[2023] FWC 290 [Note: An appeal pursuant to s.604 (C2023/1072) was lodged against this decision - refer to Full Bench decision dated 10 July 2023 [[2023] FWCFB 71] for result of appeal.]

DECISION ON COSTS

Fair Work Act 2009
s.400A - Application for a costs order against a party

Jenny Wood

v

Amigoss Preschool and Long Day Care Co-Operative Ltd
(C2022/7600)

COMMISSIONER CAMBRIDGE SYDNEY, 9 FEBRUARY 2023

Unfair dismissal claim - application for costs - s. 611 and s. 400A - consideration of vexatiously, without reasonable cause, no reasonable prospects of success, and unreasonable act or omission - application for costs refused.

[1] This Decision is made in respect to an application for costs that was made pursuant to ss. 611 and 400A of the *Fair Work Act 2009* (the Act). The costs application was made on 16 November 2022, by *Haywards Solicitors*, (Haywards) acting on behalf of *Jenny Wood* (the applicant). The respondent to the application for costs is *Amigoss Preschool and Long Day Care Co-Operative Ltd ABN: 54 866 248 590* (the employer or the respondent). In accordance with the requirements of s. 402 of the Act, the costs application was made within 14 days after the originating unfair dismissal application was determined by the Fair Work Commission (the Commission).

Relevant Background

[2] On 1 December 2020, the applicant filed an Unfair Dismissal Application (Form F2) in respect of her summary dismissal from employment with the employer on 12 November 2020. At all relevant times during the proceedings, the applicant has been represented by Haywards.

[3] On 11 December 2020, the representatives of the employer, *Employsure Law Pty Ltd* (Employsure) filed an Employer response to unfair dismissal application (Form F3) which inter alia, raised a jurisdictional objection to the application on the basis that the dismissal was consistent with the Small Business Fair Dismissal Code (the SBFD Code). At all relevant times during the proceedings, the employer has been represented by Employsure.

[4] The Form F3 also advised that the employer did not agree to participate in conciliation of the matter and asked that its SBFD Code objection be first determined in accordance with s. 396 (c) of the Act. Consequently, a conciliation conference which had been scheduled for 15 December 2020 was cancelled.

[5] A Pre-Hearing Conference/Conciliation was held on 18 January 2021, at which time the Commission adjourned the unfair dismissal proceedings pending the finalisation of related criminal proceedings.

[6] The related criminal proceedings arose from the employer having dismissed the applicant after it had accepted allegations made by other employees that the applicant had physically abused a child on two occasions in 2017 (the abuse allegations). In accordance with the employer's mandatory reporting obligations, the employer had reported the abuse allegations to the NSW police and the Department of Education. The NSW police subsequently charged the applicant with two counts of assault on a student while attending school.

[7] As a result of the criminal charges that were laid against the applicant, the Office of the Children's Guardian and the National Education Standards Authority suspended the applicant's accreditation which is required to enable her to work with children and to teach children. Accordingly, the applicant's Working With Children Check (WWCC) was cancelled. Although the applicant has subsequently made an application for her WWCC to be restored, she has been advised that the standard time to process a WWCC application when assessment is required is at least 12 months. Consequently, the earliest date that the applicant could be cleared to work with or teach children would be July 2023.

[8] On 19 April 2022, Haywards advised the Commission that the criminal proceedings in relation to the applicant had been determined by the Local Court on 11 April 2022, with all charges having been dismissed. The Commission listed further proceedings by way of Mention and Directions scheduled for 4 May 2022. On 3 May 2022, Employsure advised that the employer wished to have an opportunity for conciliation of the unfair dismissal claim, and the Commission indicated that conciliation would be explored at the Mention and Directions proceedings to be held the following day. During the Mention and Directions proceedings held on 4 May 2022, Haywards advised that the applicant did not wish to participate in conciliation.

