The Advisor

March 2025 Edition

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Introduction

It has been a quick start to the year and SIAG hopes that your business is meeting the challenges of the day and safely navigating the raft of employment law amendments and updates.

This March edition covers a range of interesting topics including:

- an outcome in a dispute matter concerning the interpretation of an enterprise agreement and the access of both types of paid parental leave by one employee – see Case 4;
- an application of the new barriers to approval of enterprise agreements around 'genuine agreement' and whether the voting cohort has a 'sufficient interest' in the enterprise agreement – see Case 3;
- a case on definition of protected industrial action (noting we are seeing more industrial activity across Australia) – see Case 1;
- unfair dismissal laws and drug testing – cocaine in the workplace – see Case 7 ;
- lessons from recent general protection cases – see Cases 2 and 5; and
- a quick jump back to mask mandates and employees who refuse to comply – see Case 6.

I have not seen a time in my long career like this one in respect to a very unstable industrial relations environment, which unfortunately shows no signs at this stage of changing for the better.

I do hope you find this edition informative and if you require any further information please do not hesitate to contact our advice line.

Our next publication will be in June, after the Federal election. We anticipate the major parties will each have positions on industrial relations and we will monitor these developments closely and, as appropriate, keep you updated.

Brian Cook
Managing Director
SIAG

A sign of the times, industrial action in NSW
https://www.theguardian.com/australia-news/article/2024/sep/10/nurses-midwives-strike-nsw-hospitals-pay-rise-premier-chris-minns

Case 1: Interpretation of 'Industrial Action'

Baptcare Ltd v Australian Nursing and Midwifery Federation [2024] FWC 3485

Two off-duty employees distributing campaign materials at the workplace does not constitute industrial action, the Fair Work Commission has ruled.

Facts and Background

On 11 December 2024, two of Baptcare's employees attended their workplace while off duty and distributed campaign badges and materials to fellow employees. Management requested that the employees cease. The employees refused and stated that the union had told them their actions were lawful / permissible. Baptcare filed an Application to the FWC contending that the employees' actions constituted unauthorised industrial action. Baptcare was seeking orders that the industrial action stop on the basis that the industrial action was unprotected industrial action.

At the time of the application, the Australian Nurses and Midwifery Federation (**ANMF**) had applied for a protected ballot order (**PABO**) which was issued on 15 November 2024. However, Baptcare claimed that the PABO did not cover the type of action that was being engaged in by the off-duty employees.

Decision

The FWC held that the conduct of the two employees did not constitute industrial action as the employees were off duty.

The FW Act defines 'industrial action' as:

a) the performance of work by an employee in a manner different from that in which it is customarily performed or
b) a ban, limitation or restriction on the performance of work by an employee or
c) a failure or refusal by employees to attend for work; or
d) the lockout of employees from their employment by the employer of the employees.

In this case, there was no work being performed at all

The FWC was also not persuaded by Baptcare's claim that the employees' conduct was disruptive to the performance of work by on-duty employees and it was not clear how this would alter the outcome of the case. It was sufficient for the FWC to note that there was no evidence tendered to support the conclusion that the activities were disrupting the work of on-duty employees.

What does this mean for employers?

The case is important as it signifies the increase in protected industrial action and the employer response. It is not uncommon for employees to attend the workplace to campaign while off duty, and the case makes it clear that the FWC holds no power to stop such action on the grounds that it constitutes unprotected industrial action.

It is unclear whether the outcome of the case would have been different if Baptcare was able to tender credible evidence that the actions of the off-duty employees was causing disruption / significant disruption to the performance of work of on duty employees.

Case 2: Defending General Protection Claims – Identifying the 'Decision Maker'

Pilbrow v University of Melbourne [2024] FCA 1140 (30 September 2024)

The University of Melbourne failed to discharge the reverse onus of proof in a recent general protection case as it could not establish who made the decision to dismiss a lecturer. The case highlights the importance of leading clear evidence of the decision making process in an adverse action case.

