



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Steven Mallis

v

Organic Indulgence Pty Ltd
(U2019/4137)

COMMISSIONER HARPER-GREENWELL

MELBOURNE, 11 DECEMBER 2019

Application for an unfair dismissal remedy – application for costs pursuant to ss.400A, 401 and 611 – costs not ordered.

[1] On 10 April 2019, Mr Steven Mallis (**the First Costs Respondent**) filed in the Fair Work Commission (Commission) an application for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* Cth (**the Act**) in relation to the termination of his employment by Organic Indulgence Pty Ltd (**Organic Indulgence**) (**the Costs Applicant**). Mr Mallis was at all times represented by McDonald Murholme Solicitors (**MMS**) (**the Second Costs Respondent**).

[2] On 14 August 2019 the Costs Applicant filed an application for the payment of costs against Mr Mallis and MMS pursuant to sections 400A, 401 and 611 of the Act.

Procedural Background

[3] A copy of Mr Mallis' application for an unfair dismissal remedy was served on Organic Indulgence on 18 April 2019 and listed for conciliation on 21 May 2019. This conciliation was unable to proceed and the matter was relisted for conciliation on 3 June 2019 however remained unresolved.

[4] Despite numerous requests from the Commission, Organic Indulgence did not file a Form F3 Employer Response until 12 July 2019. Directions were issued for the filing of submissions, with Organic Indulgence filing on 31 July 2019, Mr Mallis filing on 7 August and Organic Indulgence filing their reply submissions and application for costs on 14 August 2019.

[5] The matter had been listed for an out of hours hearing on Saturday 31 August 2019 at the request of Organic Indulgence. On 29 August 2019, MMS filed a Form F50 – Notice of Discontinuance on Mr Mallis' behalf.

[6] Organic Indulgence advised that they wished to press their costs application notwithstanding the Form F50 filed by MMS. Directions were issued and the parties each filed written submissions in support of their positions. In the directions the parties were

notified that I intended to determine the costs application on the basis of the written submissions, however if either party sought a hearing they were to advise my chambers by the date set down. Neither party made a request to be heard.

The power to award costs

[7] The Commission has the discretionary power to award costs against a party to an unfair dismissal matter if it is satisfied that the party caused the other party to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter. However, the presumption of the Act is that each party bears their own costs.

[8] In its application, Organic Indulgence relied on sections 400A, 401 and 611 of the Act, which provide as follows:

“400A 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.

401 Costs orders against lawyers and paid agents

- (1) This section applies if:
 - (a) an application for an unfair dismissal remedy has been made under section 394; and
 - (b) a person who is a party to the matter has engaged a lawyer or paid agent (the representative) to represent the person in the matter; and
 - (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.
- (1A) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:
 - (a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or
 - (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under this section 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.

...

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)."

[9] Section 402 of the Act provides that an application for costs under s.611, s.400A and s.401 must be made within 14 days after the matter is determined by the Commission. Organic Indulgence's cost application was made within the specified time period. Accordingly s.402 of the Act is satisfied.

The cases presented

Submissions of Organic Indulgence

[10] In their Form F6 Application for Costs Organic Indulgence sought \$6,457.00. They submitted that this was calculated as the costs for each of their employee witnesses to attend the hearing (\$495 and \$375) and 100 hours of the Director of Organic Indulgence's time preparing necessary paperwork (\$5,000) plus GST.¹ It was their submission that whilst traditionally an application for costs was used to recover legal fees paid, as a struggling small business they believed that their time was just as valuable as the time of a paid lawyer.²

[11] Organic Indulgence submitted in their application for costs that the First Costs Respondent had behaved in a vexatious manner and had purposely attempted to cause harm to the Costs Applicant. They submitted that he had manipulated facts and ignored all of the protocols that had been adhered to by them in dismissing him.³

[12] Organic Indulgence submitted that “MMS has used the support processes supplied by the Fair Work Commission to run a scheme in which they no doubt raise a lot of revenue.”⁴ They submitted that it is incumbent on the Commission to recognise when a company has been unfairly attacked without jurisdiction for financial gain.⁵

[13] In their subsequent submissions, Organic Indulgence submitted that they were no longer seeking costs against the First Costs Respondent and instead were only seeking costs against the Second Costs Respondent, MMS.⁶

