AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Goffett v Recruitment National Pty Ltd

[2009] AIRCFB 626

Lacy SDP, Hamilton DP, Larkin C

28 August 2009

Costs — Termination of employment — Unsuccessful applicant's claim for costs — Relevant factors — Employer's deliberate or reckless act or omission constituted unreasonable conduct — Applicant thereby caused to incur costs — Costs order against employer warranted — Indemnity costs — Parties liable to pay indemnity costs — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 643, 653, 658.

Australian Industrial Relations Commission — Jurisdiction — Whether Commission able to award indemnity costs — Costs certificate under Federal Proceedings (Costs) Act 1981 (Cth) — Issue of certificate — Commission lacked jurisdiction to issue certificate — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 658(3), 658(9) — Federal Proceedings (Costs) Act 1981 (Cth), s 57.

The applicant sought a remedy in respect of the termination of her employment with the respondent. Conciliation proceedings before the Australian Industrial Relations Commission failed because the respondent did not attend. The parties then prepared for arbitration before the Commission. The Commission dismissed the application as incompetent pursuant to s 643(10) of the *Workplace Relations Act 1996* (Cth) (the Act) because the respondent finally produced evidence, which was accepted, that it employed less than 101 employees.

The applicant then sought costs under s 658(3) of the Act, and sought leave to appeal against the Commission's refusal to grant that application.

Section 658(3) of the Act provided that where a party to a proceeding caused the other party to incur costs because of an unreasonable act or omission in connection with the conduct of the proceeding, that first party could be ordered by the Commission to pay the other party's costs

Held (allowing the appeal in part): (1) The conduct of an employer, that was challenging an unfair dismissal claim on the ground that it employed less than 101 employees, in not moving for dismissal of the claim while actively leading the claimant to believe that it was interested in settling the matter when it was, in fact, gathering the evidence to make good its defence, could be described, in some respects at least, as duplicitous.

(2) The failure of such an employer to take steps to inform the claimant of its intentions was either a deliberate or reckless act or an omission that could not be regarded as anything other than unreasonable and the cause for the claimant to incur costs in connection with the conduct of the proceeding.

(3) The Australian Industrial Relations Commission has the discretion to award indemnity costs.

Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd (1986) 10 FCR 177; *Oshlack v Richmond River Council* (1998) 193 CLR 72, considered.

(4) There is no reason to limit the discretion to make an award of indemnity costs in favour of a successful party only. A successful party, even a wholly successful party and whether plaintiff or defendant, may be ordered to pay the other party's costs in part or in whole.

Cretazzo v Lombardi (1975) 13 SASR 4, considered.

(5) The Australian Industrial Relations Commission has no power or authority to issue a costs certificate under the *Federal Proceedings (Costs) Act 1981* (Cth).

Cases Cited

Andrews v Barnes (1888) LR 39 Ch D 133.

Australian Guarantee Corporation Ltd v De Jager [1984] VR 483.

Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd (1986) 10 FCR 177.

Christie v Christie (1872-73) LR 8 Ch App 499.

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (1998) 89 FCR 200; 84 IR 314.

Cretazzo v Lombardi (1975) 13 SASR 4.

Degmam Pty Ltd (in liq) v Wright (No 2) [1983] 2 NSWLR 354.

Donald Campbell & Co v Pollak [1927] AC 732.

Forester v Read (1870) LR 6 Ch App 40.

Forsyth v Hi Security Fencing Systems Pty Ltd (2007) 166 IR 413.

Goffett v Recruitment National Pty Ltd [2009] AIRC 417.

House v The King (1936) 55 CLR 499.

Oshlack v Richmond River Council (1998) 193 CLR 72.

Preston v Preston [1981] 3 WLR 619.

Wan v Australian Industrial Relations Commission (2001) 116 FCR 481.

Application for leave to appeal and appeal

F Hancock, for the appellant.

A Britt, for the respondent.

Cur adv vult

The Commission

1 Anita Goffett applies for leave to appeal against the decision [*Goffett v Recruitment National Pty Ltd* [2009] AIRC 417] of Senior Deputy President Hamberger given in Sydney on 24 April 2009.[1] The application is made under s 120(1)(f) of the *Workplace Relations Act 1996* (Cth) (WR Act). Ms Goffett (Appellant) contends that his Honour erred in refusing her application for an order that Recruitment National Pty Ltd (Respondent) pay her costs incurred in the course of conciliation proceedings associated with her

1 *Goffett v Recruitment National Pty Ltd* [2009] AIRC 417.

application for a remedy in respect of the termination of her employment. The Respondent opposes a grant of leave and, in the event that leave is granted, defends the decision at first instance.

