CITATION:	*Danielle Rankin v Toll Personnel Pty Limited [2019] NTLC009*
PARTIES:	Danielle Rankin V Toll Personnel Pty Limited
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	21611252
DELIVERED ON:	16 December 2019
DELIVERED AT:	DARWIN
HEARING DATE(s):	26, 27, 28, 29, 30 November 2018, 14 February, 7 June, 2 July, 8 August, 21 August, 30 October 2019, 20 November 2019
JUDGMENT OF:	Chief Judge Morris

CATCHWORDS:

REPRESENTATION:

Counsel:

Worker: Michael Doyle

Employer: Duncan McConnel

Solicitors:

Worker: Povey Stirk

Employer: HWL Ebsworth

Judgment category classification:	B
Judgment ID number:	009
Number of paragraphs:	35

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

No. 21611252

BETWEEN

Danielle Rankin

Worker

AND

Toll Personnel Pty Ltd

Employer

COSTS

CHIEF JUDGE MORRIS

1 On 7 June 2019, I determined that the Worker, Danielle Rankin did suffer an injury in the course of her employment on 9 July 2015. Written reasons were published for that decision and I invited the parties to make further submissions on final orders and costs.

2 Written submissions were then made by the Worker and the Employer as well as subsequent oral submissions at various mentions of the matter in Court.

3 I found that the Worker was partially incapacitated as a consequence of the injury, which finding placed the onus on the Employer of proving the value of her most profitable employment while the partial incapacity arising from the work injury persisted.

4 I found that work injury of 9 July 2015 aggravated the Worker's underlying degenerative conditions in the affected areas, but this had ceased by 4 February 2016 at the latest.

5 I found that the Worker has not satisfied me that she had symptoms or incapacity attributable to the work injury of 9 July 2016 after 4 February 2016 nor attributable to the surgery in February 2016.

6 The Worker has a closed period claim.

7 The parties have agreed the details of all payments made to the Worker and the annexure to the written submissions of the Employer, now Exhibit E21, details all payments made by the Employer to the Worker.

8 Based on my findings the Worker is entitled to payment of the agreed normal weekly earnings from 10 July 2015 to 3 February 2016, being an amount of $54,060.99, less the amount already paid pursuant to section 85 (4) of the *Return to Work Act*, being $17, 269.27. Thus, the Worker is entitled to be paid the shortfall of $36, 791.72.

9 In respect of medical expenses the Worker is entitled to be paid $4,278.41, which is the total incurred minus the expenses that appear to be related to the fusion surgery.

10 This means that the Worker has been successful on the fundamental issue of having suffered a work-related injury, and she has been successful in establishing partial incapacity from and including 10 July 2015 to and including 3 February 2016. She has been unsuccessful in establishing any entitlement to any benefits after 4 February 2016. Accordingly, this is a case of mixed outcomes when it comes to the question of costs.

11 The issue of costs is a discretionary one for the Court. The general principle is that costs normally follow the event. That is the costs of the proceedings should follow the verdicts on the issues. However, where a party has not been successful on all issues, costs may be apportioned. In *Law of Costs*, the author says:

> "Where a court rules that the party ultimately successful has not succeeded on all the issues and considers that this should be reflected in the costs order, it may frame the costs order in one of three main ways: it may make an order according to success or failure on the particular issues; it may make a percentage order, entitling the successful litigant to a percentage of his or her costs; or it may, where the proceedings involve claim and counterclaim that both success (or both fail) make an order that the claimant receive the costs of the action except for those relating to the counter-claim."[1]

12 In *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12 Chief Justice Bray said:

> "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

[1] Dal Pont G E, "Law of Costs", 4th Edition, LexisNexis Butterworths, Australia 2018 at p210

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."

