DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Bevan Geoffrey Roberts
v
Quantum-Systems Pty Ltd and Others
(C2025/5247)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT BUTLER

SYDNEY, 7 JANUARY 2026

Appeal against decision [2025] FWC 1380 of Commissioner Simpson at Brisbane on 19 May 2025 in matter number C2025/820 – Jurisdictional objection made by the respondents on grounds that application was not dismissed – Jurisdictional objection withdrawn during hearing – Application for costs by the applicant – Nature of the power of the Commission to order the payment of costs under ss 375B and 611 of the Fair Work Act 2009 (Cth) – Whether the Commissioner failed to consider whether the jurisdictional objection was untenable from the outset – Whether the Commission failed to consider impact of documents produced by the respondents and of evidence given in cross-examination – Permission to appeal granted – Appeal dismissed.

[1] Bevan Roberts seeks permission to appeal and, if permission is granted, to appeal a decision of Commissioner Simpson of 19 May 2025, dismissing an application for an order for costs. Mr Roberts had applied for an order for costs under ss 375B or 611 of the *Fair Work Act 2009* (Cth) (the **Act**). For the reasons that follow, we grant permission to appeal but dismiss the appeal.

Background

[2] The events leading to the costs decision can be stated concisely. On 10 December 2024, Mr Roberts had filed applications to the Commission, including a general protections application under s 372 and a stop bullying application under s 789FC of the Act while still employed. Mr Roberts' employment subsequently came to an end on 13 January 2025. After his employment ended, he made an application for the Commission to deal with a dispute under s 365 of the Act. Quantum Systems Pty Ltd (the **first respondent**), Michael Lilleghagen (**the second respondent**), Kim Hannant (the **third respondent**), David Sharpin (**the fourth respondent**) and Quantum Systems Gmbh (the **fifth respondent**) (referred to collectively as **the respondents**) objected to that application on the grounds that Mr Roberts had not been dismissed, arguing that he had abandoned his employment. On that basis, the respondents argued that the Commission lacked jurisdiction to deal with the dispute. The jurisdictional objection was listed for hearing on 18 March (the **objection hearing**) before Commissioner Simpson. During the course of the objection hearing, the Commissioner expressed a provisional

view that the evidence received up to that point would appear to make it more difficult for the respondents to succeed in their abandonment argument.[1] After an adjournment, counsel for the respondents conveyed their decision to withdraw the objection, saying:[2]

> Thanks for the opportunity to have those discussions following the intimations of your – what you expressed quite clearly would be only a preliminary view. Having considered all those, the matters and the various other aspects which I needn't go into in detail of matters surrounding these proceedings, the instructions from the respondent are that they will withdraw the jurisdictional objection …

[3] Mr Roberts made an application for costs on 7 April 2025 (the **costs application**). The application was made within time. The Commissioner made directions which were conveyed to the parties on 8 April 2025, providing the parties with an opportunity to provide submissions. The respondents made submissions in correspondence of 14 April 2025. Mr Roberts filed an outline of submissions in reply on 17 April 2025. On 5 May 2025, Mr Roberts, by his solicitors, wrote to the Commission asking that the costs application be set down for hearing. The following day, the respondents, by their solicitors, wrote to the Commission stating that, in their view, the written submissions should suffice, and no hearing was necessary. They argued a hearing would waste time and costs. On 7 May 2025, the Commissioner's decision to determine the matter on the papers was conveyed in correspondence, which referred to both parties' correspondence, and went on to state that the Commissioner had "decided to deal with the costs application based on the material filed" and did "not intend to list the matter for a hearing". There was no further correspondence from the parties to the Commission, and the Commissioner's decision to dismiss the costs application was issued on 19 May 2025 (the **costs decision**).

[4] Mr Roberts filed his notice of appeal and application for permission to appeal on 6 June 2025. This was also filed within time. Mr Roberts filed an outline of submissions on 10 July 2025. The respondents filed their outline on 31 July. The application and, subject to permission being granted, the appeal were listed for hearing before a Full Bench on 14 August 2025. Both parties were legally represented at the hearing, with permission pursuant to s 596 of the Act.