Facts and Background

Dr Pilbrow, a lecturer at University of Melbourne in the Faculty of Medicine, Dentistry, and Health Sciences, was dismissed on 27 February 2020 after being made redundant.

Around the time of the termination of her employment, the University was dealing with allegations of serious misconduct against Dr Pilbrow, which claimed that she they had deleted numerous files related to a course that they previously coordinated.

In the Court filing, Dr Pilbrow alleged that the decision to make her role redundant, the raising of allegations of serious misconduct, and the dismissal, were due to her exercising her 'workplace rights'. Specifically, Dr Pilbrow made an email complaint in September 2018 and initiated a dispute under the dispute resolution procedure in the Enterprise Agreement. Additionally, she initiated a similar dispute under the Enterprise Agreement in relation to her redundancy.

The ability to make a complaint is a workplace right under section 341(1)(c) of the FW Act. The case advanced by Dr Pilbrow was that the adverse action was taken against them because of the complaints that she had raised. This triggered the reverse onus of proof – meaning that *unless* the University could prove that it did not take such adverse action because of the reason alleged, it would be presumed that it taken the action for the unlawful reason.

Decision

This decision was an appeal. In the decision at first instance, it was held that the adverse action was proven to be not connected to the protected reason (ie the exercise of workplace rights).

On appeal, Dr Pilbrow argued that there was no evidence that would allow the primary Judge to make a finding about the identity of the decision-maker(s) who decided the serious misconduct allegation.

In analysing the University of Melbourne's claim that the adverse action was not taken due to the exercise of a workplace right, Justice Snaden stated that two central issues arose:

- firstly, '*who was it that visited the adverse action that was admitted*'; and
- secondly, '*why did they do so?*'

Therefore, as a first step in determining why adverse action was taken and whether that was for an impermissible reason, the Fair Work Commission (**FWC**) must determine *who* actually made the decision to take adverse action.

In considering the evidence, Justice Snaden noted that the allegations of file deletion began with Associate Professor Fogg, who was informed by some of his students that files had been deleted relating to a course that Dr Pilbrow was previously the coordinator for.

Associate Professor Fogg then raised this with the Head of the Department, who then notified the Associate Director of Workplace Relations (Mr Caswell) and a Senior Human Resources Business Partner. Finally, the Senior Human Resources Business Partner then raised this to the Deputy Director of People and Culture, Ms Karakiozakis.

Mr Caswell gave evidence that he could not recall who had made the decision to investigate the alleged serious misconduct, although noted that he discussed the conduct with his own manager, Mr Hogan, and Ms Karakiozakis.

However, Ms Karakiozakis then gave evidence that it was either Mr Hogan or Mr Caswell who decided to issue the allegations of serious misconduct.

Summarising the assortment of evidence, Justice Snaden stated that '*the evidence did not suffice to identify who, within [the human resources] team, was relied upon' to make the decision that the alleged conduct would be classified as serious misconduct. Further, 'neither of those whom the primary judge identified [as making the decision] – Mr Caswell and Ms Karakiozakis – was able to say who it was that made the decision.*'

As the University did not identify precisely who made the decision to take the adverse action (specifically relating to the raising of the serious misconduct allegations), the FWC could not ascertain the reasons behind the decision that the University had taken the adverse action. It followed that there was no evidence to displace the assumption that the University had raised the serious misconduct allegations against Dr Pilbrow because she had made a complaint and exercised workplace rights in their employment.

What does this mean for employers?

The case is another important reminder on the need to identify a decision maker in any instance where adverse action is being taken against an employee.

Case 3: Agreement Voting Cohort had Insufficient Stake

Application by Hawthorne Plant and Logistics Pty Ltd [2024] FWC 2756 (3 October 2024)

The Fair Work Commission (**FWC**) has refused to approve an enterprise agreement because it disadvantaged a group of low-paid casual employees.

