

FAIR WORK AUSTRALIA

**Cremona v Lane**

[2011] FWAFB 6984

O'Callaghan and Kaufman SDPP, Lewin C

13 October 2011

*Costs — Application for costs of proceedings at first instance — Successful appeal — Application made after conclusion of appeal — Whether finalisation of appeal constituted conclusion of first instance proceedings — Application out-of-time — Statutory requirements for costs orders to be made — Requirements met for costs of appeal — Fair Work Act 2009 (Cth), ss 402, 611.*

Following an unsuccessful appeal by an employer against a decision of a Commissioner of Fair Work Australia finding the employer's termination of his employee's employment had been harsh, unjust or unreasonable, the employee applied for costs of both the proceedings before the Commissioner, and the appeal, relying on s 611 of the *Fair Work Act 2009* (Cth) (the Act).

That provision stated, relevantly, that Fair Work Australia could award costs against a person if it should have been reasonably apparent to that person that an application brought by that person had no reasonable prospect of success.

Section 402 of the Act provided, relevantly, that a costs application in a matter had to be made within 14 days after Fair Work Australia had determined the matter.

The employee had not previously applied for costs.

*Held:* (1) The proceedings before the Commissioner were concluded when the Commissioner made his decision, not when the appeal was finalised, so that the application for costs of the first instance proceedings not having been made within the time prescribed by s 402 of the Act, should be dismissed.

(2) Since it should have been reasonably apparent to the employer that his appeal had no reasonable prospect of success, and his position on the appeal having been so manifestly untenable and so lacking in merit or substance as to be unarguable, the application for costs of the appeal should succeed.

**Cases Cited**

*Lane v The Heights Grocer* [2011] FWA 3214.

**Application for costs**

*Mr Moore*, for the applicant/respondent.

*Cur adv vult*

**Fair Work Australia**

- 1 This decision deals with an application for costs made by Mr Lane who seeks costs against his former employer, Mr Cremona, arising from an action commenced by Mr Lane on 13 October 2010 pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the Act), and from a subsequent appeal made by Mr Cremona. The application has been referred to us for determination.

**Background**

- 2 Mr Lane's application for an unfair dismissal remedy was made against Mr Cremona, trading as Frooty Fresh, The Heights Grocer. It was unable to be settled through conciliation and was referred to Commissioner Cambridge for arbitration. Mr Cremona, in his written response to the application for relief, asserted that the application was frivolous and vexatious and lacking in jurisdiction, and should be dismissed accordingly.

- 3 From 3 November 2010 Mr Lane has been represented by Mr Moore of Brazel Moore Lawyers.

- 4 The matter was listed for hearing on 21 January 2011. Mr Cremona failed to attend at that hearing. He did not provide an acceptable explanation for this non-attendance. The matter was relisted for 12 May 2011. Again, Mr Cremona did not attend that hearing. The hearing proceeded ex-parte and evidence in support of the application was provided to the Commissioner. At the conclusion of the hearing the Commissioner determined that the termination of Mr Lane's employment was unfair. He reserved judgement on the quantum of compensation. At the conclusion of the hearing, Mr Moore raised the issue of costs to which the Commissioner responded:

But I am going to reserve more generally on that and it may be that in due course I seek to have some further submissions just simply in writing from the parties on the question of costs once the primary determination is finalised and orders for compensation are formalised as well. ...<sup>1</sup>

- 5 Commissioner Cambridge published his decision<sup>2</sup> on 24 May 2011. In that decision he summarised the background and confirmed his earlier finding that the termination of Mr Lane's employment was harsh, unjust or unreasonable. Having considered the criteria in s 392 of the Act the Commissioner awarded 26 weeks' pay as compensation. We note that the Order reflecting this decision was issued against The Heights Grocer trading as Frooty Fresh ABN 54824384378 rather than Mr Cremona. However, no appeal or complaint has been made to us in that respect. The Commissioner concluded his decision on the basis that:

[22] The issue of costs is reserved generally.

