DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Andrew O'Farrell
v
Guest Tek Australia Pty Ltd
(U2018/8699)

COMMISSIONER RIORDAN SYDNEY, 18 JULY 2019

Application for an unfair dismissal remedy – costs application.

[1] Mr O'Farrell (the Applicant) made an application for an indemnity costs order in accordance with section 402 of the *Fair Work Act, 2009* (the Act) against Guest Tek Australia Pty Ltd (the Respondent) following his successful application for an unfair dismissal remedy on 14 February 2019.

[2] The Applicant claims that the Respondent acted unreasonably by failing to settle the matter before his application was determined by the Fair Work Commission (FWC). As a result of this allegedly unreasonable act, the Applicant claims that he was required to incur costs, as defined in section 400A of the Act.

[3] Relevantly, section 400A of the Act states:

> "**Costs orders against parties**
>
> (1) The FWC may make an order for costs against a party to a matter arising under this Part (the ***first 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.
>
> (2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.
>
> (3) This section does not limit the FWC's power to order costs under section 611."

[4] The Applicant has relied on the submissions and statements of the parties in the earlier unfair dismissal application.

[5] In the earlier proceeding, I found that the Respondent was an associated entity of Guest-Tek Interactive Entertainment Ltd, an organisation based in Canada. In relation to this

application, in response to an email from my Chambers, the Commission received the following correspondence from a Mr Jeffery Dyck:

> "Dear Ms. North,
>
> ……. I am a Canadian lawyer and I work in Canada with Guest Tek Interactive Entertainment Ltd., a Canadian corporation. I have recently (last contact several hours ago) been discussing settlement possibilities with Carly Stebbing with respect to Mr. O'Farrell's prior relationships with Guest Tek entities.
>
> I am not qualified to practice law in Australia and have not asked to be involved in any proceedings before Commissioner Riordan. Guest Tek and I both assume that Commissioner Riordan will make a reasonable costs award in our absence if and when that applications proceeds.
>
> If I can be of any further assistance in answering your questions or concerns please do not hesitate to contact me again.
>
> Jeffrey Dyck"[1]

Issues

[6] The hearing of the unfair dismissal application was to be conducted on 27 November 2018. The Respondent failed to appear. The following emails were sent between the Respondent and the FWC at the allocated time:

> "**Tues, Nov 27, 2018 at 9.22am**
>
> Dear Ms Ly,
>
> The hearing of Mr O'Farrell's unfair dismissal application was listed to start at 9:00 am today, Australian Eastern Daylight Savings Time (i.e. 3:00 pm in Calgary). We did not receive any request from you to participate via telephone or video link, so the Commissioner had expected that you or your representative would attend the hearing in Sydney.
>
> I have tried to ring you on your landline (** *** *** ****) and your mobile phone number (** *** *** ****) from the hearing room today, about 10 minutes ago, but received no answer on either number.
>
> Please let me know urgently how the respondent intends to participate in today's hearing. If we do not hear further from you, Commissioner Riordan may proceed with the hearing in your absence or relist the matter for hearing on a different day.
>
> Edrea Venal
> Relief Associate to Commissioner Riordan

Tue, Nov 27, 2018 at 9.27am

Hello Edrea,

My apologies as we were unable to locate any representative to attend the meeting in Sydney in person, and the dates got mixed up on my schedule. Please advise if we can reschedule as I will make myself available at that time as I am traveling at the moment.

Van Ly
Global HR Director

Tue, Nov 27, 2018 at 9.37am

Dear Ms Ly,

Commissioner Riordan asks if you have any questions you wish to ask the applicant about his evidence. If not, the Commissioner is inclined to determine the matter 'on the papers'. That is, he will make a decision on the application based on the written submissions and evidence both parties have already filed, without requiring the parties to attend the Commission again.

Please let me know urgently.

