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

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**Abstract**

This paper explores how decision-making by Australia's Fair Work Commission has adapted and creatively responded to the sharp increase in unfair dismissal applications since the commencement of the Coronavirus pandemic. It is a topic that will not just be of interest to Australian labour lawyers and academics, but also to the international labour law community in comparing and contrasting their own jurisdiction's responses to dismissals arising out of the pandemic.

The pandemic has now entered its second year, and globally, workforces have felt its effects. In Australia, many businesses have needed to dramatically downsize and terminate employees' employment to remain operational, and according to data released by the Australian Bureau of Statistics, nearly 600,000 Australians lost their jobs in April 2020 alone. It has become apparent that one of the main reasons why an employee may now file an unfair dismissal claim is if they feel their employer is using the pandemic as an opportunity to terminate their employment, but without following the correct procedures for doing so.

Unfortunately, the increase in pandemic-related job losses has meant that many Australian employers have been subject to an increased risk of unfair dismissal claims being brought against them. With these increases in mind, this paper questions the specific ways in which the Fair Work Commission's decision-making has adapted and creatively responded to the increase in the number of unfair dismissal applications being brought in an unprecedented context. In investigating that question, it adopts a doctrinal legal research method, providing a systematic exposition of a series of unfair dismissal decisions made over the course of the pandemic, analysing the relationship between those decisions and ways in which the Fair Work Commission's decision-making has been adaptive and creative in response to the pandemic. The purpose of utilising a doctrinal legal research method in this manner is to probe the Fair Work Commission's reasoning in each of the decisions selected for analysis.

It does not appear that the Fair Work Commission's decision-making processes have been analysed elsewhere in the manner proposed. The analysis presented is therefore a unique and innovative contribution to existing literature on Australia's unfair dismissal jurisdiction. Overall, the findings presented demonstrate that the Fair Work Commission has repeatedly exercised its decision-making powers around applications for unfair dismissal in an adaptive and creative, yet highly responsive, manner in the midst of a global crisis. Just as the pandemic has caused humankind to adapt and become creative, so too has it caused the Fair Work Commission to do the same.

Keywords: Australian employment law; Coronavirus pandemic; unfair dismissal

## INTRODUCTION

From 2020 into 2021, news channels have been populated by updates on the outbreak and spread of the Coronavirus, which has proliferated worldwide, resulting in a global pandemic. There have been significant unforeseen humanitarian, health and economic concerns emerging, and the public health crisis has offered many unique challenges in the field of labour law. Just as in other jurisdictions, working Australians have felt the impacts of the pandemic in insurmountable ways, with one major impact being the focus of this paper: the sheer rise in applications for unfair dismissal, and the manner in which Australia's Fair Work Commission (**Commission**) has had to creatively adapt and respond to those applications. As Australia's national workplace relations tribunal, the Commission holds an important role in regulating Australian employment law. It is an independent decision-making body, operating under the *Fair Work Act 2009* (Cth) (**FW Act**). Among other things,[1] individuals can come to the Commission if they believe they have been unfairly dismissed, and more is said about Australia's unfair dismissal jurisdiction later at Part I.

Data from August 2020 confirms that the workplace upheaval generated by the pandemic has generated a jump in unfair dismissal applications.[2] A statement issued by the Commission's President, Justice Ross, said that its substantive caseload rose almost 25% from 16 March to 31 July, compared to the same period in the previous year.[3] As at August 2020, there had been nearly 2,000 more unfair dismissal applications filed since 16 March 2020, compared to the same period in the previous year.[4] The largest spike in applications was seen in April 2020, when unfair dismissal applications had risen by 67% in comparison to April 2019.[5] This sharp rise in applications has not shown much sign of slowing, prompting the Commission to ask Federal Government for extra resourcing to deal with the Coronavirus-

[1] Individuals can also lodge a complaint with the Commission if they believe they have been discriminated against, victimised or unfairly treated under the provisions of the *Fair Work Act 2009* (Cth) (**FW Act**), or bullied at work and want an order to prevent that from happening. Other roles performed by the Commission include: setting minimum wages; creating and changing Modern Awards; approving enterprise agreements; and acting as an independent umpire in the aforementioned disputes brought by individuals. The Commission does not handle complaints about wages, superannuation or workplace safety. Each of these matters is handled by other agencies, some of which are state/territory-based.

[2] See, eg, Fair Work Commission, 'President's Statement: The Fair Work Commission's Coronavirus (COVID-19) Response' (Web Page, 7 August 2020) <https://www.fwc.gov.au/documents/documents/resources/covid-19-information/presidents-statement-fwc-covid-19-response-2020-08-07.pdf>.

[3] Ibid.

[4] Ibid.