Facts and Background

As part of recent amendments to section 188(2) of the *Fair Work Act* states that in determining whether an Agreement has been genuinely agreed to, the FWC must be satisfied that the employees eligible to vote on the Agreement had a 'sufficient interest' in the proposed terms, and were 'sufficiently representative' having regard to the employees that the proposed Agreement is expressed to cover.

At the time of the ballot, 18 employees were eligible to vote, which included those at the higher classification levels, but no employees at the Construction Worker Level 1 (**CW1**) and Construction Worker Level 2 (**CW2**) classifications. The Agreement was voted up, and the employer applied to the FWC for Approval.

Decision

In the analysis of the better off overall test (**BOOT**), Commissioner Durham could not be satisfied that employees at the two lowest classifications were better off overall under the proposed enterprise agreement compared to the Award. However, as was noted by Commissioner Durham, this BOOT failure could be addressed via an undertaking given by the employer.

However, noting the new amendments to section 188, the Commissioner was not satisfied that their concerns around whether the enterprise agreement had been genuinely agreed to could be satisfied by an undertaking. Commissioner Durham held that the lack of representation of employees at the CW1 and CW2 classifications in the Agreement meant that the 18 workers who were eligible to vote on the Agreement were not sufficiently representative of the workers who would be covered by the Agreement.

It was decided that section 188(2) prevented the FWC from making a finding that a proposed Agreement had been genuinely agreed to, and therefore, the Agreement was unable to be approved.

What does this mean for employers?

This is the first case where we have seen the impact of the new section 188 resulting in a refusal to approve an enterprise agreement.

Employers must therefore ensure that when requesting eligible employees to vote on an Agreement, that they have a sufficient interest in the terms of the proposed Agreement and are also sufficiently representative of the employees which the Agreement will cover. Many of our clients may have enterprise agreements with classifications where there are no employees.

The FWC has also updated the Statement of Principles to include a list of factors they may find relevant when considering sufficient interest and sufficient representation (see paragraph 17 of the Statement of Principles). This includes the extent to which employees are employed in classifications covered by the Agreement, and in this case, the only two classifications which failed the BOOT test had no employees.

Case 4: Full Bench says Worker can access both types of employer-paid Parental Leave

Independent Education Union of Australia v Peregian Beach Community College Ltd T/A Peregian Beach College [2025] FWCFB 1 (8 January 2025)

In its first decision of 2025, the Full Bench of the Fair Work Commission found that an employee double-dipping into primary caregiver and non-primary caregiver parental leave provisions may be permitted to do so, if the drafting of the particular parental leave provisions in their enterprise agreement did not expressly prohibit it.

Facts and Background

The case involved the interpretation of the parental leave clause of the Peregian Beach College Enterprise Agreement 2022 (**the Agreement**).

Relevant Clauses:

5.3. Parental Leave

The following Parental Leave provisions are to be read in conjunction with the National Employment Standards and the *Fair Work Act 2009* as varied from time to time.

5.3.2 Paid Parental Leave

(a) In addition to statutory entitlements to unpaid leave, primary caregivers will be entitled to paid leave of eleven (11) continuous and uninterrupted weeks which is exclusive of any vacation period that falls during the paid leave. …
(b) The employer funded eleven (11) weeks paid parental leave will be in addition to the Commonwealth Government's implementation of a national paid parental leave scheme.
(c) …
(d) In addition to the unpaid leave provisions prescribed by legislation, non-primary caregivers are entitled to a period of 5 (five) days paid leave and 5 (five) days unpaid leave which is to be taken consecutively.

An employee of Peregian Beach College (**the College**) applied for paid parental leave as a non-primary caregiver in July 2023 pursuant to clause 5.3.2(d) of the Agreement. The College approved his request and leave was taken.

Upon his return, the employee enquired about taking another period of paid parental leave, this time as the primary caregiver pursuant to clause 5.3.2(a) of the Agreement. The employee said he would provide a statutory declaration to evidence that he would be the primary caregiver of his son throughout the requested period of leave. The College declined his request on the basis that the employee had already taken paid parental leave as a non-primary caregiver.

