

[2025] FWC 1380 [Note: An appeal pursuant to s.604 (C2025/5247) was lodged against this decision - refer to Full Bench decision dated 7 January 2026 [\[\[2026\] FWCFB 4\]](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.611—Costs

Bevan Geoffrey Roberts

v

Quantum-Systems Pty Ltd, Michael Lillehagen, Kim Hannant, David Sharpin, Quantum-Systems Gmbh
(C2025/820)

COMMISSIONER SIMPSON

BRISBANE, 19 MAY 2025

Application for costs under ss.611 and 375B – s.365 application – costs not ordered – application dismissed.

[1] Mr Bevan Geoffrey Roberts (**Mr Roberts / the Applicant**) made an application to the Fair Work Commission (**the Commission**) seeking an order for costs against Quantum-Systems Pty Ltd (**the First Respondent**), Michael Lillehagen (**the Second Respondent**), Kim Hannant (**the Third Respondent**), David Sharpin (**the Fourth Respondent**) and Quantum-Systems Gmbh (**the Fifth Respondent**) pursuant to ss.375B and 611 of the *Fair Work Act 2009* (Cth) (**the Act**).

[2] The application is made in the context of an application to deal with contraventions involving dismissal made under s.365 of the Act by Mr Roberts on 3 February 2025. Mr Roberts was represented by Mr Michael Harmer of Harmer’s Workplace Law in the substantive case, and in this costs matter. The Respondents were represented by Mr Bob Reid of Counsel instructed by Mr Ben Warren of Ellem Warren Napa Lawyers in the substantive matter. In this costs matter the Respondents were represented by Ellem Warren Napa Lawyers.

Procedural background between the parties

[3] On 10 December 2024, Mr Roberts lodged a Form F8C – General Protections Application not involving dismissal and a Form F72 – Stop Bullying Application with the Commission (**First Application**).

[4] On 19 December 2024, the Respondents lodged submissions in response to the First Application, a Form F73 – Response to a Stop Bullying Application on 23 December 2024 and a Form F8D – Response to a General Protections Application not involving dismissal on 24 December 2024.

[5] A conciliation to deal with the First Application was listed on 21 January 2025 (having been relisted from 8 January 2025). On 13 January 2025, and prior to the parties participating in the conciliation, the Applicant's employment with the First Respondent was terminated. On 16 January 2025, the Applicant withdrew the First Application.

[6] On 3 February 2025, the Applicant filed a Form F8 – General Protections Application involving dismissal in the Commission (**Second Application**). In the Second Application, the Applicant contended that he was dismissed by the First Respondent on 13 January 2025 in contravention of Part 3-1 of the Act and that the Second Respondent, Third Respondent, Fourth Respondent and Fifth Respondent were involved in, and liable for, the alleged contraventions pursuant to ss.362 and 550 of the Act.

[7] On 18 February 2025, the Respondents lodged a Form F8A – Response to a General Protections Application involving dismissal in which they raised a jurisdictional objection to the Second Application to the effect that the Applicant had abandoned his employment and was accordingly not dismissed at the First Respondent's initiative in accordance with s.386 of the Act.

[8] During the jurisdictional hearing on 18 March 2025, after partial cross examination of the Second Respondent and my prompting to consider if the Respondents intended to continue to press the jurisdictional objection, the Respondents withdrew the jurisdictional objection. The hearing was adjourned, and the matter was then listed for a conciliation conference on 24 March 2025.

[9] On 21 March 2025, the Applicant's lawyers contacted the Respondent's lawyers by letter notifying the Respondents that the Applicant intended to commence proceedings in the Federal court and pursue compensation for breaches of contract, the Act, the *Corporations Act 2001* (Cth) and the *Work Health and Safety Act 2011* (Qld). The letter outlined that the Applicant would also be seeking general damages for psychiatric injury, humiliation, distress and loss of enjoyment of life all of which have been compounded by the ongoing actions of Respondents. The letter concluded noting the ongoing legal costs being incurred, and the willingness to engage in conciliation in good faith before the Commission.

[10] On 24 March 2025, the Respondent's lawyers issued the Applicant's lawyers a letter, citing the opportunity 'on the record' to clear up some misapprehensions that arose during the jurisdictional hearing and to provide a summary of the relevant facts in the full context. The letter concluded echoing the ongoing legal costs being incurred, and the willingness to engage in conciliation in good faith before the Commission.