[5] Ibid.

driven surge in unfair dismissal claims, particularly with many such applications heading towards the hearing stage, following an initial conciliation.[6]

Nevertheless, the Commission has adapted ably and promptly. It has reallocated resources to support case management and conciliation of claims for unfair dismissal,[7] alongside a working group established in May 2020, made up of members led by Deputy President Mansini, with the task of formulating a plan to address the surge in claims and avoiding the backlog 'that would otherwise have developed'.[8]

Perhaps the greatest adaptation beyond the reallocation of resources has been in the Commission's ability to oversee and make decisions concerning new and unprecedented unfair dismissal matters arising from unique situations, which are a product of the pandemic. In showcasing that ability, as mentioned, this paper begins at Part I, with a brief overview of Australia's unfair dismissal jurisdiction, which sets the scene for its operation and application by the Commission in the context of the pandemic. Part II traverses five select decisions, which demonstrate the Commission's ability to adapt, finding creative and nuanced responses to unfair dismissal applications brought out of new and emerging situations unique to the pandemic. Concluding comments are made in Part III.

The author acknowledges the vast academic attention already paid to Australia's unfair dismissal jurisdiction in the general sense.[9] However, it does not appear that a collective analysis of the latest decisions covered in this paper has yet occurred, particularly as those developments relate how the Commission has adapted its decision-making powers in respect of unfair dismissal applications impacted by the pandemic. Therefore, this paper generates an innovative and timely contribution to Australian employment law, especially insofar as it relates to unfair dismissal and the role of labour law during the pandemic more broadly.

## I UNFAIR DISMISSAL IN AUSTRALIA: AN OVERVIEW

This part provides an overview of Australia's unfair dismissal jurisdiction as a means of informing the later discussion of five select decisions concerning whether or not a dismissal arising during the pandemic was, indeed, unfair. By way of background, unfair dismissal is when an employee is dismissed from their job in a harsh, unjust or unreasonable manner.[10] Employees must apply to the Commission within 21 days of the dismissal taking effect, with the 21-day period starting the day after the dismissal occurs.[11] In the context of this paper, it is worth noting that extensions to that timeframe can be granted in exceptional

[6] See, eg, Justice Iain Ross AO, 'The Fair Work Commission's Response to the COVID-19 Pandemic' (Webinar, Australian Labour Law Association, 7 May 2020).

[7] Ibid.

[8] Ibid.

[9] See, eg, Joanna Howe, *Rethinking Job Security: A Comparative Analysis of Unfair Dismissal Law in the UK, Australia and the USA* (Routledge, 2016).

[10] FW Act ss 385, 387.

[11] FW Act s 394(1).

circumstances. For instance, an employee was recently granted a 13-day extension for filing an unfair dismissal application after the Commission accepted that the termination of his employment during the pandemic had left him in a 'bad way'.[12] In particular, Commissioner McKinnon reasoned that such an extension was warranted because the employee's 'state of ill health, the effect of the pandemic on his personal safety and an online lodgement error effectively prevented him from making the application earlier than he did'.[13]

It must also be noted that there are various other eligibility criteria that need to be met, in order to allow an employee to access unfair dismissal.[14] Among other things, employees have to be employed for at least six months before they can apply for unfair dismissal,[15] and must earn under the high-income threshold,[16] which is currently indexed at $153,600 AUD.[17]

Any claim for unfair dismissal will involve the Commission considering the circumstances of the employee's case and assessing whether, overall, they were treated fairly in terms of process and substance.[18] If an employee succeeds in respect of a claim for unfair dismissal, they can receive up to six months' salary as compensation.[19] Although reinstatement is notionally the 'preferred' remedy,[20] it is rarely awarded because often the relationship between the employer and employee has irrevocably broken down.[21]

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[12] See, eg, *Wilson v Quatius Logistics Pty Ltd* [2020] FWC 3110.

[13] Ibid [9].

[14] Workers can take the Commission's eligibility quiz to see if they can apply for unfair dismissal: see, eg, Fair Work Commission, 'Unfair Dismissal Eligibility Quiz' (Web Page, 15 April 2020) <https://www.fwc.gov.au/termination-of-employment/unfair-dismissal/eligibility>.

[15] Cf, employees working for a small business have to be employed for at least 12 months before they can apply (FW Act ss 23, 121, 123, 388(1)) and their dismissal is governed by the Small Business Fair Dismissal Code.

[16] FW Act ss 333, 382.

[17] This figure applies from 1 July 2020. For more information on the high-income threshold, see FW Act s 333; *Fair Work Regulations 2009* (Cth) reg 2.13.

