



Friday, 26 April 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)

O'Brien v Caboolture Aero Club Inc (FCA) - former employee suing former employer granted leave to amend statement of claim to add further bases for relief

Western Sydney Wanderers FC Pty Ltd v Football Australia Limited (NSWSC) - determination for the National Dispute Resolution Chamber established by Football Australia in favour of a player against a club held to be invalid for non-compliance with the contractual regulations governing the Chamber

Purcell v Indigenous Land and Sea Corporation & Anor (QSC) - limitation period extended as the critical mass of information did not reach the tipping point such that it could be reasonably concluded that an injured worker had a worthwhile cause of action until after a particular expert's report was received

HABEAS CANEM

Country smile



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Summaries With Link (Five Minute Read)

O'Brien v Caboolture Aero Club Inc [2024] FCA 392

Federal Court of Australia

Meagher J

Civil procedure - O'Brien was employed by the first respondent, the Caboolture Aero Club Inc as Aerodrome Reporting Officer and Airfield Maintenance Supervisor - Coburn was President of the Aero Club's Management Committee - O'Brien took personal leave due to illness, and was diagnosed with a psychological injury which he claimed was a result of bullying and harassment by Coburn - he applied for worker's compensation pursuant to the *Workers Compensation and Rehabilitation Act 2003* (Cth) - Coburn, on behalf of the Aero Club, terminated O'Brien's employment, purportedly for redundancy after receiving a report regarding comparative costs of employees versus outsourced contractors - O'Brien contended the Aero Club had thereby taken adverse action against him pursuant to s342 of the *Fair Work Act 2009* (Cth), and that it had breached s351 by terminating his employment due to his psychological injury and s352 by terminating his employment as he was temporarily absent from work, as well as breach of the *Airline Operations - Ground Staff Award 2020* and breach of his contract of employment - O'Brien sought to amend his statement of claim to plead that his employment was covered by the *Miscellaneous Award 2020*, that he had the benefit of further workplace rights and the Aero Club had dismissed him because of that, and that the Aero Club had breached the *Anti-Discrimination Act 1991* (Qld) - held: s37M of the *Federal Court Act 1976* (Cth) provides that the overarching purpose of the Federal Court rules of court is to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively, and efficiently as possible - s37N obliges the parties to conduct the proceedings consistently with this overarching purpose - s33ZF gives the Court power to make any order which is appropriate or necessary for the administration of justice - r16.53 of the *Federal Court Rules 2011* (Cth) provides for a party getting leave to amend a pleading - the party seeking leave to amend bears the onus of persuading the Court that leave should be granted - the starting point is that all amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided - the general approach is that, where a party satisfies the Court that he or she generally desires to amend the pleadings so as to alter an existing claim or to introduce a new claim, leave should be granted unless the proposed amendment is so obviously futile that it would be struck out if it had appeared in the original pleading or would cause substantial injustice which cannot be compensated for - leave should be granted to amend.

[O'Brien](#)

[From Benchmark Monday, 22 April 2024]

Western Sydney Wanderers FC Pty Ltd v Football Australia Limited [2024] NSWSC 426

Supreme Court of New South Wales

Richmond J

Associations - the National Dispute Resolution Chamber (NDRC), a body established by Football Australia Limited, determined a grievance which a player, Lopar, had against Western

Sydney Wanderers FC Pty Ltd in respect of his player salary payments - the NDRC determined that the player had succeeded in establishing that the club breached the Standard Playing Contract in a manner entitling him to terminate it, and was to pay the player damages of about \$465,000 - the club sought orders from the Supreme Court declaring that the determination was null and void, that it was not made in accordance with the NDRC regulations and was therefore not binding on the club, and restraining Football Australia from requiring the club to pay the damages as required by the determination - held: the defendants did not dispute that the NDRC Panel had not been properly constituted under the NDRC Regulations, nor that the determination was not signed by the Chair or Deputy Chair of the NDRC sitting on the panel as required by the NDRC Regulations 0 clause 25 of the NDRC Regulations provided that no proceedings before the NDRC in relation to a dispute would be invalidated for any defect whether of substance or of form in any notice or report or by reason of non-compliance with any term of the NDRC Regulations, unless the Chair so determines - the terms of the NDRC Regulations must be given the meaning that a reasonable businessperson would understand the words to mean, which required a consideration of the language used by the parties, the surrounding circumstances objectively known to them, and the commercial purpose or object to be secured by the contract - in the context in which "proceedings" appears in cl25, that term means a legal process which takes place for the resolution of a dispute commencing with the making of an application and continuing to the final determination by the making of a determination or a finalisation of any appeal from that determination - on this meaning of "proceedings", cl25 does not render valid a determination which has not been made in accordance with the requirements of the NDRC Regulations - what cl25 does is ensure that the proceedings as a whole are not rendered invalid by that non-compliance - where a domestic tribunal determines a dispute and finds the binding nature of its determination in contract (rather than in accordance with a statute or other instrument), that decision must be consonant with the terms of the contract - the decision of the NDRC here was not consonant with the terms of the contract - the determination was not final and binding because it was not made in accordance with the NDRC Regulations - orders made as sought by the club.

