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HUMAN RESOURCES & INDUSTRIAL RELATIONS

"30 years of providing practical Industrial Relations/Human Resources solutions to employers"

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In this edition

Introduction (including recent "true story")

Costs. As we know the FWC can (under certain circumstances) award costs against a party which has acted in an unreasonable manner. This edition looks at a number of recent cases, where one party has sought costs against the other.

As seen in my last edition most cases for unfair dismissals and the like are resolved 90 per cent of the time via conciliation (read: the employer pays "go-away" money to the applicant). The big winners (see further this part) are usually the "no-win, no-fee" lawyers. Which my simple math's leaves up to 10 per cent of matters left in the hands of the FWC to decide an outcome.

Before I examine these "costs" cases, I would like to share a **true** story with you. All the facts are true (including $'s), but all details are altered in line with confidentiality of the parties concerned. Read on…

This company, let's call them XYZ Pty Ltd ("the Company"), had five employees. Given that the owners were taking a more active role in the business, it decided to make the team leader redundant.

It should be noted at this point that, under the Fair Work Act, the employer was not required to pay redundancy pay (under the 15-employee threshold).

As a sign of recognition of the employee's contribution over a 10 year period, the Company decided to pay to the employee $50,000 redundancy (which would have been free of tax), five weeks' notice and the usual accrued, untaken annual and long service leaves.

In accordance with my advice, the employer required the employee to sign a deed of release as a condition of receiving the redundancy pay. The employee refused and went to a well-known NWNF law firm who advised him (a) not to accept the payment, (b) not to look for work and (c) they would get him much more $'s. Come in spinner.

Being a bunch of clever-dicks, the aforementioned law firm lodged a general protections application, alleging that the employee had been sacked because the Company (that had offered him $50,000) did not like him. This is "clever" because, under the "General Protection" provisions the reverse onus of proof is applied (ie the employer is required to prove they did nothing wrong) and there is notionally no upper limit to any payout.

The downside is that if conciliation fails in the FWC, the matter must be prosecuted in the Federal Circuit Court.

The outcome: the claim went from $100,000 (this being for reasonable notice, as there was no contract of employment on foot) to eight weeks' pay of which the NWNF law firm took five weeks.

The moral of the story is that NWNF law firms may be accused of having no morals, and ensure that you have an up-do-date contract of employment for your employees – no matter how small a business you may be.

Costs: Unreasonable act or omission

Lyndon John Kube v Dominelli Group Pty Ltd T/A Rockdale Nissan (U2016/1455). HAMBERGER, SDP 23 DECEMBER 2016

Mr Kube ("Kube") made his application for an unfair dismissal remedy against Dominelli. Kube had been employed by Dominelli as a Used Car Sales Consultant. His wife, Kristy Kube, was also employed by Dominelli, as its General Sales Manager. Kube was dismissed by Dominelli for serious misconduct.

Kube was dismissed for what amounted to abusive behaviour towards his co-workers. The dismissal was handled by Dominelli's HR manager. It was later alleged that Kube had participated in fraudulent behaviour.

Kube sent an email to Dominelli's legal representative indicating that he did not intend to cross-examine any of Dominelli's witnesses. Dominelli's legal representative put Kube on notice that Dominelli would pursue costs if he did not turn up at the FWC (having previously adjourned the matter due to illness) and the matter had no reasonable prospects of success.

"Costs" are covered by Section 611 of the FW Act:

> (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.

Section 400A with unfair dismissal:

> (1) The FWC may make an order for costs against a party…for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.

The SDP stating that:

> *"The primary position is that each party bears its own costs in proceedings before the Commission. This is designed to enable a person to make or defend an application without being burdened with the risk that an order for costs might be made against the person.*
>
> *"However,[the Act] provide[s] exceptions to that general rule. They are provisions which provide the Commission with the discretion to order that a party pay some or all of another party's costs where there has been what might broadly be termed 'an abuse of process' by that other party.*

Where an Application has been made without reasonable cause, the SDP referenced a Full Bench decision *Keep v Performance Automobiles Pty Ltd* which in turn cited in Church v Eastern Health t/as Easter Health Great Health and Wellbeing (Church):

- The power to order costs should be exercised with caution and only in a clear case.
- A party cannot be said to have made an application 'without reasonable cause' simply because his or her argument proves unsuccessful.
- One way of testing whether a proceeding is instituted 'without reasonable cause' is to ask whether upon the facts known to the applicant at the time of instituting the proceeding, there was no substantial prospect of success.
- The test imposed by the expression 'without reasonable cause' is similar to that adopted for summary judgment, that is, 'so obviously untenable that it cannot possibly succeed', 'manifestly groundless' or 'discloses a case which the Court is satisfied cannot succeed'.'

