CITATION: *Jennings v Calman Australia Pty Ltd (No. 2)* [2009] NTMC 023

PARTIES:	DEBBIE JENNINGS
	v
	CALMAN AUSTRALIA PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Workers Rehabilitation and Compensation Act (NT)
FILE NO(s):	20631181
DELIVERED ON:	27 May 2009 (by email)
DELIVERED AT:	Darwin
HEARING DATE(s):	17 February 2009
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

COSTS – WORKERS CLAIM PARTIALLY SUCCESSFUL – EMPLOYER SUCCESSFUL ON COUNTERCLAIM

Jennings v Calman Australia Limited [2008] NTMC 079
Hughes v Western Australian Cricket Association (Inc) & Ors (1986) ATPR 40-748
Hayle Holdings Pty Ltd v Australian Technology Group Ltd [2002] FCA
Oshlack v Richmond River Council (1998) 193 CLR 72
Cretazzo v Lombardi (1975) 13 SASR at 13,15 & 16

REPRESENTATION:

Counsel:

Worker:	Mr Neill
Employer:	Mr Barr QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt and Hunt

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 023
Number of paragraphs:	24

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20631181

[2009] NTMC 023

BETWEEN:

DEBBIE JENNINGS
Worker

AND:

CALMAN AUSTRALIA PTY LTD
Employer

REASONS FOR DECISION ON COSTS

(Delivered 27 May 2009)

Jenny Blokland CM:

Introduction

1. This decision involves a dispute about costs with respect to various aspects related to the conclusion of these proceedings. The substantive decision in this case was delivered on 12 December 2008: *Jennings v Calman Australia Limited* [2008] NTMC 079. In short, the Worker was successful in her claim for assistance by way of household services pursuant to s 78(c) *Workers Rehabilitation and Compensation Act* and for assistance by way of attendant care services pursuant to 78(d) *Workers Rehabilitation and Compensation Act*. The Worker did not succeed to the level originally claimed by her in terms of the number of hours of assistance she originally asserted she needed.

2. The Worker had also pursued a claim that she had been underpaid by the Employer in terms of her weekly benefits and she sought a ruling that she be paid arrears of weekly benefits. During the course of the hearing solicitors

for both the Worker and Employer retrieved certain documentation and in the final days of the hearing an agreed position was put to the Court that the Worker had received $27,800 in excess of her legal entitlement for weekly payments from 13 March 2003 to 31 August 2008. (see para 40-42, *Jennings v Calman Pty Ltd* [2008] NTMC 079). The Employer was successful in relation to the allegation of overpayment contained in the Employer's counterclaim. The Worker was not successful in her claim for the costs of vehicle modification. The mixed success for both parties has been the basis of a significant dispute on costs.

3. The Worker's primary position is that despite being unsuccessful in the vehicle modification aspect of the claim and the claim for the alleged underpayment of Workers Compensation payments, the Court should take her to be overwhelmingly successful and therefore, applying the usual principle she should receive costs of and incidental to the whole proceedings and the dispute which gave rise to the proceedings to be taxed in default of agreement at %100 of the Supreme Court Scale. The Worker also seeks the Employer pay her costs of and incidental to the argument on costs.

4. Alternatively, the Worker seeks the Employer pay the Worker's costs of and incidental to the proceedings and the dispute that gave rise to the proceedings up to and including 30 July 2008 and that the parties pay their own costs in respect of all work from and including 31 July 2008 to and including 28 November 2008. (These dates essentially have regard to the extra time taken to resolve the issue of whether there had been an underpayment or overpayment). On this alternative position the Worker seeks the Employer pay the Workers costs on and after 29 November 2008, including costs incidental to the argument on costs.

