



DECISION

Fair Work Act 2009

s.400A—Costs against parties in unfair dismissal matters

Liang Chen

v

Right2Drive Pty Ltd

(U2022/9330)

COMMISSIONER BISSETT

MELBOURNE, 30 MARCH 2023

Application for an order for costs

[1] On 3 February 2023 Right2Drive Pty Ltd made an application to the Fair Work Commission (Commission) for an order for costs under s.400A of the *Fair Work Act 2009* (FW Act) against Mr Liang Chen.

[2] Right2Drive says it incurred legal fees in applying to dismiss the application for a remedy for unfair dismissal made by Mr Chen pursuant to s.399A of the FW Act (**s.399A application**) and seeks an order for costs in the sum of 75% of its legal fees (and further costs in respect of costs associated with the making of the application for a costs order). Accounting for those further costs (\$2,363.00, provided in its submissions on 17 February 2023) it says it has spent \$10,299.00 and seeks an order for costs of 75% of this figure (\$7,724.25).

[3] Right2Drive was represented by lawyers and Mr Chen by counsel at the hearing of this application, permission having been previously granted.

BACKGROUND

[4] On 17 September 2022 Mr Chen made an application for an unfair dismissal remedy under s.394 of the FW Act. Mr Chen alleged he was unfairly dismissed by Right2Drive Pty Ltd on 16 September 2022.

[5] The application was listed for hearing in February 2023 but was adjourned to 27, 28 and 29 March 2023.

[6] On 21 December 2022 Right2Drive made a s.399A application that the unfair dismissal application made by Mr Chen be dismissed on the basis that a settlement agreement had been concluded but Mr Chen had failed to discontinue the matter. The application also sought an order for costs incurred since 14 December 2022, in the event that Mr Chen did not discontinue his application for an unfair dismissal remedy prior to the hearing of the s.399A application.

[7] The s.399A application detailed that on 30 November 2022 Mr Chen made a without prejudice offer to resolve the unfair dismissal proceedings and that the offer was accepted by Right2Drive without equivocation on 14 December 2022. In accepting the offer Right2Drive confirmed it would execute settlement on receipt of a Form F50 Notice of discontinuance from Mr Chen, seeking it no later than close of business on 16 December 2022.

[8] In response to the s.399A application Mr Chen suggested that I could not hear the application as it related to without prejudice discussions between the parties.

[9] On 23 December 2022, following consultation with the parties, I issued directions listing the s.399A application for hearing on 1 February 2023. Previous directions concerning the filing of materials and evidence in the substantive s.394 application were vacated as well as the substantive hearing listed for March 2023. The directions were in the following terms:

1. The Directions previously issued by the Commission are set aside in full and the hearing listed for 27 to 29 March 2023 is vacated.
2. Mr Chen is to file with the Commission and serve on the Respondent submissions and evidence as to why the Commissioner should not dismiss his application for unfair dismissal pursuant to s.399A(1)(c) of the FW Act by **4.00 pm Wednesday 4 January 2023**. These submissions should include any grounds on which he says the Commission cannot hear the application.
3. The Respondent is to file with the Commission and serve on Mr Chen submissions and evidence as to why the Commission should dismiss the application of Mr Chen by **4.00 pm Wednesday 18 January 2023**.
4. Mr Chen is to file and serve any submissions and evidence in reply by **4.00 pm Wednesday 25 January 2023**.
5. The application to dismiss the unfair dismissal application will be listed for hearing by **video on Wednesday 1 February 2023 at 10.00 am**.

[10] Subsequent to the issue of directions Right2Drive emailed my chambers on 23 December 2022 detailing that:

- On 21 December 2022 Mr Chen emailed Right2Drive informing that he would attend to discontinuing his application in the new year
- That day Right2Drive replied to Mr Chen requesting that, if he now agreed a binding settlement existed between the parties, he discontinue his application prior to 4.30 pm on 22 December 2022. A failure to do so would result in further legal costs being incurred and it would pursue an application for an order for costs against him
- There had been no response from Mr Chen, and Right2Drive now sought that I direct Mr Chen to discontinue proceedings immediately

[11] My chambers responded to Right2Drive informing that I do not have the power to direct a party to discontinue their application. Copied to Mr Chen, the response also encouraged Mr Chen, should the matter be settled, to discontinue his application.