[View Decision](#)

[From Benchmark Tuesday, 23 April 2024]

Purcell v Indigenous Land and Sea Corporation & Anor [2024] QSC 58

Supreme Court of Queensland

Crow J

Limitation of actions - Purcell was an employee of Primary Partners Pty Ltd, who performed work at Mimosa Station near Gayndah - the Station was owned by the Indigenous Land and Sea Corporation - Purcell suffered personal injury in 2013 and succeeded in bringing a WorkCover statutory claim in respect of the injury, but he did not seek to bring any common law proceedings concerning his injury until 2022 - as against Primary Partners, in order for an extension of the limitation period, Purcell had to show that the material fact of a decisive nature came into his means of knowledge after a date in December 2021 - as against the Indigenous Land and Sea Corporation, Purcell had to show that a material fact of a decisive nature came



into his means of knowledge after a date in May 2022 - held: the most significant issue between the parties is determination of the point of time when there was a "critical mass of information" or sufficient information to reach the "tipping point" where the information available to Purcell showed that he had a worthwhile claim and that in his own interests, he ought to pursue that claim - the critical mass of information did not reach the tipping point such that it could be reasonably concluded that Purcell had a worthwhile cause of action until he received the report of a particular expert in June 2022 - the opinions as set out in this report constituted a material fact of a decisive nature relating to that right of action that was not within Purcell's means of knowledge until June 2022 - the discretion to extend the period of limitation was therefore enlivened - there was no significant prejudice to Primary Partners as there were numerous medical reports on Purcell's injuries - the extensions of the limitation period should be granted.

[Purcell](#)

[From Benchmark Monday, 22 April 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)

European Court of Human Rights

Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ

Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.

[Kirkorov](#)



Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,
Far-cast, I flare
Through gulfs the sun's uncharted orbits bind,
And spaces bare
That intermediate darks immerse
By road of sun nor world confined.
Upon my star-undominated gyre
I mark the systems vanish one by one;
Among the swarming worlds I lunge,
And sudden plunge
Close to the zones of solar fire;
Or 'mid the mighty wrack of stars undone,
Flash, and with momentary rays
Compel the dark to yield
Their aimless forms, whose once far-potent blaze
In ashes chill is now inurned.



A space revealed,
I see their planets turned,
Where holders of the heritage of breath
Exultant rose, and sank to barren death
Beneath the stars' unheeding eyes.
A down contiguous skies
I pass the thickening brume
Of systems yet unshaped, that hang immense[67]
Along mysterious shores of gloom;
Or see—unimplicated in their doom—
The final and disastrous gyre
Of blinded suns that meet,
And from their mingled heat,
And battle-clouds intense,
O'erspread the deep with fire.

Through stellar labyrinths I thrid
Mine orbit placed amid
The multiple and irised stars, or hid,
Unsolved and intricate,
In many a planet-swinging sun's estate.



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Ofttimes I steal in solitary flight
Along the rim of the exterior night
That grips the universe;
And then return,
Past outer footholds of sidereal light,
To where the systems gather and disperse;
And dip again into the web of things,
To watch it shift and burn,
Hearted with stars. On peaceless wings
I pierce, where deep-outstripping all surmise,
The nether heavens drop unsunned,
By stars and planets shunned.
And then I rise
Through vaulting gloom, to watch the dark
Snatch at the flame of failing suns;
Or mark
The heavy-dusked and silent skies,[68]
Strewn thick with wrecked and broken stars,
Where many a fated orbit runs.
An arrow sped from some eternal bow,
Through change of firmaments and systems sent,



And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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