Grounds of appeal

2 The notice of appeal sets out 22 numbered grounds of appeal, including five grounds going to issues of leave and public interest. There are 16 substantive grounds of appeal and one general ground. It is unnecessary for us to set them out in full. The Appellant conveniently consolidated all 16 grounds in argument by reference to the four types of errors that might be made in the decision-making process as identified in *House v The King*.[2] The Appellant argued that the Senior Deputy President:

- allowed irrelevant matters to guide him (Appeal Grounds 4 & 5 and 8, 9, 10, 11, 12, 13, 14 & 15);
- acted on a wrong principle (Appeal Grounds 3, 6, 7 &16);
- mistook the facts (Appeal Ground 5); and
- denied the Appellant natural justice (Appeal Ground 2).

3 We deal with the particulars of the appeal grounds below in our consideration of the submissions advanced in argument.

Background facts

4 Initially the Appellant applied on 29 September 2008 for relief in respect of the termination of her employment with the Respondent. The application was listed for conciliation before Commissioner Roberts on 5 November 2008. The Respondent failed to attend the conciliation advising however, that it was interested in settlement and that the Appellant's legal representative should contact the Respondent's legal representative. At that time no appearance (Form R28) had been filed for the Respondent and no details of its defence were provided or known to the Commission or the Appellant's legal representative.

5 The matter was re-listed for conciliation on 21 November 2008. The Respondent did not attend the conciliation, having notified the Commission through its legal representative about an hour and a half prior to the scheduled listing time that there would be no attendance. The Commissioner then certified that the matter was unlikely to be resolved by conciliation.

6 On 25 November 2008:

- the Appellant elected to proceed to arbitration;
- the Respondent's representative filed in the Commission a letter dated 24 November 2008 confirming instructions to liaise with the Appellant's legal representative "in the hope of resolving the matter". Attached to the letter was the Respondent's appearance (Form R28) stating, inter alia, the "Respondent employs less than 100 employees";
- the Respondent's representative wrote to Appellant's representative indicating "his client was receptive to any resolution proposals";
- the Appellant's representative put an offer for settlement. The Respondent's representative sought a breakdown of the offer and the Appellant's representative responded.

7 About 27 November 2008 the Respondent's counsel told the Appellant's

2 *House v The King* (1936) 55 CLR 499.

representative in a telephone conversation that the Respondent employed less than 100 employees at the time of the termination of the Appellant's employment.

8 On 5 December 2008 Senior Deputy President Hamberger issued a notice of listing for the arbitration of the Appellant's application for a remedy in respect of the termination of her employment. The listing incorporated directions for the Appellant to file her materials on 15 January 2009, the Respondent to file its materials by 12 February 2009 and any reply from the Appellant to be filed by 20 February 2009. The matter was listed for hearing on Tuesday, 24 February 2009. The Appellant in compliance with the first direction filed submissions and two witness statements with attachments.

9 The Respondent filed submissions on Friday, 20 February 2009. It also filed a statement of Ms Goncalves with an attached payroll summary. The Respondent's material only addressed the jurisdictional issue of less than 101 employees. According to the Respondent's submissions and statement, it employed 105 casual staff with less than 12 months service and 87 permanent and casual staff with more than 12 months service, at the time of termination of the Appellant's employment.

10 On Tuesday 24 February 2009 Senior Deputy President Hamberger heard the substantive application for a remedy in respect of the termination of the Appellant's employment and dismissed it as incompetent pursuant to s 643(10) of the WR Act.

11 On 6 March 2009 the Appellant filed an application for costs under s 658(3) of the WR Act. On 10 March 2009 Senior Deputy President Hamberger wrote to the legal representatives of the parties inviting submissions from the Appellant, responsive submissions from the Respondent and a reply by the Appellant, on the question of costs. The parties filed written materials accordingly and on 4 April 2009 his Honour published his decision, the subject of this appeal, refusing the Applicant's application for costs.