[12] On 3 January 2023 Mr Chen emailed a chronology of settlement discussions between the parties to my chambers. The chronology did not comply with the directions issued so that day my chambers wrote to Mr Chen advising that:

The Commissioner hereby **directs you** to advise the Commission by **10.00am Thursday 5 January 2023**:

1. If you intend to file submissions in accordance with the directions issued by the Commission on 23 December 2022;
2. If the email sent by you is intended to be submissions filed in accordance with the directions of 23 December 2022 (noting that these are not of the standard of submissions the Commission would expect from a lawyer and that the Commission is not inclined to rely on a cut and paste of emails as evidence of emails);
3. If you have now abandoned your claim that the Commission cannot hear the application of the Respondent as it “relates to without prejudice communications regarding settlement discussions”.

Should you fail to provide a response to this email you should be aware that the Commissioner may consider, on her own motion, dismissing your application pursuant to s.587 of the FW Act.

[13] Mr Chen ultimately filed submissions later on 4 January 2023, and in response to these questions posed answered yes, no and no.

[14] Right2Drive’s submissions were received on 18 January 2023.

[15] On 22 January 2023 Mr Chen filed a Form F50 Notice of discontinuance. The s.399A hearing was vacated and the file closed.

[16] As detailed above Right2Drive made an application for an order for costs on 3 February 2023. Directions in respect of the costs application were issued to parties 7 February 2023 and a hearing listed on 20 March 2023. Parties complied with the directions prior to the hearing of the application.

LEGISLATION

[17] The application for costs has been made pursuant to s.400A of the FW Act which states:

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.

THE APPLICATION FOR COSTS

Hearing

[18] The costs hearing was heard by video on 20 March 2023. Both parties provided oral submissions and neither called any witnesses. Relevant to the parties' submissions was the chronology of email correspondence between Mr Chen and Right2Drive, in relation to settlement of the unfair dismissal application, between November 2022 and January 2023.

Correspondence

[19] There is no factual dispute as to the correspondence between the parties in relation to the settlement agreement. The following chronology is taken from the documents filed and not contested.

[20] On 30 November 2022 at 4.03 pm Mr Chen emailed Right2Drive's representatives making an offer to settle his application for an unfair dismissal remedy:

Without prejudice save as to costs

[salutation]

In the interest of resolving this matter and to avoid the time and costs associated with this matter proceeding to hearing, I am prepared to offer the following terms of settlement:

1. Right2Drive pays me 6 weeks' pay as compensation for unfair dismissal.
2. No confidentiality.
3. No non-disparagement.

If Right2Drive does not accept this offer and it does not achieve a better outcome arising from a hearing of this matter, I hereby put Right2Drive on notice that I will rely on this correspondence in support of a claim that Right2Drive pay all of the my costs of this proceedings, on an indemnity basis.

As you ought to be fully aware, section 400A of the Fair Work Act 2009 (Cth) entitles me to apply for an order against Right2Drive to recover my costs if the Commission is

satisfied those costs were incurred as a result of an unreasonable act or omission by Right2Drive in connection with the conduct or continuation of the matter.

It ought now be obvious to you and your client that I will succeed in my unfair dismissal claim, which will entitle me to compensation. As published on the FWC website “[t]he median [compensation] is between 6 – 8 weeks pay.”, your client’s rejection of my offer (which is on the lower end of the average award for compensation for unfair dismissal) contained in this email and the continuation of the matter, are unreasonable acts entitling me to payment of my costs when I am successful.

My offer is open for acceptance until **5 pm on 14 December 2022** after which time it will lapse.

If you have any queries in relation to any of the above, please feel free to contact me.

[emphasis in original]

[21] On 14 December 2022 at 3.58 pm Right2Drive’s representatives replied, accepting the offer:

[salutation]

We refer to your email below dated 30 November 2022 and the settlement offer outlined in that email (**Offer**).

We confirm that we are instructed to accept the Offer.

Within two business days of you discontinuing the proceedings, our client will make a payment to you of six weeks’ pay (which is \$3,006.12), less applicable tax, with no commitment as to the confidentiality of the settlement or any non-disparagement obligations on the parties.

Please file a Form F50 Notice of Discontinuance at your earliest convenience, and by no later than close of business Friday 16 December 2022.

[22] On 14 December 2022 at 8.18 pm Mr Chen replied to Right2Drive’s representatives requesting confirmation as to whether the payment was compensation for unfair dismissal:

Without prejudice save as to costs

[salutation]

I refer to your email below dated 14 December 2022 at 3:58 pm, in response to my email dated 30 November 2022 at 4:03 pm.

Please confirm, for the avoidance of doubt, that Right2Drive Pty Ltd will be making a payment to me for compensation for unfair dismissal, calculated as six (6) weeks’ pay.

That is, by making payment to me, Right2Drive Pty Ltd acknowledges that I was unfairly dismissed.

