

Resource: HR & ER Insights – Learning from Recent Case Law

A quick overview of key recent Australian employment law cases, translating recent decisions into practical HR insights and actions.

Case 1: The "Contract vs. Record" Distinction

Reference: *Naskovski v Hisense Australia Pty Ltd* [2025] FedCFamC2G 943 / January 2026

Summary: The Federal Court has confirmed that while employers must keep payroll and employment data under the Fair Work Regulations 2009, an employment contract itself is not a prescribed "employee record." While it may provide some comfort to employers to know that a missing contract does not automatically result in a statutory record-keeping penalty. However, relying on this technicality is a "dangerous win" as it potentially leaves you defenceless in boarder wage dispute.

Implications:

- **The Evidentiary Vacuum:** Without a signed contract, the Court is legally inclined to accept the employee's version of the verbal agreement. This could result in higher notice periods or unagreed-upon bonus structures being enforced against the employer.
- **Culture as Evidence:** A "cold-hearted" or dismissive response to a staff member's request for their own documents can trigger Adverse Action claims. Being legally "right" about a document doesn't protect you if your conduct appears retaliatory.

Your Guidance Checklist:

- ✓ **Audit:** Ensure your HRIS captures all Statutory Data required under Regulation 3.32 of the Act.
- ✓ **Governance:** Move all legacy paper contracts to a secure, searchable digital cloud to ensure they are available for evidentiary purposes.
- ✓ **Culture:** Train managers to treat document requests as a routine service process rather than a "hostile interruption" to mitigate adverse action risks.

Case 2: Withdrawing Job Offers: Is it a Dismissal?

Reference: *Ms Anastasia Perri v Oral Health Victoria [2026] FWC 507 (20 February 2026)*

Summary: The Fair Work Commission (FWC) has provided critical clarity on the limits of "unfair dismissal" claims. In this case, a job offer was withdrawn before the candidate actually commenced work. The Commission ruled that because the employment relationship had not yet started, the candidate was never technically "dismissed" under the Fair Work Act and was ineligible to bring an unfair dismissal claim.

Implications:

- **The "Commencement" shield:** For a "dismissal" to occur, the employment relationship must have actually been activated. A signed contract alone may not be enough to trigger unfair dismissal protections if no work has been performed.
- **Recruitment flexibility:** This provides employers with a layer of legal certainty when a candidate's circumstances change or new information comes to light between the contract signing and the start date.
- **The "Watch Out":** If a candidate has already begun attending mandatory training, performing tasks, or following directed orientations, the relationship may be deemed to have "started" regardless of the official start date.

Your Guidance Checklist:

✅ **Audit onboarding timelines:** Ensure that pre-employment paperwork doesn't inadvertently involve performing actual work duties before the official start date.
R Review offer contingencies: Ensure offer letters clearly state that they are subject to satisfactory completion of pre-employment checks (e.g., references, police checks, or right-to-work).

✅ **Professional protocols:** While legally protected from "unfair dismissal" in this specific window, withdrawing an offer still carries reputational risk and potential breach of contract risks. Always handle withdrawals with a professional, high-standard communication process.

✅ **Contractual clarity:** Ensure the contract explicitly defines the "Commencement Date" as the date the employee first performs duties for the employer.

Case 3: The Danger of "Personality Fit" Dismissals

Reference: *Wijaya v Matthews Brothers Engineering Pty Ltd [2026] FCA 138 (20 February 2026)*

Summary: The Federal Court summarily dismissed an Adverse Action claim from an employee terminated during probation for "not being a good fit." While the employer won because the employee couldn't prove a specific breach of a "workplace right," the case highlights how subjective reasons for termination (like personality) can trigger costly, multi-stage legal battles and Federal Court scrutiny.

Implications:

- **The subjectivity red flag:** Using "personality" or "culture fit" as a reason for dismissal is often seen by Courts as a placeholder for deeper issues. It invites an employee to search for an unlawful reason (e.g., discrimination or retaliation) to explain the termination.
- **The cost of a "Technical Win":** Even if an employer wins on a technicality, the legal spend, management time, and reputational hit of a Court application are significant.
- **No Probationary immunity:** General Protections claims have no minimum employment period. A dismissal on Day 1 carries the same legal risk as one after many years of service.

Your Guidance Checklist:

- ✓ **Use objective language:** Avoid using "personality" in termination meetings. Instead, link to specific, observable behaviours (e.g., Failure to follow the Team Charter).
- ✓ **Document the "Why" early:** Always keep diary notes of performance or behavioural issues as they occur to provide a defensible paper trail.
- ✓ **Procedural softness:** Avoid "ambush" meetings. Poor processes often trigger the resentment that leads to litigation.
- ✓ **Pre-action review:** Before terminating for "fit," consult with your HR advisor to ensure there are no underlying protected attributes or workplace rights (e.g., a pay query or recent injury,) that could underpin an Adverse Action claim.

Case 4: Employer Liability & Workplace Sexual Harassment

Reference: *Clarke v Beiler Constructions Pty Ltd as trustee for Fox Trading Trust* [2026] FCA 734

Summary: The Federal Court held an employer vicariously liable for sexual harassment committed by a supervisor on a remote construction site, despite there being no direct eyewitnesses to the conduct. The Court accepted the employee's evidence based on credibility and her contemporaneous disclosures to family members shortly after the events occurred. The case is historically significant as the first fully contested Federal Court judgment under the expanded Fair Work Act protections, highlighting that static workplace policies alone are insufficient to defend against vicarious liability claims.

Implications:

- **The "No Witnesses" Myth:** Employers cannot assume "he said, she said" claims are unprovable. Courts will rely on credibility, consistency, and post-incident disclosures to family or colleagues to establish liability.
- **Rejection of "Workplace Banter":** The Court rejected attempts to excuse inappropriate sexual remarks or requests as part of a "rough site culture" or "gallows humour".
- **Inadequacy of Paper-Only Policies:** Having a written policy or handbook provided at onboarding does not satisfy the "reasonable steps" defence if it lacks visible enforcement, regular training, and trusted reporting pathways.

Your Guidance Checklist:

- ✓ **Operationalise "Reasonable Steps":** Ensure sexual harassment policies are actively supported by regular refresher training and visible leadership accountability.
- ✓ **Establish Accessible Reporting Channels:** Provide independent, safe, and trusted reporting mechanisms—especially in isolated or high-risk work environments.
- ✓ **Take Immediate Disclosures Seriously:** Recognise that prompt, informal, or complaints to peers, family, or managers carry significant weight during investigations and court proceedings.