[18] See, eg, FW Act ss 385, 387. For further commentary on the eligibility criteria, see, eg, Andrew Stewart, *Stewart's Guide to Employment Law* (5th ed, Federation Press, 2015) 366–8. There are a range of other options for Australian employees to challenge their dismissal pursuant to state and federal legislation and the common law: see, eg, Stewart (n 18) 360–4. Taking a couple of examples, employees can also apply to the Commission if they have been dismissed because of a breach of general protections or unlawful termination. While prevalent and worthy of consideration, these possibilities are not the focus of this paper.

[19] FW Act s 392(1).

[20] Ibid s 391(1).

[21] See, eg, Elizabeth Shi and Freeman Zhong, 'Rethinking the Reinstatement Remedy in Unfair Dismissal Law' (2018) 39 *Adelaide Law Review* 363.

## II CREATIVE RESPONSES FROM THE COMMISSION

The following discussion outlines five unfair dismissal decisions spanning the last 12 months, wherein employees have challenged their dismissal for conduct engaged in during the midst of the pandemic. These decisions have been selected on the basis of their ability to expose the breadth and depth of matters that the Commission has had to consider in the context of whether a dismissal occurring in the unique context of the pandemic was, in fact, justified and, in all the circumstances, 'fair'. In two of those decisions, the relevant employees' dismissal was found to be justified. For the remaining three, the employee's dismissal was found to be unfair. Importantly, the utility of examining each of these decisions is not to highlight the overall result, but rather, the creativity and adaptability that the Commission needed to exercise in reaching its overarching decision on whether a particular employee's dismissal was indeed, harsh, unjust or unreasonable. Despite already being faced with often factually complex scenarios, in each instance described below, the Commission was compelled to react swiftly to the unique and unforeseen circumstances of the pandemic and to make a decision accordingly—and, indeed, quite creatively.

### A *Fair dismissal of a childcare employee who refused a flu vaccination*

In *Barber v Goodstart Early Learning*,[22] the Commission upheld Goodstart Early Learning's dismissal of a childcare worker, Ms Bou-Jamie Barber, who refused to take a free influenza vaccination. Notwithstanding 14 'exemplary' years of service, Goodstart dismissed the lead educator in August 2020, some four months after she first raised objections about having the vaccine.[23] Compelled to be creative in its approach to this new and unforeseen occurrence, the Commission acknowledged the scarcity of guidance on compulsory workplace vaccinations, particularly in the context of the existing Coronavirus pandemic. Deputy President Lake of the Commission ultimately rejected the lead educator's argument that Goodstart had implemented a mandatory vaccination policy that constituted an 'unlawful assault', determining that her inability to support claims of having a 'sensitive immune system' and a prior adverse reaction vindicated the employer's decision to dismiss her in August 2020.

Deputy President Lake's decision was not made without due consideration of the weight of public interest that would attach to it. He expressed that he was mindful of the 'unnatural high' interest in vaccinations in the current climate of the global Coronavirus pandemic, seeking to categorise this particular ruling as being highly specific to the circumstances of the present case.[24] The Deputy President even went so far as to attempt to 'limit a maladroit application' of his findings, remarking that it was beyond the scope of this particular decision to 'consider whether the conclusions above extend even as far as the entirety of [Goodstart's] business, as the role each employee performs in fulfilling

[22] [2021] FWC 2156.

[23] Ibid [426].

[24] Ibid [13].

[Goodstart's] undertaking may differ'.[25] He also warned that 'an attempt to extrapolate further and say that mandatory vaccination in different industries could be contemplated on the reasons [contained in the decision] would be audacious, if not improvident'.[26] Noting that 'guidance surrounding how [Coronavirus vaccinations] will be administered in the workplace is scarce', the Deputy President emphasised that his decision was 'relative to the influenza vaccine in a highly particular industry.[27] While this may seem obvious to most, given the climate we find ourselves in, it feels appropriate to make this declaration'.[28]

Ms Barber's aversion to the vaccination came to light during June 2020 when Goodstart publicised a new policy requiring its 17,500 employees to have flu vaccinations 'unless they have a medical condition which makes it unsafe for them to do so'.[29] Deputy President Lake recounted that even '[o]n the [worker's] own account, multiple doctors refused to provide her a statement that she should be exempt from vaccination',[30] adding that '[i]In a scenario where the cost of visiting medical practitioners was covered by [Goodstart], there was no barrier to collecting this information, if it existed. In the absence of that evidence, it is unclear how I, or Goodstart, could be satisfied that there was valid ground for a medical exemption'.[31]

The Deputy President also added that the employee had received 'ample time' to seek medical opinions, 'and what she produced was evidence of coeliac disease, vague unsubstantiated accounts of an allergic reaction that was not anaphylaxis, and a statement that she [had] (sic) a sensitive gut, which is not known to be a medical condition. None of the above satisfies me that a medical exemption should have been granted in the circumstances'.[32]

Despite these comments to the effect that Ms Barber had no sound medical basis for refusing a vaccination, the Deputy President still took issue with Goodstart's basis for dismissing her, turning to a question that was purportedly not answered in the over two thousand pages of material before him in presiding over the case; that being 'why [Goodstart] sought to dismiss the [worker] for a purported lack of capacity and not for alleged misconduct—that is, a breach of the mandatory vaccination policy they had recently implemented'.[33] In essence, the Deputy President found the approach of absconding from misconduct in favour of capacity to be 'an unfortunate choice' by Goodstart.[34] He went on to

[25] Ibid [394].

