Court of Appeal
Supreme Court
Sydney

Decisions of interest

26 March 2018 – 6 April 2018

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal decisions of interest

1. **Administrative law: procedural fairness**

***Bhusal v Catholic Health Care Ltd* [2018] NSWCA 56**

Decision date: 26 March 2018

Meagher JA; Simpson JA; Sackville AJA

In 2014, Ms Bhusal suffered a back injury in the course of her employment at Catholic Health Care Ltd (**CHC**). She made a claim under the *Workers' Compensation Act 1987* (NSW) (**the Act**). CHC, through its insurer, Catholic Church Insurance Ltd (**CCI**), accepted liability and commenced payments. In February 2016, CCI advised Ms Bhusal that, following a review, it had decided she had a current capacity to work that disentitled her to further payments.

Following internal review in accordance with s 44BB of the Act, CCI affirmed its decision. Ms Bhusal did not receive notice of this decision until 2 June 2016 when she returned from overseas. She filed an application for *"merit review"* by the State Insurance Regulatory Authority (**SIRA**) but stated on her application that she had been notified of the CCI's decision on 2 May 2016. Later that day, SIRA notified CCI that it had received the application, but that it did not confirm it had jurisdiction to review the decision. No such reservation was communicated to Ms Bhusal. On 30 June 2016, she was advised that SIRA did not have jurisdiction as the application was not made within 30 days of her being notified of CCI's decision, as required by s 44BB(3)(a).

Ms Bhusal sought judicial review. This was unsuccessful. On appeal, the issues were whether Ms Bhusal had been denied procedural fairness by SIRA's failure to seek submissions on her failure to lodge within 30 days, and whether non-compliance with the time requirement deprived SIRA of jurisdiction.

Held:

- The Court allowed the appeal and remitted the application to the SIRA: [70]. It was common ground that SIRA's decision was wrong: there was undisputed evidence that Ms Bhusal had lodged her application within time. However, this was not sufficient to ground a denial of procedural fairness; the touchstone was whether the procedures adopted by the decision-maker had caused *"practical injustice"* to Ms Bhusal: [50]; [57].

- Practical injustice was manifest, because Ms Bhusal was denied the opportunity to make submissions to SIRA on the issue that proved critical to the outcome of her application: [64]. This conclusion did not imply that SIRA was obliged in every case to check the accuracy of information provided by an applicant that appeared to be adverse to their case: [64]; [67].

- It was not necessary to determine the remaining grounds of appeal: [68].

2. **Appeals: assessment of credibility by primary judge**

Chahal Group Pty Ltd v 7-Eleven Stores Pty Ltd **[2018] NSWCA 58**

Decision date: 27 March 2018

Basten JA; Gleeson JA; Emmett AJA

The Chahal Group Pty Ltd (**Chahal**) operated a 7-Eleven convenience store (**the store**) under a franchise agreement with 7-Eleven Stores Pty Ltd (**7-Eleven**). In October 2016, 7-Eleven terminated the franchise agreement, on the basis that Chahal Group had acted fraudulently by operating a 'cash back scheme'. It was alleged that two employees (**Messers Ali and Yasa**) were nominally paid award wages, but were required to make a 'cash back' payment so their effective wage was well below the award rate. Chahal commenced proceedings in the Supreme Court seeking a declaration that the notice of termination was unlawful, and consequential monetary relief. Mr Chaudhry, the sole director and shareholder of Chahal, was joined in the proceedings. The findings ultimately turned upon the credibility of Mr Chaudhry as against the credibility of the two employees. The trial judge dismissed the proceedings, and Chahal appealed.

On appeal, Chahal contended that (i) the trial judge had relied upon a number of incorrect factual assumptions to impugn the credibility of Mr Chaudhry; (ii) the trial judge had rejected the evidence of two of Chahal's corroborative witnesses which was relevant and probative, and (iii) the trial judge gave undue weight to the alleged corroborative evidence of 7-Eleven witnesses without considering the defects and anomalies in that evidence.

Held:

- The Court unanimously dismissed the appeal: [31]; [32]; [132]. The Court observed that there were three critical elements in the case. (i) There was no complaint that the trial judge misunderstood the law or erred in admitting or rejecting evidence. (ii) Unlike a jury verdict, it was appropriate for the Court to consider whether the result was right or wrong in determining whether some error may have led to a substantial miscarriage of justice. (iii) The demonstration of factual error in the reasoning of the judge in assessing the evidence will not in itself demonstrate a substantial miscarriage: [10].

- The factual assumptions did not improperly or erroneously contribute to the rejection of Mr Chaudhry's evidence: [87]. Although a mistake was identified in relation to his wife's financial circumstances, its correction would not have had any material consequence for assessing his credibility: [13].