[11] On 24 March 2025, I issued a certificate under s.368 of the Act, after conciliation before me failed to settle the matter.

[12] On 7 April 2025, Mr Roberts made this application for costs against the Respondents. Directions were issued on 8 April 2025, requiring parties to file material in respect of the costs application. The matter was determined on the papers.

Relevant Legislation

[13] Mr Roberts’s application for costs against the Respondents relied in part on s.375B of the Act, which provides:

“375B Costs orders against parties

(1) The FWC may make an order for costs against a party (the first party) to a dispute for costs incurred by the other party to the dispute if:

(a) an application for the FWC to deal with the dispute has been made under section 365; and

(b) 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 dispute.

(2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 377.

(3) This section does not limit the FWC’s power to order costs under section 611.”

[14] Section 375B was inserted into the Act by the *Fair Work Amendment Act 2012*. Relevantly, the Supplementary Explanatory Memorandum to the *Fair Work Amendment Bill 2013* (Cth) states as follows:

“New section 375B allows the FWC to order costs against a party to a general protections dismissal dispute (the first party) if it is satisfied that the first party caused the other party to the dispute to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the dispute. New section 375B is similar to the costs orders that are available against parties in relation to unfair dismissal matters (see section 400A).

57. This power to award costs is in relation to the dispute before the FWC and does not include costs associated with a general protections court application.

58. The power to award costs under new section 375B is not intended to prevent a party from robustly pursuing or defending a general protections dispute before the FWC. Rather, the power is intended to address the small proportion of litigants who pursue or defend disputes in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.

59. The FWC’s power to award costs under subsection 375B(1) 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.

60. 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.

61. New subsection 375B(2) provides that the power to award costs against one party in these circumstances is only exercisable if the other party to the dispute makes an application in accordance with section 377. New subsection 375B(3) makes it clear that the new power to award costs under subsection 375B(1) operates in addition to subsection 611(2), which enables the FWC to make costs orders against a person in certain circumstances, such as where an application is made vexatiously or without reasonable cause.”

[15] Secondly, the application for costs against the Respondents were made pursuant to s.611 of the Act, which stipulates as follows:

“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 s376, 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).”

[16] Section 611 was included in the initially passed version of the *Fair Work Act 2009* (Cth). In 2012, it was amended to include s.400A in relation to the note for s.611(2). In relation to s. 611(2), the Explanatory Memorandum for the *Fair Work Bill 2009* outlined the following:

“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.”

Submissions

Principles

[17] The Respondents noted the case of *Rahman v Commonwealth of Australia as represented by the Australian Tax Office* [2013] FCCA 388 at [4] and [7] where it was said:

“A finding of an unreasonable act or omission must be the exception rather than the rule. It follows that a reasonably high bar needs to be set for a party alleging an unreasonable act or omission.”

[18] The Applicant submitted that the Respondent had misled the Commission as to the strictness of the test partially extracted above. The Applicant contended that it is settled authority that “unreasonable” ought to be given its ordinary meaning, and that such conduct does not have to be so unreasonable that no reasonable person would have engaged in it.

[19] The Respondents also referred to the decision of *Katrina Sayce v The Trustee For Mag Unit Trust T/A Mag Apprenticeships* [2024] FWC 1319, at [13] where it was observed that:

“It is apparent ... that the legislature intended that the power to order costs provided by s.375B only be exercised where there is clear evidence of unreasonable conduct. Such an approach is entirely consistent with the jurisprudence relating to the other costs provisions in the FW Act (such as s.611).”

[20] The Respondents continued that, any departure from this usual course requires both that the subsection 611(2) criteria have been enlivened and that a discretion should be exercised to depart from the usual course. The discretion is exercised rarely, and the Respondents noted the following comments from *Pagkaliwangan v Siganto & Stacey Pty Limited* [2011] FWA 3989, at [4] and [30]; and *Vassallo v Eastitag Pty Ltd* [2021] FWCFB 3974, at [8]-[10]:

- The Commission must be satisfied that: “on the facts apparent to the applicant at the time the application was made, whether there was no substantial prospect of success”;
- The Commission must be satisfied that: “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”; and
- Such conclusions “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.”

