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New changes aim to transform costs in discrimination claims: what you need to know

In a significant shift said to be aimed at improving access to justice, the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* proposed key reforms associated with costs in discrimination matters. This article explores the implications of these changes which relate to claims of discrimination and harassment in the federal jurisdiction, and the potential challenges for respondents in defending such proceedings.

Introduction

The *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* proposed significant reforms to reduce financial barriers for applicants pursuing discrimination and sexual harassment claims in federal courts. Currently, under federal discrimination laws, unsuccessful applicants are generally required to pay a large portion of the respondent's legal costs, which can discourage people from commencing litigation.

The Bill was passed by both Houses on 19 September 2024, and is due to commence once it has received royal assent. In this article, we refer to the Bill, as passed, as the **Amending Act**.

In response to the Respect@Work report, the Amending Act introduces changes aimed at making the legal process more accessible for applicants, by encouraging victims of unlawful discrimination and harassment to pursue their claims without the fear of large costs orders against them. It implements changes that would restrict the circumstances in which a court can order an applicant to pay a respondent's costs.

What did the pre-existing legal framework entail?

The pre-existing framework governing costs in federal discrimination proceedings is similar to that in other civil litigation cases, where the 'costs follow the event', meaning the successful party in the litigation is entitled to payment of their costs by the unsuccessful party.

What were the recommendations made in the Respect@Work report?

Recommendation 25 of the Respect@Work report identified a significant barrier preventing applicants from pursuing sexual harassment claims in court — the risk of being ordered to pay the respondent's legal costs.

The report found that this financial risk often deters individuals from commencing proceedings in cases of workplace sexual harassment. In response, it recommended the insertion of a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

The effect of section 570 is that the court is not generally empowered to order costs against another party, meaning that parties typically bear their own costs of the litigation – whether they are successful or not. It gives the court discretion to award costs against a party, such as where it is satisfied that a party instituted proceedings vexatiously or without reasonable cause, or where the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

New Changes to cost provisions

If Recommendation 25 was adopted in its entirety, this would have given applicants protection against adverse costs orders

against them, but it would have also meant that they would be precluded from automatically being awarded their own costs in the event they were successful.

Given court proceedings are costly, understandably this would have given applicants little motivation to pursue legitimate, meritorious claims, due to the risk that any compensation awarded to them would potentially be consumed by their legal costs.

Instead, the Amending Act implements changes which only *partly* adopt Recommendation 25.

Under these changes, if an applicant is successful in proceedings on one or more grounds, the court *must* order the respondent to cover the applicant's costs, unless the court determines that the applicant's unreasonable actions or omissions contributed to those costs (meaning that the respondent is not liable for any of the applicant's costs incurred by an applicant to the extent such actions are unreasonable). The court is also empowered to order the applicant's costs be paid on the more favourable "indemnity basis".

By contrast, a respondent's ability to obtain their costs are far more limited and akin to the current costs regime under section 570 of the *Fair Work Act 2009* (Cth). The principal position is that the court is not empowered to award a respondent its costs, unless:

- the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause;
- the court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs; or
- the respondent is successful in the proceedings (i.e. none of the applicant's grounds are successful), does not have a significant power advantage over the applicant, and does not have significant financial or other resources relative to the applicant.

In other words, even those respondents which are successful in defeating the entirety of an applicant's claim, will have limited hopes in reclaiming their legal fees.

What are the practical effects of this legislation for employers?

Naturally, employers may be fearful that these provisions will encourage spurious or unmeritorious claims, because (subject to the exceptions noted above), applicants will no longer wear the downside of an unsuccessful claim.

Whether there will be more of these types of claims (as opposed to, for instance, claims under the *Fair Work Act*), is yet to be known. However, applicants who may have previously considered utilising the recently enacted sexual harassment protections under the *Fair Work Act,* may now have little motivation to do so where they can more easily avail themselves of the costs protections under the Amending Act.

It will take some time to see whether respondents will have much success in relying upon the exceptions to the rule against awarding costs in their favour. Many practitioners will be aware that respondents have often had mixed success under the *Fair Work Act* in reclaiming costs against an unsuccessful applicant, even where offers of compromise have been made in circumstances where an applicant has ultimately done no better than the offer.

Conclusion

It is clear that the changes aim to strike a careful balance between discouraging spurious claims and ensuring that meritorious applications are not deterred by the potential financial burden of legal costs, while offering only limited protections for respondents to recover costs under narrowly defined conditions.

Respondents to discrimination claims will need to think carefully about how they approach settlement discussions with applicants to best take advantage of these provisions. It's foreseeable that given the costs advantage that will be enjoyed by applicants, respondents will have a greater appetite for settlement. But whether settlement will actually be achievable, may ultimately depend upon how emboldened applicants become in their settlement expectations.