DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Eptesam Al Bankani
v
Western Sydney Migrant Resource Centre Ltd
(U2022/2111)

DEPUTY PRESIDENT EASTON SYDNEY, 3 DECEMBER 2024

Application for unfair dismissal remedy – application for costs – Calderbank offer made prior to hearing – alleged unreasonable conduct in failing to accept an offer of settlement – application of Calderbank principles to unfair dismissal proceedings – settlement offers made by both parties – respondent did not engaged in unreasonable conduct – costs application rejected.

[1] Ms Eptesam Al Bankani was successful in her unfair dismissal claim against Western Sydney Migrant Resource Centre Ltd, as recorded in my earlier decision: *Eptesam Al Bankani v Western Sydney Migrant Resource Centre Ltd* [2023] FWC 557. Ms Al Bankani has applied for an order that WSMRC pay $20,000 in costs.

[2] Before the original application was heard the parties exchanged without prejudice settlement offers. Ms Al Bankani's best (lowest) offer made shortly before the first day of hearing was either 12 weeks' pay to settle the unfair dismissal claim or 24 weeks' pay to settle both the unfair dismissal claim and an underpayment claim that Ms Al Bankani had commenced in the Federal Circuit and Family Court.

[3] Ms Al Bankani's offer was rejected, the matter was heard and I found that Ms Al Bankani had been unfairly dismissed. I ordered WSMRC to reinstate Ms Al Bankani and to pay her 75% of her lost remuneration – which was a result significantly greater than Ms Al Bankani's offer of 12 weeks' pay.

[4] Ms Al Bankani has applied for an order for costs and relies on s.400A of the *Fair Work Act 2009* (the **FW Act**). Ms Al Bankani also relies heavily on *Calderbank v Calderbank* principles.

[5] For the reasons that follow I have decided not to award costs.

Brief history of settlement negotiations

[6] One month before the hearing WSMRC offered 10 weeks' pay to settle the unfair dismissal claim. This offer was rejected and Ms Al Bankani made a counter offer of 16 weeks' pay to settle unfair dismissal claim. This offer was met with a "request" from WSMRC's solicitors in the following terms:

> "… To enable our client to consider your client's offer to resolve the Proceedings for (amongst other things) 16 weeks' pay, our client requires confirmation as to why it is said that your client will receive a more favourable result than the Further Offer at Hearing."

[7] At best this "request" was puerile, at worst it was an attempt to bleed Ms Al Bankani's costs. Both parties were legally represented and, by the time of this request, both parties had filed their evidence and submissions. Fortunately Ms Al Bankani's solicitor's response was appropriately brief, viz:

> "As we trust you can appreciate, we are not in the business of justifying modest settlement offers, particularly when
> 1. Reinstatement is the primary remedy under the FW Act
> 2. When your client's conduct appears to be vulnerable to criticism and
> 3. before the matter has progressed to hearing.
>
> Thanks."

[8] Negotiations then appeared to stall for several weeks before Ms Al Bankani's solicitors tried again to revive discussions. Quite reasonably Ms Al Bankani did not bid against herself. In a phone call between solicitors her offer of 16 weeks' to settle the unfair dismissal claim was restated. The phone call seems to have ended suddenly, which caused Ms Al Bankani's solicitors to write to WSMRC's solicitors in terms including the following:

> "… I will assume that you accidentally hung up on me today. Or perhaps there was a bad connection.
>
> We confirm we put in an offer of 16 weeks pay (et cetera) and you rejected it and did not provide a further offer despite being encouraged to do so.
>
> Anyway we await your client's offer – particularly as we are all wise enough to know that parties do not typically bid against their own offers…"

[9] The next day, being two working days before the hearing was due to commence, WSMRC's solicitors wrote to Ms Al Bankani's solicitors reminding them that the unfair dismissal claim was "hopeless", that the claims made by Ms Al Bankani in her underpayment claim were not genuine and that no more than $3500 was recoverable in those proceedings "at best". WSMRC made a "global" offer of settlement "on a commercial basis only" of 16 weeks' pay to settle both the unfair dismissal and the underpayment claim.

[10] On the last business day before the hearing commenced, Ms Al Bankani made a final offer as described above, being either 12 weeks' pay to settle the unfair dismissal claim or 24 weeks' pay to settle both the unfair dismissal claim and the underpayment claim.