Edrea Venal
Relief Associate to Commissioner Riordan

Tue, Nov 27, 2018 at 9.43am

Hello Edrea,

We have no questions. We stand by our response that we have honored our legal obligation in terms of the signed agreements. Mr. O'Farrell never brought this issue up in the last 6 years with HR and has been submitting monthly invoices.

Van Ly
Global HR Director"[2]

[7] Relevantly, on 18 October 2018, the Applicant sent the CEO of Guest Tek Interactive Entertainment Ltd an email which included the following paragraph:

"**Settlement Offer**

Despite the above, we are instructed to put forward a final offer in a bid to resolve this matter. Our client offers to fully and finally settle the unfair dismissal claim in matter number U2018/8699 in exchange for:

1. payment of $USD 22,578.40 representing 16 weeks; and
2. subject to a deed of release acceptable to our client, prepared by us.

> This final offer remains open until 4pm on Friday 19 October 2018. After that time it will lapse and we will rely on this correspondence on the question of costs on an indemnity basis pursuant to the principles of Calderbank v Calderbank and ss. 375B, 376 and 611 of the Fair Work Act 2009 (Cth). We will be seeking the maximum compensation for our client's unfair dismissal application given his age, length of service and circumstances surrounding his termination."

[8] Later that evening, Mr Levy responded in the following terms:

> "Sir/madam
> Andrew O'Farrell was never an employee of GuestTek
> I find your position parasitic and disgusting
> Should you proceed any further we will contact the Australian revenue authorities since Andrew has never paid taxes.
> As well we will contact the Australian bar association to report your unprofessional representation.
> Govern yourself accordingly
>
> Arnon Levy
> CEO
> GuestTek Interactive Entertainment Ltd."

[9] On 14 February 2019, the FWC, as presently constituted, awarded the Applicant 18.45 weeks compensation for being unfairly dismissed.

[10] The Applicant claims that because the arbitrated outcome is superior to that proposed by the Applicant in the final settlement offer correspondence, in accordance with the obiter in *Calderbank v Calderbank*[3], the unreasonable action by the Respondent in not settling the matter for the amount proposed by the Applicant, the Respondent prolonged the settlement of this matter unnecessarily, which caused the Applicant to incur additional costs.

[11] The Applicant also submitted that the Respondent failed to seek legal advice or obtain any advice on the applicability of Australian law. The Applicant submitted that the failure by the Respondent to obtain advice in relation to Australian law was unreasonable.

[12] Section 400A was inserted into the Act in 2012. The Explanatory Memorandum of the *Fair Work Amendment Bill 2012* stated:

> "Parts 3 and 4 of Schedule 6 to the Bill enhance the FWC's ability to order costs against a party and/or their representative in unfair dismissal matters. The new 'party costs' provision applies where a party to an unfair dismissal matter (either an employee or employer) has caused the other party to incur costs by an unreasonable act or omission. Under section 401 of the FW Act, lawyers and paid agents may currently be exposed to costs orders if FWA has granted permission for a person to be represented in an unfair dismissal matter. The Bill will provide for the FWC to order costs against a lawyer or paid agent whether or not the FWC has given permission for a person to be represented.
>
> The amendments strike a balance between the need to protect workers from unfair dismissal, and to provide a deterrent against unreasonable conduct during proceedings.

> The amendments will enable costs orders to be more easily made in the case of unreasonable conduct but will not prevent genuine claims from being pursued. They will discourage frivolous and speculative claims and assist in the efficient resolution of claims by encouraging all parties to approach proceedings in a reasonable manner. These measures are reasonable and proportionate to address the time and expense that an unreasonable conduct by a participant and/or their representative may cause another party to incur" [4]
>
> "168. Item 4 inserts a new section 400A to enable the FWC to order costs against a party to an unfair dismissal matter (the first party) if it is satisfied that the first party caused the other party to the matter to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter.
>
> 169. As with the new power to dismiss applications under section 399A, the power to award costs under section 400A 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.
>
> 170. 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 made under section 394 and a failure to agree to terms of settlement that could have led to the application being discontinued.
>
> 171. 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."[5]
> (my emphasis)