12 A notice of appeal was lodged on 14 May 2009. Initially the matter was listed for hearing in the appeal sittings in Sydney on 23 June 2009. On the application of Counsel for the Appellant and by consent of the Respondent it was directed that the matter proceed by way of written submissions due to the unavailability of the Appellant's Counsel for the appeal sittings. The Appellant's final submissions in reply were filed upon her Counsel's return from leave on 17 July 2009.

13 We note that the *Fair Work Act 2009* (Cth) commenced on 1 July 2009. It is clear from a composite reading of Items 11 and 12 of Sch 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the *Workplace Relations Act* continues to operate in respect of an application for a remedy for a termination of employment that occurred before 1 July 2009. Such a matter is to be continued by the Australian Industrial Relations Commission applying the relevant provisions of the WR Act. The WR Act continues to operate in the same way in respect of an unfair dismissal appeal lodged before 1 July 2009. Support for these conclusions can be found in the Explanatory Memorandum to the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

Decision at first instance

14 In his reasons for decision the Senior Deputy President set out the history of the proceedings, noting the Respondent's failures to attend the conciliations and

to provide contact details for its legal representative as it had undertaken to do. His Honour noted also the Respondent's representations about its intention to confer with the Appellant in the hope of resolving the matter. This is followed by a brief summary of the decision dismissing the primary application for want of jurisdiction.

15 Turning to the question of costs, the Senior Deputy President effectively posed two questions for himself, namely:

- did the Respondent cause costs to be incurred by the Appellant; and
- were costs incurred because of the Respondent's unreasonable act or omission in connection with the conduct of the proceeding?

16 The Senior Deputy President found that the Respondent's failure to attend the first conciliation conference on 5 November 2008 caused the Appellant to incur costs. He held however, the Respondent's failure to attend was not unreasonable by reason of the circumstance that the Respondent's manager was ill and could not attend the conciliation.

17 In relation to the Respondent's failure to attend the second conciliation the Senior Deputy President noted that it was due to the unavailability of the Respondent's legal representative who, less than an hour an a half before the scheduled conciliation, notified the Commission of recent instructions in the matter and that he would not be attending. His Honour held the Respondent's failure to attend was unreasonable. He was not satisfied however that the Appellant had incurred any costs as a result of the aborted second conciliation and refused an order for costs in respect of it.

18 After adverting to the exchanges between the parties about proposals for settlement, the Senior Deputy President held that the Respondent's ultimate failure to respond to the Appellant's breakdown of her costs, which it had requested, was poor behaviour. He held however, that failure to agree to a settlement could not of itself be a basis for a claim for costs under s 658(3) of the WR Act. His Honour cited the Full Bench decision in *Forsyth v Hi Security Fencing Systems Pty Ltd* as authority for this latter proposition.

19 The Senior Deputy President then held that the Respondent's late lodgement of its material in support of its jurisdictional challenge was unreasonable. His Honour however refused to make an order for costs on this basis. He found that the late lodgement did not lead to the Appellant incurring additional costs as she proceeded with her claim in the face of the Respondent's "evidence and submissions".

20 Dealing with an issue about the absence of any notice of motion to dismiss the Appellant's substantive application the Senior Deputy President reasoned that there was no obligation for the Respondent to move for its dismissal. It had put the Appellant on notice about the jurisdictional issue in its notice of appearance and orally by its Counsel in a conversation with the Appellant's representative. His Honour held that the failure of the Respondent to move for the dismissal of the application at an earlier time was not of itself unreasonable and an order for costs on this point was refused. He concluded as follows:

> While certain aspects of the way the respondent approached the conduct of this matter were unsatisfactory, the applicant has failed to establish that the requirements of s 658(3) of the Act have been met. The application for costs is dismissed.[3]

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3 *Goffett v Recruitment National Pty Ltd* [2009] AIRC 417 at [19].

Leave to appeal

21 An appeal lies to the Full Bench of the Commission by way of leave under s 120(1)(f) against a decision of a member of the Commission that the member has jurisdiction, or a refusal or failure of a member of the Commission to exercise jurisdiction in a matter arising under this Act. In this case it is apparent from the grounds of appeal that the Senior Deputy President's decision refusing costs is characterised as a constructive refusal or failure of a member of the Commission to exercise jurisdiction in the matter that was before him. The Respondent does not take issue with the Appellant's apparent characterisation of the decision and concedes the competency of the appeal. It contends however, leave should not be granted or, alternatively, if leave is granted, no relief is warranted because the Appellant suffered no injustice.