An application was lodged by the employee's union, the Independent Education Union of Australia (**IEU**), to the Fair Work Commission to deal with the dispute.

The Commissioner at first instance determined that an employee is barred from accessing paid parental leave as a primary caregiver under clause 5.3.2(a) of the Agreement if they have already accessed paid parental leave under clause 5.3.2(d) of the Agreement.

This decision was appealed by the IEU, who claimed the Commissioner fell into error in interpreting the Agreement.

Full Bench Decision

The Full Bench ruled that an employee of the College is not excluded from accessing paid parental leave as a primary caregiver where they have already accessed it as a non-primary caregiver in respect of the same child, so long as they meet the eligibility requirements in clause 5.3 of the Agreement.

In coming to this conclusion, the decision emphasised the long-standing principle in interpreting enterprise agreements to look at its ordinary meaning read as a whole and in its context. On this basis, the Full Bench interpreted the requirement for the Agreement provisions to be 'read in conjunction' with the National Employment Standards and the Act, and to apply 'in addition' to statutory entitlements, to mean that the provisions were intended to compliment statutory entitlements and not be inconsistent with them. As a relevant contextual consideration, the Full Bench noted recent amendments to the legislation which now entitled couples to be individually entitled to 12 months of unpaid parental leave with an option to request a further 12 months. This was interpreted as evidence that the NES contemplates both parents of an employee couple being entitled as a caregiver of a child.

In addition, the Full Bench observed that the term 'primary caregiver' is not defined in the Agreement but interpreted it to be defined based on actions undertaken, and the responsibilities assumed by the employee in relation to the care of the child at a particular point in time. Notably, the term was not an enduring status and could change over time depending on the allocation of caring responsibilities.

The Full Bench rejected the College's submissions that the Paid Parental Leave Act (**the PPL Act**) was contextually relevant in interpreting the provisions to exclude an employee from accessing both leaves at different times. This construction was rejected on the basis that the clauses were not required to be read in conjunction with the PPL Act, and to the extent that the PPL act provided industrial context, it was not enough to justify re-writing the language of the Agreement which did not expressly limit the entitlements to paid parental leave.

What does this mean for employers?

This case demonstrates the importance of clear and considered drafting around the access of entitlements and particular parental leave clauses which have generally removed the gendered terms of 'maternity' and 'paternity' leave.

It demonstrates the importance of anticipating how clauses in your enterprise agreement might be construed and to be wary of unintended consequences and costs. If it is the intention of employers to only permit one type of parental leave (primary or secondary carers), then this should be expressly stated within the parental leave clause of the employer's enterprise agreement.

Case 5: Terminated for a mistake or retaliation for a workplace right?

Chia v Talaroa Asset Management Pty Ltd [2024] FedCFamC2G 1411 (19 December 2024)

In a case that provides important commentary on a General Protections claim, this case highlights the need for employers to adhere to their obligations under the FW Act – ensuring disciplinary action is performance-based, and not retaliatory against an employee exercising any workplace rights. This decision offers valuable insight for employers in navigating the complexities of suspension and termination due to performance issues in the context of an employee exercising their workplace rights.

Facts and Background

Ms Joy, an employee at Talaria Asset Management (**Talaria**), began her employment on 4 July 2022. Throughout early 2023, she took personal leave and made requests to work from home due to personal reasons, including illness. In January 2023, she took several paid personal leave days, and in February, her performance came under scrutiny. Her supervisor, Ms Ninness, expressed concerns about Ms Joy's work, particularly following a significant error in a manual transaction entry by Ms Joy. On 21 March 2023, after the company viewed the entry to be a serious risk to its operations, Ms Joy was suspended. After a disciplinary process, her employment was terminated on 23 June 2023.

Ms Joy alleged that the suspension and dismissal were in retaliation to her exercising her workplace rights, including taking paid personal leave, raising a WorkCover claim, and making an application to the Fair Work Commission.