When examining if the matter was reasonably apparent that there was no reasonable prospect of success, the SDP cited Gostencnik DP's decision in *Green v Toll Holdings*:

- A conclusion that a particular application or response "had no reasonable prospect of success" is one that should only be reached with extreme caution in circumstances where the application or response is manifestly untenable or groundless, or so lacking in merit or substance, so as to be not reasonably arguable.

Costs incurred because of an unreasonable act or omission:

- The power to award costs is not intended to prevent a party from robustly pursuing or defending an unfair dismissal claim. Rather, the power is intended to address the small proportion of litigants who pursue or defend unfair dismissal claims in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.
- The FWC's power to award costs under this provision is discretionary and is only exercisable where the first party (whether the applicant or respondent) causes the other party to incur costs because of an unreasonable act or omission. This is intended to capture a broad range of conduct, including a failure to discontinue an unfair dismissal application and a failure to agree to terms of settlement that could have led to the application being discontinued.
- However, the power to award costs is only available if the FWC is satisfied that the act or omission by the first party was unreasonable. What is an unreasonable act or omission will depend on the particular circumstances but it is intended that the power only be exercised where there is clear evidence of unreasonable conduct by the first party.
- The circumstances envisaged by the expression 'unreasonable act or omission' include unreasonably failing to discontinue an unfair dismissal application.

Dominelli submitted that Kube should pay its costs of $22,595.50, arguing that:

- The application was commenced without reasonable cause and did not have reasonable prospects of success at the time they were instituted.
- The application was made in circumstances where it should have been reasonably apparent to him that the application had no reasonable prospects of success; and
- Kube caused Dominelli to incur costs because of his unreasonable conduct by continuing to pursue his application in circumstances where he no longer sought to pursue the claim for a proper purpose and in so doing caused proceedings to be an abuse of process.

Supporting the submission, Dominelli argued:

- Kube did not at any stage during proceedings deny that he had committed the offence that constituted serious misconduct (the abusive phone call).

- Kube did not deny that he had been dismissed because of this offence.
- Kube did not deny that the conduct that led to his dismissal was offensive.

Dominelli also submitted that it was unreasonable for Mr Kube to continue to prosecute proceedings and/or fail to discontinue them when he, by his own admission, had no interest in prosecuting them.

The SDP finding that:

> *"I am not satisfied that when Mr Kube made his unfair dismissal application it had no reasonable prospects of success. He did not deny the offensive conduct…on his version of events, he had at least an arguable (if weak) case.*
>
> *"However, based on what Mr Kube said during the hearing, it is very clear that he had lost all interest in pursuing his unfair dismissal application. I am satisfied that this occurred well before even the original hearing date, most probably from the time he and his wife received a demand for payment of $14,090.02 from Dominelli, associated with alleged activities of a fraudulent and deceitful nature. It was unreasonable for him not to discontinue his application at that point.*
>
> *"I consider that it is appropriate to award costs…to pay Dominelli Group $17,292.62 within 28 days of the date of this decision".*
>
> **Commentary**
>
> It would appear (at least on the SDP's reckoning) that if Kube had pursed his case "with vigour" or had discontinued to prosecute the matter when he knew that "the jig was up", costs would not have been awarded

Costs: No reasonable prospect of success

Elizabeth Mitchell v Kellogg Brown & Root Pty Ltd T/A KBR. [2016] FWC 8753 (U2016/8691). PLATT, C. 7 DECEMBER 2016.

