FAIR WORK COMMISSION

Church v Eastern Health

[2014] FWCFB 810

Ross J, President, Hatcher VP and Wilson C

4 February 2014

Costs — Application for costs in relation to appeal application — Whether application to appeal made "vexatiously and without reasonable cause" — Whether application for improper collateral purpose of delaying first instance hearing — Appeal application had limited prospects of success but not without reasonable cause — Appeal application made vexatiously for improper collateral purpose — Discretion exercised and costs ordered — Fair Work Act 2009 (Cth), ss 596, 611(2)(a).

Words and Phrases — "Vexatiously and without reasonable cause" — Fair Work Act 2009 (Cth), s 611(2)(a).

The respondent, Eastern Health, sought an order for costs in relation to an appeal filed by the appellant on the basis that the appeal was made vexatiously and without reasonable cause. The appeal had been withdrawn an hour before its hearing was scheduled to commence. The appeal was against a decision granting the respondent's application to be represented by a lawyer at the hearing of an application for an unfair dismissal remedy.

Held (making a costs order) (by the Commission): (1) The question of whether an application was made "vexatiously" looks to the motive of the applicant in making the application and may apply where these is a reasonable basis for making the application. An application will be made vexatiously where the predominant purpose is to harass or embarrass the other party, or to gain a collateral advantage. An applicant's motive can be inferred from, among other things, the surrounding circumstances, the applicant's conduct and the merits of the application itself.

Nilsen v Loyal Orange Trust (1997) 76 IR 180; *Hamilton v Oades* (1989) 166 CLR 486, considered.

(2) The test as to whether proceedings were brought without reasonable cause is not whether the application might have been successful, but whether the application should not have been made. In the context of an appeal the question becomes whether, having regard to the arguments available to the appellant at the time of instituting the appeal, there was no substantial prospect of success in that the appeal: was so obviously untenable that it could not possibly succeed; was manifestly groundless; or disclosed a case which the court/tribunal is satisfied could not succeed.

Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257; *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254, considered.

Heidt v Chrysler Australia Ltd (1976) 26 FLR 257 at 272-273; *Geneff v Peterson* (1986) 19 IR 40 at 87-88; *Hatchett v Bowater Tutt Industries Pty Ltd (No 2)* (1991) 28 FCR 324 at 327; 39 IR 31 at 34; *Re Ross; Ex parte Crozier* (2001) 111 IR 282 at [12]; *Re Australian Education Union (NT) (No 2)* [2011] FCA 728 at [30]; *Wright v Australian Customs Service* (2002) 120 IR 346, referred to.

(3) The appeal application can be fairly characterised as having limited prospects of success. However it does not follow that the application was made without reasonable cause.

(4) The appeal application was made vexatiously. It was made for the improper collateral purpose of delaying the first instance hearing. The discretion to order costs was accordingly enlivened.

Obiter: s 611 of the *Fair Work Act 2009* (Cth) does not empower the Fair Work Commission (the Commission) to make a costs order against a representative. In this case the fault was the fault of a representative, and the Commission would expect the Health Services Union Victoria No 1 Branch to pay the costs on behalf of the appellant.

Cases Cited

Attorney-General v Wentworth (1988) 14 NSWLR 481.

Australian Education Union (NT) (No 2), Re [2011] FCA 728.

Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1.

Azzopardi v Serco Sodexo Defence Services Pty Ltd [2013] FWC 3405.

Church v Eastern Health [2013] FWC 9970.

Church v Eastern Health [2013] FWC 9443.

Construction, Forestry, Mining and Energy Union v Clarke (2008) 170 FCR 574; 176 IR 245.

G & S Fortunato Group Pty Ltd v Stranieri (2013) 233 IR 304.

Geneff v Peterson (1986) 19 IR 40.

Hamilton v Oades (1989) 166 CLR 486.

Hatchett v Bowater Tutt Industries Pty Ltd (No 2) (1991) 28 FCR 324; 39 IR 31.

Heidt v Chrysler Australia Ltd (1976) 26 FLR 257.

Imogen Pty Ltd v Sangwin (1996) 70 IR 254.

J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2) (1993) 46 IR 301.

Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257.

Nilsen v Loyal Orange Trust (1997) 76 IR 180.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia (1978) 140 CLR 470.

Ross, Re; Ex parte Crozier (2001) 111 IR 282.

Saxena v PPF Asset Management Ltd [2011] FCA 395.

