The ‘litigious lottery’
Costs orders in employment litigation

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

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 in comparison to 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 costs regimes governing workplace-related 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 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’.2 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’. 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.3

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.4

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.”5 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 roundabout 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).6

In Saaved v CFMEU the Federal Court indicated that this power was ‘ordinarily to be exercised by avoiding any penalty to the successful applicant’.7

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 690 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.
This interpretation was confirmed by the Explanatory Memorandum: ‘For a respondent if they win, they will have every right to be paid the costs of an applicant party 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 principles applicable to general litigation: subject to the court’s discretion, the ‘loser pays’. 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 to the litigation process, and as G E Dal Pont observed in his Law of Costs: “The costs of a party allowable on a taxation as between party and party basis is 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) — do not provide for any costs protections. The well-known case of Richardson v Orsco, 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, 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 devasting 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.”

Ultimately Ms Richardson succeeded on appeal, with a landmark judgment awarding her $150,000 in damages. A second decision found Oracle liable for Ms Richardson’s costs on an indemnity basis from mid-litigation onward. Yet the underlying message from Justice Buchanan remains valid — the costs consequences of an adverse costs jurisdiction can be devastating, particularly where an offer of compromise is made, and offer has been made and refused.

‘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. What costs regime applies?

Until recently this question was clouded by uncertainty and ‘conflicting lines of authority’. 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 accused jurisdiction which, save for being part of a single “matter” in the constitutional sense, were unrelated to rights and obligation under federal statutory law.”

Conversely, in CFMEU v Director of the Department of Building and Housing (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.” They thus allowed one of the applicants’ total costs, ordering no costs for a claim brought under the Fair Work Act’s provisions but permitting costs for the claim involving another legislative scheme.

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.”

The resolution of this uncertainty has considerable ramifications for prospective litigants. Where the dispute involves the 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 conclusion.

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’. Being alert to costs is one small but important way to improve the odds.

John Wilson
MANAGING LEGAL DIRECTOR, BRADLEY ALLEN LOVE

Endnotes

1. Richardson v Oracle Corporation of Australia Pty Ltd (No 2) [2014] FCA 394 (27 October 2014) [101] (Buchanan, White and Penna JJ).
2. See, eg, Fair Work Act 2009 s 279.
5. See, eg, Muzzicato v New Aged Cleaning Services Pty Ltd [2011] FCA 102 (20 February 2011) [28] (Lucev FM).
6. See, eg, Richardson v Oracle Corporation of Australia Pty Ltd (No 2) [2014] FCA 394 (27 October 2014) [101] (Buchanan JJ).
12. Nikolich v Fair Work Building Inspectorate (No 2) [2014] FCAFC 139 (27 October 2014) [61].

14. Nikolich v Oracle Corporation Australia Pty Ltd (No 4) [2015] FCA 1189 (31 December 2015) [61].
15. Richardson v Oracle Corporation Australia Pty Ltd (No 2) [2014] FCA 394 (27 October 2014) [101] (Buchanan, White and Penna JJ).
16. See, eg, Federal Court Rules 2013 (Cth) r 7.34.
17. Richardson v Oracle Corporation Australia Pty Ltd (No 1) [2014] FCA 101 (20 February 2014) [79] (Tracey, Gilmour, Jagot and Beach JJ).