

Article Information

Authors: Tim Lange, David Ey, Gemma Twemlow

Service: Employment & Labour, Industrial Relations

Rubbing salt into the wound of an applicant in unfair dismissal proceedings

An applicant whose claim was “doomed to fail”, and was pursued by her to inflict as much damage as possible on her former employer, has led to severe consequences when the Fair Work Commission ordered her to pay indemnity costs to her former employer.

The Fair Work Commission has ordered indemnity costs against an office manager who pursued an unfair dismissal claim that was ‘doomed to fail’ and was motivated by trying to inflict maximum harm and seek revenge against her former employer.

Background

In June this year, the Fair Work Commission handed down its decision in the case of *Charles Parletta Real Estate Pty Ltd v Ms Maria D’Ortenzio and Mr Nicola Minicozzi* [2018] FWC 3286.

The proceedings centred around the dismissal of the office manager of Charles Parletta Real Estate (CPRE). The conduct relied upon to dismiss the office manager related to the office manager unilaterally increasing her salary without permission, unilaterally reducing the pay of another employee as punishment, instructing her solicitor to write to the Commonwealth Bank of Australia and the National Bank of Australia seeking information to assist her case against CPRE, as well as instructing her solicitor to contact a potential purchaser of CPRE to allege that CPRE had breached South Australia’s Land Agents Act.

The Commission held that CPRE had validly dismissed the office manager in circumstances where her conduct was treacherous, in breach of her employment contract, and fatally damaged working relationships within CPRE. The Commission found that the employment relationship deteriorated after the office manager began a relationship with CPRE’s solicitor – her representative in the dismissal proceedings – and that the relationship was ‘*poisoned to the point of being totally dysfunctional*’ by the time the office manager was dismissed.

As a result of the claim being dismissed, CPRE sought payment of its costs on an indemnity basis pursuant to sections 611(2) and 400A of the *Fair Work Act 2009* (Cth), alleging that the proceedings commenced by the office manager were vexatious, without reasonable cause, without prospects of success, and caused unnecessary costs to be incurred in continuing with the claim. A similar order for costs was also sought against the office manager’s legal representative.

Decision

The Commissioner was initially reluctant to award indemnity costs unless it could be shown that the matter involved ‘*some relevant delinquency on the part of the unsuccessful party*’. Whilst the Commissioner found that the relevant delinquency was not prevalent when the office manager commenced her claim, it was likely present upon receiving the company’s disclosure in the proceedings, and was undoubtedly present at the conclusion of the office manager’s evidence, especially in circumstances where the office manager was ‘*invited to consider her position in light of the evidence*’, yet continued with the application.

An order for costs was made against the office manager on the basis that her unfair dismissal claim was vexatious and motivated by a desire to ‘*inflict as much damage on [her employer] as possible*’. Commissioner Platt stated that the dismissal letter clearly outlined the grounds relied upon to dismiss the office manager and that ‘*viewed objectively it should have been evident to [her] that at the time the application was lodged there was no reasonable basis for her to commence the claim*’.

The Commissioner therefore ordered costs against the office manager as follows:

1. on a party-party basis from the day after the office manager lodged her unfair dismissal application; and
2. given the office manager's conduct in continuing with the application after that time was delinquent, on an indemnity basis from the conclusion of her evidence.

The office manager's application for leave to appeal the costs order was refused.

It is not unknown for parties in employment litigation to be carried away by a unilateral view that the proceedings do not usually involve costs orders against a losing party and can be pursued without consequence. This decision makes clear that view is wrong, especially in extreme cases. A measured approach is required in which any proceeding is brought on a proper basis, and not for an ulterior motive. The failure to commence and pursue legal proceedings for a proper purpose can open the applicant, and their solicitors, up to an order for payment of indemnity costs.

Should you have any questions about how this decision may affect your business, please contact a member of Piper Alderman's [Employment Team](#).