- Although the primary judge failed adequately to explain why the evidence of Chahal's two corroborative witnesses would be given little or no weight, this did not constitute a basis for interfering with his findings: [111]. Nor was the manner in which the primary judge dealt with the evidence of 7-Eleven witnesses such as to warrant disturbing his conclusions.

Other Australian intermediate appellate decisions of interest

3. **Statutory interpretation: *Competition and Consumer Act 2010* (Cth) s 78**

***Reardon v Magistrates' Court of Victoria* [2018] VSCA 76**

Decision date: 28 March 2018

Weinberg JA; Beach JA; Kyrou JA

Mr Setka and Mr Reardon (**the appellants**) were officials of the Construction, Forestry, Mining and Energy Union (**CFMEU**). They were charged with blackmail under the *Crimes Act 1958* (Vic), s 87. This arose from a meeting held between the appellants and two managers of Boral Resources (Vic) Pty Ltd (**Boral**), in which the appellants were accused of making an *"unwarranted demand with menaces"* to the Boral employees to induce them to cause loss to Gorcon Pty Ltd (**Gorcon**). At that time, Boral was the exclusive supplier of concrete to Gorcon in the Melbourne metropolitan area.

In the Magistrates' Court, the appellants argued that the charges were rendered invalid by *the Competition and Consumer Act 2010* (Cth), s 78 (**the Act**). Section 78(d) provided that *"criminal proceedings [did] not lie against a person by reason only that"* they had induced or attempted to induce a person to contravene a provision of Part IV of the Act. Part IV prohibited, *inter alia*, conduct which amounted to a secondary boycott. The appellants contended that the charges were invalid because the conduct subject of the charges, if established, would render the appellants liable for a pecuniary penalty under s 76(1)(d) for contravention of s 78(d). The Magistrates' Court refused to make an order striking out the charges. Judicial review was unsuccessful. On appeal, the main grounds were that the primary judge had misconstrued s 78, and had denied the appellants procedural fairness by relying on documents which had not been tendered at hearing, without giving them opportunity to respond.

Held:

- The Court dismissed the appeal: [171]. An examination of the statutory text made it clear that immunity from criminal liability was confined to the subject-matter contained within the sub-sections of s 78. It did not extend to a separate common law or statutory offence, merely because the conduct falling within one of the paragraphs incorporated by reference in s 78 also constituted the commission of that offence: [112]. Nothing in the statutory context or purpose of s 78 warranted a different construction.

- Even if the appellants had been given opportunity to make submissions on the documents in question, this would not have affected the determination of the construction of s 78. Thus even if the judge had denied the appellants procedural fairness, it would have been futile to set aside his decision: [163].

4. **Workers' compensation; administrative law: procedural fairness**

***Comcare v Wuth* [2018] FCAFC 13**

Decision date: 28 March 2018

Siopis J; Flick J; Perry J

Ms Wuth, a public servant, was treated for chronic fatigue syndrome and reduced her working hours from five to four days per week. Following a voluntary transfer to a new department, she worked long hours, and by February 2007, was suffering from 'chronic daily headache'. She made a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the Act**), which was disallowed by Comcare. Upon review, the Administrative Appeals Tribunal (**AAT**) found that Comcare was liable to pay her compensation for the headache condition. Ms Wuth made claims under ss 24 and 27 of the Act with respect to permanent impairment and non-economic loss.

Comcare rejected these claims. On review, the AAT determined that Comcare was liable under s 24 of the Act, and consequently under s 27. Section 28 provided that when assessing the degree of permanent impairment for an award, the AAT should have recourse to Comcare's approved guide, which was in this case the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (**the Guides**). The AAT found that Chapter 18 of the Guides did not assign a percentage rating of impairment applicable to Ms Wuth's case, and determined that her degree of permanent impairment was 14%.

Comcare appealed on the basis that the AAT had misconstrued Chapter 18 of the Guides, and had denied Comcare procedural fairness. Ms Wuth cross-appealed on the basis that the AAT had erred in finding that her weekly earnings for the purpose of awarding compensation should be based on 29.4 hours (4 days) of work as contractually agreed, not on the hours she actually worked.

Held:

- The Court dismissed Comcare's appeal and allowed the cross-appeal: [86]. On the proper construction of Chapter 18, it was open for the Tribunal to find that Ms Wuth's pain-related impairment was unrateable under the Guides: [56]. Recourse to the Guides for the assessment of migraine headaches was intended to produce a principled qualitative, not quantitative, assessment, upon which a decision-maker could act, in accordance with s 28(4) of the Act, to assign a percentage based on a lay *"clinical judgment"*: [76]. Moreover, Comcare had not been denied procedural fairness: [79].

