum in *Cox v Journeaux (No 2)* would strongly suggest that the exception would not apply, and we find the analysis of Watson SDP in *Williams v Genel Investments*, affirmed on appeal, persuasive in this respect. [80] We would also observe that had Ms Millington's bankruptcy post-dated the making of her application, it is highly likely that her application would have been stayed by operation of s.60(2); but again that is not a matter we need to determine to finality. **Millington v Traders International** 23/4/14 [2014] FWCFB 888

## Bias

[2013] FWC 9343 **SA Fair Work Commission** (Commissioner did not consider that his "advice, observations or conclusions made in the s.418 proceedings or decision" could indicate to a reasonable fair minded observer ... [he'd] already reached a conclusion about s.508, or that any conclusions ... expressed will not be altered irrespective of the evidence or arguments to be presented" @46)

[2014] FWC 6652 **Vic Bolden v Lyndoch Living** (Commissioner expressed a 'strongly worded' view about the appropriateness of reinstatement - such does not prevent it being a provisional view - no bias found)

[2014] FWC 7018 **WA Dunne v RePipe** (Commissioner's standard letter to A informing A of his position re costs should his application fail did not create a reasonable apprehension of bias - A complained it did because such letter was not addressed to R as well)

[2014] FWCFB 1443 **CFMEU v FWC** (appeal concerned "apprehension of bias in the unusual circumstances of proceedings under s.508 initiated by a Member of the Commission on their own motion" @51 - permission to appeal granted, but appeal dismissed as Commissioner applied right test)

## Camping allowance

[2014] FWC 1713 **SA CFMEU v Transfield Services** (interpretation of camping allowance clause in *Transfield Services (Santos Hydrocarbons Production and Processing Facilities) Project Work, Maintenance Services and Central Resource Management Enterprise Agreement 2012*)

## Carer's leave

Chapman A, 'Employment Entitlements to Carer's Leave Domesticating Diverse Subjectivities' (2009) 18(2) *Griffiths Law Review* 453

## Casuals

See also s384(2)

[2014] FWC 953 **NSW Cohen-Shapira v The Scots College** (a longstanding casual teacher working for R was not provided casual work in 2013 - R suggested it had less need for casuals due to its new policies - evidence showed R continued to rely on casuals to a similar degree - dismissal found - dismissal harsh etc)

[2014] FWC 1051 **Qld Zhong v Shiman Australia** (casual employee employed on regular and systematic basis since 2011 - "decision not to offer the Applicant any further hours for an

**undefined period because of its operational circumstances** was a sound, defensible and well founded reason. It is telling against a conclusion that the dismissal was harsh, unjust or unreasonable"@41)

[\[2014\] FWC 2352](#) **SA AMWU v Safries** (dispute about **redundancy entitlements of casual employees under EA** - "Clauses 15, 16, 17 and 18 of Appendix 1 are preceded by a heading: 'Redundancy/Retrenchment Payments (Weekly Employees Only)'. These clauses are the only provisions in Appendix 1 which provide for redundancy payments. Consequently, the proposal that employees engaged on a regular casual basis at the time of a redundancy should receive redundancy payments requires that this clear and unambiguous heading be ignored" @39 - no "redundancy payment entitlement to persons who, at the time of the termination of the employment, were engaged as regular casual employees" @42)

#### **CEO (dismissal of)**

[\[2013\] SASC 182](#) **Hand (council CEO (P) was employed on a contract for an indeterminate period** - no award applied and P had no legislative entitlement to a remedy for unfair dismissal - his working relationship with the mayor deteriorated and he volunteered to resign - parties could not agree on terms of resignation - **council terminated P's employment giving nine month's notice** - P claimed his termination and the notice he received were void for non-compliance with s97 of the Local Government Act SA ('the Act') - summary dismissal pursuant to s97(1)(a) considered - misconduct justifying summary dismissal not established - Justice David "read the term 'specified' in s 97(1)(b) [of the Act] such that it catches relevant implied terms in employment contracts, and specifically, the **implied term that an indeterminate contract may be terminated with reasonable notice**. The result of this is that s 97 does not exclude the implied term, and **termination on reasonable notice will comply with s97**" @88 - P was 59 at trial, had worked for D for 30 years and held the most senior position at the D - 12 month's notice was appropriate and A awarded damages of \$27,884 approximately representing his shortfall of salary given the nine month notice period)

#### **Classification**

[\[2013\] FWC 6531](#) **WA Lewis v Nomad Digital** ("The **title of the Applicant may have been indicative of a classification covered by an award but the actual duties and role of the Applicant's work indicate something different** to the type of work that the awards related to. His duties were clearly defined in his contract ... His primary role was not one of a technician but one of a consultant as a high level representative of the Respondent" @23)

#### **Clerks Awards – General**

[\[2013\] FWC 3300](#) **Qld Smith v Cigarette & Gift Warehouse** ...("an Accountant performing functions beyond that which would ordinarily be expected of a strictly administrative clerical officer" @50 - A not covered by Clerks Award - see commentary below)

[\[2013\] FWC 8539](#) **Joseph v Amandon** (a **supervisor of travel consultants** covered by this award or the *General Retail Industry Award 2010*)

[\[49\]](#) The Full Bench of the Australian Industrial Relations Commission stated in [Layton v North Goonyella Coal Mines Pty Ltd](#):

'It is clear from both passages and the definition of "clerk" in the Queensland Clerical NAPSA, that the task of interpretation is not a quantitative one based upon time spent performing certain types of duties. Rather, the task involves a qualitative assessment of the primary purpose of the position. Professional and managerial employees are clearly not clerks. **Where the primary purpose of the role is the exercise of skills of a professional or quasi professional nature, the role will not be regarded as clerical - notwithstanding that the role involves various recording and ordinary administrative office functions.**" **Smith v Cigarette & Gift Warehouse** ... 10/9/13

[\[2013\] FWC 3300](#) Comm. Spencer (Commission's emphasis)

#### **Clerks Private Sector Award 2010**

[\[2014\] FWC 3696](#) **Vic Lee v WorleyParsons Services Pty Limited** ("It is contrary to the scope of coverage of the Award and the evidence in this matter to describe the Applicant, in her position of

**Regional Project Controls Manager**, as ‘wholly or principally’ engaged in clerical or administrative work and therefore her employment was **not covered by the clerical award**” @29)

### Commercial arbitration

[\[2014\] FWC 5383](#) **WA Nesbitt v Dragon Mountain Gold Limited** (R sought a stay of proceedings claiming there was an arbitration procedure in A’s employment agreement that A had to submit to before the FWC had jurisdiction - WA Commercial Arbitration Act considered - “The fact that Ms Nesbitt is employed in a commercial undertaking does not mean that her relationship with the owners is ‘commercial’. Ms Nesbitt’s contractual relationship is an employment relationship” @25 - “The effect of the Employer’s application is for the Commission to endorse employers inserting in contracts of employment a clause which ousts its jurisdiction to deal with alleged unfair dismissals. I am not prepared to adopt such an approach. Secondly, I consider the purported legislative foundations upon which Clause 10 of the employment agreement is built inconsistent with the legislation relied upon” @29 - stay refused)

### Commercial Travellers

[\[2014\] FWC 49](#) **Vic Hallam v Soren Group Australia** (A was responsible for managing R’s sales team, but also did some sales himself - the “**principal or primary purpose of Mr Hallam’s employment was to take responsibility for the sales of the Sorin Group’s Cardiac Rhythm Management division** and the development of that division of the Company’s business” @49 - A not covered by Commercial Sales Award 2010)

### Competency based wage progression provisions

[\[2014\] FWC 1675](#) *Modern Awards Review 2012—Apprentices, Trainees and Juniors* (see re variation to the CBWP provisions in the Manufacturing Award)

### Confidential information

See also [Dismissal - Confidentiality](#)

Hoad R & Neil J, ‘*Confidential Information and Departing Employees – The Threat From Within*’ (2013) 19(5) *Employment Law Bulletin* 70

### Consultation clauses

[\[2014\] FWC 2777](#) **ANMF v Barwon Health** (consideration of clause 42 of the *Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2012-2016*)

### Corporate veil – piercing of

Howard L, ‘*Corporate Crime and Officer Liability Under WH Legislation Now in Harmony: But Will it Please the Ear of the Indemnified and Uninsured?*’ (2013) 31(7) *Companies & Securities LJ* 437

### Constitutional corporation

[\[2014\] FWC 1037](#) **WA Edmonds v Telethon Speech & Hearing Centre For Children WA (Inc)** (“what is determinative of whether an entity is a constitutional corporation is not that it is a not-for-profit organisation or what the organisation’s predominant purpose is. What is determinative is **whether the entity engages in, to a sufficient degree, trading activities at the time the question is posed**. It does not matter that the organisation does not conceive of itself to be involved in trading activities or does not see trading activities as its core purpose - what matters is that they be carried out to a substantial proportion” @45 - R “provides a range of services to support persons with speech, language, hearing or ear health concerns” @46 - R’s trading activities not incidental or slight - “**When total income is considered, approximately 41% is from grants - the remainder is generated from commercial activities**” @57 - R therefore a constitutional corporation)

### Constitutional issues

[\[2014\] FWC 5546](#) **AWU (Qld) v State of Qld (DCCSDS)** (the R sought expressions of interest from the private sector to take over its provision of accommodation and respite services for people with intellectual disabilities - R had 1817 employees who would be affected - A contended “that the expression of interest reveals that the Queensland Government has made an irrevocable decision

to terminate the employment of a large number of employees and has not complied with the terms of s.786 (2) and (3) of the Act” @3[5] - “we accept the Respondent’s submissions that **ss.786–7 of the Act infringe the implied limitation on Commonwealth legislative power** on the basis of the High Court’s finding in *The Industrial Relations Act Case*” @35 - “the practical effect of the operation of ss.786–7 ... is to interfere with the exercise of State constitutional power in a significant manner. This is because **ss.786–7 ... interfere with the State government’s ability to implement its powers with respect to terminating employees on redundancy grounds**. The **imposition of a condition precedent requiring union consultation** to the exercise of this power goes beyond simply subjecting the power to a delaying procedure or making its exercise more complex” @36 - “By allowing the Commission to make orders requiring union consultation before the number and identity of employees to be dismissed had been determined, it is clear that these provisions would interfere with the exercise of State constitutional power in a significant manner” @39)

### **Contract of employment/service**

[2013] FWC 7996 **Vic** *Papalia v Co.As.It. - Italian Assistance Association* (“a contract with a nominated end date is not a contract for a specified period of time if the contract provides for a broad right of termination during its term as is the case in this matter” @3 - R submitted that contract had a maximum term and was therefore an outer limit contract - the **contract included the ‘Employment Agreement’ and the letter of offer** - “the words of the letter of offer that ‘the **renewal of such contract is subject to the availability of funding**’ qualify the earlier words that ‘this appointment is for twelve months’ ... Read in context it is not appropriate to interpret the words ‘the renewal of such contract is subject to the availability of funding’ as meaning that the contract may be renewed and the availability of funding is a factor which may influence a decision to renew. The word ‘may’ does not appear and I am satisfied should not be read into the phrase” @14-15 - the term means that the contract will be renewed provided funding is available - the funding meant was government funding - such was not available after 2012, despite R’s earlier assurance in April 2011 - “**An employment contract the duration of which is ‘subject to funding’ is not a contract which could be said to come to an end without the initiative of the employer** anymore than a contract which is subject to conduct or performance standards being met comes automatically to an end if an employee fails to meet those standards” @35 - A’s employment therefore ended at R’s initiative)

[2013] SAIRC 42 **Enday** (A was a geologist who was engaged by third party (Petra Search), who worked for R - A “supervised an exploratory drilling program for the benefit of the respondent on a site in remote north eastern South Australia. After the respondent ran out of funds a dispute arose as to whether the applicant was entitled to sue for outstanding wages as an employee of the respondent” @1 - R had previously made a **part payment** to A - R “**asserts it contracted with no one at all, and in the alternative with John Howard trading as Petra Search, who in turn subcontracted with the applicant to provide onsite professional geologist services to supervise the drilling program**” @3 - Lieschke IM concluded that A “had no legal relationship with the respondent and accordingly he could neither have been its employee nor an independent contractor to it ... [and] that at all material times the applicant was working in accordance with a contractual arrangement with Mr Howard. But whether that contract was of employment or as between independent contractors is not relevant to this decision” @38)

[2014] FWC 743 **Vic** *Suckling v Adidem* (“**termination for engaging in conduct prohibited by a contract of employment** cannot by itself be the basis for concluding that there was a valid reason for the termination of an employee’s employment. A term of a contract cannot override the statute” @34 - permission to appeal refused by majority on 30/6/14 in [2014] FWCFCB 3611)

[2014] FWC 2817 **WA** *Dufall v Leighton Contractors* (**commencement** - A “was offered a contract of employment for him to commence employment at a later date” @23 - employment contract commences not from the date of acceptance of the offer of employment, but rather from the date specified in the contract, provided pre-conditions are met)



## Corporate crime

Howard L, 'Corporate Crime and Officer Liability Under WH Legislation Now in Harmony: But will it please the ear of the indemnified and insured?' (2013) 31(7) Company and Securities Law Journal 437

## Corporations Act 2001

[\[2013\] FWC 7000](#) **NSW** *Duffy v Australian Convenience Food Groups* (A "confirmed that the respondent employer Company has been placed into Liquidation by means of a **voluntary winding up**. Therefore s. 500 of the *Corporations Act* is applicable ... The **applicant has given no indication whatsoever that he has or would be seeking leave** of an appropriate Court as required by subsection 500(2) of the *Corporations Act*" @9-10 - application accordingly dismissed)

[\[2013\] FWC 7114](#) **NSW** *Martin v El Zorro Transport* (**s.471B** does not apply to the commencement or the continuation of proceedings in the Commission where a company is being wound up in insolvency)

[\[2014\] FWC 6456](#) **Vic** *Nolan v Hello Hello* (leave of court to continue unfair dismissal proceeding required per **s500(2)** of Corporations Act as R in voluntary liquidation - **FWC not a court** - proceedings stayed pending grant of leave)

## Costs

*Federal Circuit Court*

[\[2014\] FCCA 1353](#) *Robinson v Blackheart Industries Pty Ltd & Ors* (**costs against lawyer re matter under FWA** - s.79 and s.81(1)(b) of Federal Circuit Court of Australia Act considered and also r.21.07 of the FCCA - prima facie case against lawyer under r.21.07 not made out)

## Country Fire Authority/United Firefighters' Union ... EA

[\[2013\] FWC 8165](#) *United Firefighters' Union v CFA* (the appeal concerned "the extent to which the Country Fire Authority (CFA) may, under the terms of the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010* (the Agreement), use instructors in operational duties - cl.99.16 considered)

## Death of applicant before hearing

[\[2014\] FWC 5457](#) **Vic** *Stan v Frontline Australasia* (the A died before his application heard - various issues considered including **assignability of action**, and reasonable prospects of success in case where **R claimed A resigned voluntarily, but A denied so doing** - application dismissed as no reasonable prospects of success - s587 considered)

[\[2014\] FWC 7515](#) **Qld** *Nebe/Rose v Wamba Feedlot* (the A claimed she was dismissed due to her work injury incapacitating her for work - subsequently **A died in a car accident** - A's mother wished to continue A's unfair dismissal application - it is unlikely "the right under the Act to make an application for an unfair dismissal remedy survives the death of an applicant for an unfair dismissal remedy" @7 - "there are disputed issues of fact about whether Ms Nebe/Rose was dismissed and whether she had been employed for the minimum period. These **matters could only be resolved by evidence from Ms Nebe/Rose. Sadly, Ms Nebe/Rose is not able to give that evidence**" @9 - application therefore dismissed)

## Directors

[\[2013\] FWC 6759](#) **Qld** *Lee v Klean King* (**director not considered to be an employee** - "The Applicant was subject to little or no control as could be expected of an employee; even potentially a senior employee who also held the role of Director. While the Applicant relied upon the asserted fact that he 'reported' to the Board of Directors, this is no more than would otherwise be expected of a non-employee Director, discharging their obligations as a Director under Corporations Law. The Applicant was not responsible for performing any regular duties or otherwise participating in the day-to-day operations of the Respondent's enterprise. The Applicant's physical presence at the workplace, is not sufficient enough to evidence such an obligation. The Applicant was not required to attend the workplace, and did so of his own volition" @101-102 - **"The activity undertaken by**

the Applicant was consistent with a significant shareholder, who had invested in the company, attending on the business and maintaining his presence” @91)

### Discovery

See [s590](#)

[\[2013\] FWC 9564](#) **Vic Cochran v Energex Limited** (the A was dismissed for alleged misconduct - **notice to produce documents issued** - R objected to production and notice set aside as “Until the matters in dispute are clear and the parties have put forward the evidence on which they rely, it will not be possible for the Commission to assess the relevance of the documents and determine what access should be given to the documents” @15)

### Dismissal – Absenteeism/Attendance

See [Absenteeism/Attendance](#)

### Dismissal – Abusive/foul language

[\[2013\] FWC 7865](#) **WA Pustkuchen v John Holland** (the A sent several aggressive, threatening and derogatory emails to co-workers and clients - A’s “communications with other employees ... contrary to the respondent’s People Policy. As such this behaviour by the applicant was a breach of his contract of employment and so amounted to a valid reason” @72-73 - generally, A was not prepared to agree that his behaviour was inappropriate - dismissal not harsh etc)

[\[2014\] FWC 3087](#) **Vic Baker v G4S Custodial Services** (the A prison officer was dismissed for using threatening, foul and abusive language toward co-worker who he broke off an affair with, but who wanted to continue the illicit relationship - threats not established on evidence - **differential treatment** - co-worker was not dismissed for her foul language - such **bad language commonplace in prison work environment** - dismissal harsh etc - reinstatement ordered)

[\[2014\] FWC 5174](#) **Vic Baldwin v Scientific Management Associates (Operations)** (the A aggressively scrunched up his time sheet and slammed it on his manager’s desk and called him a big fat c\*\*t - found that “conduct directed to his manager ... was offensive and highly personalised, and inappropriate in a workplace. It occurred while his manager was asking the Applicant to account for his unauthorised absence from work. ... The Applicant’s conduct was in my view inconsistent with a continuation of the contract of employment” @73 - A’s **unauthorised week of leave also provided valid reason for his dismissal** - dismissal not harsh etc)

[\[2014\] FWC 7441](#) **Vic Holliday v Coca-Cola Amatil** (the A swore at co-worker who he felt did a dangerous thing getting in the way of his fork-lift - A had previously been warned for swearing at co-workers - R had not assisted A with anger management - A’s conduct did not warrant dismissal)

### Dismissal – Alcohol

See Dismissal – Drugs/alcohol

### Dismissal – Assault/aggressive behaviour

[\[2012\] FWA 1250](#) **NSW Lambley v DP World Sydney Ltd** (the A was involved in a fight at work and such gave R a valid reason for dismissing him - however, dismissal harsh etc as A was **set up by a co-worker** with a reputation for bullying, there was manipulation of the CCTV evidence, and R failed to take into account co-worker’s reputation - A re-instated with only **partial compensation for lost remuneration** - see commentary below setting out the **principles re dismissal for fighting in the workplace** - **Appeal allowed** in [\[2012\] FWA 4810](#) - Full Bench stated that “[i]f Mr Smith had set up Mr Lambley to engage in this conduct in front of CCTV cameras, it does not in any way excuse Mr Lambley’s conduct or suggest that an employer cannot reasonably discipline an employee for the conduct in which they have clearly engaged. We do not consider that this possibility, even if correct, is capable of outweighing the otherwise **inherent fairness of dismissing an employee for engaging in a serious assault** after following a procedurally fair investigation” @29 - further appeal dismissed by majority 22/11/13 in [\[2013\] FWC 9230](#) - dismissal not harsh etc)



[\[2014\] FWC 5808](#) **Vic** *Cook v The Salvation Army Victoria* (the A youth worker was summarily dismissed for **grabbing a young male resident with two hands around his neck** and providing “‘poor quality of care’ to the other two young persons, ‘using derogatory language to’ the female resident and ‘speaking negatively about her to other clients’” @10 - “Without dismissing the difficulty and challenges involved in caring for vulnerable young people, particularly where they are affected by marijuana as was the case with the three residents involved and where they were also ‘mouthy’ as Mr Cook described it in his interview with the IPG, it is difficult to comprehend why an experienced youth worker such as Mr Cook did not better handle a situation involving the use of the kitchen and avoid it escalating to the point that it eventually did” @42 - dismissal not harsh etc)

[\[2013\] FWC 8806](#) **Qld** *Rowe v Newland Food Company* (the **A was summarily dismissed after calling a co-worker and dog and telling them they better watch their back** - “Counselling or a warning may have been more appropriate. It certainly would have been appropriate to more thoroughly investigate ... rather than to summarily dismiss ... [T]he **evidence is not that the applicant entered the personal space of Mr White or that there was any indication the applicant may have been intending to physically assault Mr White**” @40 - “had no history of having threatened any other employees physically or verbally. There is evidence that the applicant appeared to be an efficient and effective employee in other respects during his employment, certainly up to at least 20 May when he was removed from the leading hand role, although there was never a real opportunity for him to understand the reasons for that. So the incident needs to be seen in that broader context where the **applicant had been given no opportunity to engage with the respondent about the decision made the previous day to demote him**” @45 - dismissal harsh etc - compensation ordered)

[\[2013\] FWC 7888](#) **NSW** *McAdie v Vanderfield* (The A was dismissed for a “**deliberate, considered, and aggressive confrontation**” with his employer in the context of their having been several complaints by customer against him - some procedural problems with A’s dismissal, but on balance, dismissal not harsh etc)

[\[2013\] FWC 7908](#) **WA** *Whittaker v EDI Rail-Bombardier Transportation (Maintenance)* (A’s **dismissal for his involvement in a fight at work with another co-worker not harsh** etc - A could have avoided the incident and he did not have reasonable grounds to believe he was in immediate danger - he **did not have to trade blows**)

[\[2010\] FWA 6431](#) **NSW** *Dobson v Qantas Airways Ltd* (A found to have assaulted co-worker in work car park - R “pays for employees to park in the car park, the employees were in Qantas uniforms and the **incident happened within a short period after the end of their working hours** and in close proximity to the workplace” @120 - **co-worker had made an injudicious comment, but it did not warrant A punching him** - A also showed a **lack of remorse** - dismissal not harsh etc - A’s appeal out of time in [\[2013\] FWC 10037](#) and no extension granted)

[\[2014\] FWC 1645](#) **NSW** *Kongor v Red Lea Chickens* (the A “engaged in serious misconduct when he **refused the lawful and reasonable direction to leave the meeting** and continued to argue with those present in what can objectively be described as an **aggressive and intimidating manner**, and thereby caused distress to the female staff that were present”@30 - the police had to be called to remove him and he was then terminated - this was in the context of previous similar behaviour not amounting to serious misconduct - A not notified of his dismissal before it occurred, but “little weight [given] to this factor because of the nature of Mr Kongor’s misconduct, and the fact that during the hearing he did not disclose any explanation for his conduct (beyond a mere denial ...) such as to suggest that the provision of procedural fairness would have given him any real opportunity to avoid dismissal - dismissal not harsh etc)

[\[2014\] FWC 1649](#) **Qld** *Aiono-Yandall v Linfox Australia* (after being given a final warning in writing for aggressive conduct toward supervisor the **A was dismissed because of similar behavior in a later incident** - in meeting regarding this incident he showed “a high level of aggression marked by abusive language and aggressive physical gestures (which caused physical damage to the employer’s premises)”@78 - his behaviour caused his site managers to feel threatened - dismissal not harsh etc)

[\[2014\] FWC 3670](#) **NSW *Brown v Coles Group Supply Chain*** (the A was involved in a **physical altercation with another employee** (Mr H) - A was being taunted and harassed by Mr H and decided to confront him to sort the issue out - Mr H's "reaction was unexpected: he approached Mr Browne very quickly and came up close to his face in a way which made Mr Browne apprehend that Mr Hearne was going to strike him. That caused Mr Browne to push him in the chest" @60 - **A's push and a subsequent push, before he was punched in the face breached R's code of conduct** - valid reason for dismissal found, but A's summary dismissal "harsh in its consequences for his personal and economic situation, and it was disproportionate to the gravity of his misconduct" @72 - A has been unemployed for six months - **reinstatement ordered, but no compensation**)

[\[2014\] FWC 5071](#) **Tas *Greene v Hobart Historical Cruise*** (**small business** - the R **business owner** "**with some justification, felt he had been assaulted by Mr Greene**. Under the Small Business Code, this is justification for **summary dismissal** without notice or warning" @62)

[\[2014\] FWC 7944](#) **NSW *Malaarachchi v UnitingCare NSW/ACT*** (nursing assistant's dismissal for **hitting a nursing home resident** not harsh etc - A had been warned after alleged previous similar misconduct, but the one recent incident alone was sufficient to justify dismissal regardless of prior alleged misconduct)

### **Dismissal – Bullying & Harassment**

See [s789FF](#)

[\[2013\] FWC 9587](#) **Vic *Federici v Kmart*** (the A's dismissal for continuing to **mimick accent of a co-worker after having been warned** not harsh etc - A was familiar with R's equal opportunity policy, yet mimicked co-worker on several occasions - A's denials of conduct rejected)

[\[2013\] FWC 9484](#) **Vic *Attard v Patrick Stevedores Holdings*** (the A was dismissed for an **indirect threat to a co-worker** suggesting he better watch himself as the workplace was a dangerous place - this was serious misconduct - A was aware of R's policies against such conduct - R attached great importance to eradicating bullying and harassment - A's recent disciplinary record concerned R, although A had not previously been disciplined for bullying - dismissal not harsh etc)

[\[2014\] FWC 5072](#) **Tas *Cannan & Fuller v Nyrstar Hobart*** (there was a **long history of behaviour of a bullying nature in pre-start meetings** by applicants - the applicants strongly voiced their work and safety concerns at these meetings - R had effectively **condoned their conduct** for many years - they were employees in their 50s with very long service with R - valid reason for dismissals, but dismissals harsh - reinstatement ordered - see [\[2014\] FWC 7014](#) where some lost pay restored, but not all, in light of workers' misconduct)

### **Dismissal – Casuals**

See [Casuals](#) & [s384\(2\)](#)

### **Dismissal – Clients (inappropriate behaviour towards)**

[\[2013\] FWC 10064](#) **ACT *Ikechukwu v Goodwin Aged Care Services*** (**carer's dismissal for not attending to client's needs as requested not harsh** etc - she did not assist a client to go to the toilet, removed client's buzzers and told them to shut up - her conduct amounted to client abuse – permission to appeal refused in [\[2014\] FWC 6405](#))

### **Dismissal – Competition**

[\[2013\] FWC 6157](#) **Qld *Bonaventura v Machinetek Engineering*** (the R anticipated that A in the future would set up a competing business - **no valid reason for dismissal when competing business from A only anticipated** - see para. 100)

[\[2014\] FWC 4411](#) **NSW *Roberts v Resource Australia Transport*** (three valid reasons for dismissal of A including **setting up competing business while employed by R, working in such business while claiming sick leave** and misappropriating cash from the sale of R's product - A also **dishonestly denied his misconduct** - dismissal not harsh etc)

## Dismissal – Complaints by worker/complaints by clients

Friedman B, '*Dismissed for being "Out of Control", or making complaints?*' (2013) 19(3) Employment Law Bulletin 34

## Dismissal – Condonation of conduct

[\[2014\] FWC 5072](#) *Tas Cannan & Fuller v Nyrstar Hobart* (see [precis](#) at Dismissal – Bullying & Harassment)

## Dismissal – Confidentiality

[\[2014\] FWC 1486](#) *Qld Tymczyszyn v Fabfit* (small business employer - the A provided to Mr T a commercially sensitive and highly confidential "**document which identifies and provides contact details for the overseas manufacturer, and which sets out Fabfit's margin on each electrical fitting**" ... Mr T while a customer of Fabfit, also on-sold products. He had worked for a competitor and had previously engaged in undercutting Fabfit's prices. The fact that the document was sent to Mr T is a matter that could cause a serious and imminent risk to the viability or profitability of Fabfit" @44 - R had reasonable grounds to conclude that A had engaged in serious misconduct - dismissal consistent with code)

[\[2014\] FWC 2771](#) *ACT Howie v RSPCA – ACT* (A's "**disclosure of confidential information that had an adverse effect on the reputation of his employer** and his **overt attempts to undermine the position of the CEO**, his direct supervisor, is behaviour that clearly establishes a valid reason for termination" @67 - dismissal not harsh etc)

## Dismissal – Conflict of interest

[\[2014\] FWC 743](#) *Vic Suckling v Adidem* (no conflict found where A worked for R which had a party-plan element to its business and when she also had a consultancy agreement with Party Lite which was also involved in **party-plan selling** and where the **products of each business were largely different** - A was given an opportunity by R to save her job by ceasing her Party Lite activity - A's dismissal was unjust despite there being a clause in A's contract saying she "was not, while working for the Body Shop, able to work for any other enterprise which the Body Shop 'considers a market place competitor'" @5 - a reasonable person would not have seen Party Lite as a competitor - permission to appeal refused by majority on 30/6/14 in [\[2014\] FWC FB 3611](#))

[\[2014\] FWC 5839](#) *Qld Lakatos v Termicide Pest Control* (the A and her partner worked for R - when partner was dismissed he went to work with rival company - **A reluctance to answer R's questions about where partner worked** gave R valid reason to dismiss her due to R's legitimate concerns about conflict of interest - R lost confidence in A as an employee - dismissal not harsh etc)

[\[2014\] FWC FB 5648](#) *Coco v Thuringowa Enterprise Centre* (the **A was a part-time employee of R, but also in his capacity as a businessman, was a member of R** - "While Mr Coco's employment relationship with the Centre did not disqualify him from exercising the rights associated with his separate legal relationship with the Centre as one of its members, it was necessary for him to ensure that he exercised those rights in a manner which did not involve an **irreconcilable conflict with or departure from his fundamental obligations as an employee**. ... [T]he conclusion was reasonably available that Mr Coco had used his rights as a member to advance his employment interests, and had thereby rendered untenable the continuation of his employment relationship" @36)

## Dismissal – Constructive

[\[2013\] FWC 7917](#) *Qld Hunter v C'th of Australia* ("conduct, including **a course of conduct whereby an employer wrongly communicates an unsubstantiated resignation, could in some circumstances form the basis of a constructive dismissal**. However to do so, it must be found that the employer either intended to force an employee to resign, or else the conduct must be of such a nature that resignation was the probable result" @53 - insufficient evidence here to conclude that R intended to force A to resign - **A's decision "to tender his resignation was a deliberate decision, made despite the availability of reasonable alternatives** and after taking advice and checking about the extent of notice he was to provide. This may well

have resulted from poor advice, however this does not mean that objectively, the written resignation provided by Mr Howes was forced or arose as the probable result of the conduct of the employer in this particular case" @60 - no constructive dismissal)

[\[2013\] FWC 9818](#) **SA Pitts v Delnorth** (R "engaged in a course of conduct which forced Mr Pitts to resign his employment earlier than he would have otherwise intended. That conduct included showing him a letter which purported to be a termination of employment advice, telling him that the relationship was unworkable and commencing what turned out to be an unsuccessful negotiation process about a termination payment. That process was not reversed on 21 May 2013 in that I have concluded that the fundamental premise of the discussions between Mr Pitts and Mr Baylis was still based on a cessation of Mr Pitts' employment" @28)

[\[2013\] FWC 4163](#) **Vic De Laps v Victorian Association for the Teaching of English** (the making of **allegations against worker** does not of itself constitute conduct intended to force worker to resign or which had the probable consequence of such - however, in this case, because the R was giving lip service to procedural fairness, A's resignation was found to be a probable consequence - it **did not appear to A that she would be given a proper opportunity to defend herself** - constructive dismissal found - **Appeal allowed** 19/2/14 [\[2014\] FWC 613](#) - held that "while Ms de Laps resigned from her employment with VATE, she was not forced to do so because of conduct, or a course of conduct, engaged in by VATE" @88 - A had an option to respond further at a meeting to allegations and the **opportunity to be performance managed rather than resign**)

[\[2014\] FWC 1352](#) **ACT Hormann v Mediaware International** (the A's claim he was constructively dismissed due to the **employer requiring him to provide medical information before he could return to work after four months off** rejected - A had not resigned - usually constructive dismissal involves a resignation - application invalid as A had filed it before his termination took effect)

[\[2014\] FWC 1126](#) **NSW Fletcher v Precision Mechatronics** (constructive dismissal not harsh etc when A resigned because R, **which was in financial difficulty, failed to pay his wages and entitlements** - no appearance by R - see also [\[2014\] FWC 1125](#) **NSW Matich v Precision Mechatronics** involving basically the same facts and conclusion)

[\[2014\] FWC 2024](#) **Vic Urand v Beaconsfield Children's Hub** (the **A's shifts were reduced by half** - it was therefore no longer tenable for her to work for R - R had anticipated A would resign as a result - constructive dismissal found - see [\[2014\] FWC 2240](#) where compensation ordered)

[\[2014\] FWC 4539](#) **WA Challancin v Smile Dental Clinic** (workplace conflict involving A - A, upon hearing her duties and hours would change took sick leave and then announced she would not be returning - A claimed constructive dismissal - R "in **relocating Ms Challancin to another area of the Dental Clinic, and allocating her different duties**, does not evince an intention ... to no longer be bound by the employment relationship. ... **[R] was attempting to manage the workplace conflict**" @39 - no constructive dismissal)

[\[2014\] FWC 5481](#) **NSW Kuty v Coast2Bay Housing Group** (A resigned her employment, but claimed constructive dismissal when **R's office at Caboolture had to be temporarily relocated 75-90 minutes away at Nambour due to the expiry of the lease** - the temporary move affected everyone in the office, but R saw it as the most cost-effective solution - R suggested to A that she carpool with others, but A did not discuss this further with R before resigning - **R "understandably believed that the resignation of the applicant was freely given and without connection to her relocation concerns**. In such circumstances it is simply not plausible or reasonable to contemplate that the actions of the employer were in any way intended to bring about the termination of the applicant's employment" @37 - "As a matter of fundamental fairness, the applicant was obliged to inform the employer that her concerns about relocation were of such significance that her continued employment was in jeopardy. If, after having been alerted to the potential for resignation from employment, the employer made little or no attempt to resolve or otherwise mitigate the issues, only then could the concept of constructive dismissal be potentially enlivened" @40)



[\[2014\] FWC 6930](#) **WA** *Harrison v Crawford Realty Karratha* (“the Employer **unilaterally abolished the position the Applicant was employed to perform**. The Employer, for whatever reason, clearly conveyed to the applicant that, contractually, it no longer wanted to be bound by its contract of employment with the Applicant as a BDM. Having unilaterally removed an essential feature of the contract of employment (which was for Ms Harrison to be employed as a BDM and its attendant conditions), it is unreasonable ... for the Employer to now say it took no action which in all likelihood resulted in Ms Harrison resigning. What was Ms Harrison expected to do? Ms Harrison was forced into taking one of two options. The first option was to accept the removal of the BDM position and continue working in another role, presumably as the Sales Consultant. In doing so, Ms Harrison would have waived any rights she may have to action against the Employer for alleged repudiation of her contract of employment as a BDM. Further, Ms Harrison found herself in a situation where, having no job as a BDM, if she wanted to remain employed, she had to accept the Sales Consultant position which was unsatisfactory. The second option was to resign ... [W]hile Ms Harrison may have expressed an interest in the Sales Consultant position, it was subject, at all times, to satisfactory terms and conditions. When finally Ms Harrison received and reviewed the conditions of employment, they were unsatisfactory but by this time, the Employer had abolished the BDM position” @74-76 - **A did not resign of her own volition**)

[\[2014\] FWC 7087](#) **NSW** *Mahesan v Henry Schein Regional* (the **A resigned, choosing not to attend a formal performance meeting** - A’s concern he was being pushed out not established - A overreacted - R tried to convince him to stay - no constructive dismissal - the implementation of performance management processes does not warrant a conclusion that R trying to bring employment relationship to end)

#### **Dismissal – Contractual issues**

See [Contract of employment/service](#)

[\[2014\] FWC 5820](#) **Vic** *Sheldrick v Hazeldene’s Chicken Farm* (the A’s **unwillingness to accept significant variation to employment contract** regarding on-call arrangements without further negotiation did not provide a valid reason for dismissal)

#### **Dismissal – Co-workers/managers (conflicts with)**

[\[2013\] FWC 8616](#) **NSW** *Lee v Toll Transport* (FWC satisfied that the A “for no good reason - **aggressively abused a co-worker in a totally unacceptable manner**. He was highly offensive and intimidating. ... [A nearby manager] was concerned that the applicant’s behaviour was so aggressive that he may have become violent. ... [T]he applicant was **dishonest during his interview** ... appeared to show no remorse for his behaviour during the investigation and continued to try to justify his actions ... [T]hese considerations in aggregate amount to a valid reason for the dismissal of the applicant on the basis of **serious misconduct**” @23)

[\[2013\] FWC 6931](#) **Qld** *Rohozinski v Real estate Network (Qld)* (there was “a valid reason for termination based on the Applicant’s **repeated defiance of Ms Edwards managerial authority and its wider impact on the business**” @79 - despite R’s failures in communicating dismissal to A, which caused her unnecessary uncertainty and stress, dismissal not harsh etc)

[\[2014\] FWC 405](#) **ACT** *Stephens v Aerial Capital Group* (“As a senior manager, the applicant’s **refusal to work constructively with other managers was a valid reason for his dismissal**. If his medical condition did not allow this then he should have taken the time off provided by his practitioner and not returned until he was in a position to cope with the workplace” @87 - **dismissal unfair due to manner of dismissal** - “The dismissal took effect while the applicant was absent on certificated sick leave and in circumstances where he had made it clear to the respondent that he attributed his illness to stress caused by the workplace. In addition, the respondent did not clearly advise the applicant that his conduct was such that termination was being contemplated” @96)

[\[2014\] FWC 1255](#) **NSW** *Adriao v BlueScope Steel* (A, who was 60, dismissed because of his **abusive, disrespectful and intimidating conduct towards his supervisor** - A had various written and verbal warnings and was on a final warning for other misconduct - dismissal not harsh etc)

[\[2014\] FWC 2771](#) **ACT** *Howie v RSPCA* – ACT (A’s “**disclosure of confidential information that had an adverse effect on the reputation of his employer** and his **overt attempts to undermine the position of the CEO**, his direct supervisor, is behaviour that clearly establishes a valid reason for termination” @67 - dismissal not harsh etc)

[\[2014\] FWC 4431](#) **Qld** *Jenner v Salisbury Bowls Club* (the A, a manager in a small business, continued to address a co-worker in a belittling and socially unpleasant way despite being warned not to - A’s **managerial conduct toward same worker was inappropriate** - dismissal was justified)

#### **Dismissal – Criminal Convictions/offences**

[\[2013\] FWC 8422](#) **Vic** *Applicant v GBE* (the A was dismissed when R found out about his criminal convictions for a **child sex offence and possession of child pornography** - A’s position with the government involved, significantly, facing the public and coming into contact with young people on a semi-regular basis - A was **dismissed for not being able to fulfil the inherent job requirements** - dismissal not harsh etc)

[\[2013\] FWC 8455](#) **NSW** *McGrath v Transfield Services* (the A was dismissed from his job as a cleaner of TAFE facilities when a **government department revoked his security clearance due to three convictions** A received after he commenced his employment - dismissal not harsh etc as **A was unable to perform the inherent requirements of the job since R’s contract was to clean only government schools**)

[\[2014\] FWC 453](#) **Vic** *Brook v Parkville Youth Justice Precinct* (“the actions of the Applicant in **introducing the phone into the [correctional] facility**, even if it was **accidental**, and her **use of the phone** during the morning, provide a valid reason for the dismissal. Her actions were a **breach of policy and a breach of the law**. They are not trite matters considering the potential harm that could have come from her actions” @119-120 - dismissal not harsh etc, despite A’s good record, the adverse consequences to her and seemingly differential treatment)

#### **Dismissal – Demotion**

[\[2013\] FWC 9084](#) **WA** *Katin v St. John Ambulance Australia (WA) Inc* (the A having to report to another worker found to be a **temporary organisational arrangement** rather than a demotion)

[\[2014\] FWC 2011](#) **Vic** *Lollback v University of South Queensland* (**demotion authorised by enterprise agreement not a termination** - term of agreement not unlawful - “bound by the authority in *Gorczyca* that provided that where the Agreement has been complied with, a demotion authorised by a enterprise agreement is not a termination of employment” @58 - terms of agreement complied with - unfair dismissal application dismissed)

[\[2014\] FWCFB 6394](#) *Soliman v Uni. of Technology, Sydney* (“The dispute in question concerned the decision of the Acting Vice Chancellor ... to take disciplinary action against Dr Soliman ... by way of **demoting him from the classification of Senior Lecturer to Lecturer**, formally censuring him, and requiring him to be counselled. This disciplinary action was in response to a finding made by a Misconduct Investigation Committee ... that **Dr Soliman had provided questions and answers to his students which subsequently appeared in an examination which he set for those students**” @1 - case considered under Workplace Relations Act - A had deliberately communicated to students, albeit indirectly, that certain questions he had shown them would be in the exam - permission refused to appeal from decision confirming demotion)

#### **Dismissal – Differential treatment**

[\[2013\] FWC 2959](#) **Vic** *Ishak v Jetstar Airlines* (“**Mr Ishak [A] ... assaulted Mr Samson and was not honest in his dealings with the investigators**. The evidence makes clear that **Mr Samson assaulted Mr Ishak and that Mr Samson was not honest with his dealings with the investigators**. Mr Ishak was dismissed, Mr Samson was not” @32 - A’s dismissal was therefore harsh - in [\[2013\] FWC 4794](#) reinstatement order, and order to maintain A’s continuous employment and service made, but R only ordered to pay half of A’s lost remuneration - stay order granted in [\[2013\] FWC 5254](#) - **Appeal allowed** in [\[2013\] FWCFB 7030](#) - dismissal not harsh etc)



[\[2014\] FWC 7971](#) **NSW** *Maunder v Moorlaben Coal Operations* (valid reason for dismissal due to safety breach - A's case distinguished from case of other workers who were not dismissed for safety breaches on the basis that he **received training and warnings very close in time to his misconduct**)

#### **Dismissal – Dishonesty**

[\[2013\] FWC 8198](#) **Qld** *Ager, Fleming & Graham v BHP Billiton Minerals* (dismissals justified where applicants **dishonest in investigation about breaches of safety**)

[\[2014\] FWC 1783](#) **Vic** *Morris v Anytime Fitness Pakenham* (the R had a **valid reason for dismissing A who said he'd personally distributed 4000 fliers about R's special offer when he hadn't** - A **did not receive procedural fairness** and was summarily dismissed - A did however receive four weeks pay in lieu of notice - **dismissal not harsh** etc)

[\[2014\] FWC 3398](#) **WA** *Pereira v Toll Energy Logistics* (the A, a health and safety representative, was dismissed for **dishonestly making several alterations to a form related to safety** - a safety advisor of R had asked A to make only one of the alterations - loss of trust and confidence found - dismissal not harsh etc)

#### **Dismissal – Disrespecting employer**

[\[2014\] FWC 882](#) **Vic** *Edwards v Wastech Engineering* (R's "decision to dismiss Ms Edwards was for a singular reason which was finding out that she had participated in the email **exchange with PO in which she was critical both of the company and its employees**. The behaviour may well have justified the issuing of a warning letter to Ms Edwards (and most likely a final warning in view of the counselling she had been provided in mid 2012) but it does not amount to a valid reason for her dismissal" @44)

#### **Dismissal – Driving issues/offences**

[\[2013\] FWC 6954](#) **SA** *Wotton v Skycity Adelaide* (A's dismissal harsh as it occurred without notice, but it was not unjust as there was valid reason for it due to **nine car accidents over a two year period while working as a valet** - question of whether dismissal at employer's initiative as R offered A casual work in another area, which he refused - dismissal found - dismissal was also "unreasonable in that the warning process, particularly the final warning formally given to Mr Wotton ... was both inconsistent with the purpose of the warning and was excessively delayed in a manner inconsistent with the commitment in the Casino's Disciplinary policy to a substantively and procedurally fair approach" @55 - four weeks pay awarded as compensation)