5. In general terms it was submitted that the work carried out by the parties up to and including submissions before the Court on 30 July 2008 was work relating to all the issues arising in and from the proceedings. It was

submitted by the Worker that the work carried out after 30 July 2008 and including further submissions on 28 November 2008 related mostly to the issue of calculating the extent of the overpayment of weekly benefits and what consequences flowed in relation to the over payment. It was put that after 28 November 2008 the work involved receipt of the Court's decision and ancillary work arising from that decision including various court attendances such as a court attendance on 12 January 2009 and the preparation and delivery of submissions as to costs.

6. The Employer agrees that it should pay the Worker's costs of the proceedings subject to a number of major qualifications. First, that the Worker not be entitled to any costs and indeed should pay the Employer's costs in respect of the Worker's claim for an alleged miscalculation and underpayment of normal weekly earnings and costs on the Employer's counterclaim. Further, that the Worker not be entitled to costs in respect of, and should pay the Employer's costs of and incidental to all attendances at Court from 31 July 2007 to 28 November 2008. The Employer withdrew its submission that the Worker pay the Employer's costs for the unsuccessful claim for reimbursement of "vehicle modifications".

General Principles

7. *Work Health Court Rule* 23.03(1) provides as follows:

> **23.03 Power and discretion of Court**
>
> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.

Section 110 *Workers Rehabilitation and Compensation Act* provides as follows:

> **110 Costs**
>
> In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of the application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference.

8. Both parties suggest and I accept that generally speaking, costs follow the event and usually the party substantially successful will be entitled to costs. There is however a broad direction that must be exercised judicially. In certain exceptional cases a wholly successful party may be ordered to pay their opponent's costs. A successful party who has failed on certain issues may not only be deprived of their costs but in certain circumstances may be ordered to pay some or all of their opponents costs. Both parties have referred me to *Cretazzo v Lombardi* (1975) 13 SASR at 13, (Bray CJ):

> "It follows, therefore, that there is now jurisdiction to order a successful party, even a wholly successful party and whether plaintiff or defendant, to pay his opponent's costs in part or in whole. Of course, it by no means follows that it would be a judicial exercise of the discretion to do so and it may well be that in many cases it would not, since there must be some reason for departing from the settled practice whereby the successful party receives his costs from his opponent; see *Donald Campbell & Co v Pollack*, per Viscount Cave L.C at p 812.
>
> The next matter is this. A successful party who has failed on certain issues may well not only be deprived of his own costs of those issues, but ordered in addition to pay his opponent's costs of them, and in this context "issue" does not mean a precise issue in the technical pleading sense, but any disputed question of fact or, in my view, of law: *Foster v Farquhar*, per Bowen L.J., as he then was, at p 570. In fact in that case the plaintiff, who succeeded to a substantial extent, was deprived of his costs and ordered to pay the defendant's costs in relation to certain specific disputed items of

> special damage on which he failed. Moreover it has been held by the House of Lords that the support of an extravagant claim by fraudulent acts or evidence may be good cause for depriving a successful plaintiff of his costs: *Huxley v West London Extension Railway Company*".

9. Specifically, Jacobs J (at 15) noted that there should be some costs adjusted in the matter because the successful plaintiff "consciously attempted to deceive the Court". As a general matter however, he noted that applications that seek apportionment of costs are to be discouraged (at 16):

> "Having said that, I would wish to sound a note of cautious disapproval of applications, which are being made with increasing frequency, to apportion costs according only to the success or failure of one party or the other on the various issues of fact or law, which arise in the course of a trial".

Further, His Honour noted:

> "But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including, in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgement goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues".

10. Both counsel referred to the principles in *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) ATPR 40-748. Mr Hughes, at that time a professional cricketer, had obtained an interlocutory injunction restraining the Western Australian Cricket Association and other cricketing organisations ("the respondents") from taking action which would interfere with his eligibility for selection to play any local cricket by reason of his participation in tour matches in South Africa. In the subsequent trial Mr Hughes alleged the Western Australian Cricket Association's conduct

constituted a contract, arrangement or understanding that contained an exclusionary provision contrary to the *Trade Practices Act* Cth and was likely to lessen competition. Relying on the Federal Court's accrued jurisdiction, he raised a number of other causes of action including unlawful restraint of trade, ultra vires, conspiracy and breach of the provisions of the *Equal Opportunity Act* (WA). He was successful in obtaining declaratory relief.

