FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sharn Stanley

v

QBE Management Services Pty Limited T/A QBE
(U2012/5472)

COMMISSIONER JONES MELBOURNE, 18 DECEMBER 2012

Costs Order under s.611 of the Act, whether costs should be awarded on an indemnity basis

Background

[1] This decision follows an earlier decision determining the Respondent's application pursuant to s.611 of the *Fair Work Act 2009* (**the Act**), for an order requiring the Applicant to pay its costs on an indemnity basis. I determined that I should exercise my discretion under s.611(2)(b) of the Act and award costs against the Applicant from the date of her application for relief from unfair dismissal (**costs decision**).[1] The determination of the quantum of costs and whether costs should be awarded on an indemnity basis was, however, deferred for further hearing.[2]

[2] Subsequently, I decided that the further hearing would be confined to the determination of whether costs should be awarded on an indemnity basis, with a bill of costs to be filed and served by QBE consequent on the decision of the Tribunal, for an ultimate determination regarding the actual costs to be ordered.

Costs of Costs Hearings

[3] At the hearing, QBE indicated that it sought the costs of the hearings conducted in relation to its costs applications, as well as costs incurred by it from the date the Applicant made her application to the date the Applicant discontinued her application on 21 June 2012.

[4] S.611(2) of the Act relevantly provides:

> *(2) However, FWA may order a person (the **first person**) to bear some or all of the costs of another person in relation to an application to FWA if:*
>
> > *(a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or*
> >
> > *(b) FWA 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: FWA can also order costs under sections 376, 401 and 780.*

[5] It is to be noted that s.611 of the Act empowers Fair Work Australia (**FWA**) to order costs "*in relation to an application*". In this matter the application made under s.394 for unfair dismissal remedy was discontinued on 21 June 2012. On a plain reading of this section, the power to award costs is one confined to costs incurred whilst the application was extant.

[6] Relevantly, s.402 of the Act, which deals with applications for costs orders, provides that applications for '*costs under s.611 in relation to a matter arising under*' Part 3.2 must be made within 14 days of either FWA determining the matter or the matter is discontinued.

[7] In context, s.611 of the Act should properly be construed as a power to award costs in relation to an application being a matter arising under Part 3.2. In this case the matter was an application under s.394 for an order under Division 4 of Part 3.2 granting a remedy.

[8] In *Dean v Sybecca Pty Ltd T/A Sleepy Lagoon Hotel*[3] (**Dean**), Richards SDP observed, regarding a costs application under s.401 of the Act in relation to earlier costs application hearing:

> *[19] It appears to me, albeit without the benefit of full argument though, that as a matter of construction a costs application made under s.401 of the Act and which accords with the requirements of s.402 of the Act may only be made against a matter arising under Part 3-2. That is, the application is a singular opportunity (albeit it for both parties) to seek costs in response to a matter arising under Part 3-2 of the Act.*
>
> *[20] Section 401 of the Act, therefore, does not appear to me to afford an opportunity for parties to engage in a continuous, circular process of making cost applications against prior costs applications (as if the prior cost application itself had been re-characterised as a matter arising under Part 3-2 in relation to which a further costs application may apply, which it is not in its own right).*

[9] The Respondent submits that s.611 of the Act is not so confined and should be construed broadly to include the award of costs incurred in the conduct of the hearing to determine their costs application.

[10] S.403 of the Act provides:

> ***403 Schedule of costs***
>
> *(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:*
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> *(a) under section 611 in relation to a matter arising under this Part; or*
>
> *(b) under section 401;*
>
> *including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.*

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 401, FWA:

(a) is not limited to the items of expenditure appearing in the schedule; but

(b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

[11] The Respondent refers, in support of its submissions, to item 1111 of Schedule 3.1 to Regulation 3.08 of the *Fair Work Regulations 2009* (**Regulations**), which specifies amounts to be charged for an attendance on taxation of costs for a solicitor or clerk. The Respondent submits that the inclusion of the schedule of costs associated with taxation of costs means that Parliament intended that s.611 ought to be construed to extend to costs for the fact of costs proceedings.[4]

[12] I am not satisfied that the inclusion in a schedule to the Regulation of an amount for attendance on taxation of costs should operate to override the meaning of s.611 construed in context.

