



# DECISION

*Fair Work Act 2009*

s.400A, 611 - Application for a costs order against a party

## **Jelmac Australia Pty Ltd Trading AS Jelmac Directional Drilling** (C2025/4793)

COMMISSIONER PANOPOULOS

MELBOURNE, 24 DECEMBER 2025

*Application for costs – costs incurred because of unreasonable acts and omissions – costs awarded.*

[1] On 7 April 2025, I issued a decision with respect to an application made by Ms Erinn McGowan for an unfair dismissal remedy (the s.394 decision).

[2] In the s.394 decision I found that the application should be dismissed subject to my discretion under s.399A of the Act. This was as a result of Ms McGowan's failure to comply with Directions from my Chambers and her failure to attend a conference or hearing held by the Commission.

[3] On 17 April 2025, Jelmac Australia Pty Ltd Trading AS Jelmac Directional Drilling (the Costs Applicant) applied for costs against Ms McGowan (the Costs Respondent) and relies on sections 400A and 611 of the *Fair Work Act 2009* (Cth) (Act). The costs application is in accordance with s.402 of the Act.

[4] The Costs Applicant has now made an application pursuant to s.400A of the Act for costs against the Costs Respondent.

[5] In summary supporting their application, the Costs Applicant's submissions include that:

- The Costs Respondent's unreasonable acts or omissions in connection with the conduct or continuation of her unfair dismissal application caused the Costs Applicant to incur costs and rely on the orders dated 7 April 2025.
- At the commencement of proceedings, The Costs Respondent was put on notice that the Costs Applicant would be vigorously opposing the Costs Respondent's unfair dismissal application and that they would be seeking recovery of their costs.
- That the Costs Respondent made the application vexatiously or without reasonable cause and that it should be inferred that her repeated failure to attend

a hearing indicates that the claim had no real prospects of success and that she knew that.

[6] The Costs Applicant has prepared an itemised schedule of costs and seeks the making of an order for costs on an indemnity basis, totalling \$43,972.26.

### **Relevant legal principles**

[7] Section 611(1) of the Act establishes a general rule that parties in proceedings before the Commission must bear their own costs.

[8] There are a number of provisions in the Act which operate as exceptions to this general rule and allow costs to be awarded in specific circumstances. Sections 400A and 611(2) of the Act are two such exceptions.

[9] Section 400A of the Act provides as follows:

#### **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.

[10] Satisfaction as to both matters enlivens the Commission's discretionary power to order the payment of costs under s.400A of the Act.

[11] While s.611(1) of the Act provides for each party to bear their own costs in matters before the Commission, s.611(2) of the Act provides as follows:

#### **611 Costs**

“(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.

[12] *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing*<sup>1</sup> summarised the principles regarding the interpretation of s.611(2)(a) and the meaning of the expression ‘vexatiously or without reasonable cause’. Vexatious, being a narrowly construed concept that requires the assessment of the applicants motive in making the application<sup>2</sup>.

[13] The phrase ‘without reasonable cause’ means that an application is so obviously untenable that it cannot possibly succeed and is manifestly groundless. That is, on an applicant’s own version of facts, it is clear the application must fail.<sup>3</sup>

[14] Principles relevant to the interpretation of s.611(2)(b) of the Act were summarised by the Full Bench in *Baker v Salva Resources Pty Ltd*<sup>4</sup> as follows:

“[10] 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.”

## Consideration

### *Section 611 of the Act*

[15] The Costs Applicant submits that the Costs Respondent’s application was made ‘without reasonable cause’ or ‘without reasonable prospect of success’ and that I should make an inference from the Costs Respondent’s non-attendance and non-compliance with the Commission’s directions that her evidence is unreliable.

[16] With regards to the Costs Respondent’s s.394 application, the Costs Applicant has submitted an appendix of what they say are inconsistencies and mistruths in her evidence.<sup>5</sup>

[17] I have considered whether upon the facts known to the Costs Respondent at the time she filed her application there was no reasonable prospect of success.

[18] The Costs Applicant dismissed the Costs Respondent after she was unable to provide an acceptable explanation regarding incorrect payroll adjustments, including awarding herself excessive entitlements, and not correcting such errors when these errors were brought to her attention. Accordingly, the Costs Applicant terminated the Costs Respondent due to serious misconduct.

[19] The Costs Applicant details in its submission their disagreement with the Costs Respondent’s version of events and present alternative facts.<sup>6</sup>

[20] In her application, the Costs Respondent denied the serious misconduct. In her application she says she had not remedied payroll inaccuracies because her father was ill and she wanted to ‘go through it with another employee (Laughlin) who overseas and approved wages after I input them into the system...’, and that she had been locked out of the Costs Applicant’s system and could not explain her actions to defend herself because she had been locked out of the system. (footnote her application).

[21] The Costs Respondent’s own version of the facts dispute the Costs Applicant’s stated reason for dismissal and claims procedural unfairness. I am not satisfied that the Costs Respondent made her application ‘without reasonable cause’. It follows that no order for costs can be made under s.611(2)(a) of the Act.

[22] Should it have been apparent to the Costs Respondent that her application had not reasonable prospect of success? Although I dismissed her application under s.399A of the Act because she had unreasonably failed to comply with directions and attend multiple hearings, I have to consider whether upon the facts known to the Costs Respondent at the time she filed her application, there was no reasonable prospect of success. And whether the application was so lacking in substance as to not be reasonably arguable. On the materials before me I cannot be satisfied on this point.

