



Friday, 21 June 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)

Rizk v Basseal (FCA) - builder's labourer/carpenter who provided services in house renovations was not an employee

Wu v DSMJ Pty Ltd (FCA) - Court refused to refer appeal from the Federal Circuit and Family Court of Australia to the Full Court

Re Stirloch Constructions Pty Ltd (VSC) - leave granted to a director to bring representative proceedings on behalf of the company against another director and a former director

Carey-Schofield v Hays & Civeo (QSC) - labour hire company and village manager both held liable in negligence for a worker who had tripped over a garbage back



HABEAS CANEM

Small dog, big surf



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Summaries With Link (Five Minute Read)

Rizk v Basseal [2024] FCA 647

Federal Court of Australia

Shariff J

Employment law - the appellant was a builder's labourer and carpenter who had assisted with house renovations - he claimed that he had been an employee and that he was underpaid as a result of various alleged contraventions of the *Fair Work Act 2009* (Cth) - the primary judge was not satisfied that the appellant was an employee and dismissed the proceedings - the appellant appealed - held: then appeal was an appeal by way of rehearing and the appellant had to demonstrate error of law or fact on the part of the primary judge - making a finding whether a worker is an employee is not an exercise in, or akin to, discretionary decision-making - although there may be evaluation involved, the worker is either an employee or an independent contractor - the appropriate standard of review in this case was therefore the "correctness standard" set out in authorities such as *Warren v Coombes* (1979) 142 CLR 531 - however, the appellant did not challenge any of the findings made by the primary judge as to his credit and reliability, or the finding that certain documentary evidence which he tendered was unreliable - the Court therefore proceeded on the basis that the primary judge had all the advantages of making an assessment of the evidence at trial, noting that findings of fact based on the credibility of witnesses can only be reversed by an appellate court "in exceptional cases" - the Court therefore had to do a real review of the evidence that was before the primary judge but noting that the primary judge enjoyed all the advantages of being the trial judge - where there is no written contract, the identification of the parties' contractual rights and duties must proceed somewhat differently from where there is a written contract, but the fundamental task remains the same: the parties' contractual rights and obligations are to be ascertained and characterised - on the evidence before the primary judge and facts as found, once the appellant accepted the engagement, he decided which days to work, when to work on those days and for how long - the primary judge had not failed to consider and apply binding authority - appeal dismissed.

[Rizk](#)

[From Benchmark Friday, 21 June 2024]

Wu v DSMJ Pty Ltd [2024] FCA 661

Federal Court of Australia

Kennett J

Appeals - the Federal Circuit and Family Court of Australia, Division 2, dismissed a claim for relief under s62 of the *Fair Work Act 2009* (Cth) about the reasonableness of additional hours of work - the appellant appealed, and sought that the appeal be heard by a Full Court - held: s25(1AA) of the *Federal Court of Australia Act 1976* (Cth) provides that the appellate jurisdiction in an appeal from the Federal Circuit and Family Court is to be exercised by a single judge or, if a judge considers it appropriate, to be exercised by a Full Court - case law has recognised that appeals from the Federal Circuit and Family Court will be heard by a single judge unless there is some persuasive reason why it is more appropriate for the case to go to a Full Court - this

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recognises the additional public resources that are involved in having a case heard by three judges, and the more complicated logistics, and usually accompanying delay, involved in convening a Full Court to hear an appeal - usually, an appeal is referred to the Full Court because it raises novel issues of law or issues of general importance, or questions the correctness of existing authority - the appellant's concern as to whether the allocated judge had specific expertise in workplace relations law was not relevant - where an appellate court is asked to make adverse findings regarding the conduct of a judge of the Federal Court, the appeal might be referred to a Full Court, but no such considerations arose where there is an allegation against a judge of a lower court - there is no general principle that an absence of precedent on a point the appellant wishes to raise justifies referring an appeal to a Full Court - while it may be accepted that the rights of large numbers of workers and employers are affected by s62, it does not follow that this particular case had special significance for a large body of employees - application dismissed.