In this matter, Ms Elizabeth Mitchell (Mitchell) pursued her employer Kellogg Brown & Root Pty Ltd T/A KBR (KBR) for an unfair dismissal…and lost. Mitchell lost her job due to being made redundant.

KBR then pursued costs on the basis:

- The dismissal was a case of genuine redundancy.
- Her role was not filled.
- Mitchell was sent a letter explaining that as her termination was a case of genuine redundancy, it was unlikely her application would be successful and that KBR would rely on that letter in recovering costs against her should she continue with the claim.
- Sent Mitchell an email to confirm that KBR would not pursue costs against her should she discontinue her application.
- Mitchell read through the evidence provided to her and therefore should have been aware her application had no reasonable prospect of success.

Michell's response:

- Perceived the letter to be intimidating and threatening.
- Felt financially threatened by the letter and contacted my associate to enquire about the process of discontinuance.
- Decided to proceed with her application, as she believed that KBR has breached its own internal protocols, that the redundancy was not justified and wanted an independent assessment of the proceedings.

The VP considered the meanings of the terms "vexatiously" and "without reasonable cause" (per the *Church decision* (see previous article).

> "An application is made vexatiously where the predominant purpose is to harass or embarrass the other party or to gain a collateral advantage."

The VP continued:

> *"The term 'without reasonable cause' is not enlivened simply because a party's argument proves unsuccessful. The test is whether the application (or in this case position adopted) by the party should not have been made (or in this case taken).*
>
> *"In Kanan v Australia Postal and Telecommunications Union, Justice Wilcox described the test as:*
>
> > *"whether upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success…where on the applicant's own version of the facts, it is clear that the proceeding must fail, it may be properly said that the proceeding lacks a reasonable cause."*

The VP found that KBR had acted in accordance with the Act in relation to the reduanncy, but did not believe that Mitchell had an ulterior motive in pursuing her unfair dismissal application. Mitchell was aggrieved by the decision to terminate her employment and clearly wanted to prosecute her unfair dismissal application and therefore not vexatious.

However, the VP found that Mitchell, having been informed of the case against her did not have any reasonable prospects of success, concluding:

> *"This finding enlivens my discretion to award costs incurred by KBR…which I exercise based on the failure of Ms Mitchell to discontinue her application after having full knowledge of the case against her, and having been warned that a failure to discontinue her application would result in KBR's pursuit of costs".*

The VP then awarded costs of $1583.00 for expenses incurred by KBR in having to travel to the hearing, this was an additional cost that would not have otherwise been incurred.

Commentary

Whilst the amount may not have been huge, it would have put a dent in any reduanncy payments that were made to the applicant. It also reinforces that before launching on the arbitration route, the employer ought to warn the applicant of costs and the applicant ought to consider carefully the strength of their case before proceeding.

NWNF law firm usually call the employer's bluff, with their business model based on "settlements" – not arbitration.

Costs: Against a lawyer or paid agent

Lindy Smith v Ecolab Pty Ltd. [2016] FWC 8491 (U2016/7804). BISSETT, C. 25 NOVEMBER 2016.

Following an unsuccessful cancelation and prior to the scheduled arbitration the matter was settled.

Ecolab then made an application for costs against Ms Lindy Smith and her "Paid Agent" Gary Dircks t/as Just Relations Consultants.

Ecolab argued Dircks and Smith caused it to incur costs:

- By engaging in an unreasonable act in connection with the conduct of the matter by refusing Ecolab's offer to settle the matter of four weeks' pay.
- By engaging in an unreasonable act or omission in that he failed to have produced documentation as required by the Commissioner.

In considering the legal argument put forward by the parties, the Commissioner considered a number of case precedents:

- The meaning of "unreasonable act or omission" citing Wintle v Foothills Administration Centre T/A Jim's Group:

  > "…that there must be a necessary link between the costs incurred (and hence sought to be recovered) and the unreasonable act or omission that is found to have occurred".

