FEDERAL COURT OF AUSTRALIA

Kennedy v Secretary, Department of Industry (No 4) [2017] FCAFC 7

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| Appeal from: | *Kennedy v Secretary, Department of Industry* [2015] FCA 714  *Kennedy v Secretary, Department of Industry (No 2)* [2015] FCA 884 |
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| File number(s): |  |
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| Judge(s): | **FLICK, JAGOT AND BROMWICH JJ** |
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| Date of judgment: | 30 January 2017 |
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| Catchwords: | **COSTS –** application for costs under the *Fair Work Act 2009* (Cth) – whether proceedings instituted without reasonable cause |
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| Legislation: | *Fair Work Act 2009* (Cth) s 570  *Federal Court of Australia Act 1976* (Cth) s 43 |
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| Cases cited: | *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548  *Construction, Forestry, Mining and Energy Union (CFMEU) v Corinthian Industries (Australia) Pty Ltd (No 2)* [2014] FCA 351  *Kennedy v Secretary, Department of Industry* [2015] FCA 714  *Kennedy v Secretary, Department of Industry (No 2)* [2015] FCA 884  *Kennedy v Secretary, Department of Industry* [2016] FCA 485  *Kennedy v Secretary, Department of Industry (No 2)* [2016] FCA 746  *Kennedy v Secretary, Department of Industry* [2016] FCA 1251  *Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 15 December 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 11 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Mr J Darams |
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| Solicitor for the First Respondent: | Ashurst Australia |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice and filed no submissions on the question of costs |

ORDERS

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|  | | ACD 81 of 2015 |
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| BETWEEN: | ROSS KENNEDY  Appellant | |
| AND: | SECRETARY, DEPARTMENT OF INDUSTRY (COMMONWEALTH OF AUSTRALIA)  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| JUDGES: | FLICK, JAGOT AND BROMWICH JJ |
| DATE OF ORDER: | 30 JANUARY 2017 |

THE COURT ORDERS THAT:

1. The appellant pay the respondent’s costs of the appeal, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. The remaining issue in this case is costs.
2. By an interlocutory application filed on 7 November 2016 the first respondent, the Secretary of the Department of Industry (Commonwealth of Australia) (the **Secretary**), seeks an order that the appellant, Ross Kennedy, pay the Secretary’s costs. Mr Kennedy opposes the making of a costs order against him.
3. The proceedings were resolved by orders of the Full Court of 1 November 2016 dismissing Mr Kennedy’s appeal (*Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149).
4. Because the appeal involved a matter under the *Fair Work Act 2009* (Cth) (the **FW Act**), the power to order costs in s 43 of the *Federal Court of Australia Act 1976* (Cth) is constrained by s 570 of the FW Act, which provides in sub-s (2) that:

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

1. The Secretary contends that the appeal was instituted without reasonable cause having regard to the observations in *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548 (***Baker***) at [10] that the relevant question requires consideration of:

whether, having regard to the facts apparent to the appellant at the time of instituting the appeal or the application for judicial review, there were no reasonable prospects of success. In evaluating these prospects regard may be had to the reasons for judgment or decision under appeal or review, as the case may be, and the grounds relied on to challenge the judgment or decision: see *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254 at 257 (Wilcox CJ).