[9] On 9 May 2022, Haywards wrote to the President of the employer's Board of Directors on behalf of the applicant and, in summary, proposed a settlement which would encompass resolution of her unfair dismissal claim and all other matters including a foreshadowed prosecution for the tort of Malicious Prosecution to be taken against the employer and its Business Manager and Chief Executive Officer, Mr Cesar Gomez. The communication of 9 May also noted that the applicant was prohibited from engaging in any work involving children and that she remained unable to work as an Early Childhood Teacher. The financial consideration that was proposed amounted to a total of $237,072.24 which was comprised of; $192,000 in respect of legal costs incurred in the defence of the criminal proceedings; $6,449.04 in respect of Long Service Leave; $5,149.76 as payment in lieu of notice; and $33,473.44 representing 6 months' pay.

[10] The applicant's settlement offer was stated to remain open for acceptance until 5pm, 20 May 2022. The employer did not provide any response to the applicant's settlement offer, and it appeared that the offer lapsed after the date for acceptance, 20 May 2022.

[11] On 19 July 2022, Employsure wrote to Haywards and proposed settlement of the applicant's unfair dismissal claim and all other matters, on the basis of an amount that totalled $28,335.30 which was comprised of; $16,736.50 as general damages that equated with 3

months' pay; $5,149.76 as payment in lieu of notice; and $6,449.04 in respect of Long Service Leave.

[12] The employer's settlement offer of 19 July (the employer's first settlement offer) was stated to remain open for acceptance until 5:30pm (AEST), 22 July 2022. The applicant did not provide any response to the employer's first settlement offer, and it lapsed after the date for acceptance, 22 July 2022.

[13] However, on 28 July 2022, Employsure sent an email to Haywards seeking a response to the employer's first settlement offer. On 29 July 2022, Haywards sent an email to Employsure which confirmed that no response was made because the applicant did not wish to accept the employer's first settlement offer.

[14] On 1 August 2022, Employsure wrote to Haywards and proposed a second settlement offer of the applicant's unfair dismissal claim and all other matters, on the basis of an amount that totalled $45,072.30, which was comprised of; $33,473.50 as an employment termination payment that equated with 6 months' pay; $5,149.76 as payment in lieu of notice; and $6,449.04 in respect of Long Service Leave.

[15] The employer's second settlement offer of 1 August 2022 was stated to remain open for acceptance until 5pm (AEST), 4 August 2022, being the first day of the Hearing of the applicant's unfair dismissal claim. Aside from and separate to the proceedings which commenced on the first day of the Hearing, the Parties clarified that the employer's second settlement offer was not confined to settlement of the unfair dismissal matter but proposed as a global settlement of all matters. The barrister who appeared for the applicant then confirmed that the employer's second settlement offer was rejected.

[16] In the absence of any settlement, the arbitration proceedings continued and eventually involved a Hearing conducted at Sydney on 4 and 5 August, and 16 September 2022. The applicant's unfair dismissal claim was successful, and in a Decision [2022] FWC 2925, issued by the Commission on 3 November 2022, Orders were made for compensation to be paid to the applicant in the amount of $33,488.00.

[17] The subsequent application for costs that was made by the applicant was the subject of Mention and Directions proceedings held on 30 November 2022. The Commission issued Directions that required the Parties to file and serve their respective evidence and other materials on the issue of costs in accordance with a timetable that required the Parties to advise the Commission by 23 December 2022, as to whether a formal Hearing was required or alternatively, whether the issue of costs could be determined upon the filed documentary material. The Parties have confirmed that each side is content for the costs application to be determined upon the filed documentary material and without any need for a Hearing.

The Case for Costs

[18] The application for costs was advanced under both s. 611 and s. 400A of the Act. In broad summary, the applicant asserted that the employer had made the response to the unfair dismissal application vexatiously, and/or without reasonable cause, and/or that it should have been reasonably apparent to the employer that the response to the application had no reasonable

prospects of success. The applicant also advanced its application for costs on the basis that s. 400A of the Act had been satisfied, and in this regard it was asserted that the employer caused costs to be incurred because of its unreasonable continuation of the matter.