22 Section 120(1) of the Act provides that an appeal lies to a Full Bench only with the leave of the Full Bench. Further, s 120(2) requires that a Full Bench grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted. Alternatively, a grant of leave is governed by the conventional considerations for the grant of leave to appeal, including whether the decision is attended with sufficient doubt to warrant reconsideration or whether substantial injustice may result if leave is refused.[4] In *Wan v Australian Industrial Relations Commission*[5] the Federal Court, in dealing with considerations relevant to grant of leave to appeal, noted:

> As we have previously observed, grounds traditionally adopted in granting leave have included considerations such as whether the decision is attended with sufficient doubt to warrant its reconsideration and whether substantial injustice may result if leave is refused. These "grounds" should not be seen as fetters upon the broad discretion conferred by s 45(1), but as examples of circumstances which will usually be treated as justifying the grant of leave. It will rarely, if ever, be appropriate to grant leave unless an arguable case of appealable error is demonstrated. This is so simply because an appeal cannot succeed in the absence of appealable error.[6]

23 It is common ground that the decision the subject of the appeal in this case is a discretionary decision. The correctness of such a decision can only be challenged by showing error in the decision-making process. The applicable principle is enshrined in the seminal case of *House v The King*[7] as set out in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[8]

> Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to a judicial decision, in *House v King* in these terms:

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4 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200 at 220; 84 IR 314 at 333.

5 *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481.

6 *Wan v Australian Industrial Relations Commission* at [30].

7 *House v The King* at 504-505.

8 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205; 99 IR 309.

> If the Judge acts upon a wrong principle, if he allows extraneous or irrelevant matter to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

24 The Appellant argued that the decision at first instance was infected by significant errors. More particularly in respect of the question of leave to appeal it was contended that his Honour erred in determining that the Respondent's Counsel had put the Appellant on notice in a telephone conversation in November 2008 that it was taking the jurisdictional point. The Appellant submitted that on the Respondent's own evidence it had no evidence to support its assertion to the Appellant's representative that it had 100 or fewer employees. It was further argued that his Honour erred in placing too much weight on the absence of any statutory obligation on the Respondent to file a Notice of Motion to take a jurisdictional point when the issue was not a question of obligation but rather the effect of the Respondent's conduct in not moving for dismissal until the day of the hearing. Such conduct it was submitted was unreasonable and caused the Appellant to incur costs. Accordingly the matter is of such importance that leave should be granted in the public interest.

25 The Respondent submitted that the actual finding of the Senior Deputy President in this regard was that it had put the Appellant on notice that it "did not believe" that it had more than 100 employees, both in its notice of appearance of 27 November 2008 and during a conversation between the Respondent's Counsel and the Appellant's representative at about the same time. It submitted that there is no public interest in hearing the appeal. Furthermore, it submitted, the decision is not attended with sufficient doubt to warrant reconsideration of the claim. No appealable error has been demonstrated, the Respondent submitted, and the Appellant will suffer no substantial injustice if leave is refused. It further submitted that if leave to appeal is granted and the appeal is upheld the matter ought to be referred back to Senior Deputy President Hamberger to determine the issue of costs.

26 While we do not accept the Appellant's contention that these matters are of such importance that leave should be granted in the public interest we do think there is some merit in the Appellant's argument. Accepting, as we do, the Senior Deputy President correctly characterised the evidence about the nature of the notice that the Respondent gave to the in Appellant November 2008, we think that he nonetheless misconceived his duty. The costs application was made under s 658(3) of the WR Act, which relevantly provides as follows:

> (3) If the Commission is satisfied:
>
> (a) that a party (first party) to a proceeding relating to an application made under section 643 caused costs to be incurred by the other party to the proceedings; and
>
> (b) that the first party caused the costs to be incurred because of the first party's unreasonable act or omission in connection with the conduct of the proceeding;
>
> the Commission may, on an application by the other party under this section, make an order for costs against the first party.

