

A VISION IN THE WORKPLACE

Our May edition of Vision includes:

- A recent decision by the Federal Court finds deferred payment of bonuses and forfeiture conditions to be unlawful;
- A Queensland law firm has been referred to the Fair Work Ombudsman for making unauthorised deductions from wages; and
- The Fair Work Commission exercises new powers regarding the 'unfair deactivation' of gig economy workers.



Deferred Bonuses and Forfeiture Conditions Found to be Unlawful by Federal Court

In the recent Federal Court of Australia decision of *Wollermann v Fortrend Securities Pty Ltd* [2025] FCA 103 (**the Decision**) an employer's attempt to defer payment of an employee's contractual bonus to which they were already entitled to has been found to be in contravention of the *Fair Work Act 2009* (Cth) (**the FW Act**).

Background

Christopher Wollerman (**the First Applicant**) and Stephen Lyle (**the Second Applicant**) (together, **the Applicants**) were employed as financial advisors by Fortrend Securities Pty Limited (**the Respondent**). In their role as financial advisors, both the Applicants performed trades on behalf of the Respondent's clients, with the Respondent obtaining revenue by way of commission earned on the trades performed.

Both the First and Second Applicant's employment contracts contained a clause stipulating each employee's bonus entitlement (**the Bonus Clause**). The Bonus Clause contained in the First Applicant's employment contract is extracted below.

"4.3 Bonus

(a) You would receive a bonus in the event of Fortrend receiving more than USD50,000 per

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month in commissions through the clients and accounts allocated to you. This bonus would be equal to 10% of the commissions above 50,000. For the avoidance of doubt, commissions are calculated on the basis of trades settled in a particular month.

For example, if Fortrend receives a commission of USD 60,000 in a month, your bonus would be USD1,000 which is 10% of 10,000.

(b) The bonus for a particular month will be paid in the following manner:

- i. 50% on the fifteenth day of the following month; and*
- ii. 50% after a period of seven months.*

(c) If you resign or if your employment is terminated, you will not be entitled to receive the unpaid bonus.”

The Second Applicant’s employment contract contained an almost identical clause, albeit with a higher payable bonus of 15% of commissions above \$50,000.00 USD and 20% of commissions above \$100,000.00 USD per month.

After earning over \$50,000.00 USD in commissions across several monthly periods, both the Applicants became entitled to the Bonus and were paid the first 50% accordingly. However, following the Applicants’ resignations, the Respondent

refused to make payment of the remaining unpaid 50% of the Bonuses (**the Unpaid Bonus**).

The FW Act

The Applicants commenced proceedings against the Respondent, alleging that the Respondent had acted in contravention of section 323 of the FW Act by withholding the Unpaid Bonus upon termination of the Applicants’ employment.

Section 323(1) of the FW Act stipulates the method and frequency to which employers must pay their employees. As such, employees must be paid in full, in money and at least monthly. Importantly, the FW Act expressly stipulates that this will include any incentives and bonuses which become payable during the relevant period.

The Decision

The Respondent argued that the Clause expressly stipulated that payment of the Unpaid Bonus would be forfeited following the Applicants’ termination of employment with the Respondent and that therefore, the Applicants were not entitled to payment of the Unpaid Bonus following the termination of their employment.

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However, Justice O’Callaghan accepted the Applicants’ construction of the Clause, stating that as the Clause stipulated the Applicants “will be paid” the Bonus in accordance with the timeframes outlined, the obligation to pay the Applicants the Bonus crystallised once the threshold amount of \$50,000.00 USD in commissions was exceeded. Pursuant to the Clause, it was found that there was no further obligation imposed on the Applicants to perform further work to become entitled to the remaining 50% of the Bonus once the Bonus had crystallised. Rather, the Clause merely outlined the timeframes in which the Applicant’s would be paid.

Therefore, as the Clause attempted to forfeit the Applicants’ owing contractual entitlements, being the Bonus, or otherwise make payment of these entitlements beyond the one-month statutory requirement, the Clause was found to be in contravention of section 323(1) of the FW Act. Consequently, Justice O’Callaghan found the Clause to be invalid.

Key Takeaways

Following the Decision, employers must be careful in drafting bonus arrangements within employment contracts, particularly where these arrangements provide for deferred or forfeited

payments. Where a bonus payment is not discretionary, attempts by an employer to forfeit or defer payment of the bonus are likely to be in contravention of section 323(1) of the FW Act and consequently, the contractual term will be invalid.

If you have any questions about the Decision and what it could mean for you or your business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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Law Firm Referred to Fair Work Ombudsman for Unauthorised Deductions from Employee Wages

In the recent decision of *Renee Passmore v The Trustee for The CBC Lawyers Unit Trust*, Sandra Clive [2025] FWC 575 (**the Decision**) the Fair Work Commission (**the FWC**) has stated that it will refer a law firm to the Fair Work Ombudsman for unauthorised deductions from employee wages in breach of the *Legal Services Award 2020* (**the Award**).

Overview of the Decision

Ms. Passmore (**the Applicant**) commenced employment with The Trustee for The CBC Lawyers

Unit Trust t/as CBC Lawyers (**the First Respondent**) on 20 May 2024. Following a deterioration in the working relationship due to alleged workplace bullying, the Applicant resigned from her employment on 1 November 2024. The Applicant's resignation email stated that pursuant to her contractual notice period, her final day of employment with the First Respondent would be 29 November 2024 (**the Resignation Email**). The Applicant was on personal leave at the time of the Resignation Email, from 28 October 2024 to 4 November in accordance with a medical certificate provided to the First Respondent on 28 October 2024.

