DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Ms Jennifer Wood

v

Amigoss Preschool and Long Day Care Co-Operative Ltd
(C2023/1072)

DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT EASTON
COMMISSIONER MCKINNON

SYDNEY, 10 JULY 2023

Appeal against decision [2023] FWC 290 of Commissioner Cambridge at Sydney on 9 February 2023 in matter number C2022/7600

[1] This Decision involves an appeal from a decision of Commissioner Cambridge to refuse an application for costs arising from a successful application under section 394 of the Fair Work Act 2009 (the Act).

Background

[2] Ms Jennifer Wood (the Appellant) was employed by Amigoss Preschool and Long Day Care Co-Operative Ltd (the Respondent) as a qualified Early Childhood Teacher in the day care centre operated by the Respondent.

[3] During 2020, there was apparent workplace friction between the Appellant and officers of the Respondent, involving grievances lodged by the Appellant, investigations into the conduct and performance of the Appellant, and finally a without prejudice meeting on 26 October 2020, where the Chief Executive Officer of the Respondent, Mr Cesar Gomez, asserted complaints had been made by parents of children who attended the day care centre. Mr Gomez made it clear at that meeting that the employment relationship had become untenable and invited the Appellant to accept an arrangement for the termination of her employment. The Appellant rejected that invitation.

[4] The Appellant was certified unfit for work from 27 October 2020, until she returned to work on 9 November 2020. Shortly after her arrival at work on 9 November 2020, the Appellant was called to a meeting with Mr Gomez and Ms Ortez, her immediate supervisor. At this meeting, Mr Gomez advised the Appellant that she was being placed on paid suspension from duty and handed her a letter entitled 'Confirmation of Suspension' that outlined, without further detail, *"a number of allegations of serious misconduct have recently been brought to our attention."*

[5] A subsequent invitation to a disciplinary meeting, to occur on 11 November 2020, outlined five allegations against the Appellant. The first two allegations, which were said to have come to the employer's attention on 2 November 2020, involved allegations that on two separate occasions in April/May and between June and September 2017, the Appellant had engaged in the physical abuse of a child whereby she had tied a student's hand together with tape or rope (the Abuse Allegations). The third allegation related to allegedly deleting files from a work computer. The fourth allegation involved the assertion that the Appellant had failed to provide effective guidance to particular parents. The fifth allegation involved the Appellant displaying inappropriate and disrespectful behaviour by scolding a child for not having pasted in the right spot in a brain activity.

[6] The disciplinary meeting occurred on 11 November 2020, by Zoom. The meeting was conducted by a person identified as *"Gwen from Employsure"*. During the meeting, Gwen advised the Appellant that written statements had been made by witnesses to the events involving the Abuse Allegations, being Ms Ortez, an employee in the position of Baby Room Leader, and an employee in the position of Toddler Room Leader. The statements were not provided to the Appellant.

[7] After the disciplinary meeting had concluded Mr Gomez considered the Appellant's responses. He determined that all five of the allegations against the Appellant had been substantiated and decided to dismiss the Appellant.

[8] At that time, in accordance with the Respondent's mandatory reporting obligations, Mr Gomez reported the Abuse Allegations to the NSW Police and the Department of Education. On 25 November 2020, the Appellant was arrested and charged with two counts of assault on a student while attending school (the Charges). As a result of the Charges, the Office of the Children's Guardian and the National Education Standards Authority suspended the Appellant's Working with Children Check which she requires to enable her to work with children and to teach children (the WWCC).

[9] On 1 December 2020, the Appellant filed her Unfair Dismissal Application (the Application).

[10] On 11 December 2020, the representatives of the employer, Employsure, filed an Employer response to unfair dismissal application (the Response) which 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).

[11] The proceedings before the Commission were adjourned pending finalisation of the criminal proceedings. On 11 April 2022, the Local Court of New South Wales determined the Charges. In response to a no case to answer submission, the Magistrate found a *prima facie* case existed. While the Magistrate found there was evidence capable of establishing each ingredient of the Charges, she was not satisfied beyond reasonable doubt that the Charges were made out, and the Charges were dismissed.

[12] After the dismissal of the Charges, the Appellant 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.