[11] There were other settlement terms in the parties' offers but they are not material to the costs application.

[12] Ms Al Bankani was a refugee with a traumatic history (known to the parties because it was detailed in her filed evidence), she was dismissed from her work of providing specialised and intensive services to support other refugees classified by the Commonwealth as having high or complex needs, and assessed objectively the reasons for her dismissal were somewhat flimsy. Ms Al Bankani was so shocked and upset on the day she was told of her dismissal that someone called the police to attend Ms Al Bankani's home to do a welfare check.

[13] The attempts to bludgeon Ms Al Bankani's case by hostile lawyer letters in the weeks before the hearing was unproductive. Fortunately for Ms Al Bankani, her solicitors did not waste her legal fees by responding in kind.

The costs provisions of the FW Act

[14] Ms Al Bankani's costs application relies on s.400A of the FW Act:

> **"400A Costs orders against parties**
>
> (1) The FWC may make an order for costs against a party to a matter arising under this Part (the first party) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.
>
> (2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.
>
> (3) This section does not limit the FWC's power to order costs under section 611."

[15] The following general principles are well established in the authorities:

(a) in the ordinary course of litigation costs follow the event. The purpose of a costs order is not to punish the unsuccessful party but to compensate the successful party against the expense to which he or she has been put by reason of the legal proceedings (per *Latoudis v Casey* [1990] HCA 59 at [13], (1990) 170 CLR 534 at 543);

(b) in the ordinary course of litigation under the FW Act, costs do not follow the event, and each party bears their own costs. The purpose or policy of the cost provisions in the FW Act are to free parties from the risk of having to pay their opponents' costs in matters arising under the Act, while at the same time protecting parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause (per *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 at [7], (2013) 232 FCR 428 citing *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109);

(c) to the extent that the cost provisions of the FW Act provide a protection against costs orders, that protection can be lost by certain conduct (per *Kangan Batman Institute of Technology and Further Education v AIRC* [2006] FCAFC 199 at [60], (2006) 160 IR 405 at 419);
(d) the costs provisions provide a deterrent against unreasonable conduct during proceedings, discourage frivolous and speculative claims and assist in the efficient resolution of claims by encouraging all parties to approach proceedings in a reasonable manner (per the Explanatory Memorandum to the Fair Work Amendment Bill 2012, p7); and
(e) there is a need to scrutinise the manner in which proceedings under the FW Act are conducted to ensure that costs are not unreasonably incurred and that the public interest in the orderly and cost-effective administration of justice is not too readily placed to one side (per *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [315]).

[16] Section 400A applies to unfair dismissal claims in the Commission. Section 400A is concerned with unreasonable acts or omissions in connection with the conduct or continuation of a matter already instituted, not whether it was reasonable to have instituted a matter in the first place. The following principles apply in relation to s.400A:

(a) There are two pre-conditions for the making of a costs order. Firstly that a party engaged in an unreasonable act or omission in relation to the conduct or continuation of a matter; and secondly that the act or omission caused the other party to the matter to incur costs (per *Gugiatti, v SolarisCare Foundation Ltd* [2016] FWCFB 2478 at [43]);
(b) whether an act is "unreasonable" is informed by its context and requires an evaluative assessment of all the circumstances (per *Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222 at 171, (2017) 274 IR 420);
(c) the continuation of a matter after arbitration has commenced might be an unreasonable act if, on the facts apparent to the applicant at the relevant time, there was no substantial prospect of success (per *Tracey* at [24]); and
(d) if the requirements of s.400A are satisfied, the awarding costs is nonetheless discretionary.

Al Bankani's Cost claim

[17] Ms Al Bankani submitted that her final offer was a significant compromise made to WSMRC and WSMRC's failure to accept the offer of settlement represents an unreasonable act or omission which caused Ms Al Bankani to incur significant further costs.

[18] Ms Al Bankani said that at the time WSMRC rejected her offer it had sufficient information from the filed evidence and submissions to make an informed assessment of Ms Al Bankani's case. Ms Al Bankani suggested that her offer presented no adverse consequences to WSMRC.

[19] WSMRC's refusal to accept her offer was said to constitute an unreasonable act in the circumstances and was contrary to the principles upheld in *Calderbank v Calderbank*.