[23] That I found she did not provide reliable evidence regarding her noncompliance, does not discount the fact that the Costs Respondent in her own mind as evidenced by her application believed she had some prospect of success. The Full Bench has set a high bar for a finding that an application has no reasonable prospects of success and that an application must be so manifestly untenable or groundless or so lacking in substance as to be not reasonably arguable.<sup>7</sup> Exercising this cautionary approach, I cannot make an order for costs under s.611(2)(b) of the Act.

*Section 400A of the Act*

[24] Section 400A of the Act provides that costs may be awarded to the Costs Applicant if I am satisfied that the costs it claims were incurred as a result of an unreasonable act or omission of the Costs Respondent in connection with the conduct or continuation of her unfair dismissal application. However, even if I am satisfied that the relevant circumstances exist, I am not obliged to order costs. It is a discretionary decision.

[25] The Costs Applicant has validly made an application and submits that the Costs Respondent’s unreasonable actions in the proceedings have caused them to incur substantial costs. It relies on my decision<sup>8</sup> in the unfair dismissal matter. The Costs Applicant’s submits the following:

12. Without repeating the Commission’s decision in full, the following findings are important in the context of the current Application for Costs:

a. at paragraph [50];

The Applicant has failed to provide a plausible explanation to the Commission for her repeated non-attendance at hearings. The Applicant failed to attend these hearings, and did not provide any reliable evidence to support her submissions for her reason for nonattendance, despite being given many opportunities to do so. The Applicant has shown very little regard for the tireless efforts of various members of the Commission's staff, who conscientiously and repeatedly attempted to make contact with her, to give her the opportunity to engage with the Commission's processes to prosecute her case.

b. at paragraph [51];

In the circumstances of this matter, I am satisfied that the Applicant has acted unreasonably in failing to attend three hearings and to comply with directions, and that I should exercise my discretion under s.399A and dismiss her unfair dismissal application. [emphasis added]

**[26]** The Costs Respondent submissions include the following:

- (a) It's more than what I would have received from any unfair dismissal outcome.
- (b) I did have cause and it was most definitely not made as a vexatious complaint.
- (c) I did try to liaison with chambers in regard to mental health issues and being able to attend the hearing after matters that were brought up with the only intention to bring bad light on myself prior to the hearing, as a simple question in the form of "am I attending" would have given the council the same answer.
- (d) The respondent has still not paid wages and entitlements that are owing from November 2024 and to date has ignored all directions from ombudsman, and the direction given to the respondent at the mediation back in January 2025.

**[27]** Adopting the approach to s.400A of the Act in *Gugiatti*<sup>9</sup>, I am persuaded that the Costs Respondent engaged in unreasonable acts or omissions in connection with the conduct or continuation of the application that caused the costs Applicant to incur additional costs.

**[28]** Without repeating my conclusions as relied upon by the Costs Applicant, I am satisfied that the Costs Respondent's repeated failures to both attend multiple hearings and comply with directions was unreasonable, including because she omitted to provide credible explanations for her absence and non-compliance caused the Costs Applicant to incur costs. Accordingly, I have decided to exercise my discretion to award costs to the Costs Applicant.

**[29]** The Costs Applicant has submitted its itemised costs, and I'll exercise my discretion to award costs as per the items that are reasonable given the circumstances.

**[30]** I do not accept all the items in Annexure A (itemised schedule of costs) as submitted by the Costs Applicant as being incurred as a direct consequence of the Cost Respondent's acts or omissions, with some fee items preceding the first non attendance at a hearing for 4 March 2025. The legal costs and disbursements incurred by the Costs Applicant in relation to 4 March

2025 hearing would have been incurred by them in the ordinary course of advancing their defence to the Costs Respondents substantive claim. Accordingly, items 1 to 80 in Annexure A and relevant disbursements have not been included.

**[31]** With the exception of items 139 and 143, the remainder of the items in Annexure A from 98 to 173 will be included in the award for costs as will the disbursements with item numbers 177 and 181 to 185. I consider that all the costs associated with the costs application, detailed in Appendix C (Jelmac costs preparing Costs Application), totalling \$5,265 arose as a direct consequence of the Cost Respondent's acts and omissions.

**[32]** A cost order to this effect will be separately issues and will require the Costs Respondent to pay the amount of \$16,822.40 to the Cost applicant within 21 days of the date of the order.



COMMISSIONER

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<sup>1</sup> Church v Eastern Health (2014) 240 IR 377; [\[2014\] FWCFB 810](#); BC201423076.

<sup>2</sup> Ibid [28]-[29].

<sup>3</sup> Ibid [30]-[33].

<sup>4</sup> Baker v Salva Resources Pty Ltd (2011) 211 IR 374; [\[2011\] FWAFB 4014](#)

<sup>5</sup> Appendix of Ms McGowan

<sup>6</sup> Digital Hearing book for U2025/xxxx pp 305-306, [10]-[19].

<sup>7</sup> Ryman v Thrash Pty Ltd (t/a Wisharts Automotive Services) [\[2016\] FWCFB 1638](#); BC201615380, [4].

<sup>8</sup> Ms Erinn McGowan v Jelmac Australia Pty Ltd [\[2025\] FWC 981](#), [50]-[51].

<sup>9</sup> Gugiatti v Solariscare Foundation Ltd [\[2016\] FWCFB 2478](#); BC201615280.