[\[2013\] FWC 6962](#) **NSW** *Karodza v The Disability Trust* (the A drove people with disabilities to appointments - she was **issued with a penalty notice for the criminal offence of negligent driving after having an accident while driving a client** - R concluded that A was not capable of driving clients safely - A was also **dishonest in filling out an incident form** - dismissal not harsh etc)

[\[2013\] FWC 8664](#) **Qld** *Hemi v BMD Constructions* (A's dismissal for a **road rage** incident whilst driving a company car upheld)

[\[2014\] FWC 1398](#) **NSW** *Johnston v Wax Hed Inc.* (**summary dismissal of an employee for losing driver's licence** - loss of licence provides valid reason for dismissal, but not for summary dismissal - R could have accommodated A for notice period (as driving was not a large part of A's duties), but not for his six months suspension - compensation granted - see also Dismissal - Frustration)

[\[2014\] FWC 3287](#) **Newcastle** *Plunkett v Thiess* (the A was dismissed for **failing to follow procedures regarding immediately shutting down the CAT 793F haul truck she was driving when the alarm was activated** - R "is entitled to expect compliance with its express and Mt Owen mine **site specific Transport Rules and related safety policies**. ... [A's] vehicle had the capacity to cause severe injury to the applicant herself and potentially mine personnel as a result of the engine seizing due to lack of oil" @157 - dismissal not harsh etc)

[\[2014\] FWC 6539](#) **Vic** *Farmer v KDR Victoria* (**tram driver** dismissed for allegedly using mobile phone while driving - not proved A used phone - A did allow himself to be **distracted when bag with phone charger in fell and he then retrieved and checked items** - he breached rule by doing this - no valid reason found and A not given adequate opportunity to respond - dismissal harsh etc)

[\[2014\] FWC 7414](#) **Vic** *Chand v Endeavor Energy* (dismissal where worker **lost his licence for one year** and where driving was an inherent part of his job, albeit a relatively small part, not harsh etc)

[\[2014\] FWC 7597](#) **NSW** *Davey v JR Bulk Liquid Transport* (there was valid reason for A's dismissal due to **several breaches of R's driving policy** - A was on a first and final warning and had an **unrepentant attitude** - **procedural unfairness** made dismissal harsh - A was dismissed at meeting without being aware beforehand that this was a possible outcome - compensation reduced by two thirds due to A's misconduct)

[\[2014\] FWC 7848](#) **SA** *Panchal v Torrens Transit Services* (**A's "decision to move the bus to stop the pedestrians from walking in front of it and his subsequent substantial misjudgement in hitting a pedestrian represents a valid reason** for the termination of his employment. It was conduct fundamentally inconsistent with his function. The incident cannot be simply described as an accident because Mr Panchal initiated the forward motion of the bus for an unacceptable purpose. Had it been the case that the pedestrian was hit by the bus as it was travelling down the road, I may have arrived at a different conclusion" @34 - A's "employment record gave rise to **legitimate questions about his past behaviours**" @46 - dismissal not harsh etc)

#### **Dismissal – Drugs/alcohol**

[\[2013\] FWC 7114](#) **NSW** *Martin v El Zorro Transport* (A "admitted to consuming alcohol during the night prior to the EOI meeting ... concerning potential work opportunities ... However, there was not a valid reason given for the [summary] termination of the applicant's employment. His dismissal was unfair given the nature of the EOI meeting and the circumstances concerning his attendance. He was not undertaking rail safety work. He did not present himself at the respondent's premises correctly attired and ready for work. He was **not told to present for work on the day of his dismissal**. The **circumstances surrounding the applicant's alcohol test were seriously flawed**. The **testing officer ... was not authorised to conduct the test**. The applicant's dismissal was disproportionate to the gravity of his conduct. Moreover, there is no material before the Commission to suggest that the applicant's conduct that gave rise to his dismissal can properly be regarded as deliberate or wilful" @22)

[\[2013\] FWC 8329](#) **ACT** *Carter v Bis Industries Ltd* (after a work accident whilst doing very hazardous work **A tested positive for cannabis at a level of 17 nanograms per millilitre** - R's policies, which A was trained in and aware of, did not tolerate any presence of drugs in workers - A did not respond according to safety protocols after accident and put himself in danger - despite A's relatively good record and likely difficulties in finding alternative employment, **dismissal not harsh** etc)

[\[2013\] FWC 4501](#) **WA** *Pitts v AGC Industries* (the A was found with drugs in his system contrary to R's policies, which he was generally aware of - he was **given a chance to produce a clear sample within about a week** - he provided a sample just before the deadline he was given, but the **sample was too dilute**, and therefore unsuitable for testing purposes - A's dismissal not harsh etc - Appeal dismissed [\[2013\] FWCFB 9196](#))

[\[2013\] FWC 10101](#) **NSW** *Vaughan v Anglo Coal (Drayton Management)* (the A "tested above the Australian Standard for an illicit substance. The Respondent was entitled to seek an explanation from the Applicant for the test results. It sought that explanation in an appropriate manner. The **Applicant was not open and honest in his explanation, although he was given a number of opportunities to tell the truth**. The Applicant's conduct in failing to declare, represented a serious breach of the relationship of trust and confidence and justified summary dismissal" @51 - dismissal not harsh etc)

[\[2014\] FWC 1186](#) **NSW** *McCarthy v Woolstar* (A “was dismissed because he recorded a positive on-site workplace drug test result which was subsequently confirmed by laboratory analysis to be **82 micrograms per litre of THC (cannabis)**” @38 - this was a high reading - there was an **apparent discrepancy between the result and a urine result** obtained by A - A’s claims that a **failure to comply with Australian testing standards** rendered his dismissal harsh etc rejected - “The attempted reliance upon the position that the regulatory authority has not accredited any on-site testing body in accordance with the Australian Standard was specious and illogical. In effect, this proposition would translate into a circumstance that would render all workplace drug testing currently being conducted in Australia as void or invalid. The current difficulties associated with formal accreditation of on-site drug testing are broadly irrelevant to the results of an analysis conducted in a laboratory, unless there was evidence to support the possible contamination of the samples sent to the laboratory” @48 - noted that a confirmatory laboratory result obtained by way of mass spectrometry testing should not automatically be treated as infallible and unchallengeable - adverse credit and character findings also made against A)

[\[2014\] FWC 2327](#) **NSW** *Toms v Harbor City Ferries* (**ferry accident when A was the master of the ferry** - R had zero drug/alcohol policy - A should have informed R before commencing shift that he had consumed a marijuana cigarette to relieve pain the day before when he was rostered off - **little harm was done in the incident and there was no evidence of impairment** - A “should have advised the Respondent prior to accepting the shift on 25 July that he had consumed a marijuana cigarette” @64 - although there was a **valid reason** for A’s dismissal, such was **harsh etc due to A’s good record, the harsh consequences of A losing job, A’s appropriate conduct post-incident** etc - **Appeal allowed** 12/9/14 in [\[2014\] FWC 6249](#). “The mitigating factors referred to and relied on by Deputy President Lawrence are not mitigating factors that address the core issue, which was the serious misconduct which led to the dismissal of Mr Toms. The core issue, the valid reason for termination of Mr Tom’s employment was his **deliberate disobedience, as a senior employee, of a significant policy**. The Deputy President does not address Mr Tom’s failure to comply with the Policy. The only mitigating factor relevant to this issue was **the use of** marijuana as pain relief. Consequent upon that explanation is the decision to accept a shift while aware of the likelihood of being in breach of the Policy” @28)

[\[2014\] FWC 5587](#) **NSW** *Crowley v Qantas* (the A, a long standing employee, was dismissed after **failing to attend a flight for which she was a crew member - A was intoxicated** - she had a few incidents in the past where alcohol had been an issue with R and she had been warned - A argued she should not have been dismissed, but rather rehabilitated - R had tried to help her in past - dismissal not harsh etc)

[\[2014\] FWC 5903](#) **Qld** *Collins v Lyndons* (when A, who drove fork-lifts in R’s yard, was informed a **new drug and alcohol policy** would soon be introduced at his work he **self-reported his difficulty giving up cannabis** - a few months later he **failed a drug test and was dismissed** - the policy was **not a zero-tolerance policy** but was “couched in flexible terms to allow the Company to deal with situations it encounters on a case by case basis ... [K]nowing the Applicant had disclosed a chronic drug use problem, the Company ought to reasonably have given him an opportunity to set out in full how he intended to respond to his problems over time” @75 - dismissal therefore harsh to a degree - however, A’s “lifestyle choices (or the legacy thereof) could not be reconciled with his duties as a driver and the obligations upon his employer to provide a safe workplace” @87 - dismissal upheld)

[\[2014\] FWC 7310](#) **NSW** *Sharp v BCS Infrastructure Support* (the A was dismissed after **testing positive for cannabis “at a level of 112µg/L. This result exceeded the permitted threshold of 15µg/L”** @11 - A was not physically impaired by the drug - A was team leader placed at Qantas to maintain and service equipment such as carousels and aerobridges - conduct found to be serious - A not informed of the level of his exact readings, but conceded he had smoked cannabis outside of work two days before being tested - A aware of R’s strict drug & alcohol policies - dismissal not harsh etc, despite A’s good work record)

### Dismissal – Email use (inappropriate)

[\[2013\] SAIRComm 4](#) *Kirkham v Dept. Correctional Services* (A sent inappropriate email from a co-worker's computer embarrassing co-worker in a significant way - A was untruthful in investigation - dismissal not harsh etc - **Appeal dismissed** in [\[2013\] SAIRComm 17](#))

[\[2014\] FWC 6568](#) *Qld Anderson v Theiss* (there was valid reason for A's summary dismissal due to him **forwarding email about Muslims wanting to behead infidels** - this breached R's policies - dismissal harsh because of consequences for 65 year old employee - dismissal also "unreasonable because the conclusion that the misconduct engaged in by Mr Anderson was wilful on the grounds that he had been previously warned about it, was not reasonably open on the material before the employer" @76 - compensation ordered, but reduced by 50% due to A's misconduct)

### Dismissal – Expenses (inappropriate or dishonest claims for work-related)

[\[2012\] FWA 3353](#) *Vic Applicant v Microsoft Australia* ("The Applicant was a senior employee of the Respondent who failed to take the necessary care in ensuring he was familiar with the relevant policies [including corporate **credit card** policies], failed to exercise **due diligence required in the submission of his expense claims for reimbursement** and **failed to display the requisite level of candour** in his dealings with his line manager and at the early stage of the Respondent's investigation into his conduct" @94 - valid reason for dismissal - dismissal harsh, as summary dismissal was not warranted - impact of dismissal also made dismissal harsh in light of A's "service with the global corporation and the **effect of dismissal on his visa status**" @128)

[\[2014\] FWC 5894](#) *SA Camilleri v IBM Australia Ltd* (**valid reason for dismissal for claiming inappropriate expenses over many months** - dismissal harsh and unjust though given A's substantial service and unblemished employment history - termination also "unjust given the **long delay in the investigation process**, the fact that Mr Camilleri was **limited in his capacity to respond to the allegations** against him and IBM's **limited consideration of his ultimate responses**. Further, IBM's decision to require Mr Camilleri to continue to work when it had made an in principle decision to dismiss him because it had no confidence in him, contributed to the injustice of the decision" @58 - reinstatement appropriate if restitution of inappropriately claimed monies made)

### Dismissal – Facebook comments

[\[2011\] FWA 8444](#) *NSW Stutsel v Linfox Australia* (the A posted remarks on his Facebook page which were construed as **racially derogatory remarks about a manager** - FWA did not consider the remarks in context to be so serious - someone else posted inappropriate **sexual comments about another manager** on A's page - **A mistakenly thought he had maximum security settings on his Facebook page**, so that the material was private, and that he was not able to delete comments of others - other employees involved in similar misconduct not disciplined - A's dismissal harsh etc - A reinstated - Appeal dismissed [\[2012\] FWAFB 7097](#) - further proceedings dismissed at [\[2013\] FCAFC 157](#))

[\[2013\] FWC 9642](#) *NSW Little v Credit Corp Group Ltd* (the A made inappropriate comments on his Facebook page about an organization R had dealings with - A also made sexually aggressive comments about a new employee of R - both actions amounted to a valid reason for dismissal - dismissal not harsh etc)

[\[2013\] FWC 10240](#) *Qld Cronin v Choice Homes* (the A was summarily dismissed for disseminating to co-workers, including the director, an email which was intended as a joke, but included a mock resume of the director listing 'excessive masturbation' as one of his interests - dismissal harsh etc, particularly because of R's strong work place culture of workers and managers regularly sending very inappropriate material to each other - "The dismissal was unreasonable because the **conclusion that the email was inappropriate because it contained sexually explicit material, could not reasonably have been reached in circumstances where the reference to masturbation was clearly not sexual and there was a workplace culture of distributing and disseminating emails that tick every box in the spectrum of highly offensive material** including hard core pornography, sexism and racism and where more serious misconduct engaged in by other employees did not result in dismissal" @99)



[\[2014\] FWC 644](#) **ACT** *Wilkinson-Reed v Launtoy* (**adverse comments by A about manager in private Facebook discussion**, which would have remained private had manager not accessed his estranged wife's Facebook page without permission, did not provide a valid reason for dismissal - "It is unlikely that a policy that was an attempt by an employer to control the contents of private emails between their employees third parties, written in their own time and using their own equipment would be found to have the requisite connection to the employment relationship such that an employee could be terminated for a breach)

#### **Dismissal – Foreign employees/workers**

See [Foreign employees/workers](#)

#### **Dismissal – Fraud**

[\[2014\] FWC 666](#) **NSW** *Pritchard & Coorey v Hertz Australia* (the applicants' dismissal for **falsifying on-line customer feedback surveys** not harsh etc - poor performance on surveys would have resulted in performance management)

[\[2014\] FWC 4201](#) **ACT** *Johnston v Australian Federal Police* (a protective services officer with the AFP dismissed for making a **false police report motivated by anger and malice** - dismissal not harsh etc)

#### **Dismissal – Frustration of contract**

[\[2013\] FWC 9521](#) **NSW** *Vaporis v Serco Australia* (the A was dismissed at R's initiative due to **A being investigated for alleged drug trafficking** - due to the investigation, **A's access to the detention services network was denied by a Departmental 'ministerial direction'** - R therefore saw the employment contract as being frustrated - R concluded without reasonable grounds that A was guilty - A's serious misconduct not proven - R treated A in an appalling manner as far as procedural fairness goes - dismissal harsh etc)

[\[2014\] FWC 7551](#) **NSW** *Cooper v ATO* (the **A was convicted and sentenced to over three years imprisonment for two counts of indecency with a person under 16 whilst overseas** - A due for release in December 2014 - **contract not frustrated** where "the contract was ... still in operation at the time of dismissal on 11 October 2013. The Applicant was suspended from duty on 21 December 2012. On 23 January 2013 he was advised of an internal investigation and accessed his leave. The suspension was re-confirmed in March 2013, after sentencing. The Applicant then cooperated, especially thorough his solicitors, in the investigation carried out by Roy Davey for the ATO. The Applicant did what he was required to do by the ATO, consistent with the contract" @34 - ATO code of conduct required "an ATO employee to behave 'at all times' in a way which maintains the integrity and reputation of the APS" @50 - A's **dismissal for breaching code of conduct not harsh** etc - R did not have to wait for outcome of appeal)

#### **Dismissal – Heated exchange (during)**

[\[2014\] FWC 6423](#) **Qld** *Boylan v Pilbeam Hall* (small business - the **A was directed to leave the work place during a heated exchange with her boss** and in the context of R having reduced her hours - **no valid reason for dismissal found, but dismissal not found to be harsh** etc in the circumstances)

#### **Dismissal – Hygiene issues**

[\[2013\] FWC 9560](#) **ACT** *Uoifalelahi v Teys Australia Southern* (the A's dismissal for **urinating on a fence near a loading dock** while working on nightshift upheld - A denied that he had done so - A worked for a meat export company and good hygiene was important - A "had been given many warnings about his unsatisfactory performance in the past. His employment had been suspended on one occasion and, at the time of his dismissal, was on a good behaviour bond and subject to summary dismissal for any breach of the respondent's policies" @57)

#### **Dismissal – Incapacity for employment**

[\[2013\] FWC 8981](#) **Vic** *Biradar v Laurent Bakery* (the A was off work for over three months due to a non work-related injury - according to medical advice, he could only do his former job with

restrictions - R decided it could not leave A's job open for him - A failed to provide further medical advice relevant to his capacity - **despite A not being given an opportunity to respond before his employment was terminated, dismissal not harsh etc because A had still not provided medical advice that he was fit for his employment)**

[\[2013\] FWC 10155](#) **SA De Sousa v Dept. of Education, Employment & Workplace Relations** ("This scenario is **not a frustration of contract in terms of an incapacity to perform the employment contract** in the conventional sense. It is not in the Commission's view a *Smith v Moore Paragon Australia Ltd* situation. The applicant was seemingly fit to work by his provided medical opinion and the respondent's expert opinion. It is clear now that medications may have played a distinct part in the play of events. However it is not a frustration of contract as a consequence directly of illness or injury where the employer should identify a prognosis and other elements before proceeding. ... [G]iven the above the respondent had a valid reason for dismissal, being the **lack of performance of the applicant in his modified duties and the apparently enduring nature of those modified arrangements**" @93-94 - R showed preparedness to accommodate A's physical and psychological needs in the workplace - dismissal not harsh etc)

#### **Dismissal – Inherent job requirements (failing to meet)**

See [Dismissal – Standards/inherent job requirements](#)

#### **Dismissal – Internet use**

[\[2014\] FWC 1637](#) **NSW Gmitrovic v Dept. of Defence** (allegations of **excessive internet use** not established, and no evidence of A's performance being affected - **use of anonymous search engine** not against R's policy - no valid reason for dismissal)

#### **Dismissal – Investigation process (misconduct during)**

[\[2013\] FWC 6513](#) **WA Terry v Burswood Resort ...** (the A made **inappropriate comments to three female co-workers** which made them feel uncomfortable, and which warranted A being disciplined and made aware of the adverse effects of his conduct, but did not warrant dismissal - A's **belligerent conduct in investigation process justified his dismissal**)

#### **Dismissal – Labour hire arrangement**

[\[2014\] FWC 750](#) **Qld Bunt v ITW Pro-line** (Clause 4.2.4 of EA stated: "**Casuals employed either by the company or a through a labour hire agency on a continuous service period of longer than 12 months will be deemed to be permanent employees [sic]**" @7 - A, who had been placed with R for more than 12 months therefore claimed he was R's employee - such contention rejected - "Clause 4.2.4 of the Agreement does not specifically mention that a contractual relationship is offered by the Respondent (as the purported employer) to an employee of labour hire agencies (as purported employees). Even if the contract did do so the Applicant's contention appears to be that a contract would be created even where neither party wished for such to be created. It is settled in law that a **contract of employment cannot be forced upon an employee without that person's consent**" @17 - further held that the **clause was not a clause about a permitted matter pursuant to s172 - permission to appeal refused** [\[2014\] FWC 2328](#))

[\[2014\] FWC 4133](#) **Vic NUW v Caterpillar ... & NUW v Hoban Recruitment** (the **NUW brought actions on behalf of two labour hire workers against host employer, but not against labour hire company** - adverse action claims involved - host employee claimed poor performance and failure to comply with policy were behind its decision to cease providing work to workers - joinder of labour hire company sought - extension of time issues pursuant to ss. 365 & 366 - discretion to order joinder not exercised)

#### **Dismissal – Lawful directions (not following)**

[\[2013\] FWC 1836](#) **Vic Townsley v State of Victoria (Dept. of Edu. & Early Childhood Dev.)** (**after cross-examination of A, R sought to have the matter dismissed** because A had no reasonable prospects of success - A had failed to follow three lawful and reasonable directions of principal to provide lesson plans and to respond to investigation into complaints against him by students - application granted - Appeal dismissed [\[2013\] FWC 5834](#))



[\[2013\] FWC 5733](#) **NSW** *Blow v SBD Services* (A's dismissal for failing to follow lawful directions to discuss with R a report he had made of a safety breach not harsh etc - it was **serious misconduct for A to repeatedly fail to cooperate with investigation**)

[\[2014\] FWC 644](#) **ACT** *Wilkinson-Reed v Launtoy* ("had the direction been that the applicant not communicate with Mrs Nixon at all, I would not have been satisfied that such a direction was reasonable. **I see no circumstance that could allow an employer to prohibit an employee from contact with another person merely because a senior manager of the employer had some personal issue with that other person.** To find some connection between such a direction and the existence of a legitimate right of an employer to intervene in the personal life of an employee would be extremely difficult" @56)

[\[2014\] FWC 1712](#) **Qld** *Grant v BHP Coal* (the A, after being off work for eight months due to injury, came back to work suddenly with little more than a generic medical clearance believing he was medically fit to work - there had been very little communication between A and R during his absence, and R did not have sufficient medical information about A's fitness to work in the coal mine - **R required A to see a specified doctor before allowing him to work - A refused to do attend scheduled appointments** - R dismissed A for failing to follow a lawful and reasonable direction, among other reasons - due to the dangers of working at the mine the "necessity to confirm the fitness for duty should have been reasonably apparent to any reasonable person returning to work on a mine site, who had had experience in working in mines ... However, it is also a reasonable expectation that where an employee considers that he is medically fit, the employer will clearly set out the basis for requiring the employee to attend for the further medical assessment" @112-113 - since R had statutory obligations to ensure the safety of its workers it was reasonable for it to insist A see a specialist of their choosing rather than a specialist insisted upon by A - A's uncooperativeness in investigative process also formed part of the valid reason for dismissal - **dismissal not harsh** etc - permission to appeal granted 18/6/14 in [\[2014\] FWC 3027](#) but **appeal dismissed** - Coal Mine Health & Safety Act (s39 &42) and Regulations (42 & 46) considered - "The Commissioner properly construed the power available under CSMH Act for the Respondent to direct the Appellant on reasonable grounds to attend a functional assessment. We also consider ... the Respondent was able to direct the Appellant to do such things that are not unlawful, and which are reasonable and properly an incident of the employment relationship, or fall within the scope of the contract for service. We have also found that the Respondent's direction to the Appellant can be so characterised" @130)

[\[2014\] FWC 2729](#) **Vic** *Patmore v Hydraulic & Pneumatic* (valid reason for dismissing A for **failing to follow instruction not to do bookkeeping work in her lunch hour for another business** - A used R's facilities and resources to do this work - A was not paid for this work and the owner of the other business was a customer of R - termination was however procedurally unfair)

[\[2014\] FWC 3188](#) **ACT** *Burns v Sacred Heart Mission* (the R lawfully dismissed A for failing to follow **reasonable directions to attend medical assessment and meetings** with the R)

[\[2014\] FWC 5506](#) **Vic** *Wu v Round Scaffolding* (no valid reason for dismissal when A made a **mistake in thinking she was authorised to transfer funds** into her own bank account)

[\[2014\] FWC 5978](#) **Vic** *McIntosh v HSU Victorian No. 1 Branch* (R did not have a valid reason for dismissing A for **not meeting deadlines to hand over files** to another worker when it had not counselled or warned A she would be dismissed if she failed to meet the deadlines - reinstatement inappropriate as R had lost trust and confidence in A - A also **involved in political activities at union in lead-up to union election (for which she was running for leadership)** which FWC considered were deleterious to R having trust and confidence in her in the circumstances)

[\[2014\] FWC 6439](#) **WA** *Gaglioti v Pilbara Mining Alliance* (the dismissal of A for **failing to perform a priority task in a timely way, where safety was an important concern** and where A was an experienced and longstanding employee not harsh etc)

**Dismissal – Lawful practice, policy, regs etc (not following)**

[\[2014\] FWC 446](#) **Vic** *Pearson v Linfox Australia* (the A's conduct involved, "in aggregate, a consistent pattern of behaviour that demonstrated a **repeated disregard for and refusal to comply with the policies and procedures** Linfox had in place in the Distribution Centre" @51 - dismissal not harsh etc - permission to appeal refused 19/3/14 in [\[2014\] FWC 1870](#))

[\[2014\] FWC 453](#) **Vic** *Brook v Parkville Youth Justice Precinct* ("the actions of the Applicant in **introducing the phone into the [correctional] facility**, even if it was **accidental**, and her **use of the phone** during the morning, provide a valid reason for the dismissal. Her actions were a **breach of policy and a breach of the law**. They are not trite matters considering the potential harm that could have come from her actions" @119-120 - dismissal not harsh etc, despite A's good record, the adverse consequences to her and seemingly differential treatment)

[\[2014\] FWC 4885](#) **NSW** *Chew & Leong v Qantas* (the applicants were dismissed for the serious misconduct of breaching R's cab-charge policy through **inappropriate usage of cabcharge/fast cards on numerous occasions** - no "valid reason for the dismissal of two such longstanding employees with otherwise unblemished records" @59 - they were not fully cognisant of the policy - "**no evidence that the applicants had signed or even sighted the Fastcard Policy. Furthermore, there was no evidence of an educational program provided to Flight Attendants on the use of the cards or the travel policy generally**" @80 - R, in dismissing the applicants, gave insufficient weight to their long service, unblemished records, contrition and the substantial impact of the dismissal on them - both reinstated, but did not receive lost pay)

[\[2014\] FWC 5547](#) **Vic** *Mond v Seymour-Gross* (the A worked in R's fashion store - A **failed to follow stock control procedures** and had a dress in her car that was not recorded - theft not established, but breach of policy provided valid reason for dismissal - dismissal harsh etc due to A's **long service with unblemished record** and procedural deficiencies, such as A being **dismissed over the phone**)

#### **Dismissal – Leave (issues associated with)**

[\[2013\] FWC 7005](#) **Vic** *Babu v Norwood Industries* (the A was refused extended leave - A got a **medical certificate purporting to confirm that he would be medically unfit for a future period due to stress** - A worked for a time before taking stress leave - **medical practitioner who gave certificate disciplined** by Medical Board - dismissal not harsh etc)

[\[2014\] FWC 2642](#) **NSW** *Sipione v Assets HQ* ("The applicant and her terminally-ill friend had travel arrangements to go to Cairns while the applicant was on leave that ... had already been approved. The **respondent did not have a valid reason to dismiss the applicant when it unreasonably and on short notice wanted the applicant to cancel the leave** and attend work, rather than taking the pre-paid holiday with her friend" @14)

[\[2014\] FWC 5174](#) **Vic** *Baldwin v Scientific Management Associates (Operations)* (see [precis](#) above at Dismissal - Abusive/foul language)

[\[2014\] FWC 7098](#) **NSW** *Johnston v The Trustee for the MTGI Trust* (see [precis](#) at Abandonment of employment)

#### **Dismissal – Misuse of funds/allowances**

[\[2014\] FWC 5176](#) **ACT** *Sharp v Commonwealth of Australia* (the A breached the APS Code of Conduct by **using his Commonwealth credit card inappropriately** and claiming for car hire for personal use which he was not entitled to - A had been warned - "believed he had a sense of entitlement which was not consistent with the responsible expenditure of public funds" @9 - dismissal not harsh etc)

#### **Dismissal – Multiple reasons**

[\[2014\] FWC 52](#) **NSW** *Burne v Hanson Constructions Materials Pty Ltd* (the A "repeatedly showed a **lack of respect for the respondent's procedures and policies** in a manner that undermined efficiency, and had a **detrimental effect on customer service and relationships with other employees** of the respondent. Moreover I am satisfied that **his negative attitude had the potential to create a safety risk**. ... The applicant **repeatedly failed to cooperate with**

**management initiatives.** ... Such behaviour would be unacceptable from any employee, but as a Batchelor, the applicant had a leadership role in relation to other employees at the Lawson plant. His poor attitude could be expected to have a detrimental effect on the morale of the other employees who had to work with him. The applicant's behaviour on 7 June 2013 was particularly egregious. Not only was he **rude and uncooperative with a customer**, but when the issue was raised with him, he responded in a totally unacceptable manner" @29-30 - dismissal not harsh etc)

#### **Dismissal – Objecting to unilateral employment changes**

[2014] FWC 7496 **NSW** *Johnson v Zehut* ("the actions of the respondent in deeming the applicant to have resigned her employment by **refusing to accept a lower remuneration package** was both harsh and unreasonable. This is because of the applicant's considerable period of service with the respondent and its predecessors, and her satisfactory performance in managing the Chatswood store and in her other roles in the business. There was no complaint about the performance or conduct of the applicant or her commitment to the respondent's business. The only complaint was that the respondent considered that the remuneration paid to the applicant was too high given the changed role in the business which she had been asked to undertake ... It was **both harsh and unreasonable for the respondent to force the applicant to resign from her employment if she did not agree to the proposed terms of the new contract**. A more appropriate way of dealing with the issues relating to the applicant's remuneration package and for any necessary or proposed adjustments to be negotiated might have been found if different procedures involving human resource expertise had been followed by the respondent" @44-45)

#### **Dismissal – OHS procedures (breach of)**

See also [Dismissal – Tom-foolery](#)

[2013] FWC 6971 **Qld** *Mora v QUBE Ports* (there was valid reason for A's dismissal when he **breached a safety policy about maintaining visual and verbal contact when driving a forklift and working with others** - a load fell causing serious injury to another - dismissal harsh etc because of the **"inadequacy of the procedure Mr Mora was alleged to have breached ... [t]he contribution that other persons involved in the incident made** - in particular that the stagehands were equally responsible for the failure in communication that lead to the incident occurring; and [t]he significant defects in the manner in which the work was organised and performed as evidenced by the receipt of an improvement notice from the Department of Workplace Health and Safety ... [T]he dismissal of Mr Mora was unreasonable, because it was decided that he was solely responsible for the incident in circumstances where there were other factors that contributed to the incident to a degree that was at least as significant as the contribution made by Mr Mora" @148-149)

[2013] FWC 5340 **NSW** *Mayer v Transfield Services (Australia) P/L* (the A was dismissed for **breaching several mandatory safety requirements** - FWC held there **was valid reason** for A's dismissal, but his dismissal was harsh as his **conduct was not grave enough to warrant dismissal**)

[2013] FWC 8430 **WA** *Prestedge v Boart Longyear Australia* (due to the A's **lapse of attention** in not looking up to see if anyone was near the drilling rig, a co-worker was struck and put at serious risk of harm - **co-worker's breach of policy in failing to communicate with A contributed to the incident** - A had a good safety and employment record with R - dismissal harsh etc)

[2013] FWC 8902 **ACT** *Cameron v Metecno* (there was valid reason for A's **dismissal for directing workers to dismantle a cold store without ensuring that even basic safety measures were in place** - however, summary dismissal was harsh where A had worked for R for 35 years and where the applicant was permitted to continue to work as normal for a further two months after his misconduct - compensation ordered - **Appeal dismissed** 19/2/14 in [\[2014\] FWC 1207](#))

[2013] FWC 9168 **Qld** *Stewart v P.O.D's Pest Control* (the A **failed repeatedly to follow safety procedures** - R reasonably believed that A's conduct was sufficiently serious to justify dismissal because of the potential threat to its business)

[\[2014\] FWC 1531](#) **NSW** *Zhou v Weir Minerals Australia* (the A used a lifter which he knew was not to be used because of mechanical issues associated with it - there was also a 'Danger - Do Not Operate' tag on the lifter - it was **serious misconduct for A to use faulty lifter to lift a 50-60 kg chuck** - dismissal not harsh etc)

[\[2014\] FWC 2127](#) **NSW** *Conlon v Asciano Services* (experienced **train driver's dismissal for failing to observe and respond to important signals**, amongst other things, not harsh etc - there was a risk of fatal train collision - A's good record considered)

[\[2014\] FWC 3805](#) **SA** *Larchin v Marnikol Fisheries* (the A worked on a fishing boat and suffered consecutive compensable injuries at work - R's generalised claims that **A was clumsy at work and a danger to himself and others** did not provide a valid reason for dismissal)

[\[2014\] FWC 3432](#) **NSW** *Gomes v Qantas* (the A deliberately "**drove the tug across Bay 2 in front of a moving aircraft**". In doing so, he has breached any number of Qantas safety policies and work practice procedures. He has also breached a number of SACL driving regulations" @67 - A had **two prior formal warnings and was one month into a performance improvement plan** - dismissal not harsh etc despite procedural errors)

#### **Dismissal – Out of control**

Friedman B, '*Dismissed for being "Out of Control", or making complaints?*' (2013) 19(3) Employment Law Bulletin 34

#### **Dismissal – Out of hours conduct**

Ruskin N & Kennedy M, '*Out of Hours Conduct – When is it a Workplace Issue?*' (2013) 16(4) IHC 53

[\[2014\] FWC 997](#) **NSW** *Morunga v Anyinginyi Health Aboriginal Corporation* (the A after having been given permission to speak at conference where she would speak on racism was dismissed after a journalist had misreported what she said which in turn caused offence to R - **she had been told by manager she could speak at the conference if she did so in her personal capacity, which she did** - no valid reason for dismissal - dismissal harsh etc)

[\[2013\] FWC 8914](#) **NSW** *King v Catholic Education Office Diocese of Parramatta* (teacher dismissed for disobeying **lawful direction not to transport students to surf life-saving events** - see précis at [Dismissal - Sexual/pornographic issues](#))

[\[2014\] FWC 2481](#) **Vic** *Bradshaw v BHP Coal* (the A was staying in a four bedroom house which R provided to its workers - it had never given A the right to stay in the house, but A claimed an entitlement through his relationship with another employee who had an entitlement, but who had left the house due to A's mistreatment of her - **A's refusal to leave after being lawfully directed to by R, and his forcing of entry to the property when the locks were changed not considered to be out of hours conduct**, but rather provided valid reason for his dismissal - dismissal not harsh etc, despite R not having any issues with A's performance of his duties)

[\[2014\] FWC 3899](#) **NSW** *Ambrose v Moolarben Coal Operations* (the A **sent an obscene text message to co-worker outside of hours** - the two workers had an ongoing poor work relationship and A had been subject to warnings (including a formal written warning) not to continue taunting/harassing his co-worker in breach of R's policies - dismissal not harsh etc)

[\[2014\] FWC 4534](#) **Vic** *Painter v Equiset Construction* (see précis at [Dismissal – Sexual/pornographic issues](#))

[\[2014\] FWC 7551](#) **NSW** *Cooper v ATO* (A convicted of serious offence and imprisoned - see précis at [Dismissal – Frustration of contract](#))

#### **Dismissal – Part-time employee**

[\[2014\] FWC 4772](#) **SA** *Heading D & J Penny* (**unilateral change of A's employment from part-time to casual** constituted dismissal)



## Dismissal – Post-dismissal materials/matters/information

See also [After-acquired knowledge](#)

[\[2014\] FWC 748](#) **Qld** *Eames v Orrcon Operations* (one month after his redundancy A became aware that his former position had been filled by another - “He then acted promptly to prepare and lodge his application for relief. This is a plausible explanation for the delay, akin to a party not being possessed of actual knowledge relevant to a cause of action until a time after a limitation period has passed” @47 - exceptional circumstances found)

[\[2014\] FWC 701](#) **Vic** *Cann v Rockdrill Services Australia* (application 21 days late - A acted promptly to lodge application after talking to a former colleague who told her that her former role had been backfilled - this information was not entirely correct - A had suspicions even before she was made redundant that her redundancy was questionable and she had even consulted lawyers before being made redundant - A was fully aware of 21 day time limit - circumstances not exceptional)

## Dismissal – Procedural fairness

Nickels L, *‘It is Not Only The ‘Why’ But Also The ‘How’ – Understanding The Process to Avoid Unfair Dismissal Claims’* (2013) 17(2) IHC 26

[\[2013\] FWC 5840](#) **NSW** *Neeteson-Lemkes v Jetstar* (the A was dismissed for being unable to meet the inherent requirements of her job - “even as at the date of the dismissal, the respondent continued to deny the applicant an opportunity to respond to any reason related to her capacity to undertake the inherent requirements of the job by the obdurate and **unreasonable refusal to provide to the applicant, the applicant’s union or the applicant’s solicitors the report on which Ms Pajmon based her assessment** concerning the applicant’s dismissal” @66 - A reasonably expected she would take part in a meeting about the medical report - dismissal harsh etc - A reinstated - **Appeal** heard 13/12/13 in [\[2013\] FWC 9075](#) - confirmed that A was unfairly dismissed - **further evidence to be heard** on the issue of the relevance of A’s medical position to reinstatement and also her possible extradition to South Africa due to allegations of criminal conduct)

[\[2014\] FWC 2593](#) **BlueScope Steel Limited v Sirijovski** (“There are practical limitations on the extent to which investigations can be conducted into workplace incidents. The essential requirement is that a **proper investigation** is conducted, and that the employee concerned is informed about the results of the investigations and is given a fair opportunity to respond. The failure to interview all persons in a particular workplace or performing similar functions does not necessarily warrant a conclusion that the conduct of the investigation was deficient. Further, there is nothing inherently improper or unfair in an investigator seeking the cooperation of others in conducting parts of the investigation process, especially where this might involve relevant supervisory staff. Further it is not *per se* a deficiency that an investigator has not been formally trained in investigative techniques or practices or that the interviews conducted with the employee concerned are relatively short” @50)

[\[2014\] FWC 3099](#) **Vic** *Muhammad v Colonial and Empire Brewing Trust* (the **A failed to obey a lawful instruction** on several occasions to perform certain duties, even after having been **clearly warned** - A “was not provided with an opportunity to respond at the time of termination. However, I do not consider it to be a strong factor in favour of a finding of unfair dismissal in the circumstances of this case. The Applicant was **given an opportunity to respond to the matters which led to his termination at meetings prior to the termination but not at the time of the termination itself**” @28 - dismissal not harsh etc)

[\[2014\] FWC 1869](#) **WA** *Fitzpatrick v Bunnings Group* (dismissal unfair when **investigation into misconduct flawed** - personnel with a close association to misconduct and A’s previous misconduct appointed as investigators - re-enactment of incident involving alleged aggressive behaviour by A toward co-worker carried out without sufficient input from A and other worker involved - reinstatement not appropriate)

[\[2014\] FWC 6416](#) **SA Vannea v Royal Bay International** (being given **partial reasons for dismissal** is an indicator of unfairness)

[\[2014\] FWCFB 5993](#) *BlueScope Steel (AIS) Pty Ltd v Agas* (Appeal allowed - “Commissioner **failed to make requisite findings about the criteria set out in s.387(b), (c) or (d)** ... If he had - based on the evidence - he would have been bound to conclude that BlueScope had notified Mr Agas of the reason they were considering dismissing him, had given him an opportunity to respond to that reason and had not unreasonably refused to allow him a support person at any relevant discussions. Despite this, the Commissioner found that ‘the investigative process’ was procedurally unfair. He did this by substituting an alternative notion of procedural unfairness to that set out in the Act. The process was unfair he found because it ‘did not involve an interview with the relevant employee.’ The requirements are those set out in s.387(b), (c) and (d); whether to conduct an interview is a matter for the person conducting the investigation. ... Mr Agas well knew the basis of BlueScope’s concerns, and had ample opportunity to present his case. There were no sound grounds for finding that there was any procedural unfairness. Mr Agas’s union made written representations for BlueScope to consider. Moreover, further representations were made at the show cause meeting and, relevantly, prior to the final decision to dismiss” @77)

### **Dismissal – Psychological issues**

[\[2013\] FWC 7421](#) *Vic Applicant v Respondent* (held it was “**indefensible to dismiss an employee who has a mental disorder for conduct which occurred when the employee was unaware that he had a mental disorder and for which he had not yet received any treatment**” @36 - A dismissed largely on the strength of psychiatrist reporting that A had paranoid schizophrenia and that there was a strong potential for him to be disruptive at work and not to be a good co-worker - psychiatrist also reported that there was no foreseeable risk of A being violent - “where the Respondent had not explored the length of time that the Applicant may be incapacitated for work the mere existence of a current level of incapacity does not support the contention that there was a valid reason for the dismissal” @42 - **diagnosis of schizophrenia may not have been correct** - no valid reason for dismissal - nor was A adequately notified of reason for dismissal - A reinstated subject to medical clearance)

[\[2014\] FWC 2937](#) *Vic Cornelius v Grant Chugg Plumbing* (**application three days late due to A’s major depressive illness** - “during the period following the termination of the Applicant’s employment until this application was lodged, the Applicant was not able to look after his own affairs through a combination of the depression that he was suffering and the effect of high doses of antidepressants ... [D]uring this period Ms Devlin assisted the Applicant in managing his affairs including ensuring that he takes his medication. The medical advice received by the Applicant after his discharge as an inpatient was that he should focus on his well-being and nothing else” @7 - **exceptional circumstances found**)

### **Dismissal – Recording (secret)**

[\[2013\] FWC 4513](#) *WA Schwenke v Silcar Pty Ltd* (valid reason for dismissal where **A secretly recorded performance meeting** and where there were a number of **performance issues** - Appeal dismissed 18/12/13 in [\[2013\] FWCFB 9842](#))

[\[2013\] FWC 9609](#) *Vic Evered v CFD ... AHD Ltd* (“The actions of the Applicant in **recording the termination meeting** were inappropriate. They were damaging of a relationship of trust and confidence between the employer and the employee. ... [T]he conduct, although **discovered after the termination** is relevant to a decision as to whether or not the termination was fair. ... [T]his action was out of character and was not intended to harm the employer or the relationship with the employer. ... [T]he recording was to make sure he understood what had been said at the meeting. ... [T]his factor is **more relevant to the question of whether or not reinstatement is an appropriate remedy** should I find that the termination was unfair” @72-73)

### **Dismissal – Redundancy grievance**

See [s389 - Consultation](#)

[\[2013\] FWC 8704](#) *WA Supara v SlumberCare* (failure to follow award **obligation to consult** re redundancy did not lead to dismissal being harsh etc)

[\[2014\] FWC 1031](#) **Qld** *Stewart v Amcor Excavations* (failure to follow award **obligation to consult** re redundancy did not lead to dismissal being harsh etc - consultation would not have changed the outcome for A)

[\[2014\] FWC 1228](#) **NSW** *Amadon Travel Management v Joseph* (here, “even though the Full Bench and the Commissioner accepted there was a valid reason for the dismissal, it was still found to be that the appellant had an **obligation to engage in the necessary consultation**, in an appropriate manner, and that by failing to do so, the dismissal might nevertheless be found to be ‘harsh, unjust or unreasonable’” @18 - this conclusion reached despite the fact that A would likely have been in the same position had consultation occurred)

[\[2014\] FWC 7606](#) **Vic** *Wirtz v The Trustee For the Posadowski Family Trust* (consideration of the issue of **whether adequate consultation would have made a difference** - factored into compensation, as dismissal harsh for reasons other than failure to consult)

### **Dismissal – Relationship breakdown**

[\[2013\] FWC 6385](#) **NSW** *Doherty v New England & Western Tenants ...* (see from paragraph 84 where relationship breakdown as a valid reason for dismissal discussed - Appeal dismissed [\[2013\] FWCFB 9026](#))

### **Dismissal – Religion**

See also Religious workers

[\[2014\] FWC 1108](#) **Vic** *Hou v 3CW Chinese Radio* (the A was **blatantly dismissed without notification because she was a Christian** - dismissal harsh etc and compensation ordered)

### **Dismissal – Sabotage**

[\[2014\] FWC 4388](#) **WA** *Fraser v WARP* (the A was lawfully dismissed for serious misconduct - found that he **deliberately sabotaged R’s registration as a Registered Training Organisation**)

### **Dismissal – Secondary employment**

[\[2014\] FWC 5785](#) **NSW** *Azzopardi v ACES Security* (contrary to applicable EA, A was **working for another employer without R’s authorisation** - A had been warned - dismissal not harsh etc)