Thompson v Hodder (1989) 21 FCR 467; 29 IR 339.

Warrell v Walton (2013) 233 IR 335.

Wright v Australian Customs Service (2002) 120 IR 346.

Application for costs on appeal

Written submission (no appearances).

Cur adv vult

Fair Work Commission

Introduction

1 Eastern Health seeks an order for costs under s 611(2)(a) of the *Fair Work Act 2009* (Cth) (the FW Act) for the payment of its costs incurred in relation to an appeal filed by Elizabeth Church (the Appellant) on 2 December 2013. The appeal was made against a decision of Commissioner Roe, granting permission for Eastern Health to be represented by a lawyer at the hearing of Ms Church's unfair dismissal application. At all relevant times Ms Church was represented by Nathan Murphy, an Industrial Officer with the Health Services Union Victoria No 1 Branch (the HSU). The appeal was withdrawn about an hour before its hearing was scheduled to commence. Eastern Health contends that the appeal was made vexatiously and without reasonable cause.

Background

2 It is necessary that we set out, in some detail, the background to this application.

3 Ms Church was dismissed from her employment with Eastern Health on 5 April 2013 and filed an application for unfair dismissal remedy under s 394 of the FW Act on 13 May 2013. Conciliation was unsuccessful and the matter was listed for a two day arbitration hearing, commencing on 2 December 2013.

4 On 15 November 2013 Eastern Health filed a submission in support of its application to be represented at the hearing. The Appellant objected to that application in the following terms:

> The Applicant submits that the criteria justifying legal representation for the Respondent has not been met as set out in 596(2). The Applicant also notes recent decisions of *g & s Fortunato Group Pty Ltd v J. Stranieri* [2013] FWCFB 4098 (26 June 2013), *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 (29 May 2013) in supporting its objection.

5 On 25 November 2013 Commissioner Roe advised both parties that he had decided to grant Eastern Health's application to be represented by a lawyer. The Commissioner's decision was subsequently published (see *Church v Eastern Health* [2013] FWC 9443).

6 The first day of the two day arbitration was scheduled to commence at 10:00 am on 2 December 2013. At 9:24 am that morning the Appellant lodged a Notice of Appeal pursuant to s 604 of the FW Act, in respect of the Commissioner's decision to grant permission for the respondent to be represented by a lawyer in the arbitration. In the covering email to the Commissioner's chambers, Mr Murphy stated:

> The Applicant has filed a notice of Appeal in relation to the matter of representation. The Applicant has requested a stay of decision, and therefore expects the matter listed for Dec 2 and 3 to be adjourned.

7 The hearing before Commissioner Roe was subsequently adjourned, when neither the applicant nor Mr Murphy appeared and could not be contacted.

8 The Notice of Appeal set out the following grounds and the basis on which it was submitted that permission to appeal should be granted:

2. Grounds

(i) Commissioner Roe has allowed representation due to the "complexity of the matter".

(ii) The applicant submits that the 596(2)(c) carries more weight than 596(2)(a) and therefore representation should not be granted;

(iii) The Applicant submits that the complexity involved goes to jurisdiction the Respondent should only be represented in relation to jurisdiction only.

3. Public interest in permitting the appeal

It is in the public interest to define which carries greater weight 596(a), (b), or (c).

9 On 2 December 2013, a Notice of Listing was sent to the parties, listing the appeal for hearing before a Full Bench at 10:00 am on 9 December 2013. A further Notice of Listing was sent to the parties at 11:49 am on 5 December 2013, advising that the matter was listed for a Telephone Mention the following morning, Friday 6 December at 9:00 am. Representatives for both the Appellant and the Respondent were contacted by phone to confirm the listings, appearances and telephone contact numbers. The Appellant's representative could not be contacted and so messages were left on his mobile phone and with the HSU office staff.

10 At 9:02 am on 6 December 2013, following a number of unsuccessful attempts to contact Mr Murphy, the mention commenced in the absence of the Appellant or her representative. During the mention it was confirmed that the Full Bench did not require the Appellant to file an appeal book, but would require both parties to prepare an outline of submissions, which were to be handed up at the commencement of the hearing on 9 December 2013. An expedited copy of the transcript was ordered and subsequently provided to Mr Murphy at 11:25 am on Friday 6 December 2013.

