



Friday, 28 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)

Monash University v Murthi (FCA) - Fair Work Commission had jurisdiction to arbitrate a dispute between a University and an academic accused of plagiarism

Botha v Secretary, NSW Department of Customer Service (NSWSC) - Appeal Panel of the NSW Personal Injury Commission had properly engaged with the ground of appeal raised by the plaintiff

Alananzeh v Zgool Form Pty Ltd (ACTSC) - injured construction worker succeeded in negligence action against employer subcontractor and the head contractor

HABEAS CANEM

First beach holiday



Summaries With Link (Five Minute Read)

Monash University v Murthi [2024] FCA 663

Federal Court of Australia

Wheelahan J

Employment law - Monash University academic staff member accused of plagiarism in breach of the *Australian Code for the Responsible Conduct of Research 2018* (the Research Code) - the staff member denied the allegation, and claimed the University had denied procedural fairness in breach of its obligations under the *Monash University Enterprise Agreement (Academic and Professional Staff) 2019* (the Agreement) the staff member referred the dispute to the Fair Work Commission - the University sought a declaration that the Fair Work Commission lacks jurisdiction to determine whether the staff member breached the Research Code, or otherwise to determine the merits or outcome of such an allegation, in the context of arbitrating a dispute about the application of the Agreement - held: as a result of its approval pursuant to s186(1) of the *Fair Work Act 2009* (Cth), the Agreement has statutory force because, under s50 and s51 of that Act, a person to whom an enterprise agreement applies must not contravene the agreement - the Commission's authority to arbitrate a dispute arising under an enterprise agreement so as to make a binding determination does not arise as a result of the enterprise agreement having statutory force, but arises in general law as a result of an agreement of the parties to submit a dispute to the Commission, as with private arbitration - where consent to arbitration is in issue, its resolution involves a factual inquiry - the initiation of a dispute and the lodging of the relevant form with the Commission by a staff member may well amount to a submission to arbitration in circumstances where, by the University's consent to the terms of the Agreement, the University has offered to submit to arbitration - the question was whether the matters raised by the staff member before the Commission involved a dispute "as to the application of [the] Agreement or any matters arising from it" as provided in the dispute resolution clause of the Agreement - on its proper construction, the Agreement invested the Commission with arbitral jurisdiction over the whole of any such dispute - there was no tension between a clause in the Agreement that envisaged that the University alone would determine whether plagiarism has occurred, and the clause investing the Commission with jurisdiction to deal with disputes where it is alleged the University has not followed the required process in making such a determination - declaration not made.

[Monash University](#)

[From Benchmark Monday, 24 June 2024]

Botha v Secretary, NSW Department of Customer Service [2024] NSWSC 781

Supreme Court of New South Wales

Stern JA

Workers compensation - the plaintiff sustained psychiatric injury by reason of interpersonal conflicts with her direct supervisor in her role as a Senior Executive (Director of Client Stakeholder Services) employed by the Department of Customer Service - she sought compensation and a dispute arose as to the extent of her impairment - a Medical Assessor

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certified that she had a 9% permanent impairment - as this was less than 15%, s65A and s151H of the *Workers Compensation Act 1987* (NSW) provided that no compensation for non-economic loss under Div 4 of Pt 3 of that Act or claim for work injury damages was available - an Appeal Panel of the NSW Personal Injury Commission affirmed the Medical Assessor's certificate - the plaintiff sought judicial review of the Appeal Panel's decision - held: subject to materiality, failure by an Appeal Panel to perform its statutory task of conducting a review on the ground, or grounds, of appeal advanced, or a misunderstanding of the case brought by an applicant, may amount to jurisdictional error - it was apparent from the Appeal Panel's decision that the Appeal Panel was aware of, considered, and rejected the plaintiff's sole ground of appeal - in two places, the Appeal Panel correctly identified the plaintiff's contention as to demonstrable error, including that the Medical Assessor's conclusion was illogical and unsupported having regard to the findings in the body of the Certificate - the Appeal Panel engaged with the issue raised by the plaintiff's ground of appeal, which was whether the matters found by the Medical Assessor supported his conclusion as to categorisation on the Social and Recreational Psychiatric Impairment Rating Scale - while the Appeal Panel did not expressly engage with the plaintiff's contention that the Medical Assessor's conclusion should be construed as relying only upon social activities which involved the plaintiff leaving her home, it was implicit in the Appeal Panel's reasoning that they rejected that contention - it was also clear that the Appeal Panel was satisfied that the findings of the Medical Assessor in the body of the Certificate properly supported the Medical Assessor's conclusion that the plaintiff's attendance at social and recreational activities was "regular" - application for judicial review dismissed.

[View Decision](#)

[From Benchmark Friday, 28 June 2024]

Alanazeh v Zgool Form Pty Ltd [2024] ACTSC 16

Supreme Court of the Australian Capital Territory

McWilliam J

Negligence - the plaintiff was employed as a labourer by a subcontractor at a construction site when he slipped and fell, injuring his back - he brought proceedings in negligence against the subcontractor employer and the head contractor - the subcontractor had failed to hold the required workers compensation insurance and so the Workers Compensation Default Insurance Fund Manager under Div 8.2.2 of the *Workers Compensation Act 1951* (ACT) was the third defendant - held: the Court accepted the plaintiff's evidence of what had occurred - the subcontractor, as employer, owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury - the employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work - the head contractor also had a duty to exercise reasonable care with regard to the safety of the area in which it was directing work to be undertaken, but this duty was not non-delegable, and did not extend to telling the plaintiff how to carry building materials, or how to lay them, or to providing mechanical assistance to undertake the work, as those were matters that it was reasonable for the head contractor to expect the subcontractor employer to manage and supervise - both the head contractor and subcontractor employer had failed to



discharge their duties of care - as to causation, the plaintiff did not have to prove that the negligence was the sole causal mechanism, only that it was a necessary condition, pursuant to s45(1)(b) of the *Civil Law (Wrongs) Act 2002* (ACT) - the plaintiff had established that causation here - the evidence did not establish contributory negligence - the plaintiff had had an underlying susceptibility or degenerative condition but that it was asymptomatic, and the fall caused the condition to become symptomatic (whether by exacerbation or acceleration of a degenerative condition), with the result that the current pain symptoms and restriction of mobility were, on the balance of probabilities, causally related to the accident - total damages of about \$245,000 assessed - as the plaintiff had established liability against each of the defendants, the plaintiff was entitled to enforce the totality of the judgment against the head contractor, and so, under s170 of the *Workers Compensation Act*, the plaintiff could not claim as against the default insurer - if the subcontractor employer had had funds to meet the claim, the Court would have found the defendants were equally negligent, resulting in apportionment of 50% each.

[Alananzeh](#)

[From Benchmark Friday, 28 June 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

United States v Rahimi (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

Summaries With Link (Five Minute Read)

United States v Rahimi 602 US __ (2024)

United States Supreme Court

In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.

[United States v Rahimi](#)



Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adlestrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*"

all’.

Adestrop by Edward Thomas, composed by Susanna Self- the third of six “Songs of Immortality”

<https://www.youtube.com/watch?v=2NYUdo12yfg>

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.

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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