13 Jacobs J noted in the same matter that is was appropriate that there be some costs adjustment because the successful Plaintiff 'consciously attempted to deceive the Court, as well as his medical advisors."[2], but continued with:

> "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 the trial."[3]

14 He further states:

> "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 judgment 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."[4]

15 Justice Toohey in *Hughes v Western Australian Cricket Association (Inc.) & Ors* [1986] WA G14 at 5 – 6 analysed the Court's discretion as follows:

> "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 simply set out in a summary way what I understand to be their effect.
>
> i) Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstance justifying some other order. *Ritter v Godfrey* [1920] 2 KB 47
>
> ii) Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expenses of litigating that portion upon which he has failed. *Forster v Farquhar* [1893] 1 QB 564

[2] Ibid. p 15
[3] Ibid. p 16
[4] Ibid. p

iii) A successful party who has failed on certain issues may not only be deprived of the cost of those issues that 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 a technical pleading sense but any disputed question of fact or of law. *Cretazzo v Lombardi* (1975) 12 SASR 4 at 12"

16 Costs are a matter within the discretion of the Court, but there is a strong endorsement that they ordinarily follow the event. Justice Kenny in *Inspector General in Bankruptcy v Bradshaw* (No 2) [2006] FCA 383 at par 11 said;

> " A successful litigant is ordinarily entitled to an award of costs…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";….Ordinarily, if a successful party is denied an order for costs in whole or part, it is because the party's conduct of the proceedings in some respect or respects makes it just or reasonable to do so…"

He further continues at par 12;

> "An unsuccessful party is not automatically entitled to costs in respect of those issues of facts or law on which the successful party failed"

17 The issues on which the Worker won and lost are not easily severable. The evidence on which she won the claim was also part of the evidence on which she lost the question of ongoing capacity. I have not found that the Worker, whilst not a reliable historian nor forthcoming with medical practitioners, was dishonest, either in her dealings or in her evidence before the Court.

18 The Worker claims she has "substantially succeeded in the proceedings and should be awarded her costs against the employer to be taxed at 100% of the Supreme Court Scale." [5]

19 The Employer claims firstly that "the Worker has been substantially unsuccessful and costs should follow the event, with the Worker ordered to pay the Employer's costs of the action….Alternatively, the Employer submits that if the Worker is to be regarded as successful in the claim by virtue of the finding of injury, the court should approach costs on an issues basis to reflect the fact that the substance of the Worker's claim was directed to alleging that her injury contributed to ongoing total incapacity and a consequential spinal fusion, upon which issues she failed completely and which issues comprised the overwhelming monetary value of the claim pursued by the Worker."[6]

[5] Worker's submission on costs, par 1.
[6] Employer's further submissions on final orders and costs, para 26,27

20 In consideration of the exercise of the discretion I do accept the matters raised by the Worker in submissions, that is:

> (1) "In the face of the employer's complete rejection of the worker's claim for compensation it was necessary for her to institute the proceedings and incur the ensuing expense.
>
> (2) The worker successfully established that she had suffered a work injury and had a consequent entitlement to compensation;
>
> (3) The employer was opposed to all forms of relief sought in respect of the worker's claim
>
> (4) It was necessary for the worker to call the evidence which she called at trial in order to prove that she had suffered a relevant work injury and that she had suffered consequent incapacity for work and a need for medical treatment – the work did not rely on evidence which was unnecessary to her case…
>
> (5) The worker did not improperly nor unreasonable raise issues or make allegations in the proceedings;
>
> (6) The worker, although having been found to be neither a good nor candid historian and having a tendency to exaggerate her symptoms, was not found to have been a dishonest witness;
>
> (7) The worker make appropriate concessions including that she had suffered prior injuries and a pre-existing degenerative conditions affecting her lumbar and cervical spines;
>
> (8) The trial was not unduly lengthened on account of any specific allegations made, or forms of relieve claimed, by the worker."[7]

Parties efforts to come to agreement

21 Section 110 of the *Return to Work Act* states

> 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 those efforts, including in

[7] Worker's submissions on costs, para 18

particular the efforts made at the directions hearing and any conciliation conference.

22 A summary of the various offers made in attempts to settle the matters in dispute has been provided to the Court. These date from 4 October 2016 to 28 November 2018. Some offers were made inclusive of costs, others with costs to be agreed or taxed. The early offers were clearly made before all matters would have been known to the parties and prior to various expert reports and the strengths and weaknesses of the case would have been fully known.

23 Of particular note, in my view, is an offer made at 10am on 26 November 2018, that is, the first day of the trial, at the time the trial was listed to commence. The Employer offered the Worker $175,000 plus the Worker's costs to be agreed or taxed. Obviously if the Worker had accepted this offer, she would have been financially better off than the ultimate decision of the Court on the evidence.

24 Was the failure to accept this offer something that the Court should take into account in determining the question of costs?

