DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Candice O'Meley
v
Bara Barang Corporation Ltd
(U2025/13580)

DEPUTY PRESIDENT BOYCE SYDNEY, 24 MARCH 2026

Application for an unfair dismissal remedy - Application for costs under ss.400A(1) and 611(2)(b) of the Fair Work Act 2009 – small business employer – employee failed to complete 12 months service - unreasonable act or omission in failing to discontinue unfair dismissal application – discretion to award costs under s.400A enlivened – costs awarded

Overview

[1] Bara Barang Corporation Ltd (**Costs Applicant**) has filed an application for costs (**Costs Application**) with the Fair Work Commission (**Commission**) against its former employee Ms Candice O'Meley (**Costs Respondent**) under s.400A and s.611 of the *Fair Work Act 2009* (**Act**).

[2] At the hearing of the Costs Application, Ms *Sandra Marks,* Partner, Marks Pritchard lawyers, appeared with permission for the Costs Applicant,[1] and the Costs Respondent, Ms *Candice O'Meley,* appeared for herself.

Background

[3] The Costs Applicant is a not-for-profit charitable organisation that builds and delivers specialised services to empower Aboriginal young people with cultural affirmation and the connection to cultural education, employment and training. It does not have (and has never had) any associated entities.

[4] The Costs Respondent commenced full-time employment with the Costs Applicant on 23 September 2024 as an Industry Mentor – Indigenous Skills & Employment.[2] Her employment was covered by the *Social, Community, Home Care and Disability Services Industry Award 2010*.[3] She was dismissed from her employment with the Costs Applicant on 1 August 2025, meaning that she was employed by the Costs Applicant for less than 12 months.

[5] On 20 August 2025, the Costs Respondent filed an unfair dismissal application (**UD Application**) with the Commission alleging that she was unfairly dismissed (within the meaning of s.385 of the Act) by the Costs Applicant.

[6] Having regard to the Costs Applicant being a "small business employer",[4] in its Form F3 Employer Response (filed 4 September 2025) (**Response**), the Costs Applicant raised two objections to the UD Application, being that:

(a) the Costs Respondent does not meet the minimum employment period under s.383(b) of the Act (i.e. 12 months for a small business employer); and/or

(b) in any event, the Costs Applicant complied with the Small Business Fair Dismissal Code (**SBFDC**).

[7] The UD Application was dismissed under s.587 of the Act (see Decision [2025] FWC 2964, Order PR792367) on 3 October 2025. The reasons given for the dismissal of the UD Application were that the Costs Respondent failed (or made no attempt to comply with) written directions issued, failed to respond to a show cause (for non-compliance) notice, failed to respond to (or return) various telephone messages left for her requesting that she immediately contact Chambers, and failed to engage with the Commission (through my Chambers or otherwise) to explain her failings.

The UD Application

[8] In her UD Application, the Costs Respondent claims (in summary) that she was dismissed unfairly by the Costs Applicant because it was unwilling to facilitate her return to work after surgery.[5]

[9] The Costs Applicant set out in its Response that at the time of the Costs Respondent's dismissal, it only employed 13 persons, and attached a table identifying these 13 employees (omitting names, but including positions/roles held).[6]

[10] On 4 September 2025, the Costs Applicant (through its legal representative, Ms Marks) sent the following email to the Costs Respondent:

"Dear Ms. O'Meley

We act for Bara Barang Corporation Ltd.

We refer to:

- the unfair dismissal application lodged by you against our client; and
- the Form F3 – Employer Response that has been filed on behalf of our client this afternoon (**Response**).

For the reasons detailed in section 2.2 of the Response, you are not eligible to bring an unfair dismissal application, and our client objects to your application on jurisdictional grounds.

As you are now on notice of these jurisdictional objections, we invite you to discontinue your unfair dismissal application.

> Should you continue to pursue your application despite the jurisdictional objections that have been raised, our client will be seeking an order for costs against you under section 611 of the *Fair Work Act 2009* on the basis that you have made the application without reasonable cause and /or it should have been reasonably apparent to you that your application has no reasonable prospect of success.
>
> Our client reserves the right to rely on this email correspondence, and any response or failure by you to respond to this email, in any application it makes for costs.
>
> Should you or your legal representative wish to discuss the jurisdictional objections, please feel free to call me on the number below.
>
> Regards,
>
> Sandra Marks | Principal"[7]

[11] The Costs Respondent did not respond to the foregoing email, and neither did anyone else on her behalf.