[26] Ibid.

[27] Ibid [13].

[28] Ibid.

[29] Ibid [22].

[30] Ibid [369].

[31] Ibid.

[32] Ibid.

[33] Ibid [296].

[34] Ibid.

find that he was not satisfied, in the circumstances, that Ms Barber lacked the capacity to perform the inherent requirements of her role.[35] Had Ms Barber been dismissed for misconduct, however, the case itself would have been far simpler. Nevertheless, the Deputy President remained of the view that there was a valid reason for Ms Barber's dismissal for the reason of her conduct in failing to comply with the lawful and reasonable direction of Goodstart to be vaccinated against influenza.[36] Ultimately, it was concluded that because the direction to be vaccinated was lawful and reasonable, 'a valid reason for termination exists based on the [worker's] conduct in failing to comply with that direction'.[37]

In relation to Ms Barber's assertion that being forced to be vaccinates constitute assault and battery,[38] Deputy President Lake observed that because the worker never even received the vaccination, and no contact with her was ever made, such an allegation could not be made out, adding that '[t]he [worker's] idea that Goodstart would threaten to [her] that they would vaccinate her seems fanciful'.[39]

As to the question of fairness, the Deputy President noted that while the 'exemplary and longstanding' worker's dismissal was 'unfortunate', it was important to recognise that she 'did knowingly and consciously object [to vaccination], and in doing so was aware of the consequences'.[40] In fact, the process involved in her termination spanned four months, and the decision was not made hastily. The Deputy President concluded that Ms Barber's dismissal could therefore be considered 'fair in all the circumstances when considering the paucity of medical evidence presented by the [worker] and the lengthy process attempted to obtain said medical evidence'.[41] In saying this, the Deputy President also added that Goodstart's vaccination policy had been 'appropriately adapted and had any evidence been presented that there was a real medical exemption it would have been considered and accepted, as was the case with over one hundred other Goodstart employees'.[42]

At this point, it is worth briefly noting Deputy President Lake's ruling follows another similar decision by Deputy President Asbury in November 2020, where it was found to be arguable that another Goodstart employee had unreasonably refused a lawful direction upon declining a mandatory influenza vaccination.[43] It also follows another recent case, where the Commission needed to consider whether an aged care provider unfairly dismissed a long serving care assistant who refused a compulsory influenza vaccine on the grounds of an

[35] Ibid.

[36] Ibid.

[37] Ibid [302].

[38] Ibid [352].

[39] Ibid [355].

[40] Ibid [426].

[41] Ibid [428].

[42] Ibid.

[43] See, eg, *Arnold v Goodstart Early Learning Limited T/A Goodstart Early Learning* [2020] FWC 6083.

allergy.[44] The Commission found that the aged care provider's decision to 'mandate influenza vaccinations for all of its client-facing employees, without allowing any exemption' was lawful and reasonable.[45] A failure to comply with that direction was considered grounds for termination.[46] This outcome was despite a medical certificate that alleged that the care assistant had a historical anaphylactic reaction to influenza vaccinations.[47] Just as in In *Barber v Goodstart Early Learning*, Commissioner Hunt expressly declined to comment on submissions relating to the potential risks of Coronavirus-related vaccines, emphasising that this decision related only to 'a requirement to be vaccinated against influenza and does not deal with Coronavirus vaccinations or their potential risks'.[48]

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

In *Yu v Hansen Yuncken Pty Ltd T/A Hansen Yuncken*,[49] the 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. Again, this unique case presented the Commission with a novel set of factors linked to the pandemic that it was compelled to adapt and creatively respond to in its decision-making process.

The building cadet, who worked for Hansen Yuncken while studying a Bachelor of Construction Management, had asked to work from home because he was concerned about taking public transport to a site in Sydney's far south-western suburb Minto during the pandemic.[50] However, in March 2020, Hansen Yuncken denied the building cadet's request, explaining that because of the importance of building cadet on-site learning, he could neither attend work at the Minto site or take annual leave and leave without pay.[51]

The building cadet emailed Hansen Yuncken afterwards stating: 'I will be taking leave without pay starting from tomorrow and I will return when I see fit to resume work as discussed and agreed upon in last Monday's meeting (23/03/20)'.[52] Emailing a fortnight later to say he would 'continue to take unpaid leave and provide you with an update at the end of May', the building cadet told the Commission that when he spoke with Hansen Yuncken's

[44] See, eg, *Glover v Ozcare* [2021] FWC 2989.

