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Benchmark

Friday, 18 October 2024

Weekly Employment Law

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

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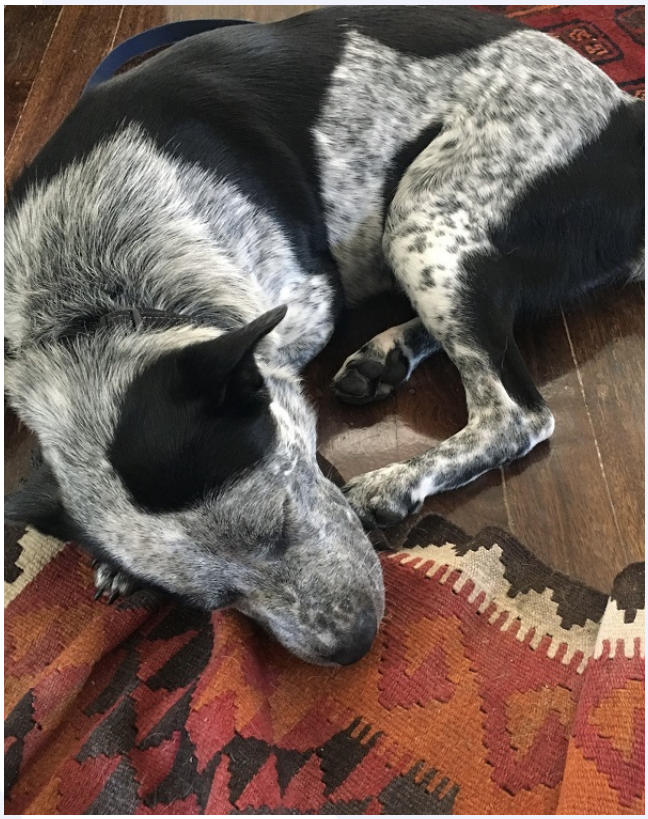
Executive Summary (One Minute Read)

Searle v Commonwealth of Australia (No.10) (NSWSC) - Commonwealth not permitted to rely on allegation of failure to mitigate loss against certain group members in a class action, as it had raised the issue too late

Kesper v Victorian WorkCover Authority (VSCA) - primary judge had erred in finding that a worker did not have a serious injury entitling him to bring a common law claim against his former employer

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

Searle v Commonwealth of Australia (No.10) [2024] NSWSC 1275
Supreme Court of New South Wales
Garling J
Class actions - the plaintiff began representative proceedings against the Commonwealth on behalf of himself and other persons enlisted in the Royal Australian Navy as part of a particular Marine Technician cohort - each of the plaintiff and group members had entered a training contract with the Commonwealth under which the Commonwealth was obliged to provide training which would enable them to attain a Certificate IV in Engineering with a particular National Qualification Code - the plaintiff claimed the Commonwealth had failed to provide the promised training, and that he and the group members had lost the opportunity to seek employment outside the Navy having attained a Certificate IV - the Court had assessed damages in respect of nine group members and in doing so had dealt with a range of issues and set out the appropriate approach to assessment of damages - the Court had then appointed a referee to follow this methodology and report on (1) the value, if any, for each group member of the lost opportunity; and (2) the damages (if any) payable to each group member, including interest - the Commonwealth sought leave to rely on a statement of contentions - held: the particular issue in the statement of contentions involved the failure to mitigate loss - the purpose of the Court in a representative proceeding referring out questions to referees is to enable the issues between the parties to be determined with as much efficiency and speed as is possible - however, proceedings before a referee must still be procedurally fair between the parties - the Commonwealth had previously raised the issue of failure to mitigate, and was on notice that such an allegation had to be raised and notified in a timely way, to allow the claimants an opportunity to consider how to respond and then engage in the response - the Commonwealth should not be permitted to rely on the disputed paragraphs in the notice of contentions - however, the Commonwealth would be able to make a claim of failure to mitigate in the individual claims of other group members for damages provided that it gave adequate and timely notice - it would be appropriate for the parties to invite the referee to formulate directions to enable this to occur.
View Decision
[From Benchmark Monday, 14 October 2024]

Kesper v Victorian WorkCover Authority [2024] VSCA 237
Court of Appeal of Victoria
Orr & Kaye JJA, & J Forrest AJA
Workers compensation - the applicant was employed as an operating theatre technician - he developed a serious neck condition which ultimately required a discectomy and fusion at two levels of his cervical spine - this condition was attributed to his work - the applicant sought leave to bring a common law claim against his employer, and to bring a claim for pain and suffering damages pursuant to s335(2)(d) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - the primary judge was not satisfied that the applicant had a serious injury within the

meaning of the Act - the applicant sought leave to appeal - held: the standard of review on an appeal challenging a judge's decision to refuse leave to bring proceedings claiming damages in respect of a serious injury is the correctness standard, rather than the *House v the King* standard - although the Court should defer to the primary judge findings likely to be affected by impressions of the credibility and reliability of witnesses, unless such findings were glaringly improbably or contrary to compelling inferences, in general the Court was in as good a position as the primary judge to decide on the proper inferences to be drawn from undisputed or established facts - the primary judge's finding that the applicant's pain and suffering consequences did not satisfy the 'very considerable' test was the ultimate finding of fact, which was not informed by relevant impressions of credibility or reliability, and the Court was in as good a position as the primary judge to determine whether it was correct - the applicant had a permanent impairment of his cervical spine attributable to his employment which was fairly described as more than significant or marked, and at least very considerable - the trial judge had erred in refusing the application - indicia of serious injury referred to in previous case might be used to determine whether serious injury was made out, but could not qualify the statutory language - leave to appeal granted, appeal allowed, and leave to bring the common law claim granted.

Kesper

[From Benchmark Friday, 18 October 2024]

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31
Supreme Court of Canada
Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ
The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.
Aquino

Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include Under Milk Wood, “a play for voices”, Do not go gentle into that good night, and, And death shall have no dominion. He loved Wales but was not a Welsh nationalist. His father wrote that he was “*afraid Dylan isn’t much of a Welshman”.* Robert Lowell, wrote of criticism of Thomas’ greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads “In My Craft or Sullen Art”
https://www.youtube.com/watch?v=Tiw3uOT2eUc

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian

parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and https://trove.nla.gov.au/newspaper/article/47250992.

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