### **Dismissal – Secondment agreement (termination of)**

[\[2013\] FWC 7675](#) **SA** *Kostenko v Flinders University of SA* (the A was an employee of Flinders University seconded to Ninti One for a research project - this was not a genuine redundancy as consultation provisions of agreement not followed - “The **termination of Ms Kostenko’s employment occurred because Ninti One provided formal notice of the termination of the Secondment Agreement which governed her employment**. Given the termination of the Secondment Agreement and the provisions of her employment contract, Ms Kostenko had no capacity to continue to undertake work as a data analyst on the Interplay Project” @64 - valid reason for dismissal - A not given opportunity to respond to termination by R, but “it is difficult to see that the provision of an opportunity ... to respond to that Secondment Agreement termination and the restructuring of the Interplay Project by Ninti One when that decision had already been made, would change the situation confronting Flinders University” @69 - dismissal not harsh etc - permission to appeal denied 11/4/14 in [\[2014\] FWCFB 526](#))

### **Dismissal – Serious & wilful misconduct**

See [Serious & wilful misconduct](#)

### **Dismissal – Sexual/pornographic issues**

[\[2013\] FWC 6564](#) **Vic** *Morrison v Yooralla Society* (the A’s summary dismissal for **inappropriate touching of a supported co-worker in his groin**, and for inappropriate comments of a sexual nature to others not harsh etc)

[\[2013\] FWC 5446](#) **NSW** *D v Charles Sturt University* (a **lecturer was dismissed** for serious misconduct, namely making **advances of a sexual nature toward a student out of hours** - dismissal not harsh etc)

[\[2013\] FWC 9140](#) *X v Commonwealth of Australia* (the A, a **team leader with a long and distinguished record with RAAF and Dept. of Defence, stored and sent various lewd and pornographic emails breaching R's policies and the Australian Public Service Code** - R had adequately informed A of policies and had been adequately trained in them - held that "material which he stored and forwarded ... was not ... of a character which was obscenely offensive. Nevertheless it was demeaning women, sexuality and gender. It contravened the Defence's values and policies and had the capacity to embarrass Defence" @96 - A expressed remorse for his actions - A is 62 and the dismissal has had a profound effect on his lifestyle - in favour of the dismissal being unfair were the "inconsistencies in the Defence investigation process. Significant in this respect, are the delays in the investigation process or information to Mr X about that process and the extent to which Defence left Mr X in his Team Leader position when it was aware of his behaviour" @111 - dismissal found unjust due to procedural deficiencies, but not harsh or unreasonable - reinstatement inappropriate - 50% reduction in compensation for misconduct - 12 week's pay awarded)

[\[2013\] FWC 8914](#) *NSW King v Catholic Education Office Diocese of Parramatta* (A was a teacher with the R college - A "was dismissed because he **transported students in his car to surf lifesaving events contrary to the direction and policies of the College and the Diocese**" @42 - A's conduct was wilful - it was an out of hours activity, but the connection with employment was the students - "the Diocese and College policies were clear enough for the applicant to be very conscious of the child protection requirements of his position ... [T]he clear intention is that teachers not transport students in their vehicles. Any exception would require express permission from a supervisor" @44-46 - **valid reason for dismissal** - A not adequately notified of reason for dismissal - FWC "would not have found that the procedural deficiencies referred to were sufficient by themselves to render the dismissal harsh [etc] ... However ... **insufficient attention was given to the applicant's long and dedicated service** [37 years] ... [and] the decision to dismiss, as opposed to other disciplinary action that could have been taken, was influenced by unrelated allegations in respect of which no Police action has been taken" @88 - dismissal harsh etc - reinstatement inappropriate as school had lost confidence in A (although there was no suggestion he would harm any of his students) - school had duty of care concerns in light of A not having followed directions - school was also under investigation generally re child abuse issues - A is almost 60 and unlikely to be re-employed again as a teacher on a permanent basis - compensation of \$41,816 awarded - on appeal in [\[2014\] FWC 2194](#) **A unsuccessfully challenged the lawfulness of R's directions as to his out of hours conduct** - Full Bench did not consider "decision to refuse reinstatement and order instead a substantial amount of compensation ... manifestly unjust" @42 - **Appeal allowed** as DP erred in failing to consider "the possibility of [A] being reinstated to another position in the Head Office or elsewhere in the Diocese that was not a teaching position and did not involve unsupervised interaction with students" @44 - several such positions existed - matter remitted to DP to determine this issue - R's **cross appeal challenging the finding that A's dismissal was harsh etc failed**)

[\[2013\] FWC 9642](#) *NSW Little v Credit Corp Group Ltd* (the A made inappropriate comments on his Facebook page about an organization R had dealings with - A also made sexually aggressive comments about a new employee of R - both actions amounted to a valid reason for dismissal - dismissal not harsh etc)

[\[2014\] FWC 755](#) *ACT Vu v C'th of Australia/ATO* (the **A stored about three items of disturbing sexually explicit material on his work computer and emailed it to his home address** - A's breaches were not inadvertent - breaches described as 'flagrant' - A was fully informed of R's strict policies regarding such material - R consistently dismissed its employees for such misconduct - dismissal not harsh, despite the severe consequences for A financially)

[\[2014\] FWC 1179](#) *NSW Patel v Telstra Corporation* (the A was dismissed after receiving a **final warning not to continue to harass co-worker**, but continuing to do so - A claimed he had a mental condition that made it difficult for him to cease showing his **unreciprocated affections** toward her - his conduct amounted to serious **sexual harassment** - dismissal not harsh etc - permission to appeal refused 20/5/14 in [\[2014\] FWC 3328](#))



[\[2014\] FWC 3899](#) **NSW** *Ambrose v Moolarben Coal Operations* (the A **sent an obscene text message to co-worker outside of hours** - the two workers had an ongoing poor work relationship and A had been subject to warnings (including a formal written warning) not to continue taunting/harassing his co-worker in breach of R's policies - dismissal not harsh etc)

[\[2014\] FWC 4534](#) **Vic** *Painter v Equiset Construction* (**persistent uninvited behaviour of a sexual nature towards co-workers in spite of being warned and in the face of R's policies against such behaviour** - the A was summarily dismissed for having discussions of a sexual nature (about his own sex-life) with a female co-worker who was not asking for such discussions and for sending a sexually explicit email to another female co-worker - out of hours sexual conduct toward co-workers considered - after-acquired information - dismissal not harsh etc)

[\[2014\] FWC 6489](#) **Vic** *Krzywicki v Boeing Aerostructures* (the A was dismissed for **sexually harassing co-worker - long delay in co-worker complaining** about A's conduct - "it is the perception of the person who is the subject of the harassment which is given weight" @14 - dismissal not harsh etc)

### **Dismissal – Sickness/injury**

See also [Dismissal – Workers compensation issues](#)

[\[2014\] FWC 3674](#) **Vic** *Gadowski v EcoClassic Group* (there was a valid reason for A's dismissal due to performance issues - however, he was **not given the opportunity to respond or to have a support person as he was on sick leave at the time of his dismissal** - dismissal unreasonable - compensation ordered)

[\[2014\] FWC 3500](#) **SA** *Cartisano v Sportsmed SA Hospitals* (the A **suffered injuries in a non work-related car accident - R gave A the impression it was okay with her extended leave while she recovered**, but subsequently called a meeting with A which resulted in her dismissal for being unable to meet the inherent requirements of her job - this took A by surprise - A's **dismissal was "effectively implemented without advance warning, was inconsistent with earlier advice** to her and was effected in a manner which deprived her of the capacity to fairly challenge the Sportsmed position" @80 - dismissal harsh etc)

### **Dismissal – Smoking**

[\[2014\] FWC 4611](#) **Vic** *Moore v Kelto* (small business - A's **summary dismissal** for smoking in the workplace after having been warned not harsh etc)

### **Dismissal – Standards/inherent requirements (not meeting)**

See also Dismissal - Warnings

[\[2013\] FWC 6547](#) **NSW** *Kestermann v RAP Investments* (the A was dismissed by R, a **small business employer**, for performance issues - A **not made sufficiently aware that his employment was at risk** if he didn't respond appropriately to R's **informal warnings** to lift his standards - A not given sufficient opportunity to respond when he was **notified of the reason why he would be dismissed at the same meeting he was informed of his termination** - dismissal harsh etc)

[\[2013\] FWC 1999](#) **Vic** *Walsh v Ambulance Victoria* (the A worked with the air ambulance emergency team - his **dismissal for his delayed departure to an urgent job not harsh** etc - Appeal allowed in [\[2013\] FWC 6867](#) - there "was a failure to give Mr Walsh the full benefit of the disciplinary policy applicable to his misconduct. ... Commissioner Cribb did not consider the absence of that opportunity... [T]he Commissioner's failure to do so was an error in the exercise of her discretion. Allowing Commissioner Cribb's decision to stand when **there has not been any consideration by Ambulance Victoria of Mr Walsh's submissions concerning an alternative to termination of employment**, or a consideration by the Commissioner of that failure, would be a manifest injustice to Mr Walsh" @10-11 - further "the Commissioner recounted the submissions of the parties concerning the Appellant's length of service, unblemished record, age and chances of finding employment with the Respondent as the only employer of paramedics in Victoria. It is not apparent to us that the Commissioner gave sufficient consideration to those matters in determining that the termination was not harsh - matter remitted and dealt with 20/1/14 in [\[2014\] FWC 482](#) -

**dismissal found to be harsh** due to “lack of proper process/procedural fairness in Mr Walsh not being given an opportunity to address the outcome of the disciplinary process” and due to his age, length of service and unblemished record - also “the chances of Mr Walsh finding employment when AV is the only employer in Victoria of paramedics are remote” @20 - reinstatement inappropriate as it was open to R to have formed the view it had lost trust and confidence in A’s ability to respond immediately - compensation to be assessed)

[\[2013\] FWC 7903](#) **Vic** *Gugliandolo v LTG Goldrock* (the A was dismissed because of his “**failure to meet the required standard for return on investment from foreign currency trading**” @5 - in the circumstances there was no valid reason for dismissal - A had other roles, other than investment, and he was not appropriately notified of dismissal)

[\[2013\] FWC 8375](#) **ACT** *Ashcroft v City Group* (a cleaner was dismissed after **not adequately responding to warnings about his performance** - dismissal not harsh etc)

[\[2013\] FWC 8422](#) **Vic** *Applicant v GBE* (the A was dismissed when R found out about his criminal convictions for a **child sex offence and possession of child pornography** - A’s position with the government involved, significantly, facing the public and coming into contact with young people on a semi-regular basis - A was **dismissed for not being able to fulfil the inherent job requirements** - dismissal not harsh etc)

[\[2013\] FWC 9511](#) **WA** *Eager v RSPCA WA* (**serious performance failures by chief inspector of RSPCA** - A **not adequately warned of such failures** - R failed to consider alternatives to dismissal - on balance, **dismissal not harsh etc** “due to the significance of the damage the Applicant’s failure could have, and may still have, on the RSPCA” @46)

[\[2014\] FWC 340](#) **Vic** *Nair v United Petroleum* (**person not present at performance meeting wrote to employee about matters discussed at meeting** - such was inappropriate)

[\[2014\] FWC 488](#) **NSW** *McDonald v Jetstar Airways* (**flight attendant’s dismissal for not being able to meet inherent job requirements** due to a lifting restriction of 10 kg not harsh etc)

[\[2014\] FWC 726](#) **Qld** *Martin v Serco Australia* (the A, a **client services officer who was escorting a detainee to Germany**, “**failed to maintain personal (and otherwise ensure) close observation of the detainee under supervision** ... He failed also to inform his employer within the required timeframes (within 30 minutes) of the detainee’s escape. The Applicant did not contact his employer for some 3.5-hours after the escape. This conduct, in all, went to the fundamental duties of an Escort Team Leader, and was contrary to the Applicant’s (recent) training and the employer’s reasonable expectation of the Applicant’s Role” @119 - “The Applicant had escorted Mr Kohl to the shower and then lost direct line of site and contact with him as he (the Applicant) made use of the toilet facilities. Mr Kohl took advantage of the situation and absconded. Further, the Applicant had failed to direct Ms Janner to provide a secondary level of supervision over the exit from the ablutions block. Indeed, he did not inform Ms Janner that he intended to use the toilet facilities in any event such that the issue of continuous line of site observation was ever raised” @156 - A’s dismissal not harsh etc)

[\[2014\] FWC 22](#) **Qld** *Born v Aurizon* (**a locomotive driver was unable to work after experiencing epileptic seizures and had been unfit for work for 18 months** - R, after giving A seven days to provide medical evidence to dissuade them from dismissing him, dismissed A - A wanted more time - FWC considered that more time would not have changed things - A, who was a loyal and long term employee of 34 years argued that R should have found him an alternative position - FWC considered R had made sufficient efforts in this regard)

[\[2014\] FWC 1437](#) **Vic** *Rowe v V/Line* (a **locomotive driver** who had been employed by R for almost 44 years was dismissed because he had been off work since December 2010 due to **PTSD** arising from incidents whilst driving trains - R saw no prospect of A returning to his duties and did not have alternative duties for him - various cases defining the **meaning of ‘inherent job requirements’** discussed - valid reason found - dismissal not harsh etc)

[\[2014\] FWC 1522](#) **NSW** *King v Crane Enfield Metals* (in circumstances where the **R had kept A on for three years after a work injury, tried to rehabilitate and retrain A and provided 10 months paid leave**, dismissal for failing to meet inherent job requirements was not harsh etc - permission to appeal refused 20/6/14 in [\[2014\] FWC FB 4103](#))

[\[2014\] FWC 1916](#) **Qld** *Friend v Bennett Carroll Solicitors* (**small business employer** - the A was a **senior solicitor who consistently failed to meet the daily six billable hours target R required of him** - because of this, his salary was reduced by \$15,000 - there was a valid reason for dismissing him after his poor performance continued and in light of complaints by clients - dismissal harsh etc though as A was **not given sufficient warning that he would be dismissed if his performance did not improve**)

[\[2014\] FWC 4098](#) **Vic** *Lalli-Cafini v The Trustee For Samios Tyres* (it "is clear that **Mr Lalli-Cafini did not make it clear to the tyre fitters that there were consequences if the rules were not followed**. By not doing so he failed to perform a critical part of his role and I find that STBT had a valid reason for terminating Mr Lalli-Cafini's employment" @70 - "the failure of STBT to properly supervise Mr Lalli-Cafini, to advise him where he was going wrong, to warn him that his job was at risk and provide him with clear expectations and additional training, makes the termination of his employment unreasonable" @95)

[\[2014\] FWC 4919](#) **ACT** *Applicant v Department of Defence* (the A's **security clearance was revoked** - R not found to have any improper motive or to have otherwise acted inappropriately in requesting A's clearance be reviewed by AGSVA - the clearance was necessary for A to perform his employment - dismissal not harsh etc)

[\[2014\] FWC 5215](#) **NSW** *Robinson v Trustee For the Keating Family Trust* (there was valid reason for A's dismissal in that she was making **costly mistakes** at work - however, dismissal was **procedurally unfair** - A, although twice warned, not warned her job was in jeopardy if she failed to improve and not given adequate opportunity to respond to allegations - A not forewarned that meeting she attended was about termination of her employment - **principles of procedural fairness in performance dismissals outlined from paragraph 47**)

[\[2014\] FWC 5793](#) **NSW** *Jaques v The McCarroll Motor Group* (the A was employed after **misrepresenting his qualifications** - A continued to misrepresent his qualifications - R discovered this and lost trust and confidence in A - A was unable to meet inherent job requirements - A dismissed in procedurally unfair way - dismissal not harsh etc)

[\[2014\] FWC 6044](#) **Vic** *Brown v Cullen Bay Electrical* (dismissal of electrician for **not having requisite white card** for working on construction sites not harsh etc)

[\[2014\] FWC 6179](#) **NSW** *Sommers v Dawson Media* (**senior sales person who had a recent workers compensation claim dismissed for alleged poor performance** after receiving three written warnings in one month - "an assessment of someone's sales performance through warnings over one month, is both unrealistic and demonstrably unfair. If there had been genuine concerns about a salesperson's performance, particularly where the employee had three years of unblemished service, had been commended for her work and encouraged not to leave by a large salary rise, then she should have been assessed over a longer period" @87 - "during the applicant's entire period of rehabilitation, some 18 months, she had achieved 96%, 85% and 94% of budget" @90 - no valid reason and also various elements of procedural unfairness - dismissal harsh etc - compensation ordered)

[\[2014\] FWC 6275](#) **NSW** *Chan v Rinex Integrated Power* (small business - the A's **pre-occupation with his own house project adversely affected his work attendance and performance** in several ways - despite procedural flaws in his dismissal, dismissal not harsh etc)

[\[2014\] FWC 6553](#) **Qld** *Oren v Garry Crick Auto Group* (the A was dismissed from his position as business manager for **failing to ensure R met its statutory obligations** without sufficient warning or opportunity to explain his conduct or improve his performance - FWC satisfied "that even if the Applicant had been provided an opportunity to explain his position and respond to the audit

findings the outcome would have been no different whatsoever. The audit report findings identified **serious deficiencies in relation to the procedures of the Applicant in conducting his sensitive role in the business** ... It may be argued ... that notwithstanding the audit findings the Applicant should have been given further opportunities to improve his performance in the future. But such an argument does not give due weight to the volume and regular nature of the training in the business, or to the statutory duties which frame the employer's business. The nature of the business, its sensitivities to regulatory risk and the focus on very regular training must be taken into account in evaluating the totality of the relevant circumstances" @60-61 - dismissal not harsh etc)

[\[2014\] FWC 6604](#) **Vic** *Columbine v GEO* (dismissal "justifiable and reasonable given the **[A's] limited engagement in providing information to GEO on which it could properly assess her fitness for work** and hence her capacity to fulfil the inherent requirements of her position" @77 - R had given A clear directions it needed certain information concerning her health due to safety concerns - R also **reasonably sought authority from A to correspond with her doctor** - A did not adequately cooperate)

### Dismissal – Strike action

See [Strike action](#)

### Dismissal – Summary dismissal

See [Serious misconduct](#)

### Dismissal – Suspension

[\[2014\] FWC 3624](#) **Qld** *Davy v ABS Business Sales* (**salesperson suspended on full wages commission** pending investigation - discussion of effect of suspension when income earning opportunities are compromised - suspension here did not amount to a dismissal - permission to appeal refused 15/9/14 in [\[2014\] FWCFB 6141](#))

### Dismissal – Theft

[\[2013\] FWC 9041](#) **WA** *Sayoun v Aurora Stone* (the A was on leave and heard it was **alleged he had stolen company property** - **A decided not to return to work** - A found to have **abandoned his employment** - A should have discussed the issue with R, whose subsequent investigations exculpated A)

[\[2014\] FWC 1013](#) **SA** *Homes v Coles Group* (the **A took home the milo supplied to him and other workers by R to make a milo mix to be later consumed at work** - when confronted in the heat of the moment A gave a false story - A summarily dismissed - suspected theft not established - A reinstated)

[\[2014\] FWC 996](#) **Vic** *Mowat v Dyer Engineering* (the A was given permission to throw out rubbish, but if he was in doubt as to whether it was rubbish he was to seek advice - **A was found to have put things in his car that R did not consider to be rubbish** - dismissal for theft upheld)

[\[2014\] FWC 3070](#) **Vic** *Elsouki v Iconic Unit Trust* (the A was the sole night time representative of the R in a shop/dispatch area - **A took several hundred dollars of R's money home (money in envelope from one client), but returned it within about 30 hours, before any allegations were made against him** - R dismissed him for stealing, but there was no proper basis for such allegation - "the failure of the Applicant to advise the Respondent and Mr Nesci as soon as he became aware that he had the money in circumstances where he knew that there was concern about the money was misconduct" @27 - A's misconduct was serious and provided valid reason for his dismissal - A was not provided procedural fairness and had a good longstanding record with R - dismissal not unfair, although noted that decision finely balanced)

### Dismissal – Time records

[\[2013\] FWC 7158](#) **Qld** *Ferris v Water-it Queensland* (the A "**intentionally extended his working hours ... by an additional hour on his timesheet** in order to include what he believed to be an hour of overtime he was owed for a call out later on in the early evening of that same day, and did not disclose his conduct in so doing to his employer when queried [including during investigation]"



@50 - A had had training the previous day about how to fill in his time sheets correctly - there were previous concerns about A in this regard and he was instructed to do it correctly - A was dismissed for this as well as for failings re other administrative procedures - loss of trust and confidence - **valid reason for dismissal** - dismissal justified)

### Dismissal – Tom-foolery

[\[2014\] FWC 157](#) **Vic** *Goldsmith v CSR Ltd* (found “that the Applicant attempted to hit or bang the rear panel of the forklift [with a broom] and that this action was deliberate ... [and] that he missed the metal part of the forklift and hit the window in the door instead and shattered the glass. Whilst it was not his intention to break the glass the act that resulted in the breaking of the glass was a deliberate act” @70 - A had an unblemished record at work - however, he was aware of the seriousness of flouting safety in the workplace - **dismissal for his one off act of tom-foolery appropriate**)

### Dismissal – Training

[\[2014\] FWC 1296](#) **Qld** *Graham v Comgroup Supplies* (the R “**pressed their jurisdictional objection that the applicant was under an apprenticeship training plan which had ended, and on that basis could not argue that they were dismissed**, relying on s.386 - R’s objection succeeded, although A might have brought a **general protections claim as a prospective employee** as she believed she was no longer employed because she had raised claims of harassment)

### Dismissal – Transfer/relocation

[\[2013\] FWC 5503](#) **Qld** *Ross v ZC Technical* (the A, who worked in the construction industry, was dismissed for **failing to follow R’s direction to continue to work in Townsville, where he had been temporarily moved** to from Brisbane - valid reason for dismissal found)

[\[2014\] FWC 2891](#) **NSW** *Piper v Pacific Coast Contractors* (**change in distributorship** - A was informed she had two options: “either accept a role at Kollaras [new distributor] or relocate to the Hunter Valley, commencing at 9am the following day. Despite the Applicant’s refusal of the Respondent’s offer of a position in the Hunter Valley, it is **unreasonable to provide an employee with less than 24 hours to make a decision as significant as moving away [from] the city in which they currently reside**. Further, Mr Hope [R’s director] alluded to a revised offer from Kollaras (without acknowledging the unilateral revocation of the previous offer), to which the Applicant responded that she would review a revised offer from Kollaras before making a decision. Before any revised offer was received, however, the Respondent (sic) was abruptly dismissed. The Applicant submits, and I accept, that this conduct caused unnecessary angst and stress. Further, it prevented the Applicant from obtaining an employer’s reference to assist in gaining employment despite the fact that at no time did the Respondent assert that there were issues with the Applicant’s capacity or conduct” @53 - dismissal unfair)

### Dismissal – Trust and confidence (loss of)

[\[2013\] FWC 7662](#) **WA** *Shone v Compac Marketing (Australia)* (**financial controller’s** (A’s) “actions and responsibilities for the payroll were applied in such a way to gouge benefits from the company. She had a **responsibility to maintain an audit trail and authorities for payments made. Little supporting documentation could be provided**. ... [A] had an obligation to act in good faith in the best interests of the company, to ensure thorough fulsome disclosure where there was a conflict of interest or even a potential for the appearance of a conflict of interest. She also had **obligations to act with due care and diligence**. ... [A] **had little understanding of these obligations or if she did she did not properly apply them**” @38 - dismissal not harsh etc - Appeal dismissed 20/2/14 in [\[2014\] FWC FB 1041](#))

[\[2013\] FWC 9464](#) **Qld** *Dubow v ATSILS* (A “**acted persistently to undermine and ridicule the Respondent’s processes and procedures and exhibited no respect for management**, despite warnings Reasonably, the Respondent had lost all trust and confidence in its employee to work cooperatively and diligently in its service, and to exercise good judgement on its behalf, particularly given her responsibilities as a **legal officer**” @63-64 - permission to appeal refused 15/4/14 in [\[2014\] FWC FB 2518](#))

[\[2014\] FWC 2060](#) **NSW** *Chahwan & Ghali v Sutherland Shire Montessori Society Inc.* (the A's, who were senior executives with R, were validly dismissed for several reasons including the following: "the extent and nature of the non-compliance concerns which arose from the ... BOS inspection represented a manifest **failure to perform a fundamental aspect of the senior management positions** of the applicants. Secondly, a similar fundamental failure of duty arose from the **non-disclosure to the Board of the BOS concerns** ... Thirdly, the establishment of a Company (AME), which provided a means for the operation of the school if it was placed into voluntary administration, without advice to the Board, created a **breach of fiduciary duty** to the employer" @91 - permission to appeal refused in 13/8/14 in [\[2014\] FWCFB 5390](#))

[\[2014\] FWC 3189](#) **SA** *The Applicant v The Respondent* (the A's behavior in **encouraging a resident of a nursing home to go to current affair programme** with an issue against R provided a valid reason for dismissal - so too did A's **suggestion resident contact politician** and media - dismissal not harsh etc)

#### Dismissal – Urination

[\[2014\] FWC 5330](#) **Vic** *Cowan v Sargeant Transport* (the **A, while making deliveries for R to Woolworths, urinated outside the gate of Woolworths** - this was captured on CCTV and Woolworths banned A from making deliveries for three months - R had a valid reason to dismiss A, but **failed to accord A procedural fairness** before dismissing him - **dismissal harsh** etc)

#### Dismissal – Vilification

[\[2014\] FWC 6568](#) **Qld** *Anderson v Theiss* (see [precis](#) at Dismissal – Email use ...)

#### Dismissal – Wages (failure to pay)

[\[2014\] FWC 1068](#) **Vic** *Siskovska v National Contractors* (the R dismissed A when she **complained about R's failure to pay her wages** - no valid reason for dismissal)

#### Dismissal – Warnings

[\[2013\] FWC 9080](#) **NSW** *Sirijovski v BlueScope Steel (AIS)* (the A was involved in a **safety breach** and was **given a first and final warning of a general nature, including operational performance** - **subsequently he was involved in a performance failure and was dismissed** - he otherwise had an unblemished performance record for 35 years, apart from being a difficult employee - the initial warning was unfair as it was too broad - **"warnings by their very nature need to be precise so that employees can focus on the areas of their performance that need improving"**. This did not happen for Mr Sirijovski. His final warning letter of 19 December 2012 covered issues such as critical operating procedures, operational negligence, wilful misconduct, etc and not the critical safety procedures for which he was being disciplined. As a result, when Mr Sirijovski was operationally negligent on the morning of 21 May 2013 his employment was unfairly in jeopardy. Such an outcome **does not pass the 'fair go' test**" @46-47 - dismissal harsh etc - compensation paid, taking into account that A had missed out on a redundancy package due to his dismissal - appeal allowed 23/4/14 in [\[2014\] FWCFB 2593](#) - held that "Commissioner erred in finding that there was an 'additional' reason for the dismissal, apart from the reason of 'operational negligence'. This was a significant error of fact which affected the Commissioner's consideration of several of the factors referred to in s.387" @33 - "s. 387(e) does not refer only to warnings which relate to the specific kind of performance failure or conduct which has given rise to a dismissal. It is **sufficient that both the warning and the dismissal relate to an employee's "unsatisfactory performance"**" @42 - Commissioner also erred in finding lack of procedural fairness in investigation process - valid reason found for dismissal, but dismissal harsh etc - A awarded 16 weeks pay)

[\[2014\] FWC 1890](#) **NSW** *Riley v Go Electrical* (the A was **late for work on a number of occasions and was informally warned about it** - on the last occasion A was to open the business, but was about two hours late - despite their being no formal written warnings and despite A being **informed of the decision to dismiss him without any opportunity to respond**, dismissal not harsh etc)

[\[2014\] FWC 3033](#) **Vic** *Fulton v PowerMove Distribution* ("when there had been **two previous warnings for failure to follow procedure** a further failure in respect to the same procedure would be a valid reason for termination. In this case the **further failure was a failure to follow a**

different procedure [about absenteeism], however, I am satisfied that the **failure to follow that procedure when considered in the context of the earlier warnings does constitute a valid reason for termination**" @28 - "there had been **no prior counselling about failure to follow the revised procedure concerning absences** and therefore no clear notice of the serious consequences which might follow from a breach might reasonably have affected the decision making process of the Respondent. The failure in this respect is a serious procedural unfairness and it stands in favour of a finding that the termination was harsh and unjust" @32 - **R "proceeded to terminate the Applicant in the belief that he had received earlier counselling** about failure to follow the procedure concerning notification of absence by email" @34 - he hadn't - dismissal harsh)

### **Dismissal – When**

[\[2013\] FWC 1629](#) **Qld** *Harvey v Transpacific Industries Group* (the A "made an application under section 394 ... on 23 November 2012, but subsequently lodged a notice of discontinuance in relation to this application [when he learned on 16/1/13 it was premature as he was still working out his notice period when his application was made]. He then lodged a subsequent application on 23 January 2013" @7 - "[FWA] **advised him that the date of the effective dismissal was the date of his resignation (which was his principal enquiry) but perhaps should have reconsidered that advice once it subsequently became aware that the Applicant was performing duties within an extended notice period**" @14 - A had shown diligence in progressing his action all along the way - exceptional circumstances found)

[\[2013\] FWC 2564](#) **NSW** *Cameron v Metecno* ("if an applicant was dismissed at 9am on a day and made an application pursuant to s.394 of the Act at 12 noon on the same day I am not convinced that it would be unlawful. Since the **applicant in this case received notification of his dismissal late on 7 February** and his **application was received by the Commission registry in Hobart in the morning mail on 7 February** the principle followed by DP Smith in *Truong* is apposite - the applicant was still employed when he made his application and thus his **application was not in accordance with the Act**. This is the basis upon which I have decided it was premature" @33 - A made a second application that was 20 days late - R did not object to extension of time - circumstances exceptional - see [\[2013\] FWC 1999](#) at para. 251 where application that was made on day of dismissal accepted)

[\[2013\] FWC 6386](#) **Vic** *Church v Eastern Health* (the mere **posting of a letter informing employee of termination** does not terminate employment until fact of termination has been communicated to worker - in some circumstances, such as **evasion by a worker**, termination might be effective from date when communication of such might ordinarily have been expected to have been received)

[\[2014\] FWCFB 1070](#) *Mihajlovic v Lifeline Macarthur* (the **Full Bench carefully considered the issues surrounding premature filing of unfair dismissal claims i.e. those filed before dismissal has taken effect** - "Section 394(2)(a) should not be read as itself establishing an anterior time limitation for the filing of an application for an unfair dismissal remedy; rather, it operates on the premise that s.394(1) requires that a person who may file such an application is a person whose employment has come to end at the initiative of the employer. On that premise, s.394(2)(a) requires that the application is to be filed '*within*' - that is, inside the limit of - 21 days after the '*dismissal took effect*'. The use of this latter expression in s.394(2)(a) only is potentially confusing, in that it invites the proposition that the date of a dismissal and the date it takes effect may be two different things. However ... we do not consider that the expression refers to anything other than the time at which the applicant's employment relationship came to an end" @15 - issue of **waiver under s586(b)** also considered)

[\[2014\] FWC 2175](#) **Vic** *Kimpton v Venarchie Ashphalting Pty Ltd* ("a termination cannot take effect, in most cases, until such time as notice of that termination has been communicated to and received by the employee. In addition, termination cannot generally take effect prior to the date it is made known to the employee. In both instances any other outcome obviously has the potential to deny an employee adequate opportunity to pursue any claim or action that might arise from her/his dismissal. However ... a distinction can be drawn ... between the requirement for termination to be made known to the employee before it takes effect, and the requirement for notice of termination to be communicated to an employee before that period of notice commences to run. ... **[U]nable to conclude that a failure to give appropriate notice extends the effective date of termination**

... [I]nstead, such failure might rather give rise to a claim for breach of the relevant notice of termination provisions, '...but it cannot change the date of termination of employment' ... The fact Mr Kimpton can establish he **did not receive the notice of termination until eight days after it was sent** to him cannot be said to have deprived him of the ability and opportunity, within a reasonable time period, to take action in response. He had, in fact, been on notice that Venarchie was ... commencing dismissal procedures in respect of his employment since the letter dated 30 August 2013 was sent to him" @39-42)

[\[2014\] FWC 1982](#) **WA** *Copland v Curtin University of Technology* (when an employee is **not required to work out notice period** and is paid entitlements in lieu of notice, **employment ends immediately**)

[\[2014\] FWC 3504](#) **NSW** *Hudson v Thompson Health Care* (**R wrote a letter to A on 20/12/13 terminating her employment 'effective immediately'** - the letter was allegedly delivered by Australia Post on 30/12/14 (based on tracking service records), but **A says she did not receive it until 8/1/14** - A's evidence accepted, so date of dismissal was 8/1/14)

[\[2014\] FWC 4416](#) **Vic** *Stephenson v Bass Coast Regional Health* (the **A received her termination letter on 7/3/14, but did not open it until days later** - termination date found to be 7/3/14)

### Dismissal – Whether

[\[2010\] FWA 6948](#) **WA** *Ferguson v Buick Holdings P/L* ... (a stern tone and language was used toward A because of performance issues, and it was **recommended by management that he find another job** - **A found to have wrongly interpreted this as a dismissal**)

[\[2010\] FWA 7308](#) **NSW** *Beasley v ANU* (A failed to attend a directed medical examination - R therefore exercised its right under EA to give six month's notice of termination of employment - **A brought unfair dismissal application whilst still employed** (although not working) - application premature - the words '**has been dismissed**' not to be construed prospectively - no jurisdiction)

[\[2011\] FWA 7507](#) **Vic** *Smith v Trustee for R & L Napier Trust* ... (the issue was **whether A resigned or was dismissed** - R's conduct after the alleged dismissal, such as assurances to A that he had not been sacked, operated against finding of dismissal)

[\[2011\] FWA 2154](#) **NSW** *TWU (Australia) on behalf of Horvath v Startrack Express* (the **A's dismissal was not communicated to him until about a year after it occurred** - A was injured and receiving compensation - the time limit for bringing his claim found not to have commenced until R provided employment separation certificate and written advice of dismissal a year later)

[\[2011\] FWA 7476](#) **SA** *Fox v Wilderness Escape Outdoor Adventures* (the A was a casual employee - there was a mutual expectation of ongoing employment - "the fundamental reason for the conclusion of the relationship was that the **[R] was seeking an expression of personal appreciation from Ms Fox, including in relation to the staff housing, and the applicant's failure to do so led to Wilderness purporting to treat her conduct as a resignation** and removing her from the roster and in effect, from employment more generally. ... [T]he cessation of the employment relationship was objectively, the probable result of the employer's course of conduct" @76 - dismissal found - R also had valid concerns about A's future employment intentions, but it had no valid reason to dismiss her)

[\[2012\] FWA 747](#) **WA** *Kurta v Independent Oil Tools* (the A and R had a **very flexible arrangement as to A's working hours** - nevertheless A has averaged 30 hours a week since March 2009 - A "was not entitled to work a set number of days or hours each week - this was dependent as much on available work, as it did, on her availability for work" @72 - **A suffered injuries at work and subsequently was not offered further work** - on the facts, **A had not been dismissed as there was a downturn in the availability of the work** she usually did and a **breakdown in the relationship between A and R** that she needed to play her part in addressing)

[\[2012\] FWA 1087](#) **Qld** *Sietu v Domain Principal Group* (the **A had worked exclusively on night shift** as an AIN with R for about four years - several **complaints were made about her treatment**)



of residents - R, instead of dismissing decided to put A on a performance improvement plan for two to four weeks during day shift - A refused to work during the day as she said she had a day job - A **not found to have been dismissed**, but rather found to have caused her own employment to come to an end)

[2012] FWA 2071 *Vic Mijaljica v Venture DMG* ("whilst the option of a mutually agreed cessation of employment, subject to a termination package was offered to the [A], such an arrangement was not agreed. ... Venture **withdrew the restricted duties previously available to the [A] and advised that it would allow her to resume her pre-injury duties and hours of work upon providing medical clearance**" @22 - R continued to grant A paid leave for a time after this - no dismissal found)

[2013] FWC 545 *Vic Frawley v Australian Carpet Cleaning Services* (R evinced an intention to terminate A's employment by **unilaterally altering fundamental terms of A's employment contract** "by altering the location and working hours of the substantive work of the applicant which applied continuously over her three years of employment with the respondent, with immediate effect" @95 - R also failed to give A adequate instructions about her work or to respond to A's requests for instructions - R, without any proper basis, also alleged A had abandoned employment, and failed to respond to A's letter disputing abandonment - R also did not pay A wages for a time and did not communicate its rectification of this to A)

[2013] FWC 9194 *SA CFMEU v Penrice Soda Products* (**duties of workers changed** due to necessary restructure - on the facts there was no repudiation of their contracts - they were not dismissed and therefore could not take advantage of redundancy provisions)

[2013] FWC 6206 *Vic Gunning v The Seymour Club* (A, who was a **casual with regular and systematic employment**, "**was removed from the roster with no indication when she would return**. She was required to hand back keys necessary to enable her to open and close the venue after having them for over six months" @40 - **the person who removed A from the roster did not have the authority to terminate her employment**, but she acted on the instructions of R to suspend those on the roster with only one or two shifts - **it may not have been R's intent to dismiss A, but termination at employer's initiative found** - no action by R to inform A she had not been dismissed)

[2013] FWC 6832 *NSW Kovac v Aboriginal Legal Service (NSW/ACT) Ltd* (whether termination of employment is the same thing as termination of the contract of employment - the **A was advised without any prior warning that his permanent contract as a lawyer was to end on 18/1/13** due to performance issues - **A was immediately offered a fixed term contract** so that R's remote office would be staffed - **A brought unfair dismissal application in February 2013 whilst still employed** under fixed term contract - **application premature** as A was still employed by R - however, SDP Drake stated that "I am not persuaded that the Commission cannot hear an application lodged after notice of termination of employment is given but before the employment relationship is at an end. ... [E]ven if Mr Kovac has to lodge a further application and seek an **extension of time** for lodgement, given the circumstances, a member might be persuaded that Mr Kovac's case for an extension of time for lodgement was in all the circumstances meritorious" @14-15)

[2013] FWC 6954 *SA Wotton v Skycity Adelaide* (A's dismissal harsh as it occurred without notice, but it was not unjust as there was valid reason for it due to **nine car accidents over a two year period while working as a valet** - question of whether dismissal at employer's initiative as **R offered A casual work in another area, which he refused** - dismissal found)

[2013] FWC 7218 *WA Tuffin v Tom McArthur Ltd* (the A "did not say 'I resign' or 'I am going to resign at a specific date in the future'. What happened ... is that, influenced by family relationships, both parties did not wish to precipitate the notice provisions in the contract of employment by Mr Tuffin either resigning or being dismissed. Consequently, **both parties entered into a variation of the contract of employment, whereby it would come to an end at some time up to three months in advance**. In such circumstances, the Employer did not have to accept or refuse Mr Tuffin's resignation. Likewise, the Employer was not placed in the position of having to dismiss a

family member without a job to go to with four weeks notice" @57 - the agreement for the ending of A's employment was not reduced to writing, but objectively, based on the parties' conduct, A's employment was ended mutually)

[\[2014\] FWC 1344](#) **Qld Hughes v Trident LNG Shipping Services** (the A was a **casual employee** whose work was perhaps on the borderline of being regular and systematic, although this was not finally ruled upon - A had **failed a drug test** at work and had been stood down - A was uncertain of his future employment as the issue of his failed drug test was taking time to finalize - he **had not been advised he was dismissed, but heard a rumour he had been and had not been offered work for some months** - no dismissal found)

[\[2014\] FWC 3106](#) **Vic Bartlett v Jagdaim (Australia)** (there was a **misunderstanding** when A told a director of R that he'd be looking for another job - **R thought A had resigned and offered A payment in lieu of notice, which A accepted** - dismissal found rather than resignation)

[\[2014\] FWC 4289](#) **WA Mitchell v CJ WA** (whilst on annual leave, A was contacted by text message about a dispute regarding her hours and asked to attend a meeting - A said she would attend a meeting later when she returned from leave - **R proposed a mutual agreement to terminate her employment - A did not respond**, and did not return to work after her leave expired - no dismissal found)

[\[2014\] FWC 4173](#) **WA Cole v Rydlyme International** (A "returned from two weeks' annual leave, immediately went on two weeks' sick leave, advised his father that he intended to resign his employment in January/February but would not be returning to work in the intervening period. When Dr Cole took issue with this proposed course of action to be adopted by his son, Mr Cole resigned" @43 - "The **relationship between father and son, employer and employee was very fractious. ... Mr Cole had made up his mind to leave his employment and following a very disagreeable conversation with his father, resigned and walked out of his father's office.** Following a further altercation ... Dr Cole flew to Indonesia and shortly afterwards ... put in writing acceptance of his son's resignation and advising him that his employment would cease on 16 December 2013" @46-47 - **A later claimed he had only stated his intention to resign, but hadn't resigned** - resignation found)

[\[2014\] FWC 7571](#) **NSW Cochrane v Petrolink Engineering** ("an **email advising colleagues that an employee was taking a day off** (whether in breach of policy or not) ... [not] an action that could bring an employment relationship to an end" @20 - CEO of R **responded by strongly advising A to submit his resignation** "whilst I can still provide a work reference and before I have to get involved in further performance issues" @8 - "about one hour after that email was sent, Petrolink **disconnected Mr Cochrane's work email account and mobile phone**" @9 - it was reasonable for A to conclude he had been dismissed)

[\[2014\] FWC 7191](#) **Vic Drakakis v Care Commercial Building Solutions** (the A "**considers that he was dismissed because he was appointed as a production manager in April 2013, and then in November 2013 another person took over some or all of his duties, and he undertook other duties** [no demotion found] ... He also claims that he was dismissed on 15 May 2014 when he ceased one of the short term jobs the employer gave him to tide him over the job search period. He had asked the employer in his resignation letter of 7 February 2014 to nominate a day 'on which I can finish up on'. He accepted the new work, and continued to accept the benefits of the work, the pay and conditions for 6 months after the change in November 2013 which he says forced his resignation" @4 - "**There is a point at which an employee can no longer reasonably claim that he was forced to resign**, otherwise an employee could simply 'bank' conduct in the past and then act on it when he considers it advantageous. It is difficult to sustain an argument that a resignation in February 2014 was caused by an event in November 2013, when Mr. Drakakis had accepted the work and had engaged in that work since that time" @23 - A's "email resignation ... specifically provided for the company ... to 'let him know when I can finish up'. He did not specify a specific date but left it to his employer. His employer was considerate in letting him continue to work, including offering ... 'short term' pieces of work - no dismissal)

[\[2014\] FWC 8115](#) **Tas** *Lynch v Price Removals and Storage* (**casual employee** - supervisor found to have **ostensible authority to dismiss** him - R claimed there was just a downturn of work and that A had not been dismissed - text message exchange between A and his supervisor indicated A had been dismissed - dismissal found)

#### **Dismissal – Workers compensation issues**

[\[2014\] FWC 2855](#) **ACT** *Sukloska v Serco Sodexo Defence Services* (“obligation on employers in certain circumstances to provide modified duties for injured employees for a reasonable amount of time to enable the employee to recover from their injury or illness” @55 - **R “had supported the applicant in allowing her to perform modified duties for four years** in an attempt to facilitate her rehabilitation to performance of her pre injury duties. Despite this support, the respondent received a **clear indication from a medical practitioner that ongoing support would be required into the future**. I am satisfied that in these circumstances there is a valid reason for termination” @55)

[\[2014\] FWC 3805](#) **SA** *Larchin v Marnikol Fisheries* (the A worked on a fishing boat and suffered consecutive compensable injuries at work - R’s generalised claims that **A was clumsy at work and a danger to himself and others** did not provide a valid reason for dismissal)