11 The Appellant seeks to excuse her non-attendance at the mention on 6 December 2013 on the basis that Mr Murphy was interstate, on leave, on 5 and 6 December 2013. Such an explanation ignores the fact that the HSU was provided with a Notice of Listing in respect of the listing and telephone contact was made with the Union offices. No explanation is provided for the Union's failure to send an alternate representative or to seek an adjournment of the mention to a later time.

12 The hearing of the appeal was scheduled to commence at 10:00 am on Monday 9 December 2013. At 8:42 am that day the Appellant filed a Notice of Discontinuance, wholly discontinuing the appeal. The Respondent attended the Commission but was advised that the hearing was cancelled as the matter had been discontinued.

13 Ms Church's unfair dismissal proceeding was then listed for hearing before Commissioner Roe at 10:00 am on 16 December 2013. At 8.01 am on 16 December 2013 Mr Murphy advised the Commissioner that Ms Church was discontinuing her unfair dismissal application and a Notice of Discontinuance was filed at 9:11 am.

14 In a decision issued on 18 December 2013 Commissioner Roe made an order under s 400A of the FW Act that Ms Church pay the costs of the attendance of the representatives of Eastern Health at the proceedings on 2 December 2013 and incidental costs, including those associated with the making of the costs application. The essence of the Commissioner's decision is set out at [18]-[21]:

[18] The matters complained of are in connection with the conduct or continuation of the matter. I must be satisfied that the HSU as the representative of the Applicant has caused costs to be incurred because of an unreasonable act or omission.

[19] I am satisfied that there was no basis for the Applicant not to attend the hearing on 2 December 2013. The Applicant was represented by an experienced union official, Mr Murphy, who was well aware of the directions to attend the hearing, well aware that no stay order had been or could have been issued and well aware that the lack of notice of the appeal meant that the Commission and the Respondent would almost certainly have been unaware of the appeal and would have been in attendance at the hearing. I am also satisfied that Mr Murphy for the Applicant was aware that the Commission had made a number of attempts to contact him to advise him that the matter was proceeding and that he failed to respond prior to 16 December 2013 to the messages left for him. I am satisfied that these matters were unreasonable actions and acts of omission and constituted an unreasonable failure to attend proceedings and constituted an unreasonable failure to comply with directions of the Commission.

[20] I am also satisfied in the unusual circumstances of this matter that the failure to lodge the appeal until 36 minutes prior to the scheduled hearing when combined with the failure to make any other attempts to provide advice or warning by telephone constitutes unprofessional and unreasonable behaviour by Mr Murphy on behalf of the Applicant. It should be noted that the procedural decision to grant representation was issued a week prior to the scheduled hearing in order to assist the parties. If Mr Murphy on behalf of the Applicant wished to appeal that procedural decision he had plenty of time to do so long before the proceedings and had he done so the costs for 2 December 2013 would not have been incurred as a decision in respect to his application for a stay order would almost certainly have been made prior to the scheduled hearing.

[21] I am satisfied that the costs of the attendance by Eastern Health and its representatives on 2 December 2013 were incurred unnecessarily and because of the unreasonable behaviour. The matter was relisted for hearing on 16 December 2013 as a consequence.[1]

15 While the costs order was made against Ms Church the Commissioner made it clear that it was Mr Murphy's conduct which was in issue. At [24] of his decision the Commissioner said:

> The unreasonable conduct was unreasonable conduct by Mr Murphy as the representative of the Applicant so I hope that the HSU will take responsibility.

16 We now turn to the application before us. At the outset it is important to appreciate that the Commission, as a statutory tribunal, has no inherent power to make costs orders. Its powers to make such orders must be derived from the FW Act. Depending on the circumstances the Commission can order costs under ss 376, 400A, 401, 611 and 780 of the FW Act. The scope of these provisions and the circumstances in which they operate vary.

17 Section 376 deals with costs orders against lawyers and paid agents in relation to general protections applications made under ss 365 or 372. Section 780 is in similar terms and applies to applications under s 773 for the Commission to deal with a dispute alleging that the employer has terminated an employees' employment in contravention of s 772.

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1 *Church v Eastern Health* [2013] FWC 9970.

18 Section 400A provides that the Commission may make a costs order against a party to a matter arising under Pt 3-2, if satisfied that the first party caused those costs to be incurred because of their unreasonable act or omission in connection with the conduct or continuation of the matter. Part 3-2 of the FW Act deals with "Unfair Dismissal". Section 401 deals with costs orders against lawyers and paid agents in relation to applications for an unfair dismissal remedy under s 394.