27 The issue raised on the argument before his Honour, in this aspect of the matter, was whether the conduct of the Respondent in not moving for the

dismissal of the unfair dismissal prior to the hearing of the substantive application, caused the Appellant to incur costs and, to paraphrase s 658(3)(b), whether any costs so incurred were because of an unreasonable act or omission of the Respondent in connection with the conduct of the proceeding. It was not merely a question of notice of the jurisdictional point but whether the Respondent's conduct in relation to it and subsequent to the oral notice caused the Appellant to incur costs and, if so, whether those costs were incurred as a result of the Respondent's unreasonable act or omission in connection with its conduct of the proceeding.

28 The evidence, such as it is, reveals that in November 2008 the Respondent had not satisfied itself about the number of employees that it employed. Ms Goncalves commenced compiling evidence about the number of employees in November 2008 and completed the exercise by 29 January 2009. The Respondent employed between 190 and 195 employees albeit a significant number of short-term casuals. For that very reason the Appellant can hardly be criticised for maintaining her belief that the number of employees exceeded 100 in the absence of any evidence to the contrary.

29 The Respondent did not provide its material as directed or until 20 February 2009, viz eight days after its due date and two business days before the hearing. At the time of the conversation between the Respondent's counsel and the Appellant's representative in late November 2008 the claim of 100 or fewer employees was little more than an assertion. The Respondent had provided no documentary evidence to support the assertion. In the absence of any documentary evidence of the fact the Appellant's representative would have been derelict in her duty to withdraw the application on the basis of a bare assertion made in the course of a telephone conversation and in the notice of appearance. This has to be viewed in the context of ongoing overtures by the Respondent about settlement of the claim. In our view the Appellant was bound to continue pressing her claim.

30 Up until 20 February 2009 the Respondent had put nothing before the Appellant to dissuade her from proceeding with her preparation for and conduct of the arbitration. An earlier motion to dismiss however would have at least put the Appellant on notice that the point was seriously taken and would be pressed. In our view the Appellant has demonstrated an arguable case of appealable error in as much as the Senior Deputy President appears to have misconceived the issue and did not take account of that conduct of the Respondent in the context of the proceedings as a whole.

31 We are satisfied that the decision is attended with sufficient doubt so as to warrant its reconsideration. There is sufficient material before us to determine the matter for ourselves. Accordingly we refuse the Respondent's application to refer the matter of costs to the Senior Deputy President for determination. Before turning to the issue of costs we note that the matter before his Honour was one of some complexity and made more so by the drawn out process occasioned by the Respondent's tardiness.

Should the Appellant have an order for her costs?

32 In her costs application the Appellant sought an order for costs incurred in respect of her application under s 643 of the WR Act. As stated earlier the application was made under s 658(3). The Appellant submitted that, given the history of the matter, costs should be awarded on an indemnity basis from 5 November 2008, the date of the first scheduled conciliation, up to and

including the date of the hearing on 24 February 2009. We will deal first with the issue of an order for costs. The issue of indemnity will be dealt with in due course.

Conciliation 5 November 2008

33 The Appellant contends that the Respondent caused her to incur costs on 5 November 2008 by its unreasonable act or omission. The Appellant submits that the Respondent, in failing to attend the conciliation on 5 November 2008, engaged in an unreasonable omission and that this caused her to incur legal costs that would not have been incurred were it not for the Respondent's unreasonable conduct and omission. The Respondent submits that it did not cause costs to be incurred. It contends that its representative was absent from the conciliation because of illness.

34 Senior Deputy President Hamberger refused to award costs in respect of the 5 November conciliation on the ground that the Respondent's representative could not attend because of illness. The only evidence of the illness of the Respondent's representative on 5 November 2008 is the affidavit of Ms Goncalves sworn at Parramatta on 26 March 2009. No medical certificate in respect of the illness was provided. The Appellant submits that the Senior Deputy President dealt with the costs application on the materials filed by the parties without a hearing and thereby denying the Appellant an opportunity to test the issue of Ms Goncalves illness. It was submitted that in the circumstances the Appellant was denied procedural fairness.