[12] On 5 September 2025, the Costs Applicant (through its legal representative, Ms Marks) sent the following email to Chambers (copying in the Costs Respondent):

> "Dear Case Management Team
>
> Thank you for your email below.
>
> We are instructed that the Respondent does not wish to participate in a conciliation and requests that the matter be referred to a Commission Member to determine, prior to any substantive hearing regarding the application, the jurisdictional objection relating to the submission that the Applicant does not satisfy the minimum employment period prescribed under s 383 of the *Fair Work Act.* This is a discrete issue that the Respondent expects can be established with a brief written statement and submissions.
>
> Kind regards
>
> Sandra [Marks]"[8]

[13] The Costs Respondent did not respond to, or otherwise engage with, the foregoing email, and neither did anyone else on her behalf.[9]

[14] At 10:41AM AEDT on Tuesday, 16 September 2025, my Chambers sent the Costs Respondent the following email:

> "Dear Ms O'Meley [Costs Respondent],
>
> Chambers refers to the above matter, which has been allocated to the Chambers of Deputy President Boyce.

> The Deputy President has had regard to your Application (Form F2) and the Respondent's [Costs Applicant's] response (Form F3), and seeks a response from you as to whether you accept that you were employed by the Respondent [Costs Applicant] for less than 12 months, and if not, how it is you claim that the Fair Work Commission has jurisdiction to hear your unfair dismissal claim when the Respondent [Costs Applicant] is a Small Business Employer.
>
> Kindly provide your response to the above (in writing by reply email and copying in the Respondent) by no later than **12pm tomorrow, Wednesday 17 September 2025.**
>
> Yours faithfully,
>
> [Associate]"

[15] At 11:51am AEDT, on 16 September 2025, the Costs Respondent replied to Chambers email as follows:

> "Dear [Associate],
>
> I refer to your email of 16 September 2025.
>
> I accept that my period of employment with the Respondent [Costs Applicant] was approximately 10 months. However, I submit that the Commission has jurisdiction to hear my unfair dismissal application because the Respondent was **not a Small Business Employer.**
>
> During my employment at Bara Barang [Costs Applicant], I was aware of at least 16 employees being engaged at the same time as myself.
>
> On multiple occasions in staff meetings this was acknowledged and it was discussed that HR (Kim Aajjes) was engaged to facilitate the organisation's transition from being a small business.
>
> Because of this I believe the minimum employment period that applies is 6 months, which I exceeded.
>
> Kindest Regards
> Candice O'Meley"

[16] The Costs Applicant's jurisdictional objection, that it was a small business employer, and that the Costs Respondent (having been employed for less than 12 months) did not meet the minimum employment period, was programmed for hearing. I observe that there was no dispute that the Costs Respondent was employed by the Costs Applicant for less than 12 months, and thus the only issue for resolution (that the Costs Respondent disputed) was the Costs Applicant's status as a "small business employer" as at the time of the Costs Respondent's dismissal (i.e. as at 1 August 2025, did the Costs Applicant employ fewer than 15 employees?).

[17] On 16 September 2025, my Chambers issued Directions and listed the matter for hearing, which relevantly read:

> "[2] By **4.00pm AEST** on **Tuesday, 23 September 2025**, the Respondent [Costs Applicant] must file in the Commission and serve upon the Applicant [Costs Respondent] an outline of submissions, witness statements, and any documents in support of their claim of Small Business Employer status.
>
> [3] By **4.00pm AEDT** on **Tuesday, 30 September 2025**, the Applicant [Costs Respondent] must file with the Commission and serve upon the Respondent [Costs Applicant] an outline of submissions, witness statements, and any documents in opposition to the Respondent's [Costs Applicant's] claim of Small Business Employer status.
>
> [4] The matter is listed for hearing by telephone commencing at **10:00am AEDT** on **Friday, 10 October 2025**.
>
> [5] Filing of documents is to occur by email to the Associate to Deputy President Boyce at chambers.boyce.dp@fwc.gov.au. Please note that any correspondence sent to Chambers regarding this matter must copy in all other parties and/or their representatives.
>
> [6] Liberty to apply generally on 2 days' notice upon email notification to the Associate to Deputy President Boyce."

