



Friday, 11 October 2024

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

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Executive Summary (One Minute Read)

Health Services Union v Asmar (FCA) - Branch of Health Services Union restrained from giving effect to a resolution that the Branch pay the legal fees of certain officers in Fari Work Commission proceedings

Irwin v Victorian WorkCover Authority & Anor (VSC) - application for judicial review of a medical panel's assessment that found 0% WPI for hearing loss dismissed



HABEAS CANEM

Before the puppy ears finally dropped

Summaries With Link (Five Minute Read)

Health Services Union v Asmar [2024] FCA 1168

Federal Court of Australia

Dowling J

Industrial law - the Health Services Union sought a declaration that its Victorian No 1 Branch had ceased to function effectively and that there were no effective means under the rules of the Union to enable it to function effectively - the Union also sought approval of a scheme of administration to enable the Branch to function effectively - pending the determination of that claim, the Union sought interlocutory orders restraining the Branch secretary and members of the Branch Committee of Management in their transfer and disbursement of Union funds, and in their direction and control of Branch employees, and in respect of other matters - the Union contended that the Branch had ceased to function effectively because of allegations of impropriety by the Fair Work Commission, the Branch's failure to take effective action in response to those allegations, and the threats and reprisals allegedly taken towards persons who had raised allegations - the respondents proffered undertakings that left one issue remaining: whether the Board should be restrained from giving effect to a resolution it had passed to pay the respondents' legal fees in FWC proceedings - held: the respondents did not deny the allegations of reprisals, and this alleged conduct was serious - the reprisal conduct supported a finding that there was a serious question that the Branch has ceased to function effectively and that there are no effective means under the rules of the Union to enable it to function effectively - the legal costs resolution appeared to have been passed at a time when the Committee had no information from an auditor or other source about the veracity of the allegations made by the FWC - the balance of convenience favoured the Union because potentially significant funds of the Union would be dispersed in circumstances where there was some doubt about the recovery of those funds - Committee restrained from giving effect to its legal costs resolution.

[Health Services Union](#)

[From Benchmark Thursday, 10 October 2024]

Irwin v Victorian WorkCover Authority & Anor [2024] VSC 615

Supreme Court of Victoria

O'Meara J

Workers compensation - the plaintiff was employed as a labourer for about 33 years, during which time he was exposed to noise - his hearing was assessed by an audiologist, who found a whole person impairment of 11%, taking into account a 3.8% correction for age related hearing loss and a loading of % for tinnitus - the plaintiff claimed an impairment benefit - the first defendant's agent referred the plaintiff to an otorhinolaryngologist, who found noise induced hearing loss of 8.7%, which equated to 0% WPI, and made no additional allowance for tinnitus beyond its effect on the plaintiff's hearing loss - the agent notified the plaintiff that liability was accepted for diminution of hearing, but rejected for tinnitus, and there was no entitlement to an impairment benefit because the degree of permanent impairment had not been assessed as

10% or greater - medical questions were referred to a medical panel which found WPI of 0% and that the plaintiff did not have an accepted injury which had resulted in a total loss injury - the plaintiff sought judicial review - held: a medical panel is neither arbitral nor adjudicative, and its function in every case is to form its own opinion on the medical question referred to it by applying its own medical experience and expertise - the testing of hearing impairment, as contemplated by the American Medical Association Guides to the Evaluation of Permanent Impairment, specifically contemplates the use of amplification - a sentence that appears in respect of the stated criterion 'permanent hearing impairment' in the AMA Guides, that prosthetic devices must not be used during the evaluation of hearing sensitivity, did not refer to amplification - although this would mean that the plaintiff would receive no impairment benefit for the employment related diminution in his hearing, this was a consequence of a scheme in which such a benefit may only be assessed in respect of whole person impairment of 10% or more, it was not said that the medical panel's assessment of the plaintiff's hearing was erroneous, the medical panel had made no error in determining that there was an impairment percentage of 0% for the effect of tinnitus, and the plaintiff had told the medical panel that he was no longer troubled by tinnitus - proceedings dismissed.

[Irwin](#)

[From Benchmark Friday, 11 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130

Supreme Court of New Zealand

Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ

Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.

[Paki Nikora](#)



Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anaïs Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

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Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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