[14] MMS submitted that Organic Indulgence had not incurred any costs that would be recoverable under s.400A(1) of the Act as they had at no stage been represented by a lawyer or paid agent.⁷

[15] They submitted that an award of costs is made to compensate a party for expenditure which the party has incurred in the conduct of litigation⁸ and that an order for costs is confined to money paid or liabilities incurred for professional legal services. It is not the purpose of a costs order to compensate litigants for the time lost in preparation or presentation of their cases.⁹

[16] MMS submitted that Organic Indulgence had provided no evidence to support their assertion that 100 hours of work had been completed, nor any explanation as to how it had valued the Director’s time. Further, they submitted that the Director is not a solicitor and has not incurred any costs for professional legal services.¹⁰

[17] In relation to Organic Indulgence’s claim of costs for the attendance of witnesses at the hearing, MMS submitted that they again had provided no explanation as to how it had valued the time of those two employees. Further, as the hearing did not actually take place, the claim for the costs of witnesses attending is misplaced.¹¹

Consideration

[18] Section 400A of the Act allows for cost orders to be made if the Commission is satisfied that costs were incurred because of an unreasonable act or omission of a party in connection to the conduct of the case. An unreasonable act or omission includes one which was either deliberate or reckless.¹² A failure to consider the possible settlement of a matter may be unreasonable, but is not necessarily so,¹³ as may be unreasonably failing to discontinue an unfair dismissal application.¹⁴ A “warning” provided to a party about the prospects of their case may be relevant to the assessment of whether the continuation of a matter was reasonable.¹⁵

[19] Other than what is allowed for under s.400A and s.611 of the Act, the general rule is that each party must bear their own costs in proceedings before the Commission. In cases where the statutory criteria may be enlivened, the Commission’s power to award costs under this provision of the Act is discretionary. The exercise of discretion must be in a manner which is ‘fair and just’ and takes into account ‘equity, good conscience and the merits of the

matter’ and there is a broad nature to the factors which may be relevant to the exercise of the discretion.¹⁶ There is also a requisite causal link between the act or omission and the costs incurred.

[20] 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. The preconditions to a valid application being made under s.401 of the Act are found in s.401(1)(a) – (c). When awarding costs under either s. 400A or s. 401 there is discretion to award costs on either a party-party or indemnity basis.¹⁷

[21] Further, it has been commonly held that costs are the amounts a party has paid to a lawyer or paid agent for advice and representation in a matter before a court or tribunal.¹⁸ The costs provided for in Schedule 3.1 to Regulation 3.08 of the Regulations do not include time spent by a party to the application that is not a lawyer or paid agent in preparing and conducting his or her own case. The schedule of costs are confined to money paid or liabilities incurred for professional services.¹⁹ The application pursuant to s.401 made by Organic Indulgence appears to be an application against MMS for the time spent by the Director Mr Nick Court and two employees who were scheduled to appear as witnesses and those costs are not costs prescribed in Schedule 3.1 of the Regulations.

[22] In the matter of *Shaun Welsh v Just Fine Food T/A Vanilla Slice Pty*²⁰ Deputy President Clancy considered the Commissions power to award costs pursuant to s 403 of the Act. The Deputy President observed that Schedule 3.1 to Regulation 3.08 of the Fair Work Regulations 2009 (Regulations) specifies matters for which charge may be made, although the Act also expressly provides that the Commission is not limited to the items of expenditure in Schedule 3.1 when awarding costs and there is the discretion to award costs on either a party-party or indemnity basis.²¹

[23] In *Ferry v GHS Regional WA Pty Ltd*²² Commissioner Williams summarised the findings in *Stanley v QBE Management Services Pty Limited T/A QBE* in which the then Commissioner Jones discussed the Commission’s power to award indemnity costs. Commissioner Williams provided the following summary:

“[73].....Commissioner Jones helpfully reviewed the relevant authorities and the principles to be applied. Those principles are that generally costs orders are not made to punish an unsuccessful party however in a case involving some 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. Some circumstances which have been thought to warrant indemnity costs being ordered are making allegations of fraud knowing them to be false, the fact that proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law, the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions or an imprudent refusal of an offer to compromise.”