[18] In accordance with the Direction [2], the Costs Applicant filed its materials on 23 September 2025.

[19] The Costs Respondent did not comply with Direction [3]. At 6:07PM on 1 October 2025, the Costs Respondent was sent a show cause email (**Show Cause Email**) in the following terms:

> "Dear Ms O'Meley,
>
> **Re: U2025/13580 - Ms Candice O'Meley v Bara Barang Corporation Ltd**
>
> I refer to the matter above.
>
> **Background**
>
> On 16 September 2025, the Fair Work Commission issued the **attached** Directions in this matter.
>
> Direction [3] of those directions read as follows:
>
> > *[3] By **4.00pm AEDT on Tuesday, 30 September 2025**, the Applicant [Costs Respondent] must file with the Commission and serve upon the Respondent [Costs Applicant] an outline of submissions, witness statements, and any*

documents in opposition to the Respondent's claim of Small Business Employer status.

To date, Chambers has not received any materials in compliance with Direction [3].

Further directions regarding show cause

In view of the foregoing, the Deputy President directs as follows:

[1] The Applicant [Costs Respondent] is to file with the Commission, and serve on the Respondent [Costs Applicant], written submissions regarding their non-compliance with directions. Further, the Applicant [Costs Respondent] is to make submissions as to why this matter should not be dismissed. The Applicant [Costs Respondent] is to comply with this Direction by no later than **4:00pm AEDT tomorrow, Thursday 2 October 2025.**

[2] If the Applicant [Costs Respondent] does not comply with Direction [1] above, or if the Deputy President is not satisfied by the Applicant's [Costs Respondent's] submissions, the matter may be **dismissed** without further notice.

Yours faithfully,

[Associate]"

[20] The Costs Respondent did not respond to (or otherwise comply with) the Show Cause Email.

[21] On 2 October 2025 at 5:08pm AEST, my Associate made two telephone calls to the Costs Respondent for the purposes of ascertaining her status or position in respect of Direction [3] and the Show Cause Email. The Costs Respondent did not answer the telephone on either occasion. My Associate thus left a voicemail for the Costs Respondent to contact my Chambers by 12:00pm AEST on Friday, 3 October 2025. The Costs Respondent did not make any contact with my Chambers.

[22] On 3 October 2025 at 12:02pm AEST, my Associate made a further and final telephone call to the Costs Respondent. The Costs Respondent did not answer the telephone.

[23] At 3:51pm on 3 October 2025, having not heard anything from the Costs Respondent, the UD Application was dismissed under s.587 of the Act (see Decision [2025] FWC 2964, Order PR792367).

[24] The Costs Respondent has not filed an appeal against this decision or order. I observe that the Costs Respondent's own evidence is that she thought that if she just did not respond to communications, or further engage with the Commission process, everything would be closed off, because her silence indicates that she is no longer fighting her alleged unfair dismissal.[10]

The Costs Application

[25] On 16 October 2025, the Costs Applicant filed its Form F6 Costs Application, seeking an order for costs for the period 5 September 2025 to 3 October 2025.[11] On 18 October 2025, at 11:15AM AEDT, the Costs Respondent emailed my Chambers (without copying in the Costs Applicant) in response to the Costs Application, giving evidence and providing written submissions to explain her non-compliance with the Directions, and to address the basis upon which she believed the Costs Applicant was a small business employer.

[26] In an email sent at 9:09AM AEDT on Monday, 20 October 2025, my Chambers advised the Costs Respondent that her submissions as contained in her email on 18 October 2025 would not be considered, as Directions had yet to be issued.

[27] On 20 October 2025, Directions were issued by my Chambers to program the Costs Application for hearing, and the matter was listed for a Microsoft Teams Video Call hearing.[12]

Section 611 of the Act

[28] Section 611 of the Act reads:

> "**Costs**
>
> (1) A person must bear the person's own costs in relation to a matter before the FWC.
>
> (2) However, the FWC may order a person (the ***first person***) to bear some or all of the costs of another person in relation to an application to the FWC if:
>
> (a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
>
> (b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> Note: The FWC can also order costs under sections 376, 400A, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
>
> Note: This subsection is a civil remedy provision (see Part 4-1)."