1. The Secretary notes that:
2. Mr Kennedy’s claims have consistently failed before the Fair Work Commission and this Court (see the summary in *Kennedy v Secretary, Department of Industry* [2016] FCA 1251 at [5] – [18]).
3. Mr Kennedy has been ordered to pay costs on multiple occasions throughout these proceedings: *Kennedy v Secretary, Department of Industry* [2016] FCA 1251; *Kennedy v Secretary, Department of Industry* *(No 2)* [2016] FCA 746; *Kennedy v Secretary, Department of Industry* [2016] FCA 485; and *Kennedy v Secretary, Department of Industry (No 2)* [2015] FCA 884.
4. Having regard to the history of his litigation Mr Kennedy ought to have known his appeal was doomed to fail.
5. Mr Kennedy appears to have received legal advice that his appeal lacked merit (see *Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149 at [34(5)]).
6. Mr Kennedy was warned in writing that if the appeal was dismissed, the Secretary would seek costs.
7. Mr Kennedy was given ample opportunity to file an amended notice of appeal identifying the alleged jurisdictional error by the Fair Work Commission but did not do so (see *Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149 at [37] – [38]).
8. Mr Kennedy opposes an order for costs on the ground that the mere rejection of his claims does not mean that the appeal was instituted without reasonable cause (*Construction, Forestry, Mining and Energy Union (CFMEU) v Corinthian Industries (Australia) Pty Ltd (No 2)* [2014] FCA 351 at [8]). At [74] and [75] of its reasons for judgment in *Kennedy v Secretary, Department of Industry (No 3)* [2016] FCAFC 149, the Full Court accepted that Mr Kennedy genuinely believed in his case, thus Mr Kennedy submits that it was not apparent to him that his appeal was doomed. Mr Kennedy also submits that the history of Mr Kennedy’s litigation is not material to s 570(2). Further, the Full Court did not find that the appeal was doomed to fail. As such, the protective purpose of s 570 of the FW Act should function as intended given that Mr Kennedy is an individual who sought to protect his employment and livelihood from unfair dismissal, with the result that Mr Kennedy ought not be made subject to a costs order.
9. The problem with Mr Kennedy’s submissions is that they are based on a misunderstanding of the relevant principles as expressed in *Baker*. The relevant question is whether there were facts apparent to the party at the time of instituting the appeal that, viewed objectively, would demonstrate that there were no reasonable prospects of success. In the present case, numerous facts were apparent to Mr Kennedy which indicated that his appeal was doomed. Mr Kennedy’s sense of grievance appears to have prevented him from appreciating the relevance of these facts but such a circumstance does not take the appeal outside the scope of s 570(2)(a) (institution of proceedings without reasonable cause).
10. **First**, Mr Kennedy was ordered to pay the costs of the proceedings below (see *Kennedy v Secretary, Department of Industry (No 2)* [2015] FCA 884). Although the primary judge accepted Mr Kennedy’s honest belief in his claims (at [9]), his Honour characterised Mr Kennedy’s case as having “no objective merit” (at [10]). This is a strong statement to the effect that, viewed objectively as required by s 570(2), Mr Kennedy’s claims were hopeless and did not approach any possible threshold of being arguable.
11. **Second**, the lack of merit in Mr Kennedy’s claims was explained by the primary judge in clear terms in the judgment the subject of the appeal (*Kennedy v Secretary, Department of Industry* [2015] FCA 714), yet Mr Kennedy determined to institute the appeal. He did so in the face of the primary judge’s findings that:
12. “… the grounds stated in the application were misconceived and do not identify any jurisdictional error which could lead to the grant of the relief sought” (at [4]).
13. Mr Kennedy’s “submissions attack the procedures employed by the Full Bench, but, again, they do not identify any jurisdictional error” (at [4]).
14. Mr Kennedy’s claim was for unfair dismissal but on “the version of events pleaded by [Mr Kennedy], he offered his resignation by email on 24 July 2012 and it was accepted on that day” (at [6]).
15. Despite this, Mr Kennedy instituted proceedings in the Fair Work Commission which he himself brought to a close and then attempted to re-open (at [7]).
16. Mr Kennedy’s application to set aside his own discontinuance, because it was allegedly filed under duress was made in circumstances where Mr Kennedy “continued to pursue his workers’ compensation claim and also managed to find and commence new employment” (at [8]).
17. Mr Kennedy’s subsequent application was filed over a year out of time which required the Fair Work Commission to be satisfied of the existence of exceptional circumstances under s 394 of the FW Act to grant an extension of time for the application to be made (at [9]).
18. The Fair Work Commission at first instance and on appeal rejected Mr Kennedy’s case (at [10]-[16]).
19. Mr Kennedy’s arguments on appeal to this Court did not raise “any respectable case” of jurisdictional error (at [17]).
20. In short, “[t]here is no substance in any of those complaints in the context of the present proceedings which are concerned with questions of jurisdictional error” (at [31]).
21. “None of the grounds of the application, or the submissions in support of them, raise any substantive legal issue, much less a jurisdictional one” (at [33]).
22. Despite his own incapacity to perceive the inevitable consequence of these facts was that his appeal was without any prospect of success, all of these facts were apparent to Mr Kennedy before he instituted the appeal. Mr Kennedy’s honest belief to the contrary does not mean that his appeal was instituted other than without reasonable cause. The appeal was always hopeless. The purpose of s 570 is not to provide protection for a party who is incapable of perceiving the manifest hopelessness of the party’s claims. The appeal was instituted without reasonable cause and Mr Kennedy should be ordered to pay the Secretary’s costs of the appeal.

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| I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick, Jagot and Bromwich. |

Associate:

Dated: 30 January 2017