[13] After the dismissal of the Charges, the Respondent sent two settlement offers to the Appellant. On 19 July 2022, the Respondent offered to settle for $28,335.30, and on 1 August 2022, the Respondent offered to settle for $45,072.30. Both offers were rejected.

[14] The Hearing of the Application occurred on 4 and 5 August, and 16 September 2022. The Application was successful, and on 3 November 2022, the Commissioner issued a Decision[1] (the Principal Decision), ordering compensation to be paid to the Appellant in the amount of $33,488.00, being 26 weeks' pay.

[15] The Appellant made an application for costs on 16 November 2022 (the Costs Application). The Commission issued a decision[2] dismissing the Costs Application (the Costs Decision).

The Principal Decision

[16] In the Principal Decision, the Commissioner found that the Respondent was a small business and therefore the provisions of section 385(c) of the Act regarding the SBFD Code required consideration.[3]

[17] The Commissioner noted the absence of any proper investigation of the allegations against the Appellant, and concluded:[4]

> *The summary dismissal of the applicant was not consistent with the Summary Dismissal provisions of the SBFD Code because there were no reasonable grounds for any belief on the part of the employer that the applicant had committed the conduct that the employer had substantiated in respect of allegations 1, 2, and 3, as was particularised in the dismissal letter of 12 November 2020. The other matters contained in the dismissal letter which were identified in allegations 4 and 5, would not, even if properly proven, provide basis for the summary dismissal of the applicant. The dismissal of the applicant was not consistent with the SBFD Code.*

[18] As the Commissioner found that the dismissal was not in accordance with the SBFD Code, the matter was considered by reference to s.387 of the Act. The Commissioner observed that the Respondent had not attempted to establish that there was a valid reason(s) for the dismissal of the Appellant and that the *"five allegations of misconduct that were substantiated by the employer as providing reasons for the dismissal were not put to the Applicant during cross examination nor was there any challenge made to the Applicant's evidence of her denials of each of these allegations"*.[5]

[19] Unsurprisingly, the Commission subsequently found that the reason for the dismissal of the Appellant was not sound, defensible or well founded and there was not a valid reason for

the dismissal of the Appellant. The Commission found that the Appellant's claim for unfair dismissal was established.

[20] Regarding remedy, the Commissioner observed:

> *The applicant has sought reinstatement as a remedy for her unfair dismissal. Ordinarily, in circumstances where a dismissal was founded upon erroneous findings of serious misconduct and the dismissed employee seeks reinstatement as appropriate vindication and rectification of the injustice that they have suffered, the Commission may be inclined to consider that such a remedy would be appropriate, despite the difficulties that would understandably be associated with the restoration of the damaged employment relationship. Unfortunately, in this instance, as the applicant's barrister acknowledged reinstatement was simply not possible because of the issue of the applicant not having a current Working With Children Check (WWCC).*

[21] The Commissioner ordered compensation to be paid to the Appellant in the amount of $33,488.00, being 26 weeks' pay.

The Costs Application

[22] The Costs Application was advanced under both s.611 and s.400A of the Act.

[23] The Appellant argued that the Respondent had made the Response vexatiously, and/or without reasonable cause, and/or that it should have been reasonably apparent to the Respondent that the Response had no reasonable prospects of success.

[24] The Appellant also argued that s.400A had been satisfied, asserting that the Respondent caused costs to be incurred because of its unreasonable continuation of the matter.

The Costs Decision and the Extent of the Appeal of that Decision

[25] Regarding s.611(2)(a) the Commissioner stated that 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. In this matter:

(a) There was no evidence to establish that at the time of making the Response, it contained some defect(s) which meant that it could have been struck out or otherwise subject to interlocutory disposal, and the Appellant never articulated the proposition that the defence of the unfair dismissal claim was so manifestly groundless or otherwise defective that summary determination could be made in favour of the Appellant;[6] and

(b) Although the Response had subsequently failed, at no stage was there some identified defect(s) that would have been the basis to find the employer's case to be manifestly groundless or obviously untenable or incapable of argument, and there was no identifiable aspect of the Response that could be capable of annulling any defence without recourse to argument.[7]

[26] Regarding s.611(2)(b) and whether there were reasonable prospects of success, the Commissioner found that consideration of this section involves a broad assessment of the merits of the case, properly evaluated at the time of the making of the Response. The Commission, given the submissions of the parties, also considered the position that emerged following the conclusion of the Local Court proceedings.