19 The costs application before us arises from an appeal under s 604 of the FW Act. No party contended that ss 376, 400A, 401 or 780 had any application in the present circumstances and, on their face, they do not. The costs application is brought under s 611(2)(a).

20 Section 611 of the FW Act provides as follows:

> 611 Costs
>
> (1) A person must bear the person's own costs in relation to a matter before the FWC.
>
> (2) However, the FWC may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to the FWC if:
>
> (a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
>
> (b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> Note: The FWC can also order costs under sections 376, 400A, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).

21 Ascertaining the meaning of s 611 necessarily begins with the ordinary and grammatical meaning of the words used.[2] These words must be read in context by reference to the language of the Act as a whole and to the legislative purpose.[3]

22 There are some similarities between s 611 and s 570 of the FW Act. Section 570 deals with the circumstances in which a party to proceedings in a court in relation to a matter arising under the FW Act may be ordered to pay costs incurred by another party to the proceedings. Section 570 states:

> 570 Costs only if proceedings instituted vexatiously etc.
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> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
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> Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

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2 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26].

3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

> (2) The party may be ordered to pay the costs only if:
>
> (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
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> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> (c) the court is satisfied of both of the following:
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> (i) the party unreasonably refused to participate in a matter before the FWC;
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> (ii) the matter arose from the same facts as the proceedings.

23 Given the similarities between ss 611 and 570, in particular the common use of the expression "vexatiously or without reasonable cause", judgements which have construed s 570 and its legislative antecedents are relevant to our consideration of s 611.

24 In *Heidt v Chrysler Australia Ltd*[4] Northrop J said of s 197A of the *Conciliation and Arbitration Act 1904* (Cth), a predecessor provision to s 570 of the FW Act:

> The policy of s 197A of the Act is clear. It is designed to free parties from the risk of having to pay the costs of an opposing party. At the same time the section provides a protection to parties, defending proceedings which have been instituted vexatiously or without reasonable cause. This protection is in the form of conferring a power in the court to order costs against a party who, in substance, institutes proceedings which in other jurisdictions may constitute an abuse of the process of a court.

25 The application of these observations to the construction of s 611 requires some qualification. Section 570 deals with the ordering of costs in court proceedings in relation to matters arising under the FW Act. In court proceedings the usual practice is that an order for costs follows the outcome of the substantive proceedings. As we have mentioned the Commission context is different. The Commission's power to order costs only arises in the context of ss 376, 400A, 401, 611 and 780 of the FW Act. There is no general practice of cost following the event. Despite these differences the observations of Northrop J in *Heidt* are apposite to s 611.

26 Section 611 sets out a general rule — that a person must bear their own costs in relation to a matter before the Commission (s 611(1)) — and then provides an exception to that general rule in certain limited circumstances. The Explanatory Memorandum confirms this interpretation of the section, it is in the following terms:

> 2353. Subclause 611(1) provides that generally a person must bear their own costs in relation to a matter before FWA.
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> 2354. However, subclause 611(2) provides an exception to this general rule in certain limited circumstances. FWA may order a person to bear some or all of the costs of another person where FWA is satisfied that the person made an application vexatiously or without reasonable cause or the application or response to an application had no reasonable prospects of success.
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> 2355. A note following subclause (2) alerts the reader that FWA also has the power to order costs against lawyers and paid agents under clauses 376, 401 and 780 which deal with termination and unfair dismissal matters.

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4 *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257 at 272. Cited with approval in *Re Ross; Ex parte Crozier* (2001) 111 IR 282 at [10] per Gray, Branson and Kenny JJ and applied in the context of s 347 of the *Workplace Relations Act 1996* (Cth).

2356. Subclause 611(3) provides that a person to whom a costs order applies must not contravene a term of the order.

27 In the context of s 570 and its legislative antecedents courts have observed that an applicant who has the benefit of the protection of a provision such as s 570(1), (ie the general rule that parties bear their own costs), will only rarely be ordered to pay costs[5] and that the power should be exercised with caution and only in a clear case.[6] In our view a similarly cautious approach is to be taken to the exercise of the Commissions powers in s 611 of the FW Act.

28 We now turn to the exceptions to the general rule expressed in s 611(1) and the meaning of the expression "vexatiously or without reasonable cause".