The costs decision

[5] The Commissioner initially considered the procedural background between the parties. The Commissioner included in that procedural history reference to the applications Mr Roberts had made under ss 789FC and 372 of the Act on 10 December 2024, as well as the application he made under s 365 on 3 February 2025 and set out events in relation to the three applications. Relevantly, the respondents raised their objection on 18 February 2025, the objection was listed for hearing on 18 March 2025, and the respondents withdrew their objection during the course of the hearing on that date. The decision recorded that the conciliation failed to settle the parties' dispute, and Commissioner Simpson issued a certificate pursuant to s 368 on 24 March 2025. Mr Roberts made his costs application on 7 April 2025, and the Commissioner issued Directions on 8 April 2025. The Commissioner then set out the relevant costs provisions, being ss 375B and 611, as well as excerpts from the explanatory memoranda to the relevant bills, relating to those provisions. The Commissioner then referred to the parties' submissions in some detail, including their submissions as to the circumstances in which the employment came to an end.

[6] In considering the application, the Commissioner noted that it had been made in time. The Commissioner found the objection had been made in circumstances where it was at least arguable on the material filed before the time of the jurisdictional hearing, that Mr Roberts had no desire to return to work, and his conduct was motivated by a desire to negotiate a large settlement sum with the respondents. The Commissioner accepted 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" (paragraph [45]). The Commissioner also accepted that following his expression of his provisional view at the hearing, the respondents had taken advice and had chosen to avoid incurring further costs by withdrawing the objection. The Commissioner found this to have been the action of a party acting sensibly in circumstances where the prospect of succeeding had diminished during the hearing.

[7] The Commissioner did not accept Mr Roberts' submission that, based on what was known by the respondents prior to the hearing, 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.

[8] The Commissioner referred to a submission that certain documents produced in response to an order of the Commission supported Mr Roberts' allegation that the second respondent had acted in disregard for the duty of care owed to him, and contrary to work health and safety obligations. The Commissioner also referred to a submission concerning an interim investigation report dated 22 October 2024 containing findings concerning the approval of the termination of Mr Roberts' employment. The Commissioner found that 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" (paragraph [49]). The Commissioner concluded the respondents had not acted unreasonably, vexatiously or without reasonable cause in pressing their jurisdictional objection up to the point of the hearing and deciding to withdraw it following the expression of a preliminary view. The application for costs was dismissed.

Grounds of appeal

[9] Mr Roberts' application for permission to appeal and to appeal listed ten grounds. We summarise them as follows:

> 1. That the Commissioner erred in failing to take into account relevant considerations, including that the Respondents' jurisdictional objection had no reasonable prospect of success from the outset, and a failure to consider, identify or cite any of the documents the Respondents produced in response to an order of the Commission.
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> 2. That the Commissioner erred in failing to properly assess and consider that the Second Respondent had, under cross-examination, admitted engaging in unreasonable and unlawful conduct contrary to his statutory safety duties and his common law duty of care, in the context of return-to-work requirements.

3. That the Commissioner erred in taking into account, and unreasonably accepting, irrelevant facts and material, and contentions, and by making findings of fact not available on the evidence or against the weight of the evidence, or so unreasonable they could not be made.

4. That the Commissioner denied Mr Roberts procedural fairness in refusing his written request for an oral hearing.

5. That the Commissioner erred in failing to properly consider the termination and jurisdictional objection as an attempt to evade the conciliation conference for Mr Roberts' previous applications.

6. That the Commissioner erred in exercising its discretion, by giving improper weight to the Respondents' submissions and evidence.

7. That the Commissioner erred in mischaracterising the reason for Mr Roberts' refusal to return to work, in that Mr Roberts had refused to return to work on safety grounds as opposed to health grounds.

8. That the Commissioner erred in law by providing inadequate reasons by using the same language as had been used in the parties' submissions, and thereby failing to engage with Mr Roberts' submissions on the issues at hand and/or to turn an independent mind to the issues in dispute.