35 In the absence of medical evidence of Ms Goncalves and an opportunity for the Appellant to be heard on the point no weight should attach to the affidavit of Ms Goncalves claim that she was ill on the day of the conciliation on 5 November 2008. The notice of listing for the 5 November 2008 conciliation was sent to the Respondent by fax on 20 October 2008. The matter was listed for 11.30am. The Respondent only notified the Commission that it would not be attending the conciliation when the Commissioner's associate telephoned the Respondent to inquire of its whereabouts at the time of the conciliation. Assuming Ms Goncalves was ill, as it is submitted that she was, no explanation appears to be given for the failure of the Respondent to inform the Appellant or the Commission of the fact prior to the scheduled commencement time of the conciliation or at all at the initiative of the Respondent. That represents conduct in our view, which caused the Appellant and her representative an unnecessary attendance at the Commission for which we think she should have her costs. The failure to initiate contact with the Commission and/or the Appellant prior to the scheduled start time for the conciliation to inform it or them of the non-attendance of the Respondent was unreasonable. If the act was intentional it would be an unreasonable act. If unintentional it would be an unreasonable omission. There is no evidence that the Respondent's conduct in this regard was an intentional act. We are satisfied that the Respondent's conduct in respect of the conciliation on 5 November 2009 was an unreasonable omission which caused the Appellant to incur costs.

36 The Respondent submitted that the Appellant should be allowed part only of the costs of the conciliation on 5 November 2008. It argued that the Appellant's representative would have had to meet with her client and to take instructions at some point in any event. There is much force in this argument. It seems the only costs thrown away as a result of the Respondent's conduct on 5 November was the costs of the attendance on and appearance in the Commission on the day.

We will make an order to the effect that the Respondent pay the Appellant's legal costs of the attendance and appearance at the Commission on 5 November 2008.

Conciliation 21 November 2008

37 On 7 November 2008 Commissioner Roberts' Associate wrote to the Respondent referring to a telephone conversation on 5 November 2008 and several unsuccessful attempts to contact Ms Goncalves and requesting that the Respondent provide details of its solicitor as had been agreed in the telephone conversation on 5 November. On 13 November 2008 a notice of listing for 11.00 am on 21 November 2008 was sent by mail and faxed to the Respondent. By email to Commissioner Roberts' associate at 4.17 pm on 20 November 2008 the Respondent advised that its solicitor "has all the paperwork" and foreshadowed the possibility of another adjournment on 21 November. By fax addressed to and received in the Commission at 9.37 am on 21 November 2008, Counsel for the Respondent advised that he had just received instructions in the matter and could not attend because of other court commitments. The conciliation was aborted and the Commissioner certified that the matter was unlikely to be resolved by conciliation.

38 It appears that there was no attendance or appearance for the Appellant on 21 November 2008 as a result of the conference being aborted prior to the scheduled start time. Senior Deputy President Hamberger held that the Respondent's failure to attend was unreasonable. He did not however award any costs in respect of the matter because there was no evidence that any costs had been incurred in respect of the scheduled conciliation on 21 November 2008. We are of the same view as his Honour on this point. We note however that the Appellant relies on the Respondent's failure to attend the second conciliation as evidence of its unreasonable conduct in the context of the whole of the proceedings. We take this into account in our assessment of the Appellant's claim for costs in respect of the hearing.

Arbitration 24 February 2009

39 It is not disputed that the arbitration on 24 February 2009 was a proceeding relating to the Appellant's application under s 643. In determining the question of the Appellant's costs for the arbitration on 24 February 2009, it is necessary to consider whether the Respondent caused the Appellant to incur costs in relation to it by some unreasonable act or omission in connection with the conduct of the proceeding. The acts or omissions upon which the Appellant relies are as follows:

- the failure of the Respondent to attend the first conciliation conference;
- the failure of the Respondent to attend second conciliation conference;
- the late lodgement by the Respondent of its Notice of Appearance asserting that it employed less than 101 employees at the time of the termination;
- the oral assertion of Counsel for the Respondent that it had less than 101 employees without any supporting particulars or evidence;
- the repeated invitations by the Respondent to the Appellant to engage in negotiations for settlement without any genuine attempt on its part to do so;

- the way in which the Respondent encouraged the Appellant to advance offers for settlement, requesting a breakdown of the offer and then failing or refusing to respond to it in any way at all;
- the non-compliance of the Respondent with the Commission's directions in filing its materials for the arbitration late;
- the short notice by the Respondent of its intention to press its jurisdictional objection;
- the complete silence of the Respondent about its asserted jurisdictional objection until two days before the scheduled date for the arbitration of the unfair dismissal claim.