[45] Ibid [260].

[46] Ibid [261].

[47] Ibid [262].

[48] Ibid [70].

[49] [2021] FWC 486.

[50] Ibid [8].

[51] Ibid [9].

[52] Ibid [10].

operations manager again in May, he accepted a further commitment to provide an update in June.[53]

The building cadet was therefore taken by surprise when Hansen Yuncken rang back after the conversation and directed him to check his email account, which contained a dismissal letter notifying him the company would provide one month's pay in lieu of notice.[54] Referring to the building cadet's 'advice about your uncertainty of when you would return to work', the letter dated 25 May 2020 said the company was 'unable to offer you a role at this time' and 'will need to put in place a termination of your role'.[55]

The building cadet argued in support of his unfair dismissal application that given Hansen Yuncken suggested leave as an option and gave him no warning it might result in dismissal, it was unreasonable and unfair to retrospectively wind back terms of the agreement without notice.[56] Nevertheless, in deciding the case, Commissioner Cambridge preferred the operations manager's evidence that he and a human resources manager had made it clear in the May meeting that Hansen Yuncken would not let the building cadet take another month off and intended to bring his leave to an end.[57]

The Commissioner found that in his email, the building cadet instead 'bluntly rejected this proposition' and 'perhaps naïvely, attempted to exercise what he believed to be his total control to make the decision about when he would return to work'.[58] The building cadet's 'refusal to accept that the employer could exercise its requirement for him to return to work, or stipulate a date upon which he would return to work, represented a refusal to comply with the reasonable direction of the employer and thus provided valid reason' for his dismissal.[59] As it transpired, the building cadet held 'a mistaken and somewhat novel belief that he could unilaterally determine when he would return from unpaid leave'.[60]

Even though it had a valid reason to dismiss the building cadet, Commissioner Cambridge still found that Hansen Yuncken's significant procedural errors denied the cadet natural justice and rendered it harsh, unjust and unfair.[61] Indeed, there was 'no justification' for deciding to dismiss the building cadet before hearing from him, while notifying him of it via email was 'unnecessarily callous', 'entirely inappropriate', harsh and unreasonable.[62]

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[53] Ibid [14].

[54] Ibid [18].

[55] Ibid [16].

[56] Ibid [21].

[57] Ibid [36].

[58] Ibid.

[59] Ibid [39].

[60] Ibid [36].

[61] Ibid [49], [53].

[62] Ibid [41], [53].

Although the cadet later confirmed in the hearing his 'misguided belief that he could exercise a unilateral right to determine when he would return', Commissioner Cambridge said it was wrong to have dismissed him before telling him his response was untenable and warning him dismissal was likely if he failed to give a return date.[63] The Commissioner also added that this outcome was 'very disappointing', and notwithstanding the presence of management specialists and other staff with employment-related expertise, the employer 'adopted a seriously flawed procedural approach that denied [the cadet] natural justice'.[64] Concluding that if Hansen Yuncken had followed a proper process, then the building cadet's employment would have continued for another three weeks, Commissioner Cambridge ordered it to pay him $2,583.00 by way of compensation.[65]

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

In *Sposito v Maori Chief Hotel*,[66] the Commission needed to exercise its creativity in navigating mandatory Modern Award[67] consultation rules required to be undertaken in the lead-up to a dismissal during the pandemic. In this case, 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, after purportedly falling foul of Modern Award consultation obligations.

The Maori Chief Hotel made its chef, Ms Michelle Sposito, redundant in July 2020, telling her via email and registered post that the government-mandated Coronavirus pandemic restrictions left it with no choice but to close down, and it did not expect business to bounce back until a vaccine became available.[68] The hotel directors apologised in the email for not speaking in person with the chef, who had worked at the hotel for 15 years, but advised that it was 'not possible in the current environment'.[69] They also said in the email to contact them if she had any questions, and in the letter said she could 'seek information about the terms and conditions of employment' from Australia's Fair Work Ombudsman.[70]

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[63] Ibid [45].

[64] Ibid [49].

[65] Ibid [69].

[66] [2021] FWC 700.

[67] A Modern Award is a statutory instrument which sets out the minimum terms and conditions of employment on top of the National Employment Standards (**NES**). Modern Awards apply to all employees covered by Australia's national workplace relations system, and are industry or occupation based, meaning that they apply to employers and employees covered by the particular Modern Award. Certain managers and high-income earners will not necessarily be covered by a Modern Award.