9. That the Commissioner erred in finding that the Respondents acted "sensibly" in aborting the jurisdictional objection during the jurisdictional objection hearing in circumstances where the Commission found that "the prospect of succeeding had diminished," the Commissioner had formulated a preliminary view as to the reasonableness of the jurisdictional objection, and the jurisdictional objection should not have been raised at all.

10. That the Commissioner erred in failing to correctly apply, and misinterpreting, the statutory test set out at s 611 of the Act in determining whether the Respondents' jurisdictional objection was vexatious, without reasonable cause and without any reasonable prospects of success.

Submissions of the parties

[10] Mr Roberts made submissions about permission to appeal, in support of the grounds referred to above. Mr Roberts submits that it is in the public interest to grant permission to appeal in light of the important role of the Commission in determining jurisdictional objections to general protection applications involving dismissal, the unreasonable conduct of the respondents in making the jurisdictional objection, the alleged conduct of the respondents in terminating his employment to frustrate the bullying application and general protections application involving dismissal and the injustice said to be caused to Mr Roberts by not being afforded an opportunity to appear at a costs hearing or provide oral submissions in respect of the costs application.

[11] As to the appeal proper, Mr Roberts' principal submission was that the Commissioner failed to properly consider whether the respondents' jurisdictional objection had no reasonable prospects of success from the outset, failed to grapple with the documents produced by the respondents even though the documents prove that specific claims made by the respondents lacked any tenable basis and that the Commissioner's framework of analysis in the costs decision was improperly aimed towards whether the respondents' behaviour during the jurisdictional hearing was reasonable. Mr Roberts further submitted that the untenable nature of the jurisdictional objection had been exposed by the answers the second respondent gave under cross-examination and that the Commissioner failed to take that evidence into account at least in the "consideration" section of the costs decision. He submitted that the Commissioner failed to take into account the respondents' use of the termination and the jurisdictional objection to evade the conciliation conference that had been listed and that the Commissioner had erred in finding that it was at least arguable on the material filed before the time of the jurisdictional hearing that Mr Roberts had no desire to return to work and his conduct was motivated by a desire to negotiate a large settlement sum.

[12] As to the procedural fairness issue, Mr Roberts submitted that the Commissioner issued directions, including directions for written submissions, but did not give them notice at that point that there would be no oral hearing in relation to the costs application. He submitted he had requested an oral hearing, but that the Commissioner had declined. Before us, Mr Roberts argued that the failure to provide an oral hearing amounted to a failure to afford natural justice, infecting all of the Commission's findings. Mr Roberts also submitted that the Commissioner had failed to provide adequate reasons in the costs decision.

[13] The respondents submitted that the Commissioner, in the costs decision, did not misapprehend, and made reference to, the established principles concerning the application of ss 375B and 611 of the Act. They submitted that the Commissioner would exercise caution before forming the view that the respondents' jurisdictional objection had been hopeless from the beginning. They made submissions as to the factual basis on which the jurisdictional objection had been made.

[14] The respondents submitted that the gist of the complaint made by Mr Roberts was that the Commissioner had failed to take into account the import of documents produced to the Commission by the first respondent. They emphasised that only two documents were referred to: a report and a series of text messages. The respondents took issue with Mr Roberts factual assertions about those documents. They submitted that, in any event, the Commissioner had taken the documents into account when deciding that the respondents had an arguable case for making the jurisdictional objection. They made submissions about the significance of the second respondent's answers under cross-examination and disputed that the evidence given by the second respondent in cross-examination had the consequence that the contention that Mr Roberts had abandoned his employment was not at least arguable.

[15] As to the issue of the Commission's decision not to conduct an oral hearing, the respondents submitted that, in performing its functions and exercising its powers, the Commission is not required to hold a hearing except as provided for by the Act (relying on s 593(1)). The respondents submitted that there is no provision requiring an oral hearing in respect of the costs application. They submitted the Commission may inform itself in such manner as it considers appropriate (in accordance with s 590), subject to the requirements of s

577 as to fairness and justice, openness and transparency, informality and the avoidance of unnecessary technicalities. They submitted, having regard to the material before the Commission, there was no denial of procedural fairness in dealing with the costs application on the papers, and that this is a course frequently adopted in the courts. The respondents submitted that Mr Roberts had not articulated what else might have been said on his behalf in the event of an oral hearing.