- The Tribunal had found that Ms Wuth had been working more than 36.75 hours per week in the two weeks prior to her injury. It was required to use that finding in calculating her normal weekly earnings under s 8(1). The Tribunal made an error of law in substituting a different contractual rate and disregarding the statutory language of actual hours worked: [17].

Asia Pacific decisions of interest

5. Succession; land ownership

Panuve v Panuve **[2018] TOCA 4; AC 10 of 2017**

Decision date: 26 March 2018

Handley J; Blanchard J; Hansen J

In 1989, Sionatapi Panuve built a house on his town allotment in Tonga, jointly borrowing money with his two sons (one of whom was the respondent) in order to do so. His first wife died before the house was completed, and he married the appellant in 1991. The appellant was born in Tonga and had married a Tongan man in the United States. She had become naturalised as a United States citizen in 1982, and had divorced her first husband in 1986. After releasing his other son from the home loan obligations, Sionatapi and the respondent shared responsibility for the necessary payments. In 2003, Sionatapi ran into financial difficulties and the respondent agreed to pay off the balance, in exchange for a lease of the town allotment. The application was approved in 2004 but the lease was not registered until 2015.

Sionatapi died on 23 July 2012. At that time, the appellant was still a citizen of the United States. Shortly after, she applied for and was re-admitted to Tongan nationality on 25 October 2012. She lodged a claim as widow for Sionatapi's town and tax allotments under the *Land Act* (Tonga) (**the Act**), and these were registered to her name. The primary judge found that the appellant was not entitled to the allotments as she was not a Tongan national at the date of her husband's death. He rejected the appellant's argument that she could inherit because she was a Tongan citizen at the time of making the claim.

Held:

- The Court dismissed the appeal: [31]. Despite the careful arguments of the appellant's counsel, the primary judge was right to find that the Act, read as a whole, intended and provided that only Tongan subjects might hold an interest in land: [18]. This was not explicit in the case of widows only because the scheme of the Act could sensibly admit no other interpretation: [24].

- While having the potential to cause injustice in individual cases, this construction was consistent with the unique system of land tenure in Tonga, whereby *"all land is given by grant and not sold for money and life interests in land are reserved for Tongan people"*: [25]. It would also be anomalous if a widow such as the appellant could retain the right to hold land, while a Tongan male who ceased to be a Tongan national would lose that right: [26].

- Consistent with previous authority, the point at which the rights of inheritance were to be determined was at the date of death, and not when the claim was lodged: [30].

6. **Real property; charitable associations**

Kalaisi v Tu'l'onetoa **[2018] TOCA 5; AC 12 of 2017**

Decision date: 26 March 2018

Handley J; Blanchard J; Hansen J

Siasi Tokaikolo 'Ia Kalaisi, also known as Tokaikolo Christian Church International (**the appellant**), was a Church which had been founded in 1978, and incorporated and registered in 2004. The fourth respondent was an unincorporated church fellowship, Mo'ui Fo'ou 'Ia Kalasi Fellowship. The first three respondents were representatives of that church.

Church members obtained permission from the Church to have their own parish. They obtained funds through the San Francisco branch in order to purchase land which was being surrendered with the intent of making it available to lease to the Church. The lease application mistakenly named the Church's former unincorporated entity, and despite a correction, officials registered the erroneous details. The first respondent, who was then the appellant's Treasurer, made an application on behalf of the Church to build a church and hall on the land. Fundraising took place and a loan was obtained to finance the construction, secured against the registered lease and the personal guarantees of members of the Church. This was repaid in full. The new church was consecrated in 2009. In 2013, the first three respondents broke away from the appellant and formed the new fellowship. They subsequently occupied the church buildings and excluded access to the remaining adherents of the appellant. The appellant sought an order declaring its ownership of the land and buildings and an order for immediate possession. The primary judge dismissed the claim.

Held:

- The Court allowed the appeal. The title to the leasehold interest in the land on which the buildings were constructed must have been intended to be held by the Church, notwithstanding the mistake in the original lease application. The fourth respondent had not then been formed, and in any event, could not be a lessee as an unincorporated body: [31]-[32].

- The donations for the buildings were clearly solicited on behalf of the Church for the particular purpose of constructing the buildings. The Court noted that there was no proof that the various parishes of the Church in Tonga or overseas were separately incorporated; by analogy to *Hall v Job* (1952) 86 CLR 639, a gift to a parish was a gift to the Church: [33]-[35].