[20] Ms Al Bankani submitted that there was a causal link between WSMRC's unreasonable action and the additional costs incurred by Ms Al Bankani – being that Ms Al Bankani incurred the additional legal costs that arose from conducting the hearing.

Respondent's submission on the cost application.

[21] In response WSMRC submitted that the costs application was 'misconceived'. WSMRC made several attempts to settle the matter in the weeks and months before the hearing. WSMRC submitted that its rejection of Ms Al Bankani's final offer was not unreasonable, particularly given that the offer was only made "7 business hours prior to the commencement of the final hearing" and by then WSMRC had already incurred significant legal costs.

[22] WSMRC submitted that it was relevant that Ms Al Bankani's offer was more than WSMRC's counsel's fees and also submitted that it was relevant that WSMRC's final offer of settlement was higher than the figure Ms Al Bankani now claims as costs.

[23] WSMRC submitted that it would be against public interest and out of step to impose a financial penalty on WSMRC for defending the proceedings when there was, on its face, a reasonable basis for it to do so.

[24] WSMRC submitted that it was relevant to the costs application that after WSMRC was ordered to reinstate Ms Al Bankani that she resigned her employment four days before she was due to return to the workplace. In this regard WSMRC submitted that if Ms Al Bankani had not intended to return to work, it was incumbent upon Ms Al Bankani to notify the Commission.

[25] WSMRC submitted that the Commission should find that Ms Al Bankani has not acted reasonably and take her conduct into account in determining the costs application.

[26] WSMRC submitted that there are no special circumstances in the proceedings that warrant the departure from the ordinary course that each party bear their own costs, and that therefore the Costs Application should be dismissed.

Consideration

[27] I accept the possibility that a party's rejection of a settlement offer could be an unreasonable act or omission that could remove the cost protections that otherwise apply under the FW Act. That is not to say that any rejection of a settlement offer could trigger an eligibility for costs.

[28] Ms Al Bankani relied heavily on *Calderbank* principles. This reliance was misplaced.

[29] "Calderbank" offers derive their name from the English Court of Appeal decision in *Calderbank v Calderbank* [1975] 3 WLR 586; [1975] 3 All ER 333. In short, the rejection of a Calderbank offer exposes a party to the risk of an indemnity costs order if the rejected offer is not bettered (for the offeree) by the litigated outcome. In general terms indemnity costs can be ordered when there has been some misconduct or delinquency on the part of the party being ordered to pay costs. The presumed delinquency in rejecting a Calderbank offer is putting the offeror to the expense of continuing the litigation when the offeree could have achieved a better result by accepting the offer. In the present case Ms Al Bankani argued that for WSMRC the offer (12 weeks' pay) was not bettered by the litigated outcome (reinstatement plus more than 12 weeks' backpay) and so it was unreasonable for WSMRC to put Ms Al Bankani to the expense of running her case.

[30] The reliance on *Calderbank* principles is misplaced because it diverts inquiry away from the terms of s.400A. The Commission's only inquiry in an application under s.400A is whether a party "caused those costs to be incurred because of an unreasonable act or omission … in connection with the conduct or continuation of the matter." The rejection of a Calderbank styled offer that is not bettered in the litigated outcome is not assumed to be or even equated with "an unreasonable act or omission" under s.400A.

[31] As the Full Court in observed in *Stratton Finance Pty Limited v Webb* [2014] FCAFC 110 at [80]:

> "Caution should be exercised as to how a Calderbank offer, even a generous one, is viewed in such circumstances. Calderbank letters presuppose what might be called a 'costs jurisdiction', in contrast to the usual rule in FW Act claims. To group together contractual and FW Act claims in an offer may permit the conclusion that the refusal of the offer was unwise, even unreasonable, but it does not follow that such is an unreasonable act or omission, for the purposes of s 570(2)."

