



Friday, 29 March 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)

EFEX Group Pty Ltd v Bennett (FCAFC) - primary judge had erred in characterising a contractor as an employee under the most recent High Court authority

May v Commonwealth (ACTCA) - primary judge was correct to allow the Commonwealth's appeal against workplace safety convictions arising from a helicopter accident in the Antarctic, and to dismiss a prosecution appeal against acquittal of a private company

HABEAS CANEM

The scent on the breeze



Summaries With Link (Five Minute Read)

EFEX Group Pty Ltd v Bennett [2024] FCAFC 35

Full Court of the Federal Court of Australia

Katzmann, Bromwich, & Lee JJ

Employment law - Bennet agreed to take up a position with EFEX as a contractor by a wholly oral contract - he later applied to the Fair Work Commission for unfair dismissal - a Commissioner found Bennett was an employee, and the Full Bench refused permission to appeal, holding that the totality of the evidence weighed in favour of Bennett being an employee - EFEX sought prohibition in the Supreme Court to restrain the Commission from continuing to hear the claim - between trial and judgment, the High Court gave two judgments changing the approach in this area: *CFMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; 275 CLR 165 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 275 CLR 254 - the primary judge held Bennet was an employee - EFEX appealed, contending that the primary judge had not properly applied *Personnel Contracting* - held: where rights and duties of the parties are "comprehensively committed to a written contract", and the contract is not a sham, varied, waived, or the subject of an estoppel, the obligations established by that contract are decisive of the character of the legal relationship - in the absence of a written contract and no evidence of a particular conversation during which the contract was made, evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken - the primary judge had given too much weight to factors emerging from the way the contract was performed that evidenced only a limited degree of exercise of control, rather than the existence of a contractual right of control, such as the periodic requirement to attend meetings - the primary judge had given insufficient weight to the significance of the almost complete freedom that Bennett had by reason of the contractual arrangements themselves - most importantly, Bennett had held the fruits of the contract with EFEX in his capacity as trustee of his family trust, and had benefited from the tax arrangements attendant on that fact, and this was known and agreed to by EFEX - the establishment of the trust was not just an expression of the parties' opinion about Bennett's relationship with EFEX, but was a manifestation of the very nature of the contract that was agreed upon and entered into - appeal allowed and Commission prohibited from hearing Bennett's application.

[EFEX Group Pty Ltd](#)

[From Benchmark Wednesday, 27 March 2024]

May v Commonwealth [2024] ACTCA 6

Court of Appeal of the Australian Capital Territory

Mossop, McWilliam, & Wheelahan JJ

Workplace safety - during helicopter operations undertaken on behalf of the Australian government in Antarctica, a helicopter pilot deposited drums of aviation fuel at a fuel cache on the Western Ice Shelf, and then landed his helicopter with its skids across a snow-covered crevasse - when returning to his helicopter after unhitching the fuel drums, the snow over the



crevasse gave way and he fell into the crevasse, was rescued, but died from the effects of hypothermia the next day - the Commonwealth authority responsible for investigating breaches of the *Work Health and Safety Act 2011* (Cth) brought proceedings against the Commonwealth and the helicopter company that employed the pilot - the charges were under s32 of the Act, which required the prosecution establish that the accused failed to take reasonably practicable measures to ensure the health and safety of the relevant helicopter pilots who landed on the West Ice Shelf - the prosecution succeeded on two of the three charges against the Commonwealth, and failed against the company - the Commonwealth successfully appealed, and the prosecution's appeal against the acquittal of the company was dismissed - the prosecution appealed on both aspects - held: the prosecution put forward a detailed and interlinked package of six measures which it said should have been taken in relation to flights to fuel depot sites on the West Ice Shelf - the prosecution would fail unless it established beyond reasonable doubt that each of the measures was "reasonably practicable" - the appeal judge had been correct in allowing the Commonwealth's appeal against its conviction and dismissing the prosecution appeal against the acquittal of Helicopter Resources - appeal dismissed.

[May](#)

[From Benchmark Wednesday, 27 March 2024]



INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Lifestyle Equities v Amazon UK Services Ltd (UKSC) - In a cross-border sale of merchandise where the same trade mark was owned by different entities in USA and UK, Amazon was liable for trade mark infringement where UK customers were targeted by Amazon's US website

Summaries With Link (Five Minute Read)

Lifestyle Equities v Amazon UK Services Ltd [2024] UKSC 8,

Supreme Court of the United Kingdom

Lord Hodge, Lord Briggs, Lord Hamblen, Lord Burrows, & Lord Kitchin

The trade mark at issue was the 'Beverly Hills Polo Club' brand. The holder of the mark in the EU/UK was Lifestyle Equities which is unrelated to the brand owner in the USA. A UK resident ordered US sourced goods bearing the trade mark through Amazon's US website. The owner of the EU trade mark contended that Amazon was liable for trade mark infringement because it targeted consumers in the UK/EU. This matter concerned conduct that occurred before Brexit. Applying EU law, the Supreme Court said that Amazon could only be liable for trade mark infringement in a cross-border sale if it in fact targeted consumers in the UK. The mere fact that a foreign website is accessible to a UK resident is insufficient to establish targeting of a UK consumer. The question for the court was whether an average consumer within the UK, who is reasonably well-informed and observant, would consider the website targeted at that consumer. The Court found that targeting had occurred because Amazon offered to deliver to the UK, in a dialog box Amazon specified which goods could be shipped to the UK, and specified UK delivery times and featured the option to pay in British currency. The Supreme Court also stated that Amazon's subjective intent was not the key issue. Rather, the question was one of objective fact taken from the perspective of the average consumer. Intent may, however, be taken into account to the extent it is relevant to the objective assessment made by the court.

[Lifestyle Equities](#)

Poem for Friday

The Nightingale

By: Sara Coleridge (1802-1852)

In April comes the Nightingale,
That sings when day's departed;
The poets call her Philomel,
And vow she's broken-hearted.

To them her soft, sweet, ling'ring note
Is like the sound of sorrow;
But some aver, no need hath she
The voice of grief to borrow.

No, 'tis the merry Nightingale,
Her pipe is clear and thrilling;
No anxious care, no keen regret,
Her little breast is filling.

She grieves when boys have robb'd her nest,
But so would Stork or Starling;
What mother would not weep and cry
To lose her precious darling?

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