[13] In *Sidney v Employsure Pty Ltd*[6] (Sidney), Commissioner Bissett conveniently summarised a number of relevant authorities on this issue in the following manner:

> "[28] The authorities relevant to a consideration of the phrase 'unreasonable act or omission' were considered in the decision of the Full Bench in Roy Morgan Research v Baker. I do not repeat those provisions here but note the following can be taken from those authorities:
>
> • A failure to inform another party of an inability to attend proceedings would be, if intentional, unreasonable and if accidental, an unreasonable omission;
>
> • a failure to advise the other party of the first party's intentions, if deliberate or reckless, would be unreasonable and if an omission could be equally unreasonable;
>
> • very strong prospects of success will not always justify a failure to participate in settlement negotiations;

> • a reasonable person will determine if and how to respond to an offer of settlement after considering all of the circumstances of the case including the terms of settlement in relation to the relief sought; the relative strength of the parties cases; the likely length and cost of proceeding to hearing if the matter does not settle; and adverse consequences of acceptance of a settlement rather than prosecuting or defending the primary application."

[14] In *Matthew Gugiatti v SolarisCare Foundation Ltd*[7], the Full Bench of the Commission held that s.400A "is concerned with unreasonable acts or omissions in connection with the "conduct or continuation" of a matter already instituted, not with whether it was reasonable to have instituted a matter in the first place."[8]

[15] The Full Bench in Roy Morgan also stated:

> "Section 400A(1) establishes two pre-conditions for the making of an order for costs under the subsection (in addition to the requirement in s.400A(2)). The first is that the Commission must be satisfied that a party engaged in an unreasonable act or omission in relation to the conduct or continuation of a matter. The second is that such act or omission caused the other party to the matter to incur costs. Once these preconditions are satisfied, a discretionary power to order the payment of such costs is enlivened."[9]

[16] The Applicant seeks the payment of $9,125.50 and has provided itemised accounts for this amount.

Consideration

[17] The Respondent had every right to reject the offer from the Applicant based on their understanding of the contractual relationship with the Applicant. They were of the view, albeit misguided, that the contract that they entered into with the Applicant was binding and enforceable. This view was possibly accurate in Canada based on the rather straight forward and direct response from the Respondent's CEO. However, the Applicant put the Respondent on notice of a further application in relation to costs if they were successful in an arbitrated outcome. I note that the Respondent did not enter into any negotiations with the Applicant as a result of this correspondence. I have taken this into account.

[18] The Respondent did not attend the Hearing. The Respondent claimed that they were confused due to the time/day difference between Sydney and Calgary in Canada. I doubt that the Respondent did not understand the time difference between the two cities, especially when the Applicant had regular contact with his managers back in Canada. I have taken this into account.

[19] I do not accept the Respondent's excuse that they could not find representation to prosecute their case. Sydney has a large number of competitively priced advisors, solicitors and barristers who specialise in the field of industrial relations. Any one of a number of these specialists could have provided advice or representation in this matter. I have taken this into account.

[20] I have taken into account that the Applicant sent the Respondent a Calderbank letter on 18 October 2018, thereby putting the Respondent on notice that it may pursue costs if successful in any arbitrated outcome.

[21] Section 400A appears in Part 3-2 Unfair Dismissal of the Act. Relevantly, section 381 of the Act states:

> "**381 Object of this Part**
>
> (1) The object of this Part is:
>
> (a) to establish a framework for dealing with unfair dismissal that balances:
>
> (i) the needs of business (including small business); and
>
> (ii) the needs of employees; and
>
> (b) to establish procedures for dealing with unfair dismissal that:
>
> (i) are quick, flexible and informal; and
>
> (ii) address the needs of employers and employees; and
>
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
>
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
>
> Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

[22] In *Baxter Healthcare Pty Ltd t/a Baxter Healthcare v Andrew Portelli*[10], a Full Bench of the Commission held:

> "**[95]** We note at the outset that the relevant sections provide that if the requisite jurisdictional facts are established (relevantly, ss. 400A(1) and (2), and s.611(2)) then the Commission *may* make an order for costs. A costs order does not automatically follow upon a finding of the requisite jurisdictional fact. It is clear from the use of the word 'may' that the Commission retains a discretion as to whether or not to make an order for costs. In that regard these provisions may be contrasted with ss. 418(1) and 424(1), which provide that the Commission *must* make certain orders if certain jurisdictional facts are present."