25 A *Calderbank* offer is one where, during the process of litigation, an offer to settle has not been accepted by the offeree, and that party has subsequently been awarded less than the amount offered. The making and refusing of the offer can then be considered in an indemnity costs application by the offeror.

26 Justice Hiley in *Ceccon Transport Pty Ltd & Ors v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 at par 58 – 60 says:

> "A *Calderbank* offer does not automatically result in the court making an order for indemnity costs. The question that the court has to determine in deciding whether to award indemnity costs is:
>
> > …whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure.
>
> In the context of a *Calderbank* offer, this generally devolves into a consideration of the following two questions:
>
> (a) whether the offer was a genuine offer of compromise; and
> (b) whether it was unreasonable for the offeree not to accept the offer in the circumstances.

> As to the first of these questions, a genuine compromise involves a party giving something away. As to the second of these questions, a court will take into account various factors such as the stage of the proceedings at which the offer was received, the time allowed to the offeree to consider the offer, the extent of the compromise offered, the offeree's prospects of success assessed as at the date of the offer, the clarity with which the terms of the offer were expressed and whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it."

27 Given the sum of money offered on 26 November 2018, and that the Worker's costs were in addition to the sum, it appears to me that the offer fulfils the criteria of a genuine offer of compromise. The offeror was 'giving something away'. The parties, at that stage of proceedings should have been well aware and cognisant of the respective strengths and weaknesses of their cases.

28 However I am not satisfied that it was unreasonable for the offeree not to accept the offer in the circumstances. The offer was literally made at the Court door. It was 10am with the trial listed to start at 10am, the Court officer might well have been indicating they were going to get the Judge from Chambers. All witnesses and evidence would have been prepared and listed to give evidence. The offeree had little practical time to consider the offer. It was not in writing, and the timing of the offer left little time to put all of the formal practicalities required of a *Calderbank* offer into effect. The trial was not anticipated to be a particularly lengthy one, with a five-day listing. I note a counteroffer was made some 20 minutes later, which perhaps once costs were calculated was not that far apart from the Employer's 10am offer. This offer by the Worker was a repeat of an offer made some five days prior to trial commencement. But both offers were rejected and the trial commenced.

29 Whilst I note Basten JA's statement in *Elite Protective Personnel Pty Ltd & Anor v Salmon* [2007] NSWCA 322 at 147 quoted by Hiley J in *Ceccon Transport Pty Ltd & Ors v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 at par 63

> "However, a defendant which receives an offer of settlement in circumstances where it reasonably requires more time to consider its position would no doubt be advised to respond to that effect and, if necessary, make a counter-offer in due course."

I also note that an offer made at the commencement time of trial, where the Court time has been scheduled, witnesses are timetabled and experts briefed allows little practical time for consideration, even if requested.

Conclusion

30 After consideration of all these matters, in my discretion I am of the view that I should not depart from the usual course, in relation to costs. That is, the Worker, whilst only partially successful, should be entitled to her costs. Her whole claim was disputed; she needed to proceed to trial in order to pursue the findings and orders I made in her favour. The evidence or proceedings were not overtly extended by evidence pertaining only to the unsuccessful part of her claims. Those claims were not a separate or discrete issue but a part of the extent of the impact and injury caused and claimed. It would be difficult to severe or apportion the evidence in relation to that part of the Worker's claim. Whilst I note the difference is large between the financial amount should she have been completely successful as the claim was pleaded, and the amount she was ultimately awarded, in my view this is not a significant matter in this particular case, although it may be in others.

Interest

31 Interest is also sought pursuant to s89 (1) of the *Return to Work Act.* An application pursuant to s109 is not pressed.

32 The Worker's claim was disputed by the Employer from the outset. Subsection 89(2) of the Act provides as follows:

> If the liable person disputes liability for compensation and the dispute is later resolved wholly or partly in favour of the worker, for the purpose of calculating interest under subsection (1), weekly payments are taken to have fallen due when they would have fallen due had there been no dispute.

Final Orders

33 The orders in relation to costs are thus:

34 The employer to pay the Worker's costs of and incidental to the proceedings on a party to party basis to be taxed in default of agreement at 100% of the Supreme Court Scale.

35 The employer to pay interest on arrears of weekly benefits pursuant to s 89(1) of the Return to Work Act, calculated to the date of payment of the arrears.

Dated this 16th day of December 2019

Chief Judge MORRIS
WORK HEALTH COURT JUDGE