[27] The Commissioner held:[8]

> *"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 it's reassessment, it should not be held to have had no reasonable prospects of success".*

[28] The Commissioner, in finding that the requirements of sections 611 (2) (a) and (b) and 400A (1) of the Act had not been properly satisfied, concluded:[9]

> *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.*
>
> *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.*
>
> *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.*

[29] The appeal only challenges the Commissioner's findings with respect to sections 611(2)(a) and (b) of the Act, specifically, that the Respondent's response was made without reasonable cause, and it should have been reasonably apparent to the Respondent that the Response had no reasonable prospects of success.

[30] The grounds of appeal advanced by the Appellant were as follows:

> *1. The Commissioner erred in not awarding costs pursuant to section 611(2)(a) of the FW Act in that:*

(a) The Commissioner failed to understand the task required to him by failing to properly consider the relevant principles in applying section 611(2)(a);

(b) The Commissioner failed to properly determine whether he had jurisdiction to order costs;

(c) The Commissioner took into account matters not relevant to his task including but not limited to the lack of a strike out application by the applicant.

2. The Commissioner erred in not awarding costs pursuant to section 611(2)(b) of the FW Act in that:

(a) The Commissioner failed to understand the task required to him by failing to properly consider the relevant principles in applying section 611(2)(b);

(b) The Commissioner took into account irrelevant considerations such as the respondent's attempts to settle the proceedings.

Appellant's Submission

[31] The Appellant submitted in summary that in not awarding costs pursuant to s.611(2)(a) and/or s.611(2)(b) of the Act, the Commissioner:

(a) Misunderstood the task before him;

(b) Misapplied the relevant tests; and

(c) Took into account irrelevant factors.

[32] The Appellant submitted the Commissioner asked himself the wrong question being whether on the face of the Response, there was some defect that would have led to the Response being struck out. The Appellant also submitted that the Commission considered an irrelevant issue regarding whether the Appellant took steps to challenge the Response.

[33] The Appellant noted the Commissioner's reference to *"... 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",*[10] and submitted that the wrong test regarding no reasonable prospects of success was applied and the decision was infected by the irrelevant consideration of offers made by the Respondent to settle the proceedings.

Respondent's Submission

[34] The Respondent submitted that the Commissioner, when dealing with the question of whether the Response was without reasonable cause, correctly applied tests for summary judgment, and did not err in considering whether, on the face of the Response there was some

defect that would have led to the Response being struck out, and whether the Appellant took steps to challenge the Response.

[35] Regarding whether there were no reasonable prospects of success, while there was some infelicity of expression in the use of the words *"in all fairness"*, it was plain that what the Commissioner was saying was that he took into account the Respondent's attempts to settle the proceedings as a factor relevant to the exercise of his discretion whether to award costs.

[36] Otherwise, the Respondent submitted the Commissioner applied the appropriate authorities, and noted that at the time that the Respondent filed the Response, allegations of assault had been made against the Appellant, three witnesses had provided statements supporting those allegations and the NSW Police had arrested and charged the Appellant in relation to those alleged assaults.

Permission to Appeal

[37] The appeal is made under s.604 of the Act. There is no right of appeal and an appeal may only be made with permission of the Commission. If permission is granted, the appeal is by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision-maker.[11]

[38] Subsection 604(2) of the Act requires the Commission to grant permission to appeal if satisfied that it is *"in the public interest to do so."* The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[12] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[13] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:[14]

> *"... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."*

[39] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[15] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[40] The Full Bench is satisfied that the grant of permission to appeal in this matter is in the public interest. We are of the view that the appeal concerns issues of general application concerning the proper approach to the application of the provisions of s.611(2) to Respondents. We also consider that the subject matter of the appeal raises issues of importance and general application.