[\[2014\] FWC 5566](#) **Qld** *Ciuzelis v Jones* (A “was employed by Mr Jones as an Office Manager on a full time basis from 4 July 2011 until her dismissal on 6 June 2013. Ms Ciuzelis was absent from work from 10 May 2013 because of a back injury which she alleges was originally sustained on 5 July 2012 while at work. The cause of the injury and whether it occurred at work is in dispute and was the subject of a Workers’ Compensation claim which was ultimately rejected. Ms Ciuzelis was **cleared to return to work on 10 June 2013**. There were issues with her return to work and **before she could do so Mr Jones sold his business** to Greencross Limited. Mr Jones asserts that Greencross was under no obligation to offer employment to any employees but that employment was offered to all of those who were at work. Ms Ciuzelis was not at work when the sale was effected and was accordingly made redundant. Ms Ciuzelis contends that she was dismissed because she injured her back at work and took the appropriate action to seek treatment for her injury and that her dismissal was unfair” @2-4 - **before R’s business was sold R employed a casual to take A’s position, and gave this person’s name to Greencross, who employed her** - no genuine redundancy found - A found to have been unfairly dismissed and awarded compensation of \$18,397.85 less taxation)

#### **Drug & alcohol award, EA provisions & policy**

[\[2014\] FWC 2404](#) **NSW** *DP World Brisbane v MUA* (**stay of decision amending A’s drug and alcohol policy granted** - “the Decision raises significant issues relating to the jurisdiction and power of the Fair Work Commission to make orders under s.739” @8 - “the balance of convenience favours the granting of a stay on the basis that significant confusion would flow and resources would be required to be expended if DP World were to modify its drug and alcohol testing procedures in line with the Deputy President’s Order and, should the appeal be allowed, subsequently return to the status quo” @11 - Appeal allowed 6/11/14 in [\[2014\] FWC 7889](#) - “**clause 17.8 provided that ‘The parties acknowledge the Company’s drug and alcohol policy will incorporate a testing regime which includes random drug and alcohol testing and will utilise swab testing.’** From a reading of the clause it is clear that it provides a policy which incorporates a testing regime that includes random drug and alcohol testing. This is not disputed. However, the words ‘and will utilise swab testing’ are ambiguous in that they can be interpreted to mean either that oral swab testing be the sole form of testing ... or but one form of testing ... Put simply, the words can be read and interpreted in either an exclusive or non-exclusive way” @35 - “in circumstances where there was doubt about the meaning of the clause, Deputy President Booth should, with respect, have turned to the surrounding circumstances and context to determine the dispute before her, i.e. the interpretation of clause 17.8 ... Deputy President Booth concluded that it was necessary for her to consider the merit of using urine for the second test. In doing so, Deputy President Booth fell into significant error. This is because the dispute before the Commission did not concern whether it was appropriate for urine testing to be used for the second test or whether its use was unjust or unreasonable - but, rather, whether clause 17.8 permitted or precluded urine testing for the second or confirmatory test” @37-38 - “The **surrounding**

circumstances and context in this case support an interpretation of clause 17.8 that it does not preclude the use of urine testing for the second or confirmatory drug test" @41)

#### Employee (whether)

[\[2013\] FWC 6715](#) **Vic** *Dick v Voros* (A "never intended to create a **bailor/bailee relationship** and ... the Respondent never intended to create an employer/employee relationship ... [B]oth the Applicant and the Respondent intended to create a relationship in which the **Applicant drove a taxi operated by the Respondent and in return was to be paid 48% of the fares taken**. It is this intended relationship which continued for 16 years until it was terminated by the Respondent" @142-143 - "The Applicant was clearly and unambiguously not carrying on a business of his own but is clearly and unambiguously providing his personal labour to the Respondent for the benefit of the Respondent's business" @169 - A considered to be an employee - Appeal allowed 4/12/13 in [\[2013\] FWC 9339](#) - "neither under the terms of the oral agreement between them or under the arrangement as it operated in practice was Mr Dick required to perform any work or provide any services for the benefit of Mr Voros. ... [O]nce he had taken possession of Mr Voros's taxi, Mr Dick was free to perform as much or as little work with it as he liked ... without any reference to Mr Voros. Thus the provision of a taxi service by Mr Dick to any customer is properly to be characterised as a contractual arrangement between Mr Dick and the customer freely entered into by Mr Dick ... Mr Voros did not make any payment to Mr Dick for the provision of any work or services. Rather, Mr Dick paid Mr Voros an agreed percentage, less the cost of fuel, of the fares he had collected from his customers as the fee for the 'hire' or 'rental' of the taxi ... The Commissioner's use of the common law criteria developed to distinguish between an employer-employee relationship and a principal-independent contractor relationship distracted him, with respect, from the real question: was Mr Dick an employee of Mr Voros? **The starting premise for the application of those criteria, being as earlier stated the existence of a contract whereby one party was engaged and paid by the other for the provision of work or services, was simply not present here, with the result that the contract between Mr Dick and Mr Voros could never have been characterised as either an employment contract or a contract for services**" @14-16 - various cases involving taxi drivers considered)

[\[2013\] FWC 7171](#) **Vic** *Kent v Trustee for Hikri Family Trust* (the **R engaged A to pack fruit and drive its van to deliver products to offices** - there was no written contract and A "did not receive holiday pay or personal leave and ... no income tax was deducted and no superannuation was paid for the period" @7 - A worked exclusively for R and was paid a set fee for each day worked - A's start times determined by R - A was an **employee**)

[\[2013\] FWC 7595](#) **Vic** *Haslam v Fazche* (**sales representatives** found to be contractors - it was significant that there was no minimum number of working hours and there was the right to assign work)

[\[2013\] FWC 7633](#) **Vic** *Jervis v Melbourne Pub Group* (the **A marketing and events manager found to be an employee despite refusing R's offer of employment and herself proposing an independent contractor relationship** - A worked full-time for R at R's premises, under R's control, presenting herself as an emanation of R and without any ability to delegate or subcontract - despite billing R for her work, not being subject to PAYG taxation and not receiving paid leave, A still found to be an employee - FWC discussed **principle that "an offer of employment is a significant indicator that the relationship which follows is in fact the same nature as the relationship which the offer went to"** @30 (see from para. 69))

[\[2013\] FWC 7827](#) **WA** *Upton v Geraldton Resource Centre* (time spent by A on a **vocational placement as a graduate lawyer on unpaid practical legal training (PLT)** was not time spent as an 'employee')

[\[2013\] FWC 5221](#) **Vic** *Tsolacis v St Vincent's Hospital (Melbourne)* (the A, after advertising for work with R, provided engineering services to R over a period of time and invoiced R for these services - A worked for others as well - he was **running his own business** - the balance was not a fine one - A was clearly a contractor - **appeal dismissed** [\[2013\] FWC 7040](#))



[\[2014\] FWC 1615](#) **Vic Frances v U Blinds Shutters & Awnings** (the A was initially engaged as a contractor with the title of sales manager - later he became an **area manager** - A “was responsible for his own tax affairs, he supplied an ABN number to the Respondent and he understood that he was employed as a contractor. He was not supplied with or required to wear a company uniform of any sort. He had flexibility with his hours of work notwithstanding that he effectively worked full time. He was not paid superannuation nor provided with paid holidays” @43 - R “**presented the Applicant as an emanation of the business**. The Respondent provided him, of their own accord, with a business card that prominently featured the logo of the Respondent and referenced the Applicant as its Area Manager. There is no evidence to support the proposition the Applicant or his company ‘KK and S Service’ was operating any other business outside of the work the Applicant performed for the Respondent”@33 - **A & R’s treatment of the relationship as an employer/contractor relationship cannot alter the true nature of the relationship** - A was an employee)

[\[2014\] FWC 1252](#) **SA Bertok v Haslan** (a **chauffeur** operating his own vehicle for R with R’s signage and uniform found to be an independent contractor)

[\[2014\] FWC 5009](#) **Newcastle Spiers v Bodycraft Tatoo Belmont** (the A worked as a **tattooist** at R’s premises sharing with R 50% of the fees he was paid - A built up his own clientele - the arrangement was quite flexible and A not paid any leave entitlements A an independent contractor)

[\[2014\] FCCA 1327](#) **Morrow v Tattsbet Limited** (the **A managed and operated R’s TAB agency for profit** - there were many features suggesting A was not an employee including her being able to claim a tax deduction for labour expenses as an employer of those who worked at the agency - nevertheless, in a finely balanced case, A was not found to be operating her own business and was found to be an employee - this was particularly due to “the measure of control provided for in the contract between the parties, together with the evidence of the way in which that control was exercised” @69)

#### **‘Employee’s company base’**

[\[2014\] FWC 3491](#) **ALS Industrial v AMWU** (interpretation of meaning of ‘employee’s company base’)

#### **Employer – Who is?**

[\[2013\] FWC 2813](#) **NSW Henry & Ors v FP Group Pty Ltd & Tooheys Pty Ltd** (the issue was **whether various employees were employed by FP, a labour-hire company, or Tooheys, where they worked on a long term basis** - concept of **joint employment considered**, but rejected - after construing the contractual arrangements and considering various aspects of the working relationship, FP determined to be the employer - see also commentary below - permission to appeal refused 17/12/13 in [\[2013\] FWC 9605](#))

[Henry] [\[765\]](#) It may be accepted that the **principles to be applied in the identification of the employer of an employee, where there is two or more contenders, were conveniently set out in the decision of Finn J in C&T Grinter Transport**. While His Honour was there dealing with the liquidation of two companies under the *Corporations Act 2001* (Cth), I consider the following principles therein recited are applicable in this case. These are:

1. A contract of service cannot be transferred by one employer to another or novated as between them without the employee’s consent. Questions of estoppel apart, the employee’s consent must be a real one whether express or implied and is ‘not to be raised by operation of law’.
2. The totality of the circumstances surrounding the relationships of the various parties including conduct subsequent to the creation of an alleged employment relationship is relevant to the assessment to be made.
3. Documentation created by one or more of the parties describing or evidencing an apparent employment relationship will be relevant to, but not necessarily determinative of, the true character of that relationship. In determining the identity of a disputed employer, the Court is entitled to consider ‘the reality of purported contractual arrangements’. The documentation may have been brought into existence for other purposes, for example, tax minimisation or the reduction of insurance

premiums, without reflecting the reality of the parties' relationship. **Henry & Others v FP Group Pty Ltd & Tooheys Pty Ltd** 31/7/13 [\[2013\] FWC 2813](#) Sams DP  
**Permission to appeal refused** 17/12/13 in [\[2013\] FWC 9605](#)

#### **Employment – Date of commencement**

See [Contract of employment/service](#), s383(a) & [s384](#)

#### **Evidence**

[\[2014\] FWC 5743](#) *CFMEU v Delta Coal Mining* (principles for adducing **additional evidence on appeal** set out at paragraph 3)

[\[2014\] FCCA 2397](#) *Bland v Australian Portable Camps Services* (**preliminary rulings on admissibility** in the case of alleged adverse action for exercising a workplace right)

#### **Ex-gratia payments by employer**

[\[2013\] FWC 10178](#) *Allied Color & Additives Pty Ltd v Birch* (“no error is revealed by a failure, explicitly or implicitly, to discount a compensation payment on the basis that an ex-gratia payment had been previously paid to the employee” @18)

#### **Extra-territorial issues**

Howard L & Elliott M, ‘*Seconding and Transferring Australian-Based Staff to Work in International Locations*’ (2013) 17(2) IHC 30

#### **Flexibility clauses/agreements**

[\[2013\] FWC 8859](#) *Modern Awards Review 2012—Award Flexibility*

#### **Foreign employees/workers**

[\[2014\] FWC 964](#) *Vic Smallwood v Ergo Asia* (“The **Applicant is in Australia on a 457 visa**. In August 2012 she sought employment with the Respondent. At around the same time she sourced Geoffrey Nathan Consulting (GNC). **GNC appear to provide migration services, including 457 visa sponsorship and the on-hiring of those individuals to organisations**” @5 - A’s employment was terminated by GNC in 2013 after a complaint about her conduct and A brought an unfair dismissal claim against R - R objected that it was not A’s employer - R succeeded on a number of grounds - a contract had not been formed with it and such a contract if made would have been an illegality as R was not A’s sponsor; rather GNC was)

[\[2014\] FWC 1149](#) *Vic Pope v D & E Air Conditioning* (“The impact on Mr Pope of the termination of employment was to him devastating. Whilst the employer appeared to be unhappy with his performance, he did not understand that his employment was in jeopardy. Mr Pope was married to an Australian citizen and was on a visa which required him to be in known employment. **The impact of his termination left him in a position where he was facing being removed from Australia and not being able to work.** This was within the knowledge of the employer. **To terminate the employment of a person in these circumstances without any warnings or notice of poor performance is harsh.** Mr Pope had to move back to Brisbane where he relied upon his parents-in-law while he sought to remain in the country” @10)

[\[2014\] FWC 4486](#) *SA McNally v Neale Taylor Plumbing* (**performance issues provided a valid reason** to dismiss A, although dismissal was a **disproportionate** response - A also **denied opportunity to improve his conduct** due to flaws in procedure in dismissing him - “The employer’s decision not to extend its sponsorship of the applicant’s visa, contrary to the advice Mr Taylor provided in December 2013, meant that the applicant had only 8 days after his dismissal until his visa expired. There was insufficient time for him to find new employment and a new sponsor. He decided to enrol in TAFE which allowed him to stay in Australia on a study visa, but he had to take out a personal loan of \$11,500 to cover the training costs. I consider that the manner of the dismissal created hardship for the applicant above and beyond the general hardship usually associated with a dismissal” @60 - dismissal harsh)

[\[2014\] FWC 3751](#) *Vic Ismailov v Highsoftware Australia* (**A’s redundancy was not genuine as he had not been adequately warned or consulted** - the termination of A’s employment “was as a result of a redundancy having regards to the operation needs of the enterprise. However ... the

**termination of employment was, overall, harsh.** Hisoftware had sponsored Mr Ismailov on a **457 visa**, which meant that upon the termination of his employment he had to find other suitable employment or leave Australia. His personal circumstances were known to Hisoftware and yet it **chose to dismiss him and present a deed of release at the same time** to deal with his statutory entitlements" @21-22 - two week's salary awarded as compensation)

[\[2014\] FWC 5023](#) **ACT** *Mori v Embassy of Peru* (the **A was from Peru and worked and lived in the Peruvian Embassy in Canberra** - she was given notice of the premature termination of her employment contract and was asked to go back to Peru almost immediately - she took refuge outside the Embassy and brought unfair dismissal application about 85 days late due to a combination of reasons including R's late written notice of her dismissal, ill-health, inability to speak English, **uncertainty as to the legality of her presence in Australia** and her limited financial means - jurisdictional point not decided - **combination of reasons amounted to exceptional circumstances**)

### **General Retail Industry Award 2010**

[\[2013\] FWCFB 8539](#) *Joseph v Amandon* (a **supervisor of travel consultants** covered by this award or the *Clerks (Private Sector Award) 2010*)

[\[2014\] FCAFC 118](#) *National Retail Association v FWC* (The FCAFC confirmed decision "to vary the *General Retail Industry Award 2010* ... to require that **20-year-old retail employees** who had worked for an employer for more than six months be **paid at adult rates**" @1 - the NRA contended that "Item 6 requires a two-stage decision making process in which separate decisions are required at each stage. The approach essentially involved dividing the item into two distinct processes: the first – the review stage – regulated by Item 6(2) and (2A), and the second – the variation stage – regulated by Item 6(3) and (4). This construction of Item 6 was fundamental to ground (ii) and also taken up by ground (i)" @54 - such contention rejected - see also [precis](#) below at FWA (Trans. Prov. ... Sched. 5 Item 6)

[\[2014\] FCAFC 148](#) *TWU of Australia v Coles Supermarkets* (**Coles Customer Service Agents delivered goods which had been ordered on-line** - the Road Transport ... Award applied to their employment because "the definition in question expressly extended to work ancillary to the principal business" @22 - however, "the classification of Retail Employee Level 1 [in the General Retail Industry Award 2010] was a more appropriate classification than Transport Worker Grade 2)

### **High income threshold**

See FWA Cth [s382\(b\)\(iii\)](#)

Please note that from 1 July 2014 the threshold excluding employees from the unfair dismissal regime increased to \$133,000.

### **Inclement weather clause**

[\[2014\] FWC 1720](#) **SA** *CFMEU v Form 700* (interpretation of *Form 700 Pty Ltd/CFMEU Enterprise Agreement* and workers obligations to work in **hot weather**)

### **Interpretation**

[\[2014\] FWCFB 6153](#) *CPSU v State of Victoria (Dept. of Justice)* ("it now seems clear that **ambiguity in an instrument need not be found before recourse to contextual surrounding circumstances may be had**" @11)

### **Joinder**

[\[2014\] FWC 4133](#) **Vic** *NUW v Caterpillar ... & NUW v Hoban Recruitment* (the **NUW brought actions on behalf of two labour hire workers against host employer, but not against labour hire company** - adverse action claims involved - host employee claimed poor performance and failure to comply with policy were behind its decision to cease providing work to workers - joinder of labour hire company sought - extension of time issues pursuant to ss. 365 & 366 - discretion to order joinder not exercised)

### **Junior rates of pay**

[\[2014\] FWCFB 1846](#) *Modern Awards Review 2012 - General Retail Industry Award 2010 - Junior Rates* ("**appropriate that 20 year old retail employees should be entitled to adult rates of pay**")

**provided that they have worked for the employer for more than six months.** This would recognise the work performed by experienced 20 year old employees in the retail classifications and would provide an appropriate balance between the various considerations relevant in the setting of junior rates generally and in the context of the retail industry” @172 - General Retail Industry Award 2010 varied - change to rates of 20 year olds to be phased in over 2014-2015 - appeal dismissed in [\[2014\] FCAFC 118](#))

### **Jurisdiction**

[\[2014\] SAIRC 14](#) *Brennan v TCFUA & Ors* (A “was employed as a secretary of the TCFUA South Australia Branch, this branch being known by different names as it amalgamated with different branches over time” @41 - A finished his employment in 2006 - A joined “more than one party due to the conduct of the TCFUA in amalgamating different entities. It follows that the applicant probably had more than one employer historically even if he only ever had one employer at a time” @42 - **indicia for being a separate legal entity** listed at para. 53 - “There is nothing to suggest that prior to 3 June 2008 the Textile, Clothing and Footwear Union of South Australia existed and could be a party to a contract of employment with the applicant. The proceedings against the second respondent are a nullity, there is no jurisdiction and therefore the proceedings must be dismissed” @85-86 - “**a branch of a federally registered organisation has no separate existence as a juristic person.** The first respondent is a branch of the TCFUA, a federally registered organisation. The first respondent is incapable of being a respondent. The proceedings as against the first respondent are a nullity and must be dismissed” @88-90)

[\[2014\] FCCA 2206](#) *Amponsem v Laundry (Exhibition)* (**Federal Court’s jurisdiction** - “This Court does not have jurisdiction to deal with a claim for **damages for breach of an employment contract**, or a claim for **equitable compensation for breach of fiduciary duty**; not unless such claims form part of a single ‘matter’ – that is, a **single justiciable controversy** – which includes claims over which the Court does have jurisdiction” @9 - jurisdiction to hear claim for unpaid annual leave - therefore jurisdiction to hear issues of damages for breach of contract and equitable compensation in R’s cross-claim - alternative submission that **s18 of the FCCA Act re ‘associated matters’** provided jurisdiction did not succeed)

### **Jurisdictional challenge – Standard of proof**

[\[2013\] FWC 6715](#) *Vic Dick v Voros* (“Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence” @2 quoting High Court)

### **Implied terms**

[\[2013\] SASC 182](#) *Hand* (**council CEO (P) was employed on a contract for an indeterminate period** - no award applied and P had no legislative entitlement to a remedy for unfair dismissal - his working relationship with the mayor deteriorated and he volunteered to resign - parties could not agree on terms of resignation - **council terminated P’s employment giving nine month’s notice** - P claimed his termination and the notice he received were void for non-compliance with s97 of the Local Government Act SA (‘the Act’) - summary dismissal pursuant to s97(1)(a) considered - misconduct justifying summary dismissal not established - Justice David “read the term ‘specified’ in s 97(1)(b) [of the Act] such that it catches relevant implied terms in employment contracts, and specifically, the **implied term that an indeterminate contract may be terminated with reasonable notice.** The result of this is that s 97 does not exclude the implied term, and **termination on reasonable notice will comply with s97**” @88 - P was 59 at trial, had worked for D for 30 years and held the most senior position at the D - 12 month’s notice was appropriate and A awarded damages of \$27,884 approximately representing his shortfall of salary given the nine month notice period - Appeal dismissed [\[2014\] SASCFC 90](#) - “The question in the present case is **whether the reasonable notice implied term which is included in the parties’ contract at common law permitted the period of reasonable notice to commence during and to expire after a period of long service leave then being enjoyed.** ... I see no basis upon which that cannot be so. There is no question of Mr Hand being deprived of his long service leave entitlement. He enjoyed full pay whilst on leave from his employment duties in accordance with his entitlement under the rules of long service leave” @111)



[\[2013\] SADC 99](#) *Brennan* (submission rejected “that a term requiring that **reasonable notice be given in the event of a redundancy** was an implied term of all employment contracts which did not contain an express term dealing with notice, or payment in lieu of notice, on redundancy ... It amounts to an argument that the term is implied as a matter of custom, and there is no evidence before me of such a custom presently existing” @32 - “Had the SAMSO Award not applied to the second employment contract, then the result would have been different. In those circumstances, there would have been no applicable way of calculating Ms Brennan’s entitlements upon redundancy without the implication of a contractual term, and all five of the requirements for an implied term would have been present. Had the SAMSO Award not applied to the contract of employment, then, in all of the circumstances, including Ms Brennan’s age of 54 years old at the date of redundancy, her service to the Council of 3 years and 7 months, her experience, her seniority, the regional location of the Council and the fact that Ms Brennan and her husband relocated to Kangaroo Island in order for Ms Brennan to take up the initial position with the Council, I would have determined that it was an implied term of the second employment contract that Ms Brennan be given 6 months notice of termination upon redundancy, or payment in lieu of notice” @35 - **Appeal dismissed** 20/12/13 in [\[2013\] SASCFC 151](#))

[\[2014\] HCA 32](#) *Commonwealth Bank of Australia v Barker* (the R was made redundant, and his employer, by its actions, denied R the opportunity of redeployment - the High Court considered **whether “under the common law of Australia, there is a term of mutual trust and confidence to be implied by law in all employment contracts”** @1 - the High Court unanimously found against the implication of such a term - duty of fidelity distinguished by majority at para. 40 from implied duty of trust and confidence)

### **Live-in employee**

[\[2014\] FCCA 259](#) *Johnson v Monti-Haitsma Enterprises Pty Ltd* (**award coverage** - live-in motel manager not found to be covered by Motels, Accommodation & Resorts (State) Award or Hospital Industry (General) Award 2010)

### **Living away allowance**

[\[2014\] SAIRC 31](#) *Burge v Barry Perrett* (meaning of ‘**major rest break**’ considered - **truck driver underpaid** allowance)

### **Loading/unloading**

[\[2014\] SAIRC 31](#) *Burge v Barry Perrett* (the A “stood clear of the vehicle whilst machinery was used to both load and unload the various items that he carried. He did remove and put on restraints and would guide the load onto the trailer but that was the extent of his involvement. In my view this does not amount to being ‘**physically engaged in the loading or unloading** of the vehicle” @44)

### **Location for proceedings**

[\[2014\] FWC 2758](#) *WA Jarman & Valentine v Cygnet Capital* (application made in Perth registry - **R failed to convince FWC that proceedings should be transferred to Melbourne** - observations on evidence by video link)

### **Meal breaks**

[\[2014\] FWCFB 1573](#) *TWU – Road Transport Industry* (in the context of a review into the variation of an award the Full Bench considered a clause dealing with “**the rate of pay to be payable for meal breaks after ordinary hours and before overtime is worked**” @2)

[\[2014\] FWCFB 5518](#) *Blake v Prosegur Australia* (interpretation of clause regarding meal allowance for **meal breaks required to be taken in armoured vehicle**)

### **Monetary claims**

[\[2013\] SAIRC 47](#) *Collins v GK Corporation* (the parties had not specified what they meant by ‘**40% profit share**’ - IM Lieschke concluded “the reference to 40% profit share is clear and unambiguous. It means the applicant was entitled to 40% of the profit of the business operations of the respondent during the relevant period. Whilst ... the period stated in the contract does not

neatly align with a financial year given that the applicant's potential entitlement to a profit share commenced after six months on 2 August 2011, it is a simple arithmetical task to apportion the profit of the corporation calculated over the financial year to the period of entitlement under the contract of employment" @30)

### Multiple applications

[2014] FWC 1048 **NSW** *Viera v AWA Ltd* (the A "lodged an Unfair Dismissal application on 8 November 2013 and on 13 November 2013 he discontinued the General Protections application. AWA Ltd objected that this application could not be made because the ... [Act] prevents multiple actions being made concerning the same dispute and should be dismissed because it was out of time" @1 - "the **General Protections application had not been validly made since it was out of time** and no extension of time in relation to it had been granted. This meant that Mr Viera's Unfair Dismissal application could be made" @14)

### Notice

[2014] FWC 437 **Vic** *Callahan v Graphic Impressions* (notice of termination clause implied - various factors considered in calculating the **appropriate period of notice for a shareholder and director** - "The assessment of a period of reasonable notice is to be determined having regard to all of the circumstances that applied as at the date that notice is to be given rather than the date on which the contract of employment commenced" @112 - four months appropriate)

### On-call clauses

[2013] FWCFB 8166 *Presbyterian Care Tasmania Incorporated* (see re interpretation of clause concerning the quantum of the minimum payment required to be made to employees who are recalled to work after leaving the workplace)

[2014] FWC 5820 **Vic** *Sheldrick v Hazeldene's Chicken Farm* (the A's **unwillingness to accept significant variation to employment contract** regarding on-call arrangements without further negotiation did not provide a valid reason for dismissal)

[2014] FWC 5291 **SA** *Kiley v Thiess Services Adelaide* (see re **interpretation of recall provisions in EA and requirement to pay overtime**)

### 'Ordinary day'

[2014] FWCFB 2823 *ASU v Hobson's Bay City Council* (the EA provided "*inter alia*, at clause 39.2 of Part B, that employees 'with twelve months service or more will be entitled to have twelve ordinary days leave (pro rata for Part-time) credited to the employee in respect of the ensuing year, without loss of pay'. Employees with less than twelve months service are entitled to 'leave of absence of one ordinary day for each completed calendar month of service, without loss of pay' - meaning in this context of 'ordinary day' considered)

### Out of hours conduct

See [Dismissal – Out of hours conduct](#)

### Overpayment

[2014] SAIRC 33 *International Cleaning Services (Australia) P/L v Mullaney* (the **A overpaid R about double her salary for six months** - R initially questioned her supervisor about the payments she received - **R held to have acted in good faith, not realizing she was being paid more than she was entitled** - R quit her second job due to earning sufficient income with A - R also detrimentally and irreversibly took out a loan - R not required to repay monies - A may be able to recover mistaken tax and superannuation payments from ATO etc)

### Overtime rates

[2014] FWCFB 379 *Australian Municipal, Administrative, Clerical and Services Union* (this case involved a review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHCDS Award) in relation to **overtime penalty rates for casuals** as there was a divergence between the way they were treated as compared to other employees - "The provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will

be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees. The variation is, we consider, appropriate to remedy the issue of casual employees not being entitled to overtime rates which this review of the SCHCDS Award has identified, having regard to the modern award objective in s.134" @44)

### Part-time employees

[2014] FWCFB 129 *Leading Age Services Australia NSW-ACT* (variations to Aged Care Award 2010 considered - clause 10.3 regarding **part-time employees** and its interrelationship with clause 22.6 regarding **rosters** considered - "part-time employees could not be required to work additional hours without their written consent" @16 - clause 15.4(a) regarding **meal allowances** and clause 28.2 defining **shift workers** and dealing with the **quantum of their annual leave** considered)

### Penalty proceedings – Approach to

[Luka Tippers] 22. The authorities establish that the appropriate penalties are to be determined as follows.

23. The first step for the Court is to identify the separate contraventions involved. Each contravention of each separate obligation found in the FW Act is a separate contravention of a civil remedy provision for the purposes of s.539(2) of the FW Act.<sup>[1]</sup> Section 557(1) of the FW Act provides for treating multiple contraventions of the same provision, involved in a course of conduct, as a single contravention.

24. Second, to the extent that two or more contraventions have common elements, this should be taken into account in considering what an appropriate penalty is in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondents did.<sup>[2]</sup> This task is distinct from and in addition to the final application of the 'totality principle'.<sup>[3]</sup>

25. Third, the Court will consider an appropriate penalty to impose in respect of each contraventions, whether a single contravention, a course of conduct or group of contraventions, having regard to all the circumstances of the case.

26. Finally, having fixed an appropriate penalty for each contravention, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the contravening conduct.<sup>[4]</sup>

The Court should apply an 'instinctive synthesis' in making this assessment.<sup>[5]</sup> This is known as the 'totality principle'.

27. The factors relevant to a penalty for a contravention of the [Fair Work Act](#) have been set out in a number of decisions of the Federal Court such that the factors which are to be considered in relation to penalty for the agreed contraventions in this matter are now well established. Those factors have been referred to in the submissions filed by the parties.

28. The following factors identified by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 have been described as a helpful list of considerations that are relevant to the determination of penalty in matters such as those presently before the Court:<sup>[6]</sup>

- a. the nature and extent of the conduct which led to the breaches;
- b. the circumstances in which that relevant conduct took place;
- c. the nature and extent of any loss or damage sustained as a result of the breaches;
- d. whether there had been similar previous conduct by the respondent;
- e. whether the breaches were properly distinct or arose out of the one course of conduct;
- f. the size of the business enterprise involved;
- g. whether or not the breaches were deliberate;
- h. whether senior management was involved in the breaches;
- i. whether the party committing the breach had exhibited contrition;
- j. whether the party committing the breach had taken corrective action;
- k. whether the party committing the breach had cooperated with the enforcement authorities;
- l. the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- m. the need for specific and general deterrence.<sup>[7]</sup>

While the above factors are a 'convenient checklist', they do not proscribe or restrict the matters which may be taken into account in the exercise of the Court's discretion."

*Director of the Fair Work Building Industry Inspectorate v Luka Tippers & Excavation Pty Ltd & Anor* 7/7/14 [2014] FCCA 1459 Judge O'Sullivan

## Penalty rates

See *Restaurant and Catering Association of Victoria* at [Restaurant Industry Award 2010](#)

## Piecework

[\[2013\] FWC 6877](#) **WA** *Carvalho v J-Corp* (A “is paid a rate of commission for each home that he sells, irrespective of how many hours he works. If he does not produce any output in terms of sales, he is not paid commission, and has not and will not receive any remuneration” @49 - Regulation 1.09 and 1.12 considered - A is a pieceworker - “He is paid on the basis of a quantifiable output” @53)

## Professional Employees Award 2010

[\[2014\] FWC 4427](#) **Vic** *Bateman v Communications Design & Management* (the A was qualified as a **professional engineer** - his **employment “as a Senior Project Manager in the information technology industry** was not covered by the ... Award” @50)

## Public holidays – Part day

[\[2013\] FWC 8938](#) Modern Awards Review 2012 (Schedule X.1 (g), appearing in 113 modern awards, considered in relation to part day holidays on Christmas Eve and New Year’s Eve)

## Real Estate Industry Award

[\[2014\] FWC 253](#) **Qld** *SSKB Executive Services* (**facilities manager** not covered by award)

## Reasons – Duty to give adequate reasons

[\[2014\] FWC 2777](#) *ANMF v Barwon Health* (see from para. 90 re **FWC’s obligation to give adequate reasons**)

## Recall provisions

See [On-call clauses](#)

## Redundancy

See [FWA s389](#)

[\[2014\] SADC 170](#) *Bampton v Viterra Ltd* (the P was **told his position would be divided into two** - he rightly accepted this as a **repudiation of his contract of employment** - “The new roles of Country Manager and Terminal Manager were different and each had different requirements both as to tasks and focus. ... In the end I am satisfied that there was no redundancy under the defendant company redundancy policy. The plaintiff was left with sufficient duties to perform. The role of Country Manager - Eyre Peninsula existed under the plans of the defendant. That role, created as part of the reorganisation of the plaintiff’s business on Eyre Peninsula required the plaintiff to perform those duties attributed to the position after the split. **There was no redundancy because it could not be said that the majority of the duties had changed and it could be said that sufficient work associated with the role was to continue to be performed by the plaintiff.** This view is based upon my quantitative and qualitative assessment of the position as a whole” @339 - **contractual term relating to redundancy not found to be a penalty** after a review of various authorities - subsequent to P’s acceptance of repudiation of contract D, in its discretion, **unilaterally varied the redundancy policy without consultation** - [if such had to be decided, Slattery J stated that] “consistent with the approach of Handley JA in *Renard*, there is sufficient to indicate unreasonable conduct on the part of the defendant in causing such an amendment to be made unilaterally and then carried into effect and that thereby, such amendment would breach an ad hoc implied term of the contract of employment requiring reasonableness by the parties in implementing its terms ... Having regard to the extent of the change of the policy as a term of the contract of employment, a unilateral amendment in its terms may well meet the descriptor of capricious” @441)

## Redundancy – Variation of entitlement

See [Section 120](#)



## Religious workers

[\[2014\] FWC 6277](#) **Qld** *Threadgill v Corporation of the Synod of the Diocese of Brisbane* (“Rev Threadgill’s role was one within the church proper, primarily or entirely religious in character, as affirmed by the relief sought. His post was under the archbishop’s licence, which (subject to the canons) is discretionary. His case is materially different in those respects from *Ermogenous* and *Bellia* but cannot be materially distinguished from *Knowles*. **Rev Threadgill’s office was under the canon law not the common law. He was not an employee for s. 382** and this Commission has no jurisdiction” @23)

## Resignation (whether)

[\[2013\] FWC 7803](#) **NSW** *Martin v Impact Bottles* (the A resigned and was fully aware of what she was doing - no termination date had been specifically agreed, as R was allowing A time to find another job - A was **not able to unilaterally withdraw her resignation**)

[\[2013\] FWC 9520](#) **Vic** *Verma v Sun Health Foods* (**resignation, as opposed to constructive dismissal, found** where A’s working relationship with R had been deteriorating for some time resulting in A receiving a warning about her timekeeping - A believed she heard that she was to take a pay cut - no such action taken and there was no further action threatening her dismissal – A’s **resignation was not done ‘in the heat of the moment’**)

[\[2014\] FWC 4067](#) **Tas** *Dawes v Presbyterian Care Tasmania* (the A, a care assistant, attended a meeting with a nurse manager where it was **indicated there would need to be a police investigation into an allegation she had hit a resident - A decided to resign** - A argued she was constructively dismissed - “It was open to Ms Dawes to participate in the investigation that was to commence. The investigation, had it been completed, may have found that there was no substance to the allegations ... Therefore I am unable to find that Ms Dawes was forced to provide her resignation because of conduct engaged in by PCT” @80 - **resignation, not constructive dismissal**)

[\[2014\] FWC 5495](#) **Tas** *Stanley v Tasmanian Freight Services* (the A’s **retraction of his resignation the next day was not timely enough** - after resignation, uncertainty as to his employment status was created by his own actions and employer’s response - dismissal not found to be at employer’s initiative)

## Restaurant Industry Award 2010

[\[2014\] FWCFB 1996](#) *Restaurant and Catering Association of Victoria* (see for detailed history of Restaurant Award and on issue of **two-yearly review and Sunday penalty rates** - the issue of Sunday v Saturday penalty rates considered - “None of this evidence would cause us to conclude that a total Sunday penalty rate of 50% is too high. For career restaurant industry workers, the disability associated with working on Sundays which we have earlier described clearly applies. Even for transient and lower-skilled casual employees working primarily on weekends, that disability exists, as in the retail industry. However, we consider that for this latter category of primarily younger workers, the superimposition of the casual loading of 25% in addition to of the Sunday penalty of 50%, resulting in a total loading of 75%, would tend to overcompensate them for working on Sundays and is more than is required to attract them to work on that day ... [I]n respect of Sunday penalty rates, the Restaurant Award does not meet the modern awards objective in that they are not *‘fair and relevant’* to the extent that they tend to overcompensate one category of employees ... The appropriate course to address this issue is to vary the Restaurant Award to provide, in respect of the class of employees in question, that the Sunday penalty rate together with the casual loading should not exceed 50% in total ... [F]or casual employees employed in the Introductory Level classification or in any classification falling within the Level 1 and Level 2 pay grades, the Sunday penalty rate together with the casual loading should not exceed 50% in total (that is, the 25% casual loading and in addition a further 25%)” @138-141 - “The RCAV’s case that, as a general proposition, the level of disability for working on Sundays is no higher than that for Saturdays is rejected” @154 per leading judgment of Hatcher, Bolton & McKenna)

## Road Transport & Distribution Award 2010

[\[2014\] FCAFC 148](#) *TWU of Australia v Coles Supermarkets* (**Coles Customer Service Agents delivered goods which had been ordered on-line** - the Road Transport ... Award applied to their

employment because “the definition in question expressly extended to work ancillary to the principal business” @22 - however, “the classification of Retail Employee Level 1 [in the General Retail Industry Award 2010] was a more appropriate classification than Transport Worker Grade 2)

#### **‘Rostered to work’**

[\[2014\] FWCFB 3484](#) *TWU v Wymap Group* (choosing **to voluntarily work on Sundays did not amount to being ‘rostered to work’** as per clause 10.1(d) of EA)

#### **Rosters**

[\[2014\] FWCFB 129](#) *Leading Age Services Australia NSW-ACT* (variations to Aged Care Award 2010 considered - clause 10.3 regarding **part-time employees** and its interrelationship with clause 22.6 regarding **rosters** considered - “part-time employees could not be required to work additional hours without their written consent” @16 - clause 15.4(a) regarding **meal allowances** and clause 28.2 defining **shift workers** and dealing with the **quantum of their annual leave** considered)

[\[2014\] FWCFB 6153](#) *CPSU v State of Victoria (Dept. of Justice)* (“dispute arose from a proposed change to the number of days employees at the Dame Phyllis Frost Centre would be rostered to work and the proper application of the *Victorian Public Service Workplace Determination 2012*” @1 - the question for resolution, which was answered in the affirmative, was “For a custodial officer shift worker who works a roster pattern of **80 ordinary hours over a 9 day fortnight period**, does the Determination permit the Department to change the roster pattern in the form of a change to the number of days in the fortnight over which the 80 hours are worked?” @2 - “it is quite clear that the only limitations on working ordinary hours for employees of the Department are those expressed in the Determination. It is not appropriate to read further limitations into the provisions” @16)

#### **‘Roster system’**

[\[2014\] FWCFB 1629](#) *RACV Road Service v AMWU* (a “roster system’ does not refer to the starting and finishing times set out in any given roster” @28)

#### **Serious & wilful misconduct**

[\[2013\] FWC 8553](#) *NSW Ayappagari v Australian Opal Cutters* (following suspension and investigation, A was summarily dismissed for **falsifying invoices to increase his commission and for lying about what he did** - A was putting R in a position of breaching Commonwealth customs laws - dismissal not harsh etc)

[\[2014\] FWC 543](#) *NSW John v The Star* (“if a Security Officer or other member of the employer’s staff, consciously permitted **entry of a minor into the casino**, absent some extenuating circumstances, such action would likely be wilful misconduct which would justify summary dismissal” @54 - in this case “there was no suggestion that the applicant consciously permitted Ms L to enter the casino, in the knowledge that she was only 17 years of age” @55 - **A checked L’s ID, but his check was deficient, although not grossly negligent** - “although the common law position may provide for **summary dismissal** to be justified in circumstances involving gross negligence, it seems to me, that the statutory position may not” @60 - there were factual errors in letter of dismissal - dismissal harsh - A reinstated)

[\[2013\] FWC 8902](#) *ACT Cameron v Metecno* (there was valid reason for A’s **dismissal for directing workers to dismantle a cold store without ensuring that even basic safety measures were in place** - however, **summary dismissal was harsh** where A had worked for R for 35 years and where the applicant was permitted to continue to work as normal for a further two months after his misconduct - compensation ordered - **Appeal dismissed** 19/2/14 in [\[2014\] FWCFB 1207](#))

[\[2014\] SADC 37](#) *Spartalis v BMD Constructions P/L* (in the context of deciding whether an estoppel existed Judge Bampton decided that **the phrase ‘serious and wilful misconduct’ referred to in the Long Service Leave Act did not involve the same inquiry to be undertaken to determine ‘serious misconduct’ as that under the common law**” - see para. 43-51 - Appeal and cross appeal essentially dismissed 14/11/14 in [\[2014\] SASCF 124](#) - “the **changes made to Mr Spartalis’ employment arrangements in 2005, 2007 or thereafter were not so profound,**

**exceptional or far reaching as to result in a clear inference that the old contract had been brought to an end and a new contract created” @46 - “The unchallenged findings of fact made by the trial Judge support her Honour’s conclusion that Mr Spartalis should have more strongly responded to the suggestion by Mr Calandro in his email messages of 24 August 2010 that work might commence on stage 2B without the approval of CFAL. His responsibility for financial matters, combined with the serious consequences of non-compliance and his knowledge that work on stage 2A had previously commenced without approval, required Mr Spartalis to take a more active approach. There was a clear risk that the limited steps he took would prove to be insufficient to guard against the risk faced by his employer. Thus, the **conduct of Mr Spartalis could properly be regarded as negligent” @89 - however the conduct was not gross misconduct justifying summary dismissal - Mr Spartalis did not fail to mitigate)****

[\[2014\] FWC 1860](#) **Vic** *Hutchinson v Monash Health* (the A’s dismissal for **using excessive and unnecessary force on violent patient** who had punched doctor not harsh etc)

[\[2014\] FWC 2060](#) **NSW** *Chahwan & Ghali v Sutherland Shire Montessori Society Inc.* (the A’s, who were senior executives with R, were validly dismissed for several reasons including the following: “the extent and nature of the non-compliance concerns which arose from the ... BOS inspection represented a manifest **failure to perform a fundamental aspect of the senior management positions** of the applicants. Secondly, a similar fundamental failure of duty arose from the **non-disclosure to the Board of the BOS concerns** ... Thirdly, the establishment of a Company (AME), which provided a means for the operation of the school if it was placed into voluntary administration, without advice to the Board, created a **breach of fiduciary duty** to the employer” @91 - permission to appeal refused in 13/8/14 in [\[2014\] FWC 5390](#))

[\[2014\] FWC 3076](#) **Vic** *Chmielewski v Arcare* (dismissal not harsh etc where A, a personal care worker, dismissed for **failing to provide food and fluid to resident** after having been **warned** because of a recent previous incident re the same)

[\[2014\] FWC 3259](#) **Vic** *Bolden v Lyndoch Living* (the A, whilst working as a nurse in a high care facility, was summarily dismissed - A was found to have erred by **using physical contact to return a resident to bed who did not want to go to bed** - however, it was not clear what degree of force she used - whilst there was valid reason for her dismissal, her conduct was not such to justify summary dismissal - Appeal allowed with respect to remedy only 1/9/14 in [\[2014\] FWC 5969](#) - see [precis](#) at s391 – Remedy-Reinstatement)

[\[2014\] FWC 5124](#) **WA** *Edmonds v Telethon Speech & Hearing* ... (quoting the High Court in *Concut* the Commissioner wrote: *[T]he **conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises*** @100 - such test was satisfied in this case where A didn’t follow reasonable instructions, misused R’s property, breached confidentiality, was involved in a conflict of interest and showed disdain toward, or non-acceptance, of her role - summary dismissal for serious misconduct justified)

[\[2014\] FWC 6048](#) **Vic** *Gall v Brain Injury Association of Qld* (“The **Applicant [a Lifestyle Support Worker] reacted to the Client’s strike of him and subsequent grabbing** of his T-shirt instinctively and he panicked. Instead of choosing one of the several less restrictive means available to him to calm the situation and to disengage, the **Applicant chose an offensive technique which was highly restrictive, which escalated the situation** and ultimately resulted in the Client being restrained and immobilised. Though panicking and acting instinctively, the Applicant’s conduct towards the Client fell seriously short of an appropriate response. It was a serious breach of the Client’s rights and the Respondent’s policy. ... Applicant’s conduct, though instinctive, was nonetheless deliberate behaviour that is inconsistent with the continuation of the Applicant’s contract of employment ... That the **Applicant does not recognise the serious nature of the conduct** ... merely serves to underline that the Respondent should no longer be bound by the contract of employment” @77 - conduct justified summary dismissal)