[19] The applicant filed evidence in support of its application for costs in the form of a witness statement dated 12 December 2022, made by the applicant. The evidence of the applicant included copies of various communications between the applicant's lawyers and the NSW Education Standards Authority (NESA) and the Office of the Children's Guardian. These communications provided inter alia, confirmation that NESA had placed the applicant on Leave of Absence (LoA) and culminated with the following statement of *David Cranmer*, Director Teacher Policy & Professional Conduct:

> *"Importantly, NESA will not allow Ms Wood to come of* [sic] *the LoA and become active again until she can provide NESA with a WWCC clearance number."*[1]

[20] The applicant also filed submissions in support of the application for costs dated 12 December 2022, and submissions in reply dated 23 December 2022.

[21] The submissions made by the applicant in support of its application for costs, firstly asserted that the employer's response to the unfair dismissal application was made vexatiously and in satisfaction of s. 611(2)(a) of the Act. It was submitted by the applicant that at the time of making the response to the unfair dismissal application, the employer was aware of the harm caused to the applicant by the actions which had led to her accreditation being suspended. The applicant asserted that the conduct of the employer was unfairly burdensome, prejudicial, and damaging to the applicant. The employer submitted that it was open for the Commission to find that the employer responded to the application vexatiously.

[22] Secondly, the applicant submitted that at the time that the employer made the response to the unfair dismissal application it knew, or should have known, that having examined all of the circumstances surrounding the alleged misconduct of the applicant, any reliance upon the Small Business Fair Dismissal Code had no substantial prospects of success. Consequently, the applicant asserted that it was open to the Commission to find that the response to the unfair dismissal application was made without reasonable cause and in satisfaction of s. 611(2)(a) of the Act.

[23] Thirdly, the applicant submitted that it should have been reasonably apparent to the employer that the employer's response to the unfair dismissal application had no reasonable prospects of success in satisfaction of s. 611(2)(b) of the Act. In support of this submission, the applicant asserted that particularly after the employer had the benefit of the findings of the Local Court proceedings, it should have been obvious to the employer that its defence was without reasonable cause and had no reasonable prospects of success.

[24] Finally, the applicant's costs application was advanced on the basis that the relevant conduct of the employer satisfied the requirements of s. 400A of the Act. The applicant asserted that once the employer had properly assessed all of the circumstances of the case, including in particular, having the benefit of the transcript of the Local Court proceedings, it was clear that, as was subsequently conceded by the employer, the employer did not have a valid reason for the dismissal of the applicant. According to the submissions made by the applicant, the

employer should have conceded that the conduct for which the applicant had been dismissed did not occur, and then the proceedings would have taken a different course where for example, the matters in dispute may have only been procedural issues or in respect of remedy. The applicant asserted that the employer acted unreasonably by continuing to defend the application after it had recognised that it did not have a valid reason for the dismissal. Therefore, the applicant submitted that it was open to the Commission to find that the maintenance of the defence to the proceedings constituted an unreasonable act that caused the applicant to continue to litigate her claim and incur costs.

[25] In summary, the applicant submitted that the Commission should exercise its discretion to award costs pursuant to sections 611 and 400A of the Act. The applicant submitted that the employer's response to the unfair dismissal application was made vexatiously and/or without reasonable cause, and/or it had no reasonable prospects of success. Further, the applicant asserted that the employer had acted unreasonably when it continued to defend its case against the unfair dismissal application after it had realised that there was not a valid reason for the dismissal. The applicant submitted that the continued defence of the matter was an unreasonable act that caused the applicant to incur costs. The applicant sought that costs be Ordered in accordance with the itemised schedule of costs attached to the costs application and which identified total costs and disbursements in the amount of $39,416.50.

