

FAIR WORK AUSTRALIA

Expanse Pty Ltd (t/as Expanse Search and Selection) v Mocsari

[2010] FWAFB 7124

Acton and Cartwright SDPP, Thatcher C

24 August, 17 September 2010

Costs — Appeal — Whether error in exercise of discretion to dismiss application for costs — Whether unfair dismissal application vexatious, without reasonable cause or had no reasonable prospects of success — Fair Work Act 2009 (Cth), s 611.

Termination of Employment — Unfair dismissal application — Costs — Appeal — Whether error in exercise of discretion to dismiss application for costs — Whether unfair dismissal application vexatious, without reasonable cause or had no reasonable prospects of success — Fair Work Act 2009 (Cth), s 611.

Fair Work Australia at first instance determined a jurisdictional issue in favour of the appellant concerning whether the respondent's employment had been terminated before or after the commencement of the *Fair Work Act 2009* (Cth). The appellant made an application for costs under s 611 of the *Fair Work Act* which permitted an order for costs in the case of a vexatious or unreasonable application, or where it was reasonably apparent that the application had no reasonable prospect of success. The application for costs was dismissed because it was at least arguable in a context where the respondent failed to issue a formal notice of termination that the respondent's employment was not discharged until after the commencement of the *Fair Work Act*. The appellant appealed.

Held (dismissing the appeal): (1) No error was established in the exercise of the Tribunal's discretion to dismiss the s 611 application.

(2) Further, the appellant's response to the respondent's unfair dismissal application and its conduct of the matter confirmed that it was arguable at all relevant times that the respondent's employment was terminated after the commencement of the *Fair Work Act*.

Cases Cited

Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection) [2010] FWA 2138.

Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection) [2010] FWA 3585.

Appeal against dismissal of application for costs

J Iquierdo, for the appellant.

M Stevens, for the respondent.

Cur adv vult

Fair Work Australia

1 Expanse Pty Limited, trading as Expanse Search and Selection (Expanse), has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (the Act) against Senior Deputy President Hamberger's decision of 17 May 2010¹ declining an application for costs under s 611 of the Act. The application for costs followed the Senior Deputy President's decision of 24 March 2010² that Fair Work Australia lacked jurisdiction to deal with Ms Nathalie Mocsari's application under s 394 of the Act for a remedy in relation to the termination of her employment with Expanse. The grounds of appeal and arguments advanced were various, but the matter on appeal is relatively clear.

2 Section 611 of the Act relevantly provides:

- (1) A person must bear the person's own costs in relation to a matter before FWA.
- (2) However, FWA may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to FWA if:
 - (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
 - (b) FWA is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.

Note: FWA can also order costs under sections 376, 401 and 780.

3 The jurisdictional question before the Senior Deputy President in the original matter was to be determined by answering the question of when the termination of Ms Mocsari's employment occurred: before or after 1 July 2009, when the Act commenced operation.

4 The chronology and facts are set out in the Senior Deputy President's decision³ and it is not necessary to restate them here. The Senior Deputy President determined that the termination of employment was before 1 July 2009 and that FWA lacked jurisdiction to deal with Ms Mocsari's application. Accordingly, the Senior Deputy President dismissed Ms Mocsari's s 394 application.⁴

5 Senior Deputy President Hamberger decided the costs' application as follows:⁵

The jurisdictional issue the tribunal had to determine concerned whether the applicant's employment had been terminated prior to 1 July 2009... However, the applicant argued that her employment did not terminate until she sent the respondent a letter of resignation in October 2009. In the letter and her subsequent application, she asserted that her resignation had been brought about by the actions of the respondent, and thus constituted a constructive dismissal. This was in a context where the respondent had failed to issue a notice of termination, even

1 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 3585.

2 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 2138.

3 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 2138.

4 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 2138 at [33].

5 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 3585 at [7].

though one had been foreshadowed in late May 2009. It was at least arguable that the contract of employment was not discharged until the resignation letter. The decision of the tribunal was significantly based on the distinction between the termination of the employment relationship and the discharge of the contract of employment, and a finding that the employment relationship had been dissolved prior to 1 July 2009.

6 Accordingly, his Honour said that “[t]he requirements of s 611 that must be met before a costs order can be made are not satisfied. The application for costs is therefore dismissed.”⁶

7 While his Honour’s decision on the s 611 application involved the exercise of discretion, in our view the Senior Deputy President’s decision was correct and none of the arguments put by Expanse in this case establish error in the exercise of that discretion. Nor in the circumstances, despite Expanse’s genuine sense of grievance, was an order under s 401 of the Act available.

8 Expanse’s response to Ms Mocsari’s unfair dismissal application and its conduct of the matter confirmed that it was arguable at all relevant times that Ms Mocsari’s employment was terminated after 1 July 2009.

9 Ms Mocsari sent Expanse a letter of resignation on 20 October 2009 and lodged an unfair dismissal application on 29 October 2009, stating:

Date notified of dismissal: (constructive dismissal)

Date dismissal took effect: 20 October 2009.

10 On 3 November 2009 Fair Work Australia listed a conciliation conference. Expanse’s solicitor wrote on 10 November 2009 to Ms Mocsari’s solicitor. The letter included:

To confirm, however, and to avoid confusion regarding any further claim you wish to pursue, we do not accept your client’s resignation but in the alternative provide to you, and through you to your client, formal notice that your client’s employment has been terminated with immediate effect.

11 Expanse filed with Fair Work Australia on 17 November 2009 a written response to Ms Mocsari’s application. It stated as follows:

Date notified of dismissal:	10 November 2009
Date dismissed took effect:	10 November 2009.

12 Conciliation on 18 November 2009 was unsuccessful and on 21 December 2009, Fair Work Australia listed the application for hearing on 1 March 2010 and issued directions for the filing of materials by 15 February 2010. Ms Mocsari filed her materials on 2 February 2010 and Expanse on 23 February 2010, 6 days before the hearing. The covering letter from Expanse’s solicitor raised “a jurisdictional objection to the applicant’s claim” and amended its previous response as follows:

Date notified of dismissal:	20 April 2009
Date dismissal took effect:	20 April 2009.

13 Filing of Expanse’s material on 23 February 2010 followed email correspondence between the respective solicitors on 17 and 18 February 2010, exploring settlement or further conciliation options in view of Expanse’s

6 *Mocsari v Expanse Pty Ltd (t/as Expanse Search and Selection)* [2010] FWA 3585 at [8].

intention to raise the jurisdictional objection. In an email on the afternoon of 17 February 2010, Expanse's solicitor stated that, "Your client is obviously entitled to take issue with our client's jurisdictional argument. That issue will of course be ventilated in due course."

14 There was some issue before us as to whether we should consider permission to appeal under s 400 or s 604 of the Act. That issue is of no consequence because considering everything before us in this case and there being no error in the Senior Deputy President's dismissal of the costs' application, we see no public interest or other grounds justifying or requiring the Full Bench to grant permission to appeal. We decline to do so.

15 The appeal is dismissed.

Appeal dismissed

ALICE LAM