[\[2014\] FWC 7965](#) **SA Kruschel v Blue Dawn Health Care** (“actions were wilful in the sense that **throwing the wipes into the chair with some force** was not accidental. However the **wilfulness did not extend to any intent to place the resident at risk of injury**. While the applicant’s actions had the potential to cause bruising and/or discomfort to the resident, her actions did not put EP at ‘serious and imminent risk’ to her health and safety” @74 - 30% reduction of compensation for misconduct)

### Set off

[\[2014\] FCCA 2206](#) *Amponsem v Laundry (Exhibition)* (found it was “in the interests of justice that the Court should enter one order for payment that reflects the difference between \$84,143.60, being the amount of **equitable compensation** to which Laundry is entitled against Mr Amponsem, and the amount of \$11,305, being the amount of **accrued annual leave** to which Mr Amponsem is entitled. That amount is \$72,838.60” @154)

[\[2014\] FCCA 1374](#) *Hanmer v B & F Brack Plant Hire* (**whether payments made by employer to an employee can be offset against payments due under Award** - “where there is a payment made for, or in respect of, ordinary hours of work which is in excess of the Award obligation, the excess cannot be set-off against a claim for annual leave loading, unless, at the time of the payment of the excess, the employer designates that the excess over the amount of the Award obligation is paid for the purpose of satisfying any entitlement to annual leave loading” @20)

### Sham contracting

See [FWA s357](#)

### Shift workers

[\[2014\] FWCFB 129](#) *Leading Age Services Australia NSW-ACT* (variations to Aged Care Award 2010 considered - clause 10.3 regarding **part-time employees** and its interrelationship with clause 22.6 regarding **rosters** considered - “part-time employees could not be required to work additional hours without their written consent” @16 - clause 15.4(a) regarding **meal allowances** and clause 28.2 defining **shift workers** and dealing with the **quantum of their annual leave** considered)

### Sick leave

[\[2014\] FCA 32](#) *Australian and International Pilots Association v Qantas Airways Ltd* (implied terms - **return to work from sick leave of pilot** - Qantas’s **right to medical information** - “Although Capt Miller did not set out in terms the obligations that Qantas had under the [Work Health and Safety Act](#) and its analogues as being a factor in his reasoning, the concerns which he expressed can be seen to fit into Qantas conforming to its obligations to ensure Mr Kiernan’s health and safety while he was at work in Qantas’ business. Under [s 19\(2\)](#) and (3), Qantas had to ensure, as far as reasonably practicable, that the health and safety of other persons was not put at risk from work carried out as part of the conduct of its business and, as far as reasonably practical, that it provide and maintain a work environment without risks to health and safety and having safe systems at work the provision of adequate facilities for the welfare at work of workers carrying out work for the business, and the provision of training and instructional supervision necessary to protect all persons from risks to their health and safety arising from work performed. Under [s 28](#) of that Act, a worker had to comply, so far as he or she was reasonably able, with any reasonable instruction given to him or her by Qantas to allow Qantas to comply with the Act and to co-operate with any reasonable policy or procedure of Qantas relating to health or safety in the workplace that had been notified to its workers. In these respects, the need for planning to enable Mr Kiernan to return to work can be seen as part of the objective Qantas had in mind in satisfying those requirements. Similarly, pilots who were unfit or uncertified to fly planes posed a significant and obvious risk to the health and safety of other persons, including potential passengers. In addition, Qantas’ rostering arrangements were directed, among other matters, to ensuring the health and safety of all other Qantas employees affected by the roster and the airline’s passengers. The need to accommodate the absence on sick leave of skilled employees, such as flight crew members, and to plan for their future orderly return to full or part-time duties within its organisation or their cessation of employment (depending on the nature of their illness and prognosis) all bore on Qantas’ ability to fulfil its duties under [s 19\(2\)](#) and (3) of the [Work Health and Safety Act](#) and its analogues ... **In the absence of express wording, the [Qantas Airways Limited Flight Crew (Long Haul) Certified Agreement 2005-2006]** ... should not be given a construction that



would make its own extensive provisions for rostering employees operate to impose unnecessary constraints on Qantas' entitlement to reasonable information from an employee on sick leave as to his or her illness, prognosis likelihood and timing of any return to work" @73-75)

### Small Business Fair Dismissal Code

[\[2014\] FWC 2244](#) **Qld** *Dillon v Knight Chiropractic* ("The terms of the Code make it clear that an employer contending that a dismissal was consistent with the Code **cannot rely on knowledge acquired after the dismissal was effected in order to establish serious misconduct on the part of the employee**. For the purposes of the Small Business Fair Dismissal Code, an employer cannot have a reasonable belief that an employee engaged in misconduct at a point when the employer has no knowledge of that misconduct. This is so regardless of whether the employee concealed the misconduct" @14)

### Start/finish times

[\[2014\] FWC 3255](#) **SA** *AMWU v Custom Coaches* (dispute over **proposed one hour change to starting times** with corresponding changes to finishing times - "The Award provisions enable Custom Coaches to specify changes to starting and finishing times within the spread of hours. The change proposed is within that spread of hours. Agreement with a majority of the employees affected by that change is not required" @30)

### Status-quo provisions

[\[2014\] FWCFB 4104](#) *United Voice v Fosters Australia* (status quo-type provisions in industrial agreements considered)

### Stay applications

[\[2014\] FWC 1228](#) **NSW** *Amadon Travel Management v Joseph* ("the balance of convenience, in circumstances where the respondent is a **declared bankrupt** (although this is not entirely clear in this case) would have likely fallen on the appellant's side" @24)

[\[2014\] FWC 2404](#) **NSW** *DP World Brisbane v MUA* (**stay of decision amending A's drug and alcohol policy granted** - "the Decision raises significant issues relating to the jurisdiction and power of the Fair Work Commission to make orders under s.739" @8 - "the balance of convenience favours the granting of a stay on the basis that significant confusion would flow and resources would be required to be expended if DP World were to modify its drug and alcohol testing procedures in line with the Deputy President's Order and, should the appeal be allowed, subsequently return to the status quo" @11)

[\[2014\] FWC 5383](#) **WA** *Nesbitt v Dragon Mountain Gold Limited* (**R sought a stay of proceedings claiming there was an arbitration procedure in A's employment agreement that A had to submit to** before the FWC had jurisdiction - see precis at Commercial arbitration)

### Strike action

[\[2014\] FWC 2756](#) **Qld** *Mahoney v Bechtel Construction (Australia)* (the A was **dismissed for allegedly participating in unlawful industrial action after having had a 'first and final' warning for other misconduct** - there was no valid reason for dismissal as R failed to adequately consider the factual circumstances of A's case and "while the Applicant was notified of the reasons for his termination ... [notification] was not specific enough and lacked sufficient detail. While he was given an opportunity to respond to any allegations, the approach taken was formulaic, the decision to dismiss was taken beforehand, and his responses were not taken properly into consideration" @106)

### Superannuation contributions

[\[2014\] FWCFB 299](#) Modern Awards Review 2012 – Superannuation (applications to insert **default superannuation fund or funds** into various modern awards failed)

## Supplementary employees

[\[2013\] FWC FB 8557](#) *DP World Brisbane v MUA* (method of determining back pay to be paid to supplementary employees under EA considered)

## Social media

Bland A & Waterhouse S, *'Legal Risk Management of Social Media of the Workplace'* (2013) 19(1) Employment Law Bulletin 9

## Taxi drivers

[\[2014\] FWC 2666](#) *Vic Brar v 13 Cabs* (the R “submits Mr Brar entered into a commercial relationship with the owner of a taxi vehicle in February 2012. **This relationship involved him paying a fee to Black Cabs in consideration of access to its dispatch system.** It submits this relationship should properly be categorised as one of bailor and bailee and at no stage was there any contractual relationship, let alone any employment relationship in existence” @12 - A “was not required to share any of the takings generated from customers with Black Cabs, and Black Cabs exercised no control over where and when and how often he drove the taxi. In addition, Black Cabs did not provide him with any of the pay and conditions or other entitlements that would normally be inherent in an employment relationship” @20 - application dismissed as **A not an employee** - see also Voros précis at [Employee \(whether\)](#))

## Transfer of business

[\[2014\] FWC 5566](#) *Qld Ciuzelis v Jones* (see [precis](#) at Dismissal – Workers compensation issues)

## Transcript

[\[2014\] FWC 670](#) *SA Mace v ASC* (no obligation on FWC re provision of transcript - such is in the FWC’s discretion)

## ‘Transport by road of goods ... or anything whatsoever’

[\[2014\] FCCA 1435](#) *Rooth v S. Brady Industries Pty Ltd* (“**unlicensed vehicles being delivered to their prospective owners**, are clearly of themselves goods. They are vehicles which have been bought by the prospective purchaser and which are required to be transported. Their transport on the roads would, in any event, meet the definition of the transport by road of anything whatsoever. While I would certainly accept that in an enormous number of cases, transport by road will involve the transport of something other than the transporting vehicle, in the circumstances of this case, it seems to me quite clear that the vehicles themselves are goods or anything whatsoever” @26)

## Underpayment

[\[2014\] SAIRC 27](#) *AEU, SA Branch v Chief Executive of DPC* (the worker (W) was employed on terms such that he would “receive a salary equivalent to PCO 2 ... You are entitled to any salary increases applicable to this classification under current award and valid enterprise agreements, or any increases determined by the Chief Executive of the Department for Education and Child Development” @4 - a subsequent EA replaced the PCO 2 classification, and in the new band structure PCO 2’s were receiving more than what W was being paid - **W claimed he was underpaid and that “the parties’ intention in entering the contract was that the contract be understood by reference to the arbitrated award and future valid enterprise agreements.** Without the meaning given to ‘PCO2’ by the industrial instruments it will be impossible to know what was ‘equivalent to PCO2’ @96 - **R contended that the “terms of the contract should be construed without reference to any award or enterprise agreement**, as these industrial agreements do not form part of the contract, either expressly or by implication. The industrial instruments do however provide a reference point for the purpose of determining Mr Kuhlmann’s salary under the contract” @59 - **Court decided that the words of the contract were clear** and that a “reasonable person would not construe the contract as providing for a salary equal in value to the salary of a classification corresponding to PCO2” @105 - no underpayment)

### Union eligibility rules (interpretation of)

[\[2014\] FWC FB 3501](#) *AMWU v ResMed Ltd* (see from paragraph 34 the general approach to the interpretation of eligibility rules - AMWU's rule 1A(a) considered - see from paragraph 43 the history of the AMWU eligibility rules regarding machinists and assemblers - "the employees in the Ventilation and Machines work groups are 'assemblers' for the purpose of rule 1A(a) of the AMWU's eligibility rules, and are thus able to be members of and be represented by the AMWU. Although it is not strictly necessary to do so, we would also find that they engaged in the engineering trades in that their work forms part of the manufacturing process of mechanical and electrical appliances" @77 - "Mask Assemblers are 'assemblers for the purpose of rule 1A(a)' @78 - other groups also considered)

### Wage adjustments/Work value increases

[\[2014\] FWC 53](#) *SA ARTBIU v Rail Commissioner* (electrification of train lines - assessment of work value increases - wage adjustments made)

### Wine Industry Award (SA) 2010

[\[2013\] FWC 9683](#) *SA SA Wine Industry Association* (variation of clause relating to hours of work during vintage)

### 'Work'

[\[2014\] FWC FB 1573](#) *TWU – Road Transport Industry* ("the concept of 'work' is a broad one, encompassing time spent having lunch or being on a break and remaining on duty" @18)

### 'Work load equivalent to the employee's existing full or part time workload'

[\[2014\] FWC FB 2836](#) *NTEIU v University of Western Sydney* (meaning of this phrase considered)

## [Fair Work Australia Act 2009 - Annotations](#) link to Act

### FWA Cth s14 – Meaning of 'national system employer'

[\[2014\] FWC 3383](#) *WA Collins v Lower Great Southern Family Support Association* (R successfully objected to unfair dismissal application as it was not a constitutional corporation or national systems employer - the **vast majority of R's funding comes from the Disability Services Commission (DSC)** - "There is a very small percentage of other income generated from fees, rent and other sundry sources which ... is approximately 5% of the Lower Great Southern Association's total income per annum" @85 - **R's purpose was "not to trade, but rather to provide guidance, assistance and services to individuals with disabilities.** The Respondent's activities reflect this purpose. ... [R] has limited control over the purpose for which the funding it receives is used and ... this is largely directed and decided by the DSC" @87)

[\[2014\] FWC FB 5633](#) *Greyhound Racing Victoria Employees Award 2004 [Transitional]* (principles for determining whether organisation a **'trading corporation'** outlined - Greyhound Racing Victoria determined to be one)

### FWA Cth s16 – Meaning of 'base rate of pay'

[\[2014\] FCAFC 94](#) *Maughan Thiem Auto Sales Pty Ltd v Cooper* (held that "The 'base rate of pay' for the purpose of calculating the redundancy entitlement is not Mr Cooper's weekly salary as at the date he last worked, as the industrial magistrate decided, but his weekly salary minus the 18% 'penalty rate' for afternoon shift work, that 18% being a 'separately identifiable amount' within s 16(1) of the FW Act" @57)

## FWA Cth s19 – Meaning of industrial action

[\[2014\] FWC 1413](#) **NSW** *McAuliffe v ATO* (the A had an adjustment disorder - **although he was given medical clearance to return to work, he was not permitted back at work** - A was not constructively dismissed or otherwise dismissed and did not resign - found to have been **locked out** - officer of R had deliberately and mischievously delayed and frustrated A's return to work)

[\[2014\] FWCFB 4104](#) *United Voice v Fosters Australia* ("**non-participation of employees in ... work** trial did not fall within the exclusionary provision of s.19(2)(a), and was therefore '*industrial action*' under s. 19(1)(a)" @33)

## FWA Cth s22 – Meaning of service and continuous service

[\[2013\] FWC 5292](#) **Qld** *Ireland v Hanson Construction Materials* ("There is an absence of a clear legislative provision, covering the **re-engagement of an employee within 3 months by the same Employer**, as the Act in its current form does not allow for these two periods of employment to be joined. In this case the Respondent argued the Applicant's termination was justified. He did not have the requisite licence for an alternative position, accordingly he took the option to resign, get the licence and take up the new employment. Whilst the Employer's approach may raise concerns of fairness in bringing the contract to an end, the Applicant did not raise this submission. The Commission can only deal with the jurisdictional facts of the employment period as presented by the Applicant. Therefore the **Applicant's resignation from the first period of employment severed the period of continuous service**" @37)

[\[2014\] FWC 4506](#) **Vic** *Barnes v Travelrite International* (here, the question was "whether, at the time Ms Barnes was dismissed, she was within a fresh and separate period of employment distinguishable from the period of full-time employment she had had with Travelrite. Should the period of part-time employment she was undertaking on 4 March 2014 be separable from the earlier full-time period, it would be the case that she would not have yet served the minimum employment period" @14 - "The critical issue for consideration ... [was] **whether or not the period in which Ms Barnes worked as a part-time employee (which appears to have commenced on 3 March 2014, although she was not rostered to work on that day) is a period of service which is continuous with the period in which she worked on a full-time basis**" @20 - found it was - General Retail Award and changing from full-time to part-time employment considered)

[\[2014\] FWC 5391](#) **SA** *Armstrong v Bay Removals* (small business employer - the A was dismissed from his employment as a casual - a few months later he was re-employed in a different position - A tried to argue he had not been dismissed and that there was an understanding he would later resume working with R - **potential for future employment did not maintain service** as continuous - first period of service not counted in minimum employment period - insufficient service)

## FWA Cth s22(8)(b) – Transfer of employment between non-associated entities

[\[2014\] FWC 3047](#) **NSW** *Harris v SX Projects* (the A, upon transfer, was **told his past service would be 'carried forward'** - also, there was a transfer between non-associated entities established on facts)

## FWA Cth s45 – Contravening a modern award

[\[2014\] FCCA 1587](#) **FWO** *v Barry Scott Distributors* (contraventions re **failure to pay penalty rates and overtime** - approach to assessing penalty discussed including relevance of **deterrence**, the **totality principle** and **accessorial liability**)

[\[2014\] FCCA 2380](#) *Fair Work Ombudsman v Soleimani & Anor* (**multiple contraventions of s44, s45, s535 and s536** - "the contraventions represent a failure to provide basic and important conditions and entitlements under the Act. These include minimum wage entitlements (including during annual leave), laundry allowance, penalty rates including evening, weekend and public holidays; annual leave on termination, adequate superannuation contribution as well as the provision of meal breaks and pay slips" @46 - "conduct extended over the duration of Ms Carter's employment, some 18 months ... [I]t is likely the conduct would otherwise have continued but for Ms Carter's resignation" @48 - A, due to her young age, limited experience and reliance on



minimum wage, was a vulnerable employee - failure by R (and senior management) to keep records - significant underpayment involved - breaches not deliberate - R took inadequate steps to ascertain its award obligations - no priors - contrition shown - corrective action and cooperation - total penalty of \$19,805)

### **FWA Cth s50 – Contravening an Enterprise Agreement**

[\[2014\] FCAFC 34](#) *United Voice v Valspar (WPC)* (**employer directed annual leave be taken contrary to EA** - A, an employee organisation, sought relief for contravention of s50 on behalf of employees whose entitlements were in issue - A “made out a clear case of **breach of s 50** of the FW Act by establishing a contravention of cl 34 of the Agreement with respect to the requirement to take annual leave” @65 - matter remitted re question of relief)

[\[2014\] FCCA 1615](#) *CEPU v Thyssenkrupp* (the R **failed to consult with applicant about a major workplace change** leading to his redundancy - such failure was a **mistake** by one of R’s employees - R still did not fully understand the nature of its obligation - there were no prior contraventions - penalty a matter of discretion - penalty of \$15,300 (30% of maximum) imposed)

### **FWA Cth s55 – Interaction between NES, Modern awards and EAs**

[\[2014\] FWCFB 3202](#) *Canavan Building Pty Ltd* (“Section 55(1) of the Act relevantly provides that an enterprise agreement ‘*must not exclude*’ the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that **if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES**. That was the approach taken by the Full Bench in *Hull-Moody*” @36 - *Hull-Moody* not followed in other respects - *Jeld-Wen* preferred - see also précis at [s90](#))

### **FWA Cth s90 – Payment for annual leave**

[\[2014\] FWCFB 3202](#) *Canavan Building Pty Ltd* (“The obligation for payment for annual leave in s.90(1) requires that the payment be made at the employee’s base rate as it is at the time the leave is taken. This is made clear by the words ‘*must pay the employees at the employee’s base rate of pay for the employee’s ordinary hours of work in the period*’ (underlining added), the “period” being the “period of paid annual leave” taken by the employee. ... Because the **Agreement provides for payment for annual leave on a progressive basis in advance rather than when annual leave is taken, and also provides for increases in the rates of pay during the life of the Agreement**, it permits annual leave to be paid for, at least in part, at an earlier and lower rate of pay rather than the rate of pay applicable at the time that leave is taken. Therefore compliance with the terms of the Agreement does not require compliance with the payment obligation in s.90(1), and may result in that obligation not being complied with. To that extent, the **NES provision in s.90(1) is excluded, contrary to s.55(1)**” @38 - “consistent with the approach taken by Gray J in *Jeld-Wen*, we consider that ‘**paid annual leave**’ means **annual leave with pay, in the sense that the pay is provided together with the leave**” @42 - “the requirement to make payment in respect of paid annual leave arises when the employee actually takes the annual leave” @43 - “we cannot accept the submission that the provisions in the Agreement concerning ‘pre-payment’ for annual leave can be characterised as provisions merely ancillary or incidental to the operation of the NES annual leave entitlement and are thus authorised by s.55(4)” @53 - “the Agreement, in providing in clause 7.1 of Annexure B that employees are required to fund any time taken off work by way of annual leave, excludes the NES provisions for annual leave contrary to s.55(1) of the Act in two inter-related respects: (1) it excludes the entitlement to ‘*paid annual leave*’ in s.87(1); and (2) it excludes the requirement for payment in respect of annual leave in s.90(1). Additionally we consider that the scheme of ‘pre-payment’ of annual leave in the Agreement constitutes cashing out of annual leave in a manner inconsistent with s.93, with the result that the prohibition in s.92 is excluded” @56 - *Hull-Moody* not followed)

### **FWA Cth s113 – Entitlement to long service leave**

[\[2014\] FCAFC 94](#) *Maughan Thiem Auto Sales Pty Ltd v Cooper* (“Turning first to the text, for there to be ‘**applicable award-derived long service leave terms**’ the section expressly requires that two conditions be satisfied. The first condition is that there is an award which would have applied

to Mr Cooper at the test time if, at that time, he had been in his **‘current circumstances of employment’**. It was common ground that ‘current circumstances of employment’ referred to Mr Cooper’s circumstances of employment just before his employment with Maughan ended (that being the relevant time for considering his long service leave entitlement). The second condition is that the terms of the award ‘would have entitled’ Mr Cooper to long service leave. This was the subject of the dispute. So what is meant by **‘terms of an award...that...would have entitled’**? The language here is awkward, the meaning ambiguous. On one possible interpretation the phrase refers to terms that provide for an entitlement to long service leave. Alternatively, as Mr Cooper argued, it may refer to an entitlement that would have actually accrued. In my view, the first interpretation is to be preferred. The second condition in s 113(3)(a) is satisfied if, at the test time, the employee would have had a right to long service leave under a relevant award (that is, an award satisfying the first condition in s 113(3)(a)), irrespective of whether at that time the employee would have accrued long service leave. If there was a federal long service leave award or terms in a federal award that provided for the payment of long service leave that would have applied to the employee at the test time, then they continue to apply. If not, then the State or Territory Act applied. If, under the terms of the award, Mr Cooper was not eligible for long service leave at the time of his redundancy, s 113 does not give him an entitlement under the State Act” @39-43)

### **FWA Cth s115 – Meaning of public holiday**

[\[2013\] FCAFC 151](#) *Woolworths Limited v SDA Buchanan J* (Greenwood J concurring) found that “as a result of the WA PBH Act [Public & Bank Holidays Act], on the occasions in Western Australia when New Year’s Day or Christmas Day falls on a Saturday or Sunday or Boxing Day falls on a Saturday, it is followed by an additional public holiday on the next Monday within the meaning of s 115(1)(b) of the FW Act. Similarly, on the occasions when Boxing Day falls on a Sunday or Monday, it is followed by an additional public holiday on the next Tuesday within the meaning of s 115(1)(b) of the FW Act. None of those Mondays or Tuesdays are days referred to in s 115(2) of the FW Act as days which are substituted for the original holiday and become *the* public holiday. At the end of 2010, Christmas Day fell on a Saturday, Boxing Day fell on a Sunday and 1 January 2011 fell on a Saturday. Accordingly, under the WA PBH Act and the National Employment Standards in s 115 of the FW Act, each of Monday 27 December 2010, Tuesday 28 December 2010 and Monday 3 January 2011 were also public holidays – i.e. not holidays in substitution for or in lieu of Christmas Day, Boxing Day or New Year’s Day but other additional days which were public holidays in their own right. Similarly, at the end of 2011 Christmas Day fell on a Sunday, Boxing Day fell on a Monday and 1 January 2012 was also a Sunday. Accordingly, Tuesday 27 December 2011 and Monday 2 January 2012 were each in Western Australia and, for the purpose of the National Employment Standards in s 115 of the FW Act, public holidays in their own right” @31-33)

### **FWA Cth s117 – Requirement for notice of termination or payment in lieu**

[\[2014\] FWC 437](#) *Vic Callahan v Graphic Impressions* (notice of termination clause implied - various factors considered in calculating the **appropriate period of notice for a shareholder and director** - “The assessment of a period of reasonable notice is to be determined having regard to all of the circumstances that applied as at the date that notice is to be given rather than the date on which the contract of employment commenced” @112 - four months appropriate)

[\[2014\] FWC 5864](#) *Vic D’Souza v Henry Schein Halas* (The A “**submitted that as the payment in lieu of notice was made on a later day, the Applicant’s employment did not end until that later day** ... the Applicant relies upon the prohibition of termination of an employee’s employment unless the employer has relevantly paid to the employee an amount in lieu of notice that is found in s. 117(2)(b)”@26-27 - no substance in submission - “If an employer terminates the employment of an employee without notice and without making payment in lieu of notice before effecting termination, the result is that the employer has acted unlawfully. It does not invalidate the termination of the employment” @30)

[\[2014\] FCCA 1627](#) *Heriot v Sayfa Systems P/L (No. 2)* (“For an employee who is over 45 years of age and who has had in excess of five years service with the respondent, the applicant is entitled to at least five weeks notice: see **s.117(3)**” @12)

[\[2014\] FWC 7301](#) *NSW McCarthy v Aero-care Flight Support* (The **obligation not to terminate an employee unless written notice is given as per s.117 of the Act may not have been complied with**, however, **it does not result in the employee remaining in employment on pay** until this has occurred. Termination of employment takes effect once the employee becomes aware of it, subject of course to any advice that the dismissal is to take effect at some later date" @16)

#### **FWA Cth s119 – Redundancy pay**

[\[2014\] SAIRC 10](#) *Gabbusch v Mildren & Mildren Automotive Pty Ltd* (Mr Mildren involved in decision not to pay redundancy pay - "redundancy pay entitlements are part of the National Employment Standards and ... any contravention of these Standards constitutes a breach of a civil remedy provision. Section 550 states that a person who is involved in the contravention of a civil remedy provision is taken to have contravened that provision. Here the evidence is **clear that Mr Mildren was involved in the contravention of s 44(1). He is accordingly taken to have contravened that provision personally**" @18-19 - employer's failed s120 application - interest awarded - **appeal by employer in [2014] SAIRC 15 failed, but appeal by manager allowed as there was no power to order him to pay redundancy entitlement** - "The company was required to pay the entitlement and failed to do so as and when it fell due. That failure to pay was a breach of the civil remedy provision. The company's liability was not contingent upon it making any 'decision' not to pay. In any event ... the company made a decision to pay the respondent his accrued entitlements, but to not pay the redundancy entitlement pending the outcome of its application to the FWC for relief from that obligation. It has still not paid the redundancy entitlement despite the application to the FWC being dismissed. Thus, although for the wrong reasons, the Magistrate was correct in finding that the company had breached a civil remedy provision of the Act in failing to pay the respondent's redundancy entitlement, and was empowered to make the order for payment against the company under **s 545(3)**" @41-42 - **s550** considered)

#### **FWA Cth s120 – Acceptable alternative employment**

[\[2014\] FWC 4673](#) *SA Company P. v D.S.* (see from para. 32 outline of relevant **principles for variation of employer's obligation to pay redundancy entitlements**)

[\[2014\] FWC 6858](#) *SA Hamra Furniture v Parmiter* (acceptable alternative employment found and R also had an inability to pay redundancy payments - "**new employment is the same distance from his home** as was Hamra. It involves **similar work but an approximate \$3.00 per hour wage increase**" @7 - redundancy payment obligations set aside)

[\[2014\] FWCFB 6737](#) *MUA v FBIS International Protective Services* (R was unsuccessful in securing contract to provide security services - ACG secured the contract instead - "The finding of Commissioner Gregory that 'the evidence of Mr Christmas, in particular, indicates FBIS has done enough in all the circumstances to "obtain" alternative employment for the employees' was incorrect and was not open on the evidence given the limited actions of the Respondent which **did no more than facilitate the entry of its employees into the recruitment processes of ACG**. In our view, as the conclusion was not available to the Commissioner on the evidence it reflects a significant error of fact. For that reason, we grant the appellant permission to appeal. Further, we uphold the appeal and quash the decision and orders of Commissioner Gregory" @55-56 - "**the Commissioner conflated the issues of acceptable employment and the extent of any reduction in redundancy entitlements**, concluding that 'I am accordingly satisfied the test of what is acceptable alternative employment has been satisfied and FBIS should be relieved of any obligation to make redundancy payments'. Having recognised some detriment to employees arising from the loss of accrued service and the role, in part, of compensating employees for the loss of service related entitlements, the Commissioner removed the redundancy entitlements entirely for each employee other than Ms Pickering. The Commissioner did so without separately considering the extent of any reduction and without considering the different circumstances of each employee in terms of service, which ranged from four months to nine and a half years, and accrued personal leave which ranged from a negative accrual through to over 300 hours. The decision of the Commissioner provides no indication as to how he reached that conclusion in exercising the discretion to reduce the redundancy pay entitlements in respect of each employee subject to his first order to nil. In our view, this constitutes a further error in the decision of Commissioner Gregory"@65)

### **FWA Cth s130 – Restriction on accruing leave or absence while receiving workcover**

[\[2014\] FCCA 2580](#) *NSW Nurses and Midwivesâ€™ Associate v Anglican Care* (“In circumstances where s.49 of the *Workers Compensation Act [NSW]* does not prevent the worker from receiving both, and, indeed expressly contemplates receipt of both workers compensation and accrued leave, a beneficial construction of s. 130(2) ... would allow for s. 130(2) to be enlivened by reason of s.49 of the *Workers Compensation Act* because s.49 does not prevent it. In that sense, s.49 ‘allows’ or ‘permits’ the receipt of both. Accordingly, **the *Workers Compensation Act*, being a compensation law, ‘permits’ receipt of the benefit of accruing annual leave whilst in receipt of compensation payments for the compensation period**” @39-40)

### **FWA Cth s134 – Modern awards objective**

[\[2014\] FWCFB 3500](#) *Annual wage review 2013/2014* (“CCIQ submitted that the Panel must ensure that it: ‘considers the impact of the new section **134(1)(da)**, which provides for additional remuneration for employees through overtime, penalty rates and allowances. This will have potentially significant implications for employment costs in traditionally award reliant industries, including retail and hospitality” @92 - “There is no factual basis for the submission. Even if applications were made to vary modern awards in the manner suggested the outcome of such applications is far from certain. Section 134(1)(da) requires the Commission to take into account certain considerations but it does not dictate a particular result. The modern awards objective is very broadly expressed and no particular primacy is attached to any of the considerations set out in s.134(1)(a) to (h). CCIQ’s submission is entirely speculative and on that basis we reject it” @96)

### **FWA Cth s143(7) – Coverage terms of modern awards ...**

[\[2013\] FWC 7447](#) *NSW George v Park Trent Property Group* (the A “was likely no longer state award covered and by operation of section 143(7) cannot be modern award covered” @28)

### **FWA Cth s145A Consultation about changes to rosters or hours of work**

[\[2013\] FWCFB 10165](#) *Consultation clauses in modern awards* (see re the form, interpretation and rationale behind the recently inserted s145A “which provides that all modern awards must include a term requiring employers to consult employees about a change to their regular roster or ordinary hours of work” @1)

### **FWA Cth s156 – 4 yearly review of modern awards to be conducted**

[\[2014\] FWCFB 1788](#) *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* (**general observations about 4 yearly reviews** and their ambit - see summary from paragraph 60)

### **FWA Cth s168C – Rules about making and revoking modern EAs**

[\[2014\] FWCFB 2170](#) *Coleambally Irrigation Co-operative Limited v AWU, CPSU ...* (“other than modern enterprise awards which are made under Schedule 6 of the Transitional Act, no new enterprise awards will be made. This is the effect of s.168C” @4)

### **FWA Cth s168G – Making State reference public sector modern awards on application**

[\[2014\] FWCFB 5254](#) *The Police Federation of Australia (Victoria Police Branch)* (the *Police Services Industry Sector Order - Victoria 1998* determined not to be an award or order capable of modernisation under Schedule 6A - the PFA failed to establish “that the Order can be replaced by a State reference public sector modern award as the Order is not an award or a transitional award and there is no express saving or application of the modernisation process under Schedule 6A to the Transitional Act with respect to the Order” @9 - alternative application under s168G also failed - “The critical question is whether subsection (3) of s.168G operates as a pre-condition to making applications, such as to require consent to the making of an application, or alternatively requires an application to be considered and an award made if consent and the other elements of the subsection are satisfied. ... [T]he better interpretation is that **subsection (4) establishes mandatory requirements** for the making of a State reference public sector modern award, and that subsections (1), (2) and (3) contain mandatory requirements for an application to be made and considered. An award can only be made, and must be made if those circumstances are present ... An interpretation that **consent is required** by the proposed parties to the proposed award is



consistent with the statement by the Minister in the Second Reading Speech and gives effect to that statement of intention" @24-26 - requirements not satisfied)

### **FWA Cth s172 – Making an enterprise agreement**

[\[2014\] FWC 750](#) (Clause 4.2.4 of EA stated: “Casuals employed either by the company or a through a labour hire agency on a continuous service period of longer than 12 months will be deemed to be permanent employees [sic]” @7 - held that the clause was not a clause about a permitted matter pursuant to s172)

[\[2014\] FWC FB 4342](#) *Tutt Bryant Group Ltd* (“under s 172(2)(b) ... it is whether an employer has employed any of the persons who will be necessary for the normal conduct of the genuine new enterprise and will be covered by the enterprise agreement, rather than whether there is a policy that approval for employment at the genuine new enterprise will not be given without an approved enterprise agreement covering the relevant employees, that is relevant” @23 - “There is no basis ... for the suggestion of TBG that s 172(2)(b) ... requires an employee of an employer to have commenced or undertaken work necessary for the normal conduct of the genuine new enterprise the employer is establishing or proposes to establish before a greenfields agreement is unavailable” @31 - meaning of the word ‘**necessary**’ in s 172(2)(b)(ii) considered)

### **FWA Cth s174(1A) – Notice requirements**

[\[2014\] FWC FB 2042](#) *Peabody Moorvale v CFMEU* (Full Bench considered “whether the notice of employee representational rights ... provided by Peabody to each employee who will be covered by the Agreement, complied with s.174(1A) of the Act and, if the Notice did not comply, was it necessarily invalid and of no effect ... The second issue is whether **Regulation 2.06A(b)(i)** of the *Fair Work Regulations* ... requires that an application for the approval of an enterprise agreement be accompanied by a signed copy of the agreement which includes the ‘residential address’ of each person who signs the agreement” @2 - found that “As the Notice includes ‘other content’ it does not comply with s.174(1A) and hence is invalid” @85 - the word ‘**address**’ in Regulation 2.06A(2)(b)(i) does not mean ‘residential address’)

### **FWA Cth s176(3) – Employee organisation’s bargaining representation rights**

(amended from 1/1/13)

[\[2014\] FWC 7784](#) *SA CEPU v Active Tree Services* (ATS argued “that the CEPU does not have the right to act as a bargaining representative for these employees. ATS asserts that it provides vegetation management services to local councils, water utilities, power utilities, road and rail authorities, emergency response services, community organisations and civil contractors, and that accordingly its **vegetation management services are not ‘peculiar to the electrical industry’**” @7 - O’Callaghan SDP concluded he was “**not satisfied that the CEPU rules enable that union to cover employees of ATS in South Australia who undertake vegetation clearance work in the vicinity of power lines.** As a consequence, I do not consider that the CEPU can be regarded as an employee organisation for the purposes of s.176(3) of the FW Act and as such, is not entitled to seek a majority support determination pursuant to s.236 of the FW Act” @53)

### **Full Bench decisions**

[\[2014\] FWC FB 1447](#) *Uniting Church in Australia Property Trust (Q) T/A Blue Care and Wesley Mission Brisbane v QNU* (“Since the QNU has two members, Ms Scott and Ms Orreal, who are employees of Blue Care and who will be covered by the Care and Support Agreement and the QNU is entitled to represent the industrial interests of them in relation to work that will be performed under the Care and Support Agreement, the QNU is a bargaining representative of employees, being Ms Scott and Ms Orreal, who will be covered by the Care and Support Agreement. Thereby the QNU is a bargaining representative for the proposed Care and Support Agreement. Accordingly, the **Deputy President did not err in concluding the QNU is a bargaining representative for the proposed Care and Support Agreement**” @45-46)

[\[2014\] FWC FB 3501](#) *AMWU v ResMed Ltd* (consideration of “**entitled to represent the industrial interests of the employee**” - “the AMWU is entitled to represent the industrial interests of an employee if it may enrol the employee as a member in accordance with its eligibility rules - that is, to use a common expression, whether it has ‘coverage’ of that employee” @8)

### **FWA Cth s181 – Employers may request employees to approve a proposed EA**

[\[2014\] FWC FB 1313](#) *AMIEU v Teys Australia Beenleigh* (“The phrase ‘**will be covered by the agreement**’ in s.181(1) does not indicate future likelihood but rather expresses a determinate or necessary consequence. As Katzmann J observed in *CFMEU v FWA*: ‘Objectively, the intention of the legislature in using the expression was to ensure that the employer could only make an agreement with those employees who were named or described in the agreement and whom the agreement purported to cover.’” @15 - “the Deputy President erred in her interpretation of the expression ‘will be covered’ by the agreement, in s.181(1), and in having regard to anteriorly derived notions of fairness in construing the coverage of the Agreement” @26)

### **FWA Cth s182 – A majority of employees must approve EA**

[\[2014\] FWC FB 5643](#) *AMIEU v Teys Australia Beenleigh* (**trainee supervisor status - effect of such on classification** - by majority judgment, held that EA should not have been approved as there wasn’t a majority of those eligible to vote in favour of it - “Notwithstanding the fact that the employees of Teys who were a ‘Trainee Supervisor’, the ‘Trainee Workplace Health and Safety Officer’, the ‘Vietnamese translator’ and the ‘employee acting in a “HR” role’ at the time of the vote on the approval of the 2013 Agreement were not employees who ‘will be covered’ by the 2013 Agreement at the time of the vote, and thereby not entitled to vote on the approval of the 2013 Agreement, they were included on the roll of voters who could vote on the approval of the 2013 Agreement. It is not in dispute that **some of the 17 employees who were a ‘Trainee Supervisor’ at the time of the vote actually voted** in the ballot on the approval of the 2013 Agreement and that all of them may have voted. Accordingly, **the outcome of the ballot may have been different if those who were not employees who ‘will be covered’ by the 2013 Agreement at the time of the vote had not voted in the ballot**, there being 359 employees who voted to approve the 2013 Agreement and 343 employees who voted against its approval” @122)

### **FWA Cth s185(3) – When the application must be made**

[\[2014\] FWC 2245](#) *SA Andrew Puglisi Trust and Kinkawooka Trust* (“a **failure to comply with s.180** negates the capacity to approve an agreement and hence makes an extension of time inappropriate” @24)

### **FWA Cth s186(3A) – When FWC must approve an EA**

See also [s238\(4A\)](#)

[\[2014\] FWC FB 7560](#) *OneSteel Recycling Pty Ltd* (“the **Agreement only covers operators employed by OneSteel Recycling in Victoria**, albeit the Agreement **does not cover all the OneSteel Recycling sites in that State**. Because of the nature and location of the work and the organisation of the OneSteel Recycling business, we are satisfied that the group of employees can be properly described as organisationally, operationally or geographically distinct within the meaning of s.186(3A)” @24)

### **FWA Cth s188(c) – No other reasonable grounds to believe no genuine agreement**

[\[2013\] FWC FB 7453](#) *ASU v Yarra Valley Water Corporation* (“A **false representation or a material non-disclosure by an employer in the course of bargaining for an enterprise agreement** may constitute a reasonable ground for believing under s.188(c) of the Act that an enterprise agreement has not genuinely been agreed to by employees if it could reasonably be expected to have had the effect of deceiving those employees into voting for something which, if they had known the true position, they would not have voted for” @28 - no reasonable grounds in this case)

### **FWA Cth s189(2) – FWC may approve EA that does not pass BOOT (public interest test)**

[Jarman Ace] “In *Re Jellifish! Pty Ltd, (Re Jellifish!)* Asbury C (as she then was) said:

‘With respect to the “public interest” consideration in s 189(2) it is true, as observed by Deputy President Bartel in [Top End Consulting](#) that the requirement is for the Tribunal to be satisfied that the existence of exceptional circumstances makes the approval of the agreement “not contrary to the public interest” rather than to be satisfied in a positive sense that approval of the agreement is in the public interest. It is also the case that the expression “in the public interest” when used in legislation, is to be determined by making a

discretionary value judgment on the relevant facts, constrained only by the scope and purpose of the legislation.

In relation to public interest in the context of the Act, Vice President Lawler in *Re Tahmoor Coal Pty Ltd* cited the following passage from the Full Bench decision of the Australian Industrial Relations Commission in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*:

‘The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.’