29 The question of whether an application was made "vexatiously" looks to the motive of the applicant in making the application. It is an alternative ground to the ground that the application was made "without reasonable cause" and may apply where there is a reasonable basis for making the application. In *Nilsen v Loyal Orange Trust*[7] North J observed that this context requires the concept of vexatiousness to be narrowly construed. His Honour went on to state that an application will be made vexatiously "where the predominant purpose … is to harass or embarrass the other party, or to gain a collateral advantage".[8] Deane and Gaudron JJ made a similar observation in *Hamilton v Oades*[9] in which they said:

> The terms "oppressive" and "vexatious" are often used to signify those considerations which justify the exercise of the power to control proceedings to prevent injustice, those terms respectively conveying, in appropriate context, the meaning that the proceedings are "seriously or unfairly burdensome, prejudicial or damaging" and "productive of serious and unjustified trouble and harassment".

30 We now turn to the expression "without reasonable cause". A party cannot be said to have made an application "without reasonable cause", within the meaning of s 611(2)(a), simply because his or her argument proves unsuccessful.[10] The test is not whether the application might have been successful, but whether the application should not have been made.[11] In *Kanan v Australian Postal and Telecommunications Union*,[12] Wilcox J put it this way:

> It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being

5 *Thompson v Hodder* (1989) 21 FCR 467 at 470; 29 IR 339 at 341; *Hatchett v Bowater Tutt Industries Pty Ltd (No 2)* (1991) 28 FCR 324 at 325; 39 IR 31 at 32; *Re Ross; Ex parte Crozier* (2001) 111 IR 282 at [11].

6 *Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574; 176 IR 245 at [29]; *Saxena v PPF Asset Management Ltd* [2011] FCA 395 at [4].

7 *Nilsen v Loyal Orange Trust* (1997) 76 IR 180 at 181.

8 Also see *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491.

9 *Hamilton v Oades* (1989) 166 CLR 486 at 502.

10 *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 473; *Nilsen v Loyal Orange Trust* (1997) 76 IR 180 at 181 per North J.

11 *J-Corp Pty Ltd v Australian Builders Labourers' Federated Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301 per French J.

12 *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257.

> "without reasonable cause". But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

31 In the context of an appeal the question becomes whether, having regard to the arguments available to the appellant at the time of instituting the appeal, there was no substantial prospect of success. As Wilcox CJ (with whom Madgwick J agreed) observed in *Imogen Pty Ltd v Sangwin*:[13]

> The prospect must be evaluated in the light of the facts of the case, the judgment appealed from and the points taken in the notice of appeal. If having regard to those matters, there was not insubstantial prospect of the appeal achieving some success, albeit not necessarily complete success, then it would seem to me it cannot be fairly described as having been instituted "without reasonable cause". This is so even if, in the result, the appeal proved unsuccessful.[14]

32 In the same matter Ryan J said:

> The existence of "reasonable cause" within the meaning of s 347 falls to be determined at the time when the relevant proceedings were instituted. The fact that the party instituting the proceedings later discontinues them is therefore not a matter to be taken directly into account in the application of the section. However, an appeal stands in somewhat different case from proceedings at first instance in that discontinuance may bear indirectly on the discretion conferred by s 347 by tending to confirm an impression derived from the grounds of appeal and the reasons for judgment below that the prospects of success on the appeal were slight.
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> Not without significance to an assessment of the reasonableness of the institution of an appeal are the amount at issue and the nature of the points raised by the notice of appeal. Where, as here, the appeal is essentially against findings of fact made by the trial judge after a two day hearing resulting in a judgment for $16,900 and raises no important or distinctive point of law or principle, the Court may more readily conclude that it was not reasonable in the circumstances to have instituted it. On a fairly fine balance of the relevant considerations and not without hesitation, I have been led to reach that conclusion in this case and agree with the Chief Justice and the orders which he has proposed.[15]

33 In construing s 570 and its legislative antecedents courts have observed that the test imposed by the expression "without reasonable cause" is similar to that adopted for summary judgement, that is "so obviously untenable that it cannot possibly succeed", "manifestly groundless" or "discloses a case which the Court is satisfied cannot succeed".[16]

34 We now turn to the application before us.

35 Eastern Health submits that the appeal application was made both *vexatiously* and *without reasonable cause*. It is convenient to first deal with the second limb of the cost application.