I refer to our telephone discussion where you sought clarification in respect of my “without prejudice save as to costs” offer. As discussed the purpose of the offer was to give me costs protection, i.e. the elements of which are needed for me to achieve a better outcome at a hearing are:

1. A finding by the Commission that I was unfairly dismissed – which I am confident that I will get; and
2. An order by the Commission that Right2Drive Pty Ltd pays me compensation for the unfair dismissal, such amount being better than my offer – which having pitched my offer at the lower end of the average as published on the FWC website, I am also confident that I will get.

Please confirm your client’s position. Once confirmed I look forward to receiving some simple proposed settlement terms.

If you have any queries in relation to any of the above, please feel free to contact me.

[23] On 15 December 2022 at 5.21 pm Right2Drive’s representatives responded to Mr Chen:

[salutation]

We confirm that the offer outlined in your email dated 30 November 2022 at 4:03pm (Offer) has been accepted by our client in the terms expressed by you without equivocation.

As such, a settlement agreement has been concluded and the terms of the settlement agreement are binding on the parties.

It was not a term of the Offer that the settlement terms be further documented and this is unnecessary.

Please confirm whether you intend to file a Form F50 Notice of Discontinuance by COB tomorrow.

If not, we will be required to approach the Commission to have the matter dismissed under section 399A(1)(c) of the *Fair Work Act 2009* (Cth) (the **Act**), which empowers the Commission to dismiss an application after a settlement agreement has been concluded.

As you are no doubt aware, a binding settlement agreement extinguishes a pre-existing cause of action, and the continued pursuit of the application based on such cause of action is considered to be frivolous or vexatious, without reasonable prospects of success, and an unreasonable act in connection with the continuation of the matter. Accordingly, if we are required to approach the Commission to have the matter

dismissed, our client will seek to recover its costs in respect of that application under section 400A of the Act.

[emphasis added]

[24] On 21 December 2022 at 2.50 pm Right2Drive filed with the Commission and served on Mr Chen an application to dismiss his application for an unfair dismissal remedy pursuant to s.399A of the FW Act. As noted at paragraph [8] Mr Chen indicated that it was not open to me to hear the application.

[25] On 21 December 2022 at 4.09 pm Mr Chen emailed Right2Drive's representatives:

In light of the concession made in the respondent's current application that I was unfairly dismissed:

5. The Company has committed to making the payment of 6 weeks' pay (which is \$3,006.12), less applicable tax, to Mr Chen as compensation for unfair dismissal by its acceptance of the Offer but has not done so given that Mr Chen is disputing the settlement.

[emphasis added]

I will attend to discontinuing the proceeding in the new year.

My position will be reflected to the Commissioner assigned to hear this matter.

[26] On 21 December 2022 at 4.53 pm Right2Drive's representatives responded:

There is no reason that you should wait until the new year to discontinue the proceedings.

If it is your position now that you agree that there is a binding settlement between the parties, please immediately, and by no later than **4.30pm tomorrow, 22 December 2022**, file a notice of discontinuance.

In those circumstances, we will write to the Commission and confirm that our application lodged today can be withdrawn and there is no need for the Commission to issue the proposed directions, circulated to the parties today at 4.40pm.

However, if you fail to discontinue the proceedings by tomorrow, and our client is necessarily required to continue to incur legal costs in relation to this matter, we will pursue our application in respect of seeking an order for costs.

[emphasis added]

[27] On 21 December 2022 at 4.39 pm my chambers issued proposed directions to the parties with respect to the s.399A application to dismiss, providing the parties until 5.00 pm 22 December 2022 to raise any objections or proposed amendments.

[28] On 23 December 2022 at 11.41 am Directions were issued as outlined at paragraph 9.

[29] On 23 December 2022 at 2.05 pm Right2Drive's representatives emailed my chambers, copying Mr Chen:

We refer to your email below and the directions now made by Commissioner Bissett today regarding the s 399A application made by Right2Drive Pty Ltd.

On 21 December 2022 at 4.09pm, Mr Chen wrote to us in the following terms:

In light of the concession made in the respondent's current application that I was unfairly dismissed ...

I will attend to discontinuing the proceeding in the new year.

My position will be reflected to the Commissioner assigned to hear this matter.

We replied to Mr Chen, at 4.53pm on 21 December 2022, in the following terms:

There is no reason that you should wait until the new year to discontinue the proceedings.

*If it is your position now that you agree that there is a binding settlement between the parties, please immediately, and by no later than **4.30pm tomorrow, 22 December 2022**, file a notice of discontinuance.*

In those circumstances, we will write to the Commission and confirm that our application lodged today can be withdrawn and there is no need for the Commission to issue the proposed directions, circulated to the parties today at 4.40pm.