In my view, public interest considerations in the context of s 189 could involve deciding whether a term of an agreement sought to be approved under that provision, undermines or reduces entitlements in a modern award to the extent that members of the public whose employment is regulated by that award may have interests which are impacted by the approval of the agreement. It may also be the case that there is a public interest consideration in maintaining a level playing field among employees in a particular industry or sector. This is particularly so given that the Objects of the Act include at s 3(b):

‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.’ [citations omitted]

**Transport Workers Union v Jarman Ace Pty Ltd t/as Ace Buses 28/10/14**  
[\[2014\] FWC 7097](#)

### **FWA Cth s193 – Passing the BOOT**

[\[2014\] FWC 7097](#) *Transport Workers Union v Jarman Ace* (“The primary contention between the parties related to the issue of **minimum engagement periods**. Under the Agreement, it is the sum of the parts of a split shift that are utilised when calculating a minimum engagement period. For example, an employee who performs a split shift made up of two 25 minute parts is considered to have worked for a total of 50 minutes, and under the Agreement that employee would be entitled to two hours’ pay for the day. The TWU argued that under the Award, on its proper interpretation, employees in the same position would be considered to have been engaged twice, and would therefore be entitled to payment for two separate minimum engagements” @5 - DP had not erred by considering as **non-monetary benefits** personal use of bus and employees being free to return home after finishing shifts and not being required to work the balance of the minimum engagement period)

### **FWA Cth 201 – Approval decision to note certain matters**

[\[2014\] FWC 4011](#) *CFMEU v St John of God Health Care Inc. & Ors (s201(1)(b) not satisfied* - “Whether the respondent conceded the model consultation term applied or not is not to the point. It was for the Commissioner, having decided for himself the Agreement did not include a consultation term as required by s.205, to note in his decision that the model consultation term was to be taken to be a term of the Agreement. His comment that the model consultation term would apply to the extent of any inconsistency with clause 44 did not satisfy that requirement” @24)

### **FWA Cth s205 – EAs to include a consultation clause**

[\[2014\] FWC 4011](#) *CFMEU v St John of God Health Care Inc. & Ors* (“Clause 44 excludes certain employees from the respondent’s **obligation to consult** in the event there was to be major workplace change which was likely to have a significant effect on them. Such a limitation is not consistent with **s.205(1)(a)**” @21 - also “clause 44 did not extend the right to representation to all employees covered by the Agreement” @22 - “Although the Commissioner did not refer expressly to the possibility of an undertaking from the respondent being given pursuant to s.190 of the Act, to the extent his comments ... about the respondent’s concession may somehow rely on that section it is sufficient for us to note that s.190 only arises when a member has concerns an agreement does not comply with ss.186 and 187. It is not applicable where an agreement does not contain a consultation term as required by s.205” @25)

### **FWA Cth s206 – Base rate of pay under EA must not be less than modern award ...**

[\[2013\] FWCFB 8025](#) *Ferryman Pty Ltd* (the interpretation of a clause involving wage increases was in dispute - s739(5) also considered)

### **FWA Cth s225 – Application for termination of EA after nominal expiry date**

[\[2013\] FWCFB 8726](#) *AWX Pty Ltd* (It was “argued that the AMIEU solicited employees to make the application as part of an industrial campaign and therefore there was no genuine application by those named employees ... [Held] There is no suggestion that the persons named did not make the application or that they were not genuine applications other than it was said to be a part of an AMIEU campaign. Even if such a process was taken simultaneously with a campaign to achieve an enterprise agreement it does not invalidate the application” @9-10)

### **FWA Cth s226 – When FWC must terminate enterprise agreement**

[\[2013\] FWCFB 8726](#) *AWX Pty Ltd* (“It was submitted that because the Commission only had 12.42% of the views of employees it could not take into account those views and therefore had not complied with the statutory obligation” @17 - **“We do not share the view of AWX that a simple examination of the response to a vote is indicative or conclusive of the exercise of jurisdiction or not.** Whether or not the jurisdiction is exercised, will depend on the particular facts and the opportunities presented to employees (or those covered by the agreement for that matter) to express a genuine view, free from any form of coercion” @23 - **s226(b), public interest and the interests of employees who were asylum seekers considered** - “it was argued by AWX that this identifiable group of employees were benefiting from its approach as they received meaningful training, employment and accommodation and did not end up in the black economy” @26 - FWCFB did “not accept that because competitors may not comply with award conditions or taxation laws that this provides a basis for arguing that it would be contrary to the public interest to terminate the Agreement” @27 - “This is a matter which seeks to distinguish between employees generally and those with asylum seeker backgrounds. We see no reason to discriminate in this regard. Modern awards constitute a set of terms and conditions of employment which apply as minimum standards to employees within the Australian community” @29 - termination of agreement confirmed)

### **FWA Cth s236 – Majority Support Determination (MSD)**

[\[2014\] FWCFB 2418](#) *ResMed Limited v AMWU* (jurisdiction to hear and determine an application by AMWU, an employee organisation, for a majority support determination in respect of a section of ResMed’s workforce - AMWU had proposed a single EA - “ResMed’s submissions require s.236(1) to be read as if, in addition to the requirement for an applicant to be “a bargaining representative of an employee who will be covered by a proposed single-enterprise agreement”, it contained a further requirement not stated in the text, namely that if the applicant was an employee organisation, it had to have the right to represent the industrial interests of *all* employees who will be covered by the proposed single-enterprise agreement. This would involve a major departure from the usual approach to statutory construction” @12-13 - “There is also no warrant to read into s.236(1) an additional limitation concerning the capacity of bargaining representatives to make an application for a majority support determination based on the line of authority which includes *Williams, Dunlop Rubber, Clarkson, Aird and Cohen*” @22 - permission to appeal granted, but appeal dismissed)

### **FWA s237 – Majority Support Determinations**

[\[2014\] FWCFB 2418](#) *ResMed Limited v AMWU* (s237(2)(a) considered from para. 18)

### **FWA Cth s238 – Scope orders**

[\[2014\] FWC 4307](#) *SA Voet & Anor* (capacity of applicants to pursue scope order - applicants not “excluded from the capacity to pursue a Scope Order simply because they are excluded from the definition of the employees proposed by GWA to be covered by the agreement” @19)

[\[2014\] FWC 4626](#) *SA Voet & Broome v GWA Group* (“The **exclusion of supervisors from an Enterprise Agreement** is commonplace and reflects a very normal practice. The evidence of Mr Dunstan in this matter has confirmed significant differences in the work and the responsibility of GWA supervisors from operational employees. Evidence to contradict this position is not before



me. In this context, the proposition that the exclusion of the supervisors creates an unfairly chosen workgroup seems to me to lack evidentiary support and to be fraught with difficulty" @22)

### **Full Bench decisions**

[\[2014\] FWC FB 1476](#) *The AWU* ("Overall, the Commissioner's approach was to consider whether the requirements of s.238(4) were met in relation to the enterprise agreement proposed by the Company and then, having been satisfied that those requirements were met, granting the Company's application without separately considering whether the requirements of s.238(4) were also met in relation to the Union's proposed agreement. That approach involved error. The Commissioner was considering **two separate and competing applications for a scope order**. Each had to be considered on its own merits. In circumstances where each of the competing proposed agreements satisfied the requirements in s.238(4)(a) to (c), the resolution of the competing applications is governed by s.238(d). One of the two applications will be a more reasonable exercise of discretion. It would not be reasonable to make the orders sought in the other application" @42-43)

### **FWA Cth 238(3) – Bargaining representative must give notice of concerns**

[\[2013\] FWC 6892](#) *SA AWU v Sodexo Remote Sites Australia* (meaning and determination of 'relevant' bargaining representatives - 'reasonable time' and 'responded appropriately' considered)

### **FWA Cth s238(4)(b) – Scope orders (promotion of fair and efficient conduct)**

[\[2013\] FWC 6892](#) *SA AWU v Sodexo Remote Sites Australia* (the requirements of s238(4)(b) considered from para. 89)

[\[2014\] FWC FB 1476](#) *The AWU* (issues associated with **bargaining for two agreements** as it relates to fairness and efficiency)

### **FWA Cth s238(4)(d) – Scope orders (reasonable in all the circumstances)**

[\[2013\] FWC 6892](#) *SA AWU v Sodexo Remote Sites Australia* ("although I have found that the making of the orders would promote the fair and efficient conduct of negotiations to some degree, the relevant findings were made on balance and the **potential improvements to the bargaining process are marginal and somewhat indirect**. Further, there are also efficiency consequences associated with the proposed change of scope and the effective conduct of what would become three bargaining processes. I have also considered the status and conduct of the present bargaining process, the degree of commonality of interests amongst the employees concerned, and the capacity for the employees to collectively accept or reject the revised proposed national agreement in a ballot which would otherwise take place shortly. I have also had regard to the timing of each request for the change in scope, the impact upon Sodexo and the other bargaining representatives, and the history of industrial regulation concerning these parties. In all of the circumstances of each case, it is **not reasonable that the orders be made at this time**. I am also not persuaded that it would be appropriate to exercise any discretion to make the orders given those same circumstances" @112-115)

### **FWA Cth s238(4A) – Scope orders (matters which FWA must take into account)**

[\[2014\] FWC 1035](#) *SA ARTBIU & Ors v ARTC* (**network controllers in this case not regarded as geographically distinct** - "They work in a particular separate control room; however, they interact with a number of other groups of employees on a relatively regular basis. They also work with source materials provided by the Programmers and others, and directly report to the Train Transit Managers. The Network Controllers are the only group who undertake full 24/7 shift rosters however other groups, including those who work in association with them, do undertake shiftwork and cover 24 hour periods" @128)

[\[2014\] FWC 1361](#) *SA TWU v SouthLink* ("The effect of the scope order would be to **separate a group of bus drivers who are based at two particular bus depots of SouthLink** ... from an enterprise agreement bargaining process that presently involves all of the bus drivers of that

employer" @1 - **geographical, operational and organisational distinctness considered** in relation to Hills bus drivers - application failed)

[2014] FWCFB 1476 *The AWU* ("Geographical distinctness under [s.238\(4A\)](#) is concerned with the **geographical separateness of the employer's various worksites or work locations**, not a separation of a few hundred metres within the same work site" @13)

#### **FWA Cth s284 – The minimum wages objective**

[2014] FWCFB 3500 *Annual wage review 2013/2014* (whether "in the 2012–13 Review decision the Panel made an 'error of law' in its construction of s.284(1) and failed to give proper effect to the intended operation of the provision and to paragraph 284(1)(c) in particular" @75 - no error found)

[2014] FCAFC 118 *National Retail Association v FWC* ("the minimum wages objective must be regarded as not only relevant to, but an inherently important consideration in, any assessment of whether, by reference to the minimum wages provided by a modern award, that award achieves the **modern awards objective**" @64)

#### **FWA Cth s311(3) – 'Arrangement'**

[2014] FWC 6245 *NSW Oliphant v Savills (NSW)* (the A was employed by CBRE (building manager) as a building operations supervisor at 60 Carrington Street - the building was sold to CC Nominees - R was contracted by CC to take over from CBRE as property manager - R then employed A as building operations supervisor - A left the employment of CBRE - CBRE continued to provide property accounting management services for the building - the issue was whether A's service with CBRE could be counted as service with R so he could satisfy the minimum employment period - R contended "s.311(1)(d) requires a connection between CBRE and Savills and this condition was not satisfied. Mr Oliphant says that this condition was satisfied by the existence of an arrangement between CBRE and Savills of the kind described in s.311(3) - **meaning of 'arrangement' considered** - "the primary motivation for CBRE to provide the relevant information so as to allow for a smooth handover of the role of building manager was the obligations contained in the Property Management Agreement at paragraph 8.5. CBRE continued in the role of building accounts manager and I think it is probable that they would have wanted to maintain a good relationship with CC Nominees and meet the obligations in their contract. It would appear to me that the provision of a small number of documents, the ownership of which is open for speculation, occurred as an incidental part of the obligation of CBRE to facilitate the handover process"@26 - no arrangement found, and even if one did exist "the provision of the relevant documents to Savills by CBRE was not in accordance with that arrangement but in compliance with the contract between CBRE and CC Nominees" @27)

#### **FWA Cth s319 – Orders relating to instruments covering new employer and non-transferring employees**

[2014] FWCFB 351 *Zancourt Recruitment (s319(1)(b))* considered - **time limits on orders** - Commissioner did not have jurisdiction to place time limit on her order)

#### **FWA Cth s332(1)(b) – Earnings (amounts applied on employee's behalf ...)**

See also [s382\(b\)\(iii\)](#)

[2013] FWC 9894 *Qld North v PrimeARC* ("Section 332(b) of the Act provides that an employee's earnings include amounts applied or dealt with in any way on the employee's behalf or as the employee directs. ... [I]t is asserted that Mr Scott North voluntarily reduced his salary without reference from the Board, in order to avoid his creditors and/or an order of the Family Court. It is suggested that Mr Gary North played some kind of role in the reduction as it was Mr Gary North who informed the Company that Mr Scott North had requested to reduce his salary. I accept that **if Mr Gary North and Mr Scott North colluded to reduce Mr Scott North's salary to defeat his creditors or a court order, and that Mr Scott North gave a direction in relation to that reduction, then it could be said that the amount by which the salary was reduced constituted earnings dealt with on behalf of Mr Scott North**" @25-26 - "if Mr Scott North expended PrimeARC's funds to pay his personal legal expenditure, without authority from the Company to do so, that the amounts so expended are not part of Mr Scott North's annual earnings for the purpose of determining whether those earnings exceed the high income threshold" @32)

## FWA Cth s332(2) – Exclusions

[\[2013\] FWC 7447](#) **NSW** *George v Park Trent Property Group* (A's **bonus, which was not performance related** taken into account - *Jenny Craig Weight Loss Centres* applied)

[\[2014\] FWCFB 1976](#) *Foster v CBI Constructors* (decision at first instance placed "much emphasis ... on the note to s.332 and, in particular, **whether the overtime in question was 'guaranteed' or not** - "Mr Foster was subject to an ongoing direction from his employer that he must work half an hour's overtime every day that he worked. ... [E]very supervisor was required to attend the 30 minute pre-start meeting every work day. The Respondent had unequivocally directed to all employees that work was not to commence until the pre-start meeting had been commenced ... Until such time that the Respondent notified Mr Foster that it intended to make a modification to this existing arrangement, the overtime payments could be determined in advance. ... Thus, Mr Foster's regular overtime payments for the daily pre-start meetings should not be excluded from the calculation of his earnings by virtue of s.332(2)(a) of the Act" @41-42)

[\[2014\] FWC 3844](#) **Qld** *Hembrow v Bartley Burns Town Planning* (**back pay** of \$12,000 paid monthly over 12 months for a retrospectively granted pay increase referable entirely to past periods of employment not found to be earnings for the purposes of the high income threshold - a case involving '**conscious underpayment by the employer being made good**' distinguished)

## FWA Cth s332(3)(b) – Non-monetary benefits

[\[2014\] FWC 1467](#) **Qld** *Hallam v DavBridge Properties* (**no agreed monetary value agreed on A's use of lap top, phone and vehicle** - R "has attempted to assign a value to those items in circumstances where no value was agreed. It is also the case that the Applicant gave evidence to the effect that he **did not use those items for personal use**, and no evidence to the contrary was provided by the Respondent" @25 - such benefits not considered for purpose of high income threshold)

## FWA Cth s332(4)(b) – Non-monetary benefits

[\[2014\] FWC 3047](#) **NSW** *Harris v SX Projects* (pursuant to s.332(4)(b) the **compulsory superannuation contribution** is "not to be included in the annual rate of earnings for the purpose of comparison with the high income threshold" @40)

## FWA Cth s340 – Protection

See [Adverse action](#)

Ash A & Kane C, '*Post-Barclay Adverse Action Snapshot: Emerging Trends in Adverse Action Law*' (2013) 19(2) *Employment Law Bulletin* 29

Dawson M, '*There's a Workplace Right, Right? The Adverse Action Provisions in the Fair Work Act in Relation to Workplace Rights*' (2013) 18(10) *Employment Law Bulletin* 161

[\[2013\] FCAFC 160](#) *State of Victoria v CFMEU* ("The allegation made against the State under s 340(1)(a) in relation to Lend Lease was that, when (and for so long as) it threatened to refuse to accept the Exemplar tender on the basis that the Lend Lease Agreement was non-compliant with the Guidelines, it took adverse action against the employees of Lend Lease" @53 - there is no reason "why the conduct of a person who offers a **contract for the provision of services to a large corporate independent contractor**, and then refuses to engage the independent contractor unless the employees of that contractor are adversely affected in some way, should be regarded as exempt from the operation of s 340" @120)

[\[2014\] FWC 4133](#) **Vic** *NUW v Caterpillar ... & NUW v Hoban Recruitment* (the **NUW brought actions on behalf of two labour hire workers against host employer, but not against labour hire company** - adverse action claims involved - host employee claimed poor performance and failure to comply with policy were behind its decision to cease providing work to workers - joinder of labour hire company sought - extension of time issues - discretion to order joinder not exercised)

## FWA Cth s341 – Meaning of workplace right

See [Adverse action](#)

[\[2014\] FCCA 2317](#) *Hall v City Country Hotel Management Pty Ltd & Ors (No.2)* (see precis below at **Underpayment of wages** sub-heading)

[\[2014\] FCCA 2397](#) *Bland v Australian Portable Camps Services* (**preliminary rulings on admissibility** in the case of alleged adverse action for exercising a workplace right)

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* (see [precis](#) at Adverse action – Complaint in relation to employment)

[\[2014\] FCCA 2464](#) *Evans v Trilab* (**R sought summary dismissal of application claiming A “had not pleaded a complaint that is capable, as a matter of law, of constituting a workplace right as provided by s.341(1)(c)(ii)” @6** - A had complained to others at work about the way R was requiring them to do testing, alleging R was not complying with Australian standards - A claimed adverse action was taken against him as a result - meaning of **‘is able to make a complaint or inquiry’** and **‘in relation to’** employment considered - after in depth consideration of various seemingly divergent authorities the court concluded “it is arguable that a complaint or inquiry need ... not arise from a statutory, regulatory or contractual provision before it can be a complaint or inquiry in relation to a person’s employment for the purposes of s.341(1)(c)(ii) ... and [need] only have an indirect nexus with a person’s terms or conditions of employment to come within the scope of s.341(1)(c)(ii), and may be a complaint about the conduct of another person in the workplace or about a workplace process which concerns or has implications for an employee’s employment” @61 - summary relief denied)

[\[2014\] FCCA 1327](#) *Morrow v Tattsbet Limited* (A “was entitled to make an **inquiry of both her employer and of the ATO about the respondent’s liability to make superannuation contributions** for her. To the extent that she may have done that, she exercised her *workplace right*. To the extent that she may have made **preparations to make that inquiry of the ATO**, she was clearly proposing to exercise her *workplace right*” @72 - however, **A never made a complaint to R or ATO** - “she deliberately chose not to make the respondent aware of her inquiries for fear of reprisals from the respondent” @96 - **adverse action therefore not taken for proscribed reason**)

#### **FWA Cth s342 – Meaning of adverse action**

See [Adverse action](#)

[\[2013\] FCAFC 160](#) *State of Victoria v CFMEU* (“The proposed Builder Direct Deed was the only foundation for the findings by the primary judge that the State proposed to enter into a contract for services with Lend Lease and that it threatened to refuse to engage Lend Lease to provide services to it. In our view, the terms of the Deed do not fall within the operation of s 342 of the FW Act. As a result, we do not agree with the primary judge that those essential elements arising from s 342 of the FW Act were satisfied by the CFMEU in its case against the State under s 340 of the FW Act, so far as the New Bendigo Hospital project was concerned” @132-133)

#### **FWA Cth s343 - Coercion**

[\[2013\] FCAFC 160](#) *State of Victoria v CFMEU* (meaning of **‘intent to coerce’** considered - see from para. 70 - “The allegation against the State under s 343(1)(a) in relation to Eco was that the State (through Ms Cato) took action with intent to coerce Eco and its employees to vary the Eco Agreement to make it comply with the Guidelines” @52 - “It is well accepted that even overwhelming economic pressure is not, without more, illegitimate. A party is not required to forego its advantages, or compromise its position, merely because it can negotiate from an unassailable position. It is also important ... that for the purpose of the analysis of this issue it must be accepted that the conduct of the State was lawful, that the adoption and implementation of the Code and Guidelines was within power and that no breach of the FW Act was thereby involved” @95 - the state did not interfere with ‘free bargaining’ - “The publication and use of the Code and Guidelines was not (if within power) “illegitimate” @98)

#### **FWA Cth s346(b) – Protection**

[\[2013\] FCAFC 132](#) *BHP Coal v CFMEU* (trial judge decided “that Mr Doevendans’ holding and **waving of the scabs sign** was conduct by way of participation in a lawful activity organised by an industrial association. Since a reason for his dismissal was that he did so hold and wave the sign,



it follows that his dismissal was done in contravention of s 346(b) of the FW Act [114 of trial] ... [and] that, in displaying the scabs sign at the protest, Mr Doevendans was representing and advancing the views and interests of an industrial association. Since he was dismissed for that conduct, it follows that the dismissal was done in contravention of s 346(b)" [143 of trial] - "The reasons for the dismissal of Mr Doevendans extended beyond the mere fact that he waved the scabs sign and had '*deliberately and repeatedly held and waved*' that sign. ... [A]s found by the primary Judge, the reasons for the dismissal were far more extensive and included (for example): his arrogance when confronted; the fact that the waving of the sign was contrary to the policy of BHP Coal; and the fact that Mr Doevendans' conduct was antagonistic to the culture sought to be developed at the mine by Mr Brick. And, as again found by the primary Judge, '*the fact that he was engaged in industrial action or activity, did not play any part in his decision-making process*'" @107. **Trial judge erred by concluding "that there had been a contravention of s 346(b) in circumstances where the evidence that had been accepted and the findings of fact made by his Honour excluded any prospect that the decision to dismiss Mr Doevendans was taken 'because' he had engaged in 'industrial activity'.** The onus imposed by s 361, it should have been concluded, had been discharged ... [His honour erred by] seizing upon one aspect of the conduct engaged in by Mr Doevendans, namely his participation in the protest or his advancing the views of the union, and placing to one side the reasoning process of Mr Brick. In doing so, his Honour erred by **not making any ultimate finding of fact as to what was – or what was not – a 'substantial and operative' reason for the dismissal of Mr Doevendans**" @108)

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* (quoting the High Court in *Bendigo ... v Barclay* the court stated, "*The use in s 346(b) of the term 'because' in the expression 'because the other person engages ... in industrial activity', invites attention to the reasons why the decision-maker so acted. Section 360 stipulates that, for the purposes of provisions including s 346, whilst there may be multiple reasons for a particular action 'a person takes action for a particular reason if the reasons for the action include that reason'. These provisions presented an issue of fact for decision by the primary judge ... An employer contravenes s 346 if it can be said that engagement by the employee in an industrial activity comprised 'a substantial and operative' reason, or reasons including the reason, for the employer's action and that this action constitutes an 'adverse action' within the meaning of s 342. ... [I]f the reasons for the conclusions and the facts for which they were formulated are not challenged, then the contravention of s 346 cannot be made out. This proposition should be accepted. To hold otherwise would be to endorse the view that the imposition of an **onus of proof** on the employer under s 361(1) creates an rebuttable presumption at law in favour of the employee*" @69-70 - quoting Jones "*the employee is required to first prove the existence of objective facts which are said to provide a basis for the alleged adverse action, before the onus shifts to the employer in respect of the prohibited reason*" @72)

#### **FWA Cth s351 – Discrimination**

See [Adverse action](#)

#### **FWA Cth s356 – Objectionable terms**

[\[2014\] FWCFB 410](#) *United Firefighters' Union of Australia v Country Fire Authority* ... (sub-clauses 17.3 and 17.4 of the OS Agreement dealing with conditions for employees participating in consultation not regarded by majority to be objectionable terms - Commissioner Blair, however, found clause 17.2 objectionable for falling foul of item 1 of s.342(1))

#### **FWA Cth s357 – Misrepresenting employment as independent contracting arrangement**

[\[2014\] FCCA 1124](#) *The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.9)* (assessment of penalty for multiple **[139] contraventions** of sham contracting laws - offending at upper end of scale - "**the contraventions were deliberate and senior management directed the conduct.** There is no evidence that the respondent has taken corrective action to rectify the contraventions" @116 - penalty of \$313,500)

#### **FWA Cth s358 – Dismissing to engage as independent contractor**

[\[2014\] FCCA 2257](#) *The Director of the Fair Work Building Industry Inspectorate v Robko Construction Pty Ltd & Anor* (**company and owner of company found to be involved in contravention** of dismissing worker to re-engage her as an independent contractor - Company also "contravened [s.44\(1\)](#) ... in that, before dismissing Ms Simmons, it **failed to give her one**

**weeks' notice of termination or, alternatively one weeks' pay in lieu of notice**, as is required by [s.117](#) ... and instead gave her one days' pay in lieu of notice" @5)

#### **FWA Cth s361 – Reason for action to be presumed unless proved otherwise**

[\[2014\] FCCA 1895](#) *Miller v Executive Edge Travel & Events* (quoting the High Court in *Bendigo ... v Barclay* the court stated, "Clearly a defendant employer interested in rebutting the statutory presumption in [s 361](#) can be expected to rely in its defence on direct testimony of the decision-maker's reason for taking the adverse action. The majority in the Full Court correctly rejected an argument put by the respondents that the introduction of the statutory expression 'because' into a legislative predecessor to [s 346](#), in place of the previous statutory expression 'by reason of', rendered irrelevant the state of mind of the decision-maker ... Generally, it will be **extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer**" @67 - "Subject to the applicant establishing a workplace right and there has been adverse action, the provisions of s.361 of the FW Act operate to **shift the burden of proof** to the respondent" @75 - see further discussion from para. 76)

#### **FWA Cth s365 – Application for FWA to deal with a dispute**

[\[2014\] FWC 1155](#) *Vic Jobson v JB Hi Fi Group ...* ("In *Hewitt v Topero Nominees P/L T/a Michaels Camera Video Digital*, a Full Bench ... determined that the **Commission was not to consider a jurisdictional challenge that an employee who made a s.365 application had not been dismissed** ... [stating] 'it is sufficient to give the Commission jurisdiction to conduct a conference under s.368 that a s.365 application to state on its face that the applicant has been dismissed and it is alleged that the dismissal was in contravention of Part 3-1'" @8 - "The Full Bench identified that s.366 was an exception to the general rule that the Commission is not to conduct hearings to resolve jurisdictional objections raised against s.365 applications. The basis for s.366 being an exception was that it was an express power to extend the time within which an application must be made and that it does not involve any determination of the *merits* of a s.365 application" @10)

[\[2014\] FWCFB 2745](#) *Bartosiewicz v Monash University* ("In light of the provisions of the FW Act, the authority in *Hewitt* and the position of **Monash University opposing consent arbitration**, there was no error in the Deputy President not conducting a hearing, not allowing the presentation of evidence, not making private arbitration available and/or not otherwise dealing with Mr Bartosiewicz's s.365 application, in the manner sought by Mr Bartosiewicz" @14)

[\[2014\] FWC 4708](#) *Qld CFMEU (Qld) v Anglo Coal (Dawson Services)* (R complained that a single application covering multiple dismissals could not be made - however, "a general protections application is analogous to an application for the Commission to deal with a dispute and not to an application for an unfair dismissal remedy. There is **no reason why a single application cannot encompass multiple disputes, particularly when there is a common denominator** - as there is in the present case - whereby each of the persons in dispute was employed by the same employer" @29 - if wrong in concluding thus, DP Asbury was prepared pursuant to "s.586 to allow the application to be amended on the basis that it would be treated as a separate application for each employee named in the Schedule to it" @36)

#### **FWA Cth s366(2) – Time for application**

[See also [s394\(3\)](#) generally as many s366 cases have been included there]

[\[2014\] FWC 3903](#) *Vic Shaw v ANZ* (**distinction between s366(2) and s394(3)** - "The matters that must be taken into account, which are set out in s. 366(2) of the Act, are similar to but not the same as the matters that are to be taken into account in considering whether there are exceptional circumstances in the context of an unfair dismissal remedy application identified in s. 394(3) of the Act. It is with that note of caution that authorities which concern extensions of time about unfair dismissal matters are to be viewed in their application to the considerations set out in s. 366(2) of the Act. The statutory context and overall content is similar, but it is not the same" @10)

[\[2014\] FWC 5324](#) *Qld Nicolas Jr v Nortask* (**A complained "that upon hearing the facts of his case, a representative of the FWO should have advised him to make a general protections application or informed him that such an application was an alternative to an unfair dismissal application"** @59 - Commissioner did "not accept that there was error on the part of the FWO so that this is a case where there are exceptional circumstances. There is no evidence of any

incorrect information being provided to Mr Nicolas by the FWO. There is no evidence about the facts that were conveyed by Mr Nicolas to the FWO. If the facts were those set out in the Statement of Facts in these proceedings, then either an unfair dismissal application or an application for the Commission to deal with a general protections dispute could have been made. In those circumstances, that the FWO representative who spoke to Mr Nicolas only gave him the Form F2 Application for an unfair dismissal remedy, is not an error" @59 - "Ignorance of an option, in the absence of an additional consideration such as representative error or the provision of demonstrably incorrect advice by an agency such as FWO, is not an exceptional circumstance. Taken at its highest, Mr Nicolas' assertions could only establish an **omission on the part of the FWO**" @62-63)

#### **FWA Cth s370 – Taking a dispute to court**

[\[2014\] FWC 5666](#) *SA Hall v K.M. Mcardle & Sons & Ors* (see from para. 21 discussion of "the requirement under the FW Act to obtain a **certificate** from the Commission prior to making a general protections court application in relation to a dismissal" @21)

#### **FWA Cth s372 – Application for FWC to deal with a dispute**

[\[2014\] FWC 1553](#) *Abu-Izneid v Charles Darwin University* ("The **application did not exclusively rely on either s.372 or s.365**. However the information on the application was inconsistent. The grounds suggested that a termination of employment had occurred, yet the applicant's solicitor ticked 'no' in answer to the question 'Did the alleged contravention involve the dismissal of the applicant?' The **Commissioner noted that the file was processed as a s.372 matter but acknowledged that at the time of the application it was apparent that Mr Abu-Izneid had been dismissed**. Yet the Commissioner dismissed the application on a ground that is not available for applications made under s.365 of the Act regarding contraventions that involve dismissal" @13 - **whilst A was overseas and the Commission had difficulty contacting A's solicitor his application was dismissed** - "The consequence of dismissing the matter is that the Commission did not conduct a conference of the parties and did not issue a certificate that would enable the dismissal of Mr Abu-Izneid to be challenged under the general protection provisions" @6 - "The failure to provide an opportunity to the applicant to clarify the basis of the application ... amounts to a **failure to provide the applicant with procedural fairness** ... [I]n the light of the circumstances disclosed in the application and the concessions made by the employer, the Commissioner should have ascertained the appropriate basis for the application and provided an opportunity to the applicant or his solicitor to clarify their intent ... Further, in circumstances where the applicant was overseas, his solicitor was not in Darwin, Melbourne or Adelaide which were the locations of video conference facilities established for the conference, and the solicitor attempted to contact the Commission prior to the hearing, a further opportunity to enable the applicant to be heard in relation to the status of his application and ensure that the Commission carries out its duty under the relevant provisions of the Act should have been provided" @14-15)

#### **FWA Cth s376 – Costs orders against lawyers and paid agents**

[\[2013\] FWC 6700](#) *NSW Price v John Holland Group* (**s376(1)(b) considered** - new or novel issue raised concerning general protection provisions - R in the primary decision had sought to have A's s365 application summarily dismissed - costs applications of both parties denied)

#### **FWA Cth s382(a) – Period of employment of ... minimum period**

[\[2014\] FWC 4136](#) *Qld Wilson v Programmed/Integrated Workforce* ("Pursuant to **s.2G of the Acts Interpretation Act 1901**, where a period of employment commences on 2 September 2013, six months thereafter is 2 March 2014" @16)

#### **FWA Cth s382(b)(i) – Whether award covers worker**

[\[2013\] FWC 6402](#) *Qld McDonnell v Capricornia Training Company* (the A was engaged as a **chief executive pursuant to a written agreement**, but **asserted that "he was primarily a manager only** for the Award's purposes [Labour Market Assistance Industry Award 2010], and that at the time of his dismissal he was not performing the duties of CEO of the Company" @10 - A "may well have been particularly attentive over a number of weeks ... to the apprentice functions (responsibility for which he had assumed) but that does not diminish the principal purpose of his having been employed by the Company. And that was to perform the function of CEO ... [T]he

quantum of work ... is not determinative of the principal purpose for which the employee is employed" @19-20 - A not covered by award)

[\[2014\] FWC 7682](#) **SA Mitolo Group Pty Ltd** (FWC after considering **whether the Horticulture Award 2010 or the Storage Services and Wholesale Award 2010 applied** to the relevant employees held the latter applied - "Notwithstanding that the Angle Vale Road operation has a commercial relationship with, and is connected to the horticultural operations of the broader Mitolo Group, the substantial character of the Angle Vale Road site falls within the definition of the 'storage services and wholesale industry'" @93)

#### **FWA Cth s382(b)(iii) – High income threshold**

[\[2013\] FWC 7042](#) **Qld Priem v Priority Building** ("despite the **Respondent not having actually applied the wage increase**, due to the termination being effected immediately after the increase took effect, the balance of the evidence is that the **Applicant was entitled to a 5% increase** as of 1 July 2013" - taking into account the increase, A therefore found to be above the high income threshold even though he had not received it" @44)

[\[2013\] FWC 7447](#) **NSW George v Park Trent Property Group** (" \$115,000 was not the actual earnings of the Applicant because she had not paid income tax on the Consultancy and Bonus components. [Therefore] the **benefit to the Applicant of not paying income tax should be taken into account**" @100 - *Atkinson v Midway Community Care Inc* [\[2010\] FWA 2907](#) applied)

[\[2014\] FWC 2752](#) **WA Tipene v Norton Goldfields Limited** (**A's health insurance premiums, paid by employer to direct to insurer**, took A over the high income threshold)

[\[2014\] FWC 3844](#) **Qld Hembrow v Bartley Burns Town Planning** (see from paragraph 52 approach where **difficulty proving percentage of private motor vehicle use**)

[\[2014\] FWC 7608](#) **Vic Muhtari v ACI Operations** ("Mr Muhtari was not provided with a car by his employer. The vehicle did not belong to ACI it was leased by Mr Muhtari. He was able to package his salary to include a car. If he had not, he would have received the full benefit of the \$21,000 [his entitlement under his contract to a motor vehicle benefit]. He **chose to use some of his motor vehicle benefit to lease a car**. Had he not done so and retained the money because, for example, he already had a car, the expenses associated with using his private car for business use may have needed to be reimbursed by his employer but it would not have had the effect of reducing his remuneration. Under ACI's policy, if Mr Muhtari used his vehicle for work related purposes then he was entitled to be reimbursed for the costs on a distance travelled basis" @75 - no deduction from his earnings allowed)

#### **FWA Cth s383(a) - Meaning of minimum employment period**

[\[2014\] FWC 3077](#) **WA Rutherford v Cigarette & Gift Warehousing (Franchising)** (R claimed A had not completed the minimum six month employment period - "In this case the employment began on 12 August 2013 and the six-month minimum employment period was completed at midnight on 11 February 2013. The **Applicant was not dismissed until 12 February 2013 which was the day after she had completed the six-month minimum employment period**" @9-10 - R's objection therefore dismissed)

[\[2014\] FWC 3467](#) **Vic Adalopoulos v CMC International** (alleged **trial period** counted toward minimum employment period of one year)

[\[2014\] FWC 7634](#) **WA Nash v Serco Australia** (the A performed two six month fixed term contracts on Christmas Island - there was a **gap of a few months between her second contract and a third during which she was dismissed** - A failed in arguing that the interim period between the second and third contract could be counted toward the minimum six month period - she was paid the usual annual leave and completion bonus after the second contract - the third contract was not an automatic extension of the second)

#### **FWA Cth s384 – Period of employment**

[\[2013\] FWC 9448](#) **WA Jean v Yara Pilbara Fertilisers** (A "was offered employment with the Employer on 24 December 2012 which he accepted on 31 December 2012. Mr Jean's acceptance



of the offer of employment was nothing more than that - accepting an invitation to form a contract of employment at a later date. For this reason, I am unable to agree with Mr Jean that he was employed from 31 December 2012"@18 - **"if both parties had undertaken their respective obligations, Mr Jean would have commenced employment on 4 February 2013"** @22 - the offer of employment was accompanied by an email indicating that R was obligated to provide A rent free accommodation and relocation of his furniture and personal effects - this had not occurred by 4/2/13 - A did not actually commence employment until 18/2/13 - FWC **unwilling to deem 4/2/13 to be the commencement date)**

#### **FWA Cth s384(2)(a)(i) – 'Regular and systematic'**

[\[2013\] FWC 10004](#) **NSW** *Lambley v Jetpets Animal Transport* (the A worked for 20 weeks before being made permanent - he **worked on average about 25 hours a week as a casual** - after that he worked for 11 weeks as a permanent employee - he worked exclusively for R and never rejected an offer to work - employment found to be **regular and systematic**)

[\[2014\] FWC 5053](#) **NSW** *Mckinnon v Reserve Hotels* ("a **different roster week to week** is not fatal to a conclusion that a casual employee is employed on a regular and systematic basis" @19 - the A worked every week for 76 weeks averaging about 25 hours a week usually on a Wednesday or Saturday or Sunday nights - **not necessary that the hours or days of work be on a regular or systematic basis** - it's the employment which must be on a regular or systematic basis - **employment that is seasonal** can even be of such a nature)

[\[2014\] FWC 5372](#) **Tas** *Massey-Ross v Richmond Fellowship Tasmania* (the A, after working about 24 days from early July 2013 as a casual, was included for two months on the part-time line of R's site roster - time period of **two months not too short for a finding of reasonable expectation** - also, A reasonably expected she'd be made permanent after discussions with R in late July, and she was given a plethora of work in the two month period with regular additional shifts - **"The establishment of regular and systematic employment does not, of itself, require an employee to have knowledge of why the employment is being offered. The unchallenged evidence of the Applicant was that she filled out the roster with the shifts she wanted to do, and was regularly requested to, and did, undertake additional shifts"** @34 - **"systematic employment does not require the worker to be able to foresee or predict when his or her services may be required. The requirement as established by Yaraka is that there is a pattern of offer and acceptance of employment in such a way as the Employer is reliant on the workers services. ... [DP Wells] satisfied that this pattern of employment existed between the Applicant and the Employer in this matter"** @39)

#### **FWA Cth s384(2)(a)(ii) – 'Reasonable expectation of continuing employment'**

[\[2013\] FWC 8127](#) **NSW** *Van Kampen v Transfield Services* (A's "sequence of [casual] engagements did not amount to a regular and systematic pattern over his entire employment history, although it did become more so in recent years. In 2005 he was employed for two periods amounting to a total of 6 weeks, for the next four years he was employed on two to three occasions amounting to totals of 12,10,14 and 13 weeks respectively. In the last three years he was employed on two to three occasions amounting to totals of 38, 35 and 23 weeks respectively. In 2012 there was 3 weeks between the first and the second occasion and 14 weeks between the second and the third and last occasion. However he **could not have had an expectation of continuing employment once the contract between Transfield and its client was concluded** ... This is because as each contract came to an end the probability of him being offered employment on another Transfield contract depended upon a number of uncertain factors" @38-39 - **no continuing relationship** between employer and employee had been established)

#### **FWA Cth s384(2)(b)(iii) – Period of employment**

[\[2014\] FWC 6245](#) **NSW** *Oliphant v Savills (NSW)* ("Savills **did not explicitly state that Mr Oliphant's service with CBRE would not count** as service with Savills. They submitted that there was a clear **implication to be drawn from the imposition of the probationary period**. I think it is incumbent upon persons in the position of Savills to explicitly state that which they say arises from an offer of employment, rather than rely upon what could be a **contentious implication**" @30)

**FWA Cth [s386\(1\)\(a\)](#) – Meaning of ‘dismissed on employer’s initiative’**

[\[2013\] FWC 7996](#) **Vic** *Papalia v Co.As.It. - Italian Assistance Association* (see [précis](#) at Contract of employment/service - **contract subject to funding not renewed due to lack of funding**)

[\[2013\] FWC 8021](#) **Vic** *Hooker v Coffee Break Café* (A “**walked out on her employer during her shift of work without reasonable excuse**, left her apron and her keys to the premises and departed without notice or explanation. ... [A’s] possession of the keys was for the purposes of opening the premises in the mornings. Her return visit ... [the next day to enquire of her employment status] merely confirmed that by taking this action she apprehended that it was most likely her who ... had initiated the end of the employment relationship unless Ms Chen was prepared to forgive it” @45 - R was not so prepared - no dismissal at employer’s initiative - application dismissed)

**FWA Cth s386(2)(a) – ‘A contract of employment for a specified period ...’**

[\[2013\] FWC 8890](#) **Qld** *Downes v The Uniting Church in Australia Property Trust (Q)* (discussion of differences between FWA provisions and Workplace Relations Act - the fact of a **probationary period** or a **right to terminate a contract earlier** does not detract from a contract being a contract for a specified period - Explanatory Memorandum considered - A was **terminated a month before the expiry of her contract** but paid out for the whole contract so her contract did not expire by **effluxion of time** - no jurisdictional bar found - however the utility of her application questioned since R did not intend to renew her contract)

[\[2013\] FWC 9791](#) **SA** *Derar v Recruitco* (the A was a labour-hire employee - his assignment with IGA ended - “where the **employment offer is clearly restricted to an engagement by a host organisation**, that must define the specific duration of that particular employment arrangement. Accordingly, Mr Derar was **engaged for a specified task**. That task concluded when IGA terminated the assignment. It follows then that Mr Derar was not dismissed for the purposes of s.386 and accordingly, is not able to pursue this application. Had Mr Derar been dismissed by Recruitco whilst his assignment to IGA continued, a different conclusion relative to s.386 would have resulted. In this instance however, it was the termination of the assignment with IGA which ended the employment with Recruitco” @39)

[\[2014\] FWC 67](#) **NSW** *Bokhari v Australian Campus Network* (the A had been a **contract teacher** with R for about three years - “It is **often the case that a series of fixed term contracts of employment over a number of years will give rise to an understanding of permanent employment** or an inference that what is occurring is long-term permanent employment and not a series of fixed term appointments. There is certainly a series of fixed term contracts in this case of a duration which might reasonably give rise to such an inference. However, the particular terms of these contracts of employment make it very clear that there is no obligation arising to offer further contracts of employment and no permanent employment intended to be engaged in” @20)

[\[2014\] FWC 42](#) **NSW** *Hope v Rail Corporation NSW* (“The letters of appointment which are said by RailCorp to set out fixed term or specified time appointments refer to **appointments up to instead of to a specified date, indicating that termination of the contract of employment might take place earlier than the specified date**. This weighs against the contract being a contract for a specified period of time with a specified end date. At commencement of employment Mr Hope was employed pursuant to a contract that contained a probation clause. That clause provided RailCorp with an **unqualified right to terminate the contract on notice during the probationary period**. This weighs against the contract being a contract for a specified period of time with a specified end date” @33-34 - “Although the original contract of employment appointed an end date, Mr Hope was allowed to continue in employment past the proposed end date. **When he continued in employment past the original proposed end date ... [he] became a permanent employee and remained so despite the fact that, at various times thereafter, RailCorp proposed to retrospectively create further fixed term contracts** - A was therefore employed in full time employment and his contract was terminated at R’s initiative)

## FWA Cth [s387\(b\)](#) – Whether person notified of reason for dismissal

[\[2013\] FWC 8430](#) **WA** *Prestedge v Boart Longyear Australia* (“To ‘notify’ is not just announcing to the employee a set of words hoping that he or she understands why they have been dismissed. For an employee to be notified, it is not merely telling them. An **employee should be notified in plain and simple terms why they are dismissed and not in ‘officialised’ assertions that, among others, he or she has breached a ‘global policy’**” @81)

[\[2014\] FWC 543](#) **NSW** *John v The Star* (“On 2 May, the **employer provided verbal advice to the applicant that he was summarily dismissed**. It was **not until a few days after he had filed a claim for unfair dismissal remedy that written notification of the reasons for the applicant's dismissal were provided**. A delay of this nature should not occur ... In this instance, at the time of making claim for unfair dismissal remedy, the employer had not provided written notification of the reasons for the applicant's dismissal. The unacceptable delay with the written notification of dismissal reflects poorly upon the employer generally and when combined with the inaccurate and erroneous contents of the letter of dismissal which was eventually provided, it has manifested as an indication of serious managerial ineptitude” @91-92 - see précis at Serious and wilful misconduct)

[\[2014\] FWC 7965](#) **SA** *Kruschel v Blue Dawn Health Care* (“there was a **valid reason for dismissal, albeit not the one relied upon by the employer**, being the use of unreasonable force. It follows that the applicant was not notified of the valid reason. However in my view ss.387(b) and (c) are intended to, collectively, provide an opportunity for an employee to respond to the reasons relied upon by the employer. It is implicit that an employer may not have, or may have but not articulate, a valid reason for dismissal at the time it occurs ... The failure of the respondent to provide the applicant with the names of witnesses and/or their statements was perhaps not ‘best practice’ but I am satisfied that the **applicant was given sufficient detail to enable her to understand what was alleged** and to respond appropriately” @66-67)

[\[2014\] FWC 2143](#) *Ventyx Pty Ltd v Murray* (“As the Deputy President herself found by reference to the Full Bench in *UES (Int'l) Pty Ltd* [\[2012\] FWA 5241](#) (“**Re: UES**”), the notice referred to under s.387(b) is in respect of ‘that reason’, and ‘that reason’ relates to the valid reason under s.387(a) of the Act. It follows that **the issue of notice in respect of an operational reason cannot be the subject of a finding under s.387(b) of the Act**, as the Full Bench in *Re: UES* made clear. So far as the Deputy President's decision suggests to the contrary, she fell into error” @97-98)

## FWA Cth s387(c) – Opportunity to respond

[\[2013\] FWC 8656](#) **Vic** *Killeen v Uniting Care Ballarat* (the A was informed that a review process had been carried out and that findings of fact had been made leading to a **preliminary decision** to terminate her employment - **at face value A was given an opportunity to provide a response before a ‘final decision’ was made** - FWC did not consider R was genuine in stating that a final decision would not be made until receiving A's response, and that if it was, A “had neither been notified of the reason for dismissal nor given an opportunity to respond because, apart from the formal complaint made by Mr Cronin, **none of the details of the evidence ... [it] had relied on in reaching their preliminary view were made available to Ms Killeen**. Whilst Ms Killeen could respond to the general allegations against her and whilst she could respond to the formal complaint of Mr Cronin she could not respond to any of the detailed allegations made by anyone else nor could she respond to the detailed consideration by the review panel without that information having been made available to her and to her legal representatives as they had requested” @144 - dismissal harsh etc)

[\[2014\] FWC 543](#) **NSW** *John v The Star* (R “required the applicant to attend a meeting on 2 May during which he was given an opportunity to respond to various allegations. Unfortunately, the allegations were only particularised as the meeting progressed and the applicant was shown the CCTV vision for the first time. In such circumstances, the **applicant was required to respond at the same time that he became aware of the particulars of the allegations made against him**. Consequently, there was not a proper opportunity for the applicant to carefully consider and respond in respect to the details of the allegations made against him” @93-94 - see précis at Serious and wilful misconduct)

[\[2014\] FWC 437](#) *Vic Callahan v Graphic Impressions* (“the Applicant was **not notified of the reasons for his dismissal before the termination of his employment took effect**, it follows that the Applicant was not given the opportunity to respond to any of the reasons now identified by the Respondent relating to his capacity or conduct. Moreover the Respondent was not aware of the investigation being conducted by Mr Morelli and was not given an opportunity to comment on the outcome of the investigation nor to participate in the directors meeting at which the investigation was discussed because he was unaware that Mr Morelli’s investigation would be discussed at that directors meeting” @67 - inadequate opportunity to respond found)

[\[2014\] FWC 2143](#) *Ventyx Pty Ltd v Murray* (“The circumstances of this case relate to a **dismissal on the basis of operational circumstances** ... As such, the matter cannot be ‘a relevant factor’ for purposes of s.387(c) ... In so far as the Deputy President intended to convey otherwise she fell into error” @105)

[\[2014\] FWC 2857](#) *Li v Edith Cowan University* ... (“In circumstances where the very serious plagiarism allegations against Dr Li were dealt with by the University’s Misconduct Investigation Committee at a **hearing held at a time when it was known to the University that Dr Li was in China**, we consider that it was **open to the Deputy President to find that the University did not provide Dr Li with a proper opportunity to provide an explanation for his conduct, notwithstanding that Dr Li went to China without permission**. The hearing conducted by the Misconduct Investigation Committee was the critical event in the University’s decision-making process, so that it cannot be said that Dr Li’s absence from this hearing was compensated for by other opportunities he was given to respond to the allegations. Nor can it be said that his attendance at the hearing could not possibly have made any difference to the outcome, having regard to the fact that the Deputy President found that Dr Li’s conduct could not properly be characterised as plagiarism in accordance with the allegations against him” @43)

“[63] Recently in *Pitts v AGC Industries Pty Ltd* a Full Bench of the Commission said:

‘In considering whether the Commissioner was satisfied that the dismissal of the Appellant was harsh, unjust or unreasonable the Commissioner was required to take into account, *inter alia*, whether the Appellant was given an opportunity to respond to any reason related to his capacity or conduct. This opportunity must have been afforded to the Appellant before a decision to dismiss is made. The process involved in providing the Appellant with such an opportunity does not require formality and is to be applied in a common sense way, to ensure that the Appellant has been treated fairly. In this regard we reject so much of the Appellant’s submissions which asserts that this requires an employer to conduct a meeting with the employee to inform the employee of the reasons for the proposed dismissal or otherwise provide the employee with an opportunity to address the concerns in writing.’” (Citations omitted) **Baldwin v Scientific Management Associates (Operations) Pty Ltd** 1/8/14 [\[2014\] FWC 5174](#) DP Gostencnik

[Reid] “[100] In *Wadey v Y.M.C.A. Canberra* [1996] IRCA 568, *Moore J* made clear that an employer cannot merely pay ‘lip service’ to giving an employee an opportunity to respond to allegations concerning his/her conduct. His Honour said:

‘In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the **employee must be made aware of allegations** concerning the employee’s conduct so as to be able to respond to them. The second is that the employee **must be given an opportunity to defend himself or herself**. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.’