[21] The Applicant referred to the Full Bench decision of *Church v Eastern Health t/as Easter Health Great Health and Wellbeing* [2014] FWCFCB 810 (**Church**) which is authority for the following propositions:

- (i) The power to order costs pursuant to s.611(2) should be exercised with caution and only in a clear case.
- (ii) A party cannot be said to have made an application ‘without reasonable cause’ within the meaning of s.611(2)(a), simply because his or her argument proves unsuccessful.
- (iii) One way of testing whether a proceeding is instituted ‘without reasonable cause’ is to ask whether upon the facts known to the applicant at the time of instituting the proceeding, there was no substantial prospect of success.
- (iv) The test imposed by the expression ‘without reasonable cause’ is similar to that adopted for summary judgment, that is, ‘so obviously untenable that it cannot possibly succeed,’ ‘manifestly groundless’ or ‘discloses a case which the Court is satisfied cannot succeed’.

[22] The Applicant also noted the Full Bench decision of *Baker v Salva Resources Pty Ltd* [2011] FWAFCB 4014 (**Baker**), which set out:

[10] The concepts within s.611(2)(b) “should have been reasonably apparent” and “had 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.

[23] The Applicant further referred the case of *Wood v Amigoss Preschool and Long Day Care Co-Operative Ltd* [2023] FWCFCB 71, where a Full Bench of the Commission held that the tests under s.611(2) 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))

[24] Finally, the Applicant noted the case of *Hansen v Calvary Health Care Adelaide Limited* [2016] FWCFCB 8162 where a Full Bench of the Commission stated:

“...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.”

Submissions

[25] The Applicant submitted that it was unreasonable, within the meaning of s.375B(1)(b) of the Act, for the Respondents to raise the jurisdictional objection to the Applicant’s Second Application in circumstances whereby they knew (as evidenced by the Second Respondent’s own concessions in the course of cross-examination at the jurisdictional objection hearing), or ought to have known, that the dismissal was:

- (a) premature;
- (b) unlawful (particularly in that it was contrary to the work health and safety obligations owed to the Applicant); and
- (c) built upon invalid assertions including that (i) there was no basis for the Applicant’s claims, notwithstanding the fact that an independent investigator had made adverse findings relating to the Third Respondent’s behaviour as referred to above; and (ii) there was no basis to name the Fourth Respondent notwithstanding the fact that he approved the decision to terminate the Applicant’s employment.

[26] Accordingly, the Applicant submitted that the jurisdictional objection was not maintainable at law and the Respondents consequently:

- (a) caused the Applicant to incur significant costs because of the unreasonable act of pursuing the jurisdictional objection notwithstanding the factors referenced above, and despite the evidence provided in the witness statement of the Applicant that was contrary to the inferences relied on by the Respondents in the Second Application; and/or
- (b) caused the Applicant to incur significant costs because of the unreasonable omission of failing to withdraw the jurisdictional objection prior to the hearing (by which stage the majority of costs had already been incurred by the Applicant in connection with required preparation), notwithstanding the factors referenced above, and despite the evidence provided in the Applicant’s witness statement that was contrary to the inferences relied on by the Respondents.

[27] Further or in the alternative, by reason of the same conduct and for the same reasons set out above, the Respondents’ jurisdictional objection to the Applicant’s Second Application was vexatious, without reasonable cause and without any reasonable prospects of success within the meaning of s.611 of the Act.

[28] The Respondents referred to the letters dated 21 March 2025 and 24 March 2025 exchanged between the parties before the conciliation, which address the above issues. The Respondents submitted that in a nutshell, Mr Harmer was able to extract “correct” answers in response to specific questions that were contextually inaccurate; and on any full and true understanding of the facts, the basis for the jurisdictional objection was valid.

[29] The Respondents argued that the Applicant has asserted a desire to return to work but his conduct has unequivocally displayed a desire only to walk away with an extortionate payout.