Evidence and produced documents

[16] There were three exhibits admitted into evidence at the jurisdictional objection hearing. A witness statement of Mr Roberts, and the annexures to it, was admitted as exhibit 1. A witness statement of the second respondent and its annexures was exhibit 3. At the respondents' request and with Mr Roberts' agreement, during the objection hearing the Commission admitted the hearing book in its entirety as exhibit 2.

[17] For the purposes of the appeal, Mr Roberts filed an appeal book and then an amended appeal book (which for convenience we will refer to as "the appeal book"). Exhibits 1 and 3 were included in the appeal book but exhibit 2 was not. The appeal book also contained, *inter alia*, the initiating application made under s 365 of the Act and the response to it, both with various annexures, and several documents that the respondents had produced on 17 March 2025, the day before the objection hearing, in response to an order of the Commission. There is nothing before us to indicate that the documents produced the day before the objection hearing, including the report of 22 October 2024 and the text messages of 13 January 2025, were tendered or admitted into evidence at the objection hearing before the jurisdictional objection was withdrawn.

Permission to appeal

[18] Generally, and relevantly, a person aggrieved by a decision of the Commission may appeal the decision only with permission under s 604(1) of the Act. The Commission must grant permission to appeal if satisfied that it is in the public interest to do so in accordance with s 604(2). Otherwise, the Commission has a broad discretion as to whether to grant permission to appeal. Matters traditionally considered relevant to the question of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration, and that substantial injustice may result if leave is refused. 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. However, the fact that the member made an error is not necessarily a sufficient basis to grant permission to appeal.

[19] Mr Roberts submitted that the costs decision was affected by appealable error, and that it was in the public interest to grant permission to appeal. His grounds for the latter were, to summarise, that it is in the public interest to avoid employers making baseless objections that are doomed to fail from the outset, that the respondents' objection in this case had been untenable and their conduct in raising it had been egregious, that the first respondent had terminated his employment to avoid conciliation in his two earlier applications, and that he should have an opportunity to cure the injustice occasioned by the failure to conduct an oral hearing of his costs application.

[20] We have decided to grant permission to appeal in this matter as the appeal raises important issues with respect to the operation of the costs provisions of the Act, and in respect of the question of whether the Commission must conduct an oral hearing in order to afford procedural fairness. However, for reasons set out below, the appeal should be dismissed.

Consideration of the appeal

[21] Section 375B of the Act applies where the substantive proceedings have been brought under s 365, being an application for the Commission to deal with a general protections dispute involving dismissal. The section provides that the Commission may make an order for costs if the Commission is satisfied that a party caused the costs applicant to incur costs "because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute." Section 375B does not limit the Commission's power to order costs under s 611.

[22] Section 611 applies to all proceedings before the Commission and provides that a person must bear the person's own costs in relation to a matter before the Commission. However, s 611(2) provides that the Commission may order a person to bear some or all of the costs of another person in relation to an application to the Commission if:

> (a) the Commission 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 Commission 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.

[23] The power of the Commission to award costs under either ss 375B(1) or 611(2) involves a two-stage process. The Commission must first determine whether the power to award costs is enlivened on the basis that it is satisfied that a party caused costs to be incurred because of an unreasonable act or omission (in the case of s 375B(1)(b)) or that the application was made or responded to vexatiously or without reasonable cause or in circumstances in which it should have been reasonably apparent that the application, or the response, had no reasonable prospects of success (in the case of s 611(2)(a) and (b)).[3]

[24] If the power to order a person to pay costs does exist, the Commission is then required to consider whether it is appropriate in the circumstances to exercise the power to award costs. The use of the word "may" in both ss 375B(1) and 611(2) makes clear that the Commission retains a discretion as to whether to make an order for costs even if the circumstances permitting such an order to be made exist. In that respect, the power of the Commission to award costs mirrors the approach that has been adopted by the courts with respect to a limitation on the circumstances in which an order for costs can be made in s 570 of the Act.[4]