Ms Joy also raised additional concerns regarding her payslips for both March and June 2023. She claimed that she did not receive a payslip within one day of payment, as required by the Act, and that she did not receive a payslip at all for the month of June.

Decision

The Court found that while Ms Joy had exercised certain workplace rights, these did not play a significant role in Talaria's decision to suspend or terminate her employment. Talaria's actions were primarily based on performance-related concerns regarding a significant error made by Ms Joy.

However, the Respondent was found to have breached the Act in regard to payslip delivery and failure to pay proper notice.

Suspension and Termination

The Court ruled that the suspension and termination of Ms Joy were not in retaliation for her exercise of workplace rights but were instead linked to performance concerns, including the manual entry error.

The Court accepted Ms Ninness's honest and reasonable belief that Ms Joy's manual transaction entry of $248,408.73 posed a risk to the company's reputation and viability by way of a failure to comply with regulations and legal obligations. Although Ms Ninness's concerns were ultimately based on a mistaken belief regarding the risk posed by the transaction, the Court was satisfied this belief was reasonably held. As such, the Court found that the reverse onus had been met, as Ms Ninness's mistaken yet honest belief about Ms Joy's conduct represented the subjective state of mind that justified the termination of Ms Joy's employment.

Payslip Issue

The Court ruled that Talaria breached s 536(1) of the FW Act by failing to provide Ms Joy with a payslip for March 2023 within the required one-day timeframe. While the payslip was available via Xero, the Court emphasised that the company had not followed the standard procedure for issuing payslips directly to employees. Thus, Talaria failed to provide Ms Joy with her payslip within one business day. As for June 2023, no payslip was required since Ms Joy did not work after her suspension and was not entitled to any wages. The court highlighted that to receive a payslip, an employee must conduct work.

Employment Entitlements

The Court also found that Talaria failed to provide Ms Joy with the minimum one week's pay in lieu of notice upon her termination, breaching sections 44(1) and 117 of the Act.

What does this mean for employers?

This case is a good example of where litigants adopt a scatter gun approach and make various claims. While the employer was able to successfully defend the general protections claim, it was liable for breaching the NES and the Act in relation to pay slip obligations and notice payment. An employer does not have a choice in litigation, and it is important to ensure that you do not have a compromised defence in any area.

Case 6: Failure to Comply with Covid-19 Public Health Order, Valid Dismissal

Toki v All Class Training Pty Ltd [2024] FedCFamC2G 566 (24 June 2024)

Many may have wondered where those cases challenging dismissals for refusing to comply with Government public health orders ended up. This is an example of one such case. The employee was not successful in seeking a legal remedy following their dismissal on the grounds of refusing to comply with COVID-19 restrictions.

Facts and Background

Mr Toki (**the Applicant**) commenced employment with All Class Training Pty Ltd (**ACT**) in August 2020 under a written employment contract. ACT was a registered training organisation operating in Newcastle and the Hunter Valley region of New South Wales. In response to the COVID-19 pandemic and prior to the employment of Mr Toki, ACT developed an action plan in July 2020, which included mask-wearing protocols for all employees.

Upon commencement of his role, Mr Toki completed a health questionnaire, stating he had no medical conditions that might affect his work. However, he later revealed that he had been diagnosed with severe sleep apnoea, as evidenced by a valid medical certificate, which required him to use a positive airway machine. This became relevant when ACT mandated that he wear a face mask in line with then-current public health orders.

Mr Toki struggled with wearing the mask, citing breathing difficulties, but did not initially disclose his sleep apnoea to ACT.

A conflict arose in August 2021 when ACT instructed him to wear a mask outdoors in line with a public health order. On 9 August 2021, Mr Toki came to work without a face mask and provided a statutory declaration, attempting to exempt himself from the order. ACT informed Mr Toki that this was inadequate in exempting him from the requirement to wear a face mask outdoors as it was not provided by a medical practitioner. Subsequently, Mr Toki was invited to a 'show cause meeting' on 11 August 2025 where he was provided an opportunity to justify his breach of the public health order. At that meeting, Mr Toki provided no justification for the breach, but did provide a valid medical exemption from a specialist. Shortly after the meeting, his employment was terminated.

