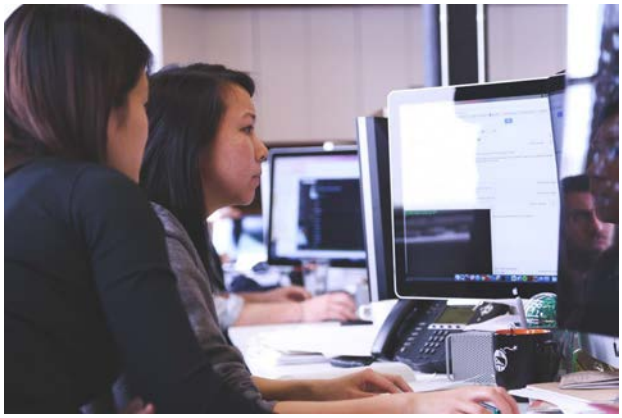
STEVENS & ASSOCIATES LAWYERS

June & July 2025

A VISION IN THE WORKPLACE

Our June & July edition of Vision includes:

- A Victorian Parliamentary Inquiry recommends further restrictions on workplace surveillance;
- The Fair Work Commission (**the FWC**) rules that 'zero work from home' is not a basis for rejecting an alternative suitable position; and
- Mental health break beats unfair deactivation claim under the new powers of the FWC.



Victorian Parliamentary Inquiry Recommends Further Restrictions on Workplace Surveillance

A parliamentary inquiry by the Economy and Infrastructure Committee (**the Committee**) led by Labor MP Alison Marchant (**the Inquiry**) has found that laws governing workplace surveillance are outdated.

The Inquiry asserts that recent technological advancements as well as the long-term impacts of the Covid-19 pandemic which have seen workers shift to remote working has led to an increase in the use of workplace surveillance by employers. New technologies including telephone recordings, cameras, keylogging and the use of artificial intelligence are being more commonly utilised to monitor employees, with the Inquiry alleging that both Victorian State law and Federal legislation have failed to keep pace with these changes.

The Inquiry states that many workers are unaware of the extent of the surveillance they are subject to, how much surveillance data is stored, and how the data is handled. As such, the Committee has handed down several recommendations to assist the Victorian Government in bringing the State's privacy and surveillance laws up to date.

Findings

The Inquiry made 29 key findings regarding the impact of current workplace surveillance technologies on employees and the current state of the law in Victoria. The Inquiry found that workers were being subject extensive means of workplace

surveillance, with employers failing to be transparent concerning the extent of surveillance and use of data. It was also found that employers were increasingly relying on artificial intelligence to process the data captured from surveillance.

Concerning the impact of workplace surveillance on employees, it was found that despite the utilisation of surveillance methods to track and monitor the productivity of workers, there proved little positive impact. In fact, the Inquiry found that due to the intrusive nature of these technologies, workplace surveillance had a profoundly negative impact on employee productivity, with consequences arising from its use including a loss of trust in management and reduced job satisfaction, leading to disengagement and higher staff turnover. It was also found that due to the increased pressure arising from such monitoring, workers' physical and mental health was negatively impacted.

It was also found that employers were ill-equipped to deal with the sensitive information obtained through such surveillance. The Inquiry also found that employers were overly reliant on artificial intelligence to gather data and assess employee performance. However, the Inquiry found that despite its widespread use, artificial intelligence proved to be susceptible to errors including bias and unfair results, which was exacerbated in cases where there was no element of human involvement in the decision-making process.

Recommendations

The Committee proposed a total of 18 recommendations to the Victorian Parliament which would improve the legislation concerning privacy and provide additional protections to employees, to compensate for the current power imbalance.

These recommendations include:

- Introducing technology neutral legislation to ensure regulation stays up to date despite the rapidly transforming technology landscape;
- Placing a positive obligation on employers to prove through a risk assessment that surveillance conducted is *"reasonable, necessary and proportionate to achieve a stated legitimate objective"*;
- Imposing an obligation on employers to conduct a human review of surveillance data that could *"significantly affect rights, interests or employment status of worker"*;
- Requiring any employer that conducts workplace surveillance to have a relevant

policy which is accessible to all employees; and

- Introducing a requirement that employers must give employees access to workplace surveillance data generated about them on request.

Key Takeaways

With the Committees final report tabled on 13 May 2025 it will be interesting to see which recommendations are incorporated into Victorian legislation. Employers should remain cautious of workplace surveillance methods and ensure such surveillance is reasonable and necessary.

If you have any questions about the Inquiry and what it could mean for you as an employee or an employer, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

Zero WFH; No Basis for Rejecting Alternative Suitable Position

In the recent decision of *Mater Misericordiae Ltd Trading AS Mater v Robyn Tyler* [2025] FWC 1396

(**the Decision**), the Fair Work Commission (**the FWC**) determined that an employee cannot reject "other acceptable employment" on the basis that the new role does not allow for flexible working arrangements.