[25] It is relevant to record that the limitation placed on the discretion to award costs in proceedings under the Act, including in the Commission, serves an important purpose which informs its exercise. In *Ryan v Primesafe* [2015] FCA 8, Mortimer J (as her Honour then was) observed in relation to s 570:[5]

> The reason for caution is the potential for discouraging parties' pursuit in a complete and robust way of the claims for contravention which they seek to make under the Fair Work Act, or the defence of such claims. The policy behind s 570 is to ensure that the spectre of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings. It is an access to justice provision. Insofar as it operates to the benefit of respondents, it is designed to ensure respondents feel free to pursue arguable legal and factual responses to the claims made against them.

[26] The consequence is that the discretion must be exercised with caution because of the exceptional nature of the power in an otherwise no-costs jurisdiction and the case for its exercise should be clearly demonstrated.[6] The same approach is, in our opinion, appropriate with respect to ss 375B(1) and 611(2).[7]

[27] The parties accepted that both stages of the analysis required by ss 375B(1) and 611(2) involved the exercise of a discretion. The first depends on the Commission forming a state of satisfaction that the relevant threshold of vexation, unreasonableness or lack of prospects is reached and is properly to be regarded as involving the exercise of a discretion in the broad sense.[8] The second stage of the determination is more classically discretionary in that it involves the exercise of a general discretion in relation to costs constrained only by the subject-matter and objects of the legislation.

[28] An appeal under s 604(1) of the Act is by way of rehearing such that the powers of the Full Bench on appeal are exercisable only upon the detection of error in the decision under appeal. Mr Roberts accepts that, given the nature of the decision of the Commissioner, the determination not to order the payment of costs can only be overturned on appeal by identification of a relevant error in the decision-making process in the sense discussed in *House v The King*. It is not sufficient that the Full Bench might have come to a different conclusion. Mr Roberts contends that the decision of the Commissioner is infected by ten separate errors of law such that it is affected by vitiating jurisdictional error.

Grounds 1, 2, 3, 5, 7 and 9 – Prospects of success of the jurisdictional objection

[29] We will first deal with appeal grounds 1, 2, 3, 5, 7 and 9 together, as they go to related issues about the prospects of success of the respondents' jurisdictional objection, and the Commissioner's consideration of that issue in the costs decision. In summary, those grounds involve a contention that the Commissioner failed to consider whether the respondents' jurisdictional objection was hopeless from the outset and failed to take into account various matters or pieces of evidence said to establish that it was doomed to fail or otherwise improperly advanced.

[30] It was not in contest between the parties that it was open to the Commissioner, as the objection hearing proceeded, to form, and convey, a provisional view as to the likely determination and disposition of that objection during the hearing conducted in relation to it. We agree with the Commission at first instance that it is sensible for a party to withdraw an objection in the face of an adverse provisional view as to its prospects. A failure to withdraw in such circumstances could well militate in favour of an adverse costs order pursuant to s 375B, in the event the objection was determined consistently with the provisional view. At the appeal

hearing, however, Mr Roberts made clear that he accepted that withdrawing the objection was not unreasonable, and that in his submission costs ought to have been ordered because the objection had been doomed from the outset.

[31] In *Re 4 Yearly Review of Modern Awards — Abandonment of Employment* [2018] FWCFB 139; (2018) 273 IR 249,the Full Bench made clear that "abandonment of employment" is an expression used to describe a situation in which an employee ceases to attend their place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. Where an employee abandons their employment, thereby renouncing their employment contract, the election by the employer to accept the repudiation terminates the employment contract but the abandonment terminates the employment relationship. In such a case, the acceptance of the employee's renunciation of the contract does not constitute a dismissal for the purposes of s 386(1) of the Act.[9]

[32] The evidence in this matter was that the first respondent had received a medical report from an independent medical examiner. The report stated, *inter alia*, that Mr Roberts was fit for work. It indicated that Mr Roberts' grievance be dealt with before he returned. The material also shows the first respondent had attempted to have an independent investigator deal with Mr Roberts' grievance, and that Mr Roberts appeared to have been unresponsive to the investigator's attempts to contact him. It also shows that the first respondent had directed Mr Roberts to return to work and that he had not done so. On the other hand, Mr Roberts had been vigorously pursuing his rights, raising issues in relation to safety and seeking adjustments. The material shows that the period in which the investigator had tried to contact him had coincided at least in part with his providing medical certificates, and with Christmas. It shows that the first respondent demanded Mr Roberts' return on short notice.