Decision

The central issue in the case was whether Mr Toki faced adverse action due to his exercising his workplace rights, namely regarding his alleged medical exemption from wearing a mask, his alleged right to work from home under the public health order, and his alleged right to consultation under the applicable workplace Award.

The Court ruled that while ACT had taken adverse action against Mr Toki in suspending him and eventually terminating his employment, this was based on a belief that Mr Toki had breached a public health order.

Despite Mr Toki presenting a valid medical exemption for the mask-wearing requirement at the 'show cause' meeting, ACT focused on Mr Toki's behaviour on 9 August 2021 — particularly his failure to follow the mask-wearing directions prior to providing the valid exemption. The Court found that ACT was justified in believing that Mr Toki breached the public health order, and thus, the termination was lawful.

What does this mean for employers?

Hopefully there is no return to curfews and public health orders in the near future, but the case is a useful example that complying with the public health orders, including in effecting a dismissal for refusing to comply with a lawful and reasonable direction, will not result in liability to post-employment claims.

Case 7: Inadequate Policy Leads to Cocaine User's Reinstatement

Lee Witherden v DP World Sydney Limited [2025] FWC 294 (3 February 2025)

Facts and Background

Lee Witherden was employed as a stevedore by DP World Sydney, a multinational logistics company, until his dismissal on 7 June 2024 for failing a random drug test on 27 May 2024 (positive result for cocaine metabolites).

Although DP World had a 'zero tolerance' approach to drugs and alcohol, per their Alcohol and Other Drugs policy, a breach of the policy did not automatically result in dismissal. Deputy President Wright noted '*the disciplinary response, if any, will depend on all of the relevant circumstances*'.

Mr Witherden explained that he had been 'self-medicating' with cocaine due to a long and painful recovery from a shoulder injury that he acquired on the job. Mr Witherden had admitted that he used cocaine heavily for three days prior to the day of the drug test, including around 24 hours prior to his shift. However, the Fair Work Commission (**FWC**) discovered that while he was aware of the policy, DP World never explained the meaning of 'fit for work' under the policy, nor had DP World ever explained the significance of cut-off levels and how the Australian Standards apply. Mr Witherden believed that, as he knew he was not impaired on 27 May 2024, he was fit for work.

The FWC accepted that the nature of cocaine means that whilst its metabolites are typically detectable on a drug test for up to four days after being used, any effects of intoxication will cease within three hours of ingestion. It was agreed by both sides that there was no risk or possibility that Mr Witherden could have been impaired on the day when at work.

Decision

While it was accepted there had been a breach of the policy and that this provided a valid reason for his dismissal, Mr Witherden's dismissal was held to be harsh and unreasonable by the FWC.

This outcome was due to a number of factors, including:

- his lengthy period of service;
- the inadequacy of the information in the policy regarding inactive metabolites and hangover effects (noting Witherden's assertion he was never impaired while attending work); and
- DP World's failure to consider rehabilitation.

Further, Mr Witherden swiftly accepted guilt for his actions and had shown he was committed to undergoing counselling to end his drug use.

There was nothing in the policy which explained that inactive metabolites were also detected by a drug test, and a detection of these would result in a positive test even if the drug was no longer impairing the person. For this reason, the FWC found the information provided to employees about the policy was inadequate.

Differentiating from matters where it was found a dismissal for breaching a drug and alcohol policy was not unfair, the FWC noted that here, Mr Witherden was not intoxicated, had not he consumed cocaine on the day he attended work, and was not involved in any safety incidents on the day.

Furthermore, the FWC considered the dismissal as harsh considering that Mr Witherden had only received 2 warnings in 25 years of service and neither of those warnings pertained to a breach of the Alcohol and Other Drugs policy.