[24] Organic Indulgence relies on the decision of *Church v Eastern Health T/A Eastern Health Great Health and Wellbeing*²³ in submitting that the findings support the notion that costs can be awarded against a representative in circumstances where an application has been made “vexatiously and mis-handled by the legal representative”²⁴. In a separate yet related decision the then Commissioner Roe granted permission for the Respondent to be represented

by a lawyer. In the cost application the then Commissioner was satisfied that the Applicant had caused costs to be incurred by the Respondent and its representative because of unreasonable behaviour and ordered that the costs of the attendance of the Respondents representatives at the proceedings *inter alia* be paid by the Applicant.

[25] In its application for costs against MMS pursuant to s.401 of the Act, Organic Indulgence is not claiming representation costs incurred for engaging a lawyer and nor does it appear to be claiming the costs of a paid agent but rather, the wage costs of company personnel who undertook the work involved in defending the unfair dismissal claim. Organic Indulgence submits that the costs claimed were the actual time spent by the Director Mr Nick Court defending himself against the unfair dismissal claim. Further it is claiming the cost of the attendance of two employees at a hearing that did not proceed.

[26] It is an unfortunate circumstance that the time spent preparing to defend the case against it by Organic Indulgence is time a small business can rarely afford however this is a common factor respondents have to deal with in defending an application that has been made against them. It is undoubtedly the case that Organic Indulgence has experienced some financial burden due to valuable resources being diverted to defend the organisation against the claim and this is often the case for small businesses. However the costs being claimed by Organic Indulgence are not of a type that can be recouped through cost orders under the Act.

Conclusion

[27] Whilst I am satisfied that Organic Indulgence undoubtedly experienced a financial loss in having to redirect its internal resources to the task of defending the claim I am not satisfied that the application for costs is valid. At no stage during the processing of the application or the subsequent proceedings was Organic Indulgence represented by a lawyer or a paid agent and as a result, it did not incur any costs that would be recoverable under section 400A or s.401 of the Act. Therefore, it is not necessary for me to determine whether I should exercise the power to order costs pursuant to s.611, consequently Organic Indulgence's application must be dismissed. An order²⁵ to this effect will be issued separately.



COMMISSIONER

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¹ Form F6 – Application for Costs

² Costs Applicant submissions

³ Form F6 – Application for Costs

⁴ Costs Applicant Submissions

⁵ Form F6 – Application for Costs

⁶ Costs Applicant submissions

⁷ Costs Respondent submissions, [36]

⁸ *von Reisner v Commonwealth of Australia* (No 2) [2009] FCAFC 172

⁹ Costs Respondent submissions, [37]; *Cachia v Hanes* (1994) 179 CLR 403; *Bell Lawyers Pty Ltd v Janet Penetlow* [2019] HCA 29

¹⁰ Costs Respondent submissions, [38]

¹¹ Costs Respondent submissions, [39]

¹² *Goffett v Recruitment National Pty Ltd* [2009] AIRCFB 626, [47]

¹³ *Roy Morgan Research Ltd v K Baker* [2014] FWCFCB 1175, [12]; with reference to *Brazilian Butterfly Pty Ltd v Charalambous* (2006) 155 IR 36, [39] – [45]

¹⁴ *Kube v Dominelli Group Pty Ltd T/A Rockdale Nissan* [2016] FWC 8933, [15]

¹⁵ *Roy Morgan Research Ltd v K Baker* [2014] FWCFCB 1175, [21] – [23]

¹⁶ *Baxter Healthcare Pty Ltd v Portelli* [2017] FWCFCB 3891, [104]

¹⁷ *Shaun Welsh v Just Fine Food /A Vanilla Slice Pty* [2018] FWC 6077

¹⁸ <https://www.fwc.gov.au/anti-bullying-benchbook/associated-applications/costs>

¹⁹ *Shaun Welsh v Just Fine Food /A Vanilla Slice Pty* [2018] FWC 6077

²⁰ Ibid

²¹ Ibid

²² [2016] FWC 3120

²³ *Ms Elizabeth Church v Eastern Health T/A Eastern Health Great Health and Wellbeing* [2013] FWC 9970

²⁴ Costs Applicant submissions

²⁵ PR715112