[33] It is not necessary for the Full Bench to determine whether Mr Roberts had in fact abandoned his employment. There were a range of facts and circumstances that would have been relevant to deciding the jurisdictional objection had it not been withdrawn. However, it was not necessary for the Commissioner, in deciding the costs application, to analyse or consider that material in detail. The Commissioner did not have to all but decide the objection in order to determine whether it had been arguable in the first place. Having regard to the circumstances it was, at least, arguable that Mr Roberts had abandoned his employment.

[34] We do not accept that the Commissioner failed to consider the contention that the respondents' jurisdictional objection had no reasonable prospects from the outset as contended in appeal ground 1(a). The summary of the submissions made on behalf of Mr Roberts provided by the Commissioner, particularly at paragraphs [25] and [26] of the costs decision, make clear that he understood the submission to be that it had been unreasonable for the respondents to have raised the jurisdictional objection in the first place. The reasoning of the Commissioner is admittedly brief but sufficiently demonstrates that he addressed that submission. In particular, the Commissioner concluded at paragraph [48] of the costs decision:

> 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.

[35] The Commissioner considered whether the information available to the respondents prior to the hearing of the jurisdictional objection made it unreasonable for them to raise the objection. The focus of the Commissioner's analysis was not restricted to the reasonableness of the respondents' conduct at the hearing itself as also contended in ground 9.

[36] We also do not consider the Commissioner failed to consider, or misconstrued, the second respondent's responses while under cross-examination. The Commissioner clearly took those responses into account in forming its provisional view as to the jurisdictional objection and in dealing with the costs application. Mr Roberts' appeal grounds 1(b) and 3 refer specifically to the documents produced by the first respondent the day before the hearing. Ground 1(b) asserts the Commissioner failed to consider, identify, or cite any of those documents. Ground 3 takes issue with findings and inferences, including in relation to the documents, which Mr Roberts say were not reasonably available on the evidence or against the weight of the evidence. He also submitted that the Commissioner misdescribed those documents. Paragraph [49] of the costs decision states:

> 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.

[37] That paragraph appears to be a reference to Mr Roberts' costs application, and the submissions he made in support of it that referred to the second respondent's concessions in cross-examination, an investigator report of 22 October 2024 insofar as it related to the third respondent and text messages of 13 January 2025 between the fourth respondent (who was said to have approved the termination) and another person.

[38] As indicated above, the report and text messages appear to have been produced before, but not tendered during, the objection hearing. The lawyer for Mr Roberts had expressed an intention to deal with some of the produced documents during cross-examination, and tender them then, though as the objection was withdrawn that did not eventuate. Beyond that, there is nothing before us to suggest that there was any request from Mr Roberts to adduce additional evidence in support of the costs application. In the circumstances, all the Commissioner could take from these documents was that if the objection had not been withdrawn, they may have been put to the witnesses and may have been tendered.

[39] We accept the submission that the Commissioner's description of this material was not wholly accurate. The second sentence of paragraph [49] appears to conflate the contents of the interim investigation report and the text message communications produced by the first respondent. We do not accept that the misdescription indicates that the Commissioner did not read the documents or misunderstood the effect of the documents as a whole. In any event, the submission made on behalf of Mr Roberts focused on whether the respondents had grounds to contend that the fourth respondent should not have been named as a respondent to the application and whether the direction given on 8 January 2025 to return to work was unlawful

or unreasonable. Those matters were not, in our view, necessarily determinative of the prospects of the jurisdictional objection.