- The Court rejected an argument that the Church was no longer the body to which the funds and labour were directed because it no longer adhered to the original tenets on which it was founded, such that the fourth respondent was entitled to the properties in its place: [40]. The donors would have been aware of the Church's current practice. There was no basis for the respondent's assertions that it was they who represented the donee: [45].

Other international decisions of interest

7. **Labour law; statutory interpretation**

***Encino Motorcars, LLC v Navarro*, 16-1362**

Decision date: 2 April 2018

The respondents were current and former service advisors for Encino Motorcars, LLC (**Encino**), a Mercedes-Benz dealership. Service advisors interacted with customers, and *inter alia*, suggested repair and maintenance services, sold accessories and replacement parts, recorded service orders and followed up with customers as those services were performed. The respondents contended that Encino had violated the *Fair Labor Standards Act* (**FLSA**) by failing to pay them overtime. Under the Act, there is an exemption from the overtime pay requirements for "*any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements"*.

The Court of Appeals of the Ninth Circuit ultimately found in favour of the respondents. The issue on appeal was whether the service advisors fell within the meaning of *"salesmen… primarily engaged in selling or servicing automobiles"* under the Act.

Held:

- The majority of the Court reversed the decision of the Ninth Circuit Court. A service advisor was obviously a *"salesman"*. The term salesman was not defined in the statute, but by its ordinary meaning, it referred to someone who sold goods or services. This was precisely the function engaged in by service officers.

- Moreover, service advisors were *"primarily engaged in… servicing automobiles"*. Although they did not spend the majority of their time physically repairing automobiles, the statutory language was not so limiting as to exclude those who did not physically repair automobiles but were integrally involved in the servicing process. The use of *"or"* to join *"selling"* and *"servicing"* should be read distributively such that the exemption covered salesmen engaging in either activity. This construction was also supported by the reference to *"partsman"* in the provision, who, like service advisors, neither 'sold' nor 'serviced' automobiles in the conventional sense.

- In dissent, Ginsburg J (Breyer J, Sotomayor J and Kagan J joining) held that because service advisors neither *"sold"* nor *"serviced"* automobiles under the ordinary meaning of those terms, they should remain outside the exemption and within the statutory coverage. The rationale of the section was not engaged, because unlike salesmen, partsmen and mechanics, service advisors worked ordinary, fixed hours on-site.

8. **Constitutional law: fourth amendment, qualified immunity**

***Kisela v Hughes*, 17-467**

Decision date: 2 April 2018

Mr Kisela, a police officer, shot Ms Hughes multiple times, causing serious injuries. Mr Kisela and two other officers had arrived on the scene after receiving reports that a woman was engaging in erratic behaviour with a knife. When they arrived, a woman, later identified as Ms Hughes's roommate (**Ms Chadwick**) was standing in the driveway of a nearby house. The officers were separated from the woman by a chain-link fence with a locked gate.

Ms Hughes emerged from the house carrying a large knife, and stopped a couple of metres from Ms Chadwick. The officers drew their guns, and Ms Hughes was warned at least twice to drop the knife. She appeared calm, but gave no indication that she had heard the officers. She did not drop the knife. Mr Kisela shot Ms Hughes through the fence. It emerged subsequently that Ms Hughes had a history of mental illness, and Ms Chadwick gave evidence that she had never felt threatened by Ms Hughes.

Ms Hughes commenced a civil action against Mr Kisela on the basis that he had used excessive force in violation of the Fourth Amendment of the United States Constitution. The Court of Appeals for the Ninth Circuit found in favour of Ms Hughes and Mr Kisela filed a petition for certiorari in the Supreme Court.

Held:

- The majority of the Court overturned the ruling. The Court need not, and did not, decide whether Mr Kisela had violated the Fourth Amendment when he used deadly force against Ms Hughes. Assuming such a violation had occurred, which was not at all evident, he was entitled to qualified immunity.

- This doctrine applies when an official's conduct does not violate clearly established constitutional rights of which a reasonable person would have known, the focus being on whether they would have had *"fair notice"* that they had acted unconstitutionally. An officer *"cannot… have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official … would have understood that he was violating it"*.

- It would not have been obvious to Mr Kisela that he was violating the Constitution, in circumstances where he was separated from Ms Hughes by a fence, she had moved close to Ms Chadwick, and where she failed to acknowledge at least two commands to drop the knife.

- In dissent, Sotomayor J (Ginsburg J agreeing) held that Mr Kisela's use of force was unreasonable and unconstitutional. Moreover, he had had fair notice that he was acting unlawfully, in circumstances where Ms Hughes posed no objectively reasonable threat to those around her, and had not been given warning of the imminent use of a significant degree of force.