The ‘litigious lottery’

Costs orders in employment litigation

The litigation landscape is littered with the wreckage of unforeseeable events and unexpected circumstances.[1]

‘IT’S NICE TO DREAM SOMETIMES’, BY MARK OU

Costs, it might be said, are an *unsexy* topic. Amidst the cut and thrust of high stakes litigation, questions of costs can be easily overlooked. Yet that does not diminish their importance. Many a courtroom victory has been soured by an unfavourable costs order.

In the employment context, costs take on additional importance. The financial stakes in employment disputes are often lower than in commercial litigation, such that costs can quickly surpass any damages awarded. Almost all employment grievances involve at least one individual party, who ordinarily will be far less able to absorb an adverse costs order than a corporate litigator. The diverse variety of costs regimes governing workplace-related litigation, which in turn often have complex and uncertain exceptions, only amplifies the necessity for employment lawyers to be attuned to the law in this area.

The following article intends to provide practitioners with an accessible guide to costs in employment disputes. It will begin by considering the costs protections offered by the *Fair Work Act 2009* (Cth) and *Public Interest Disclosure Act 2013* (Cth), before identifying other prominent employment-related claims which lack beneficial costs regimes. It then concludes by highlighting an important yet often overlooked issue — the application of inconsistent costs regimes to litigation where multiple causes of actions are pleaded.

Fair Work Act

The general position in disputes under the *Fair Work Act*, which account for the bulk of employment litigation, is that parties bear their own costs. Thus, in unfair dismissal and general protection claims, among others, the costs result is the same — win, lose or draw. This default position gives effect to a desirable policy objective: encouraging the resolution of employment disputes in a cheap and efficient manner. When neither party can be awarded costs, there is — in most circumstances — a common interest in avoiding protracted litigation.

Although there are nuances to the costs treatment of different sections of the *Fair Work Act*, and slight deviations depending on the chosen forum (whether the Fair Work Commission or a court exercising federal jurisdiction), generally the exceptions to this no costs principle are limited to three.

Firstly, when a party institutes proceedings vexatiously or without reasonable cause, adverse costs orders can be made.

Secondly, when an unreasonable act or omission of a party causes the other party to incur costs, orders can be made for those particular costs.

Thirdly, if a party has unreasonably refused to participate in a matter before the Fair Work Commission, and court proceedings arise on the same facts, adverse costs may be awarded in those proceedings.[2]

Judicial or Fair Work Commission utilisation of these exceptions is a ‘rare event’.[3] The relevant provisions will not necessarily be engaged merely because a party ‘does not conduct litigation efficiently’, ‘may have acted in a different or timelier fashion’ or ‘has adopted a genuine but misguided approach.’[4] However, in recent cases the refusal to accept a reasonable settlement offer, the making of baseless assertions and the pursuit of an appeal with no prospects all satisfied the exception.[5]

In a nasty surprise for inattentive solicitors, the *Fair Work Act* also permits the Fair Work Commission to enter costs orders against lawyers in certain circumstances.[6]

As the legislation’s Explanatory Memorandum elaborates, ‘these provisions are designed to deter lawyers and paid agents from encouraging others to make speculative applications, or make applications they know have no reasonable prospects of success.’[7] However, in light of the high threshold which must be met before the general principle is overcome, a lawyer’s conduct must be fairly egregious to warrant a costs order.

While at times the *Fair Work Act*’s no costs jurisdiction can make addressing a workplace wrong financially unpalatable, the legislation does provide a round-about way to partially recover costs in some instances. Civil penalty orders can be made at the court’s discretion, and on application these can be paid to the successful party (rather than to the Commonwealth).[8] In *Sayed v CFMEU* the Federal Court indicated that this power was ‘ordinarily to be exercised by awarding any penalty to the successful applicant’.[9]

Public Interest Disclosure Act

Introduced in 2013, the *Public Interest Disclosure Act* provides protection to Commonwealth government whistleblowers. It offers both a shield and a sword: it is an offence to cause detriment to an individual because that person made a public interest disclosure, and where such a ‘reprisal’ occurs the discloser can seek compensation in the federal courts.

The scheme has proven popular, with 639 disclosures made in 2014/15 on matters ranging from maladministration, abuse of public office, wastage of resources and the contravention of a Commonwealth law. As these disclosures often arise in the context of a workplace dispute, the legislation has become an additional spanner in the employment lawyer’s toolbox.