[29] In *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing*[13] (**Church**), the Full Bench stated:

> "[26] Section 611 sets out a general rule - that a person must bear their own costs in relation to a matter before the Commission (s.611(1)) - and then provides an exception to that general rule in certain limited circumstances. The Explanatory Memorandum confirms this interpretation of the section, it is in the following terms:
>
> > 2353. Subclause 611(1) provides that generally a person must bear their own costs in relation to a matter before FWA.

> 2354. However, subclause 611(2) provides an exception to this general rule in certain limited circumstances. FWA may order a person to bear some or all of the costs of another person where FWA is satisfied that the person made an application vexatiously or without reasonable cause or the application or response to an application had no reasonable prospects of success.
>
> 2355. A note following subclause (2) alerts the reader that FWA also has the power to order costs against lawyers and paid agents under clauses 376, 401 and 780 which deal with termination and unfair dismissal matters.
>
> 2356. Subclause 611(3) provides that a person to whom a costs order applies must not contravene a term of the order.

[27] In the context of s.570 and its legislative antecedents, courts have observed that an applicant who has the benefit of the protection of a provision such as s.570(1), (i.e. the general rule that parties bear their own costs), will only rarely be ordered to pay costs and that the power should be exercised with caution and only in a clear case. In our view a similarly cautious approach is to be taken to the exercise of the Commissions powers in s.611 of the FW Act."[14]

[30] In *Hansen v Calvary Health Care Adelaide Limited*[15] a Full Bench of the Commission said in relation to s.611:

> "[15] 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).
>
> [16] 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."

[31] In *Mitford Investments Pty Ltd ATF The JJG Trust T/A Integro Private Wealth v Rick Adaszko*,[16] Deputy President Beaumont crucially noted that:

> "The starting point in relation to costs of proceedings before the Commission is that each person involved in a matter must bear their own costs. This statutory imperative is said to have derived from the policy purpose that a person is entitled to make or defend an application made under the Act, without the risk that a costs order may be made against them."
>
> [and]

> "Section 611 contains no indication of the considerations which the Commission must take into account in deciding how to exercise its discretion. The discretion conferred is expressed in general, unqualified, terms."[17]

s.611(2)(a)

[32] The relevant principles concerning the interpretation and application of s.611(2)(a) of the Act were comprehensively stated in *Church*, and can be summarised as follows:

- 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.

- An application is not made without reasonable cause simply because the application did not succeed.

- 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.

- If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to characterise the application as having been made without reasonable cause.

- In relation to an appeal, the question becomes whether the appeal has no substantial prospect of success. The prospect of success must be evaluated in the light of the facts of the case, the judgment appealed from and the points taken in the notice of appeal. If there is a not insubstantial prospect of the appeal achieving some success, it cannot fairly be described as having been made without reasonable cause.

- 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.[18]

s.611(2)(b)

[33] In relation to s.611(2)(b), the principles were summarised by the Full Bench in *Baker v Salva Resources Pty Ltd*[19] (footnotes omitted):

> "[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."[20]

[34] In *Keep v Performance Automobiles Pty Ltd*,[21] a Full Bench further stated:

> "As to s.611(2)(b), the FWC may make a costs order against a person if satisfied that 'it should have been reasonably apparent' to that person that their application had 'no reasonable prospect of success'. The expression 'should have been reasonably apparent' in s.611(2)(b) imports an objective test, directed to a belief formed on an objective basis as opposed to the applicant's subjective belief.
>
> There is Full Bench authority for the proposition that the Commission should exercise caution before arriving at the conclusion that an application had 'no reasonable prospects of success'. In *Deane v Paper Australia Pty Ltd* a Full Bench made the following observation about this expression 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'."[22]

[35] In *Qantas Airways Limited v Mr Paul Carter*,[23] the Full Bench stated that it was clear from the terms of s.611 that the point at which the Commission must determine whether or not an application was vexatious, without reasonable cause or had no reasonable prospect of success, was when the application was made (i.e. filed).[24]

[36] It is also appropriate to refer to the decision of Justice Snaden of the Federal Court of Australia in *Macushla Pty Ltd (Trading as Sunnytop Bakery Ciabatta Della Nonna) v El Souki*[25]:

> "In *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548 (Dowsett, Tracey and Katzmann JJ), a Full Court of this Court endorsed (at [9]) what was said about the application of s 570(2)(a) of the FW Act in *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd (No 2)* [2014] FCA 351 (Pagone J). There, Pagone J, at [8], said that:
>
> > '...[t]o exercise the discretion conferred by [s 570(2)(a) of the FW Act] the Court must be satisfied that the claims were, relevantly, instituted without reasonable cause. That is not established merely because a party fails in the claims: *R v Moore; ex parte Federated Miscellaneous Workers Union of Australia* [1978] HCA 51; (1978) 140 CLR 470, 473. The relevant provisions reflect 'a policy of protecting a party instituting proceedings from liability for costs' and costs will rarely be awarded unless justified by exceptional circumstances: see *Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at [60]. In *Kangan Batman Institute* it was said by the Full Court at [60] that 'a proceeding will be instituted without reasonable cause if it has no real prospects of success, or was doomed

> to failure'. In *Kanan v Australian Postal and Telecommunications Union* [1992] FCA 539; (1992) 43 IR 257 Wilcox J indicated at 264 that one way of testing whether a proceeding was instituted 'without reasonable cause' was to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no 'substantial prospect of success'. His Honour went on to say that a proceeding lacks a reasonable cause where it is clear that it must fail on the applicant's own version of the facts.'"[26]

Section 400A of the Act

[37] Section 400A of the Act reads:

> "**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."

[38] The *Explanatory Memorandum to the Fair Work Bill 2012* states the following with respect to s.400A of the Act:

> "168. Item 4 inserts a new section 400A to enable the FWC to order costs against a party to an unfair dismissal matter (the first party) if it is satisfied that the first party caused the other party to the matter to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter.
>
> 169. As with the new power to dismiss applications under section 399A, the power to award costs under section 400A is not intended to prevent a party from robustly pursuing or defending an unfair dismissal claim. Rather, the power is intended to address the small proportion of litigants who pursue or defend unfair dismissal claims in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.
>
> 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."

[39] Relevantly, the Full Bench of the Commission said in *Gugiatti v SolarisCare Foundation Ltd*[27]:

> "s.400A is concerned with unreasonable acts or omissions in connection with the "conduct or continuation" of a matter already instituted, not with whether it was reasonable to have instituted a matter in the first place."
>
> …
>
> "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."[28]

Submissions of the Costs Applicant

[40] The Costs Applicant made oral submissions (at the hearing)[29] to supplement its written submissions,[30] together summarised as follows:

a) The Costs Respondent unreasonably continued, and failed to discontinue, her UD Application. She has never advanced any cogent evidence that the Costs Applicant was not a small business employer.

b) The critical period was 5 September 2025 to 3 October 2025, wherein costs were incurred after the Costs Respondent was put on notice on 4 September 2025 (by way of the Costs Applicant's Form F3 Response) that the Costs Applicant was a small business employer, and that the Costs Respondent had not met the 12 month minimum employment period.

c) In particular, the Costs Applicant referred to the headcount schedule accompanying its Form F3 Response, which listed its thirteen employees and their roles (with names redacted, save the Costs Respondent's name and the General Manager, Mr Andrew Malloch).[31] In addition to this being filed with the Commission and served upon the Costs Respondent, the Costs Applicant flagged this jurisdictional hurdle in an email to the Costs Respondent on 4 September 2025 (and again on 5 September 2025), inviting her to discontinue her Application, and indicating that the Costs Applicant would otherwise pursue its legal costs against her if she did other than immediately discontinue her UD Application.[32]

d) The Costs Respondent's explanations for her failure to discontinue the Application, being incapacity due to psychological fragility, memory loss, illness, and caring responsibilities for her former companion animal, not opening or reading her emails (unless she is expecting an email from someone),[33] are full of inconsistencies.[34] Her omission in failing to discontinue her UD Application on or around 5 September 2025 cannot be attributable to any purported incapacity or other difficulty, and renders her continuation of the UD Application unreasonable (and extraordinary and exceptional) in all the circumstances.

e) The Costs Respondent's medical evidence, being a medical certificate from her General Practitioner, does not state incapacity to discontinue, but rather that the Costs Respondent decided not to pursue her unfair dismissal claim further because she "did not have the mental energy to pursue it". There is no evidence that Costs Respondent was incapable of making a decision or choice to discontinue as at 4 or 5 September 2025, or at any time thereafter.[35]