[13] Consequently, I find that s.611 of the Act does not permit the award of costs in relation to a costs hearing(s) conducted to determine an application made under s.402 of the Act for a costs order pursuant to s.611 in relation to an application being a matter arising under Part 3-2.

[14] I indicate here that, even if I had found in favour of the Respondent's submissions, I would have refrained to exercise my discretion primarily for the reasons averted to by Richards SDP in *Dean*.[5]

Power to Award Indemnity Costs

[15] Indemnity costs were awarded by a Full Bench in *Goffett v Recruitment National Pty Ltd*[6] ***(Goffett)*** under the *Workplace Relations Act 1996* (**the WR Act**). S.658(3) of the WR Act provided that costs are to be awarded where the Commission was satisfied a party had caused costs to be incurred because of the first party's unreasonable act or omission in connection with the conduct of the proceeding.

[16] The Full Bench found that the Respondent's conduct amounted to an unreasonable act or omission and that satisfaction as to this ground for the award of costs, by definition, involved "*some relevant delinquency*".[7] Consequently the test having regard to the relevant authorities for the award of costs on an indemnity basis was satisfied.

[17] Under the Act, the award of costs on the ground of unreasonable act or omission is specified under s.401 dealing with costs orders against lawyers and paid agents. S.401 is to be found in Part 3-2 - Unfair Dismissal. S.611 of the Act, the general provision dealing with costs which provides for costs against a party, does not specify unreasonable act or omission as a ground. By contrast the general provision dealing with costs under the WR Act, s.824 included this ground.[8]

[18] The question arises whether FWA has the power to award indemnity costs under s.611 of the Act.

[19] By its express terms, FWA's power to award costs is not limited to 'items of expenditure' contained in the schedule.

[20] Schedule 3.1 of the Regulations sets out the Schedule of Costs. The Schedule of Costs sets out in tabular form various items, being matters for which charge may be made and the 'charge'. The 'charge' for each item is expressed in different forms. In some cases a particular dollar amounted is specified. In some cases the charge refers to a specific dollar amount or an amount 'at the discretion of FWA'. In other cases, the charge is specified as 'an amount FWA considers reasonable in the circumstances'.

[21] S.403 of the Act expressly provides that FWA is not limited to the items of expenditure in any schedule. Moreover, Schedule 3.1 to Regulation 3.08 of the Regulations contemplates, in relation to a number of items specified, the exercise of a discretion by FWA as to amounts to be awarded.

[22] It is relevant to note that in *Goffett*, the Full Bench said:

> "*Query whether the Commission has power to award costs on an indemnity basis. Its power to award costs under s.658(3) is discretionary. The discretion is limited to some extent by s.658(9). Section 658(7) makes provision for a schedule of costs to be prescribed. Schedule 7 to the WR Act is just such a schedule. Section 658(9) provides that if a schedule of costs is prescribed the Commission must not award costs in respect of an item appearing in the schedule at a rate or an amount in excess of that item. The amount that may be allowed for counsel is entirely a matter of discretion under the schedule. It would seem therefore that the Commission has discretion to award indemnity costs, sometimes expressed as solicitor and client costs.*"[9]

[23] I am satisfied that s.611 of the Act is a broad discretion given to FWA to award costs, provided it is satisfied as to certain circumstances. Taking into account the operation and effect of s.403 of the Act, Schedule 3.1 and Regulation 3.08, I am satisfied that this broad discretion includes the discretion to award costs on a party-party or indemnity basis. Of course, the exercise of discretion and the basis on which costs should be awarded will be conditioned by the approach taken by relevant authorities.