While no litigation arising from the *Public Interest Disclosure Act* has yet been reported, the scheme offers an unusually generous form of costs protection. Section 18 provides that the applicant can only be ordered to pay costs if they instituted proceedings vexatiously or without reasonable cause, or their unreasonable act or omission caused the other party to incur costs. However, the wording of the section does not extend such protection to the respondent/s.

FEATURES . EMPLOYMENT LAW

The litigious lottery may be inescapably chancy, but being alert to costs can improve the odds.

This interpretation was confirmed by the Explanatory Memorandum: 'For a respondent party, it is intended that the [Court] could exercise its ordinary jurisdiction to award costs, which could include that a respondent party pay the costs of an applicant party if the respondent party is unsuccessful in defending the claim against it.'[10]

Applicants litigating under the *Public Interest Disclosure Act* thus get the best of both worlds. They are protected from adverse costs orders if they lose, but can seek costs from the respondent if they win.

Were such a costs scheme to be replicated in a private sector equivalent of the statute, which has been on the legislative agenda for some time now without progress, companies would have every right to fear the prospect of expensive whistleblower lawsuits.

General employment litigation

The above exceptions aside, employment disputes are governed by the same principle applicable to general litigation: subject to the court's discretion, the 'loser pays'.[11] Accordingly, common law employment claims such as breach of contract operate in adverse costs jurisdictions and the risk attending to such actions can be considerable — costs often escalate far beyond the sum in dispute.

Several frequently litigated employment-related statutes proceed on the same basis. Claims of discrimination in its various forms are ordinarily brought under the *Australian Human Rights Commission Act 1986* (Cth), which makes no provision for costs protection. Discrimination claims must initially be conciliated by the Australian Human Rights Commission, and since that step must occur before proceedings can be commenced, it is arguable that costs so incurred are also recoverable.

The conciliation is a condition precedent of the litigation process, and as G E Dal Pont observes in his *Law of Costs*:

> "The costs of a party allowable on a taxation as between party and party are not necessarily limited to costs incurred once the writ is issued. The test remains … whether the costs in question are necessary or proper for the attainment of justice, and circumstances may arise where costs meeting this description are incurred prior to the proceedings being formally instituted."

Another common site of employment litigation — claims for sexual harassment under the *Sex Discrimination Act 1984* (Cth) — similarly offers no costs protections. The well-known case of *Richardson v Oracle*, in its initial iteration, provides a cautionary tale. The applicant had been sexually harassed by a colleague, and Oracle was found vicariously liable. Justice Buchanan ordered Oracle to pay $18,000 in damages,[12] but awarded them indemnity costs from mid-litigation onward because they had made an offer of compromise above the amount ultimately awarded. As Justice Buchanan conceded:

> "the final outcome of these proceedings … will probably be devastating for Ms Richardson both financially and personally. Although the findings made in the earlier judgment provide public vindication of her position, she will remain solely responsible for the payment of the bulk of her own legal costs and obliged to pay a high proportion of the legal costs of the respondents. That will be a very high price to pay for her victory."[13]

Ultimately Ms Richardson succeeded on appeal, with a landmark judgment awarding her $130,000 in damages.[14] A second decision then found Oracle liable for Ms Richardson's costs on an indemnity basis from mid-litigation onward.[15]

Yet the underlying message from Justice Buchanan remains valid — the costs consequences of employment litigation in an adverse costs jurisdiction can be devastating, particularly where an offer of compromise or *Calderbank* offer has been made and refused.[16]

'Blended' litigation

Questions of costs become more complex when multiple causes of actions are pleaded in the same proceedings — which for present purposes we might describe as 'blended' litigation. For example, say an action is commenced in the Federal Court, claiming adverse action under the *Fair Work Act*, sexual harassment under the *Sex Discrimination Act* and breach of contract. While the *Fair Work Act* ordinarily prohibits the awarding of costs, the *Sex Discrimination Act* and the common law of contract do not. Which costs regime applies?

