CITATION:	*Akouete Gbekou v Aussiemove International Movers Pty Ltd* [2022] NTWHC005
PARTIES:	AKOUETE GBEKOU
	v
	AUSSIEMOVE INTERNATIONAL MOVERS PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO:	21921639
DELIVERED ON:	3 March 2022
DELIVERED AT:	DARWIN
HEARING DATES:	7 JUNE & 17 DECEMBER 2021
DECISION OF:	JUDGE MACDONALD

CATCHWORDS:

Costs - Work Health Court Rules 1999 – R.23.02 – Supreme Court Rules - Order 63 – Rule 63.07(c) - gross amount

REPRESENTATION:

Counsel:

Worker:	Self Represented
Employer:	Mr Wade Roper

Solicitors:

Worker:	Self Represented
Employer:	Minter Ellison

Judgment category classification:	B
Judgment ID Number:	[2022] NTWHC005
Number of Paragraphs:	18

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

Claim No: 21921639

BETWEEN

AKOUETE GBEKOU

Worker

AND

AUSSIEMOVE INTERNATIONAL MOVERS PTY LTD

Employer

REASONS FOR DECISION

(Delivered 3 March 2022)

JUDGE GREG MACDONALD

BACKGROUND

1. On 13 October 2015 Mr Akouete Gbekou (the Worker), while employed by Aussiemove International Movers Pty Ltd (the Employer), sustained a back injury for which he made a claim for workers compensation. The Employer, through its insurer, accepted liability for the injury and claim.[1]

2. The dispute giving rise to the proceedings began on 5 June 2018, through the Employer's insurer, QBE Insurance (Australia) Limited, writing to the Worker requiring that he provide a medical certificate within 14 days. No certificate was provided and in July 2018 the employer ceased payment of weekly benefits to the Worker in accordance with s 69(2) (aa) of the *Return to Work Act 1986* (the Act). The dispute proceeded through mediation and a tortuous procedural course, with the claim ultimately proceeding to a contested hearing on 7 June 2021. On that date the Worker had some resort to counsel from the independent bar, Mr Simon

[1] Paragraphs 9 of the Amended Statement of Claim and Amended Defence. However, the Worker's position in the proceeding was more complex than this, in that the Amended Statement of Claim filed 19 March 2020 also alleged he was first injured on 17 June 2012 through a separate incident, in relation to which the Employer pled that liability has not been accepted.

Lipert, who was good enough to accept an amicus role to assist. That step had been facilitated by the Employer's solicitors in the circumstances of the difficulties which conduct of the Worker's case was prone to present, and the court was grateful for the efforts of Mr Lipert and Minter Ellison's facilitation.

3. On 7 June 2021, despite procedural directions given together with guidance provided to the Worker, he was ultimately in a position of being unwilling or unable to call any medical evidence as to injury and incapacity. The Worker's predicament was no doubt unassisted by English being very much his second language. However, the court ensured the presence of a French interpreter on the day of the hearing, and other measures were also taken in relation to procedural requirements leading to hearing, particularly, by the Registrar, towards enabling the Worker to prosecute his claim.[2]

4. In addition to the language barrier, conduct of the matter was not assisted by various other aspects, including movement of the Worker's representation from firm to firm. The Worker was entirely unassisted and self-represented in the Employer's application for costs made 17 December 2021.

5. On 7 June 2021 the Orders made included leave to the Worker to withdraw his claim, and liberty to apply. The latter order was in the context that the Employer's lawyers then needed to provide advice and obtain instructions on the question of costs.

Application & principles

6. On 13 October 2021 Minter Ellison lodged a Re-List application to Chambers, seeking a date for argument on and determination of the question of costs. The Registrar liaised with the Worker and the matter was ultimately listed on 17 December 2021.

7. On 17 December the Employer's application was for a costs order under s 110 of the Act read in conjunction with r23.03 of the *Work Health Court Rules 1999* (WHC Rules) and Order 63 of the *Supreme Court Rules 1987* (SC Rules), that the Worker pay the Employer's costs fixed in the lump sum of; $45,000; or $22,700; or such other sum as the court sees fit.[3] Those orders in the alternative were sought instead of the usual 'taxed or agreed' order, due to the circumstances of the Worker, the issues involved in the proceeding, respective conduct of the parties, the manner in which the proceeding resolved, and the further time and resources which agreeing or taxing of any costs order would entail.

8. The Employer relied on an Affidavit sworn by Mr Lachlan Baird of Minter Ellison on

[2] On 7 June 2021 it was the court's ultimate understanding that the Worker, for one or a complex of reasons, refused to summons any relevant medical practitioner to attend and produce evidence.

[3] Noting that paragraph 2.b of the Employer's written submissions also sought a further alternative of costs on an indemnity basis, to be agreed or taxed.

