



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Andrew O’Farrell

v

Guest Tek Australia Pty Ltd
(U2018/8699)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 12 MARCH 2020

Application for an unfair dismissal remedy.

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

[2] In a decision and order dated 18 July 2019,¹ Commissioner Riordan determined:

“[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.”

[3] The Applicant provided a written itemised assessment of the costs to the Respondent but quantum of costs was not agreed. Accordingly, I conducted a conference on 10 March 2020 for the purposes of taxing the costs. The parties were notified of this conference by

¹ [2019] FWC 4290.

means of email from my chambers sent on 31 January 2020 and a Notice of Listing sent on 3 February 2020. It was made clear to the parties through these documents and subsequent email correspondence that my preference was for the parties to be in attendance because I would be inspecting the file of the Applicant's solicitors when conducting the conference.

[4] The applicant was represented at the conference by Ms Genevieve Barry, who presented the itemised Schedule of Costs. The Respondent elected to be represented by Mr Jeffrey Dyck. Mr Dyck is located in Canada and appeared via telephone.

[5] I gave the parties the opportunity to address me in relation to each item after 18 October 2018 and until 28 February 2019 in the Applicant's Schedule of Costs and I then assessed each item in accordance with Schedule 3.1 of the *Fair Work Regulations 2009* (the FW Regulations). I had regard to s.403(2)(b) of the FW Act, which provides that if an item appears in Schedule 3.1, the Commission 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.

[6] The total of my assessment of the items was \$7,815.00.

[7] Part 12 of Schedule 3.1 of the FW Regulations provides that the Commission may also allow an amount it considers reasonable in the circumstances of the case for general care and conduct. In particular, Item 1201 of Schedule 3.1 outlines that if the case or circumstances warrant it, an allowance may be claimed in addition to any other item that appears in Schedule 3.1 for general care and conduct in relation to the following:

- a) the complexity of the matter and the difficulty and novelty of questions raised;
- b) the importance of the matter to the party and the amount involved;
- c) the skill, labour, specialised knowledge and responsibility involved in the matter on the part of the solicitor;
- d) the number and importance of the documents prepared or perused, without regard to length;
- e) the time taken by the solicitor; and
- f) research and consideration of questions of law and fact.

[8] In determining whether an allowance should be made in this case for general care and conduct, I had regard to:

- the matters outlined in Item 1201 of Schedule 3.1;
- the submissions made on behalf of the Applicant during the conference before me regarding the nature of the proceedings before Commissioner Riordan and the comments made by Mr Dyck in response; and
- the Federal Court of Australia's [Guide to Discretionary Items in Bills of Costs](#), which indicates that a percentage in the range of 0—15% is commonly allowed for skill, care and responsibility.

[9] I determined that in all the circumstances of this proceeding, an allowance of 15% was appropriate. Applied to the \$7,815.00 I assessed, this equates to \$1,172.25.

[10] Therefore, the total of my assessment of the costs claimed by the Applicant is \$8,987.25 (inclusive of GST).

[11] Pursuant to the decision and order of Commissioner Riordan, the Respondent is to pay the Applicant \$8,987.25 (inclusive of GST) within 28 days of 10 March 2020.²



DEPUTY PRESIDENT

Appearances:

Ms G Barry for the Applicant.

Mr J Dyck for Guest Tek Australia Pty Ltd.

Conference details:

2020.

Sydney:

March 10.

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² Ibid at [34].