AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 3 May 2024

Weekly Employment Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Employment Law

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Tasevski v Westpac Banking Corporation (NSWSC) - Workers compensation Appeal Panel had erred in not concluding that there had been no error in a medical assessment

Henderson v Canterbury Hurlstone Park RSL Club Ltd (NSWSC) - Appeal Panel of Personal Injury Commission had misconstrued cl1.32 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*

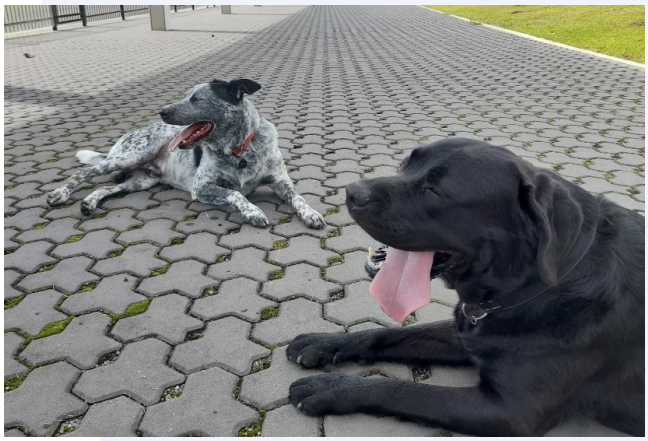
Box Hill OHP v Whitehorse CC (VSC) - Victorian Civil and Administrative Tribunal had not erred in affirming a refusal by Council to grant a permit for a service station

Manca v Teys Australia Beenleigh Pty Ltd (QCA) - primary judge had not erred in dismissing negligence action brought by abattoir worker against employer after he had slipped on stairs in the blooding floor area

Woods v Northern Territory of Australia (NTSC) - appeal dismissed against judgment of the Work Health Court that an employer had acquitted its liability under the *Return to Work Act 1986* (NT) where there were two alleged injuries

HABEAS CANEM

Panting pooches



AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Tasevski v Westpac Banking Corporation [2024] NSWSC 401
Supreme Court of New South Wales
Schmidt AJ
Workers compensation - Tasevski was employed for many years by Westpac, most recently as a head teller, when she suffered a psychiatric injury at work which resulted in her seeking lump sum compensation under s66 of the *Workers Compensation Act 1987* (NSW) - a medical assessor found that Tasevski had suffered both PTSD and a major depressive disorder from which she had not recovered and which were now chronic, but that her whole person impairment was only 10%, which was below the 20% statutory thresholds for compensation - an Appeal Panel dismissed Tasevski's appeal - Tasevski applied for judicial review - held: there was no issue that the Panel had misunderstood the legal test which it had to apply on the appeal, but whether the result was that the Panel had failed to exercise its statutory functions in accordance with applicable law and had issued a certificate which did not accord with the statutory scheme remained in issue - the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* specify the method which must be used for assessing psychiatric impairment - behavioural consequences of psychiatric disorders must be assessed according to six scales that evaluate separate areas of functional impairment: self care and personal hygiene; social and recreational activities; travel; social functioning (relationships); concentration, persistence and pace; and employability - the assessor had concluded that the self and personal hygiene scale fell into Class 2, whereas, on the evidence, the correct classification was Class 3, the impairment being moderate, not mild - on an appeal where the grounds advanced are application of the wrong criteria or making a demonstrable error in the conclusions reached about the severity of the impairment, the Panel has to consider the assessor's conclusion about the correct class of any disputed scale, by confining itself to the conduct relevant to that scale and the requirements of the Guidelines - even if the Panel identifies that the evidence raised matters about which reasonable minds might differ, it cannot resolve what is in issue about a disputed scale by an observation that what arose to be considered concerned matters about which reasonable minds might differ, or by a finding that the assessor's conclusion was open - the Panel must rather consider and determine whether the assessor applied the incorrect criteria in arriving at his or her conclusion, or whether there was a demonstrable error in the conclusion reached about that class assignment - the Panel had erred, and another panel, approaching the appeal in accordance with applicable law, might reach a different conclusion about the grounds of appeal advanced - Appeal Panel's decision set aside, and matter remitted to a differently constituted appeal panel to be considered according to law.
View Decision
[From Benchmark Monday, 29 April 2024]