40 At first instance the Senior Deputy President considered each of the claims as a stand alone issue. He found as unreasonable the failure to attend the second conciliation and the late lodgement of materials. He considered the failure of the Respondent to respond to the Appellant's settlement offer and the break up of the offer it had requested as "poor behaviour" and that certain aspects of the way the Respondent approached the conduct of the proceedings were unsatisfactory.

41 In our view the conduct of the Respondent appears to have been, in some respects at least, duplicitous. Until 20 February 2009 the Respondent's claim that it "employs less than 100 employees" was a bare assertion. It was not supported by any particulars or material facts. Meanwhile the Respondent, by not moving for dismissal of the application while actively leading the Appellant to believe that it was interested in settling the matter, was gathering the evidence to make good its claim. From a fair reading of the Appellant's written submission filed in accordance with the Senior Deputy President's directions, these matters might reasonably have been put to the Respondent if there had been a hearing. Alternatively, they are matters that might reasonably have been asserted in written submissions if the parties had been informed that the matter of costs was to be dealt with on the papers. We think his Honour erred in not putting the parties on notice that he intended to determine the matter on the papers without a hearing.

42 The Respondent's conduct in not disclosing to the Appellant between 27 November 2008 and 20 February 2009 that it would press its jurisdictional objection was unfairly prejudicial to the Appellant. More important however is the conduct of the Respondent in not notifying the Appellant immediately following the Senior Deputy President's directions for the arbitration on 5 December 2008 that it wished to press its jurisdictional objection.

43 The directions accompanying the notice of listing for arbitration made no reference to the jurisdictional issue. It required the parties to file responsively their materials in the arbitration of the substantive matter. The Respondent did not comply with the timetable for filing its material. It took no steps until two working days before the arbitration to alert the Appellant to the fact that it maintained its jurisdictional objection. Meanwhile the Appellant had prepared, served and submitted its case for arbitration in accordance with the Senior Deputy President's directions. The Respondent's failure then to comply with the directions for filing and serving its materials effectively deprived the Appellant of any reasonable opportunity to reconsider and properly assess her position in the matter. That such conduct caused the Appellant to incur costs cannot be

disputed. The costs incurred were counsel's professional costs of and incidental to the submissions filed and served in the arbitration and preparation for the hearing.

44 The Appellant also seeks costs in respect of her Counsel's appearance in the arbitration in which the jurisdictional point was determined. The Respondent submits that there is no evidence that the Appellant would not have appeared in jurisdictional hearing on the day fixed for arbitration and accordingly it did not cause any costs to be incurred in respect of the Appellant's appearance on the day of the arbitration. The Appellant did contest the jurisdictional point on the day of the arbitration, arguing that the Commission could not be satisfied that there was no jurisdiction on the evidence upon which the Respondent sought to rely. The Senior Deputy President was against her and that decision has not been challenged.

45 The Appellant's point now seems to be that the matter may never have reached the stage it did if the Respondent had have given some material facts in support of its claims in a timely fashion, either in its notice of appearance or by way of motion. That may well be the case, but it is mere speculation and there are no primary facts upon which such an inference can properly be drawn in relation to it. We are not satisfied that the Respondent's conduct caused the Appellant to incur costs for her Counsel's appearance on the day of the hearing.

46 The question that remains to be addressed is whether the costs that were incurred in relation to the submissions and preparation for the hearing were caused by an unreasonable act or omission by the Respondent? We are satisfied that they were so caused.

47 The Respondent's failure to take steps to inform the Appellant of its intentions immediately after the issue of the notice of listing was either a deliberate or reckless act that could not be regarded as anything other than unreasonable. Alternatively, to the extent that the failure might be regarded as an omission, it was equally unreasonable. That those unreasonable acts or omissions caused the Appellant to incur the costs in connection with the conduct of the proceeding is unquestionable. We are satisfied that the Respondent must be ordered to pay the Appellant's costs of and incidental to the submissions and preparation for arbitration. We allow also the costs on an indemnity basis in respect of the costs application.

48 The Appellant asks that the costs be paid on an indemnity basis. Query whether the Commission has power to award costs on an indemnity basis. Its power to award costs under s 658(3) is discretionary. The discretion is limited to some extent by s 658(9). Section 658(7) makes provision for a schedule of costs to be prescribed. Schedule 7 to the WR Act is just such a schedule. Section 658(9) provides that if a schedule of costs is prescribed the Commission must not award costs in respect of an item appearing in the schedule at a rate or an amount in excess of that item. The amount that may be allowed for counsel is entirely a matter of discretion under the schedule. It would seem therefore that the Commission has discretion to award indemnity costs, sometimes expressed as solicitor and client costs.