However, if you fail to discontinue the proceedings by tomorrow, and our client is necessarily required to continue to incur legal costs in relation to this matter, we will pursue our application in respect of seeking an order for costs.

We have received no response from Mr Chen, and he has failed to file a notice of discontinuance, despite conceding he intends to do so. Nor has any explanation been provided as to why this cannot be done forthwith.

We respectfully request that Mr Chen be directed to discontinue the proceedings immediately to avoid the parties incurring any further unnecessary costs in relation to this matter.

We confirm Mr Chen is copied into this correspondence.

[30] On 23 December 2022 at 2.43 pm my chambers replied:

Your correspondence has been brought to the attention of Commissioner Bissett. Whilst obviously disappointed that the Commission's time continues to be spent on a matter that has apparently settled, the Commissioner notes that she does not have the power to order that a notice of discontinuance be filed. Rather, the Commission's powers are limited to those in s.399A or s.587 of the FW Act.

There are, of course, options available to the Respondent, some of which have been outlined in your correspondence and of which Mr Chen would now be aware.

That said the Commissioner encourages Mr Chen, should the matter be settled, to file a Notice of Discontinuance as soon as possible noting that the Commissioner will be working next week. Alternatively he can send an email advising that he discontinues the matter and this will be sufficient for the Commission to close the file.

[31] Mr Chen and Right2Drive filed submissions in relation to the s.399A application in compliance with the Directions, filing material on 4 and 18 January 2023 respectively.

[32] On 22 January 2023 at 9.53 pm Mr Chen filed a Form F50 Notice of discontinuance.

Submissions of Right2Drive

[33] Right2Drive submits that on 14 December 2022 it accepted Mr Chen's settlement offer in full and that, thereafter, his conduct in refusing to discontinue his application in light of the acceptance was unreasonable, incurring Right2Drive unnecessary costs.

[34] In its response to Mr Chen's email of 14 December 2022 at 8.18 pm on 15 December at 5.21 pm, Right2Drive says that, in confirming his settlement offer was accepted "without equivocation", any doubt in Mr Chen's mind was abated. It says Mr Chen was fully on notice that a binding agreement existed between the parties and warned that a failure to discontinue would result in the respondent applying to have his application dismissed under s.399A(1) of the FW Act as well as seeking an order for costs.

[35] Right2Drive says that Mr Chen had more than adequate time to discontinue his application between 15 December 2022 and the filing of its s.399A application on 21 December 2022, which was filed as foreshadowed, again warning of an application for an order for costs. In light of the email from my chambers to the parties on 23 December 2022 at 2.43 pm, Right2Drive submits that it would have taken Mr Chen only a minute to discontinue his application which would have disposed of the matter.

[36] Right2Drive says it therefore follows that Mr Chen's failure to file a notice of discontinuance required it to unnecessarily prepare, file and serve its s.399A submissions. It says nothing had changed at all from 14 December 2022 when the offer was accepted, or at the latest 21 December 2022, until 22 January 2023 when the discontinuance was filed. The company unnecessarily incurred legal costs in having to make the application to dismiss in circumstances where a binding settlement had been concluded on 14 December 2022.

[37] Right2Drive submits that Mr Chen was put on notice on several occasions that as settlement had been concluded, if it was required to "press on" to have the matter dismissed

due to a lack of the filing of a notice of discontinuance, an application for an order for costs would be pursued. As Mr Chen is a lawyer (and was also legally represented in the proceedings) he was well positioned to understand the implications of his actions. The absence of a discontinuance of his unfair dismissal application persisted nonetheless.

[38] Right2Drive submits therefore that the Commission can be satisfied that Mr Chen caused Right2Drive to incur costs because of unreasonable acts or omissions by Mr Chen in failing to discontinue proceedings at the earliest opportunity, and in particular failing to do so before it was required to file submissions in the s.399A proceedings. Section 400A(1) of the FW Act is therefore satisfied and the Commission should exercise its discretion to make an order for costs in light of Mr Chen's clearly unreasonable conduct. No satisfactory explanation has been given by Mr Chen as to why he persisted in defending the s.399A application where, on 21 December 2022, he had advised he would attend to filing a notice of discontinuance. The only real explanation, Right2Drive says, is a complete disregard for the Commission's processes (i.e. discontinue after settlement reached) or purposefully putting Right2Drive through the cost and effort of filing submissions (on 18 January 2023) where shortly thereafter he discontinued his application without further comment (on 22 January 2023).