Henderson v Canterbury Hurlstone Park RSL Club Ltd [2024] NSWSC 473
Supreme Court of New South Wales

Harrison AsJ
Workers compensation - Henderson commenced work with the Canterbury Hurlstone Park RSL Club in 1998, primarily as a marketing assistant/coordinator - from about 2013, she had a new manager, and felt less supported - from 2016, co-workers began behaving inappropriately, with conversations that were often sexual in nature, rough, and involved swearing - she complained, and then felt targeted and excluded - she was accused of doing private work for some of the managers at the club; and suspended, and then asked to enter mediation with the people who had bullied her, and she resigned in 2017 - she sought judicial review a decision of an Appeal Panel in the Personal Injury Commission appointed under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: the Psychiatric Impairment Rating Scale ("PIRS") was applicable by virtue of Chapter 11 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th ed) - in the evaluation of permanent impairment resulting from psychiatric injury - the PIRS sets out six categories of behaviour to be assessed, each being divided into five classes - cl1.32 of the *Guidelines* provides that, where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant's permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%, which should be combined with any other impairment percentage, using the Combined Values Chart - there was no requirement in cl1.32 that an injured worker must demonstrate improvement (due to the effects of treatment) in each and every PIRS category - the Appeal Panel had misconstrued cl1.32 in this respect - the Appeal Panel had also denied procedural fairness by not giving Henderson an opportunity to be heard on the construction of cl1.32 - other grounds of judicial review also considered - Appeal Panel's certificate and reasons set aside, and matter remitted to the President of the Personal Injury Commission of New South Wales for redetermination according to law.
View Decision
[From Benchmark Tuesday, 30 April 2024]

Box Hill OHP v Whitehorse CC [2024] VSC 199
Supreme Court of Victoria
Watson J
Planning law - OHP applied to Whitehorse City Council for a permit for a proposed service station - Council refused the application - OHP filed an application for review of the Council's decision with the Victorian Civil and Administrative Tribunal, which affirmed Council's decision to reject OHP's application and determined that no permit should be issued for the proposed service station - OHP sought leave to appeal from the Tribunal's decision - held: the prospects of the appeal were real and not fanciful, so the Court would grant leave to appeal - under the *Whitehorse Planning Scheme*, the land as in a residential growth zone and also in a substantial change area - in determining whether the Tribunal had made an error of law, the weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision maker - for a residential growth zone and a

substantial change area the planning policy provides relatively more encouragement for housing use and less encouragement for a service station - when regard was had to the totality of the Tribunal's reasons, the better characterisation of the Tribunal's decision was that it permissibly gave weight to the policy objectives of the *Whitehorse Planning Scheme* and its prioritisation and encouragement for increased density of housing use in the area in which the land is situated as part of an overall weighing of the various factors which were relevant on the application for the permit - the Tribunal's finding was not legally unreasonable having regard to the Tribunal's other findings regarding the proposed service station use - the Tribunal had not impermissibly treated the service station proposal's consistency with 'the planning policy and strategic vision' as a threshold issue prior to and without regard to its amenity impacts - the Tribunal had not failed to consider whether a service station was an 'acceptable' outcome under the planning scheme, and had not impermissibly considered the application by reference to an ideal or optimal use, being higher density housing - the Tribunal had not fallen into any error of law - leave to appeal granted but appeal dismissed.
Box Hill OHP
[From Benchmark Thursday, 2 May 2024]