They submit that this is unreasonable conduct on the Applicant's part. The Respondent referred to the following conduct of the Applicant to support this:

- His repeated refusal to engage with wellness checks;
- His premature, poorly evidenced and grossly excessive – two years' salary - offer to walk away, only a month after he'd left the workplace;
- Despite the WorkCover process being the prescribed statutory process to compensate workplace injuries and facilitate a return to work, the Applicant chose not to participate in WorkCover until after his employment had ended, and then he stated at conciliation that he prefers (i.e. voluntarily bearing legal costs) to pursue compensation through the Commission and Courts due to his WorkCover claim having been rejected;
- His wilful refusal to participate in the grievance process, even when a Doctor assessed him as fit to do so, while repeatedly asserting exacerbation of his symptoms;
- His refusal to accept the superior psychiatrist evidence that he was fit to participate in the grievance process and to return to work;
- His failing and refusing to provide any further or updated medical evidence after 23 December 2024, despite warnings of the consequences and multiple visits to his preferred medicos.

[30] The Applicant submitted that as inferred by me, part-way through the jurisdictional objection hearing, the jurisdictional objection was unsustainable noting the Second Respondent's responses during cross-examination that I described as "*making it more difficult to make out the jurisdictional objection*".¹

[31] The Applicant noted that I interrupted the cross-examination of the Second Respondent to indicate that, based on the Second Respondent's oral evidence, it was becoming more difficult for the Respondents to make out the jurisdictional objection.

[32] The Applicant contended that by reason of the Respondents' conduct set out above, the Respondents caused the Applicant to unnecessarily incur significant costs, including in relation to the:

- (a) preparation of written submissions;
- (b) preparation of a witness statement with extensive supporting documents;
- (c) preparation of the order for the production of documents;
- (d) collation of evidence, including medical evidence;
- (e) review and preparation of correspondence; and
- (f) preparation for the jurisdictional objection hearing, including the cross-examination of the Second Respondent.

[33] The Respondents observed that "*making it more difficult to make out the jurisdictional objection*" is not the same as, or even analogous to, "clear evidence of unreasonable conduct" or a position so "*manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.*"

[34] The Respondents contended that as soon as I made the "more difficult" observation, and despite the merits of the jurisdictional objection with a more complete, less 'cherry picked'

understanding of relevant facts as outlined in their letter dated 24 March 2025, the Respondents took advice and chose to avoid the incurring of further costs by withdrawing the jurisdictional objection. They submitted this is not the conduct of a party acting unreasonably.

[35] The Respondents asserted that a couple of out-of-context “correct” answers in response to clever cross-examination do not change the merits of the jurisdictional objection; and nor do those answers provide “clear evidence of unreasonable conduct” sufficient to hurdle the “high bar” that would justify the award of costs under ss.375B or 611 of the Act.

[36] The Applicant submitted that contrary to the Respondent’s submissions, that the relevant ‘concessions’ are insufficient to overcome the “high bar” required, the Respondents forget the gravity of the concessions made by the Second Respondent in the course of cross-examination and/or which were otherwise revealed by the forced production of documents by the Respondents, namely that:

- (a) the Second Respondent acted in flagrant disregard for the duty of care owed to the Applicant, and contrary to his work health and safety obligations in the context of the Applicant suffering from a diagnosed psychiatric injury, leading to the termination of the Applicant’s employment;
- (b) An interim investigation report was prepared, dated 22 October 2024 containing adverse findings against the Third Respondent; and
- (c) The Fourth Respondent explicitly approved the termination of the Applicant’s employment.

[37] The Applicant alleged that making the jurisdictional objection and maintaining it with the knowledge of the content of the documents produced in response to the F52 Order was clearly an unreasonable act. The Applicant was of the view that the application was only withdrawn at my suggestion only reinforces this.

[38] The Applicant continued that, not only was the course adopted by the Respondents inherently costly, but opting to pursue the jurisdictional objection in light of the Second Respondents’ concessions is plainly unreasonable. By the time of the discontinuance, the Applicant was already put to the time and expense of responding to the manifestly groundless and untenable jurisdictional objection.

[39] The Applicant referred to the case of *Samantha Rumbel v Modern Motors Dungog Pty Limited* [2023] FWC 3346, where Commissioner Ryan noted:

“[49] I agree with the Respondent that the date of dismissal is an essential fact to be determined in the context of whether a dismissal related application is made within the prescribed period. I also agree that a respondent is entitled to challenge the jurisdiction of the Commission in a matter. However, that entitlement is not unfettered and any challenge as to the Commission’s jurisdiction that is mounted vexatiously, without reasonable cause, instigated when it should have been reasonably apparent that it had no reasonable prospect of success, or involves an unreasonable act or omission exposes a respondent to an order for costs.”