Consideration

[41] Sub-sections 611(1) and (2) of the Act provide as follows:

> **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.*

[42] In *Hansen v Calvary Health Care Adelaide Limited*,[16] the Full Bench said in relation to s.611 generally:

> *It is trite to observe that the statutory and policy imperative underpinning a costs application under the Act, is that a person in a matter before the Commission must bear their own costs. So much is plainly obvious by the precise and unambiguous language of s.611(1).*
>
> *However, the statutory scheme sets out the relatively circumscribed circumstances in which an order for costs might be found by the Commission to be appropriate in a particular case. It includes the exercise of discretionary power where the Commission is satisfied that one, or more of the circumstances set out in s 611(2), has been established. If such circumstances are established, the Commission, in the broad exercise of its discretion, may make an order that a person/s bear some, or all of the costs of another person, in relation to the application, including on an indemnity basis, or decline to make any order at all.*

[43] The principles concerning the interpretation and application of s.611(2)(a) were stated comprehensively in *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing* (**Church**).[17] The Full Bench in *Chapman v Ignis Labs Pty Ltd*[18] (**Chapman**) summarised the findings in *Church* as follows:

> (a) An application is made vexatiously when the predominant motive or purpose of the applicant is to harass or embarrass the other party or to gain a collateral advantage.

(b) Whether an application is made without reasonable cause may be tested by asking, on the facts apparent to the applicant at the time the application was made, whether there was no substantial prospect of success.

(c) In relation to an appeal, the question becomes whether the appeal has no substantial prospect of success. This must be evaluated in light of the facts of the case, the judgment appealed from and the points taken in the notice of appeal.

(d) An application will have been made without reasonable cause if it can be characterised as so obviously untenable that it cannot possibly succeed, is manifestly groundless or discloses a case where the tribunal is satisfied it cannot succeed.

[44] The principles that are relevant to s 611(2)(b) were summarised by the Full Bench in *Baker v Salva Resources Pty Ltd* (**Baker**):[19]

The concepts within s.611(2)(b) 'should have been reasonably apparent' and 'had no reasonable prospect of success' have been well traversed:

- *should have been reasonably apparent' must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis, rather than a subjective test; and*

- *A conclusion that an application 'had no reasonable prospect of success' should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.*

[45] The Full Benches in *Church*, *Chapman* and *Baker* all considered cost applications made against appellants in relation to the costs of appeal proceedings. There are very few Full Bench decisions that consider cost applications against respondents to proceedings.

[46] In *Walker v Mittagong Sands Pty Ltd*[20] (**Walker**) Commissioner Thatcher considered a costs application against an unsuccessful employer respondent. The Commissioner made the following observations in relation to the criteria 'without reasonable cause' and 'no reasonable prospect of success'[21]:

(a) the criteria 'no reasonable prospect of success' in paragraph 611(2)(b) is lower and wider than the term 'without reasonable cause' referred to in paragraph 611(2)(a), which is similar to the test traditionally applied by a court to summarily dismiss actions. Circumstances which satisfy the 'without reasonable cause' test would be likely to satisfy the 'no reasonable prospect of success' criterion, but the reverse would not necessarily apply.

(b) when FWA is required to form an opinion as to whether the application had a reasonable prospect of success, it is not to undertake an assessment of whether a certain and concluded determination could be made that the proceedings would necessarily fail.

The test in paragraph 611(2)(b) is not about whether there is no 'real' prospect of success and does not of necessity require that the proceedings were hopeless or bound to fail (by applying a test such as whether an application is manifestly untenable or groundless).

(c) a similar approach should be taken by FWA to the construction of the expression 'no reasonable prospect of success' as was adopted by the majority of members of the High Court in Spencer in respect of the term 'no reasonable prospect', namely:

> *"No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is 'no reasonable prospect'. The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like 'no reasonable prospect' is to be avoided. ... Rather, full weight must be given to the expression as a whole."*

(d) it is a matter of judgement, sometimes of fine judgement, in all of the circumstances of a particular case whether an application or response had no reasonable prospect of success.

(e) an assessment of whether an application or response was made without reasonable cause or had no reasonable prospect of success should be undertaken with caution, particularly when the matter had not been determined by FWA and questions of fact and issues of law are important and in dispute.

