



THE UNIVERSITY
of ADELAIDE

Dr Gabrielle Golding

**UNFAIR DISMISSAL AND THE
CORONAVIRUS PANDEMIC:
ADAPTATIONS AND CREATIVE
RESPONSES FROM AUSTRALIA'S
FAIR WORK COMMISSION**

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Overview



1. Unfair dismissal in Australia

2. Adaptations and creative responses from the Fair Work Commission

3. Concluding comments

Unfair dismissal in Australia

- An unfair dismissal is when an employee's dismissal is '**harsh, unjust or unreasonable**'
- Applications for protection from unfair dismissal must be made to the Fair Work Commission **within 21 days** of the dismissal taking effect
- Employees must satisfy various **eligibility criteria** in order to access protection from unfair dismissal (eg, employed for more than 6 months; earn under the high income threshold)
- The Fair Work Commission will consider the circumstances of the employee's case and whether they were **treated fairly in terms of process and substance**
- If successful, an employee can receive **up to 6 months' salary** as compensation
- **Reinstatement** is the preferred remedy, but is rarely awarded

Creative responses from the Fair Work Commission

A consideration of 5 unfair dismissal decisions spanning the last 12 months

- In 2 decisions, the employee's dismissal was justified
- In 3 decisions, the employee's dismissal was unfair





Fair dismissal of a childcare employee who refused an influenza vaccine

Barber v Goodstart Early Learning

- The Fair Work Commission upheld Goodstart Early Learning's dismissal of a childcare worker, Ms Bou-Jamie Barber, who refused to take a free influenza vaccination

Unfair dismissal of an employee who insisted on indefinite unpaid leave to avoid public transport during the pandemic

Yu v Hansen Yuncken Pty Ltd T/A Hansen Yuncken

- The Fair Work Commission was scathing of construction company, Hansen Yuncken, who callously and unfairly dismissed a naïve building cadet who nevertheless provided it with a valid reason to dismiss him by insisting that he remain on indefinite unpaid leave, in order to avoid lengthy public transport commutes during the Coronavirus pandemic





Inability of employer to engage in face-to-face discussions before redundancy due to lockdown resulted in unfair dismissal

Sposito v Maori Chief Hotel

- The directors of the Melbourne-based Maori Chief Hotel claimed an inability to engage in face-to-face discussions before making a chef redundant during the city's second Coronavirus lockdown, denying the need to compensate her for unfair dismissal
- However, they were found to have fallen foul of consultation obligations, resulting in an unfair dismissal

Fair dismissal of a wildlife sanctuary employee due to 'obvious impracticability' of sanitising a koala

McClelland v Kamori Australia Pty Ltd T/A Lone Pine Koala Sanctuary

- The 'obvious impracticability' of sanitising a koala helped to justify a Coronavirus pandemic-affected wildlife sanctuary's decision to make a worker responsible for co-ordinating photographs of visitors holding its main attraction redundant





Compensation awarded to a salesperson dismissed due to attitude during a teleconference and questionable productivity while working from home

Petersen v Kizuri Capital Pty Ltd, Maycorp Pty Ltd and Cricklewood Capital Pty Ltd T/A Allpet Products

- The Fair Work Commission awarded compensation to a salesperson dismissed after a director took exception to her attitude during a teleconference and drew negative conclusions about her productivity after scrutinising her Instagram posts.

Concluding comments

- Notwithstanding a burgeoning caseload in the fallout of the pandemic, the Fair Work Commission has adapted, and responded accordingly, and creatively

- The 5 decisions assessed demonstrate a capacity to adapt and respond to unforeseen and unprecedented circumstances with clarity and cogency

The Commission's responses have been highly adaptive and nuanced, in the midst of a widespread catastrophe, and have the potential to apply in future and broader contexts



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