The Case against Costs

[26] The employer opposed the application for costs upon the assertions that the circumstances of the matter should not lead to the Commission to any conclusion that the terms of either s. 400A or s. 611 of the Act had been satisfied. The employer provided evidence in support of its opposition to the application for costs in the form of a statement dated 20 December 2022, made by *Eugenia Sadiq Ikonomou*, a lawyer employed by Employsure.

[27] The evidence provided in the statement of Ms Ikonomou included copies of the various communications between the Parties which set out the respective offers of settlement. Relevantly, these communications were; firstly, the letter of 9 May 2022, from Haywards to the employer's President which proposed the settlement amount of $237,072.24; secondly, the employer's first settlement offer of 19 July 2022, in the amount of $28,335.30; and thirdly, the employer's second settlement offer of $45,072.30.

[28] The submissions made by the employer first dealt with s. 400A of the Act. The employer rejected the proposition that it had engaged in conduct that by way of unreasonable action or omission, had caused the applicant to continue to litigate her claim and incur costs. In support of this submission the employer noted that it had acted proactively by making two offers to settle and on both occasions the applicant did not provide any counteroffer, and the applicant had refused to participate in discussions that may have led to an agreed settlement. Further, the employer stated that it could not have acted unreasonably when it had made an offer to settle for an amount above what the applicant obtained by Order of the Commission.

[29] According to the submissions made by the employer, it had no choice but to defend the application because the applicant had rejected an offer that was in excess of the maximum compensation that the Commission could Order, and it refused to engage in reasonable settlement discussions. Consequently, the employer asserted that it had not caused the applicant

to incur costs because of any unreasonable act or omission on its part, and therefore the Commission should not conclude that the provisions of s. 400A of the Act had been satisfied.

[30] The employer made further submissions which addressed the terms of s. 611 of the Act. In respect of s. 611(2)(a) of the Act, the employer submitted that at the time that it made the response to the unfair dismissal claim, the criminal trial of the applicant had not commenced, and at that point in time, the employer could not have had the benefit of any of the evidence or determinations made in those proceedings. Consequently, according to the submissions made by the employer, without the knowledge that was subsequently obtained from the criminal proceedings, the response made by the employer could not have been made vexatiously or without reasonable cause.

[31] In respect to s. 611(2)(b) of the Act, the employer submitted that once it had the benefit of the evidence, transcript, and determinations of the Local Court proceedings, it advanced the first and second settlement offers in recognition that the defence may not have reasonable prospects of settlement. Consequently, according to the submissions made by the employer, particularly as the second settlement offer was in excess of the compensation cap, the employer made diligent and good faith attempts to settle the matter. Further, the employer submitted that although it recognised that the employer's prospects for success were poor, and that eventually it was unsuccessful, that fact was not immutable at the time of making good faith settlement offers.

[32] In summary, the submissions made by the employer asserted that the employer had not acted unreasonably, vexatiously, or without reasonable cause in respect to its response to the applicant's unfair dismissal claim. The employer stressed that it had taken reasonable steps to resolve the proceedings which involved making considerable settlement offers. The employer urged the Commission to dismiss the application for costs.

Consideration

[33] Although there are a number of different sections of the Act which deal with costs, in this instance the application for costs, as set out in the initiating Form F6, was made under both s. 611 and s. 400A of the Act.

[34] The Commission may make a costs Order in respect to an unfair dismissal claim if any of the terms of either ss. 400A or 611 have been satisfied. Relevantly, these two sections of the Act are in the following terms:

> ***"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

And

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)."