Submissions of the Costs Respondent

[41] The Costs Respondent's written submissions[36] are summarised as follows:

a) Her non-compliance with the Directions issued could be reasonably explained by the following:

   a. she was unfamiliar with the deadlines and procedural requirements of the Commission's operations and jurisdiction,[37] and she could not afford legal representation to assist her in this regard;

   b. any non-compliance was unintentional, resulting from stress, confusion, and mental incapacity due to severe psychological injury and emotional distress arising out of her dismissal from the Costs Applicant;

   c. her capacity to participate in the proceedings was hindered by her recovery from surgery, suffering from glandular fever, attending medical appointments, dealing with an ongoing workers compensation claim, caring for her companion animal, and caring for her child;

   d. she did not receive correspondence sent to her on 4 September 2025 from the Costs Applicant's legal representative, which flagged the jurisdictional issues with the UD application and invited her to discontinue her UD Application;[38] and

   e. her phone call attempt to the Costs Applicant's legal representative on 30 September 2025, wherein she intended to explain her mental unfitness to participate or comply with Commission directions, was not answered or returned.[39] It is noted that under cross-examination, the Costs Respondent conceded she had been on the phone when Ms Marks attempted to call her, and that she received a missed call notification and text message from Ms

Marks,[40] which she did not respond to due to receiving news shortly after that her companion animal was unwell.[41]

b) The Costs Respondent also submits that she believed the Costs Applicant was not a small business employer, and that her own knowledge arising from her time under its employ led her to believe that the Costs Applicant employed sixteen employees.[42]

c) Finally, the Costs Respondent submits that her ongoing financial stress would render any costs order unreasonable, unjust, and severe, and would be inconsistent with the Act.[43]

Consideration

[42] Whilst the Costs Applicant has made an application for costs under s.611 and s.400A of the Act, at the hearing, its primary focus was upon a claim for costs under s.400A for the period 5 September 2025 to 3 October 2025. The unreasonable act or omission relied upon in this regard is the Costs Respondent's failure to discontinue the unfair dismissal application after she was put squarely on notice of the jurisdictional issue that she was unable to satisfy the 12 month minimum employment period requirement for a small business employer.

[43] I do not accept that the requirements set out under s.611 are satisfied in this case.

[44] Turning to s.400A of the Act, there is no doubt that:

a) a failure to discontinue an application can constitute an unreasonable act or omission; and

b) such unreasonable act or omission by a first party (in failing to discontinue an application) can cause costs to be incurred by a second party.

[45] On the evidence before me, I find that the Costs Applicant was a small business employer as at the date of the Costs Respondent's dismissal (i.e. 1 August 2025).[44] Indeed, the Costs Respondent has provided no evidence to the contrary (despite every opportunity to do so).

[46] In *Abbey v Daycare Management Pty Ltd t/as Blinky Bill Early Childhood Centre*,[45] Lawler VP stated:

> "... A distinction must be drawn between facts which were reasonably susceptible to objective specification and facts which turn on matters of impression or interpretation. In relation to facts that were reasonably capable of objective specification, a costs application will be determined by reference to the facts as found. In the case of facts that turn on matters of impression or interpretation, the Commission ought proceed on the basis of the facts as reasonably perceived by the party against whom the application is made."

[47] The Costs Respondent's case, that the Costs Applicant was a small business employer, comes down to facts objectively specified, i.e. not facts or conclusions ascertained by way of impression or interpretation.[46] Indeed, this is not a case in which an arguable point of law, or arguable facts, would have ever determined the outcome.[47]

[48] The Costs Respondent was put squarely on notice of the Costs Applicant's assertion, that it was a small business employer at the time of her dismissal, on 4 September 2025 when the Costs Applicant filed its form F3 Employer Response. This was reiterated to the Costs Respondent separately by the Costs Applicant by way of email to her that same day, and an email to Chambers on 5 September 2025. The Costs Respondent did not respond to or otherwise engage with the Costs Applicant's contention in this regard. Concerningly, according to the Costs Respondent, the Costs Applicant's legal costs were not her concern.[48]