[32] Similarly, Justices Bromberg and Charlesworth observed in *Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222 at 165, (2017) 274 IR 420 at 165:

> "In the context of justifying an order for indemnity costs in favour of a person who has made a *Calderbank* offer, the rejection of the offer need not be "plainly unreasonable" and an "especially high standard of unreasonableness" is not to be adopted because that would operate to diminish the effectiveness of the *Calderbank* offer as an incentive to settlement: *Black v Lipovac* [1998] FCA 699 at [218] (Miles, Heerey and Madgwick JJ); *Alexander v Australian Community Pharmacy Authority (No 3)* [2010] FCA 506 at [22] (Bromberg J). Accordingly, in that context the word "unreasonable" may be used synonymously with "imprudent": *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* [2002] FCA 224 at [11] (Weinberg J). It denotes an act which is not guided by or based upon good sense or sound judgment. In the context of the use of the word "unreasonable" in s 570(2)(b), taking into account the underlying purpose of that provision which includes the promotion of access to justice (*Trustee for the MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 at [8] (Siopis, Collier and Katzmann JJ)), a higher standard of unreasonableness is to be adopted. It has been said that the fact that a party has conducted litigation inefficiently or adopted a misguided approach will be relevant to, but not conclusive of, the party having acted unreasonably in a sense relevant to s 570(2)(b): *Hutchinson v Comcare (No 2)* [2017] FCA 370 at [8] (Bromberg J); *Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574 at [29] (Tamberlin, Gyles and Gilmour JJ). The difference in the standards of unreasonableness which are applicable in the two contexts in question needs to be appreciated before the rejection of a reasonable offer of settlement is characterised as an "unreasonable act or omission"

[33] The terms of s.400A of the FW Act are not materially different to the terms of s.570(2)(b) of the FW Act. In *Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No.5)* [2021] FCA 1645 at [6] Justice Lee summarised the principles applied to s.570(2)(b) by the Federal Court:

> "[6] The relevant principles are not in doubt and can be summarised as follows:
>
> …
>
> (2) Subsection 570(2)(b) of the FWA relevantly provides that a "party may be ordered to pay the costs only if ... the Court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs".
>
> (3) The Court has adopted the following principles in connexion with this provision:
>
> (a) a failure to accept a reasonable offer of compromise is capable of constituting an unreasonable act or omission for the purposes of s 570(2) and its predecessors: see *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 317 ALR 665 (at 697 [166] per Tracey, Gilmour, Jagot and Beach JJ);
> (b) "unreasonable" does not equate to "exceptional": *Australian Workers Union v Leighton Contractors Pty Limited* (No 2) [2013] FCAFC 23; (2013) 232 FCR 428 (at 430 [7] per Dowsett, McKerracher and Katzmann JJ); and
> (c) whether an act is "unreasonable" is informed by its context and requires an evaluative assessment of all the circumstances: *Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222; (2017) 256 FCR 306 (at 342 [164] per Bromberg J, and at 344 [171] per Charlesworth J).
>
> (4) In considering whether it is unreasonable for a settlement offer to be rejected, the following matters are should ordinarily be considered:
>
> (a) the stage of the proceeding when the offer was made;
> (b) the time afforded to the offeree to consider the offer;
> (c) the extent of compromise involved;
> (d) the offeree's prospects of success, assessed as at the date of the offer;
> (e) the clarity with which the terms of the offer were expressed; and
> (f) whether the offer foreshadowed an application for indemnity costs in the event of refusal, *Veda Advantage Ltd v Malouf Group Enterprises Pty Ltd (No 2)* [2016] FCA 470; (2016) 118 IPR 156 (at [31] per Katzmann J)."

[34] Drawing from these authorities, there are a number of matters that support a conclusion that WSMRC acted unreasonably in rejecting Ms Al Bankani's final offer. Although WSMRC submitted that the final offer was made "7 business hours prior to the commencement of the final hearing", the offer made at 10:25am on the Friday before the hearing commenced on the following Monday. In this context WSMRC had ample time to consider Ms Al Bankani's offer.

[35] Ms Al Bankani's offer represented a material compromise. At the time the offer was made Ms Al Bankani was seeking reinstatement. The offer of 12 weeks' pay was a significant compromise compared to Ms Al Bankani's stated claim. I do not think it is relevant that Ms Al Bankani later resigned her employment rather than returning to work - WSMRC was not to

know this at the time the offer was made. I am not satisfied that later events are particularly relevant. Before the hearing WSMRC carried a material risk that a reinstatement order could be made. Compared to that risk Ms Al Bankani's offer of 12 weeks' pay was a sizable compromise.

[36] WSMRC's case in the substantive proceedings was weak from the start. WSMRC's solicitors and counsel should have recognised this and advised WSMRC accordingly long before the hearing commenced, in fact long before both parties had incurred the expense of preparing evidence and submissions. There was no evidence led about the information or advice provided to WSMRC at the time that it rejected Ms Al Bankani's final settlement offer.