Principles - Indemnity Costs

[24] The relevant authorities extracted in *Goffett* (footnotes omitted) are set out below:

> *[49] In Australian Transport Insurance Pty. Ltd. v Graeme Phillips Road Transport Insurance Pty. Ltd Woodward J dealing with a costs application in the Federal Court of Australia isolated the following principle in relation to indemnity costs:*
>
> > *"Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where 'there is some special or unusual feature in the case to justify the court exercising its discretion in that way' (Preston v Preston (1982) 1 All ER 41 at 58). It is sometimes said that such costs can be awarded where charges of*

> *fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion - for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties: see Andrews v Barnes (1888) 39 Ch D 133; Forester v Read (1870) 6 LR Ch App Cases 40; Christie v Christie (1873) 8 Ch App Cases 499; Degmam Pty Ltd (In Liq) v Wright (No 2) (1983) 2 NSWLR 354."*

[50] In Oshlack v Richmond River Council, Gaudron and Gummow JJ said:

> *"It may be true in a general sense that costs orders are not made to punish an unsuccessful party. However, in the particular circumstance of a case involving some relevant delinquency on the part of the unsuccessful party, an order is made not for party and party costs but for costs on a 'solicitor and client' basis or on an indemnity basis. The result is more fully or adequately to compensate the successful party to the disadvantage of what otherwise would have been the position of the unsuccessful party in the absence of such delinquency on its part."*

[25] Justice Sheppard said in *Colgate-Palmolive Co v Cussons Pty Ltd*[10] (**Colgate Palmolive**) at 233:

> *"... it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion [to award indemnity costs]. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in Fountain and also by Gummow J in Thors v Weekes (1989) 92 ALR 131 at 152 evidence of particular misconduct that causes loss of time to the court and to other parties (French J in Tetijo); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J in J-Corp); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in Ragata); an imprudent refusal of an offer to compromise (eg Messiter v Hutchinson (1987) 10 NSWLR 525; Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721 at 724(Court of Appeal); Crisp v Kent (SC(NSW)(CA), 27 Sept 1993, unreported) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in EMI Records)...."*

[26] In *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australian Branch and Anor (No 2)*[11], Justice French said:

> "*... It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case. The case against the BTA was paper thin. ...*"

[27] In *Commonwealth Bank of Australia v Mohamad Saleh and Ors*[12] (**Commonwealth Bank decision**), indemnity costs were awarded against the defendants, following a finding by the Court that they had sought to defraud the Bank of around $7 million.[13] In the decision on costs, Justice Einstein said:

> "*[5] There is no doubt but that the Bank is entitled to an indemnity costs order against Mr Edge. Not only was he one of the fraudulent conspirators but significantly he sought to rely in the proceedings on documents which were found to be fabricated. He persisted throughout the whole of the hearing in denying the bank's allegations in respect of his fraud: knowing those allegations to be true. This conduct par excellence constituted relevant delinquency. The case for a indemnity costs against him is plainly a fortiori.*
>
> *[6] Likewise the case for ordering indemnity costs against Mr Qureshi is clearly made out. He also relied upon invoices and time sheets which have been found to have been fabricated and were at the very heart of his defence. He also persisted throughout the whole of the hearing in denying the bank's allegations in respect of his fraud: knowing those allegations to be true. Additionally he persisted in frustrating the Bank's attempts to obtain access to documents required to be produced by the litigious process: see the judgement in respect of the ultimate obtaining of access to the deep memory of the computer and the circumstances in which only during the hearing when in the witness box [initially as part of the voire dire to ascertain the enquiries which he had made in relation to the existence of material documents] did he come forward with the important information concerning how the money which he had received had been expended. This was delinquent conduct. The case for a indemnity costs against him is also a fortiori.*
>
> *[7] The cases for indemnity costs orders against Mr Mohamad Saleh and Mr Hassanien Saleh are also quite clear. Although they were not any longer represented during the hearing, their pleadings denying the fraud were before the Court and the Bank was required to prove the fraud. Their denial of the fraudulent allegations which they knew to be correctly made and the vast expense which the Bank was required to undertake to prove its case against them clearly mandates an indemnity costs order being made against each of them.*"

QBE Submission

[28] QBE submit that costs should be awarded on an indemnity basis from the time the Applicant commenced her application. In doing so, they rely on the following extracts from the costs decision:[14]