[49] When the Costs Respondent was again directed to the Costs Applicant's assertion that it was a small business employer, via email from my Chambers on 16 September 2025, the Costs Respondent's response was simply that she was "aware" that the Costs Applicant employed 16 employees. At that time, no further details or specifics were provided by the Costs Respondent to support this assertion, noting that the Costs Applicant had already specified the 13 employees (only) that it employed at the time of the Costs Respondent's dismissal. In other words, the Costs Respondent did not say as at 16 September 2025 (or prior), that I have seen the list of 13 employees, but I say (supported by evidence) that there are a further three roles that are not included or have not been disclosed and they are 'XYZ'.[49] Ultimately, the highest the Costs Respondent's case reaches as to the Costs Applicant being a small business employer comes down to her belief or understanding, absent any objective (or documentary or particularised) evidence in support.[50]

[50] Having regard to the evidence before me, I make the following findings:

a) The Costs Respondent was sent and did receive the Form F3 Response, and the Costs Applicant's emails dated 4 September and 5 September 2025. Whether or not she read those emails is a matter for the Costs Respondent. In other words, the Costs Respondent cannot rely upon her assertion that she did not read, or might not have read, or had memory loss around, the Form F3 Response and/or the 4 and 5 September emails. Having initiated proceedings in the Commission, she was not only obliged, but required, to read all correspondence in relation to these proceedings that had been sent to her in a timely fashion. Wilful blindness or ignorance is a wholly unacceptable response to contact made by the Commission or another party concerning proceedings before the Commission.

b) The act or omission that led to the Costs Applicant incurring costs was the Costs Respondent's failure to discontinue her unfair dismissal proceedings on or about 5 September 2025. I consider that this was an unreasonable act or omission in all of the circumstances.

c) The legal costs incurred by the Costs Applicant were caused by the Costs Respondent's unreasonable act or omission in failing to discontinue her unfair dismissal proceedings on or about 5 September 2025, with the Costs Applicant thereafter incurring legal costs in defending the proceedings in circumstances where

it was a small business employer and the Costs Respondent was not protected from being unfairly dismissed under Part 3-2 of the Act.

d) In all of the circumstances, the Costs Respondent's failure to discontinue her unfair dismissal proceedings on or about 5 September 2025 was an 'unreasonable' act or omission that caused costs to be incurred by the Costs Applicant (in circumstances where such costs did not need to be incurred). The circumstances (in this case) are undoubtedly exceptional and extraordinary.

[51] On the basis of the foregoing findings, I find that the evidence, and the events that have happened, give rise to the Costs Applicant enlivening my power to award costs under s.400A of the Act on and from 5 September 2025 to 3 October 2025.

Conclusion

[52] The Costs Respondent gave evidence, and made various submissions, as to why it would not be appropriate for the Commission to exercise its discretion to award costs against her.[51] Taking these matters into account, I do not consider that such reasons are a basis upon which I ought not exercise my discretion to award costs against the Costs Respondent. Accordingly, I will make an Order for costs in favour of the Costs Applicant (pursuant to s.400A of the Act), being costs to be paid by the Costs Respondent to the Costs Applicant in the amount of $3,102 payable within 28 days. In settling on this costs amount, I have applied s.403 of the Act, and Reg 3.08 of Schedule 3.1 of the *Fair Work Regulations 2009* where required, and otherwise exercised my discretion for amounts not prescribed.[52]

[53] An order for costs, payable by the Costs Respondent to the Costs Applicant, in the amount of $3,102 will be published contemporaneously with this decision [PR797949].

DEPUTY PRESIDENT

Appearances:

Ms *Sandra Marks,* Partner, Marks Pritchard lawyers, appeared with permission for the Costs Applicant (Bara Barang Corporation Ltd).

Ms *Candice O'Meley,* Costs Respondent, appeared for herself.

Printed by authority of the Commonwealth Government Printer

<PR795596>

[1] Transcript, PN7.