General Approach to Costs

[35] The approach to consideration of any application for costs made under the Act should, at the outset, recognise the significance of subsection 611(1) and the implications that have been established to flow from those particular provisions. In this regard, it is relevant to refer to a Full Bench Decision in the matter of *E. Church v Eastern Health t/as Eastern Health Great Health and Wellbeing*[2] and the following extract from that Decision is relevant:

*"**[26]** Section 611 sets out a general rule - that a person must bear their own costs in relation to a matter before the Commission (s.611(1)) - and then provides an exception to that general rule in certain limited circumstances. The Explanatory Memorandum confirms this interpretation of the section, it is in the following terms:*

2353. Subclause 611(1) provides that generally a person must bear their own costs in relation to a matter before FWA.

2354. However, subclause 611(2) provides an exception to this general rule in certain limited circumstances. FWA may order a person to bear some or all of the costs of another person where FWA is satisfied that the person made an

> *application vexatiously or without reasonable cause or the application or response to an application had no reasonable prospects of success.*
>
> *2355. A note following subclause (2) alerts the reader that FWA also has the power to order costs against lawyers and paid agents under clauses 376, 401 and 780 which deal with termination and unfair dismissal matters.*
>
> *2356. Subclause 611(3) provides that a person to whom a costs order applies must not contravene a term of the order.*
>
> ***[27]** In the context of s.570 and its legislative antecedents courts have observed that an applicant who has the benefit of the protection of a provision such as s.570(1), (ie the general rule that parties bear their own costs), will only rarely be ordered to pay costs 5 and that the power should be exercised with caution and only in a clear case 6. In our view a similarly cautious approach is to be taken to the exercise of the Commissions powers in s.611 of the FW Act."* [emphasis added]

[36] Consequently, it has been well established that there should be a cautious approach taken in respect to any application for costs made under the Act. This caution operates to establish an underlying reluctance to grant any application for costs and to only do so in instances where a clear case has been made out to satisfy the exceptions to the general rule that each side bear its own costs. Those exceptions are specified in subsections 611(2)(a) and (b) of the Act, and in the case of a claim for unfair dismissal, also extend to circumstances identified in subsection 400A (1).

[37] In this case, the applicant has advanced its costs application upon various identified grounds. Firstly, it was asserted that the response to the unfair dismissal application had been made vexatiously, and/or without reasonable cause, and/or that it should have been reasonably apparent to the employer that the defence of the application had no reasonable prospects of success. Secondly, the applicant asserted that the conduct of the employer in respect to the continuation of the defence of the proceedings after the Local Court outcomes were known, established unreasonable acts or omissions which caused the applicant to incur costs. The applicant asserted that on any of these grounds, either separately or in combination, there was basis upon which the exceptions to the general rule that each side bear its own costs, had been established.

Vexatiously – s. 611(2)(a)

[38] At the time at which the response to the application was made, 11 December 2020, for the response to have been vexatious there would need to be evidence to establish that the response was motivated to achieve some improper, collateral purpose. Although the employer has subsequently been found to have had no reasonable grounds for the belief that there was valid reason for the dismissal of the applicant, that absence of proper foundation for the dismissal could not be translated into some malicious or collateral motivation for the filing of a response to defend the unfair dismissal claim.

[39] Particularly in view of the fact that on 25 November 2020, the applicant had been arrested by NSW police and charged with two counts of assault on a student while attending school, the employer would have been somewhat fortified by the actions of the police notwithstanding any underlying malfeasance that may have triggered some level of soul searching on the part of the employer's Business Manager and Chief Executive Officer, Mr Cesar Gomez. In simple terms, the criminal charges laid against the applicant would have provided sufficient, reasonable motivation to make the response. In these circumstances, there has been no basis to establish that the employer's response was made vexatiously.

Without Reasonable Cause - s. 611(2)(a)

[40] On the question of whether the response to the application could be considered to have been taken without reasonable cause, it is important to have regard for the established stringency of the test that must be met to satisfy that a case, or response, was taken without reasonable cause. In numerous Judgements and Decisions there have been various descriptions used to characterise the test required for a finding that a case was commenced, or the response was made, without reasonable cause. Terminology such as "manifestly groundless" "obviously untenable" and "incapable of argument" has provided guidance.

