



## Précis Paper

### Costs orders in Fair Work Act matters

A discussion about costs in employment matters and in particular, the operation of section 570 of the *Fair Work Act* 2009 (Cth).

#### **Discussion Includes**

- Rationale behind Section 570
- When can a costs order be granted?
- Reasonableness
- Tips

## Précis Paper

### Costs orders in Fair Work Act matters

1. In this edition of BenchTV, Marc McKechnie (Barrister, Murray Gleeson Chambers, Queensland) and Stephen Mackie (Barrister, Queensland Bar, Queensland) discuss costs in employment matters and in particular, the operation of section 570 of the *Fair Work Act* 2009 (Cth).

#### Rationale behind Section 570

2. Section 570 of the *Fair Work Act* 2009 (Cth) deals with the costs that the Federal Court or Federal Circuit Court can make in matters related to the *Fair Work Act* 2009 (Cth).
3. The default is that there are no costs in *Fair Work Act* 2009 (Cth) matters unless one party has started proceedings vexatiously or without reasonable cause, engaged in some unreasonable act or omissions which have caused the other party to incur costs or a party has refused to engage with the matter when it was before the Fair Work Commission.
4. The rationale was to make the industrial sphere less legalistic and to be accessible to people who cannot afford legal assistance.
5. Whether or not section 570 is effective has been a topic that has been debated for a long time. Section 570 means that an employee that has been unfairly treated who wants to hire a lawyer, may find it difficult to financially break even. This makes section 570 a disincentive for an employee to get legal representation.
6. From an employer's perspective, a common criticism is that if there are no costs orders there is no disincentive to bring futile claims.
7. However, section 570 provides some basis for the court to grant a costs order in extreme circumstances.

#### When can a costs order be granted?

8. The case of *Tamu v World Vision Australia (No 2)* [2021] FCA 565 is a recent example of where the Federal Court has awarded costs against a self-represented litigant in a matter concerning the *Fair Work Act*.
9. It concerned an application for leave to appeal from a decision of the Federal Circuit Court. The primary dispute between Mr Tamu and World Vision was an adverse action matter that was commenced properly and was being case managed by Judge Jarrett in the Federal Circuit Court in Brisbane.
10. Mr Tamu's pleading had a number of deficiencies in it. World Vision applied to have that pleading struck out. Judge Jarrett in his interlocutory decision struck out that pleading

and granted leave to Mr Tamu to replead. Mr Tamu repleaded but also filed an application for leave to appeal from Judge Jarrett's decision regardless.

11. In the meantime, the matter came before Judge Jarrett again for case management and Judge Jarrett made some fairly simple case management orders effectively staying the Federal Circuit Court matter until such time as the Federal Court had ruled on the matter regarding the application for leave to appeal. Mr Tamu then applied for leave to appeal that case management decision as well.
12. These two applications came before Justice Rangiah of the Federal Court in Brisbane.
13. Justice Rangiah dismissed both applications fairly quickly on the basis that there were no prospects of success, there was no basis to challenge the correctness of Justice Jarrett's decisions and those decisions being interlocutory in nature, there was no impact or interference with Mr Tamu's substantive rights that would arise from those decisions.
14. World Vision sought costs on an indemnity basis against Mr Tamu and was successful in obtaining costs only on a standard basis.
15. In that decision, Justice Rangiah found that both Subsection 570(2)(a) and (b) of the *Fair Work Act 2009* (Cth) both applied. Subsection 570(2)(a) relates to instituting proceedings vexatiously or without reasonable care and 2(b) relates to the unreasonable act or omission incurring costs.
16. His Honour placed particular emphasis on the fact that his Honour had warned Mr Tamu at the first case management that he thought the proceedings were a waste of time and that the solicitors for World Vision had followed that up with their own warning in open correspondence with costs as a shadow consequence
17. At paragraph 24 of the decision, His Honour highlighted Mr Tamu ignoring that warning as an unreasonable act that has caused costs to be incurred.
18. In the decision of *Sabapathy v Jetstar Airways (No 2)* 2021 FCAC 68, which involved a Full Court handing down a costs order, there was a call upon all practitioners to follow section 37N of the *Federal Court Act 1976* (Cth) which dictates the obligations of parties to cooperate with obligations of the Court to ensure that matters are conducted in a way to minimise unnecessary costs and delays.
19. These two cases are both leave to appeal interlocutory decision cases therefore they are confined in terms of the issues that are going to be determined. as the law is very settled and as a result, they are apt to be decided in accordance with 570(2)(A).
20. In terms of broader proceedings, particularly adverse action proceedings, it is much harder to say that at the start of proceedings, before any evidence has been gathered or heard, that the proceedings should have been stopped at an earlier date or not commenced at all.