[68] Ibid [7].

[69] Ibid.

[70] Ibid [8].

In support of her unfair dismissal application, Ms Sposito argued that she did not respond because the directors made it 'abundantly clear that I was being made redundant as they were closing down the business suggesting permanent closure'.[71] However, she then belatedly filed the application in November 2020, after the hotel advertised on its Facebook page that it was 'looking for chefs' to work '35-40hr p/w nights & weekends included contracted award wage'.[72] During Ms Sposito's unfair dismissal hearing, the hotel directors told the Commission that this was an 'overly ambitious advert' placed by the venue manager, and that it had, in fact, re-engaged two former casual bar workers who performed no kitchen duties.[73]

The directors also objected to the application on jurisdictional grounds, arguing it complied with the Small Business Fair Dismissal Code (**Code**), and maintained the dismissal amounted to a genuine redundancy within the meaning of s 389 of the FW Act.[74] However, Commissioner Cirkovic noted that, except for summary dismissals, the Code requires employers to have a valid reason based on conduct or capacity. As redundancies are based on business or operational needs, she found that the chef's dismissal was inconsistent with the Code.[75] It did not constitute a genuine redundancy because the employer did not comply with its consultation obligations at clause 38 of the *Hospitality Industry (General) Award 2020* (**Hospitality Award**).[76]

Ultimately, while the hotel had 'sensible and credible reasons' for dismissing the chef based on sheer economic downturn, Commissioner Cirkovic found that it had breached s 389(1)(b) of the FW Act by failing to comply the Hospitality Award requirement to tell the chef her position would be made redundant and discuss any 'measures to avoid or reduce the adverse effects of changes' on her.[77] She was not persuaded by evidence from the hotel that these conversations could not feasibly occur during the pandemic; in fact, nothing prevented the employer from calling the chef or arranging to speak to her via other means.[78]

In finding that the chef's redundancy was not genuine because of the way in which her employer carried it out, the Commissioner found the hotel's 'failure to comply with the consultation provision in the Award rendered the [chef's] dismissal unfair'.[79] In turn, Commissioner Cirkovic awarded the chef compensation of two weeks' pay, to cover the

[71] Ibid [10].

[72] Ibid [12].

[73] Ibid [13].

[74] Ibid [15].

[75] Ibid [14].

[76] Ibid [20]–[24].

[77] Ibid [20].

[78] Ibid [22].

[79] Ibid [30].

further period she would have remained employed if the hotel had complied with the Hospitality Award's consultation provision and engaged in the required discussions.[80]

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

In *McClelland v Kamori Australia Pty Ltd T/A Lone Pine Koala Sanctuary*,[81] 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.[82] In once again needing to be creative in the face of an obscure instance of dismissal arising out of the pandemic, the Commission found that it was lawful for Lone Pine Koala Sanctuary to dismiss Mr Samuel McClelland in early April 2020, shortly after government directions forced a shutdown following advice that all 'animal interactions' with visitors should stop because they did not meet social distancing requirements.[83]

Even though Mr McClelland had performed numerous roles at the Brisbane sanctuary since 2015, at the time of the shutdown he was mostly responsible for coordinating photographs of visitors holding koalas.[84] In substantiating his finding that Mr McClelland's dismissal was fair, Commissioner Simpson noted that 'Lone Pine [had] submitted that due to the possibility that COVID-19 may spread as a result of physical contact between koalas and guests, the obvious impracticability of sanitising a koala, and the restrictions still in place for international travellers', and therefore, it was unlikely the employee's role would need to be performed by anyone for an indefinite period of time.[85]

Lone Pine's general manager also gave evidence that the sanctuary had dismissed 30 workers after calculating that international travel bans meant there would be no return to pre-Coronavirus conditions until 2023.[86] While it retained animal keepers, the general manager said Lone Pine opted not to apply for JobKeeper for other workers because of its projections.[87] Nevertheless, in bringing his unfair dismissal case and disputing that Lone Pine had complied with the *Amusement, Events and Recreation Award 2020* consultation requirements, Mr McClelland described Lone Pine's efforts as 'vapid and contrived' and incapable of influencing its already-settled decision.[88]

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[80] Ibid [33]–[34].

[81] [2020] FWC 3707.

[82] Ibid [47].

[83] Ibid [12].

[84] Ibid [8].

[85] Ibid [47].

[86] Ibid [32].

[87] Ibid [41].

[88] Ibid [60].