[41] The relevant tests for finding that a position, either claim or response, was taken without reasonable cause, when translated into the context of the response to an application for unfair dismissal remedy, requires identification of some aspect of the response which would unquestionably defeat any defence of the matter. A response to an unfair dismissal claim that was taken without reasonable cause would contain some aspect which was identifiable from the response document and which of itself, would operate to render any defence as plainly incapable of success. As a theoretical example, a response to an unfair dismissal application which stated and provided verification that the dismissal was solely motived by the applicant advising of her pregnancy and invoked for the single purpose of avoiding any obligation to provide parental leave, would be a response that might be construed to have been taken without reasonable cause.

[42] In this case, there was no evidence to establish that at the time of making the response, 11 December 2020, that the response contained some defect(s) which meant that it could have been struck out or otherwise subject to interlocutory disposal. At no point prior to the making of the application for costs did the applicant articulate the proposition that the defence of the unfair dismissal claim was so manifestly groundless or otherwise defective that some summary determination could be made in favour of the applicant.

[43] Indeed, there was no application made to challenge the adjournment of the unfair dismissal proceedings to enable the outcome of the related criminal proceedings. If the response to the application was made without reasonable cause, then some identification of the fundamental defect(s) that would likely render any defence as incapable of argument, should have been made, or at least foreshadowed, in response to the filing of the employer's response, Form F3 and at around the time of the Pre-Hearing Conference/Conciliation that was held on 18 January 2021.

[44] Although the employer's response has subsequently failed, at no stage was there some identified defect(s) that would have been the basis to have made the employer's case found to

have been manifestly groundless, or obviously untenable, or incapable of argument. There was no identifiable aspect of the response to the application which could be capable of annulling any defence without recourse to argument. Consequently, the response to the application was not made without reasonable cause as contemplated by s. 611(2)(a) of the Act.

No Reasonable Prospect of Success - s. 611(2)(b)

[45] The applicant also advanced its application for costs upon the assertion that it should have been reasonably apparent to the employer that its defence had no reasonable prospect of success. It seems to be well settled that the test to establish that a case had no reasonable prospects of success is not as stringent as that required to find that a claim or response had been taken without reasonable cause.

[46] Consideration of this aspect of the application for costs involves a broad assessment of the merits of the case as should have been properly evaluated at the time of the making of the response. Further, it was argued that an assessment of the reasonable prospects of success should also involve consideration of the position that emerged once the employer had the benefit of the material arising from the outcome of the Local Court proceedings. Although, no binding Authority was provided to support the prospect that it would be open to have this potential ongoing re-evaluation of the prospects of success essentially evolving throughout the course of proceedings, the Parties appeared to be content to not have the assessment regarding reasonable prospects of success confined to the time of the making of the response to the application.

[47] In this instance, the Parties made submissions about whether there were reasonable prospects of success of the defence case at a point in time after the determination of the Local Court proceedings. The employer provided evidence that after reviewing the transcript of the Local Court proceedings, together with the applicant's submissions and evidence, their representatives concluded that the prospects for the defence case to succeed were poor.[3] As a result, the employer made the first and second settlement offers.

[48] At the point in time after the Local Court proceedings had finalised and the employer had made what would have amounted to a re-assessment of the prospects of success, it genuinely attempted to settle. The approach of the employer following its re-assessment of the prospects of success and having regard that any defence would rely heavily upon the operation of the SBFD Code, are factors which should be taken into account in any finding that the response to the application had no reasonable prospects of success as contemplated by s. 611(2)(b) of the Act.

[49] Importantly, any prospect of success for the employer's case as it would have been re-assessed circa July and August 2022, would logically have turned upon the witness evidence that was to be adduced from Mr Gomez. The summary dismissal provisions of the SBFD Code focus upon the reasonable grounds for the employer's belief and realistically, in this case, the performance of Mr Gomez in the witness box could have always been contemplated to be the difference between success and failure.