[2] Costs Applicant's Form F3 Employer Response, Attachment B; CB, p.39.
[3] The Costs Respondent first attended work on 1 October 2024. She says she sustained a psychological injury on that day, however, she continued to work up until mid-February 2025 (i.e. there is no evidence that the Costs Respondent's asserted workplace injury caused her to be unfit for work). Transcript, PN64.
[4] Thew Statement, at [8]-[16], CB, pp.40-41. This evidence was not contested by the Costs Respondent, who chose not to cross-examine Mr Thew.
[5] Costs Respondent's Form F2 Application, p.5.
[6] Costs Applicant's Form F3 Employer Response, Attachment A; CB, pp.46-81 (Table at p.60).
[7] CB, p.82.
[8] CB, p.125.
[9] The fact that the Applicant was only carbon copied into the 5 September 2025 email is not to the point. This email was yet another reminder to the Applicant that the Costs Applicant was asserting that it was a small business employer.
[10] Transcript, PN258.
[11] Form 6 Costs Application, Section 2 at [31]; Transcript PN370.
[12] Both parties complied with the Directions in respect of the Costs Application.
[13] [2014] FWCFB 810, 240 IR 377.
[14] Ibid, at [26].
[15] [2016] FWCFB 8162.
[16] [2021] FWC 4632.
[17] Ibid, at [31] and [33].
[18] [2014] FWCFB 810, 240 IR 377, at [23]-[33].
[19] [2011] FWAFB 4014; (2011) 211 IR 374.
[20] Ibid at [10].
[21] [2015] FWCFB 1956.
[22] Ibid, at [18]-[19].
[23] [2013] FWCFB 1811, at [20].
[24] See also *Mitford Investments Pty Ltd ATF The JJG Trust T/A Integro Private Wealth v Rick Adaszko* [2021] FWC 4632, at [39], and *Oz & Kosaroglu v Amity College Australia Limited* [2021] FWC 5041, at [37]-[38].
[25] [2019] FCA 643.
[26] Ibid, at [15].
[27] [2016] FWCFB 2478.
[28] Ibid, at [61] and [43] (cited in *Anthony Christensen v PGG Wrightson Seeds (Australia) PTY LTD T/A PGG Wrightson Limited* [2018] FWC 1766). See also *Jones v Brite Services* [2013] FWC 4280, at [28], and *James Delany v Manage Meant Pty Ltd* [2023] FWC 2202, at [84].
[29] Transcript, PN370-PN408.
[30] CB, pp.96-105.
[31] CB, p.60.
[32] CB, p.82. On 23 September 2025, the Costs Applicant also filed its materials in accordance with Direction [2]. In the Thew statement at [8]-[9], Mr Chris Thew annexes a list of 13 employees, with their full names, start dates, and whether they are casual/full time. The Costs Respondent was served with this material, and subsequently did not comply with Direction [3], or otherwise make any contact with the Commission.
[33] Transcript, PN120.
[34] Compare, Transcript, PN104 and PN223 - In other words, the Costs Respondent was well versed in the use of ChatGPT and there is no evidence to establish that she could not again use ChatGPT in or around 5 September 2025, or at any time thereafter. The Costs Respondent was also aware that she had 21 days from her dismissal to file her unfair dismissal application (i.e. another example of the Costs Respondent's capacity to engage with the unfair dismissal process when she needed to (Transcript, PN114-PN116). See also, Transcript, PN269-PN335, and PN345-PN354.
[35] Transcript, PN28, PN404.
[36] CB, pp.106-122. The Costs Respondent chose not to make any oral submissions at the hearing.
[37] CB p.106.
[38] Ibid, p.111.
[39] Ibid.
[40] CB, pp.30-31.
[41] Transcript PN277-PN314.

[42] CB, p.111, at paragraph [4].
[43] Costs Respondent's Submissions; CB p. 112.
[44] Thew Statement, at [8]-[16], CB, pp.40-41. This evidence was not contested by the Costs Respondent, who chose not to cross-examine Mr Thew.
[45] [2004] AIRC, PR946186.
[46] *Bakker v Nick Xenophon & Co Lawyers* [2012] FWA 4982 (upheld on appeal in *Bakker v Nick Xenophon & Co Lawyers* [2012] FWAFB 8518).
[47] The Applicant put no facts (by way of evidence) into contest. Assertions, by way of submissions, belief, or otherwise, simply do not count.
[48] Transcript, PN266.
[49] Transcript, PN136 and PN183, and PN196 to PN244. See especially at PN227: "I believed that they were no longer a small business, just with discussions that had happened at work prior and [name withheld] being hired, like the HR, because they were moving out of the small business space."
[50] Ibid.
[51] CB, pp.106-122. The Costs Respondent chose not to make any oral submissions at the hearing.
[52] Costs Application, Schedules 1 and 2, CB, pp.18-23.