> *[57] I have had regard to the fact that, particularly where there has been no finding in FWA or other jurisdictions, a conclusion that the Applicant had no reasonable prospect of success must be exercised with extreme caution. However, in this case the documentary material relied on by QBE and set out in detail at [33] above falls, in my opinion, within the concept of unanswerable evidence of facts fatal to the Applicant's case (see Re Spencer (supra)).*
>
> *[58] True it is that the Applicant, in her written submissions, has denied the Citibank account is hers. However, the test is an objective test, directed to a belief formed on an objective basis (see Baker (supra)). The Applicant has not provided evidence of any kind of any investigation into identity fraud. Further, her failure to*

attend the costs hearing and provide evidence as to the basis for her denial means that the question as to whether her belief that the Citibank account is not hers was reasonable, in the face of a detailed body of documentary material to the contrary,[15] *remain untested. The Applicant's denials are no more than an assertion of a subjective belief.*

[59] It is to be noted that the Applicant did not refute, in her written submission that there existed a relationship between her and the person identified in this decision as Sarah P nor address factual material regarding the deposits made from the Sarah P CBA account into the Applicant's Community First Credit Account.

[60] It is significant that the Applicant, in an interview with QBE on 17 February 2012 and in her witness statement filed on 23 April 2012, denied knowledge of Sarah P. Clearly, having regard to the emails and financial transactions between the Applicant and Sarah P, this denial is baseless.

[61] It is incontrovertible that the Applicant and Sarah P had a personal relationship as evidenced by the numerous emails and the content of those emails between the two, and the payments from Sarah P CBA Accounts to the Applicant. On the documents available it can be concluded these facts were known to the Applicant at the time she made her application. There is also no doubt that the post office box address for the Sarah P CBA Accounts and the Applicant's Community First Credit Account are the same and that numerous unauthorised payments were made into the Sarah P CBA Accounts.

[62] There is then the issue of the Applicant's knowledge of, or relationship with, the email address identified in this decision as r...@gmail.com.au. The Applicant denied in her written submission that she was at work on the day the documents show an email was sent from the Applicant to r...@gmail.com.au. In response, QBE filed in FWA a copy of a screen dump of records of leave taken by the Applicant for the period 17 June 2011 to 15 February 2012. This does not record leave taken by the Applicant on 29 September 2011.[16]

[63] Also filed were a copy of records of the Applicant's pay slip for the week ending 30 September 2011, which is said to show that the Applicant worked her full 72.5 hours for the fortnight ending 30 September 2011 and copies of emails sent by the Applicant under her QBE email address to other recipients (including clients and other employees) dated 29 September 2011. These disclose that, at the very least, the Applicant had access to her QBE email address on that day.

[64] I am not satisfied that the Applicant has or had a reasonable belief or an objective basis for her written submission that the Citibank account is not hers. In addition, it is clear the Applicant was not truthful in the interview with QBE on 5 February 2012 and in her witness statement filed on 23 April 2012, when she denied knowing a Sarah P.

[65] The consequence is that the fact of the deposits of large sums of unauthorised transactions into the Citibank account and the transfer of monies from Sarah P's CBA Accounts into accounts held by the Applicant and into the Citibank account, renders in my opinion, the application for unfair dismissal remedy so lacking in merit or

substance so as to be not reasonably arguable. I agree with QBE that any deficiencies in procedure could never overcome the incontrovertible documentary evidence.

[66] I am satisfied that it was reasonably apparent to the Applicant at the time she made her application, that there was no reasonable prospect of success. I am further satisfied that in the circumstances of this case I should exercise my discretion under s.611 of the Act by determining that the Applicant must bear the costs incurred by QBE from the date she made her application, 28 February 2012.

[67] I defer the question of the quantum of costs to be ordered for further a hearing. QBE submit that any costs should be on an indemnity basis. Given the failure of the Applicant to attend the hearing and my decision to refuse the Applicant's adjournment, the question whether costs should be awarded on an indemnity basis is also deferred for a further hearing.

[29] These passages referred to above, the Respondent submits, satisfy the requirement of "*some special or unusual feature in the case to justify the court exercising its discretion*" to award indemnity costs. Amongst other things, QBE submits they indicate:

(a) that the proceedings were commenced and continued in wilful disregard of known facts;

(b) that allegations were made by Ms Stanley which ought never to have been made and unduly prolonged the case by groundless contentions.