- 6 On 7 June 2011 Mr Cremona filed an appeal against the decision of Commissioner Cambridge and sought a stay against the order issued by the Commissioner. A stay was granted. The appeal was heard on 27 July 2011. On the appeal, Mr Cremona asserted that the Commissioner erred in not accepting that his reasons for not attending the hearing on 12 May 2011 were valid. He asserted that he was at that time, affected by a medical condition for which he had to be hospitalised. Whilst Mr Cremona provided to us various documents, they did not support his contentions.

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1 Transcript PN169, 12 May 2011.

2 *Lane v The Heights Grocer* [2011] FWA 3214.

7 Mr Cremona also argued that his appeal should be upheld on the basis that he could not afford to pay the amount of compensation awarded to Mr Lane.

8 At the conclusion of the appeal hearing on 26 July 2011 we provided oral reasons to the effect that we were not satisfied that Mr Cremona had demonstrated that there was error in the Commissioner's approach or that it was in the public interest that permission to appeal should be granted. The appeal was dismissed.

9 Mr Lane's costs application was lodged on 1 August 2011. Costs are sought against Mr Cremona. The grounds for this application are:

1. The Application for Unfair Dismissal Remedy of Mr Lane was listed on 21 January 2011 on the request of Mr Cremona as it was his contention that the application had no reasonable prospect of success. On 21 January 2011 there was no appearance for or on behalf of Cremona.
2. On 21 January 2011 Mr Lane appeared represented by Mr Peter Moore, Solicitor.
3. Mr Lane incurred legal costs as a result of the appearance on 21 January 2011.
4. The Application of Mr Lane was listed for decision before Commissioner Cambridge on 24 May 2011. Again there was no appearance for or on behalf of Mr Cremona.
5. Mr Lane appeared on 24 May 2011 represented again by Mr Moore. Mr Lane had in company with him a witness, Mrs Maree Young.
6. Again costs were incurred by Mr Lane in relation to the hearing on 24 May 2011.
7. Mr Cremona appealed the decision of Commissioner Cambridge of 24 May 2011. That appeal was determined on 26 July 2011 and was dismissed. It is submitted that having regard to the decision of the Full Bench there was no merit in the Appeal.
8. On 26 July 2011 Mr Lane was represented by Mr Moore and again legal costs have been incurred.
9. In light of the above and in particular having regard to the hearing on 21 January 2011 and the appeal before the Full Bench on 26 July 2011 significant legal costs over and above what would have otherwise been payable have been incurred. It is submitted that in the circumstances an award of costs should be made in favour of Mr Lane in relation to the 3 hearings before Fair Work Australia.

10 Clearly Mr Lane seeks costs with respect to both the determination of the matter at first instance and the appeal. Whilst the application does not indicate which section of the Act is relied upon, we have noted that Mr Cremona is, and has been, self represented in this matter from the outset and have concluded that s 611 provides the only basis upon which this application can be founded. This section states:

11 Section 611 states:

611 Costs

- (1) A person must bear the person's own costs in relation to a matter before FWA.
- (2) However, FWA may order a person (the first person) to bear some or all of the costs of another person in relation to an application to FWA if:
  - (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or

(b) FWA 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: FWA can also order costs under sections 376, 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).

12 Section 402 imposes a timeframe within which an application for costs must be made. Section 402 states:

402 Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 401, must be made within 14 days after:

- (a) FWA determines the matter; or
- (b) the matter is discontinued.

13 On 15 August 2011 by written directions both parties were invited to provide us with written submissions. The directions made it clear that either party could object to this approach within a specified time.

14 No objection was received. Written submissions have been received on behalf of Mr Lane but nothing has been received from Mr Cremona.