Submissions of Mr Chen

[39] Mr Chen did not give evidence as to his state of mind from the time he made the offer to settle to the time when he discontinued on 22 January 2023. His submissions were made by counsel.

[40] Counsel submits that it was noticeable from Mr Chen's email of 14 December 2022 at 8.18 pm that he was concerned to ensure that Right2Drive's agreement to settle was done on the basis of a concession that it had breached the law in respect of his unfair dismissal protection. Rather than engaging with a simple, direct query, Right2Drive adopted a technical approach saying it had settled on the terms exchanged. The terms exchanged contained an apparent ambiguity or at least a degree of uncertainty about whether Right2Drive agreed it had, in fact, unfairly dismissed Mr Chen. While Right2Drive conceded this it was apparent Mr Chen needed to obtain certainty. The chain of correspondence between the parties following his settlement offer, and his submissions of 4 January 2023 pertains to this.

[41] Counsel submits that Mr Chen's uncertainty was finally extinguished on 18 January 2023 when Right2Drive filed its s.399A submissions, namely at the first sentence of paragraph 18 which reads:

18. The Respondent accepted the Applicant's "full" Offer. There is no authority for the Applicant's proposition that there is no concluded agreement unless the Respondent expressly refers to or repeats the terms of the Offer, or particular terms of the Offer, in accepting the Offer. Such a submission should be rejected.

[42] By this Right2Drive had now accepted Mr Chen's full offer as a "concession in respect to unfair dismissal".

[43] Mr Chen's counsel submits that the matter does not come down to whether the unfair dismissal had settled, but whether the speed of his filing a notice of discontinuance was

unreasonable. Mr Chen acknowledges that it is he who put the offer forward, but it is apparent that on the day the matter settled he perceived the existence of a doubt in a way he had put the offer, apparent from his email of 14 December 2022 at 8.18 pm. Regardless of whether one agrees with this doubt, this doubt was perceived by Mr Chen. As this was consciously in his mind, he wrote to the Right2Drive for clarity but Right2 Drive avoided that issue in its replies.

[44] Counsel submits that Mr Chen accepts a deal was struck on 14 December 2022 at 3.58 pm. However, if it was not unreasonable for him to hold a doubt as expressed in his email that day at 8.18pm, then everything that followed could not have been unreasonable on his part. This would flow to the filing of the notice of discontinuance. He says however that point 1 of his offer of 30 November 2022 contained an ambiguity leading to doubt in his mind as to the scope of the settlement and it was this he sought to clarify in his email at 8.18 pm. This doubt was not allayed by Right2Drive's failure to squarely engage in his question. Even if no ambiguity was present, it was not unreasonable for Mr Chen to perceive an ambiguity. Conversely, Mr Chen accepts that if the doubt he held was not reasonable as at 14 December 2022 then the time taken to discontinue his unfair dismissal application would also be unreasonable.

[45] By way of his email on 21 December 2022 at 4.09 pm Mr Chen had, by this time, come to the view that there was no longer ambiguity and advised he would discontinue his application in the new year. For whatever reason the ambiguity was restored by 4 January 2023 when he filed submissions in respect of the company's s.399A application. The restored ambiguity was only extinguished on 18 January 2023 when Right2Drive accepted what Mr Chen called the full offer at paragraph 18 of its s.399A submissions.

[46] Counsel for Mr Chen accepts that no evidence was given as to why the ambiguity Mr Chen perceived was extinguished on 21 December 2022 but had returned on 4 January 2023, but submits it was not unreasonable for Mr Chen to perceive a doubt up until 21 December 2023. It is obvious that Mr Chen's email of 21 December 2022, committing to discontinuing his application in 2023, was a "red herring" as he was in fact still perceiving doubts, and therefore filed submissions on 4 January 2023.

[47] The critical question, as put by counsel, comes down to whether it was unreasonable for Mr Chen to perceive a doubt. A change of mind, as shown by Mr Chen on 21 December 2022, does not come to bare on the reasonableness or unreasonableness of his conduct in not discontinuing the matter. Counsel explained however that if Mr Chen's email of 21 December 2023 is not a "red herring" then his change of mind is unexplained. The question is whether it was unreasonable for Mr Chen's action (or failure to act) to be guided by his perception of doubt.

[48] As to quantification, Counsel submits that if there was no unreasonableness in Mr Chen's doubt, there can be no costs awarded. However, if it is found that his doubt was unreasonable, it only became unreasonable sometime between settlement being reached and the filing of a notice of discontinuance, but costs should certainly not accrue before the filing of his submissions on 4 January 2023.