- In *Rainshield Roofing Pty Ltd T/A Rainshield Roofing v Peter Paerau and Anor* Commissioner Wilson observed that the determination of whether something is an unreasonable act or omission is an objective test.
- *In Goffett v Recruitment National Pty Ltd*, the Full Bench was concerned with a failure to attend conciliation proceedings. The Full Bench concluded that if the act was intentional it would be an unreasonable act and if unintentional it would be an unreasonable omission. The Full Bench found in that matter that failure to advise the other party of its intentions not to attend conciliation was 'either a **deliberate or reckless** act that could not be regarded as anything other than **unreasonable'** or, to the extent that that it was an omission it was equally unreasonable. [my emphasis].
- In *Construction, Forestry, Mining and Energy Union v Benegalla Mining Company Pty Limited (No 2)*, Katzman J found that if the conduct could 'be characterised as not endowed or guided by reason or **good sense**, or not based on or in accordance with **reason or sound judgment**, it would be unreasonable…'
- In *Roy Morgan Research Ltd v Baker* (Roy Morgan) the Full Bench considered the circumstances in which Roy Morgan Research Ltd put an offer to Ms Baker to settle the matter. The Bench observed that Roy Morgan was entitled to engage in hard bargaining but ultimately concluded that the failure to put a reasonable offer, given the lack of strength in its case, was unreasonable.
- In *Brazilian Butterfly Pty Ltd v Charalambous*, the Full Bench In considering the 'reasonableness' of the actions it found:

  "By referring to a party who "unreasonably" fails to agree to terms of settlement, the legislature has adopted the standard of the reasonable person. That is, the test…is determined by reference to whether, in all the circumstances, a reasonable person in the position of the party against whom the costs application has been made would not have failed to agree terms of settlement that may have led to the discontinuance of the application.

  "A reasonable person…when confronted with an offer of settlement from the other party, will determine whether, and if so, how to respond to such an offer after considering all the circumstances of the case, including:

  - *the terms of the settlement offered in relation to the relief sought;*
  - *the relative strengths of the parties' cases (and thus their relative prospects of success) in relation to both 'liability' and the relief sought;*
  - *any assessment of the merits in the certificate issued by the Commission;*
  - *the likely length and cost of proceeding to a hearing if the matter does not settle; and*
  - *any adverse consequences that will accrue to a party if they accept a settlement on particular terms rather than successfully prosecute or defend the primary application, as the case may be.*

- In Hart v Kangan Batman TAFE:

> *"A party cannot simply disregard matters that should have been reasonably apparent and then claim that such matters were not apparent to them".*

In fundamentally accusing Dircks of not being truthful, attempting to push the blame on his client, and sloppy work, the Commissioner commented:

> *"Mr Dircks is an experienced practitioner in the Commission in the unfair dismissal practice area. He is no stranger to orders to produce, being an applicant for them and a receiver of them on behalf of his clients. No cogent explanation is given as to why he did not properly seek instructions from his client in this case or why his client failed to produce a document…"*

And further, adding:

> *"I find it curious that Mr Dircks chose to file a statutory declaration in the form he did, at the time he did and with the apparent rider in the covering email to the declaration, but did not take the opportunity seek to have any direct evidence admitted.*
>
> *"The declaration is curious to put it at its best. Ecolab is correct when it says that Mr Dircks does not say which of his 'various factual statements' in his submission are true or provide any helpful direction to the Commission. Rather he makes a broad statement that I should take his submissions to be true. The declaration is of very little probative value to the Commission. It is not something that can be tested. It is not appropriate practice in the Commission for an experienced party or representative to make a submission and then say oh, by the way, any of the facts claimed in that submission are true".*

The Commissioner then finding:

> *"I am satisfied that a reasonable person would have rationally assessed the situation and recognised that the settlement offer was, in all of the circumstances, a fair and equitable outcome. I am satisfied that Ms Smith therefore acted unreasonably in refusing to accept the offer".*
>
> *"Ms Smith and Mr Dircks t/as Just Relations Consultants should be responsible each for 50% of the amount. While I note that Ecolab puts in application against Ms Smith in the alternative to that against Mr Dircks, I am satisfied that each, by their actions, caused costs to be incurred. If either had acted reasonably those costs might not have been incurred".*

Commentary

For reasons of the law of libel, I make no particular comments about this case, expect to say in general terms, if using a NWNF agent the old rule applies. *Caveat Emptor.*

Until next time…

Greg Reiffel
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