Costs and the *Fair Work Act* 2009

By Phillipa Alexander

The *Fair Work Act* 2009 (Cth) (the Act) commenced on 1 July 2009, with the unfair dismissal provisions in Part 3.2 taking effect on that date. Fair Work Australia (FWA) is empowered to order costs in accordance with ss376, 401, 611 and 780 of the Act.

The primary costs provisions are contained in s611 of the Act, which provides as follows:

'(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.'

On application by a party,[1] FWA is also empowered by ss376, 401 and 780 to make an order for costs against a lawyer or paid agent who has been permitted to represent a party in the proceedings. The FWA must be satisfied that the lawyer or paid agent caused costs to be incurred by the other party to the dispute because he or she encouraged the person to make the application; and it should have been reasonably apparent that the application would have no reasonable prospect of success; or that the lawyer or paid agent caused costs to be incurred by the other party to the dispute because of an unreasonable act or omission of the lawyer or paid agent in connection with the conduct or continuation of the dispute.

Any application for costs under ss611 or 401;[2] s376;[3] or s780[4] must be made within 14 days after FWA determines the matter; or the matter is discontinued. The application must be made in accordance with Form F6 of the *Fair Work Australia Rules* 2009 and served in accordance with the Rules.

Rule 16 of the *Fair Work Australia Rules* 2009 authorises FWA to make an order for security for costs in respect of an unfair dismissal claim under Part 3.2. Ordinarily such an order will not be made before the conclusion of conciliation. If security which has been ordered is not furnished, the matter may be adjourned until security is provided or adjourned indefinitely.

Pursuant to s403, a Schedule of Costs has been prescribed in relation to items of expenditure likely to be incurred in relation to matters covered by a costs order made under ss376; 401, 611; or 780.[5] While FWA is not limited to the items of expenditure appearing in Schedule 3.1, if an item does appear in the Schedule, costs in relation to that item must not be awarded in excess of the specified rate; for example, a rate of $60 per quarter hour applies to attendances requiring the skill of a solicitor. In addition, the costs of briefing more than one counsel will only be allowed if FWA certifies that the attendance was necessary.[6] Certification for second counsel is likely to be restricted to large or complex cases.

For unfair dismissal proceedings in the Federal Court, the Federal Magistrates Court or, in some cases, a court of a state or territory, costs orders against another party to the proceedings (including an appeal) may be made only in certain circumstances.[7] The court must be satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or that the party's unreasonable act or omission caused the other party to incur the costs. Alternately, if the court is satisfied that the party unreasonably refused to participate in a matter before FWA that arose from the same facts as the proceedings, the party may be ordered to pay the costs of the opposing party.

The issue of whether costs orders should be made against applicants in unfair dismissal proceedings has been considered in a number of cases brought under the *Workplace Relations Act* 1996 which contains substantially similar costs provisions to the *Fair Work Act* 2009. In *Papunya Community Council Inc v Hanley*,[8] the Full Bench of the Industrial Relations Commission considered the expression 'no reasonable prospect of success' and affirmed the statement of the Commission in *Thomas Wright v Australian Custom Service*;[9] that a decision that an application had no reasonable prospect of success should be reached only with extreme caution and where the application is manifestly untenable or groundless. A costs order against Papunya, the unsuccessful appellant, was refused on the basis of a finding that it was not apparent to the employer at the time of instituting the appeal, the proceeding in question was manifestly untenable or groundless, and therefore the discretion to make an order for costs was not available.

In making a costs order against an applicant in *Shumack v Commonwealth of Australia*,[10] Neville FM relied on the fact that Mr Shumack had no reasonable prospect of successfully prosecuting the proceedings. Mr Shumack's application for leave to appeal was dismissed with costs by Rares J who held 'the proceedings seeking leave to appeal are frivolous and vexatious and an abuse of the process of the court on the ground that they are doomed to fail, since they do not identify any basis on which his Honour can be said to have erred.'[11]

Commissioner Raffaelli in *A Hargraves and CMI Operations Pty Ltd*[12] ordered the employee to pay the employer's costs on the basis that the applicant acted unreasonably in failing to discontinue the matter before the Commission. The Commissioner held that it should have been apparent to the applicant after being made aware of the company's witness statements that he had a very weak case, which was reinforced by the comments of the Commission during the proceedings.