On the afternoon of 4 November 2024, the Applicant attended the offices of the First Respondent. During this visit, the Applicant spoke with an employee of the First Respondent whilst returning company property, being the Applicant's keys to the office, remote control to the office carpark, a work laptop and charger and two company polo shirts worn on 'casual Fridays'. The Applicant made a statement to the employee using words to the effect of "good luck with everything, you're going to f***ing need it". This employee took the Applicant's actions to be evidence of the Applicant's intention to not return to work despite her contractual notice period and relayed this to the principals of the firm, being Mr. Clive (**the**

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Second Respondent) and Ms. Clive (**the First Respondent**).

Later the same afternoon, however, following the expiry of her medical certificate, the Applicant sent the First and Second Respondent a second updated medical certificate stating that she remained unfit to return to work until 18 November 2024.

On 5 November 2024, the Applicant contacted the Second Respondent as she had not received her fortnightly pay. The Second Respondent responded to the Applicant by letter on 12 November 2024 (**the Letter**). The Letter stated that the Respondent had taken the Applicant's return of company property to constitute a repudiation of her employment contract (**the Alleged Repudiation**), that the Alleged Repudiation had been accepted by the Respondent, and that the Respondent's employment had therefore been terminated on 4 November 2024.

On 18 November 2024, the Applicant responded to the Letter by email stating that by providing ongoing medical certificates she had not repudiated her employment contract and therefore remained employed by the Respondent. Later this day, the Applicant filed a General Protections Application Involving Dismissal in the FWC (**the Application**).

Key Issues

The First Respondent raised a jurisdictional objection in response to the Application, alleging the Applicant had not been dismissed. In response, the Applicant argued the Resignation Email was consistent with her contractual obligations, and that the Letter terminated the Applicant's employment during her contractual notice period.

In the alternative, the Applicant argued she had been forced to resign due to the conduct of the First Respondent, citing alleged workplace bullying, the First Respondent's failure to pay wages and an unlawful "salary sacrifice" as the reasons for resignation.

Outcome

In determining whether the Applicant had been 'dismissed' in accordance with section 386(1) of the *Fair Work Act 2009* (Cth). Deputy President Lake of the FWC accepted the Applicant's first argument, being that the Letter terminated the Applicant's employment during her notice period.

In arriving at this conclusion, Deputy President Lake considered the Applicant's alternative argument, being that she was forced to resign due to the conduct of the Respondent. Despite

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rejecting the Applicant's argument, Deputy President Lake stated that the alleged unlawful deductions to the Applicant's salary including a "salary sacrifice" for the Applicant's car space and the deduction of 4-weeks' pay from the Applicant following the Alleged Repudiation was in breach of the *Legal Services Award 2020* and was "concerning, especially for employers who are legal practitioners". Deputy President Lake stated that due to their seriousness, these matters were to be referred to the Fair Work Ombudsman.

Deputy President Lake also considered the Alleged Repudiation. Notably, it was found that whilst the Applicant's return of company property may have amounted to repudiatory conduct, the Applicant's later provision of a second medical certificate demonstrated her intention to still be bound by the terms of her employment contract.

Deputy President Lake was particularly scathing of the First and Second Respondent's failure to contact the Applicant following the Alleged Repudiation, stating that "the whole matter could have been avoided if Mr and Mrs Clive had simply called or texted the Applicant to ask why she returned her property before the end of her notice period."

Key Takeaways

The Decision emphasises the importance of compliance with any applicable modern award and that contraventions of the same, such as unlawful wage deductions, will not be treated lightly and may be subject to potential referral to the Fair Work Ombudsman. Furthermore, the Decision demonstrates the high threshold required for repudiation of an employment contract and the importance of objectively examining the employees' conduct in determining whether they have evinced the requisite intention to no longer be bound by an employment contract.

If you have any questions about the Decision and what it could mean for you or your business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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6-Months Of Continuous Service Required for FWC To Exercise New Powers for Gig Economy Workers

The Fair Work Commission (**the FWC**) have exercised new powers to deal with disputes regarding gig economy workers and ‘unfair deactivation’ in the recent decision of *Ibrahim Jibril* [2025] FWC 1289 (**the Decision**).

As such, the FWC determined that an Uber driver was not protected by the new unfair deactivation provisions under the *Fair Work Act 2009* (Cth) (**the FW Act**) in the absence of 6-months of regular or continuous service on the platform.

Outline of the Provisions

Applications can be made to the FWC under section 536LU of the FW Act on the grounds that an individual has been unfairly deactivated from a digital labour platform.

Furthermore, section 536LD of the FW Act protects a person from being unfairly deactivated, if at that time the person had been performing work on a regular basis for a period of at least 6 months.

The Decision

Mr. Jibril (**the Applicant**) made an application to the FWC under s 536LU of the Act after his account on the Uber driver platform, operated by Raiser Pacific Pty Limited (**the Respondent**) was deactivated in March 2025, after three and a half months of usage (**the Application**).

The Respondent held that the Applicant was not a person ‘protected from unfair deactivation’ as he had not performed regular work for a period of at least 6 months, as required under section 536LD(c) of the FW Act.

Alternatively, the Applicant argued as he had previously performed work through the Uber driver platform between 2017 and 2019, in addition to the recent three and a half months

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from November 2024 to March 2025, the 6-month requirement had been satisfied.

However, Deputy President Colman held that to be a person protected from unfair deactivation, “for a period of six months” required an individual’s work to be continuous and “form part of the same period’ in which the worker is deactivated. Consequently, Deputy President Colman dismissed the Application.

Key Takeaways

This decision of the FWC demonstrates the specific interpretation of the Act and how it is applied to applications made to the FWC. Applications made based on the misinterpretations of the Act will not be substantiated in the FWC.

If you have any questions about this case and what it could mean for you, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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