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WELCOME TO : Hamish Granger, Solicitor & Wade Butterworth, Law Graduate

This weeks Article by Hamish Granger : **Costs in the Fair Work Commission**

The Fair Work Commission (FWC) is considered to be a 'no costs jurisdiction' meaning the general rule is that the parties must bear their own costs, as is contained in section 611(1) of the *Fair Work Act 2009* (the Act). There are however limited circumstances in which the FWC may depart from this general rule and order costs against a party if the proceedings have been commenced vexatiously or without reasonable prospects of success (see 611(2) of the Act).

When are cost orders made

In a recent decision heard by the FWC, Commissioner Hunt recognised that costs orders in proceedings under the Act are very rare and should be approached with caution.[1] The purpose of the cost provisions contained in the Act are to free parties from the risk of having to pay their opponents' costs, while at the same time, protecting those parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause.[2] Even if the FWC finds that proceedings were initiated vexatiously or without cause, the FWC retains a discretion as to the extent or at all, of any costs order.[3]

The meaning of 'vexatiously' and 'without reasonable cause'

The Full Bench of the FWC determined that the question of whether an application is made vexatiously looks to the motive of the applicant in making the application.[4] The FWC concluded that an application will be deemed as vexatious where the predominant purpose is to harass or embarrass the other party or to gain a collateral advantage.

In determining whether an application is vexatious, the FWC may have regard to factors such as whether the proceedings are seriously or unfairly burdensome, prejudicial or damaging.[5] Again, the decision to order costs is discretionary and a discretion which the FWC will only exercise in clear cut cases.

An application will also not be deemed as being without reasonable cause merely because the case proves unsuccessful. The FWC will ask itself not whether the application might have been successful, but whether the application should have been made.[6] Without reasonable cause means the application is so obviously untenable that it cannot possible and is manifestly groundless.[7] It should therefore be quite apparent to the applicant that the application had no reasonable prospects of success and that the application should never have been lodged.

Takeaways

The decisions of the FWC serve as a lesson to those seeking to bring a case against their employer to always first consult a lawyer to assess the merits of the application before commencing proceedings. This can affect the award of costs by the FWC and ensures that you do not incur any unnecessary costs in your pursuit of justice.

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[1] *Kelie Smith v Melissa Eileen Horvat t/a Palena Fresh* [2020] FWC 5783 at [61] – [62].
[2] *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* (2013) 232 FCR 428 at 430-431.
[3] *Eghlima and another v Winco Systems Pty Ltd* [2013] FWC 2351 at [44].
[4] *Church v Eastern Health t/a Eastern Health Great Health and Wellbeing* [2014] FWCFB 810.
[5] *Hamilton v Oades* (1989) 166 CLR 486 at 502 as per Deane and Gaudron JJ.
[6] *J-Corp Pty Limited v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1993) 46 IR 301 per French J.
[7] *Keep v Performance Automobiles* [2015] FWCFC 1956