[50] Upon a careful, objective, and balanced assessment of the response made by the employer to the unfair dismissal claim, both at the time of the filing of the response document,

and subsequently after the outcome of the Local Court proceedings, and notwithstanding that the employer's case was indeed poor, in all fairness, having regard for the employer's attempts to settle after its re-assessment, it should not be held to have had no reasonable prospects of success. Consequently, no finding is made that the employer's response to the unfair dismissal application had no reasonable prospect of success in satisfaction of the provisions of s. 611(2)(b) of the Act.

Unreasonable Act or Omission - s. 400A (1)

[51] The applicant also pursued its costs application on the basis that there was conduct on the part of the employer that satisfied subsection 400A (1) of the Act.

[52] Subsection 400A (1) of the Act introduces a further exception to the general rule established by subsection 611 (1) that each side bear their own costs in relation to a matter before the Commission. This particular exception is confined to unfair dismissal proceedings and requires that the Commission be satisfied that a Party caused costs to be incurred by another Party because of an unreasonable act or omission. An unreasonable act or omission could occur in respect to a particular aspect or part of the proceedings, or such act or omission might involve a more general finding in respect to a combination of factors surrounding the application, the defence, and any part or parts of the proceedings.

[53] The applicant submitted that the conduct of the employer in continuing to defend the claim after the employer had the benefit of the related criminal proceedings materials such as the transcript of the Local Court proceedings, and the applicant's evidence and submissions, was conduct that represented unreasonable acts or omissions in connection with the conduct or continuation of the unfair dismissal claim in satisfaction of s. 400A of the Act. Consideration of this submission should by necessity, involve a brief review of the chronology of the conduct of both Parties following the determination of the Local Court proceedings whereby the two charges against the applicant were dismissed on 11 April 2022.

[54] The relevant chronology summary can be set out as follows:

> 11 April - Criminal Charges dismissed by Local Court.
> 19 April - Haywards communicated with Commission seeking reactivation of the unfair dismissal proceedings.
> 20 April - Notice of Listing for Mention and Directions on 4 May 2022.
> 3 May - Employsure requested conciliation.
> 3 May - Commission advised that conciliation would be explored at the proceedings to be held the following day.
> 4 May - Haywards advised that the applicant did not wish to engage in conciliation.
> 4 May - Matter listed for Hearing on 4 and 5 August 2022.
> 9 May - Haywards letter to employer's President proposing settlement for $237,072.24.
> 20 May - Applicant's settlement offer lapsed without any response from employer.
> 19 July - Employsure letter to Haywards proposing settlement for $28,335.30.
> 22 July - Employer's settlement offer lapsed without any response from applicant.
> 28 July - Employsure letter to Haywards seeking response to settlement offer.
> 29 July - Haywards confirmation that settlement offer was rejected.
> 1 August - Employsure letter to Haywards proposing settlement for $45,072.30.

4 August circa 10:11am - Hearing commenced
4 August circa 2:30pm - applicant's barrister provided confirmation that (second) settlement offer was rejected.

[55] The relevant events in the period 11 April to 4 August 2022, as summarised above, need to be considered in the context that it was clear to all involved that the without a Working With Children Check (WWCC) the applicant was prevented from engaging in work with or teaching children. Consequently, although the applicant was advancing a case seeking a remedy of reinstatement, such an outcome was simply not available. On any realistic assessment, the applicant had a strong case which was likely to succeed, however, the practical impediment to any reinstatement would logically lead to an outcome of compensation, the maximum being circa $33,470.00.

[56] In these circumstances, it was somewhat puzzling to note that the employer's first settlement offer made on 19 July, for $28,335.30, was not pursued further by the applicant. Although the applicant was understandably aggrieved by the injustice she had suffered, the concept of recovery of the $190,000.00 financial losses via the foreshadowed prosecution of the tort of malicious prosecution against the employer and Mr Gomez, in circumstances where the criminal proceedings were taken by the NSW police, and the employer had mandatory reporting obligations, may have been realistically assessed as an adventurous proposition.