Commissioner Simpson disagreed, however, pointing to written notice provided by Lone Pine that gave employees a 'clear opportunity' to consult over the proposed changes, and that it was the employee's decision not to accept that invitation.[89] He was also satisfied that the restrictions placed on the manner of consultation because of the Coronavirus pandemic did not point to the sanctuary's 'mind being closed, but the reality of dealing with both the restrictions imposed on Lone Pine by COVID-19 itself, and as determined by government'.[90] Commissioner Simpson also accepted that the employer had no vacant positions to which the worker could have been redeployed.[91] Overall, in finding that Mr McLelland's redundancy was genuine, the Commissioner dismissed the case.[92]

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

In a decision highlighting the challenge of the Commission needing to now take into account a heightened consideration of the management of remote workers during the pandemic, in *Petersen v Kizuri Capital Pty Ltd, Maycorp Pty Ltd and Cricklewood Capital Pty Ltd T/A Allpet Products*,[93] the 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.

In mid-April 2020, Ms Clair Peterson, an Allpet Products sales representative, was summarily dismissed for serious misconduct after a director visited her Instagram account over the Easter long weekend and found what she believed to be evidence of personal activities conducted on company time.[94] The director also discovered that Ms Peterson had not disclosed that she had previously established and continued to run a pet-chaperoning business, which was considered to potentially be in competition with her employer's business.[95]

These discoveries proved to be the last of a succession of irritations for her co-director husband, who had earlier in the same month issued the salesperson with a written warning concerning her failure to consistently provide daily and weekly sales reports.[96] That written warning had also come after a teleconference during which the Perth-based director queried the South Australian-based salesperson—calling in from her car—about overdue weekly reports, to which she replied that she could not do them in the car, could not do them outside

[89] Ibid [62].

[90] Ibid [63].

[91] Ibid [70].

[92] Ibid [74].

[93] [2020] FWC 5332.

[94] Ibid [71], [229].

[95] Ibid [218].

[96] Ibid [112].

as it was raining, and could not do them inside as cafes and shops, which were closed due to pandemic lockdowns.[97]

Deputy President Anderson found that the director 'formed a view that [the salesperson] had been "defiant" and displayed a "rude, patronising and frustrating" attitude during the meeting in front of senior staff'.[98] In his subsequent dismissal letter, the director cited the salesperson's failure to provide weekly sales reports, customer complaints, poor attitude and 'demonstrated lack of respect' for management as reasons for her dismissal.[99]

In firstly considering whether there was a valid reason for dismissal, the Deputy President observed that the salesperson had consistently exceeded sales targets after joining Allpet in early 2018, her success was recognised when her territory was extended to include Queensland as well as South Australia.[100] While her success meant she was initially absolved of much of her reporting responsibilities, the situation changed when a new national sales manager took over in October 2019.[101] The reporting responsibilities increased further with the arrival of the Coronavirus pandemic, with Allpet's sales representatives being asked to submit daily sales reports at the same time as having their days and wages cut by 20%.[102]

Following receipt of the emailed written warning, the salesperson quickly emailed back that 'no sales were made Thursday 2nd April – hence no email', adding that she did 'however work on my unpaid day off, Friday 3rd April – hence update of sales for that day today'.[103] With that in mind, the Deputy President noted that the director had 'wrongly jumped to the conclusion that [the salesperson] was responding as a whole to the warning letter, when in fact she was simply providing sales data that was sought by the letter and doing so at the earliest opportunity to try and give the owner what he needed'.[104] As such, the director had drawn an adverse conclusion 'in the heat of the moment' that was not reasonably open.[105]

In finding that the salesperson's failure to consistently provide reports after October 2019 was a performance failure, the Deputy President observed that the salesperson had 'a somewhat tin ear … to the reality that she was required to meet these reporting obligations and would be marked down for not doing so'.[106] However, not all performance failures

[97] Ibid [102].

[98] Ibid [103]

[99] Ibid [123].

[100] Ibid [53].

[101] Ibid [89].

[102] Ibid [78].

[103] Ibid [112].

[104] Ibid [214].

[105] Ibid.

[106] Ibid [292].

constitute a valid reason for dismissal, and the seriousness of a performance failure requires a consideration of context and circumstance, which was not present in this case.[107]

Deputy President Anderson also went on to find that Allpet showed a 'similar tin ear' when it came to appreciating the pressures Ms Peterson faced during the final three weeks of her employment.[108] The Deputy President found that Allpet 'failed to recognise her natural anxieties about COVID-19 (mixing with clients in public places) and all that COVID-19 could mean for her job security if the business was to be severely impacted'.[109] By contrast, Allpet required her to undertake 'competing and conflicting obligations: service all customers largely to the same extent (including keeping an eye out on days off); complete all reporting obligations; comply with a new reporting obligation; and do this for 20% less pay and in 20% less time'.[110] Viewed objectively, this placed an 'unreasonable cocktail of expectations on' Ms Peterson.[111] As such, these constituted mitigating factors in assessing the seriousness of the salesperson's failures.[112]

