FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.611 - Application for costs

Transport Workers' Union of Australia
(AM2012/9)

Road transport industry

COMMISSIONER LEWIN MELBOURNE, 14 JUNE 2012

Costs - application to vary a modern award

[1] An application has been made by the Transport Workers' Union of Australia ("TWU") for costs pursuant to s.611 of the *Fair Work Act 2009* ("the Act") against the National Union of Workers ("NUW"). The TWU's application for costs was lodged in response to the NUW filing an application in the Tribunal to vary a modern award to remove alleged ambiguity or uncertainty or to correct error.

[2] On 16 February 2012 the NUW lodged an application to vary the Road Transport and Distribution Award 2010 (the Award) pursuant to s.160 of the Act. That matter was dealt with by way of decision on 25 May 2012[1] in which I dismissed the application.[2] The application sought to have the LUCRF Superannuation fund included as a default superannuation fund prescribed by the Superannuation provisions of the Award.[3]

[3] The proceedings in relation to the NUW's application were as follows. On 6 March 2012 Fair Work Australia issued directions to the NUW and any other interested party. Those directions were emailed to the applicant and displayed on the Fair Work Australia Modern Awards Website.

[4] By 23 March 2012 the TWU, amongst others, filed submissions in the matter. Accompanying the TWU's submissions was an application for an order for costs made under s.611 of the Act. As foreshadowed in decision concerning the application to vary[4] the modern award. I now turn to deal with that application. Section 611 is set out below:

> "**611 Costs**
>
> (1) A person must bear the person's own costs in relation to a matter before FWA.
>
> (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.

(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)."

[5] An extract from the TWU's application for an order for costs is set out below:

"**9.2** Costs can and should be awarded against the applicant and in favour of the Transport Workers' Union of Australia on any one or more of the following bases:

(a) the application fundamentally relies on a proposition which has been unambiguously rejected by a Full Bench of the AIRC. On that basis it should be reasonably apparent to the applicant that the application has no reasonable prospects of success;

(b) an earlier application to the same effect was withdrawn when it became apparent that it could not succeed on the basis of the material then filed (or at all). This application is now brought two years later, with no additional material to that produced on the last occasion. On that basis it should be reasonably apparent to the applicant that the application has no reasonable prospects of success;

(c) the earlier application was withdrawn late in the piece, at a point where the parties had expended significant time and resources in responding to it;

(d) the application is brought vexatiously, in the sense that it is made with the ulterior purpose of re-agitating the NUW's claim previously denied by a Full Bench. So much is apparent from the disinterest of employers, employees and most importantly the fund itself.

9.3 It might is (sic) accepted that an order for costs would not normally be made in respect of an application of this kind. This is however an exceptional case. It is unreasonable that the applicant should continue to vexatiously raise an issue already determined, and raise it in a manner which maximises cost and inconvenience to the TWU. An order for costs is warranted as an exceptional response to address the applicant's conduct."

[6] For the TWU's application for an order for costs to succeed the Tribunal would have to be satisfied that the NUW made the application to vary the Award vexatiously or that the application had no reasonable prospect of success. The power to make the order would not arise otherwise. Moreover, if the Tribunal was so satisfied whether or not an order should or would be made is a matter of unconditioned discretion for the Tribunal.

[7] An application will be made vexatiously where the applicant's purpose and motivation is to annoy, harass or embarrass another party or to seek collateral advantage. I am not satisfied that the TWU has established that the NUW's application was made with that purpose or motivation. On the contrary, in my judgement the only apparent purpose and intention of the application was to have an additional superannuation fund named as a default superannuation fund in Clause 21.4 of the Award. Whilst the TWU opposed the application and was no doubt dissatisfied and possibly annoyed by the application of the NUW, more is required in order for the filing of the application to be properly characterised as vexatious. The additional requirement is that the intention and motivation of the NUW was to cause such dissatisfaction, harassment or annoyance. This is not addressed by way of any evidence or material which could support a finding of such intention or motivation. Moreover, I am unable to identify any relevant collateral advantage sought by the NUW having been identified by the TWU in their submissions.

