FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal
s.611—Costs

B Mijaljica

v

Venture DMG Pty Ltd
(U2011/12656)

SENIOR DEPUTY PRESIDENT WATSON MELBOURNE, 3 APRIL 2012

Application for unfair dismissal remedy - costs application.

[1] This is an application by Venture DMG Pty Ltd (the respondent), pursuant to s.611(2)(b) of the *Fair Work Act 2009* (the Act), for an order for costs against Mrs B Mijaljica (the applicant) in relation to an application by her under s.394 of the Act in relation to the alleged termination of her employment by the respondent.

[2] The s.394 application was dismissed in a decision of 13 March 2012.[1]

[3] In the arbitration, the respondent argued that the applicant had not been unfairly dismissed because she had not been dismissed (s.386(2)), having regard to the meaning of dismissed found in s.386 of the Act. Specifically, it submitted that the applicant's employment with the respondent had not been terminated on the employer's initiative (s.386(1)(a)). The respondent submitted that the employment had not been terminated at all, let alone at the initiative of the employer.

[4] My decision as to whether the employment of the applicant was terminated, or whether she had been dismissed, was determined by regard to the evidence of the 3 October 2011 meeting between the applicant, Mr Tyler, Mr Uzelac and Mr Du (three managers of the respondent). I found on the evidence in respect of the 3 October 2011 meeting, that the respondent did not terminate the applicant's employment and that there was no termination of the applicant's employment by the respondent employer.[2]

[5] On 20 March 2012, the respondent sought an order for payment of legal costs incurred for representation in the arbitration on 7 March 2012. It submitted that upon receipt of materials served on the applicant on 20 February 2012 by the respondent, for the arbitration, comprising an outline of submissions and witness statements, the applicant should have been aware that her claim had no reasonable prospect of success. The respondent also relied on a 22 February 2012 private and confidential letter from its solicitors to the applicant which stated that her claim was completely lacking in merit and if successful in the arbitration, the respondent would seek an order for costs. The letter stated that the applicant's claim had no reasonable prospect of success because:

"1. Your employment has never been terminated, as far as our client is concerned you are still currently employed by the Respondent;

2. Your application for unfair dismissal was filed on 17 October 2011, whilst you were receiving annual leave entitlements, which demonstrates that you were an employee of the Respondent at the time that you filed your unfair dismissal application."

[6] The letter reserved the right of the respondent to rely upon it in a costs application.

[7] The respondent sought an order for costs at the level of $5,000 being the costs incurred by it for legal representation at the hearing on 7 March 2012.[3]

[8] The costs application was heard on 2 April 2012. The respondent relied upon the grounds advanced in its application for costs (Form F6). The applicant was represented by her son, Mr D Mijaljica. He put no submissions against the application for a costs order.

[9] The costs application is brought pursuant to s.611(2)(b) of the Act, which states:

"(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:

.....

(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."

[10] On the evidence in respect of the 3 October 2011 meeting, it is fair to say that the applicant was unclear as to her employment status. The respondent did not provide written advice to the applicant of the outcome of the meeting of 3 October 2011. The respondent did not file an Employer's Response to Application for Unfair Dismissal Remedy (Form F3), nor participate in conciliation. This prevented the applicant from becoming clearly aware, at an early stage, of the status of her employment.

[11] However, the materials filed by the respondent and served on the applicant on 20 February 2012, and the 22 February 2012 letter in respect of costs, made the fact of continuing employment and the fact that her employment had not been terminated clear to the applicant. This was acknowledged by Mr Mijaljica, representing the applicant, during the hearing for an order for security of costs on 7 March 2012:

"MR MIJALJICA: My earlier statement, your Honour, it just was to remind Mr Maher that still don't know if this termination or not. I didn't know was my mother's job terminated or not until the stage where they handed in all these forms like application of the costs security. That's probably the first time and the time in their final submission document that indicated my mother was still employed. Before that I had no idea. What was the matter and if it was termination or something else was never explained to it." [emphasis added]

[12] I am satisfied that upon receipt of the respondent's materials for the 7 March 2012 arbitration, on 20 February 2012, and upon receipt of the respondent's letter of 22 February 2012 in which a costs application was foreshadowed, the applicant should have been aware that her employment had not been terminated and should have been reasonably aware that her s.364 application had no reasonable prospect of success.

[13] The jurisdictional requirement for the making of a costs order under s.611(2)(b) of the Act has been satisfied.

[14] The respondent was remiss in not complying with the requirement to file an Employer's Response to Application for Unfair Dismissal Remedy (Form F3), and in failing to participate in conciliation. Had it done so the applicant may have understood her employment status at an earlier time and the costs associated with the application might have been minimised. However, on 20 and 22 February 2012, the respondent did clarify the applicant's employment status with her and foreshadowed a costs application for the applicant to understand that her employment had not been terminated and her application was without any reasonable prospect of success. The applicant had ample time to discontinue her application and save the respondent the cost of legal representation at the 7 March 2012 hearing. The order sought only goes to those costs.

[15] In the circumstances, I am satisfied that an order for costs, at the level sought by the respondent, should be made.

[16] An order for payment of costs is published in PR521974.

SENIOR DEPUTY PRESIDENT

Appearances:

D Mijaljica for the applicant.

A Maher for the respondent.

Hearing details:

2012.
Melbourne:
April 2.

Decision Summary

TERMINATION OF EMPLOYMENT – costs – reasonable prospect of success – s.611 Fair Work Act 2009 – former employer sought costs in relation to unfair dismissal matter – substantive application was dismissed – whether initial claim had no reasonable prospect of success – costs incurred for legal representation at hearing –

respondent forwarded letter stating employment had not been terminated and foreshadowing costs application – applicant should have been aware that application had no reasonable prospect of success – applicant on notice regarding costs – order for payment of costs granted.

Mijaljica v Venture DMG P/L

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Watson SDP Melbourne 3 April 2012
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[1] [2012] FWA 2071.

[2] [2012] FWA 2071 at para 23.

[3] Transcript at para 46 (relied upon in the application for costs).