MAY 2025

Industrial Reports from the High Court, Federal Court, the State and Territory Supreme Courts, and Federal and State Industrial Courts and Tribunals

Incorporating the Authorised Reports of the Fair Work Commission, the Industrial Relations Commission of NSW, the Industrial Court of Queensland and the Queensland Industrial Relations Commission

INDUSTRIAL REPORTS

2024-2025

CONSULTANTS

The Honourable JUSTICE ADAM HATCHER President of the Fair Work Commission

The Honourable JUSTICE INGMAR TAYLOR President of the Industrial Relations Commission of New South Wales

The Honourable LANCE WRIGHT KC former President of the Industrial Relations Commission of New South Wales

ALICIA ASH BA LLB (Hons)

MANAGING EDITOR MAHREEN HASAN BCom (Hons) LLB, MPP

VOL 337 — PART 1

PAGES 1-110

The mode of citation of this part will be: 337 IR

TABLE OF CASES REPORTED

Part 1 — Pages 1-110

Dixon v United Workers Union (Fair Work Commission)	1
Hawken v Patrick Stevedores Holdings Pty Ltd (Fair Work	
Commission)	11
Lederer Group Pty Ltd v Hodson (NSW Ct of App)	55
Virgin Airlines Australia Pty Ltd v Macnish (Fair Work	
Commission)	32

(Cases in **bold** reported in this part)

Chomson Reuters™

© 2025 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668 Lawbook Co. Published in Sydney

ISSN 0728-8417

INDEX

Part 1 - Pages 1-110

APPEAL

Application for permission to appeal — Unfair dismissal proceedings — Employee dismissed for contravening employer's policy on drug and alcohol consumption — Commissioner found such contravention did not constitute valid reason for dismissal — Commissioner found in the alternative that dismissal would be harsh — Employee reinstated to position without backpay — Where respondent conceded contravention of policy by consumption of alcohol prior to serving on flight — Where Commissioner found that contravention inadvertent and not committed recklessly — Where Commissioner rejected litany of concerns raised by appellant about respondent's character and conduct — Whether grant of permission to appeal in public interest — Whether circumstances and issues raised by case warrant permission to appeal — Permission to appeal granted — Fair Work Act 2009 (Cth), ss 394, 400, 604.

Virgin Airlines Australia Pty Ltd v Macnish (Fair Work

EVIDENCE

Opinion evidence — Expert opinion evidence — Relevance and admissibility of expert opinion evidence — Discordance between expert opinion and factual assumptions underpinning opinion — Where first respondent's claims to medical practitioners regarding extent of exposure to scene of fatality inconsistent with CCTV footage — Whether primary judge's use of medical expert reports accordingly erroneous — Relevant ground of appeal upheld — Primary judge erred in placing weight on reports where factual assumptions therein had not been made good.

Lederer Group Pty Ltd v Hodson (NSW Ct of App) 55

JURISDICTION

Appeal to Full Bench of Fair Work Commission — Appellant commenced proceedings against respondent for unlawful adverse action and sought relief including interim injunction preventing termination of employment — Application for interim injunction dismissed and appellants' employment terminated — Appellant brought subsequent proceedings for unfair dismissal and shortly thereafter discontinued adverse action proceedings — Unfair dismissal proceedings dismissed for want of jurisdiction as institution of secondary proceedings contravened s 725 of Fair Work Act 2009 (Cth) because, at relevant time, initial proceedings remained on foot and s 729 of Fair Work Act 2009 (Cth) applied — Whether Fair Work Commission had erred — Appeal dismissed — Fair Work Act 2009 (Cth), ss 725, 728, 729, 734.