Lack of jurisdiction has also formed the basis of a number of costs orders against employee applicants. Lucev FM held that a respondent employer was entitled to costs in *Olsen v Wellard Feeds Pty Ltd (No. 2)*[13] on the basis that the proceedings were instituted without reasonable cause, a determination being made that the applicant was a managerial employee and not an award employee. A costs order was also made against Mr Shabo in *Phantom Couriers v Eddie Shabo*,[14] on the basis that the employee's application was beyond jurisdiction, Mr Shabo being a contractor and not an employee, and therefore the application had been frivolously made and was clearly vexatious.

Costs have also been argued[15] in relation to claims incorrectly brought before the Industrial Relations Commission against small business employers where less than the prescribed number of employees was employed by the respondent under the relevant Act.[16] A costs order on an indemnity basis was made against the employee applicant in *Dowling v Kirk & 3 Ors*[17] on the basis that the applicant's 'behaviour in bringing the proceedings and subsequently maintaining them was so unreasonable that it would be unjust for the respondents to be limited to party and party costs'.[18]

In summary, the *Fair Work Act* 2009 empowers both FWA and the courts to make costs orders both in favour of and against an applicant in relation to an unfair dismissal claim. Costs orders may also be sought against lawyers or paid agents, and it may be appropriate to consider an application for costs against a respondent employer's representative where additional costs have been incurred as a result of an unreasonable act or omission of the lawyer or paid agent. The Act also raises some difficulties in relation to disclosure of estimates of costs under the relevant *Legal Profession Acts* for which an applicant may be liable or which may be recovered from an employer. These costs may range from nil to costs calculated in accordance with Schedule 3.1 of the *Fair Work Regulations* 2009. Practitioners may need to disclose a wide range of costs at the outset of a retainer and carefully monitor the estimates during the course of the proceedings. In addition, any information which may emerge during the course of the proceedings that impacts on an applicant's reasonable prospects of success is a factor which may have significant costs consequences. ■

Notes: **1** See ss377, 402 and 781 of the *Fair Work Act* 2009. **2** *Fair Work Act* 2009, s402. **3** *Ibid* at s377. **4** *Ibid* at s781. **5** See subreg 3.04(1), 3.08(1) and 6.06(1) *of the Fair Work Regulations* 2009. **6** See Note 2(2) to Regulation 3.08 *Fair Work Regulations* 2009. **7** See s570 *Fair Work Act* 2009 and s43(1) of the *Federal Court of Australia Act* 1976. **8** *Papunya Community Council Inc v Hanley* PR974659 [2006] AIRC 757 (27 November 2006). **9** *Thomas Wright v Australian Custom Service* PR926115 [2002] AIRC 1595 (23 December 2002). **10** *Shumack v Commonwealth of Australia* [2009] FMCA 428 (8 May 2009). **11** *Shumack v Commonwealth of Australia* [2009] FCA 775 (17 July 2009). **12** *A Hargraves and CMI Operations Pty Ltd* PR910723 [2001] AIRC 1120 (20 October 2001). **13** *Olsen v Wellard Feeds Pty Ltd (No. 2)* [2008] FMCA 447 (11 April 2008). **14** *Phantom Couriers v Eddie Shabo* PR953889 [2004] AIRC 1216 (2 December 2004). **15** See *Nanette Willis v Crystal Clear Window Cleaning* [2008] AIRC 17 (10 January 2008) **16** The *Fair Work Act* 2009 s23 defines a 'small business employer' as employing fewer than 15 employees at the relevant time. **17** *Dowling v Kirk & 3 Ors* [2008] FMCA 814 (26 June 2008). **18** *Ibid* at [18] per Cameron FM.

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