[101] Nevertheless, procedural fairness steps should be applied in a commonsense and practical way. In *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 ... *Wilcox CJ* said at 7:

‘Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, commonsense way so as to ensure that the affected employee is treated fairly. Where the



employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section.” **Reid v itac2 Pty Ltd** 22/8/14 [\[2014\] FWC 5749](#) DP Sams

#### **FWA Cth s387(d) – Support persons**

[\[2013\] FWC 8538](#) **NSW Jensen v Aircom Systems** (“The applicant was advised of the reason for his termination, however, the nature of the notice and the conduct of the meeting meant that he was not given a reasonable opportunity to respond to the reasons given. **While strictly speaking he was not refused the presence of a support person the nature of the notice meant he had no reasonable opportunity to obtain one.** Consequently ... this constituted an ‘unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal’ in the terms of s.387 (d)” @73)

[\[2014\] FWC 4534](#) **Vic Painter v Equiset Construction** (“The **statute does not place any obligation on an employer to advise an employee that he or she should have a support person** with them at any meeting at which that employee’s employment might be in jeopardy ... The **Applicant did not ask for support person and the employer did not therefore refuse to allow the Applicant to have a support person**” @98-99)

#### **FWA Cth s387(f) – Size of employer’s enterprise**

[\[2014\] FWC 4548](#) **Vic Hall v Living Concepts** (**small employer** with one employee - A dismissed for **financial irregularities and not following reasonable directives** - A was notified of the reasons for his dismissal, but was not given any opportunity to respond - A was warned, but not in writing - “Section 387(f) has particular relevance in this matter. Living Concepts is a very small employer and there was **little to no understanding of processes and procedures in relation to effecting dismissal.** ... Mr Yu did not take the decision lightly. In addition, per **s.387(g)**, there were no human resources specialists within Living Concepts, which resulted in the process of terminating Mr Hall’s employment being clumsy” @21 - dismissal not harsh etc)

#### **FWA Cth s387(h) – Other relevant matters**

[\[2013\] FWC 6780](#) **NSW Gurdil v The Star** (**valid reason existed for A’s dismissal** as he breached R’s policies by dealing with an unruly customer of the casino in an overly aggressive manner - dismissal harsh however due to the **length and quality of A’s of service, mitigating factors associated with the incident, severe personal and economic consequences** and **R not giving any consideration to any response other than dismissal**)

[\[2014\] FWC 3751](#) **Vic Ismailov v Highsoftware Australia** (**A’s redundancy was not genuine as he had not been adequately warned or consulted** - the termination of A’s employment “was as a result of a redundancy having regards to the operation needs of the enterprise. However ... the **termination of employment was, overall, harsh.** Hisoftware had sponsored Mr Ismailov on a **457 visa**, which meant that upon the termination of his employment he had to find other suitable employment or leave Australia. His personal circumstances were known to Hisoftware and yet it **chose to dismiss him and present a deed of release at the same time** to deal with his statutory entitlements” @21-22 - two week’s salary awarded as compensation)

[\[2014\] FWC 4675](#) **Vic Nain v Southern Cross Care** (A, a care worker, found to have **slapped an elderly resident of a nursing home on two occasions** - “By choosing not to identify the persons within whom Mr Nain was working at the time the alleged incidents occurred, Southern Cross limited Mr Nain’s ability to identify the place and time when the incidents where alleged to have occurred and to recollect the basis of the circumstances and his conduct which was under consideration” @51 - this, and other **procedural imperfections did not render dismissal harsh etc**)

#### **FWA Cth s389 – Meaning of genuine redundancy**

##### **Consultation**

See [Dismissal – Redundancy grievance](#)

[\[2013\] FWC 6838](#) *Vic Papathanasiou v HBS Group* (R “**advised employees in a general way that the GPO job was coming to an end and discussed with them, relocation to other sites to mitigate the impact of the change. However there was no consultation, once a definite decision had been made, to reduce the number of employees on the GPO site and to terminate Mr Papathanasiou’s employment**” @24 - “The failure to consult is serious. However in this case **consultation would not have changed the outcome**. The work that Mr Papathanasiou was doing was coming to an end. All the employees would either have their employment terminated or they would be relocated. Mr Papathanasiou would not accept a change in his conditions of employment so that he could work on other commercial sites” @46 - termination not harsh etc)

[\[2013\] FWC 8097](#) *Vic Andronicou v Cooke & Dowsett* (“A **reduction in the overall requirement of the Respondent for plumbers could ... result in a genuine redundancy whether or not it was the Applicant’s particular position that was no longer required or some other position**” @20 - “On the basis of a **lack of sound evidence to support its claims of staff reductions** at the period of time relevant to this application I cannot find that the Respondent no longer required the job done by the Applicant to be done by anyone due the operational needs of the business” @32 - “**Whilst projects ending (and starting) are part of the normal operations of the business this does not mean that the end of a project is not a major change** in the organisation of the work of the Respondent” @48 - “If ... there was a reduction of 21% of employees in April, I am satisfied that this will have come about by some major change in its business. That being so there is a positive obligation on the Respondent to consult with the Applicant ... about that change in those requirements. The requirements on the Respondent are to notify the employees affected and then consult on those matters set out in clause 10.6 and give consideration to matters raised by the employees. This did not occur, at least with respect to the Applicant who was clearly affected by the change” @52 - consultation obligations not met - no genuine redundancy - Appeal dismissed 16/1/14 in [\[2014\] FWC 447](#))

[\[2013\] FWC 8889](#) *NSW Haynes v Chubb Security Services* (a “bona fide opportunity was provided to the Applicants to influence Chubb’s decision making process on 28 May 2013. ... **Applicants [advised] that if they could not work morning shifts they would be made redundant**. Chubb considered what was put on behalf of the Applicants and made a decision, while unfavourable to the Applicants’ interests, it did not diminish the fact that the discussion process required to be undertaken had occurred. In considering whether the Agreement provisions have been complied with it is not to the point whether the consultative process adopted by Chubb could have been better, **mere compliance is all that is required**” @63-64)

[\[2013\] FWC 8020](#) *NSW Fisher & Ors v Downer EDI Mining* (**consultation process involving several hundred employees** - “material provided in the PowerPoint presentations omitted reference to anticipated redundancy for maintenance employees and specifically only mentioned anticipated redundancies for operators. There was further evidence that maintenance management staff erroneously suggested to maintenance employees that the anticipated redundancies would be confined to operator positions. There was also evidence that at least one of the applicants who was a maintenance employee, had not been provided with any advice via the PSI ... An examination of the totality of the evidence regarding **important omissions in respect to anticipated redundancies applying to maintenance employees**, has been a most troubling aspect for consideration ... Downer Mining **acted in good faith and with every intention to comply with the consultation obligations** arising from the provisions of the Agreement. Consequently ... the consultation obligations have been met” @60-64)

[\[2014\] FWC 988](#) *Qld Stewart v Amcor Excavators* (the A, **a labour hire employee, was placed with a client who no longer wanted him - A was surplus to R’s needs**. “The Applicant’s skill profile was not in demand at any other site, it was powerless to return the Applicant to the original client and its work site, and the Employer at the same time was reducing its employment levels significantly in other areas in which it had direct employees” @46 - R “no longer required the Applicant’s job to be performed by anyone because of changes in the operational requirements of the Employer’s enterprise, as it is broadly conceived” @47 - R claimed that the decision to make A redundant could not be regarded as a ‘major change’ under the relevant Modern Award’s consultation provision arguing “that the redundancy of a single employee alone does not constitute a major change” @19 - the plural ‘employees’ was used in the award, but such held not to negate the application of the award to one employee - R also argued that a “major change is ‘where an

employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology” @26 - according to R, “there was no decision taken by the Employer to introduce a major change that had any significant effects. The Employer encountered a set of circumstances imposed upon it by an external event, and responded at a discrete level, but this could not amount to a major change of the type the consultation clause envisages” @31 - held that **“consultation provisions in modern awards (from which small businesses are not excluded) are - in their standardised origins - intended to capture redundancies however they might arise and on whatever scale (despite the conditionality expressed by the adjectives in the phrases ‘major change’ and ‘significant effects’”** @42 - R failed to comply with consultation provisions of applicable modern award - dismissal found)

[\[2014\] FWC 9311](#) **WA** *MacLeod v Alcyone Resources* (this case involved a **genuine redundancy**, but **R failed to meet its consultation obligations** under Clerks Award - A was an executive assistant - after restructure, the only position A might have been redeployed to was a junior receptionist position - the disparity between A’s former role and the junior position and A’s failure, in the face of **opportunity to express interest in the new role**, contributed to finding that A’s **dismissal not harsh** etc)

[\[2014\] FWC 1775](#) **Vic** *Barbakh v Jewish Care (Victoria) Inc* (the A was made redundant and there were no reasonable redeployment options - R did not meet its award consultation obligations - **even if R had met its consultation obligations, A would still have been terminated** - “having regard to the Applicant’s more than twelve years of service, her age and her numerous unsuccessful attempts to secure employment ... **Applicant’s termination was harsh** ...” @67)

[\[2014\] FWC 2046](#) **Vic** *Robertson v Car Stackers International* (the A reacted badly during one on one consultation to the news there would be redundancies - **consultation with A was left incomplete due to his intimidating, aggressive and threatening reaction** - R decided A would therefore be the one made redundant - dismissal harsh etc as no valid reason and lack of procedural fairness)

[\[2014\] FWC 3235](#) **SA** *Lassiter v Ford Dynasty* (after the A was told by R was it was looking at making his position redundant and that it wanted to discuss options with A, A absented himself from work on various forms of leave for an extended period - A’s position was then made redundant - **in light of A’s deliberate unavailability for consultation, R had met its consultation obligations**)

[\[2014\] FWC 4514](#) **WA** *Wessels v Midwest Vanadium* (a **destructive fire forced R to shut down a large part of its operations and A was made redundant along with 47% of R’s workforce** - A claimed R did not meet its consultation obligations under the award - award required consultation when employer had made **“definite decision to introduce major change in production”** - FWC satisfied this “was a ruinous event forced on the Employer rather than the Employer being the architect of the change in production” and that therefore there was no “definite decision” - in any event there were general discussions with employees about redundancies - genuine redundancy found - permission to appeal refused 1/10/14 in [\[2014\] FWC 6873](#) - **appeal lacked utility**)

[\[2014\] FWC 4564](#) **Qld** *Collie v Metropolitan Caloundra Surf Life Saving Club Inc* (“At the point that the intention to make his position redundant was discussed with Mr Collie, it was a **fait accompli** and the only possible option open to Mr Collie was a casual coaching position with uncertain hours. While it was open to the Club to discuss this option with Mr Collie, the casual position was presented as the only option. The manner in which the discussions occurred does not fulfil the obligations under the Award to consult. There was no discussion with Mr Collie about relevant skills and whether he could perform work other than coaching. While I accept that the Club’s capacity to redeploy Mr Collie into an administrative role was limited, there were casual employees performing work which could have been used to supplement the casual coaching role. This option was not discussed with Mr Collie, and had a proper consultative process been followed this subject could and should have been discussed” @28-29 - **R’s lack of knowledge about A’s qualifications hindered it in considering redeployment options** - **R failed to consider redeploying A to an associated entity** - see *precis* at Associated entities)

[\[2014\] FWC 5275](#) **WA** *Salisbury v McKay Drilling* ("The **change in this case was to make one position redundant**. The context relevant at the time the change was made there were approximately 60 employees employed by the respondent. Whether a change has significant effects on particular employees affected is not determinative of **whether or not it is a major change**. There was not in this case a major change in the respondent's production, program, organisation, structure or technology. Consequently there was no obligation under the Award for the respondent to consult with Mr Salisbury in these circumstances" @81)

[\[2013\] FWC 9972](#) **SA** *NTEIU v UniLife Inc.* (in mitigation of pending redundancy R deployed worker to new role until February 2014 - R argued worker was now employed on a fixed term basis and that it had no **further obligations re consultation and redeployment** - the A argued worker's employment was continuing and it was reasonable he be redeployed to an advertised position - A succeeded)

[\[2014\] FWC 6606](#) **Vic** *Zito v Goulburn Valley Imaging Group* (on balance, genuine operational reasons found - **A, a long standing employee, was told at a meeting (that took her unawares), that her position was to be made redundant** - at the meeting the A was not provided "all the relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees ... Because Mr Dodos did not comply with his obligations to provide relevant information, Ms Zito was prevented from having any discussion with Mr Dodos that could have caused him to adopt a different course of action. She was denied the opportunity to have a discussion which may have, in the words of the clause, averted or mitigated the impact of the changes on her" @65-66 - **R's failure to consult in circumstances where it had an HR manager weighs in favour of dismissal being harsh etc** - unfair dismissal found)

[\[2014\] FWC 5606](#) **NSW** *Chang v Mega International Commercial Bank* (manager made decision that A "could be made redundant purely on the basis that she filled in for Ms Chang for two weeks whilst she was on annual leave. The fact that she did not have to work overtime during these two weeks whilst performing both roles led her to believe that the Assistant Manager's role was not a full time role" @35 - R "had determined that Ms Chang would be the employee to be made redundant before any consultation process had commenced. In the Full Bench Decision in *UES (Int'l) Pty Ltd v Leevan Harvey* the majority concluded that the **selection process in identifying the redundant employee was not a relevant consideration** in determining whether a dismissal was a genuine redundancy. I agree with this rationale **as long as there is a transparent process** in place. **Such a process, examining each employee's skill, competence and training did not occur**. If it had, then Ms Chang may have been found to have superior knowledge and competency then some of her colleagues" @49-50 - **A not treated in accordance with award and R's policies** - "By failing to consult in an appropriate manner, Mega ICBC has failed to meet the tests associated with the genuine redundancy provisions" @52 - A was a senior, long standing employee - A has not found other work - dismissal harsh etc)

[\[2014\] FWC 6912](#) **WA** *Millen v Electrix* (the abolition of one position not a '**major workplace change**') )

### **Operational requirements**

[\[2013\] FWC 8097](#) **Vic** *Andronicou v Cooke & Dowsett* ("A **reduction in the overall requirement of the Respondent for plumbers could ... result in a genuine redundancy whether or not it was the Applicant's particular position that was no longer required** or some other position" @20 - "On the basis of a lack of sound evidence to support its claims of staff reductions at the period of time relevant to this application I cannot find that the Respondent no longer required the job done by the Applicant to be done by anyone due the operational needs of the business" @32 - no genuine redundancy - **stay of decision granted** on 26/11/13 in [\[2013\] FWC 9174](#) - "insofar as the Commissioner considered the question of remedy, she placed some reliance on a finding that the Appellant contravened the provision of the AC Act and relied in paragraphs [93] and [94] of her decision, on that contravention as a guide for determining the period that the Respondent would have continued to be employed, but for the termination. It seems to me arguable that, in so doing, the Commissioner relied upon that contravention in assessing the remuneration that the Respondent would have received, or would likely to receive, if he had not been dismissed.



Therefore the Appellant had made out a sufficiently arguable case with some reasonable prospect of success that the Commissioner's conclusion that there had been a contravention of the AC Act was erroneous based upon a proper and alternative construction of section 194 of the AC Act." @10-11)

[\[2013\] FWC 8020](#) **NSW** *Fisher & Ors v Downer EDI Mining* ("Subsection 389 (1) (b) of the Act does not establish any requirement that when an employer decides that it no longer requires a person's job to be performed by anyone, it must make that **decision based on sound and well defensible management practices**" @55)

[\[2014\] FWC 5604](#) **WA** *Fisher v Association for The Blind* (part-time position abolished - "the fact that the **Employer wishes to have the activities/tasks of the abolished position carried out on a casual basis** in the future, does not annul the Employer's submission that there are good and proper operational reasons to abolish the position" @44)

### ***Procedures for implementing redundancy examined***

[\[2014\] FWC 5275](#) **WA** *Salisbury v McKay Drilling* ("the **process for selecting employees for redundancy** it is not relevant to whether the dismissal was a genuine redundancy" @76)

### ***Redeployment***

[\[2013\] FWC 1993](#) **Vic** *Stephanou v Taffcorp* (it would be **unreasonable to dismiss an employee to create a position** for a redundant employee to be redeployed to - however, Commissioner Lewin stated that "Such a consideration might apply where casual employees or labour hire employees are filling a vacant position on a temporary basis or an employee is yet to commence employment when a position becomes redundant and redeployment comes under consideration" @31)

[\[2013\] FWC 7309](#) **Qld** *Roy v SNC-Lavalin Australia* (s389(2) and **reasonableness of international redeployment considered** - not reasonable in circumstances)

[\[2013\] FWC 8905](#) **Qld** *Beach v Ansaldo STS Australia* ("There is **no ongoing obligation in s.389(2)** for an employer to continually assess redeployment options for an employee after they have been dismissed on the basis of a genuine redundancy. This is confirmed by the inclusion of the words 'would have' being the test prescribed by the legislation. That is, would it have been reasonable, at the time of the person's redundancy for that person to be redeployed" @54)

[\[2013\] FWC 4982](#) **NSW** *Pykett v TAFE NSW* (the A was given the option of voluntary redundancy or to remain in employment and seek redeployment during a three month retention period - A chose the latter - due to the **constrained nature of R's redeployment policy**, including there being a freeze on certain permanent appointments R had not met its obligations under **s389(2)(a)** - FWC concluded that it would "have been reasonable in all the circumstances for the respondent to redeploy or to consider redeploying the applicant within its enterprise other than to an advertised, permanent vacancy. I do not consider it necessary in the circumstances of this case to determine which position, specifically, would have been appropriate for redeployment of the applicant. **That the respondent did not allow for any consideration of the redeployment of the applicant within its enterprise other than under the artificial confines of the Managing Excess Employees-conditioned understanding of 'redeployment', in and of itself, leads me to the conclusion the dismissal was not a genuine redundancy** within the meaning of the Act" @33 - A was unfairly dismissed - Appeal allowed 29/1/14 in [\[2014\] FWCFB 714](#) - "The Commissioner erroneously focussed on the inadequacy of the appellant's redeployment policy and **failed to make a finding that there was a job, a position or other work to which Ms Pykett could have been redeployed**. Such a finding is a necessary step in reaching the conclusion that it would have been reasonable in all the circumstances for Ms Pykett to be redeployed within the appellant's enterprise" @40 - on remittal in [\[2014\] FWC 3177](#) Comm. McKenna was satisfied "there was a job or a position or other work within the respondent's enterprise of a Technical Officer Scientific Grade 1/2 level at the Ultimo campus to which it would have been reasonable in all the circumstances to redeploy the applicant - even if, for example, the redeployment would not have had the greater security of tenure of redeployment to a permanent, advertised position of the type

contemplated in the *Managing Excess Employees* policy” @50 - requirements of **s389(2)** canvassed)

[\[2014\] FWC 748](#) **Qld Eames v Orrcon Operations** (“The Full Bench in *Ulan Coal Mines* noted at [28]: ... **the question posed by s.389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal.** The subsequent actions of Orrcon, apparently in response to changed circumstances, cannot be determinative of whether a position existed for Mr Eames at an earlier date. I place **no weight on whether Orrcon later employed or replaced POs or whether temporary staff or contractors were engaged**” @28-29)

[\[2014\] FWC 1542](#) **NSW MacLeod v Alcyone Resources** (the A was **executive assistant to the managing director** and was made redundant - “it was open to the Deputy President to conclude that s.389(2) was not satisfied as it was **reasonable for the employer to assume that the junior receptionist position was not an appropriate position to consider for redeployment** due to its nature, as well as the lack of indication from Ms MacLeod that she was interested in the position” @32)

[\[2013\] FWC 9609](#) **Vic Evered v CFD ... AHD Ltd** (R needed to make redundancies for operational reasons - **R’s various dealerships had a high degree of integration** - FWC “satisfied that given the skills and experience of the Applicant he could have been successfully redeployed to vacant spare parts, fleet sales, new car retail sales and used car sales jobs in any of the dealerships. Of course some of the potential jobs may not be suitable for geographical reasons. I am not satisfied that the Respondent took its obligations to consider redeployment of the Applicant seriously enough. **Mr Baker should have contacted all of the dealerships directly and should have followed up initial requests. Mr Baker should have ensured that he was aware of the full range of the Applicant’s skills and experience.** The Respondent should not have taken the attitude that it was purely a matter for local managers to determine if the Applicant was suitable for a job. There should be no requirement for a potentially redundant employee to apply for a vacant position in competition with other persons. **Options for redeployment should have been the subject of consultation with the Applicant.** The range of redeployment options and the opportunities for redeployment could have been greatly enhanced through such consultation” @44-45 - A could have been redeployed to vacant retail car sales position - **FWC did “not accept that there is a general principle that if the consultation was highly unlikely to have changed the outcome this means that the dismissal was not unfair”** @54 - “in the circumstances of this case the process was a denial of natural justice in that adequate information was not provided and there was inadequate opportunity to respond. ... [C]onsultation could well have made a difference to the outcome” @55 - R’s failure to let A, a longstanding employee, work through notice period had harsh consequences - termination harsh etc)

[\[2014\] FWC 516](#) **Vic Murray v Ventyx** (redeployment to an **overseas position** would have been reasonable - see [\[2014\] FWC 2143](#) where **appeal upheld** on various grounds - in relation to redeployment Full Bench stated: “Absent a properly evidenced finding that there was a position to which Mr Murray could have been re-deployed, the Deputy President was not jurisdictionally positioned to determine whether it would have been reasonable in all the circumstances to redeploy Mr Murray” @87 - “the cost to relocate a staff member overseas was significant (approximately \$15,000 - \$30,000) and ... Mr Murray had not indicated to the employer that he was prepared to relocate to Atlanta at his own cost ... [A]ll the recruitment processes (interviewing etc) for overseas positions took place locally (in the USA) ... We do not consider that it was unreasonable (or otherwise) for Ventyx to proceed to terminate Mr Murray’s employment on grounds of redundancy instead of providing an overseas redeployment. In the circumstances, **we consider it reasonable that on the evidence before us that Ventyx did not consider such an alternative to be practical.** There was no established or articulated policy for overseas redeployment in redundancy situations, and international relocations were more the exception than the rule. Ventyx’s redundancy policy, referred to earlier, makes no reference to such an option or process. Mr Murray could have had no reasonable expectation that international relocations were available in redundancy situations” @155-158 - dismissal not harsh etc)

[\[2014\] FWC 1578](#) **NSW** *Teterin & Ors v Resource Pacific* (several employees were made redundant by R which was part of the large Glencore Xstrata Group of Companies - they were grieved over R's failure to redeploy them - options of the R **reducing overtime of other workers and its use of contractors**, amongst other things, considered - insufficient evidence to support reasonable redeployment options - **excellent summary of redeployment law** provided - permission to appeal refused 2/7/14 in [\[2014\] FWC 4125](#) - legal versus **evidentiary onus** discussed in relation to redeployment issues)

[\[2014\] FWC 1043](#) *Mackay Taxi Holdings Ltd v Wilson* (the R worked as a bookkeeper for A, but was made redundant as **A had decided to have a qualified bookkeeper fill a new position incorporating about 70% of R's previous tasks** - R did not have the requisite qualifications for this position - "The job, however, was not the same job. The requirement for a formal qualification was not added to a job as if a mere administrative initiative. The qualifications required were reflective of new and higher level duties which were to be carried out by an appropriately qualified bookkeeper" @34 - "the Commissioner, because she took the view that because a certain volume of duties and tasks remained to be carried out and that as a result the position or job itself had not changed or been restructured to a sufficient degree to achieve another operational purpose, fell into error. In this regard, the Commissioner too narrowly construed the scope of s.389(1)(a) of the Act" @47 - see further proceeding re issue of redeployment in [\[2014\] FWC 2425](#) - **reasonableness of retraining discussed** - "there is a significant difference between an employer paying for a short course that is specific to a particular job and paying for a nominally 12 month Certificate IV TAFE Course which is transferrable" @34 - unreasonable burden on a small business employer - R's conduct not unreasonable)

[\[2014\] FWC 2500](#) **Qld** *Khawaja v Queensland Tissue Products* (R "considered that **the nature of the Applicant's long standing previous work was too far removed from the available positions in the business to provide a productive accommodation**. The Applicant's own view of his skills and knowledge compared to others in the Company add to this conclusion. The Applicant had also informed Mr Johnson that he was not disposed to shift work" @37 - no failure re-deployment)

[\[2014\] FWC 3382](#) **NSW** *Fisher, Davis & Shaw v Downer EDI* ("The **dismissals of the applicants were for operational reasons which were created by a decision to decrease production** at the Boggabri Coal Mine (the Mine). **Two months after the retrenchments, a decision was made to increase production at the Mine**. The employer then commenced to employ persons in the roles that the applicants had previously performed" @6 - "evidence of the **conscious decision for the divisions of Downer EDI to operate with a level of autonomy which severely restricts any prospect for redeployment across the divisions**, has operated to confirm and reinforce the Jurisdictional Decision. Further, in circumstances where qualified, skilled individuals are being made redundant in one division and **redemption into another division is not contemplated or promoted in any meaningful way**, there would be strong prospect that the various divisions are likely to implement dismissals that will be found to be cases of non-genuine redundancy ... 'Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy and "...subjecting a redundant employee to a competitive process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely redundant"'@50-51 - non-genuine redundancies found - each A was unfairly dismissed)

[\[2014\] FWC 7376](#) **Qld** *Aralar v Rio Tinto* (**redemption to associated entities** considered, but R not found to have failed to meet its obligations in this regard)

[\[2014\] FWC 7565](#) **WA** *Welltech v Total Water Management* (A was an engineer by qualification and R had been unable to find him work suited to his qualifications for some time - "The condition, **'in all the circumstances'** in s.389(2) ... is only limited by relevancy" @56 - "the actions of the Employer in **trying to keep Mr Bhalla occupied with 'fill in' duties from October/November 2013 onwards are relevant to my finding of whether it would have been reasonable**, in all the circumstances, to redeploy him within the Employer's enterprise or entities (if any)" @58 - not so reasonable)

### **Sudden operational change**

[\[2013\] FWC 8949](#) *Qld Dowrick v We Can Transport* (dismissal by reason of an **unanticipated and sudden operational change** not harsh etc - R had lost a major contract)

### **FWA Cth s389(1)(a) – Job no longer required to be performed**

[\[2014\] FWC FB 1043](#) *Mackay Taxi Holdings Ltd v Wilson* (the R worked as a bookkeeper for A, but was made redundant as **A had decided to have a qualified bookkeeper fill a new position incorporating about 70% of R's previous tasks** - R did not have the requisite qualifications for this position - "The job, however, was not the same job. The requirement for a formal qualification was not added to a job as if a mere administrative initiative. The qualifications required were reflective of new and higher level duties which were to be carried out by an appropriately qualified bookkeeper" @34 - "the Commissioner, because she took the view that because a certain volume of duties and tasks remained to be carried out and that as a result the position or job itself had not changed or been restructured to a sufficient degree to achieve another operational purpose, fell into error. In this regard, the Commissioner too narrowly construed the scope of s.389(1)(a) of the Act" @47 - see further proceeding re issue of redeployment in [\[2014\] FWC 2425](#) - **reasonableness of retraining discussed** - "there is a significant difference between an employer paying for a short course that is specific to a particular job and paying for a nominally 12 month Certificate IV TAFE Course which is transferrable" @34 - unreasonable burden on a small business employer - R's conduct not unreasonable)

[\[2014\] FWC 3633](#) *Vic Angwin v Dimmays Stores* (redundancy not genuine where A's role as general manager replaced by position of CEO - **role was the same, just different name**)

### **FWA Cth s390(2) – When the FWC may order remedy for unfair dismissal**

[\[2014\] FWC FB 1070](#) *Mihajlovic v Lifeline Macarthur* ("Section 390(2) does not say that the application needs to have been made *in accordance with* s.394, but only *under* s.394 (and is to be contrasted in that respect to s.587(1)(a), to which we will shortly turn, which refers to applications not made *in accordance with* the Act). In that connection, the purpose of the provision is, we think, to make it clear that the Commission cannot grant an unfair dismissal remedy on its own initiative but may only do so upon application; in this respect, the provision is to be contrasted with a range of provisions under the Act in which the Commission is conferred with power to act on its own initiative as well as upon application; see, for example, ss.157, 159, 160, 418, 419, 423, 424, 505, 508. **It would be superfluous for the provision to be read as having the purpose of establishing a jurisdictional requirement that the person must have been dismissed in accordance with the definition in s.386**, because as already explained that jurisdictional prerequisite is already established by s.390(1)(b) read with s.385(a) and s.386" @29)

### **FWA Cth s391 – Remedy-reinstatement etc**

[\[2012\] FWA 1250](#) *NSW Lambley v DP World Sydney Ltd* ("a review of the authorities makes clear that **it is not in every case where an employee has been involved in a fight, that an application for reinstatement will be refused**: see *Yew v ACI Glass Packaging Pty Limited* [1996] 71 IR 201" @137 - further appeal dismissed by majority 22/11/13 in [\[2013\] FWC FB 9230](#) - dismissal not harsh etc)

[\[2013\] FWC 766](#) *Vic Colson v Barwon Health – Geelong Hospital* (see from paragraph 252 a discussion of **why in modern times loss of trust and confidence not necessarily a bar to reinstatement** - "it will be embarrassing for Barwon Health to reemploy Dr Colson. However, this is not a circumstance where lives will be endangered or where confidential relationships will be at risk if reinstatement occurs" @269 - reinstatement ordered - **Appeal allowed** 15/7/13 in [\[2013\] FWC FB 4515](#) where Full Commission found some significant factual errors relating to whether there was a valid reason for dismissal in the appealed decision and "concluded that the termination of Dr Colson's employment was harsh, particularly having regard to his 14 years of service and the significant impact of the termination on his reputation and ability to find suitable employment" @157 - issue of remedy remitted - in *Colson v Barwon Health* 11/11/13 [\[2013\] FWC 8734](#) **reinstatement held to be inappropriate because "relationship of trust and confidence between Barwon Health's managers responsible for Dr Colson along with the management of the Department and Dr Colson has broken down** and the evidence strongly points to a conclusion that the **relationship cannot be repaired** making ongoing employment unworkable"



@106 - DP Gostencnik carefully considered the law as to when reinstatement is appropriate - compensation of \$431,173.32 assessed - such included a deduction of \$107,793.32 due to the contribution of Dr Colson's conduct to his own dismissal - **compensation reduced to \$59,050.00 due to compensation cap** - Appeal from decision on remedy on multiple grounds dismissed 24/3/14 in [\[2014\] FWC FB 1949](#) - "The contention that the Deputy President erred in specifying and applying a test that the 'only question' is whether reinstatement 'is appropriate' is not supported by a fair reading, the surrounding context or the decision as a whole" @30 - Full Bench "not persuaded that the Deputy President erred in finding that the adequacy or otherwise of any compensation order is not a matter that should be taken into account in assessing whether an order for reinstatement is appropriate" @47 - "no error in the Deputy President finding that the **Appellant's 'obstinacy is a relevant factor in assessing whether and to what extent there has been a loss of trust and confidence**, whether that relationship can be repaired to the point of workability and whether there is a rational basis for the views expressed by the managers responsible for Dr Colson about the status of that relationship" @60)

[\[2013\] FWC 7493](#) **WA** *Haigh v Bradken Resources* (reinstatement not appropriate as found that A would substitute his own decision as to what is appropriate for **safety** rather than applying R's safety policies and procedures - see further appeal on remedy at [\[2014\] FWC FB 236](#) - decision on reinstatement confirmed)

[\[2013\] FWC 1049](#) **Vic** *Jin v University of Newcastle* (leading researcher and investigator (A) was dismissed for misconduct - misconduct not serious misconduct - enterprise agreement only allowed dismissal for serious misconduct - dismissal found to be harsh - **"Reinstatement cannot be limited to just salary** but it must comprehend the full scope of the position previously held. That is why ... **reinstatement can occur on terms and conditions no less favourable**" @13 - found that it was "inappropriate to reinstate Professor Jin to the position he was employed immediately before his dismissal and that there is no comparable position which comprehends his terms and conditions of employment" @14 - compensation to be assessed - **Appeal allowed** in [\[2013\] FWC FB 3369](#) - "The Deputy President's essential reason for finally determining that reinstatement was not appropriate related to the impracticability and inappropriateness of Professor Jin continuing in the role of 'Chief Investigator' ... The Deputy President's error lay in approaching the matter on the basis that he was considering whether he should reinstate Professor Jin to the position of Chief Investigator when the FW Act required him to consider whether reinstatement to the position of Professor, Chair of Information Technology was inappropriate" @58-59 - reinstatement of A to position of professor appropriate)

[\[2013\] FWC 8220](#) **NSW** *Thomas v Newland Food Company* (whilst it was not unlawful in Queensland for A to **secretly record conversations** with R, such conduct contributed to finding that reinstatement was inappropriate)

[\[2013\] FWC 8196](#) **NSW** *Pykett v TAFE NSW* (due to A's **age and lengthy period of service** with R (32 years) it would be **very difficult for A to find alternative employment** - s391(1)(b) and *Blackadder* considered - reinstatement ordered - Appeal allowed 29/1/14 in [\[2014\] FWC FB 714](#), but not in regard to remedy - "The essence of the error alleged on appeal is the proposition that a reinstatement order pursuant to s.391(1)(b) must specify the position to which the person is to be appointed" @44 - s170EE of former IR Act compared with s390 and s391 - no relevant distinction found - case of *Sinclair* still apposite - "it was **open to the Commissioner not to specify a particular position and to leave it to the employer to choose the position** and to comply with the order to provide terms and conditions that are no less favourable than those on which the applicant was employed immediately before her dismissal" @53 - on remittal in [\[2014\] FWC 3177](#) Comm. McKenna was satisfied "there was a job or a position or other work within the respondent's enterprise of a Technical Officer Scientific Grade 1/2 level at the Ultimo campus to which it would have been reasonable in all the circumstances to redeploy the applicant - even if, for example, the redeployment would not have had the greater security of tenure of redeployment to a permanent, advertised position of the type contemplated in the *Managing Excess Employees* policy" @50 - requirements of **s389(2)** canvassed)

[\[2014\] FWC 437](#) **Vic** *Callahan v Graphic Impressions* (see from paragraph 86 where DP Gostencnik discusses at length the **circumstances relevant to when reinstatement is appropriate/inappropriate**)

[\[2014\] FWC 1448](#) *Vic Hall v Mirridong Services* (reinstatement ordered where **R failed to establish A had said team leader had assaulted resident in care facility** - team leader did not want to work with A - A had been intemperate in meeting - CEO and team leader expressed their loss of confidence in A - A had unblemished work record and would find it difficult to find alternative work)

[\[2013\] FWC 8914](#) *NSW King v Catholic Education Office Diocese of Parramatta* (A was a teacher with the R college - A “was dismissed because he **transported students in his car to surf lifesaving events contrary to the direction and policies of the College and the Diocese**” @42 - A’s conduct was wilful - it was an out of hours activity, but the connection with employment was the students - “the Diocese and College policies were clear enough for the applicant to be very conscious of the child protection requirements of his position ... [T]he clear intention is that teachers not transport students in their vehicles. Any exception would require express permission from a supervisor” @44-46 - **valid reason for dismissal** - A not adequately notified of reason for dismissal - FWC “would not have found that the procedural deficiencies referred to were sufficient by themselves to render the dismissal harsh [etc] ... However ... **insufficient attention was given to the applicant’s long and dedicated service** [37 years] ... [and] the decision to dismiss, as opposed to other disciplinary action that could have been taken, was influenced by unrelated allegations in respect of which no Police action has been taken” @88 - dismissal harsh etc - reinstatement inappropriate as school had lost confidence in A (although there was no suggestion he would harm any of his students) - school had duty of care concerns in light of A not having followed directions - school was also under investigation generally re child abuse issues - A is almost 60 and unlikely to be re-employed again as a teacher on a permanent basis - compensation of \$41,816 awarded - on appeal in [\[2014\] FWC 2914](#) A unsuccessfully challenged the lawfulness of R’s directions as to his out of hours conduct - Full Bench did not consider “decision to refuse reinstatement and order instead a substantial amount of compensation ... manifestly unjust” @42 - **Appeal allowed as DP erred in failing to consider “the possibility of [A] being reinstated to another position in the Head Office or elsewhere in the Diocese that was not a teaching position and did not involve unsupervised interaction with students”** @44 - several such positions existed - matter remitted to DP to determine this issue - R’s cross appeal challenging the finding that A’s dismissal was harsh etc failed - reinstatement found to be inappropriate in [\[2014\] FWC 6413](#) for various reasons including evidential deficiencies and lack of suitable positions - “The **unavailability of a position or the fact that it has been filled** is not of itself fatal to an application but it is a relevant factor” @56 - not “appropriate to reinstate the Applicant to a position with a much lower remuneration and skill level but still maintain his previous wages and conditions” @64)

[\[2014\] FWC 3402](#) *Vic Green & Crilly v H. J. Heinz Company* (unfair dismissal - A’s had not been found untruthful re why they took a break - the evidence showed “**a fraught, if not fragile, relationship between the Applicants, Heinz and others working at Heinz, including those who gave evidence** ... [T]he relationships at the time the investigation commenced were working and issues of loss of trust and confidence were not actively under consideration” @99 - “sufficient trust to make a reinstated relationship viable and productive” @104 - **lost pay not fully restored** - order “to restore lost pay by a factor that takes account ... **lack of cooperation [with investigation and giving evidence] and lack of effort to mitigate their loss**” @120 - permission to appeal refused 9/9/14 in [\[2014\] FWC 6031](#))

[\[2014\] FWC 4314](#) *SA Nguyen & Le v Vietnamese Community in Australia* (the applicants **sought reinstatement as part-time teachers** - they had succeeded in claiming they were employees rather than volunteers - they were **concerned about their standing and reputation in the Vietnamese community** - R, since dismissing the applicants had hired replacement teachers - reinstatement inappropriate in light of broken down relationship, potential conflicts with other teachers who saw themselves as volunteers, and **disruption to students and recently employed replacement teachers** - compensation for 20 weeks at rate of pay of applicants at time of their dismissal - permission to appeal refused 21/10/14 in [\[2014\] FWC 7198](#) - at para. 27 the **Full Bench summarised several “propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate** - “The fact that the Appellants have pursued an underpayment claim and that this has given rise to a degree of

acrimony between the parties is *not* a matter which should be taken into account in determining whether reinstatement is appropriate” @38 - Senior DP erred by taking this irrelevant consideration into account in considering reinstatement - however, there were other relevant considerations relied on to establish that reinstatement was inappropriate - public interest not enlivened)

[\[2014\] FWC 5712](#) **Vic Furneaux v Peninsula Health** (“The mere **absence of a position** in a business into which an employee may be reappointed will rarely find a conclusion that reinstatement is inappropriate, although whether an employee would be surplus to requirements if reinstated is a relevant question the question of appropriateness” @220 - “the uncertainty as to the Applicant’s **medical condition** and, in particular, the likely effect of a return to the workplace on the Applicant’s medical condition are such that reinstatement is inappropriate” @228)

[\[2014\] FWC 3259](#) **Vic Bolden v Lyndoch Living** (the A, whilst working as a nurse in a high care facility, was summarily dismissed - A was found to have erred by **using physical contact to return a resident to bed who did not want to go to bed** - however, it was not clear what degree of force she used - whilst there was valid reason for her dismissal, her conduct was not such to justify summary dismissal - Appeal allowed with respect to remedy only 1/9/14 in [\[2014\] FWC 5969](#) - “failure to alert the parties, and the Appellant in particular, to the possibility of reinstatement qualified on the basis that the Respondent should not work in a high care area constituted a denial of natural justice and an error of jurisdiction” @50 - matter remitted to consider whether **reinstatement on qualified basis** appropriate)

[\[2014\] FWC 5978](#) **Vic McIntosh v HSU Victorian No. 1 Branch** (R did not have a valid reason for dismissing A for **not meeting deadlines to hand over files** to another worker when it had not counselled or warned A she would be dismissed if she failed to meet the deadlines - reinstatement inappropriate as R had lost trust and confidence in A - A also **involved in political activities at union in lead-up to union election (for which she was running for leadership) which FWC considered were deleterious to R having trust and confidence in her** in the circumstances)

[\[2014\] FWC 5606](#) **NSW Chang v Mega International Commercial Bank** (reinstatement not found appropriate in case of **redundancy where no adequate consultation** - there were **genuine operational reasons**)