Dixon v United Workers Union (Fair Work Commission)1

INDEX

TERMINATION OF EMPLOYMENT

Application for unfair dismissal remedy — Where employee worked in hazardous environment — Where employee breached workplace policy on drugs and alcohol repeatedly — Where workplace policy provided written warning "shall" be issued for third breach — Where employee terminated after third breach with no written warning — Commissioner held dismissal was not harsh, unjust or unreasonable — Appeal — Whether valid reason for dismissal — Word "shall" could sometimes be used to confer power or obligatory force of word "shall" in one provision could be qualified by other provisions or its context or purpose — Effect of policy to set out courses of action that were available rather than requirement that each step be followed in every case — Whether other relevant matters considered — Compliance with workplace policy to be considered under s 387(h) rather than relevant to whether there is valid reason for dismissal — Deviation from workplace policy mitigating factor in employee's favour — Appeal dismissed — Fair Work Act 2009 (Cth), ss 387, 394. *Hawken v Patrick Stevedores Holdings Pty Ltd (Fair Work*

Unfair dismissal - Appeal against finding of unfair dismissal and order of reinstatement — Employee dismissed for contravening employer's policy on drug and alcohol consumption — Where respondent consumed single glass of prosecco in breach of appellant's policy requiring abstention from alcohol within eight hours of commencement of shifts - Where respondent understood policy as guideline rather than firm rule — Where rule not mentioned in appellant's consolidation of policies on drugs and alcohol - Where respondent returned nil blood alcohol content reading prior to signing on for shift - Where respondent self-reported contravention --- Where Commissioner found contravention did not constitute valid reason for dismissal and in any event dismissal would have been harsh — Whether Commissioner erred by having regard to respondent's subjective understanding of policy - Whether Commissioner further erred by finding that respondent's understanding was not unreasonable - Whether Commissioner made significant errors of fact - Whether Commissioner's decision to reinstate respondent unreasonable or plainly unjust given gravity of contravention and appellant's concerns regarding respondent - No errors in Commissioner's reasoning - Appeal dismissed - Civil Aviation Safety Regulations 1998 (Cth), regs 99.010, 99.045 - Fair Work Act 2009 (Cth), ss 387(h), 390(3), 394.

TORT

Negligence — Employer's non-delegable duty of care to take reasonable care to avoid foreseeable risk of injury to employee — Extent and breach of duty — Foresight of risk of psychiatric injury if reasonable care not taken — Where second respondent did not instruct or direct first respondent not to attend appellant's shopping centre after fatality — Whether primary judge erred in finding that risk of psychiatric injury reasonably foreseeable by second respondent — Whether primary judge in any event erred in finding that reasonable response to risk required second respondent to instruct or direct first respondent not to attend work after fatality reported — Cross-appeal upheld — Primary judge so erred.

Lederer Group Pty Ltd v Hodson (NSW Ct of App) 55

INDEX

TORT — continued

Negligence — Host employer's duty of care to avoid causing mental harm to contractor working under its instruction or direction - Existence and extent of duty - Foresight that person of normal fortitude might suffer recognised psychiatric illness if reasonable care were not taken - Where first respondent contracted as cleaner at shopping centre operated and overseen by appellant ---Where first respondent so contracted in capacity as employee of second respondent - Where overseer of shopping centre directed first respondent to attend work ahead of shift following fatality at centre — Where first respondent claimed to have been exposed to and directed to clean viscera by overseer upon arriving at shopping centre — Where first respondent repeated claims to series of medical practitioners — Where respondent consequently diagnosed with post-traumatic stress disorder on basis of exposure to viscera and distressed colleagues - Where overseer apprised of first respondent's marital and emotional problems prior to directing him to attend work following fatality ----Where first respondent's claims inconsistent with CCTV footage of scene of fatality prior to and upon his arrival at shopping centre - Whether person of normal fortitude exposed to scene of fatality as recorded on CCTV footage might suffer recognised psychiatric illness - Relevant grounds of appeal upheld - Primary judge erred in not finding that duty of care negatived by s 32(1) of Civil Liability Act 2002 (NSW) - Overseer would not have foreseen that person of normal fortitude might be traumatised by exposure to scene of fatality - Civil Liability Act 2002 (NSW), ss 5B, 30, 32.

Lederer Group Pty Ltd v Hodson (NSW Ct of App) 55

WORDS AND PHRASES

"In relation to the dismissal" — Fair Work Act 2009 (Cth), ss 725, 726, 727, 728, 729, 730, 731, 732.

Dixon v United Workers Union (Fair Work Commission) 1