(See *Colgate Palmolive*).

[30] The Respondent submits the decision of Justice Einstein in the Commonwealth Bank decision is directly on point, specifically it is submitted that His Honour's observation, that Mr Edge "*persisted throughout the whole of the hearing in denying the bank's allegations in respect of his fraud: knowing those allegations to be true*" applies equally to Ms Stanley – as does Justice Einstein's summation that "[t]*he case for a indemnity costs against [him] is plainly a fortiori*".

[31] Moreover, the Respondent relies on a "without prejudice offer" dated 7 May 2012 sent by the Respondent's solicitors to the Applicant's solicitors. The correspondence set out certain matters then known to the Respondent, alleged that the Applicant had been responsible for defrauding the Respondent and offered not to pursue the Application for costs if she discontinued. The letter placed the Applicant on notice that in the event the Applicant's claim is dismissed the Respondent would seek costs on an indemnity basis. The failure of the Applicant to accept this offer, the Respondent asserts, amounts to an imprudent refusal of an offer to compromise: *Colgate Palmolive*.

Applicant's Submission

[32] The Applicant opposes the award of costs on an indemnity basis.

[33] Mr McArdle submits his client acknowledges she should not have made an application under s.394 of the Act because of the jurisdictional barriers facing her. However, in this the Applicant was badly advised by her then lawyers.[17]

[34] Mr McArdle submitted his client should not be called upon to award costs in what, in effect, is a common law accusation of theft.[18] It is submitted that the bulk of the costs sought is in relation to unnecessary forensic examination in relation to allegations of fraud which properly belong in another jurisdiction.[19]

Consideration

[35] In this matter I have found that it was reasonably apparent to the Applicant that she had no reasonable prospect of success at the time she made her application on 28 February 2012. I have done so on the facts known or should have reasonably been known to her having regard to the material referred to in **[33]** of the costs decision. The award for indemnity costs requires some further factor influencing my discretion.

[36] I am satisfied that the further factor operated from 18 May 2012 when, provided with all the material the Respondent relied on, and which is summarised in the costs decision at **[33]**, the Applicant failed to discontinue her proceedings. Allowing some time for the Applicant to read QBE's Outline of Submission and witness statements filed on 18 May 2012, I am satisfied that it was "delinquent" of the Applicant not to have discontinued on 20 May 2012.

[37] The fact her lawyers had ceased to represent her on 21 May 2012 and she was self represented does not diminish what can only be described as delinquent conduct in failing to discontinue her application.

[38] I am therefore satisfied and determine that costs be awarded:

- On a party-party basis from 28 February 2012 to 20 May 2012; and
- On an indemnity basis from 21 May 2012 to 21 June 2012.

[39] Directions will be issued requiring the Respondent to submit a Bill of Costs in accordance with my determination.

COMMISSIONER

Appearances:

Ms E. Raper of counsel - Representative of QBE Management Services T/A QBE
Mr C. McArdle - Representative of Ms Sharn Stanley

Hearing details:

2012
Melbourne by videolink to Sydney
12 December

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[1] [2012] FWA 7165 at [57]
[2] Ibid
[3] [2011] FWA 1010
[4] Transcript of Hearing - 12 December 2012 at PN829
[5] Op.Cit at [20]
[6] [2009] AIRCFB 626 at [47].
[7] [2009] AIRCFB 626 at [52].
[8] S.824 of the WR Act.
[9] [2009] AIRCFB 626 at [48]
[10] (1993) 46 FCR 225
[11] (1993) 46 IR 263 at 303
[12] [2007] NSWSC 990 at [5]-[7]
[13] *Commonwealth Bank of Australia v Mohamad Saleh and Ors* [2007] NSWSC 903
[14] [2012] FWA 7165 at [57] - [65]
[15] See [33] above
[16] Witness Statement of Geoffrey Burnett Brown, Annexure GB-1.
[17] Transcript of Hearing - 12 December 2012 at PN798 and PN803
[18] Transcript of Hearing - 12 December 2012 at PN802
[19] Transcript of Hearing - 12 December 2012 at PN813