

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 128 of 2011

B E T W E E N:

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THE BOARD OF BENDIGO REGIONAL INSTITUTE OF
TECHNICAL AND FURTHER EDUCATION

Appellant

and

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GREGORY PAUL BARCLAY
and
AUSTRALIAN EDUCATION UNION

First Respondent

Second Respondent

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APPELLANT'S SUBMISSIONS ON COSTS IN REPLY
(Filed pursuant to the Orders of the Court made 7 September 2012)

20 1. The Respondents have conceded that the costs restriction in s.570 of the *Fair Work Act 2009* (Cth) (**FW Act**) does not apply. The Respondents, nevertheless, advance the argument that because an order for costs was not sought:

(a) at the time of the special leave to appeal application; and

25 (b) in the Appellant's written submissions filed in the appeal –
the usual order that costs follow the event should not apply.

2. In support of the above contention, the Respondents say, without any evidentiary basis, that the failure of the Appellant to seek an order for costs at the time of seeking special leave or in its written submissions was not a mere oversight but rather "*a deliberate forensic choice*".¹

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The Appellant's position on costs at the time of special leave

3. As disclosed in the affidavit of Julian Graham Riekert sworn 14 September 2012 at [3] to [5] (**Riekert Affidavit**), prior to the appeal, the Appellant did not seek costs as it was under the misapprehension that the costs restriction

¹ The Respondents' Submissions at [4].

Date: 14 September 2012
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in s.570 of the FW Act applied. A reconsideration of this issue was prompted by the observations of Justice Gummow made during the course of the appeal. At the time the Minister announced his appearance on appeal, Justice Gummow made the observation that the appeal did not arise under the FW Act but in fact *“arises under section 73 of the Constitution, consequent upon a grant of special leave under the Judiciary Act”* (Transcript at p.2.32).²

4. No prejudice has been asserted by the Respondents to have been suffered by the Appellant not seeking costs at the time it sought special leave. To the contrary, as a consequence of the Appellant’s position on costs at the time of special leave, no order for costs was made, including whether they be reserved or in the appeal. The Appellant’s present application for costs is also confined to the appeal. Costs are not sought in respect of the special leave application.

5. Furthermore, it cannot be seriously contended that the outcome on the special leave application would have been different if the Appellant had sought costs in its application.

The Appellant’s position on appeal

6. The Appellant in its submissions on appeal did not seek any order for costs. Again, this can be explained by the fact that the Appellant was under the misapprehension that the appeal was subject to the costs restriction in s.570 of the FW Act.

Respondents put on notice – no costs restriction – no objection

7. By correspondence dated 17 July 2012 to both the solicitors for the Respondents and the solicitor for the Minister (Exhibit JGR1 at p.1), the Respondents and the Minister were put on notice that it was the Appellant’s view that the appeal was not governed by s.570 of the FW Act and that, in the event the Appellant’s appeal was successful, it would seek an order for costs.

8. The Appellant received no response to this correspondence, either from the Respondents or the Minister.

² See Riekert Affidavit at [4].

9. By correspondence dated 6 August 2012 to the solicitors for the Respondents and the solicitor for the Minister (Exhibit JGR1 at p.3), the Appellant sought agreement from the Respondents and the Minister that irrespective of whether the appeal was successful or unsuccessful, costs should follow the event by reason of costs not being constrained by s.570 of the FW Act.
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10. No response was ever received to this correspondence from the Respondents.³
11. By correspondence dated 5 September 2012, the solicitors for the Appellant wrote to the Senior Registrar of the Court (Exhibit JGR1 at p.12) (the correspondence being copied to the solicitors for the Respondents and the Minister) seeking orders in neutral terms for the programming of submissions on the question of costs in the event “*any party*” sought an order for costs.
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12. The Respondents did not seek to oppose these directions being made.⁴
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15 No prejudice suffered by the Respondents

13. Contrary to the Respondents’ current position, the Respondents did not respond to the Appellant’s correspondence of 17 July 2012, 6 August 2012 or 5 September 2012 in any way, let alone to suggest that the Appellant was disentitled to seek costs.
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14. Further, the Respondents have not suggested that they have acted to their detriment by being under the belief that they could not be exposed to a costs order in the appeal. It is not being suggested that the Respondents would have done anything other than oppose the appeal if they had been on notice from the outset that the Appellant would seek its costs in the event it was successful.
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The Respondents at all times preserved their position to seek costs

15. In addition, in failing to take issue with the Appellant’s correspondence of:

³ On 31 August 2012, the Minister responded that it would oppose any costs order against him, including because of his limited role in the appeal (Exhibit JGR1 at p.9).

⁴ The Minister on 6 September 2012 said that the directions should not be made because orders for costs were not sought in the Notice of Appeal (Exhibit JGR1 at p.16).

(a) 6 August 2012, which included a concession that “if the appeal is unsuccessful, the Respondents should get their costs of the appeal” (Exhibit JGR1 at p.3); and

(b) 5 September 2012, for the programming of written submissions on costs (Exhibit JGR1 at p.12) –

the Respondents at all times sought to preserve their position to seek costs against the Appellant in the event the appeal was unsuccessful.

16. In such circumstances, it is unmeritorious for the Respondents to seek to avoid a costs order on the basis that no express order for costs was foreshadowed by the Appellant prior to the appeal being heard.

Costs order sought

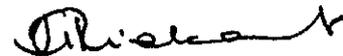
17. By reason of the matters above, the Appellant seeks the orders for costs against the Respondents and the Minister as foreshadowed in paragraph 7 of its submissions in chief.

18. In the event no order for costs is made against the Minister, the Appellant seeks orders that the Respondents pay the Appellant’s costs of the appeal.

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DATED: 14 September 2012



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