[37] Hopefully WSMRC received objective advice on its prospects of success at the time, despite the posturing adopted in its correspondence. However I strongly suspect that WSMRC took legal advice and had legal assistance during the dismissal process. The correspondence to Ms Al Bankani before her dismissal, for example, included inane defined terms such as "Dear Ms Al Bankani, We refer to our letter dated 20 January 2022 (**20 January Letter**) … and we acknowledge receipt of your letter dated 28 January 2022 (**Response**)". This letter conveyed a pre-litigious warmth often found in correspondence drafted by lawyers. If I am right about this then it is unlikely that the legal advice to WSMRC after the dismissal was critical of the decision to dismiss Ms Al Bankani or of the process undertaken to effect the dismissal.

[38] Although some offers exchanged between the parties included a component to resolve an underpayment claim, the final offer was clear in its terms.

[39] However there are number of matters that do not support a conclusion that WSMRC acted unreasonably. The final offer relied upon by Ms Al Bankani was made relatively late in the proceedings, being the business day before the hearing commenced. At the time the offer was made WSMRC had already incurred a significant portion of its legal expenses in preparing its evidence and written submissions and preparing for hearing. By this point in time there was very little commercial imperative for WSMRC to fully compromise its case. Even though some of WSMRC's costs would have been saved, a significant amount of costs would have been lost.

[40] More importantly WSMRC made some offers to resolve the matter, including and offer made the day before Ms Al Bankani's final offer. WSMRC's final offer was 16 weeks' pay to settle both the unfair dismissal and the underpayment claim. It is unfortunately a little imprecise to compare the competing final offers. Ms Al Bankani's final offer was expressed as alternate offers: 12 weeks' pay to settle the unfair dismissal claim or 24 weeks' pay to settle the unfair dismissal claim and the underpayment claim. In comparing like for like WSMRC's 16-week offer should be compared to Ms Al Bankani's 24-week offer (so that the release from the underpayment claim is a constant). However this comparison introduces a confounding problem: I would need to make an objective assessment of the strength of the underpayment claim in order to assess whether WSMRC acted unreasonably in rejecting the 24-week offer.

[41] Comparing the 16-week offer to Ms Al Bankani's 12-week offer is obviously just as problematic. Ms Al Bankani does not claim that WSMRC acted unreasonably in making its final offer in a form that included a release from Ms Al Bankani's underpayment claim and nor could such a claim be properly made.

[42] Approximately one month before the hearing WSMRC had offered 10 weeks' pay to resolve the unfair dismissal claim. It is not clear whether WSMRC knew about Ms Al Bankani's underpayment claim at that stage. If Ms Al Bankani's final offer of 12 weeks' pay to settle the unfair dismissal claim was compared to WSMRC's earlier offer 10 weeks' pay to settle the unfair dismissal claim, then it cannot be said that only WSMRC acted unreasonably in failing to reach an agreement to resolve the unfair dismissal claim.

[43] It is not apparent to me how Ms Al Bankani could establish that WSMRC offering only 10 weeks' pay was so unreasonable that the costs provisions are triggered, but if WSMRC had offered two more weeks, or of course accepted Ms Al Bankani's offer of 12 weeks, then WSMRC would not have acted unreasonably. Just to add to the imprecision of these considerations: at the time that WSMRC offered 10 weeks' pay, Ms Al Bankani was offering 16 weeks' pay to settle the unfair dismissal claim not 12 weeks.

[44] All of these permutations show that if both parties take active steps to try to resolve the claim by agreement, but do not ultimately reach agreement, then it is difficult for one party to say that the other was acting unreasonably in failing to resolve the matter by agreement. Unsurprisingly, the closer the parties come to reaching an agreement before settlement negotiations fail, the less likely it is that only one party has acted unreasonably.

[45] With the benefit of hindsight WSMRC was imprudent in not taking further steps to bridge the gap between the parties and if the proceedings were in a costs jurisdiction Ms Al Bankani would have a very strong claim for indemnity costs under *Calderbank* principles.

[46] However I am not satisfied that WSMRC acted unreasonably when it rejected Ms Al Bankani's final offer.

[47] Ms Al Bankani does not claim any other basis for an order for costs. Ms Al Bankani's costs application is therefore rejected.

DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR781986>