[47] In *Walker* the employer's nominated representative for the proceedings was the applicant's former manager. The employer's response centred upon an allegation made by the manager that was found to be knowingly false. The Commissioner awarded costs against the employer, finding at [71]-[72]:

"*Knowledge on the part of Cowra Quartz as to the illegitimacy of the sample of oil sent by the manager for analysis should be taken into account in assessing whether its response to Mr Walker's application was made without reasonable cause. Once the truth became known Cowra Quartz' opposition to Mr Walker's application had to fail because there would have been no disputed fact as to whether Mr Walker had oil from the drum in his container. Therefore my assessment is that the company's response was made without reasonable cause. For similar reasons, my assessment is that it should have been "reasonably apparent" to the company that its opposition of Mr Walker's application had no reasonable prospect of success. I am satisfied that based on the facts known to Cowra Quartz, its response to the application was made without reasonable cause (paragraph 611(2)(a)).*

Further, in respect of the lesser and wider test, I am satisfied that a reasonable person in full knowledge of the facts as known to the manager, would have realised that when the

truth became known Cowra Quartz' response to the application had no reasonable prospect of success (paragraph 611(2)(b)).''

[48] Two subsequent Full Benches endorsed Commissioner Thatcher's general summary above: *ACI Operations Pty Ltd v Cook* [2012] FWAFB 3292 at [12] and *McKinnon v Eventide Homes (Stawell) Inc* [2013] FWCFB 9405 at [9]. In both matters the Full Benches were considering costs orders against appellants and therefore did not consider the application of those principles specifically in relation to respondents.

[49] In *Veal v Sundance Marine Pty Ltd*[22] Mr Veal was found to have been unfairly dismissed at first instance. Mr Veal applied for costs against the Respondent and also appealed the remedy awarded. The costs application was not determined before the appeal. Mr Veal was not successful on appeal and Sundance applied for costs against Mr Veal in relation to the appeal. The Full Bench then considered both costs applications.

[50] The Full Bench rejected the costs application against the respondent, primarily by reference to the respondent's "own version of events" and "own facts"[23]:

''Notwithstanding that the preconditions for the making of a s 401 application for costs were met in these circumstances, we are not satisfied, in terms of s 401(1)(a) that the evidence before us establishes that either HR Legal, Mr Krins or Mr Maher encouraged Sundance Marine to respond to the matter when it should have been reasonably apparent that Sundance Marine had no reasonable prospect of success or, alternatively, that HR Legal, Mr Krins or Mr Maher's actions represented an unreasonable act or omission.

Sundance Marine presented an arguable case to the Commission. ***It was not a hopeless case such that, on its own facts, it was doomed to fail****. Further, the settlement offers presented on behalf of Mr Veal identified monetary compensation and recognition of non-monetary issues. The $12,000 offer put by Sundance was not an unreasonable offer in the context of this matter. Satisfactory evidence which establishes the Sundance Marine position represented an unreasonable act or omission has not been made out to us. We note that we may have arrived at a different conclusion had Sundance Marine not put any form of settlement offer.*

...

On this basis we are not satisfied that the Sundance Marine behaviour, in responding to Mr Veal's application involved an unreasonable act or omission.

In terms of s 611, we do not consider that the Sundance Marine position was such that ***on its own version of events****, it had no case such that it should have settled the matter on the terms proposed or should have conceded the application. Accordingly, we are not satisfied that Sundance Marine responded to the application vexatiously, without reasonable cause, or that its response was such that it should have been reasonably apparent to Sundance Marine that it had no reasonable prospect of achieving an*

> *outcome which would closely approximate that which it had offered in settlement of the matter."*

[51] We also note the Full Bench's observation in *Azad v Hammond Park Family Practice Pty Ltd* [24]:

> *"… Section 611 is directed towards the conduct of a person at the time an application (or response) is first made and requires consideration of whether the application was "made" vexatiously or without reasonable cause, or whether it should have been reasonably apparent, at the time the application was made, that it had no reasonable prospect of success."*

[52] The tests under s.611(2) for respondents are relevantly the same as the tests applied to applicants:

(a) on the facts apparent to the respondent at the time the application was made, whether it responded to the application vexatiously or without reasonable cause (s.611(2)(a)); and
(b) on the facts apparent to the respondent at the time the application was made, whether there was no substantial prospect of successfully defending the application (s.611(2)(b)).

[53] We note that for respondents the notions of reasonable cause and of successfully defending an application are less clear than for applicants. For applicants in unfair dismissal proceedings 'success' is invariably assessed by reference to whether the Commission finds that the dismissal was unfair or, in cases where there is a jurisdictional challenge, the Commission finds that the application was properly made.