16 December 2021 and also provided written submissions on 17 December 2021. The Affidavit deposed that the Employer had expended $72,480 in professional and counsel fees.[4] In addition, the Affidavit annexed counsel's memoranda of fees and various correspondence engaged in between the parties for the purpose of resolution of the proceeding by agreement.

9. The Worker made clear to the court on 17 December that he wanted all issues to be finally determined by the court, and did not wish for the application to be adjourned to enable legal advice on the Affidavit or submissions, or to be heard in relation to that material. Despite the court's reservations concerning the Worker's capacity to fully appreciate and understand the essential processes and likely consequences involved, it became necessary to proceed. The application was then adjourned to 3 March 2022 for decision.

Rule 23.03 of the WHC Rules provides;

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.

(2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.

(3) In exercising its discretion under this rule in relation to a proceeding commenced under section 104 of the Act, the Court must have regard to the matters referred to in section 110 of the Act.

10. Rule 23.03 is conditioned on "*subject to the Act*", so s 110 of the Act is potentially relevant. Section 110 provides;

> *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.*

11. Minter Ellison's Affidavit sworn 16 December 2021 deposes to extensive efforts on the part of the Employer to resolve the proceeding by agreement. It might legitimately be submitted that the Employer (and Worker) should prudently have sought to resolve the dispute at an earlier juncture, and been more persistent and

[4] Paragraph 7 of Mr Lachlan Baird's Affidavit sworn 16 December 2021.

consistent throughout conduct of the proceeding in that vein. However, I note that the Amended Statement of Claim was not filed until 19 March 2020 and that earnest negotiations were underway by July 2020. Ultimately, I have concluded that s 110 could only have a minimal role in determination of the question of costs.

12. The three issues for decision are, firstly, whether a costs order in favour of the Employer should be made. Second, whether any costs order should be made in a "*gross amount*" as provided by SC Rule 63(7)(c). Lastly, if so, in what quantum.

13. The first issue was readily resolved. The worker withdrew his claim at hearing, rendering the employer successful in the proceeding. The usual approach of costs following the event would apply.[5] It is of no assistance to recognise that the Worker was self-represented at some crucial junctures in the litigation, or that he is very likely impecunious.[6]

14. I also note that SC Rule 63.11(6) providing that "*a party who discontinues a proceeding or withdraws part of a proceeding… shall pay the costs of* [the other party]", which fortifies the usual approach.

15. The Employer at paragraph [14] of its written submissions of 17 December 2021 submits a range of factors as to why it would be appropriate to make the inevitable costs order in a "*gross amount*". Other than to respectfully disagree with the proposition that the case was "*relatively straightforward*" and "*simple and straightforward*", I accept the Employer's propositions in support of the costs order being in the form of a "*gross amount*".[7] The difficulties, expense, and likely waste of further time and resources indicate a costs order in the form sought would also generally be in the interests of administration of justice.

16. It is also noted that, unless made in indemnity or 'solicitor and client' terms, a cost order is never a complete indemnity to a successful litigant's costs liability. However, any full costs order should approximate reasonable compensation for the costs and disbursements incurred. Ranged against that, in matters where a gross or lump-sum amount is sought, the court must be vigilant so as to not penalise the unsuccessful litigant. Ultimately, any amount awarded in the circumstances must be fair and reasonable.

17. It is accepted that the Employer's gross costs incurred amount to $72,480, which amount is the total expenditure on professional fees and disbursements, so may be characterised as the 'indemnity amount'. On 17 December 2021 it was said that the lowest lump-sum amount sought by the Employer, being $22,700, was a figure arrived at by application of a reduction in the vicinity of 60%. Even on a particularly rigorous taxation, and having regard to factors adverse to the Employer's optimal

[5] See *Oshlack v Richmond River Council* (1998) 193 CLR 72 and *Matzat v Gove Flying Club Inc* [1998] NTSC 36

[6] *Northern Territory of Australia v Sangare* (2019) 265 CLR 164.

[7] The ultimate approach indicated in this matter is not dissimilar to the costs issue before the court in *Lawrie v Lawler (No. 2)* [2015] NTSC 46.

position on the reasonableness of fees and disbursements incurred, a reduction of that magnitude would be very unlikely. Doing the best I can, I apply a reduction of 50%, which produces a "*gross amount*" of $36,240.[8]

18. The Worker is to pay the Employer's costs in the proceeding, in the amount of $36,240.

Dated this 3rd Day of March 2022

……

Judge Greg Macdonald
Work Health Court

[8] It is noted that effectively, a 40 percent reduction was applied to the costs awarded in *Lawrie v Lawler (No. 2)* [2015] NTSC 46, as the distinction between indemnity and party and party costs in that matter.