49 In *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd*[9] Woodward J dealing with a costs application in the Federal Court of Australia isolated the following principle in relation to indemnity costs:

9 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177.

> Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where "there is some special or unusual feature in the case to justify the court exercising its discretion in that way" (*Preston v Preston* (1982) 1 All ER 41 at 58). It is sometimes said that such costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion - for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties: see *Andrews v Barnes* (1888) 39 Ch D 133; *Forester v Read* (1870) 6 LR Ch App Cases 40; *Christie v Christie* (1873) 8 Ch App Cases 499; *Degmam Pty Ltd (In Liq) v Wright (No 2)* (1983) 2 NSWLR 354.

50 In *Oshlack v Richmond River Council*,[10] Gaudron and Gummow JJ said:

> It may be true in a general sense that costs orders are not made to punish an unsuccessful party. However, in the particular circumstance of a case involving some relevant delinquency on the part of the unsuccessful party, an order is made not for party and party costs but for costs on a "solicitor and client" basis or on an indemnity basis. The result is more fully or adequately to compensate the successful party to the disadvantage of what otherwise would have been the position of the unsuccessful party in the absence of such delinquency on its part.

51 We note that the cases cited above speak in terms of indemnity costs of the successful party. Cases in which a successful party is required to pay the costs of the unsuccessful party are unusual but not unheard of. In *Cretazzo v Lombardi*[11] Bray CJ in the South Australian Supreme Court gives some guidance in this regard:

> It follows, therefore, that there is now jurisdiction to order a successful party, even a wholly successful party and whether plaintiff or defendant, to pay his opponent's costs in part or in whole. Of course, it by no means follows that it would be a judicial exercise of the discretion to do so and it may well be that in many cases it would not, since there must be some reason for departing from the settled practice whereby the successful party receives his costs from his opponent; see *Donald Campbell & Co. v Pollak* [[1927] A.C. 732.], per Viscount Cave L.C., at p. 812.

52 We see no reason to limit the discretion to an award of indemnity costs in favour of a successful party only. Moreover, where there is a statutory power to award costs to an unsuccessful party, as there is in s 653 of the WR Act, there is no limit on the discretion in that way. It seems almost axiomatic that an unreasonable act or omission that causes a party to incur costs in a proceeding should be regarded as "some relevant delinquency". In any event we are satisfied that the act of the Respondent in the conduct of the proceeding and, more particularly, in the period between 5 December 2008 and 20 February 2009 was high handed[12] and reckless to the consequences for the Appellant. Accordingly the relevant costs will be awarded on an indemnity basis.

53 The Appellant also seeks an order for costs in respect of the appeal and a Costs Certificate under s 7 of the *Federal Proceedings (Costs) Act 1981* (Cth) (Costs Act). The application for costs of the appeal is made under s 658(2), (3) and s 10(e) of the WR Act. We are not satisfied that there is any proper foundation for an order for costs in respect of the appeal and the Appellant's

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10 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [44].

11 *Cretazzo v Lombardi* (1975) 13 SASR 4 at 11.

12 See *Australian Guarantee Corporation Ltd v De Jager* [1984] VR 483 at 502.

application in that regard is dismissed. Section 7 of the Costs Act provides for costs certificates in respect of "Federal appeals". Section 3 of the Costs Act defines "Federal appeals" in terms of the forums in which appeals may be heard. The definition includes Federal courts and other courts exercising federal jurisdiction. Appeals in the Australian Industrial Relations Commission are not included. Accordingly, the Commission has no power or authority to issue a costs certificate and the application in that regard is refused.

Conclusion

54 We grant leave to appeal. We allow the appeal in part and quash the decision of Senior Deputy President Hamberger. We will order that the Respondent pay to the Appellant indemnity costs of the attendance of counsel at the conciliation on 5 November 2008 ($825) and the indemnity costs of and incidental to the submissions ($1,100) and preparation for the arbitration of the substantive application listed for hearing on 24 February 2009 ($1,100). We also allow the indemnity costs in respect of the costs application ($962.50). An order to those effects will issue separately.

Orders accordingly

DR RJ DESIATNIK