## Reasonableness

21. In the decision in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 3)* [2017] FCA 810, the judge pointed out that unreasonableness for the purposes of 570(2)(b) of the *Fair Work Act 2009* (Cth) is not negligence nor inefficiency. It has to be unreasonable; it has to be something more than just a bad idea, particularly in retrospect. Rejecting an offer may be unwise depending on how the matter turned out, particularly where a decision is based on a finding of fact, a credit issue or a contestable proposition of law, it would be hard to show that rejecting the offer was unreasonable.
22. Whilst this is easier in hindsight, based on the evidence of the affidavits and the provisions of the *Fair Work Act*, it is often not that difficult to figure out if there is a claim, a potential claim or no claim at all or what the maximum recovery might be.
23. *Group Properties* also is useful as if you are bringing an application under section 570(2)(b), it sets out a three step process for those sorts of applications.
  - a. First, the Court has to be satisfied that there was an unreasonable act or omission, focusing on there being an objectively unreasonable act, not just negligence.
  - b. Second, it has to be satisfied that the unreasonable act caused costs to be incurred
  - c. Third, even if the court is satisfied that section 570(2)(b) is made out, it has a discretion whether to award costs or not
24. It emphasises the need, if you are not in a Tumu or Sabapathy situation, you need to find a crystallised point in time to find the point where it was unreasonable and everything that followed from that point, we have incurred costs because of that unreasonable behaviour.

## Tips

25. If you are looking at bringing one of these applications, it is not good enough to say that the other party was unreasonable, you need specifics; what was it and how did it cause your costs
26. It is also worthwhile checking, if you are bringing an application for costs, the section you are proceeding under. Section 570 of the *Fair Work Act 2009* (Cth) is the one that applies to the Federal and the Federal Circuit Court. If you are proceeding under the *Fair Work Act* in the Fair Work Commission, there are different provisions depending on what type the application is.
27. If you have to appeal a costs decision, it is technically an interlocutory decision. The natural assumption is that it is the final decision, however it is interlocutory. As it is interlocutory you need to file an application for leave within 14 days. This is in contrast to an application to appeal which is to be filed within 21 days.

## **BIOGRAPHY**

### Marc McKechnie

Barrister, Murray Gleeson Chambers, Queensland

Mr McKechnie practices in the following areas of law – administrative law, appellate, banking, finance, building, construction, bankruptcy, insolvency, commercial, contract, equity, employment, native title and regulatory prosecution. Prior to becoming a Barrister, he worked as a Senior Associate at Ashurst.

### Stephen Mackie

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Mr Mackie predominantly practices in employment/industrial law. Prior to becoming a Barrister, he worked as a Senior Associate at Norton Rose Fulbright.

## References

### Legislation

*Fair Work Act 2009* (Cth)

*Federal Court Act 1976* (Cth)

### Cases

*Tamu v World Vision Australia (No 2)* [2021] FCA 565

*Sabapathy v Jetstar Airways (No 2)* 2021 FCAC 68

*Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 3)* [2017] FCA 810