Manca v Teys Australia Beenleigh Pty Ltd [2024] QCA 60
Court of Appeal of Queensland
Bowskill CJ, Fraser AJA, & Applegarth J
Negligence - the appellant worked on a part of the "kill floor" at Teys' Beenleigh meatworks, where his work was slicing meat to remove fat and using a saw to cut briskets - he was transferred to do different work in a different environment on "the blooding floor" - the slipped while walking down stairs and was injured - he sued Teys in negligence - the primary judge found that Teys had taken reasonable steps to mitigate any risk that a person would slip on the steps, and that the appellant had not proven that he slipped due to any failure by Teys to take reasonable precautions against a risk of slipping, and therefore dismissed the proceeding - the appellant appealed - held: it had been open to the primary judge to conclude that the appellant had not proven that there was blood on the step or steps and that the blood caused him to slip - the appellant had not established that the primary judge erred in his findings that there was no blood on the appellant's boots when he fell - given the course of evidence at trial, the Court was not persuaded that there was a breach of the principles in *Browne v Dunn*, or that the primary judge was not entitled to act upon the evidence of witnesses called in Teys' case about congealed blood and whether blood is slippery or not - the evidence did not prove that any supervisor had seen the appellant carrying his tools in both hands as he descended the stairs on one of the few days that he worked in the blooding floor area before his fall - the primary judge had been correct to conclude in the light of his findings of fact that the precautions he had noted meant the risk of a person being injured by slipping on the steps was insignificant - the primary judge's conclusion that the risk was "not significant" had not been shown to be in error - the primary judge had not been shown to have erred in his assessment of whether, in the circumstances, a reasonable person in Teys' position would have taken the pleaded precautions - the appellant had not shown that the primary judge had erred in concluding that it was not

clear what caused the appellant to slip and fall and that, therefore, the appellant had not proved that he slipped due to any failure by Teys to take reasonable precautions against the risk of slipping - the appellant had failed to prove that any one of the causes that he alleged was the cause of his fall, and he had therefore failed to prove causation - appeal dismissed.
Manca
[From Benchmark Monday, 29 April 2024]

Woods v Northern Territory of Australia [2024] NTSC 35
Supreme Court of the Northern Territory
Riley AJ
Workers compensation - Woods worked as a school teacher with the Northern Territory Department of Education at two schools - she claimed that, in the course of her employment, she was exposed to traumatic and violent interactions with students which substantially contributed to her sustaining psychological injuries - the primary judge in the Work Health Court decided that the Northern Territory had paid permanent impairment compensation to Woods in relation to both the first injury and the second injury prior to the commencement of the proceedings and therefore had acquitted its liability under the *Return to Work Act 1986* (NT) in relation to the appellant's entitlement to compensation for whole person impairment - Woods appealed on questions of law under s116 of the *Return to Work Act* - held: the relevant objects of the Act were expressed to include providing effective compensation for injured workers and ensuring that the compensation of such workers is fair and affordable and also that adequate and just compensation be provided - while proof of a compensable injury is a matter for the Court, the question of compensation for permanent impairment is largely determined by extra-curial administrative procedures and the operation of the statute - once liability has been established by determination of the Court or where the employer has accepted liability, an entitlement to compensation exists and the amount payable will be calculated in accordance with the requirements of s71 by reference to the level of permanent impairment and that, in turn, will be assessed according to the requirements of the Act and the *Northern Territory Guidelines for the Evaluation of Permanent Impairment* - the psychiatrist treated the condition of the appellant as requiring assessment of the appellant's total impairment with the source of that impairment being from two separate injuries with levels of causation being allocated in the manner he described - in so doing, he was proceeding in accordance with the requirements of the Guidelines and, in particular, the Guidelines relating to the existence of a pre-existing condition or injury and how that should be addressed - neither the Act nor the Guidelines refer to, or distinguish between, injuries incurred whilst employed by different employers - rather, they refer to permanent impairment caused by an injury and allow for deductions for previous injuries or conditions to ensure double compensation does not occur - whether one impairment or more than one impairment arose out of two or more incidents considered in a medical sense, the legislative provisions applicable for the purposes of calculating compensation require that the matter proceed in accordance with the Act and Guidelines - appeal dismissed.
Woods
[From Benchmark Wednesday, 1 May 2024]

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
www.arconolly.com.au

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler
AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the

public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.
R v Secretary of State for the Home Department

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

Click Here to access our Benchmark Search Engine