15 Accordingly, we have considered the costs' application on the basis of the information before us.

#### **Costs with respect to the initial proceedings**

16 The Commissioner, in finding that Mr Lane had been unfairly dismissed and that he would afford a remedy, determined:

The remedy is provided for under section 392 but there are some Full Bench decisions which govern the way in which an individual member of this Tribunal is to approach the actual quantum of any compensation that is to be ordered. If I could indicate that I am persuaded towards the higher end of the scale in the circumstances as the matter has proceeded but I want to consider that very carefully before I make an order and within that order contain the actual amount of compensation. I am going to reserve more generally on the question of costs. Given the very regrettable approach that the respondent appears to have taken to the proceedings, failing to attend on at least two occasions and certainly today there was no satisfactory explanation for the absence of the respondent, does suggest that in due course there might be a persuasive basis upon which to order costs.<sup>3</sup>

17 Mr Lane asserts that the issue of costs was addressed in the course of the hearing before Cambridge C. Mr Lane's submission is that:

It is submitted that as there was no order for costs made by Commissioner Cambridge the issue of costs can still be made as the legal proceedings are not concluded until such time as the appeal rights are finalised. For the purposes of Section 402 it is submitted that the matter has been determined by the FWA when the appeal proceedings are concluded.<sup>4</sup>

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3 Transcript PN168, 12 May 2011.

4 Lane Submissions dated 22 August 2011.

18 It is apparent that Mr Lane did not contend that an application for costs had  
been made within the time period allowed by s 402 of the Act.

19 We do not accept his submission that the proceedings at first instance were  
not concluded until “such time as the appeal rights are finalised”. In the final  
paragraph of the Commissioner’s decision of 24 May 2011 we think he did no  
more than indicate his thinking should Mr Lane pursue a costs’ application. No  
further proceedings were foreshadowed and the onus was clearly on Mr Lane to  
make a costs’ application if he wished to do so. No such application was made  
until 1 August 2011, some substantial time after the Commissioner determined  
the matter at first instance.

20 Had Mr Lane sought to pursue costs against Mr Cremona with respect to the  
initial proceedings, an application to do so should have been made within the 14  
days prescribed by s 402. We doubt that discretion exists to extend that time  
limit but, in any event, we are not satisfied that any basis for doing so has been  
made out.

### **Costs on the Appeal**

21 The costs application is made on the basis that both of the criteria in  
s 611(2)(a) and (b) of the Act had been established. It was submitted that  
Mr Cremona had not provided evidence to support his various assertions,  
including his general assertion that the Commissioner’s decision contained  
significant errors of fact, and his allegations that his medical condition  
explained his non-attendance at the 12 May 2011 hearing.

22 It appears to us that Mr Cremona sought to pursue his appeal because he felt  
that he had been denied procedural fairness when the matter proceeded on  
12 May 2011 in his absence. Secondly, he simply wanted the Commissioner’s  
Order to be set aside because he cannot pay that amount. Thirdly, he sought to  
use the appeal as an opportunity to, for the first time, address the merits of the  
initial application for relief.

23 As to the first issue, Mr Cremona did not provide us with evidence that a  
medical condition affected either his ability to accurately record the hearing date  
or to attend that hearing. The medical advice that he provided to us did not  
correspond with his assertions.

24 As to the second and third issues, Mr Cremona did not establish a basis upon  
which we could even begin to interfere with the Commissioner’s decision. He  
did not identify any substantive error.

25 In summary terms, Mr Cremona simply sought that the matter be reheard.

26 We have taken into account that Mr Cremona is self represented.  
Nevertheless, we are satisfied that it should have been reasonably apparent to  
him that his appeal had no reasonable prospect of success. His position on the  
appeal was so manifestly untenable and so lacking in merit or substance as to be  
unarguable.

27 Accordingly, we are satisfied that costs with respect to the appeal proceedings  
should be awarded against Mr Cremona.

28 Mr Moore is directed to provide to us, and to Mr Cremona, an itemised  
schedule of costs by 21 October 2011.

29 Mr Cremona may provide to us and to Mr Lane, his position with respect to  
that schedule by 4 November 2011.

30 A costs order will be issued subsequent to our consideration of this material.

*Orders accordingly*

Solicitors for the applicant/respondent: *Brazel Moore Lawyers.*

DR RJ DESIATNIK