[50] ... I am satisfied that based upon the facts known to the Respondent at the time of raising the Jurisdictional Objection, the response was simply untenable. Accordingly, I am satisfied that the Respondent responded to the Application (insofar as it relates to the Jurisdictional Objection) without reasonable cause.”

[40] The Applicant also referred to the case of *Bland v MPower Projects Pty Ltd* [\[2021\] FWC 2737](#) where a jurisdictional objection was made without any factual or legal basis. In this case, the Employer was not legally represented, and did not outline the substance of their objection in their Form F8A response, selecting first the ‘other’ objection, and only later particularised it as a ‘no dismissal’ objection to the application in addition to arguing that the employment contract was terminated but the employment relationship was not. The Employer also did not advance witness evidence in support of their objection.

[41] I note the Full Bench decision of *Keep v Performance Automobiles Pty Ltd* [\[2015\] FWCFB 1956](#), where it was determined that:

“[30] Having regard to all of these considerations we are not persuaded that the Application was made without reasonable cause. Nor are we persuaded that the Application had no reasonable prospect of success. As to the respondent’s alternative submission - that the applicant acted unreasonably in failing to discontinue the Application - we are not persuaded that the applicant’s continuation of the dispute was unreasonable”

[42] I also note the appeal of *Deane v Paper Australia Pty Ltd* [PR932454](#), where a Full Bench made the following observation about the expression ‘should have been reasonably apparent’ in s.611(2)(b) in the context of enlivening a power to award costs under s.170CJ(1) of the *Workplace Relations Act 1996*:

“unless upon the facts apparent to the applicant at the time of instituting the [application], the proceeding in question was manifestly untenable or groundless, the relevant requirement in s.170CJ(1) is not fulfilled and the discretion to make an order for costs is not available”.

Consideration

[43] In the present matter the Commission finished dealing with the dispute when I issued the certificate under s.368 on 24 March 2025. The costs application was filed on 7 April 2025 and hence is within the time period prescribed in s.377. Neither party contests this.

[44] The Respondents raised the jurisdictional objection in circumstances where it was at least arguable on the material filed before the time of the jurisdictional hearing, that the Applicant had no desire to return to work, and his conduct was motivated by a desire to negotiate a large settlement sum with the Respondents.

[45] I agree with the Respondents’ submission that “*making it more difficult to make out the jurisdictional objection*” is not the same as, or analogous to, “*clear evidence of unreasonable conduct*” or a position so “*manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.*”

[46] I accept the Respondents' submission that, following my invitation to Counsel for the Respondents to consider their position regarding whether they wished to continue to press their jurisdictional objection, given certain answers in the course of cross examination, that they took advice during an adjournment and chose to avoid incurring further costs by withdrawing the jurisdictional objection when I had given an indication of a preliminary view, not a final view.

[47] I agree with the Respondents, its actions were not the conduct of a party acting unreasonably, but a party acting sensibly in circumstances where the prospect of succeeding had diminished during the hearing.

[48] I do not accept the Applicant's submission that based on what was known by the Respondents prior to the hearing, that pressing their jurisdictional objection was an unreasonable act, or a position so manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.

[49] The Applicant submitted that the documents produced by order of the Commission supports his allegation that the Second Respondent acted in disregard for the duty of care owed to the Applicant, and contrary to his work health and safety obligations. The Applicant also points to the interim investigation report dated 22 October 2024 containing findings concerning the Third and Fourth Respondents who approved the termination of the Applicant's employment. None of these things were necessarily fatal to the Respondents' jurisdictional objection, and what was to be made of these matters always turned on disputes that needed to be tested.

Conclusion

[50] I have concluded the Respondents have not acted unreasonably, vexatiously or without reasonable cause in pressing their jurisdictional objection up to the point of the hearing, and subsequently making a decision to withdraw it following the expression of a preliminary view from the Commission in the course of the jurisdictional hearing. For the reasons set out above the application for costs is dismissed. An order to this effect will be issued separately and concurrently with this decision.



COMMISSIONER

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¹ PN237-238 of the official hearing transcript.