Case Overview

Ms. Tyler commenced employment with Mater Misericordiae Ltd (**the Company**) on 21 January 2019, on a 12-month fixed-term contract. This

contract was extended for a further 12 months until 26 December 2021. On 17 June 2021, Ms. Tyler was offered a permanent part-time role as an Educator in Curriculum Design (**the Role**).

On 30 January 2025, the Company began consulting with Ms. Tyler regarding structural changes that were to take place within the Education and Training Division. As part of these changes, the Company found that the Role, was no longer required to be performed.

On 18 February 2025, the Company offered to Ms. Tyler an alternative suitable position within the Company. This position was as an Educator and had the same rate of pay, hours of work, work location, fringe benefits and workload as the Role. The Company advised Ms. Tyler that a refusal to accept this alternative suitable position would result in the Company applying to the FWC to reduce Ms. Tyler's redundancy entitlements.

During the course of her employment in the Role, Ms. Tyler worked from home twice a week, although she did not have an approved Flexible Working Arrangement with the Company. The proposed alternative suitable position required Ms. Tyler to work from the Company's primary place of work located at Mater South Brisbane. Ms. Tyler rejected the alternative suitable position on the basis that it would have a negative impact on her work-life balance, due to not accommodating to her extracurricular activities. The required onsite attendance which would.

Key Issues

The Company lodged an application to the FWC under s 120 of the *Fair Work Act 2009* to vary the redundancy pay owing to Ms. Tyler. In response, Ms. Tyler raised that the basis for the rejection of the alternative suitable position included a lack of clarity around the new role and what it would entail, her inability to assess whether her qualifications met the requirements of the alternative suitable position and the reduction in the amount of time working from home.

Outcome

On hearing at the FWC, Commissioner Simpson (**the Commissioner**) observed that Ms. Tyler had been offered a new role at the same rate of pay and hours of work that would keep her continuity of employment. This offer was rejected although the Commissioner believes that Ms. Tyler was "capable of performing the role".

The Commissioner found that the concerns raised by Ms. Tyler as to why the alternative suitable

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position was rejected were "not sufficiently significant to detract from the fact that the new role was objectively acceptable employment".

Key Takeaway

The Decision demonstrates to employees that legal requirements override personal preferences when considering alternative, suitable positions in the event of redundancy particularly in regards to working from home.

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.

Mental Health Break Defeats Deactivation Claim

In the recent decision of *Priyansh Singh Panwar v Portier Pacific Pty Ltd* [2025] FWC 1578 (**the Decision**) the Fair Work Commission (**the FWC**) has declined an application for an unfair deactivation on the basis that s 536LD(c) of the *Fair Work Act 2009* (**the FWA**) concerns a single period of work, rather than multiple periods which add up to at least 6 months.

Case Overview

The applicant, Mr. Panwar (**the Applicant**) commenced performing work through the Uber Delivery App on 28th October 2023. The Applicant undertook a few deliveries in late October 2023

and then did not perform any work on the Uber Delivery App until January 2024. The Applicant undertook deliveries until mid-June 2024, in which he left for India seeking family support, after a relationship breakdown. From late July to late October 2024, the Applicant undertook deliveries from the Uber Delivery App, after which he took a 9-week mental health break. The applicant states that he was advised by his doctor to not drive after taking antidepressants. Deliveries were recommenced in late December 2024.

The Applicant's account was deactivated from the Uber Delivery App on 23rd April 2025. After which he made an application to the FWC for an unfair deactivation remedy pursuant to s 536LU of the FWA.

Key Issues

The Applicant argues that he has satisfied the requirements under s 536LD, having worked on a regular basis for a period of at least 6 months, and is therefore protected from unfair deactivation. The Respondent, Portier Pacific Pty Ltd trading as Uber Eats, contends that the Applicant is not protected from unfair deactivation because at the time of his deactivation, he had not been performing work on the Uber Delivery App on a regular basis for a period of at least 6 months.

Outcome

In determining whether the Applicant had been unfairly deactivated, Deputy President Saunders reviewed the provisions set out in s 536LD of the FWA. Ultimately, Deputy President Saunders rejected the application on the basis that the Applicant had not been performing work on the Uber Delivery App on a regular basis for a period of at least 6 months.

In arriving at this conclusion, Deputy President Saunders stated that s 536LD of the FWA "requires a point-in-time inquiry"; it asks whether at the time a person was deactivated, had they been performing work on a regular basis for a period of at least 6 months. Deputy President Saunders went on to say that the provision of the FWA is not concerned with whether the person has, at any point in time, completed a 6-month period of work, but had been performing work regularly for at least 6 months immediately preceding deactivation.

Deputy President Saunders also stated that the reference to "*a period*" in the s 536LD(c) suggests that the point-in-time inquiry is *"concerned with a*

single period of work, not multiple periods of work that cumulatively add up to at least 6 months".

Therefore, the application was dismissed as the Applicant was not performing work on the Uber Delivery App for a period of at least 6 months, prior to the deactivation, as he had taken a 9-week mental health break.

Key Takeaways

This decision emphasises the importance of understanding the meaning behind words in s 536LD of the FWA. Furthermore, the decision demonstrates the importance of needing to understand your rights as an employee-like worker.

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