[49] Counsel submits that the figures found in the tax invoices to Right2Drive from its lawyers are unreasonable (a lead solicitor charging \$1,000.00 per hour, a junior solicitor

charging \$690.00 per hour with one preparing documents and the other settling) in circumstances where a junior barrister at \$220.00 per hour could have been briefed for the whole process. An appropriate weighting is for one solicitor charging in the \$200s per hour. An excessive amount of time was spent by Right2Drive's lawyers preparing and drafting documents. An appropriate total costs figure would be in the range of \$1000.00.

[50] Counsel submits that there is nothing unreasonable in Mr Chen resisting Right2Drive's costs application.

[51] Finally, it is put for Mr Chen that the money spent by Right2Drive in making its costs application will exceed any costs order in their favour. Rather than seeking to recover wasted money, they are standing on their rights and will be more out of pocket from making the application than before.

Reply submissions of Right2Drive

[52] Right2Drive says the offer put by Mr Chen was accepted without equivocation on 14 December 2022. To the extent that there was any ambiguity this was resolved by Right2Drive on 15 December 2022 at 5.21 pm confirming the offer had been accepted "in the terms expressed" by Mr Chen "without equivocation." Right2Drive does not see how it could have been any clearer. Asserted ambiguity thereafter is a construct and failure to discontinue was unreasonable.

[53] Mr Chen's counsel conceded that a concluded settlement was reached, with Right2Drive conceding that to the extent that any doubt existed it was extinguished by its email of 15 December 2022 at 5.21 pm. It should not be accepted that uncertainty expressed by Mr Chen on 14 December 2022 should mean everything he did thereafter was not unreasonable, as this ignores all the conduct that occurred thereafter.

[54] With no notice of discontinuance received by close of business 16 December 2022, Right2Drive instructed its lawyers to file a s.399A application to dismiss Mr Chen's application.

[55] Right2Drive says Mr Chen's email of 21 December 2022 is not a red herring, but a clear piece of correspondence accepting the company's concession and making it clear he would attend to discontinuing his application. A failure to do so thereafter is a question of timing and it was unreasonable for the company to incur costs filing and serving written submissions.

[56] A purported reliance on one line in the submissions of 18 January 2023 that everything was now certain is the real red herring. No evidence was given as to why Mr Chen behaved in the way he did and failed to discontinue proceedings. As the costs application was foreshadowed on several occasions, Right2Drive is entitled to make the application and the terms of s.400A(1) of the FW Act have been engaged.

[57] Right2Drive reject the assertion that the amount sought is unreasonable or due to time wasted. It says the time spent was in fact lean and minimal, and that written submissions need to be carefully written and considered.

WERE COSTS INCURRED BECAUSE OF AN UNREASONABLE ACT OR OMISSION OF THE APPLICANT? (s.400A)

[58] In its application for an order for costs Right2Drive says that since 14 December 2022, and certainly since 21 December 2022, it has incurred legal costs unnecessarily in being required to make and pursue a s.399A application in circumstances where a binding settlement agreement had plainly been concluded on 14 December 2022. The failure of Mr Chen to discontinue his unfair dismissal application constituted an unreasonable act or omission by Mr Chen.

[59] Mr Chen submits that there existed some ambiguity or uncertainty in the scope of the agreement leading to doubt in his mind as to whether the payment agreed was expressly for compensation for his unfair dismissal. As this doubt was not unreasonable there are no costs to be awarded. If it was unreasonable then costs should not accrue until at least 4 January 2023.

[60] If I find that there were unreasonable acts or omissions at a particular point in time and I decide to award costs on that basis, only the costs incurred by Right2Drive from that particular point in time are relevant. Right2Drive say that the unreasonable act or omission of Mr Chen was in not discontinuing his unfair dismissal application when he had reached a binding settlement agreement. Mr Chen says that it is not unreasonable that he did not discontinue when he had reasonable doubts in his mind as to the settlement.

[61] In *Construction, Forestry, Mining and Energy Union v Clarke*¹ the Full Court of the Federal Court considered an application for costs pursuant to s.824 (1)-(2) of the *Workplace Relations Act 1996*. Section 824(2) provided that the court may award costs if it was satisfied that a party “by an unreasonable act or omission” had caused another party to incur costs. In considering the provisions of s.824(2) the Full Court said:

28. The first criterion is that one party must have engaged in “an unreasonable act or omission”...[W]hether a party has conducted itself or its litigation in such a way as to cross this threshold will depend on the particular circumstances of the case. The second criterion is that the act or omission of one party must have “caused another party to the proceeding to incur costs in connection with the proceeding”. Once both criteria are satisfied, then the Court “may” in its discretion order the party which has engaged in the unreasonable act or omission to pay some or all of the costs of the other party.