[40] We do not accept the proposition that the Commission failed to properly consider whether the termination and jurisdictional objection were an attempt to evade conciliation of Mr Roberts' two previous applications. Ground 5, which advances this proposition, makes little sense in light of the nature of the two previous applications and in light of the task before the Commission in deciding the costs application. Ground 6 appears to be an expression of Mr Roberts' disagreement with the Commissioner's weighing of the matters that were taken into account. Ground 7 is not made out having regard to paragraphs 100 and 101 of Mr Roberts' witness statement of 7 March 2025, tendered and admitted as exhibit 1 in the objection hearing. With Mr Roberts clarifying in his outline of submissions and at the appeal hearing that he takes issue with the objection having been made, not with its withdrawal after the Commission expressed a provisional view, ground 9 takes the matter no further than the preceding grounds.

[41] It was, in our view, open to the Commissioner to find that it was arguable that Mr Roberts did not want to return to work and wanted to negotiate a settlement. This was consistent with the Commissioner's finding that the jurisdictional objection was arguable. The submissions made on behalf of Mr Roberts focus too closely on whether the direction given to Mr Roberts on 8 January 2025 to return to work was a lawful and reasonable direction. The jurisdictional objection advanced by the respondents relied on the assertion that the conduct of Mr Roberts generally from the time he commenced a period of medical leave on 20 September 2024 supported a conclusion that he did not want to return to work and intended to negotiate a settlement payment. When a wider view is taken of the circumstances, it was open to the Commissioner to conclude that the documents produced by the first respondent were not necessarily fatal to the respondents' jurisdictional objection.

[42] The Commissioner dealt with the issue of whether the respondents' jurisdictional objection had no reasonable prospect of success and with the contentions and evidence relied upon by Mr Roberts in support of the proposition that the respondents had acted unreasonably. We do not accept that the findings made by the Commissioner were not open to him. Grounds 1, 2, 3, 5, 6, 7 and 9 are not made out.

Ground 4 – Procedural fairness

[43] As to ground 4, we accept that the Commission is obliged to afford the parties procedural fairness, and that this requires the Commission to make sure a party is given a reasonable opportunity to present their case.[10] What will constitute a reasonable opportunity for a party to present his or her case in a given situation depends upon the whole of the circumstances, including the nature of the jurisdiction exercised and the statutory provisions governing its exercise.[11] We accept that this means having regard to the provisions of the Act cited by the respondents in their submissions. Having regard to the statutory scheme, and the nature of the application (being an application for an order for costs), we do not consider that the Commissioner was obliged to conduct an oral hearing in order to afford procedural fairness in the circumstances of this matter.

[44] The Commissioner provided an opportunity for the parties to make written submissions, which they did. The initial correspondence conveying the directions did not indicate whether

the application would be determined by way of an oral hearing or on the papers. The Commissioner could have directed, at that point, that the matter would be dealt with on the papers subject to further direction to the contrary, implicitly providing the parties with an opportunity to seek a direction to the contrary if they wished to do so. But the fact that the directions were silent on that point simply left the question open. The parties obviously took this as allowing them to express their views as to whether an oral hearing should be held, because they both did so. It is clear on the face of the correspondence that the Commission took their views into account before deciding that question.

[45] The decision to determine the costs application on the papers was open to the Commissioner. The Commissioner was able to have regard to the record and the parties' written materials. Determining the costs application did not require the Commissioner to decide the questions in issue in the now-withdrawn jurisdictional objection, only to consider whether there had been a reasonable basis for the objection to be made. Mr Roberts has not identified what matters he would have raised in a hearing of the costs application which were not contained in his written submissions on costs. At most, Mr Roberts submits that he "would have been able, more readily, to perceive any of the errors which adversely affected the Commissioner's approach to his application for costs". That submission does not, with respect, suggest that Mr Roberts was denied the opportunity to present any arguments he wished to advance.