[57] It is relevant to contemplate that if the applicant had perused the first settlement offer, there were realistic prospects that an amount close to or even exceeding the compensation cap figure of $33,470.00 may have been achieved. It would not have been unrealistic to have anticipated that if the applicant had engaged with the employer in settlement discussions following the first offer, that an amount of $45,072.30 as was advanced in the second offer, may have been negotiated. An agreed settlement outcome of this magnitude should have been evaluated against an outcome at trial that realistically was probably at best about $33,470.00, and from which, in all likelihood, the legal costs of having the matter run to Hearing would have to be subtracted.

[58] Unfortunately, for whatever reason, the applicant's refusal to engage in settlement discussions led to the conduct of a Hearing that on realistic assessment, was going to involve legal costs that would exceed the best monetary outcome. The proposition that the employer should have conceded defeat so that, as the applicant submitted, the proceedings would have taken a different course, would have meant that, in all likelihood, the same position as would have probably emerged from a negotiated settlement arising after the first settlement offer from the employer would have occurred. That is, an outcome of circa $45,072.30 but without subtraction of the legal costs of the Hearing.

[59] The proper, balanced, and realistic assessment of the conduct of the respective Parties in the relevant period between 11 April to 4 August 2022, reveals that there was no unreasonable act or omission on the part of the employer that caused the applicant to continue to litigate her claim and incur costs. Instead, it was the failure of the applicant to engage in settlement discussions following the first settlement offer that was advanced by the employer which meant that the matter proceeded to a Hearing that was likely to cost more than could be obtained as a monetary outcome. Of course, these matters are not litigated solely for monetary outcomes, and the applicant has been resoundingly vindicated. However, in simple terms, the pursuit of costs

under s. 400A of the Act will not be successful if the conduct of the successful Party caused the costs to be incurred in the first place.

[60] Consequently, in the particular circumstances of this case, no finding can be made that the employer engaged in any unreasonable conduct which may have represented an act or omission capable of satisfying the terms of subsection 400A (1) of the Act.

Conclusion

[61] This application for costs was made by the applicant who successfully established that she had been unfairly dismissed. The costs application was made under ss. 611 and 400A of the Act. Consequently, the Commission has been required to consider whether the requirements of subsections 611 (2) (a) and (b) and s. 400A of the Act were met so that costs should be Ordered in favour of the applicant.

[62] In respect to subsection 611 (2) (a) of the Act, an analysis of the circumstances at the time that the response to the unfair dismissal application was made, has confirmed that the response was not made vexatiously or without reasonable cause.

[63] Further, for the purposes of subsection 611 (2) (b) of the Act, having regard for all of the circumstances of the case, and in particular, the recognised difficulties associated with the application of the terms of the SBFD Code, the Commission could not be satisfied that at the time that the response to the application was made, or upon some subsequent assessment, it should have been reasonably apparent to the employer that the application had no reasonable prospects of success.

[64] In respect to subsection 400A (1) of the Act, the Commission has not been satisfied that the actions of the employer in connection with the conduct or continuation of the matter could be found to have been unreasonable. Consequently, the Commission has not been satisfied that any unreasonable acts or omissions on the part of the employer have been established in satisfaction of the requirements of subsection 400A (1) of the Act.

[65] In summary therefore, the requirements of subsections 611 (2) (a) and (b) and 400A (1) of the Act have not been properly satisfied. The general rule established by subsection 611 (1) of the Act, that each Party bear its own costs, is not disturbed by any one or more of the exceptions provided in subsections 611 (2) and 400A (1) of the Act. Consequently, the applicant’s application for costs must be refused and an appropriate Order shall be issued in conjunction with this Decision.

COMMISSIONER

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[1] Attachment ‘D’ to Statement of Jenny Wood dated 12 December 2022.

[2] E. Church v Eastern Health t/as Eastern Health Great Health and Wellbeing [2014] FWCFB 810.

[3] Statement of Ikonomou - 20 December 2022 @ para 11.