[\[2014\] FWC 7774](#) **Qld Kinnane v DP Brisbane World** (“the fact that an employer has **asserted dishonesty** on the part of a dismissed employee and continues to hold a belief that the employee acted dishonestly, is no barrier to reinstatement in circumstances where the Commission has **found that the employee did not engage in dishonesty**” @14 - “The fact that a **position formerly occupied by a dismissed employee no longer exists or is not available**, would rarely, on its own, justify a conclusion that an order for reinstatement is not appropriate, and to adopt such an approach would defeat the remedial purpose of the legislation. The unavailability of a job is one factor to be taken into account in deciding whether an order for reinstatement is inappropriate” @15-16 - “In circumstances where Mr Kinnane has been found not to have engaged in misconduct, the assertion that DP World has lost trust and confidence in Mr Kinnane is not soundly or reasonably based and is not a basis for a finding that reinstatement would be inappropriate” @54 - **A having previously volunteered for redundancy had no bearing on appropriateness of reinstatement** - “It is also not determinative that Mr Kinnane may be made redundant after being reinstated or that some other employee may be made redundant as a result of Mr Kinnane’s reinstatement” @57 - A, a fitter and turner, failed to take reasonable steps to mitigate his loss by only applying for two jobs and only in the stevedoring field - reinstatement ordered with an order for 75% of lost remuneration and continuity of employment and service)

“[48] In *Quinn v Overland*, Bromberg J, dealt with the appropriateness of reinstatement:

‘...Dismissed employees are regularly reinstated into their former employments without apparent consequent difficulties. The long-standing nature of this remedy, and its acceptance as part of the industrial furniture, is a testament to the fact that as a matter of practice, a breakdown in confidence is not necessarily irreconcilable. What needs to be achieved by a reconciliation is a sufficient level of cooperation for a proper working relationship to resume; **mutual affection and friendship are not essential.**”

**Duncan v Bluescope Steel Pty Ltd** 4/11/13 [\[2013\] FWC 8142](#) Comm. Riordan

### **FWA Cth s391(3) – Order to restore lost pay**

[\[2013\] FWC 6877](#) **WA** *Carvalho v J-Corp* (“I doubt that ordering payment of a particular amount or form of remuneration to a dismissed employee which an employer had never previously paid whilst they were employed could be said to be ordering payment for remuneration ‘lost’ or ‘likely to have been lost’ because of the dismissal. In the case here had Mr Carvalho not been dismissed he would not have been paid the national minimum wage at all” @99)

[\[2014\] FWCFB 888](#) *Millington v Traders International* (the **A was an undischarged bankrupt before her unfair dismissal application was lodged** - “The capacity under s.391(3) to seek an order for pay lost or likely to have been lost as a result of the dismissal cannot be equated to an action for damages for wrongful dismissal. An order under s.391(3) can only be made if an order for reinstatement is made under s.391(1); it is therefore entirely ancillary to and not severable from the personal remedy of reinstatement. Further, there is no right to a lost pay order even where reinstatement is ordered; a lost pay order may only be made where the Commission ‘considers it appropriate to do so’ and is therefore discretionary in nature. The Commission and its predecessors have not infrequently declined to make lost pay orders even though reinstatement has been ordered” @73 - see also commentary at [Bankruptcy/Liquidation](#))

### **FWA Cth s392 – Remedy/Compensation**

[\[2014\] FWCFB 236](#) *Haigh v Bradken Resources* (“the Commissioner [in [\[2013\] FWC 7493\]](#) erred in starting from the compensation cap figure and reducing the amount by various amounts rather than starting from an assessment of actual loss, deducting any appropriate amounts and then applying the compensation cap ... The **assessment should not have started at the statutory maximum but ended by reducing any higher figure by reference to the cap** ... [H]aving found that employment would have continued for an unspecified period in the future it would have been appropriate to start with a figure of 12 months pay as an indicator of actual loss and ... the deductions determined would not have reduced the amount of compensation below the statutory cap ... [A]n error of this type attracts the public interest because it concerns the application of the Act to unfair dismissal remedies generally” @8-9 - methodology for assessing compensation discussed)

[\[2014\] FWC 4030](#) **Vic** *Salazar v John Holland* (“compensation **cannot be used to punish the Respondent** and ... the **level of unfairness can play no role in the calculation of the amount of compensation**” @201 - see further proceeding on compensation 22/7/14 in [\[2014\] FWC 4918](#))

[\[2014\] FWC 5566](#) **Qld** *Ciuzelis v Jones* (see [precis](#) at Dismissal – Workers compensation issues for a case involving **compensation for a worker who was the only employee not re-hired in a transfer of business**)

[\[2014\] FWC 5606](#) **NSW** *Chang v Mega International Commercial Bank* (reinstatement not found appropriate in case of **redundancy where no adequate consultation** - 10 weeks **compensation paid based on time it would have taken to follow appropriate consultation process**)

### **FWA Cth s392(2)(c) – Remedy/Compensation (remuneration ... if no dismissal)**

[\[2014\] FWCFB 888](#) *Millington v Traders International* (the **A was an undischarged bankrupt before her unfair dismissal application was lodged** - s392(2)(c) considered from para. 74 - see also commentary at [Bankruptcy/Liquidation](#))

### **FWA Cth s392(2)(d) – Remedy/Compensation(mitigation)**

[\[2014\] FWC 1926](#) **Vic** *Martin & Martin v G & P Martin Family Trust* (losses from a new business started not offset against income earned - “How mitigation is sought to be achieved is not to the point, it is the amount of lost remuneration, although care needs to be taken when consideration is given to a circumstances where an ex-employee starts a business. It cannot be, as Mrs Pennette Martin submitted, that her business should subsidise the start up of another business or its running costs. Therefore I am **not prepared to offset the losses from the business with the income earned**. The income earned will stand alone” @25)



[\[2014\] FWC 4686](#) **NSW** *Gmitrovic v Australian Government Dept. of Defence* (“While the applicant’s **decision not to seek paid work but to look after his sick mother** is understandable, I do consider that some deduction should be made for his failure to mitigate his loss. I have decided to deduct an amount equal to five weeks pay (\$7124.40). The amount may have been larger if the applicant had not had such a lengthy period of service with the employer” @19)

#### **FWA Cth s392(2)(e) – ‘Amount of remuneration earned’**

[\[2014\] FWC 1086](#) **Qld** *Lewis v Glendale RV Syndication* (the **A earned income from another job with Argyle Aged Care before being dismissed by R** - “the remuneration earned by the Applicant from her employment entered into prior to the dismissal must be given weight in the context that it would serve to limit significantly, if not defeat, the goal of compensation. It is not remuneration earned in mitigation of the loss of employment. While I take s.392(e) of the Act into account, in the circumstances of this matter I will not give it its literal effect (at least in so far as it applies to deducting remuneration earned from work entered into prior to the dismissal)” @85 - **“Because of the dismissal, it appears that the Applicant was able to enhance her hours of work at Argyle Aged Care and earn a higher level of remuneration** than she would have done, but for the dismissal. It is this enhanced, post dismissal remuneration that must be taken into account for purpose of determining compensation” @93)

[\[2014\] FWC 2351](#) **Vic** *Walsh v Ambulance Victoria* (**income protection payments** not included - “These payments could be said to be akin to social security payments which are not generally taken into account by the Commission in determining the amount of remuneration earned” @23)

#### **FWA Cth s392(3) – Reduction for misconduct**

[\[2014\] FWC 2351](#) **Vic** *Walsh v Ambulance Victoria* (the A worked with the air ambulance emergency team - his **dismissal for his delayed departure to an urgent job not harsh** etc - 50% reduction for misconduct made - “deduction for misconduct will be made prior to the application of the statutory cap” @29)

[\[2014\] FWC 2756](#) **Qld** *Mahoney v Bechtel Construction (Australia)* (the A was dismissed for engaging in unlawful industrial action after having been subject to a first and final warning for other misconduct - the question was **whether the prior misconduct attracting the warning was to be considered pursuant to s392(3), or just the unlawful industrial action** - Comm. Booth concluded that “the prior misconduct, resulting as it did in a ‘first and final’ warning is relevant but not as significant a factor as the unlawful industrial activity” @115 - see further proceedings 10/9/14 in [\[2014\] FWC 6294](#) where **comparator authorities on reduction for misconduct considered** from para. 21 - **40% reduction** in light of A’s serious misconduct)

#### **FWA Cth s394(2) – When application must be made**

[\[2014\] FWC FB 1070](#) *Mihajlovic v Lifeline Macarthur* (“Section 394(2)(a) should not be read as itself establishing an anterior time limitation for the filing of an application for an unfair dismissal remedy; rather, it operates on the premise that s.394(1) requires that a person who may file such an application is a person whose employment has come to end at the initiative of the employer. On that premise, s.394(2)(a) requires that the application is to be **filed ‘within’** – that is, inside the limit of - 21 days after the *‘dismissal took effect’*. The use of this latter expression in s.394(2)(a) only is potentially confusing, in that it invites the proposition that the date of a dismissal and the date it takes effect may be two different things. However ... we do not consider that the expression refers to anything other than the time at which the applicant’s employment relationship came to an end” @19)

#### **FWA Cth [s394\(3\)](#) – Time issues/exceptional circumstances**

##### ***Agreement to withdraw first application***

[\[2014\] FWC 2910](#) **Vic** *Kamboj v Polyseal Waterproofing Victoria* (R agreed to reinstate A if she withdraw her unfair dismissal application but did not honour agreement thereby causing A to lodge a second out of time application - exceptional circumstances despite application being very late and despite prejudice to R)

*Amicable solution (seeking)*

[\[2014\] FWC 675](#) **Vic** *Cuthbert v PRD Nationwide Werribee Real Estate* (application two days late due to **attempt to resolve the matter amicably and A's postal error**, amongst other things - A was well aware of the time limit, as she contacted the FWC two days after her dismissal - no exceptional circumstances)

[\[2014\] FWC 5329](#) **Vic** *Vadhan v Night Owls* (application seven days late - exceptional circumstances found in light of "the disputed redundancy of the position in which Mr Vadhan was employed at the time of the termination of his employment; the existence of a position to which Mr Vadhan might have potentially been redeployed; the complexity of the issues concerning Mr Vadhan's **visa status** and Mr Vadhan's **considerable attempts to maintain a positive functional relationship** with Ferntree Print, to enable further or continuing employment, that justice is best served by exercising the discretion to allow a further period for the acceptance of the application as filed" @37)

*Another application made*

[\[2014\] FWC 1236](#) **NSW** *Frankfurt v Downer EDI Engineering Power* (**s773 application made within time - FWC had raised with A the issue of whether he had applied under the correct section** - nevertheless matter progressed to conciliation before A accepted need to discontinue and file s365 application - application 15 days late - exceptional circumstances found)

[\[2014\] FWC 1384](#) **WA** *Jean v Yara-Burrup Fertilisers* (the A's **s394 application was decided against him on 13/12/13** as he had not met the six month minimum period of employment prescribed by s382 - **A subsequently brought this general protections application substantially out of time** - no exceptional circumstances found)

[\[2014\] FWC 1155](#) **Vic** *Jobson v JB Hi Fi Group ...* ("where Mr Jobson had **first made an application to VEOHRC and then subsequently made a general protections application relating to dismissal** (s.365) to the Fair Work Commission, s.725 of the Act would operate to prevent Mr Jobson from making his general protections application to the Fair Work Commission if his application to the VEOHRC was an application of the type referred to in s.732" @14 - "the proper application of Subdivision B of Division 2 of Part 6-1 of the Act [s725 ...] requires that a jurisdictional challenge made under this subdivision must be dealt with before the Commission can consider and decide the challenge under s.366. Even if the Commission had formed the view that an extension of time would not be granted under s.366 the Commission could not merely dismiss the application on that basis without having first determined that it had jurisdiction to accept and deal with the application on the basis of the jurisdictional challenge under Subdivision B of Division 2 of Part 6-1 of the Act" @19 - **application to VEOHRC made two days before dismissal and before dismissal was threatened or pending and where the probability of dismissal was indeterminate** - "In this context the phrase 'in relation to the dismissal' should be read as requiring a direct or substantial relationship between the action and the dismissal. A relationship which is indirect or less than substantial would not be sufficient" @27 - A's termination was as a result of resignation - VEOHRC application not 'in relation to dismissal' - *Du v University of Ballarat* questioned - "the action initiated by Mr Jobson under the *Equal Opportunity Act (Vic)* is not for the purpose of s.732 an application or complaint under another law that has been made by Mr Jobson in relation to the dismissal" @37)

[\[2014\] FWC 5775](#) **Vic** *McDonald v Castel Electronics* ("nothing prevented Mrs McDonald from making an unfair dismissal application within the requisite time period. She **chose instead to pursue a complaint with VEOHRC about workplace bullying**, in the knowledge that an unfair dismissal application was also a possible option. It is unclear whether the VEOHRC complaint precluded her from bringing an unfair dismissal application, given that it was made before she was dismissed. However, even if she was precluded from making an unfair dismissal application this was an outcome of the scheme of the legislation, and therefore can be considered to be an intended outcome, rather than an 'exceptional circumstance'" @49 - no exceptional circumstances)

[\[2014\] FWC 7619](#) **WA** *Yohannis v Action Industrial Catering* (The A "made a **wrong choice of jurisdiction, waited until the WAIRC processes were completed**, appears to have not sought union or legal advice and overlooked documents provided by the Employer which indicated the

appropriate jurisdiction in which the application should have been lodged" @26 - no exceptional circumstances)

### ***Bereavement***

[\[2014\] FWC 7633](#) **WA Moore v S & L Hardware** (two days after A's dismissal, his only surviving immediate relative went into intensive care - he remained at his bedside on a daily basis until his brother died about 10 days later - A then was taken up with funeral arrangements and other related issues for the next two weeks until the funeral - A lodged his application three days later, which was eight days late - exceptional circumstances found)

### ***Communication of dismissal***

See also [Dismissal – When](#) and [Postal issues](#) sub-heading below

[\[2014\] FWC 4416](#) **Vic Stephenson v Bass Coast Regional Health** (the A received her termination letter on 7/3/14, but did not open it until days later - termination date found to be 7/3/14)

[\[2014\] FWC 6158](#) **Vic Patsialaridis v Dept. of Human Services** (unreasonable for employer to leave one message on A's answering machine communicating dismissal when there was a history of difficulties in contacting A)

### ***Consent to extension of time***

[\[2014\] FWC 8123](#) **Vic Singh v Carpentaria Disability Services** (extension not granted even though employer consented to extension)

### ***Delay caused by respondent***

[\[2013\] FWC 7257](#) **WA Hill v Pilbara Manganese** (application one day late because R was slow in responding to A's efforts to have the decision to dismiss him reviewed and because A initially in error completed the wrong form for his unfair dismissal claim - extension allowed)

### ***Electronic lodgement (difficulties with)***

[\[2013\] FWC 6586](#) **Vic Garson v Urban Land Authority** (A's application one day late due to his failure to use the electronic lodgement system successfully - it was plausible that his efforts failed due to the volume of material he tried to scan - exceptional circumstances found)

[\[2014\] FWC 1085](#) **WA Thorpe v Standard Communications** ("as a result of either the applicant's errors in using the Commission's e-filing system or due to faults in the operation of the e-filing system the applicant mistakenly believed he had made his application within the 21 day time limit however when he was advised that no application had been received he immediately emailed his application to the Commission" @19 - there also appeared to be merit in A's claim, although R had not submitted material on the issue of merit - application five days late - exceptional circumstances found)

[\[2014\] FWC 3089](#) **WA Mandavy v Process Resource Group** (exceptional circumstances where A lodged an incomplete application on time due to difficulties with FWC's e-filing system)

[\[2014\] FWC 2097](#) **Vic de Vries v Chabad Institutions of Australia** (the A's husband on the last day before the limitation period expired mistakenly thought he'd successfully lodged the e-application - he had made a bona fide effort to lodge application on time - the fault was at his end and not with the Commission's processes - application four days late - serious allegations had been made against A and she had been given limited information about them - the merits of the case weighed in A's favour in this application - exceptional circumstances found)

[\[2014\] FWC 4146](#) **NSW Parker v Officeworks** (the A's mother thought she had successfully faxed A's application on time, but had not included the area code - 16 days late - upon contacting FWA the error was discovered - exceptional circumstances found - Appeal allowed 29/8/14 in [\[2014\] FWCFB 5779](#) - findings not reasonably open on the evidence made - "The failure to consider the submissions of Officeworks and the making of findings based on evidence in circumstances where the veracity of that evidence was persuasively challenged amounted to significant errors in the decision-making process" @27 - "we do not consider that incompetence

in sending a facsimile transmission is of itself such an unusual or special occurrence as to support a conclusion that there were exceptional circumstances” @32)

[\[2014\] FWC 4095](#) **WA** *Elward v Asset Shrinkage Solutions* (application a day or two late - A's **electronic application bounced back several times for being in the wrong format and then A had internet connection issues on the final day for lodging in time** - held that the “possibility of these events occurring are common and not exceptional. To accept these circumstances as valid reasons for a delay in filing the application, would ignore the elapsed time between the dismissal (or alleged dismissal in this case) and the onset of the technical problems and render the statutory timeline meaningless” @18)

[\[2014\] FWC 6260](#) **NSW** *Medcalf v Brewarrina Business Co-operative Ltd* (the A electronically lodged her general protections action successfully, but she discovered at a FWC conference that her unfair dismissal application had not been received - she **lodged her application on her work computer which soon after she did not have access to** - A had a **responsibility to follow up** the status of her application - failure to follow up - no exceptional circumstances)

#### ***Eviction by employer***

[\[2013\] FWC 6715](#) **Vic** *Dick v Voros* (application 15 days out of time - in the “unique circumstances of this matter it is hard to imagine that there is ever likely to be an **employee who is both an employee and a tenant of his employer** (or a tenant of his employer's wife) and where the employee is dismissed within a period of notice to vacate the house being rented and where the **employee's solicitor is ignorant of the time limits** in the FW Act and through such ignorance the employee fails to file his application on time” @205)

#### ***FWC/FW Ombud. (issues with)***

[\[2013\] FWC 8634](#) **Qld** *Wilson v The Respondent* (application about 10 days late due to A mistakenly applying to FWO - **FWO was experiencing email and telephone difficulties** such that it did not respond to her communications in a timely way - as soon as they did respond to A and they informed her about her need to apply to the FWC, the A did - A's case also had merit - exceptional circumstances established)

[\[2013\] FWC 173](#) **NSW** *Evans v Combined Warehousing Services* (on 19/7/13, the day after her dismissal, the A phoned the Commission and Dubbo Legal Aid - about 13 days later she electronically **submitted an FWO form by mistake** - “The first in-person appointment she could make with Legal Aid in Dubbo was 30 August. It was then that she discovered she had submitted the wrong form. The F2 form was submitted that day to the Commission together with the explanation for the delay” @14 - no prejudice to R - A disadvantaged by her regional location - exceptional circumstances found)

[\[2014\] FWC 479](#) **Vic** *Ozsoy v Monstamac Industries* (the A's claim was only **one day late** as he first enquired of the FWO - **FWO correctly advised A**, days before the expiry of the 21 day period, that he had to apply to the FWC - essentially **A had the weekend to apply on-line**, but delayed - exceptional circumstances not found - Appeal dismissed 1/4/14 in [\[2014\] FWC FB 2149](#))

#### ***Geographical limitations***

[\[2014\] FWC 1673](#) **Vic** *Ormond v Pilbara Logistics WA* (application three days late - exceptional circumstances found “because Mr Ormond endeavoured as diligently as he could to dispute his dismissal or aspects related to it, which is evidenced through his complaint to the Fair Work Ombudsman ... he was **in a remote locality associated with his family's funeral commitments**; and finally ... his application has some arguable element in the event PLWA does not rely upon genuine redundancy as the reason for his dismissal” @49 - A was also quite ignorant of the law - the **remote locality circumstance was not a strong factor in granting the extension of time**)

#### ***Identity of employer***

[\[2013\] FWC 9330](#) **NSW** *Atterson v ABC Dental Alliance* (exceptional circumstances when **claim late due to A's confusion over the legal identity of his employer** - R could have been more



helpful in clarifying matter - A and his legal representatives had been reasonably diligent in seeking to identify employer)

[\[2014\] FWC 4270](#) **SA Vannea v Royal Bay International** (application **102 days late** - the A had a **reasonable belief that Adelaide Poultry was his employer** and with the NUW's assistance brought action in time against Adelaide Poultry - **Adelaide Poultry was not A's employer** - A "took timely action to respond to the information given to him by the NUW about the Respondent as his employer and ... any further delays associated with the lodgement of this application should not be attributed to Mr Vannea" @16 - **extension granted**)

### ***Illness/injury of applicant or third party***

See sub-heading below 'Psychological issues'

[\[2014\] FWC 4806](#) **NSW Monk v Careers Australia College of Healthcare** (A claimed that although she resigned, she was bullied into resigning - **application 2 days late due to A being focused on her liver disease** for which she had to take a cocktail of medications every day - A signed her application 13 days before lodging it - her illness intervened - A not aware of the 21 day time period - **exceptional circumstances found**)

[\[2014\] FWC 5363](#) **Qld Rapmund v Go Karting Gold Coast** (application four days late as the A **underwent shoulder surgery soon after dismissal** and "was **highly medicated on pain killers and not in the right frame of mind or state** to make the application [on time]" @8 - exceptional circumstances found)

[\[2014\] FWC 5645](#) **WA Wray v Fleetwood** (application one or two days late due to A being **hospitalised for one day just after he thought he had successfully filed his application electronically** - A's hospitalisation was just before the 21 day period expired - A therefore not aware in time that his e-application had failed - exceptional circumstances found)

[\[2014\] FWC 7825](#) **WA Fabbri v Spotless Facility Services** (application lodged a two or six days late due to A being focused on **caring for mother-in-law with cancer** and transporting her to appointments - exceptional circumstances found)

[\[2014\] FWC 7301](#) **NSW McCarthy v Aero-care Flight Support** (application **one day late** - A's argument she'd filed on time because the relevant start date was the time she received written notice of dismissal rather than verbal notice at a meeting rejected - "During the time between the applicant being terminated and the date the application was filed with the Commission, the applicant was **unexpectedly hospitalised and underwent emergency surgery resulting in a three day hospital stay**" @35 - **exceptional circumstances found**)

[\[2014\] FWC 7301](#) **NSW McCarthy v Aero-care Flight Support** (application **one day late** - A's argument she'd filed on time because it was the time she received written notice of dismissal rather than verbal notice at a meeting rejected - "During the time between the applicant being terminated and the date the application was filed with the Commission, the applicant was **unexpectedly hospitalised and underwent emergency surgery resulting in a three day hospital stay**" @35 - **exceptional circumstances found**)

### ***Internal review***

[\[2013\] FWC 8201](#) **WA Whatmore v Virgin Australia Airlines** (**extension allowed** where application only about six days out of time, where **A was actively pursuing an internal review** and where he was detained overseas - the latter was not significant, as he had internet access - merits of case were limited)

[\[2014\] FWC 330](#) **Vic Stephens v Thiess Services** (**exceptional circumstances found where "it was reasonable for the Applicant to form the view that he was being afforded an opportunity to appeal if he could present new evidence.** The Applicant appears to have genuinely thought that the final decision about his employment would be made after this process was concluded. He was wrong in that assumption ... However, it would be unfair to penalise the Applicant for his incorrect assumption because it was genuinely held" @32 - this was despite A's claim being over 200 days out of time - **Appeal allowed** 11/4/14 in [\[2014\] FWC 2426](#) - no credible reason for the whole of the delay)

### **Joinder**

[\[2014\] FWC 4133](#) **Vic NUW v Caterpillar ... & NUW v Hoban Recruitment** (the **NUW brought actions on behalf of two labour hire workers against host employer, but not against labour hire company** - adverse action claims involved - host employee claimed poor performance and failure to comply with policy were behind its decision to cease providing work to workers - joinder of labour hire company sought - extension of time issues pursuant to ss. 365 & 366 - discretion to order joinder not exercised)

### **Language barriers**

[\[2014\] FWC 5008](#) **Vic Wong v Bowl & Chopstix** ("The **inability of the Applicant to access adequate information and assistance to complete an application because she does not speak any English could constitute an exceptional circumstance**. For example, if the Applicant had been seeking the services of an interpreter or other community assistance service and there were delays in this process these delays may be explained by the exceptional circumstance. However, the inability of the Applicant to access adequate information and assistance to complete an application because she does not speak any English does not adequately explain the **length of the delay** in the circumstances of this case" @19 - **exceptional circumstances not found, despite finding that A's application had good prospects of success**)

### **Merits**

[\[2013\] FWC 8907](#) **Vic Hondros v Exego/Repco** (principles re the issue of 'merits' discussed - "Both *Kyvelos' Case* and *Bearings' Case*, together with the decisions cited by the Full Bench in *Dundas-Taylor's Case*, **caution against forming a definitive view as to the merits of an application in the absence of a substantive hearing on the merits**. In addition, *Kyvelos' Case* emphasises 'that in considering the merits the Commission is not in a position to make findings of fact on contested issues, unless evidence is called on those issues.' ... [I]t is clear that the Applicant intends to contest the warnings issued to her by the Respondent and that, in the absence of any substantive hearing on issues of merit, based on the material before me I am unable to draw any conclusions as to the merits or otherwise of the application" @26)

[\[2013\] FWC 5462](#) **Qld Smith v A1 Waterproofing & Applications** (**sufficient for A to show that substantive application not without merit** - detailed analysis of merits not required)

[\[2014\] FWC 5115](#) **Vic Hlaing v Promotional Product Industries** ("The **potential merits of Ms Hlaing's application** lend support to the view she should be given additional time in which to make her application. However, the Commission was provided with **limited evidence** about these matters. The decision of the Full Bench in *Kyvelos* also makes clear that while the respective merits are an important factor in determining whether to exercise the discretion to extend the time in which to make application, the **reasons for the delay are generally the primary consideration**" @36)

### **Moving house**

[\[2014\] FWC 1509](#) **Qld Dormer v Rio Tinto** (application 11 days out of time - **moving premises interstate during 21 day period** did not constitute an exceptional circumstance - limited evidence re A's state of **depression** - A was not hospitalized for it - no exceptional circumstances)

### **Multiple reasons**

[\[2014\] FWC 495](#) **Vic Shergill v Dairy Technical Services** (application six days late - combined reasons of **ignorance of time limit, inability to afford representation, English not being A's first language and waiting for result of investigation did not amount to exceptional circumstances**)

### **Onus**

[\[2014\] FWC 2338](#) **Vic Collins v Southern Health** (Commissioner did not agree with comment in *Wemyss* that "there can be an **exponential increase in the onus** borne by an applicant for an extension of time merely because of the greater the length of time between the 21st day after the dismissal and the date of the application for an unfair dismissal remedy" @23)

### **Overseas travel/applicant overseas**

[\[2013\] FWC 8201](#) **WA** *Whatmore v Virgin Australia Airlines* (**extension allowed** where application only about six days out of time, where **A was actively pursuing an internal review** and where he was detained overseas - the latter was not significant, as he had internet access - merits of case were limited)

### **Postal issues**

[\[2014\] FWC 1914](#) **Vic** *Powell v Australian Commercial Catering* ("**posting the application by registered post the day before it was due is not a serious attempt to lodge the application within time**" - this is so despite there being a one day estimated delivery time in metropolitan areas - A could have used other lodgement options - in light of this and the substantive claim having little merit, no extension granted)

[\[2014\] FWC 1956](#) **Vic** *Hornidge v Cabways* (the **A did not lodge his application on time as he wanted to secure an ongoing relationship with R and because there were unanticipated postal delays** causing his application to be three days late - A "had posted his application [in a metropolitan area, albeit during the Christmas period] on Monday, 23 December. ... [A] appears to have sought reassurance from Australia Post that indeed it would be next-day delivery. There was nothing on the evidence which would indicate to him that something to the contrary was said" @36 - Commission did not access A's application until the 30<sup>th</sup> - **exceptional circumstances** found)

[\[2014\] FWC 2375](#) **Vic** *Park v Supreme Dental Surgery* (**express post mail did not arrive the next business day** as it should have and therefore application one day late - exceptional circumstances found)

[\[2014\] FWC 2867](#) **WA** *Ruthven v Alcom Fabrications* (**short delay** - "if Australia Post's usual **next day capital city delivery** had occurred this application would have been received within the 21 day time limit - exceptional circumstances found)

[\[2014\] FWC 4002](#) **Vic** *Casey v Guardian Community Early Learning Centres* (the **A left sending her application by ordinary post until the second-last day before time ran out** - application three days late, but only one business day late - similar cases reviewed - "merely sending an item by ordinary surface post, which item is delivered within the Australian Post estimate, does not provide an acceptable reason for the delay and is a matter that is entirely in the control of the applicant" @35)

[\[2014\] FWC 5367](#) **Vic** *Giri v Newmont v Asia Pacific* (application **one day late** - "the most compelling of the reasons for the delay ... relates to the **non-delivery to the Commission of the Express Post envelope containing his application on the next business day as per Australia Post's guarantee**. However ... it is impossible to be certain that the Express Post envelope was posted in accordance with Australia Post's requirements as to timeframe for posting and use of the correct posting box. Further ... no reason was provided by Mr Giri as to why he waited until 26 May 2014 to post his application ... in circumstances where he had completed and signed his application on 20 May 2014. Had he posted his application shortly after signing it, it is highly likely that his application would have been received within the 21 day timeframe" @4 (note: there were two para. 4s in decision) - **no exceptional circumstances**)

[\[2014\] FWC 4823](#) **NSW** *Bond v KB Redman* ("**termination of employment is effective when its communication could ordinarily be expected to have been received**. In this case, the communication of the termination of employment ordinarily could have been expected to have been received by the applicant on or about the date the letter thereto was the subject of **attempted delivery by Australia Post** on 27 February 2014 to the applicant's correct residential address (and would have been communicated but for the return of the registered mail to the respondent on the basis noted in Australia Post's records that the applicant was not known at that address). ... [I]f an employer has attempted in good faith to communicate the termination of employment and the Commission forms the view that the employee has **deliberately avoided receipt of such communication**, it may be arguable that in such circumstances the termination of employment occurred despite the fact that it has not physically been communicated to the employee"@51-52)

### ***Pregnancy/childbirth***

[\[2014\] FWC 6295](#) **Qld** *Palmer v Connolly Dore Lawyers* (the A worked for a law firm and had a partner who was a lawyer - application 10 days late due to A's significant health issues, difficult pregnancy and post-pregnancy issues - **exceptional circumstances** found)

[\[2014\] FWC 7532](#) **NSW** *Bass v Broulee Early Learning Centre* (the A "relied on her uncertainty as to what remedy to undertake, her shock and upset caused by the manner of her dismissal and her **desire to not cause herself further stress because of her pregnancy**" @8 - application was nine days late - exceptional circumstances not found)

### ***Premature applications***

See [Dismissal – When or whether](#)

### ***Psychological issues***

[\[2013\] FWC 8535](#) **NSW** *Marinas v RCR Energy* (application three or four days late - A went to solicitor in due time - **A reminded solicitor of time limits** - A **suffered anxiety attack whilst preparing summary of events for solicitor** and she required hospitalization - exceptional circumstances found - extension granted)

[\[2014\] FWC 467](#) **Vic** *Penrose v Loral Ipsum* ("**three factors combine to form the exceptional circumstances** required by s.366 to grant an extension of time, namely; Ms Penrose's initial intention to challenge her dismissal that was not pursued because of advice she received; ... her **psychological and cognitive incapacity** from 26 August to early October; and the new legal advice she received in October 2013 that she had rights and must act immediately" @26)

[\[2014\] FWC 1892](#) **NSW** *Lam v Stallman Partners* (the A suffered a "**miscarriage following the termination of her employment, subsequent health difficulties and severe distress** ... [A] submitted that her being increasingly unwell was demonstrated by the fact that she suffered her **first schizophrenic event in eight years on the evening following the lodgement of her application**" - despite all this, A was successful in obtaining another job - nevertheless exceptional circumstances found - permission to appeal refused in [\[2014\] FWC 4161](#))

[\[2014\] FWC 3957](#) **SA** *White v ANZ* (extension granted when application was 18 days late due to A's incapacitation from his **bi-polar disorder**)

[\[2014\] FWC 4792](#) **NSW** *Hersey v Reece* (exceptional circumstances found when claim four days late and where A's medically certified **depression** hindered him - "for the first two weeks after his dismissal ... he had struggled to get out of bed due to his depression" @4)

[\[2014\] FWC 4226](#) **SA** *Roberts v Westech IT Solutions* (A's "primary reason for the delay related to his **depression**. The advice provided by his doctor and the medication advice confirms this. It may well be the case that Mr Roberts was **not aware of the time limit** for the lodgement of an application and that he had some **difficulty in contacting the Fair Work Commission** ... However, I have concluded that whilst both of these factors would not generally support an extension of time, in these circumstances, where Mr Roberts has established a depressive illness, that illness impacted on his ability to pursue this application and hence supports the grant of an extension of time" @10)

[\[2014\] FWC 5123](#) **Vic** *Crowley v Eureka Operations* (extension granted when the A's claim was 2-3 months out of time due to her being **hospitalized for a month due to mental illness**)

[\[2014\] FWC 5766](#) **NSW** *Rodrigo v Mawland Quarantine Station* (the A's **severe mental illness considered to be an exceptional circumstance**, but extension not granted due to A's limited action to dispute dismissal and limited prospects of success)

[\[2014\] FWC 7982](#) **Vic** *Hamilton v I Seek Blinds* (application two days late - exceptional circumstances found due to "the fact that the Applicant was unaware of the timeframe and also that she had **difficulties making a decision within the required timeframe given her mental state** at the relevant time. This was also said to have been further complicated by Ms Hamilton's



physical health problems and pending surgery as well as her reservations about being involved in a court-like process based on her previous negative experience" @24)

### **Public holidays**

[\[2014\] FWC 5412](#) **Vic Archer v Tada** ("the application was not made until the 24th day after the dismissal had taken effect. However, as the **application was due on ANZAC Day, and that day was followed by a Saturday and a Sunday**, those 3 days did not count for the purposes of the 21 day requirement. In the particular circumstances of this case, the Applicant effectively had 24 calendar days within which to make the application" @17)

[\[2014\] FWC 5607](#) **Tas McDonald v Foamland** (state public holidays - the statutory 21 day period ended on the Monday Queen's Birthday holiday - the **Fair Work registry was shut in A's state and everywhere else except WA** - the Commission's Unfair Dismissals Benchbook stated "On state or local public holidays (such as Queen's Birthday) the local Commission offices will be closed however the other Commission offices nationally will be open and able to accept applications electronically" @26 - A should have lodged application electronically on the Monday - application late)

### **Reckoning of time**

[\[2013\] FWC 9622](#) **SA Dutton v Dutton Group** ("the 21-day period for the purposes of s.394 of the Act **does not commence until the day after the dismissal takes effect**" @19)

[\[2014\] FWC 3637](#) **Vic Renfrey v Spotless Group** (the **time of filing the application may not be taken as the time the application was posted**)

### **Redundancy**

[\[2013\] FWC 9120](#) **Vic Macartney v Pacific Worldwide** (the A's unfair dismissal application was about 35 days out of time - she reasonably **believed she had been lawfully made redundant until informed that her position had been filled by another person** - extension granted)

[\[2014\] FWC 2517](#) **Vic Miller v Elliott Air-conditioning Controls** (the A, an electrician, was made redundant - after consulting with his union representative at the ETU, A decided not to bring unfair dismissal application - when **A heard another electrician had been employed after his dismissal** he again contacted the ETU - there was a further six day delay before his application was made and no submission re representative error - application was about 10 days late - FWC would have found exceptional circumstances but for further delay)

[\[2014\] FWC 4525](#) **WA Tran v Telco Services Australia** (the **A, who was told he was made redundant heard that someone else had been employed in a similar role to his** - FWC "not positively satisfied that comments from an un-named ex-colleague 46 days after Mr Tran was made redundant is an acceptable reason for the delay. This is particularly so when the Applicant does not attempt to independently verify such information and give the information much more rigour except to avouch for its genuineness through self belief" @41 - *Bananacoast* distinguished)

[\[2014\] FWC 6076](#) **Vic Finlayson v Western Health** ("**While it is agreed that the day of dismissal is not included in the 21 days, the 21 day period does begin to be counted from that date.** There is no contest about the fact that Mr Finlayson was dismissed by Western Health on 7 July. Therefore, the 21 day period begins to run from that date, and 'day 1' is then the day after that date, being 8 July, and 'day 21' is 28 July. As the application was filed on 29 July it was therefore **filed one day after the requisite 21 day period**" @15-16)

### **Representatives (issues with legal)**

[\[2014\] FWC 4215](#) **NSW McCudden v Omega Pharma Australia** ("The **applicant had advice ... she had two viable options and was advised about the advantages and disadvantages of each** of them. She made her own decision which one to pursue. She **instructed her solicitors to issue the s.394 application and not the s.365** ... The fact Mr Betts was in error in advising the applicant that a s.365 application was to be filed within 60 days of her dismissal did not inform the choice she made. She decided, of her two options, she would pursue her s.394 application. The applicant is therefore **not blameless in relation to the way in which she chose to proceed.** The

reason she subsequently discontinued the s.394 application and commenced the s.365 application is she made a decision it was the better course to take. No other reason was given by her. She abandoned a viable claim with her “eyes open”. There is no evidence she was told her s.394 was hopeless or unlikely to succeed. These circumstances do not constitute an acceptable explanation for the delay” @38-40)

[\[2014\] FWC 4338](#) *Vic Madden v Woolworths Supermarket* (application 31 days late - a few days before the expiration of the limitation period A advised her union representative to “**do what he considered best for the circumstances**” - A claimed she meant for him to file her application - **A’s direction to representative not considered to be a clear direction** - A followed representative up, and even then he did not advise her she could bring application for extension of time - representative error not found - application dismissed)

[\[2014\] FWC 6076](#) *Vic Finlayson v Western Health* (exceptional circumstances found where A had given **clear direction to solicitor to file application** and application filed one day late)

### **Short delay**

[\[2014\] FWC 2673](#) *Qld Tromp v Tuxworth and Woods Carriers* (application one day late - in the short time A had left to lodge his application on time he **allegedly assigned the task of lodging application to his daughter** - no exceptional circumstances)

### **Unclear dismissal/resignation**

[\[2013\] FWC 9435](#) *Vic Baxter v Skyros Cycle* (the A and the R seemed to have a misunderstanding - **A believed R understood he was going on unpaid leave, whilst R thought A had resigned** - application 47 days late, but A promptly brought unfair dismissal claim upon returning from leave and realizing he no longer had a job - **exceptional circumstances found** - extension granted)

[\[2014\] FWC 2625](#) *NSW Hall v The White Horse Hotel* (the A was a **casual** and was **not sure as to the date of effect of his dismissal** - A made a genuine attempt to lodge his application on time, albeit on wrong form - exceptional circumstances found)

### **Representatives (issues with legal)**

[\[2013\] FWC 7707](#) *WA Collins v Trimatic Contract Services* (general protections application about 10 days late - A had acted swiftly in consulting industrial lawyers - **several issues had to be looked into by lawyers** - A co-operated in this process - **circumstances not exceptional** - “It is rare for an unrepresented applicant to lodge the application out of time and it would create an unfairness to those persons if represented applicant’s had a time advantage even if only partially because of that representation” @29)

[\[2013\] FWC 8535](#) *NSW Marinas v RCR Energy* (application three or four days late - A went to solicitor in due time - **A reminded solicitor of time limits** - A **suffered anxiety attack whilst preparing summary of events for solicitor** and she required hospitalization - exceptional circumstances found - extension granted)

[\[2013\] FWC 8907](#) *Vic Hondros v Exego/Repco* (application **about 5 months out of time** - the A contacted her representative very soon after being dismissed and was **told that her application had been lodged** - however, she **followed up the progress of her claim with her representative** on several occasions before she was **told it had not been lodged** due to representative error - six days later she lodged her application - **extension allowed**)

[\[2013\] FWC 9025](#) *WA Shea v Independence Group NL* (although **representative error was a significant factor in a lengthy delay**, exceptional circumstances were not found when the **case had little merit**)

[\[2013\] FWC 8864](#) *Vic Coleiro v APRA* (the A was a **professional with legal qualifications** whose claim was **one day late** - he had approached a lawyer concerning his unfair dismissal claim, but had not retained her or instructed her to lodge his claim - **lawyer did not inform him of the 21 day period, but rather indicated she would not be able to deal with his claim until a later date (which post-dated the last day A had to lodge his claim)** - A had not been timely in his

communications with this lawyer who was showing him she'd rather him approach another lawyer - A had not taken any action to dispute his termination with R other than lodge claim - extension of time refused)

[\[2013\] FWC 9334](#) **Vic Aitken v Illumination Australia** (extension allowed when **A relied on legal advice that R could and would consent to extension of time being granted** - such is not the case - A had acted expediently all along and had advised solicitors to lodge application on time)

[\[2013\] FWC 9583](#) **Qld Mischkulnig v Domain Kirra Beach** (union **representative filed application under s773 when it should have been made under s365** - A had proceeded expeditiously - exceptional circumstances)

[\[2014\] FWC 2195](#) **Vic Rogers v Melton City Council** (application filed about 13 days late on 13/1/14 due to solicitor's failure - the A **"did not take any steps to follow up with Mr Ellinghaus about whether he had complied with her instructions"**. While Ms Rogers had a responsibility to ensure that her legal representative followed through with her instructions, in this case the closure of Mr Ellinghaus' office prevented her from following this up with him. Further ... **given Mr Ellinghaus' personal circumstances, she didn't want to bother him when his office was closed**. This was not unreasonable in the circumstances" @24 - exceptional circumstances found - **Appeal dismissed** 19/6/14 in [\[2014\] FWC 4000](#))

[\[2014\] FWC 7827](#) **SA Pascoe v ALRM** (application **one day late due to solicitor's miscalculation and oversight** - A "acted quickly to pursue the matter and ... albeit in a somewhat rudimentary manner, he checked with ... [his solicitor] as to the standing of the matter during the 21 day period" @15 - extension granted)

### **Section 366(2) compared**

[\[2014\] FWC 3903](#) **Vic Shaw v ANZ** (**distinction between s366(2) and s394(3)** - "The matters that must be taken into account, which are set out in s. 366(2) of the Act, are similar to but not the same as the matters that are to be taken into account in considering whether there are exceptional circumstances in the context of an unfair dismissal remedy application identified in s. 394(3) of the Act. It is with that note of caution that authorities which concern extensions of time about unfair dismissal matters are to be viewed in their application to the considerations set out in s. 366(2) of the Act. The statutory context and overall content is similar, but it is not the same" @10)

### **Visa issues**

[\[2014\] FWC 6805](#) **Vic Paladini v AC & AJ Williams** ("the **reason for delay is based upon the desire of Mr Paladini to stay in Australia in a manner which was inconsistent with his Visa**. This is indeed exceptional but not exceptional in the context of the Act. It cannot be that conduct which is known to be inconsistent with the terms of a Visa could constitute a reason for which the Commission could regard as appropriate for the grant of an extension of time" @7)

### **Wrong choice re jurisdiction and other matters**

[\[2014\] FWC 6676](#) **WA Malcolm v Trustee of Saba Family Trust** (the A "states that the **delay was occasioned by the fact that she was unable to establish the 'full legal identity of the company'** ... [She] made the wrong choice, when at all times she had in her possession a document containing a "signpost" which indicates the Commonwealth jurisdiction of her employment conditions" @39 - the A made the **wrong choice about which jurisdiction to file in** - "making the wrong choice is not out of the ordinary, exceptional, unique, unusual, rare or uncommon. Making the wrong choice is a familiar everyday occurrence" @41)

### **FWA Cth s394(3)(c) – Action taken to dispute dismissal**

[\[2014\] FWC 7155](#) **Vic Hocking v Villa Maria** ("**raising issues that related to the termination of her employment whilst she was still employed** is action taken to dispute her dismissal. There seems to me to be nothing in the language of s. 394(3)(c) which requires that steps to dispute a dismissal can only be taken after the dismissal took effect" @28)

**FWA Cth s394(3)(d) – Prejudice to the employer**

[\[2014\] FWCFB 2149](#) *Ozsoy v Monstamac Industries* (“The **absence of a prejudice to the employer is usual in extension of time matters** and does not provide a positive basis for finding exceptional circumstances warranting an extension of time for lodgement”@38)

...