Conclusion

[23] The Respondent's involvement in the conduct of the proceedings was relatively unique. The Respondent was difficult to contact and appeared somewhat blasé about the

whole process before the FWC. I have sympathy with the Applicant in relation to the frustration that the Applicant experienced in the conduct of the matter.

[24] The law of "associated entity" is a very complex area of Australian Corporate Law. It has been defined and redefined over many years, most recently by a Full Court of the Federal Court and helpfully summarised by a single judge of the Federal Court. I accept that the Respondent could not be expected to have a thorough knowledge of this area of Australian law, however, the Respondent should have sought legal advice from an Australian IR practitioner in relation to this matter. The Respondent did not take the basic and necessary steps to defend the application. Had the Respondent obtained advice, then the Applicant's settlement offer may have been accepted. At the very least, I am satisfied that fruitful negotiations would have ensued as a result of the Applicant's correspondence.

[25] The Applicant's Calderbank correspondence should have at least generated an enquiry to an Australian IR practitioner. This letter clearly put the Respondent on notice in relation to the possibility of a future claim by the Applicant in relation to his legal costs.

[26] For the reasons identified above, I am satisfied that the Respondent's attitude and inactivity in the process before the FWC was unreasonable conduct.

[27] I am satisfied and find that this unreasonable conduct resulted in the Applicant being required to incur additional costs.

[28] The Applicant has sought indemnity costs. I am of the view that indemnity costs should only be awarded in cases, where there is virtually no chance that the party will succeed, yet the party continues with their application or defence of the application. I do not accept that it is appropriate for the FWC to award indemnity costs simply because a party has been unsuccessful in an arbitrated outcome, as is the case in this matter.

[29] I am, however, prepared to award costs on a party – party basis in this matter due to the unreasonable behaviour of the Respondent as determined earlier.

[30] I refer the parties to schedule 3.1 - Schedule of Costs contained in the Regulations of the Act.

[31] Pursuant to s400A of the Act, I order that Guest Tek Australia Pty Ltd is to pay the Applicant's party – party costs incurred after 18 October 2018 and until 28 February 2019.

[32] The Applicant is to provide a written itemised assessment of the costs to Guest Tek Australia Pty Ltd within 14 days of this Order, noting that the rate or amount claimed for items that are mentioned in the Schedule of Costs in Schedule 3.1 of the *Fair Work Regulations 2009* must not exceed the rate or amount appearing in that Schedule (see s.403(2) of the Act).

[33] The parties are then directed to confer and seek to reach agreement on the quantum of the costs. If the costs are not agreed within 14 days of the receipt of the assessment by Guest Tek Australia Pty Ltd the Applicant is to lodge the itemised assessment in the Commission for referral to Commissioner Riordan for the purposes of taxing the costs.

[34] The costs are to be paid within 28 days of the date of this Order (if the quantum is agreed) or the date the costs are taxed by the Commission, whichever is the latter.

[35] I so Order.

COMMISSIONER

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1 Email from Mr Jeffry Dyck 2 April 2019.

2 Attachment E – email exchange 27 November 2018

3 [1975] 3 All ER 333

4 Explanatory Memorandum to the Fair Work Amendment Bill 2012, page 7.

5 Ibid at page 37.

6 [2016] FWC 2659.

7 [2016] FWCFB 2478

8 Gugiatti v SolarisCare Foundation Ltd [2016] FWCFB 2478 at [61].

9 Ibid at [43].

10 [2017] FWCFB 3891