[Wu](#)

[From Benchmark Friday, 21 June 2024]

Re Stirloch Constructions Pty Ltd [2024] VSC 322

Supreme Court of Victoria

Waller J

Corporations law - a director of a construction company applied under s237 of the *Corporations Act 2001* (Cth) for leave to bring a proceeding on behalf of the company against another director and a former director and a company incorporated by them - the proposed proceeding would alleged that the other director had breached his director's duties and fiduciary duties owed to the company, and that the former director knowingly assisted the other director to breach his fiduciary duties - held: leave to bring a derivative action must not be given lightly - the applicant must show the five requirements in s237(2) are satisfied on the balance of probabilities, namely: (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; (b) the applicant is acting in good faith; (c) it is in the best interests of the company; (d) there is a serious question to be tried; and (e) either notice was given to the company or it was appropriate to give leave without notice having been given - there was no issue here regarding (a) and (e) - the Court was satisfied the applicant director was acting in good faith, in that he honestly believed that a good cause of action existed which had reasonable prospects of success, for recovery of profits that would have been earned by the company but for the actions of the defendants - the applicant director responding to an offer of settlement by offering to settle only if the defendants separated from each other did not show that the applicant director was motivated by an improper or collateral purpose - in any event, where a plaintiff has multiple purposes for commencing an action, one of which is improper and collateral, there will be no abuse of process unless the improper and collateral purpose is the predominant purpose - the Court was satisfied it was in the best interests of the company to bring the proceedings - there was a serious question to be tried - leave granted to bring representative proceedings.

[Re Stirloch Constructions Pty Ltd](#)

[From Benchmark Wednesday, 19 June 2024]

Carey-Schofield v Hays & Civeo [2024] QSC 60

Supreme Court of Queensland

Crow J

Negligence - the plaintiff suffered personal injury in the course of his employment with a labour-hire firm, Hays - he brought an action in negligence against Hays and Civeo Pty Ltd, alleging that he was assigned by Hays to Civeo to perform work as directed by Civeo at Civeo's accommodation village at Dysart - Hays claimed contribution against Civeo under s6 of the *Law Reform Act 1995* (Qld) - held: both defendants owed the plaintiff a non-delegable duty of care to take precautions against risk of injury that was foreseeable and not insignificant - the proper assessment of the alleged breach of duty depends on the correct identification of the relevant risk of injury, because it is only then that an assessment can take place of what a reasonable response to that risk would be - the risk of injury to the plaintiff arose as a result of the placing of the garbage bags on the ground in his workspace - the resulted injury was foreseeable and not insignificant as against Hays under s305B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld), and as against Civeo under the common law - both defendants breached their duty of care to the plaintiff - the defendant's system of work was to have the bin liners placed immediately in the rear of the utility to avoid the creation of a trip hazard - the incident occurred quite quickly and the plaintiff had stepped back in reaction to the presence of a wasp, which did sting him on the left inside wrist - the defendants had not discharged their onus of showing that the plaintiff acted without due care for his own safety - general damages of \$37,920 awarded against Hays and \$70,000 awarded against Civeo - total damages of about \$504,000 awarded against Hays and about \$873,000 awarded against Civeo - as to the contribution sought by Hays from Civeo, Civeo ought to be found 75% responsible for the injury sustained by the plaintiff and Hays ought to be found responsible for 25% - Hays therefore to recover contribution from Civeo of about \$472,000 pursuant to s6(c) of the *Law Reform Act*.

[Carey-Schofield](#)

[From Benchmark Monday, 17 June 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ____
Supreme Court of the United States

In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.

[Food and Drug Administration](#)



Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chillest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson

Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel,
Nazareth College

<https://www.youtube.com/watch?v=gDlSo4hEzmE>

Recitation 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



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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.

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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