[46] After the Commissioner decided to determine the application on the papers, Mr Roberts did not seek leave to file evidence, or to file further written submissions. He did not otherwise apply for further directions. Mr Roberts could have, but did not, seek to file further material in circumstances in which the application was being determined on the papers or reiterated the request that a hearing be conducted in relation to the costs application. In the circumstances, the decision to decide the matter on the papers rather than conduct an oral hearing did not result in a failure to afford procedural fairness.

Ground 8 – Adequacy of reasons

[47] Ground 8 contends that the Commissioner failed to provide adequate reasons. We accept the respondents' submissions that reasons for a decision need not be lengthy or elaborate and need not spell out every detail in the reasoning process or deal with every matter of fact or law which was raised in the proceedings.[12] We consider the Commissioner's reasoning in respect of the application for an order for costs to be sufficiently articulated in the costs decision. Ground 8 is not made out.

Grounds 6 and 10 – Focus on conduct during hearing

[48] The appellant's outline of submissions clarified that grounds 6 and 10 were directed to the test under s 611 of the Act. Mr Roberts submitted that the Commissioner's primary focus in the costs decision had been the respondents' conduct during the hearing, and that the Commission ought to have focussed its enquiry on the respondents' conduct in instituting the jurisdictional objection in the first place. As will be apparent from the discussion above, we consider that this argument is not tenable in light of paragraphs [44] and [48] of the costs decision.

Conclusion and disposition

[49] We accept that if a respondent puts an applicant to the cost of defending a jurisdictional objection that was not reasonably arguable, that will enliven the discretion to make a costs order under either ss 375B(1) or 611(2) of the Act. Respondents should be mindful of this when deciding whether to raise jurisdictional objections. We also consider that parties should be encouraged to properly consider the provisional views expressed by a member of the Commission. Parties should be encouraged to withdraw a jurisdictional objection in such circumstances. The mere fact that a jurisdictional objection has been withdrawn does not necessitate the conclusion that the objection lacked reasonable prospects of success when made. In any event, in this case, the appeal grounds are not made out. Mr Roberts has not established that the Commissioner erred in the manner alleged.

[50] For the reasons set out above, we grant permission to appeal. However, in the absence of appealable error, this appeal must be dismissed. The Full Bench makes the following orders:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

M Harmer, solicitor, of Harmers Workplace Lawyers for the appellant.
B Reed, of counsel, instructed by Ellem Warren Napa Lawyers for the respondents.

Hearing details:

14 August 2025.
Sydney (in person).

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[1] Transcript, 11 July 2025, PN237.

[2] Transcript, 11 July 2025, PN314.

[3] See, in relation to s 611(2), *Keep v Performance Automobiles Pty Ltd* [2025] FWCFB 1956 at [16].

[4] *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* (2013) [2013] FCAFC 23; 232 FCR 428 at [8] (Dowsett, McKerracher and Katzmann JJ); *Shea v Energy Australia Services Pty Ltd (No 2)* [2015] FCAFC 14 at [11] (Rares, Flick and Jagot JJ); *Dahdah v Platinum Distributors Australia Pty Ltd (Costs)* [2023] FCAFC 102 at [31] (Rangiah, Goodman and McElwaine JJ).

[5] *Ryan v Primesafe* [2015] FCA 8 at [64] (Mortimer J).

[6] *Saxena v PPF Asset Management Ltd* [2011] FCA 395 at [6] (Bromberg J); *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 at [8] (Siopis, Collier and Katzmann JJ).

[7] *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing* [2014] FWCFB 810; (2014) 240 IR 377 at [27].

[8] In the sense discussed in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [19]-[20] (Gleeson CJ, Gaudron and Hayne JJ).

[9] *Re 4 Yearly Review of Modern Awards — Abandonment of Employment* [2018] FWCFB 139; (2018) 273 IR 249 at [21]-[22].

[10] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [118]-[119] (Katzmann and Rangiah JJ) and the cases there cited.

[11] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [125] (Katzmann and Rangiah JJ) and the cases there cited.

[12] Relying on *Linfox Armaguard Pty Ltd v Symes* [2019] FWCFB 556 at [27], citing *Barach v University of New South Wales* (2010) 194 IR 259 at [16].