36 The appeal is directed at the Commissioner's exercise of discretion under

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13 *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254.

14 *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254 at 257.

15 *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254 at 261-262.

16 *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257 at 272-273; *Geneff v Peterson* (1986) 19 IR 40 at 87-88; *Hatchett v Bowater Tutt Industries Pty Ltd (No 2)* (1991) 28 FCR 324 at 327; 39 IR 31 at 34; *Re Ross; Ex parte Crozier* (2001) 111 IR 282 at [12]; *Re Australian Education Union (NT) (No 2)* [2011] FCA 728 at [30]. Also see *Wright v Australian Customs Service* (2002) 120 IR 346 per Giudice J, Williams SDP and Foggo C.

s 596. The grounds of appeal contend that "s 596(2)(c) carries more weight than s 596(2)(a) and therefore representation should not be granted". It is difficult to discern the precise point being advanced and it appears to proceed on the erroneous assumption that the factors set out in paras 596(2)(a) to (c) are competing considerations.

37 Subsection 596(2) of the FW Act provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter *only if* one or more of the requirements in paras 596(2)(a), (b) or (c) are met. Even if one or more of these requirements is satisfied that does not dictate that the discretion should automatically be exercised in favour of granting permission to appear.[17] Subsection 596(2) states:

> (2) FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before FWC only if:
>
> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
>
> (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
>
> (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

38 The matters in s 596(2)(a), (b) and (c) set out the three, separate, bases upon which the discretion to grant permission for a person to be represented by a lawyer or paid agent is enlivened. So much is clear from the use of the disjunctive "or" in s 596(2). It is sufficient to enliven the discretion that the Commission is satisfied as to any one of the matters in s 596(2)(a), (b) and (c). There is no requirement to weigh these matters one against the other. On that basis the proposition that s 596(c) "carries more weight" than s 596(a), seems unlikely to be successful. However, as we have not had the benefit of argument on the point we do not wish to express a concluded view.

39 The second ground of appeal is that permission to be represented should have been confined to those aspects of the proceeding that related to jurisdictional issues, on the basis that only those issues had the requisite level of complexity. The Commission's power under s 596 to confine the grant of permission to be represented in the manner contended by the Appellant has not been the subject of consideration by a Full Bench and we are not persuaded that it can be characterised as being made "without reasonable cause". However we note that the failure of the Appellant to advance this point at first instance would tell against the grant of permission to appeal in relation to this ground of appeal.

40 While the appeal application can be fairly characterised as having limited prospects of success we are not persuaded that the appeal application was made without reasonable cause. It follows that this limb of the costs application fails. We now turn to the question of whether the appeal application was made vexatiously.

41 As we have mentioned, the question of whether an application was made vexatiously turns on the motive of the applicant in making the application. Motive can be inferred from, among other things, the surrounding circumstances, the applicants conduct and the merits of the application itself.

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17 *Warrell v Walton* (2013) 233 IR 335 at [24] per Flick J.

42 We have earlier set out the background to this application (see particularly [3]-[12]). On the facts of this case we have concluded that the appeal application was made vexatiously. It was made for the improper collateral purpose of delaying the first instance hearing. We draw such an inference from the fact that the appeal application was filed shortly before the first instance unfair dismissal arbitration was scheduled to commence — necessitating the adjournment of that proceeding; the Appellant's failure to attend the telephone mention on 6 December 2013; and the filing of the Form F50 Notice of Discontinuance at 8.42 am on the morning of the appeal hearing. We note that the Appellant could, and should, have attended the notified first instance hearing even though it had lodged an Appeal against the Commissioner's decision in relation to representation. We have also had regard to the fact that the appeal application itself had limited prospects of success.

43 Having concluded that the appeal application was made vexatiously our discretion to order costs against the Appellant is enlivened. We have decided to exercise the discretion and to make an order for costs. The terms of s 611 only permit the making of costs orders against a party, not their representative. In the circumstances of this case the fault clearly lies with the Appellant's representative and accordingly we would expect the HSU to meet its obligations to Ms Church and to pay the costs on her behalf.

44 We order that the Appellant pay Eastern Health's costs on a party-party basis, in respect of the appeal application. The parties are to confer as to the terms of the order and file a draft order within 7 days. Vice President Hatcher will settle the terms of our order.

The appellant is to pay the respondent's costs on a party-party basis, in respect of the appeal application

ALEX LAZAREVICH