While the director cited customer relationships as the most important basis for Ms Peterson's dismissal, Deputy President Anderson found that her interaction with customers was 'occasionally deficient but generally professional and productive'.[113]

In relation to other matters raised by Allpet, Deputy President Anderson concluded that while the salesperson had been 'remiss' in not disclosing her pet-chaperoning business, there was 'no evidence of the business compromising [her] employment obligations or enriching her private interests through her employment'.[114] Therefore, it did not constitute a valid reason for dismissal.[115]

Moreover, the instances of alleged misconduct uncovered by the co-director's examination of the salesperson's social media posts, cross-referenced with her work schedule on a January trip to Queensland, orders and GPS data from her company iPad, did not give rise to a valid reason. In relation to this allegation in particular, Deputy President Anderson found that '[a] number of conclusions drawn by [the co-director] were, when tested in evidence before me, factually wrong or unable to be made out to the requite standard of proof'.[116] That said, attending a 'bridal boutique and in driving her friend to the airport during work time in a work-funded vehicle [the salesperson] exercised poor judgment and on that

[107] Ibid [158].

[108] Ibid [178].

[109] Ibid.

[110] Ibid.

[111] Ibid [179].

[112] Ibid [180].

[113] Ibid [204].

[114] Ibid [225].

[115] Ibid.

[116] Ibid [235]–[236].

day failed in her duty'.[117] Together, however, each of these occurrences were not 'of such magnitude to warrant dismissal'.[118]

In lastly considering whether the dismissal was procedurally fair, the Deputy President noted the absence of a formal personal improvement plan, despite it being clear by March that the salesperson was struggling to keep up with her multiple responsibilities.[119] Moreover, the 'impersonal nature of the dismissal by email and letter compounded the procedural unfairness'.[120]

Overall, Deputy President Anderson summarised this case as one of 'a committed but occasionally deficient employee who was already starting to sink amidst a heavy workload being unable to sustain strictly enforced internal reporting obligations on top of her customer servicing obligations'.[121] He added that when the Coronavirus pandemic came about, 'the combination of reduced hours to do the job, demotivation arising from reduced hours and pay and an additional reporting obligation combined to create a set of circumstances in which an objective assessment of performance was fraught'.[122] While Allpet had endeavoured to act fairly, its judgment 'was rash and impaired'.[123] Therefore, '[w]hen considered objectively [the salesperson's] dismissal was harsh, unjust or unreasonable'.[124] As such, the Deputy President awarded Ms Peterson '$7,476.31 (to be taxed as required by law) plus an amount of $1,644.23 to be paid into the superannuation fund applicable to [her] employment' by way of compensation.[125]

## III CONCLUDING REMARKS

To conclude, this paper has canvassed the plight of Australia's Fair Work Commission in responding to the Coronavirus pandemic, highlighting that notwithstanding a burgeoning caseload in the fallout of the global crisis, the Commission has adapted, and responded accordingly, and creatively.

For instance, the Commission allowed for an extension of time to bring an application for unfair dismissal in a new set of circumstances arising out of the pandemic, which may have a flow-on effect in respect of the factors that are to be taken into account in deciding whether such an extension is warranted.

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[117] Ibid [238].

[118] Ibid [241].

[119] Ibid [255].

[120] Ibid [284].

[121] Ibid [322].

[122] Ibid.

[123] Ibid [323].

[124] Ibid.

[125] Ibid [383].

The Commission also decided that it was fair to dismiss employees in child and aged care who refused an influenza vaccination, though it remains to be seen if and how these decisions will affect potential future arguments regarding the Coronavirus vaccine, or workers in other industries. It seems safe to assume that this question will arise again in the not-too-distant future.

Separately, a construction company was the subject of an unfair dismissal ruling, despite having a valid reason to dismiss an employee who unilaterally decided that he would not return to work and remain on indefinite unpaid leave, due to his need to catch public transport during the pandemic. Crucially, the reason the employee's dismissal was unfair was a consequence of the improper process followed by the construction company in carrying out the dismissal. This outcome emphasises the need for employers to take care in respect of the process they follow when dismissing an employee in the context of the pandemic, even if it is for a valid reason.

Further, an employer was obliged to engage in face-to-face discussions regarding a proposed redundancy during a lockdown, and a wildlife sanctuary's redundancy was found to be genuine, one of the reasons for which pertained to the Commission identifying the obvious impracticality of the worker sanitising a koala. Moreover, a remote worker whose workload had been significantly increased after a change in her role and because of the financial and social impacts of the pandemic was found to be harsh, unjust and unreasonable. It is fair to say that in each of these instances, there is the potential for the relevant findings to become more general in application, informing future decisions.

Overall, the five key decisions assessed throughout this paper demonstrate that 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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