11. In a further hearing, Mr Hughes sought substantive injunctive relief prohibiting the Western Australian Cricket Association and others from interfering with his eligibility for selection for local cricket in similar terms to the interim injunction granted earlier. The Federal Court (Toohey J) concluded that a permanent injunction in similar terms was not warranted. Mr Hughes was however successful in his application for declaratory relief and was awarded $250 damages against some of the respondents. The respondents sought an order that there be no order for costs, alternatively, that any order for costs in Mr Hughe's favour be a very small percentage because the applicant had failed on more issues that he had succeeded. Further, it was argued that much of the time of the hearing had been taken up with issues that Mr Hughes was not successful in. Toohey J expressed the principles as follows (at 138):

> "The discretion must of course be exercised judicially. There are decisions, both of Australian and English courts, that throw light on the way in which the discretion is to be exercised. I shall not refer to those decisions in any detail; I shall simply set out in a summary way what I understand to be their effect.
>
> 1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order. *Ritter v Godfrey* (1920) 2 K.B. 47.
>
> 2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster v Farquhar* (1983) 1 Q.B. 564.

3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. *Cretazzo v Lombardi* (1975) 13 S.A.S.R. 4 at p 12.

There is no difficulty in stating the principles; their application to the facts of a particular case is not always easy. Also it is necessary to keep in mind the caveat by Jacobs J in *Cretazzo v Lombardi* at p 16. His Honour sounded what he described as "a note of cautious disapproval" of applications to apportion costs according to the success of failure of one party or the other on the various issues of fact or law which arise in the course of a trial. His Honour commented, (citing the paragraph that appears above), and further in its application to the facts.

"In the present case it is true that if one took a head count of the causes of action pleaded in the statement of claim, the applicant failed on more than he succeeded, and by some margin. Nevertheless, the applicant succeeded in his primary aim viz. to challenge the operation of r.2:38:1 of the rules of the Cricket Council in so far as the rule operated to preclude him from playing district cricket by reason of his participation in the South African tours.

It is relevant, but not conclusive, to consider how much time of the hearing was taken up with evidence and submissions relating to those issues on which the applicant failed."

12. In *Hayle Holdings Pty Ltd v Australian Technology Group Ltd* [2002] FCA, on the question of apportionment of costs Hely J considered *Oshlack v Richmond River Council* (1998) 193 CLR 72 and *Hughes v Western Australian Cricket Association (Inc)* (supra). Hely J stated (para 3):

> "By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs, unless for some reason connected with the case, a different order is required."

13. His Honour noted that although the applicants were not successful in obtaining relief concerning thirty of the thirty one representations on which

they noted, each representation could not be treated as a separate case. As well as individual representations, a course of conduct was relied on that was alleged to be misleading or deceptive.

14. Further, in *Inspector-General in Bankruptcy v Bradshaw* (No 2) [2006] FCA 383, Kenny J summarised the relevant propositions as follows (para 11 and 12):

> "A successful litigant is ordinarily entitled to an award of costs: see eg. *Oshlack v Richmond River Council* (supra at 97 references omitted). The power to make orders for costs is, however, discretionary, although it "must be exercised judicially and not against the successful party except for some reason connected with the case": (see *Ruddock v Vadarlis* (No 2)). Ordinarily, if a successful party is denied an order for costs in whole or part, it is because the party's conduct of the proceeding in some respect or respects makes it just or reasonable to do so: see eg: *Ruddock v Vadarlis* and *Latoratis v Casey* (references omitted). An unsuccessful party is not automatically entitled to costs in respect of those issues of facts or law on which the successful party failed: (references omitted)".