[8] Nor am I satisfied that the application had no reasonable prospect of success. The grounds upon which the application was made was that an error of omission had been made in the course of the creation of the terms of the award governing the superannuation funds to be included in Clause 21.4 of the Award. While the matter was determined on the basis that the terms of the Award were not ambiguous or uncertain and that no error in the relevant sense was established, that conclusion required consideration and interpretation of the process by which the Award was created by the Tribunal and a judgement made accordingly. Given the statutory context in which the application was to be determined the grounds upon which the application was made were, in my view, arguable. It was possible that this point may have been decided in favour of the NUW's application.

[9] I have given consideration to the submissions of the TWU in relation to an earlier application made by the NUW and withdrawn. On what is before me, I am unable to reach a sufficiently sound conclusion that the earlier application had no reasonable prospect of success, within the meaning of those words properly applied in the context of s.611.

[10] Even if I am wrong in this and it can be considered that the application to vary the Award had no reasonable prospect of success for the reasons stated in the TWU's submissions to make an order that the NUW pay the costs of the TWU I would need to be satisfied that I should exercise the discretion to do so.

[11] In this respect it is appropriate to have regard to the nature of the application of the NUW and the relevant statutory context and circumstances in which it was made and the effects which the variation to the Award sought by the application may have had upon the interests of the TWU and members of that organisation.

[12] It is difficult to see why the TWU was required to respond to the application as a matter of practical necessity. The TWU is an organisation of employees covered by the Award, however, the manner in which the interests of the organisation or its members would have been prejudiced had the application been granted is not discernable from the submissions of the TWU and is difficult to identify otherwise. The opposition to the application was not a matter of practical necessity in order to protect the substantial interests of members of the TWU covered by the relevant terms of the Award.

[13] While the TWU and the NUW may have differing views about the relative merits of particular superannuation funds, possibly having regard to their provenance, such views are best described as policy or preference, which were not elaborated in the proceedings, except on the grounds of convenience for certain employers.

[14] It may be that the two organisations perceive some demarcation of rights or industrial influence attaching to what superannuation funds are prescribed as default superannuation funds for the purposes of the Award. However, the Award does not serve as a proxy for the policy preferences of organisations of employees in relation to the merits of particular superannuation funds or the constitutional coverage, industrial interests or merits of registered organisations.

[15] A modern award is a statutory instrument made by delegated legislative authority under the Act according to statutory conditions and directions, to meet the various objects of the Act. A modern award is an instrument of an entirely different nature to an award made by arbitration in settlement of an industrial dispute extending beyond the borders of any one state, between disputing industrial parties identified for that purpose. There are no parties to a modern award in the same sense. The two species of regulatory instrument deal with similar subject matter, terms and conditions of employment, but are of profoundly different character. The distinction is particularly relevant in this case for the purpose of considering any exercise of the relevant discretion. As is the nature of the relevant provisions of the Award, the subject of the NUW application, which are of an administrative nature.

[16] Therefore, the matter in respect of which the TWU made submissions should be seen as one in which it chose to make its views known about the organisation's policy and preference for the superannuation funds which should or should not be default funds for an employer's purposes. The use of the relevant provisions of the Award only occurs in the event that an employee, who may or may not be a member of the TWU, fails to nominate a complying superannuation fund for the purposes of the contributions the employer is required by law to make to a complying superannuation fund in accordance with Commonwealth legislation.

[17] Accordingly, I am unable to see that the variation sought by the NUW could prejudice a member of the TWU in any material sense, alter the rights, duties and obligations of an

employee employed under the modern award or have such an effect upon the organisation itself.

[18] The TWU submissions were filed by Mr Michael Burns who is described as General Counsel. Mr Burns it would seem is an employee of the TWU. The costs sought by the TWU are not specified or the character of those costs identified. It is to be assumed that such costs are not those of a professional nature for legal representation or advice but rather the administrative costs of the TWU which might be ascribed to the preparation of the submissions filed in relation to the NUW's application.

[19] That the TWU chose to express a view in relation to the application of the NUW is entirely within its purview, available to the organisation or any other person who maintains an interest in the Award, and unobjectionable in any way. However, the nature of the application to vary the Award and the circumstances of the TWU as an employee organisation, taken as a whole and looked at all round, would not persuade me that it would be appropriate to exercise the discretion conferred by s.611 against the clear statutory presumption that in proceedings before the Tribunal persons choosing to participate should bear their own costs in relation to the proceedings.

COMMISSIONER

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[1] PR522480.

[2] PR524493.

[3] Road Transport and Distribution Award 2010 Clause 24

[4] PR522480, PN10.