Until recently this question was clouded by uncertainty and 'conflicting lines of authority.'[17] In *Goldman Sachs JBWere Services Pty Ltd v Nikolich*, Justice Jessup held that 'the [statutory] prohibition on costs … extended to every part of a proceeding whose statutory basis was [the relevant section], including claims in the accrued jurisdiction which, save for being part of a single "matter" in the constitutional sense, were unrelated to rights and obligation under federal statutory law.'[18]

Conversely, in *CFMEU v Director of the Fair Work Building Inspectorate (No 2)*, Justices North, Logan and Robertson sought to construe two statutory regimes with differing costs regimes "to produce a harmonious legal meaning to the provisions claimed to conflict".[19] They thus allowed one half of the appellants' total costs, ordering no costs for a claim brought under the *Fair Work Act*'s predecessor but permitting costs for the claim involving another legislative scheme.[20]

Last year, the Full Bench of the Federal Court resolved this divergence. In *Melbourne Stadiums Ltd v Sautner*, where the proceedings involved *Fair Work Act* and common law claims, Justices Tracey, Gilmour, Jagot and Beach preferred the *Nikolich* approach. As "[t]here is only one proceeding before the Court … it is impossible to split the claims" and as a result the *Fair Work Act* 'operated to preclude the Court from ordering [the respondent] to pay any costs'.[21]

The resolution of this uncertainty has considerable ramifications for prospective litigants. Where the dispute has a *Fair Work Act* dimension, those costs protections cover the entirety of the proceedings (except, perhaps, where the *Fair Work Act* claim is obviously hopeless and only pleaded to seek the costs benefit). While at first glance this may seem beneficial for the applicant, the legislation's equal application to all parties makes the cost regime a double-edged sword. An applicant with a strong action in contract might thus be better served by bypassing *Fair Work Act* claims, and thus preserving entitlements to costs. Yet an aggrieved employee seeking compensation for sexual harassment, with uncertain prospects, might hedge their bets with a *Fair Work Act* general protections claim to minimise the financial consequences of an unfavourable decision.

Conclusion

The employment law landscape is complicated by divergent costs regimes applicable to different causes of actions. Given the strategic and practical implications of the presence (or otherwise) of costs protections, it is incumbent on lawyers to stay informed about the costs consequences of decisions made in the course of litigation. A failure to do so could prove costly for the client and, in rare circumstances, even the lawyer themselves.

The 'litigious lottery' may, to quote the New South Wales Court of Appeal, be 'inescapably chancy'.[22] Being alert to costs is one small but important way to improve the odds.

John Wilson

MANAGING LEGAL DIRECTOR, BRADLEY ALLEN LOVE

Kieran Pender

LAW CLERK, BRADLEY ALLEN LOVE

Endnotes

1. *Richardson v Oracle Corporation of Australia Pty Ltd (No 2)* [2014] FCAFC 139 (27 October 2014) [12] (Kenny, Besanko and Perram JJ).

2. See, eg, *Fair Work Act 2009* s 570.

3. *Muzzicato v New Aged Cleaning Services Pty Ltd* [2011] FMCA 1044 (1 December 2011) [13] (O'Dwyer FM).

4. *Rentuza v Westside Auto Wholesale* [2009] FMCA 1022 (21 October 2009) [28] (Lucev FM).

5. See, eg, *Mifsud v Veolia Transport Sydney Pty Ltd* [2012] FMCA 167 (29 March 2012) (but see *Veolia Transport Sydney Pty Ltd v Mifsud* [2012] FCA 1472 (21 December 2012)); *Kavassilas v Migration Training Australia Pty Ltd (No.2)* [2012] FMCA 208 (29 March 2012); *Post v NTI Limited* [2016] FWC 1059 (4 March 2016).

6. *Fair Work Act 2009* ss 376, 401.

7. Explanatory Memorandum, *Fair Work Act 2009* (Cth) 239.

8. *Fair Work Act 2009* s 546(3)(c).

9. *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 (22 January 2016) [101] (Tracey, Barker And Katzmann JJ)

10. Revised Explanatory Memorandum, *Public Interest Disclosure Act 2013* (Cth) 10.

11. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2003) 3.

12. *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 (20 February 2013).

13. *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* [2013] FCA 359 (19 April 2013) [51].

14. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014)

15. *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* [2014] FCAFC 139 (27 October 2014).

16. See, eg, *Federal Court Rules 2011* (Cth) r 25.14.

17. *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 (26 February 2015) [153] (Tracey, Gilmour, Jagot and Beach JJ).

18. [2007] FCAFC 120 (7 August 2007) [380] ('*Nikolich*').

19. [2013] FCAFC 25 (8 March 2013) [61], quoting Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011).

20. [2013] FCAFC 25 (8 March 2013) [72]

21. [2015] FCAFC 20 (26 February 2015) [156]–[157], quoting *Geneff v Peterson* (1986) 19 IR 40, 90 (Gray J).

22. *Maitland Hospital v Fisher [No 2]* (1992) 27 NSWLR 721, 725 (Kirby P, Mahoney JA and Samuels A-JA).