Application of Principles to these Proceedings

15. Some history of the proceedings needs to be examined. The Worker's statement of claim (para 9) pleaded that the Employer had never correctly calculated the Worker's normal weekly earnings in accordance with the *Workers Rehabilitation and Compensation Act* ("the Act"). At paragraph 19, the Worker pleaded that a reduction in weekly benefits in August 2006 involved calculations not properly based on the Worker's normal weekly earnings throughout. Although the substantial part of the proceedings concerned other issues, such as the issues of the degree of disability, entitlement to household services, vehicle modification and attendant care, the issue of normal weekly earnings appears to be the catalyst for bringing the other disputes before the Court as can be noted from the "Notice of Decision and Rights of Appeal", 21 August 2006 reducing payments of weekly benefits to the Worker (Exhibit W2).

16. Exhibit W2 provides that the decision made in respect of the Worker's claim for benefits "Varies the amount of weekly benefits payable to you pursuant to Section 69 of the *Work Health Act* to the sum of $519.50 per week". The reasons for decision state the normal weekly earnings at the date of injury in 1997 was $401.10 and then sets out various calculations having regard to indexing and the operation of s 65 *Work Health Act*. The payments were reduced to $519.50 per week. That notice advised of the rights of appeal that the Worker exercised. In terms of the evidence in the substantive parts of the hearing, (7-11 April 2008; 18, 21-30 July), although there was *some* evidence in chief and cross-examination concerning Mr Jenning's income, (as that had a bearing on the calculations), the evidence in the substantive hearing was referable primarily to all other issues.

17. It has to be remembered also that it came to light during the course of proceedings that there had been a history of the Employer, through successive insurers, advising the Worker of changes to her weekly benefits. Some of these were acknowledged to be incorrect. Given the context of the lengthy history of payments of normal weekly earnings and that at times the calculations by the insurer were not accurate, it is not clear cut that on that issue there should be an award costs in favour of the Employer. The Employer, through its insurers was in the position to calculate the correct payments. The Employer did bear the onus of making these calculations and could have made inquiries of the Worker in relation to her husband's income. There is no suggestion the Worker misled or failed to supply requested information. At the same time, it was a rather bold assertion on the part of the Worker to be claiming an overpayment in these circumstances. It is one thing to acknowledge the context of some miscalculations on the part of the Employer (one is acknowledged in W 20), however, it is quite qualitatively different to assert an ongoing under payment with apparently no evidence to support that assertion. To a considerable degree, the Worker retreated from this position throughout the

course of the hearing by the early agreement with the Employer that normal weekly earnings at the time of injury were $401.10.

18. Although this action by the Worker in the Work Health Court commenced with filing the Statement of Claim on 14 May 2007, the dispute had previously gone to mediation in 2006. On the first day of the hearing on 7 April 2008, the Employer filed an Amended Notice of Defence and conceded in particular that the Worker was deemed to be totally incapacitated for the purposes of s 65(6) *Workers Rehabilitation and Compensation Act* (NT). There was a significant amount of discussion at the commencement of the hearing as to what the effect of this concession was, however, with other concessions, it narrowed the dispute to considering the degree of disability that needed to be assessed for the purpose of calculating the amount of services the Worker may require. The Employer's amended defence for the first time included a counterclaim seeking a ruling that the Worker's normal weekly earnings at the outset were $401.10. The counterclaim did not seek a ruling on the amount of overpayment of weekly benefits to the Worker. In its defence to the counterclaim filed on 8 April 2008, the Worker admitted the normal weekly earnings figure of $401.10. The Statement of Claim (para 21.1) had sought a ruling as to the Worker's normal weekly earnings and (para 21.2) an order that the Employer pay arrears of weekly benefits calculated from 2 August 1997 with interest. The concession of the Worker at the outset was of significance in terms of the counterclaim but did not resolve the issue given neither party was able to complete the calculations at that time with particular reference to spousal income.