[54] A respondent with a weak case is in a much different position to an applicant with a weak case. An applicant can discontinue their application at any time (per s.588). A respondent whose case is weak can attempt to settle the matter, but otherwise has no choice but to defend it. In some instances 'success' for the respondent might be measured by reference to the remedy sought by the applicant. Respondents can and should refrain from responding to an application with points that are hopeless, but in some cases a respondent's only option might be to make a weak response to defend against the remedy sought. The obvious example is an employer respondent to an unfair dismissal claim that might have a very weak response in relation to the fairness of the dismissal, but a strong (or even just an arguable) response to a claim for reinstatement.

[55] We consider that the Commissioner applied an orthodox approach to the application of both limbs of s.611(2) of the Act, save for his consideration of events that occurred after the Response was lodged.

[56] The facts apparent to the Respondent at the time the Response was filed were that the Charges had been laid by the NSW Police after allegations of assault had been made against the Appellant, and three witnesses had provided statements supporting those allegations. The Commissioner correctly found:[25]

> *"In simple terms, the criminal charges laid against the applicant would have provided sufficient, reasonable motivation to make the response."*

[57] The language of paragraph [50] of the Costs Decision, extracted at [26] above, is imprecise regarding the Commissioner's timing of the assessment of prospects of success, as is the consideration of offers of settlement made well after the Response was filed. However on a fair reading, the Commissioner was dealing with the submissions of the parties, which he observed were as follows:[26]

> *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.*

[58] The Commissioner considered, at the urging of the parties, the Respondent's prospects of success after the outcome of the Local Court proceedings, and the subsequent offers of settlement which he was not entitled to do. However, the Commissioner correctly considered the matter and determined the prospects of success at the time of the filing of the Response and found at that time that the Respondent should not be held to have had no reasonable prospects of success.

[59] The dismissal of the Criminal Charges weakened the Respondent's defence of the Appellant's application. Given that the Commissioner ultimately rejected the Appellant's costs application, it cannot be said that the erroneous consideration of subsequent events affected the outcome of the application.

[60] Having found that the Response was not made without reasonable cause, and that the Response had some reasonable prospect of success, it was unnecessary for the Commissioner to consider whether the discretion to order costs would be exercised in the circumstances.

Disposition

[61] This appeal raises issues of general application concerning the proper approach to the application of the provisions of s.611(2) to Respondents, and as noted above we consider that it is in the public interest to grant permission to appeal.

[62] However, for the reasons stated, we consider that the Commissioner was ultimately correct in his conclusions regarding the application of the provisions of s.611(2) to the matter, and we would dismiss the appeal on that basis.

Order

[63] We order as follows:

1. Permission to appeal is granted.
2. The appeal in C2023/1072 is dismissed.

DEPUTY PRESIDENT

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<PR761029>

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[1] [2022] FWC 2925.

[2] [2023] FWC 290 and Print PR 750192

[3] Principal Decision at [68].

[4] Principal Decision at [86].

[5] Principal Decision at [88].

[6] Costs Decision at [42].

[7] Costs Decision at [44].

[8] Costs Decision at [50].

[9] [2023] FWC 290 at [62] to [64].

[10] Costs Decision at [50].

[11] *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ

[12] O'Sullivan v Farrer and another (1989) 168 CLR 210 at [216]-[217] per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in Hogan v Hinch (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; Coal & Allied Mining Services Pty Ltd v Lawler and others (2011) 192 FCR 78; (2011) 207 IR 177 at [44]-[46].

[13] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on

judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28]

[14] [2010] FWAFB 5343 at [27].

[15] Wan v AIRC (2001) 116 FCR 481 at [30].

[16] [2016] FWCFB 8162, at [15] and [16].

[17] [2014] FWCFB 810, at [23]-[33].

[18] [2021] FWCFB 932, at [14].

[19] [2011] FWAFB 4014, at [10], see also *Chapman* at [15].

[20] (2011) 201 IR 370, [2011] FWA 2225.

[21] At 389 [44].

[22] (2013) 238 IR 55, [2013] FWCFB 8960.

[23] At [40]-[45].

[24] [2022] FWCFB 110 at [9].

[25] Costs Decision at [39].

[26] Costs Decision at [46].