29. In our view, the respondent has not engaged in “an unreasonable act or omission”. As the authorities indicate, there is a distinction between a party who pursues arguments which are ultimately abandoned or rejected by the Court and a party who commences a proceeding which is misconceived in the sense of being incompetent or unsupportable...Simply because a party does not conduct its litigation in the most efficient way does not mean that the Court should exercise its discretion in s 824(2) of the WR Act to make a costs order.

[62] Whilst that decision was made with respect to provisions of the *Workplace Relations Act 1996* it can be applied to s.400A of the FW Act which uses the similar language and is in the same context of a costs application.

[63] In *Adamczak v Alsco Pty Ltd (No 4)*² it was said, in relation to an application for costs based on a party's unreasonable act or omission:

104 Although the issue must be decided retrospectively, it is to be determined by reference to the situation of each of the parties concerned assessed prospectively, when the relevant offer was made, not judged by the ultimate outcome of the case itself. The danger arises from applying the wisdom of hindsight to assess the reasonableness of a refusal of an offer to settle, after all the evidence available, in a general protection application, has been considered and canvassed at final hearing. Clearly, this full panoply of evidence is not accessible by an offeree of a Calderbank letter, when such an offer is first received.

[64] In the Explanatory Memorandum to the *Fair Work Bill 2012* it was said, of the power to award costs pursuant to s.400A:

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.

[65] Mr Chen put forward an offer to settle his unfair dismissal application on 30 November 2022.

[66] On 14 December 2022 Right2Drive "accepted the settlement offer in [Mr Chen's] email."

[67] Mr Chen then sought clarification and Right2Drive replied on 5 December 2022 that "the offer...has been accepted by our client in the terms expressed by you without equivocation."

[68] On 21 December 2022 Right2Drive filed its s.399A application and Mr Chen said that, in light of the concession at paragraph 5 of that application that he was unfairly dismissed he would "attend to discontinuing the proceedings in the new year".

[69] Despite Mr Chen putting an offer to settle in writing and that offer being unequivocally accepted *in the terms expressed* by Mr Chen and Mr Chen acknowledging Right2Drive's acknowledgement that he was unfairly dismissed, Mr Chen suggests it was not unreasonable of him not to discontinue his application until after both he and Right2Drive had filed submissions and evidence in relation to the s.399A application (by which time Right2Drive had incurred significant costs).

[70] Further, Mr Chen suggests that whether his conduct in not discontinuing his application was unreasonable should be assessed by reference to him alone.

[71] I am satisfied that Mr Chen's actions in not discontinuing his application for unfair dismissal following the acceptance of his offer to settle by Right2Drive to settle that application was an unreasonable act on his part.

[72] If Mr Chen was having doubts as to what it was Right2Drive had accepted – regardless of whether these doubts were reasonable – that is not a reasonable basis on which he could refuse to lodge his notice of discontinuance. Mr Chen made an offer to Right2Drive and that offer was unequivocally accepted. The agreement was made and was binding on the parties. If Mr Chen doubted what it was Right2Drive had accepted then this doubt is directed at what it was *he sought* in settlement of his unfair dismissal and not what Right2Drive may have agreed to. I am not satisfied that such doubt in his mind provides some reasonableness to his failure to discontinue his unfair dismissal application.

[73] Right2Drive was represented in the settlement discussions by a well credentialled law firm. It can be reasonably assumed that Right2Drive sought and took advice from its lawyers before instructing the lawyers to accept Mr Chen's offer without equivocation. Mr Chen, aware of this representation, had no cause to be concerned at what Right2Drive was agreeing to because the agreement was to his terms put by him in the offer of 30 November 2022.

[74] Further, Mr Chen is a lawyer, licensed to practice, which he apparently does. He is not naïve in these circumstances. I am satisfied that he was aware in full of the offer he made and that it was fully accepted. Further, Mr Chen put his offer to settle “without prejudice save as to costs”, live to the meaning of the phrase. Any equivocation on the offer by Right2Drive or attempt to redefine the terms ran the risk of an agreement not being made and the unfair dismissal matter proceeding.

[75] This matter, of course, is not about the reasonableness of the agreement reached between Mr Chen and Right2Drive (that is a matter for the parties) but whether, having reached that agreement:

- Mr Chen's failure to discontinue was an unreasonable act once agreement was reached
- That act caused Right2Drive to incur costs it would otherwise not have incurred
- An order for those costs should be made

[76] Mr Chen did not give evidence in the costs application so it is not possible to determine what was in his mind on 14, 15 or 21 December 2022 or why he said he would attend to discontinuing his application in the new year but waited until after Right2Drive had filed submissions in the s.399A application before doing so. I do not accept that the email of Mr Chen of 21 December 2022 was a “red herring”. This appears to be no more than a convenient argument by him to have the Commission ignore what he said in the email.