19. What emerged on the amended pleadings and throughout some of the trial was a dispute between the parties as to whether the Worker's husband's income was relevant and during what periods. This concerned the interaction of s 65(8) and s 65(10) *Workers Rehabilitation and Compensation Act* that allowed the Worker 90% of her "loss of earning capacity" except during periods when Carl Jennings (her husband) had

normal weekly earnings of more that 150% of 'average weekly earnings'. In any period when this was the case, the Worker was entitled to 75% of her "loss of earning capacity".

20. I agree with the Employer's submission that the Worker's case on the alleged underpayment of compensation was "live" throughout the trial, however, that submission needs to be tempered with the fact that the Worker conceded the initial normal weekly earnings on the second day of trial. There was still some argument on the application of s 65 that required evidence and indeed the hearing was adjourned on a number of occasions to allow the Worker's representatives to seek further information about Mr Jenning's income. After an adjournment of 30 July 2008, the matter was adjourned to 15 August, 25 September, 21 October and 28 November to allow for this evidence gathering to take place. I accept the Employer's lawyers also had to correspond with the Worker's solicitors and return to Court on those occasions. The final determination as to over payment was made by consent. I accept both parties were subject to significant costs involved in investigating and calculating the agreed amount.

21. The Worker failed on that part of the claim involving an alleged underpayment of normal weekly earnings and the Employer succeeded by proving it had in fact overpaid the Worker to a significant degree ($27,800). The issue is largely but not totally severable from the rest of the proceedings given the way the proceedings commenced as a multiple issue case with the Employer's counterclaim being filed only on the first day of trial. Given there is obviously a significant and complex history in this matter and given I can only draw limited inferences on the pre-trial conduct of the parties, I do not consider s 110 *Workers Rehabilitation and Compensation Act* to have direct application here.

22. In my view, although the Employer was successful in the counterclaim, I should not award costs in favour of the Employer on that aspect given the

Worker's overall but limited success in the remainder of the proceedings, the background on how the issue arose, the late filing of the counter-claim and the early admission of normal weekly earnings. Neither, should, however the Worker be entitled to an order for costs in relation to those parts of the hearing that can be isolated as being specifically concerned with the investigation, calculation and settlement of the question of payments of benefits. Although there would have been some work undertaken by the Employer in relation to the underpayment issue in preparation of and during the hearing days in April and July 2008, at that stage work on that issue would be too hard to isolate from the rest of the issues and hearing. In my view, that changed on 31 July 2008 so that any work done from that time is clearly referable to the alleged under payment and counterclaim. The Worker should be entitled to costs concerning work done on the receipt of the decision and the attendance at Court on 12 January 2009, however in my view, given neither party was successful in their primary position in relation to costs, I do not intend to make an order for costs in relation to the applications for costs – each party will need to bear their own costs in relation to that. I acknowledge and thank both counsel for their considered written and oral submissions but in all of the circumstances the costs of those will need to be born by their clients.

23. The following orders are made today:

1. The Employer pay the Worker's costs of and incidental to the proceedings and of and incidental to the dispute which gave rise to the proceedings up to and including 30 July 2008, to be taxed in default of agreement at 100% of the Supreme Court scale.

2. The parties pay their own costs of and incidental to all work from and including 31 July 2008 to and including 28 November 2008.

3. The Employer pay the Worker's costs of and incidental to the proceedings on and after 29 November 2008 to be taxed in default of

agreement at 100% of the Supreme Court scale, excluding any costs associated with the costs applications.

4. The parties pay their own costs of and incidental to the costs applications and hearing on 17 February 2009.

24. By arrangement with the Courts Chambers, this decision will be forwarded to solicitors for the parties by email today and a signed copy forwarded.

Dated this 27th day of May 2009.

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Jenny Blokland
CHIEF MAGISTRATE