The FWC ultimately made an order of reinstatement in addition to an order for continuity of service against DP World; however, the Deputy President found DP World owed Mr Witherden no backpay, for the reason he sometimes provided 'inaccurate' evidence before the FWC. The overall effect of this is, in essence, a nine-month suspension without pay, which the FWC deemed 'a significant penalty' that was 'appropriate in all the circumstances of the case'.

What does this mean for employers?

Drug and Alcohol Polices are standard in many workplaces including 'zero tolerance' policies.

The case highlights that the employer needs to ensure that their policy is in line with their testing regime / standards and that there is proper education / awareness around the policy.

The case may be more topical noting the increase in Medicinal Cannabis, which the SIAG Advice Line has received a number of calls about.

Case 8: Redundancy: Consultation failure not fatal to a fair dismissal

Darrel Kay v Fulton Hogan Construction Pty Ltd [2025] FWC 330 (6 February 2025)

Facts and Background

Fulton Hogan Construction, a major civil infrastructure company commenced the "Walkerston bypass project" in 2022, for the construction of a two-lane highway in rural Queensland. As part of this project, Mr Kay was hired by as a Leading Hand in July 2022.

On 30 November 2023, Mr Kay was given a 'Notice of organisational change', which stated organisational changes were to be made as a result of the project nearing completion, and if there were no suitable roles available, Mr Kay's employment would cease by way of redundancy.

The process resulted in Mr Kay's employment ending in December 2023 on the grounds of redundancy. Mr Kay filed to the Fair Work Commission (**FWC**) alleging that the dismissal was unfair.

Decision

Fulton Hogan raised a jurisdictional objection to the claim – contending that the dismissal was a genuine case of redundancy. As part of considering this objection, the FWC was required to closely review whether Fulton Hogan had complied with the consultation clause in the *Fulton Hogan Construction Pty Ltd – Queensland Business Unit Enterprise Agreement 2022 – 2025* (**the Agreement**) when effecting the redundancy.

The consultation clause required Fulton Hogan, as soon as a definitive decision was made for a major workplace change, to:

- discuss with the employees the change, its effect, and measures that are being taken to avert or mitigate the change's adverse effects on the employees;
- provide in writing, to the employees, all relevant information about the change, the expected effects, and any other matters likely to affect the employees; and
- give prompt and genuine consideration to matters raised about the major change by the affected employees.

Fulton Hogan relied on a consultation meeting between Mr Kay and Mr O'Connor, the superintendent, on 30 November 2023. Mr Kay gave evidence about this meeting. However, Fulton Hogan did not call Mr O'Connor to give evidence and did not seek orders from the FWC requiring Mr O'Connor to attend (noting that he had since resigned from his employment with Fulton Hogan). Mr Kay therefore gave unchallenged direct evidence about the consultation meeting. His evidence was that he was told to sign a letter. There was no discussion with him about the change / effects as contemplated by the consultation clause. Therefore the jurisdictional objection failed.

The FWC was then required to consider the substantive merits of the case and whether the dismissal was harsh, unjust, or unreasonable.

Often, in the context of a redundancy, an employer who fails to establish that the dismissal was a case of genuine redundancy will lose the unfair dismissal case.

However, this case represents the exception.

The Deputy President noted that '*[a] failure to consult may, but does not necessarily, mean a dismissal is harsh, unjust, or unreasonable*'. The Deputy President closely considered the legislative criteria on harshness and the consultation effort (albeit not reaching the standard required in the Agreement) and redeployment efforts and concluded on balance that the dismissal was not unfair. There was a valid reason – the downsizing was genuine and the procedural '*deficiencies on the employer's part were not such as to render the dismissal unfair*'.

What does this mean for employers?

While the employer was ultimately found to not have unfairly dismissed the worker, the failure to consult as required by the enterprise agreement severely compromised the prospects of a successful defence.

The number of unfair dismissal cases in Australia is holding steady (approx. 15,000) and many of these cases concern redundancy processes. It is important for employers to obtain proper advice around redundancy processes to ensure that there is strict and clear compliance with the applicable industrial instrument.