Workplace law

Hard bargaining, or pushing your luck?

How turning down a settlement offer can lead to a costs order

by Sara McRostie

Proceedings in the Fair Work Commission have an important distinction when it comes to costs – the general rule is that parties must bear their own.

This is to free parties from the risk of having to pay the costs of an opposing party in commission proceedings if they are unsuccessful at hearing. There are limited exceptions to this general rule under s400A and s611(2) of the *Fair Work Act 2009* (Cth) (the Act). Case law makes it clear there are hurdles that must be overcome to meet the requirements of these sections for a party to bear the opposing party's costs.[1]

Hard bargaining or reasonably refusing a settlement offer is not enough to trigger this exception, yet authorities have established that the unreasonable refusal of a settlement offer can potentially provide the circumstances to meet these requirements.

Section 400A costs – a lower bar?

Section 400A allows the commission to order costs against a party in an unfair dismissal matter if they have caused those costs to be incurred, for instance, by acting unreasonably or because of an omission in connection with the conduct or continuation of the matter.

Unlike the limited exceptions under s611(2), s400A captures a broad range of conduct, including failing to discontinue an unfair dismissal application and failing to agree to terms of settlement that could have led to the application being discontinued.

The power to award costs under s400A is not intended to prevent parties from hard bargaining or robustly pursuing or defending an unfair dismissal claim.[2] However, the commission has recently exercised its discretion to award indemnity costs under s400A when the applicant has unreasonably rejected a settlement offer.

Unreasonable refusal

Colin Ferry v GHS Regional WA Pty Ltd T/A GHS Solutions [2016] FWC 3120

The commission ordered Mr Ferry to pay indemnity costs of $13,875.50 to his former employer for unreasonably refusing a $3000 offer to settle his unfair dismissal claim.

The settlement offer came following a conciliation conference and was made on the basis that it was "without prejudice save as to costs". In the letter, the employer expressly advised the self-represented applicant of its intention to rely on the offer as to costs if the applicant's claim was unsuccessful.

The applicant didn't tell the employer directly that he refused the offer, but communicated his decision in an email to the commission and didn't make a counter-offer.

The applicant's unfair dismissal claim was unsuccessful at hearing and the employer then made an application for costs under s400A.

The commission said that s400A of the Act should not prevent parties from "hard bargaining", nor compel them to accept the best, or near best, offer from the other party.

In this case it was found that the applicant did not reasonably assess the prospects of his case. The applicant had received the employer's witness statements, supporting documents and outline of submissions by the time the offer of settlement was made. Under those circumstances, the commission was satisfied the applicant had sufficient information to realise that his case was weak, despite being a self-represented litigant with no legal experience.

The applicant's refusal to accept the offer went beyond hard bargaining and the continuation of the proceedings in wilful disregard of known facts was deemed delinquent conduct by the applicant.

Steven Post v NTI Limited T/A NTI [2016] FWC 1059

The employer in this matter was also successful in recovering indemnity costs under s400A. In this case Mr Post, who was self-represented, rejected multiple offers ranging from five weeks' pay to the equivalent of the six-month statutory limit on compensation, which the commission can order in unfair dismissal matters.

The application for an unfair dismissal remedy was dismissed by the commission on the basis that the applicant had engaged in serious misconduct. The applicant then lodged an appeal, which was also dismissed by a full bench of the commission, before a final attempt at judicial review proceedings in the Federal Court that he later discontinued.

The employer applied for costs under s400A and, in the alternative, s611 of the Act, for the costs incurred by responding to the substantive unfair dismissal remedy application (not the subsequent applications).

In allowing the employer's cost application, the commission said the applicant was either unwilling or unable to objectively assess the merits of his application. The applicant's rejection of each offer was held to be reckless conduct because, on the facts known to the applicant, he should have appreciated that he had a hopeless case. In these circumstances, the commission ordered the applicant to pay the employer's costs from the date the first settlement offer was made.

Reasonable refusal

Thaer Barkho v Dairy Country Pty Ltd [2016] FWC 1059

In contrast, an employer's application for indemnity costs under s400A was dismissed in this matter on the basis that it was perfectly reasonable for the applicant to reject the employer's offers.

At conciliation, the employer made an offer that was "final and not to be repeated", only to make the same offer two more times. The employer then increased its offer, and repeated the increased offer. The commission said the employer's approach encouraged the applicant to reject the offers.

In these circumstances, the commission was not satisfied that the applicant's rejection of the several offers made by the employer was unreasonable or an omission of the applicant.

Sara McRostie is a partner at Sparke Helmore Lawyers.
The assistance of lawyer Matthew Giles in preparing this article is gratefully acknowledged.

Notes

[1] *Church v Eastern Health* [2014] FWCFB 810.
[2] *Steven Post v NTI Limited T/A NTI* [2016] FWC 1059 at [153]; *Thaer Barkho v Dairy Country Pty Ltd* [2016] FWC 3111 at [9].

back to contents