[77] The unreasonableness of Mr Chen's actions can only be assessed by an objective assessment of them. On any view his conduct in not discontinuing his unfair dismissal

application on receipt of the confirmation of unequivocal acceptance of his offer on 15 December 2022 was an unreasonable act on his part.

[78] I am therefore satisfied that Mr Chen caused costs to be incurred by Right2Drive by his unreasonable act in connection with the continuation of his unfair dismissal application in circumstances where he had reached a binding agreement in relation to the settlement of his application.

SHOULD COSTS BE AWARDED?

[79] In *Gugiatti v SolarisCare Foundation Ltd*³ a Full Bench of the Commission observed:

[43] 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.

[80] I am satisfied that this unreasonable act on Mr Chen's part caused costs to be incurred by Right2Drive on and from 16 December 2022. Further, I am satisfied that Mr Chen was on notice of a costs application by Right2Drive on 21 December 2022 when Right2Drive lodged its s.399A application. This was confirmed by the application of Right2Drive on 3 February 2023.

[81] Section 611 of the FW Act establishes that a party to proceedings in the Commission should bear their own costs. Section 400A provides the grounds on which this general rule might not apply. Despite a finding that the grounds in s.400A are made out it is a discretionary decision as to whether costs should, in fact, be awarded.

[82] I accept that, in the finalisation of an unfair dismissal application there may be some skirmish between the parties as the terms of an agreement to settle are hammered out. However, in this case I am not satisfied that the skirmishing on Mr Chen's part – in not filing a notice of discontinuance – is, objectively, justified. As I have observed he made an offer, it was accepted. His failure to discontinue his application until 22 January 2022 was an unreasonable act on his part.

[83] To the extent the acceptance of Mr Chen's offer to settle was reconfirmed on 15 December 2022 I am satisfied that Right2Drive has a strong claim as to costs from that date. I have, however, decided that costs should be awarded on the terms sought by Right2Drive from 23 December 2022. By this time Mr Chen had given unequivocal advice that he was satisfied and would discontinue his unfair dismissal application. Further, Mr Chen was clearly on notice as to costs in the email from Right2Drive on 21 December 2022 at 4.53 pm yet, for reasons not adequately explained, he failed to discontinue until 22 January 2022.

[84] In circumstances where the lawyers for Right2Drive did not brief counsel in relation to the s.399A application I do not consider it unreasonable for the legal firm to have two lawyers assigned to the matter. Had the matter been briefed out one expects costs would have been

incurred for a lawyer and counsel. That the s.399A application could have been dealt with by junior counsel at \$200 per hour as suggested by Mr Chen's counsel is a submission without foundation and is rejected.

[85] I have therefore decided to exercise my discretion to award costs associated with the making of the s.399A application as sought by Right2Drive for costs incurred and invoiced from 23 December 2022 to 18 January 2023 at 75%. I calculate this to be \$6,831.00 (incl. GST). At 75% the costs are \$5,123.25. I am satisfied that the amount comes within the general care and conduct provisions of Schedule 3.1 of the *Fair Work Regulations 2009*. While I consider Mr Chen's conduct from 15 December 2022 to be unreasonable in not discontinuing he was clearly on notice by the s.399A application on 21 December 2022 and had, that day, given a commitment to discontinue such that I consider he should pay a portion of the costs incurred by Right2Drive from that time.

[86] I have not decided to award costs for those associated with making the costs application on 3 February 2023. While the costs application would not have been necessary had Mr Chen discontinued his unfair dismissal application once the agreement to settle was made, I have decided to exercise my discretion and not award costs.

[87] An order⁴ in relation to the payment of costs by Mr Chen to Right2Drive in the amount of \$5,123.25 will be issued with this decision.

[88] No submissions were made on the matter so I have determined that the amount I have ordered should be paid within 60 days of the date of the order. I am prepared to hear from the parties should either consider the period for payment should be varied.



COMMISSIONER

Appearances:

R. Bernasconi of Seyfarth Shaw for Right2Drive

A. Aleksov of counsel for Mr Chen

Hearing details:

Melbourne, by video

20 March 2023

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¹ [2008] FCAFC 143.

² [2019] FCCA 7.

³ [\[2016\] FWCFB 2478](#).

⁴ [PR760318](#).