

CITATION: *Sayed Khail v RTA Gove Pty Ltd* [2025] NTWHC 1

PARTIES: Sayed Khail
V
RTA Gove Pty Ltd

TITLE OF COURT: Local Court

JURISDICTION: Work Health

FILE NO(s): 2020-02625-LC

DELIVERED ON: 23rd January 2025

DELIVERED AT: Darwin

HEARING DATE(s): 21st January 2025

JUDGMENT OF: Judge Fong Lim

CATCHWORDS:

WORK HEALTH – Costs – parties partially successful – Judicial exercise of discretion

Return to Work Act 1986

Colgate-Palmolive Ltd v Cussons Pty Ltd (1993) 46 FCR 225

Cretazzo v Lombardi [1975] 13 SASR 4

REPRESENTATION:

Counsel:

Worker:	Ms Gray KC with Mr Doyle
First Employer:	Mr Roper SC with Mr Sweet

Solicitors:

Worker:	Tindal Gask Bentley
First Employer:	Minter Ellison

Judgment category classification: A

Judgment ID number: 1

Number of paragraphs: 16

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

No. 2020-02625-LC

BETWEEN:

Sayed Khail

AND:

RTA Gove Limited

REASONS FOR JUDGMENT

(Delivered 23rd January 2025)

JUDGE Fong Lim

1. On 13 January 2025, I handed down my decision on the questions remitted to me by the Supreme Court.
2. In my decision, I answered in the questions on remittal in favour of the Worker. The matter is now before me regarding the question of costs and interest.
3. The parties have agreed on the interest to be paid at a sum of \$72892.38 and that the arrears of compensation \$398,154.73 is to be paid to the Worker by the First employer RTA Gove Limited (RTA).
4. The Worker applies for his costs of the proceeding on the standard basis and at 100% of the Supreme Court costs scale with some off set off for the first employer of its costs arising out of my order of the 17 September 2021. The Worker also requests a certification fit for senior counsel on the remittal proceedings. That is reflected in the draft minutes of order and filed as below:

"1. The worker's appeal against the first employer's 22 May 2020 notice of cancellation of weekly payments made pursuant to section 69 of the RTWA is allowed on the basis that the worker had not ceased to be incapacitated by the compensable injury to his low back sustained on 5 September 2019 and remained partially incapacitated at the time of the notice, and on the basis that the first employer has not proved the reasonable availability of work as a car park attendant in respect of the period to the end of the first 104 weeks of incapacity for work resulting from that injury.

2. *The worker is entitled to recover from the first employer interest on the aforesaid arrears of weekly payments calculated in accordance with section 89 of the RTWA.*
 3. *The worker is entitled to recover from the first employer arrears of weekly payments for the period from the date of the notice of cancellation to the end of the last week of the balance of the relevant 260 week period provided for in s 65(1BA) of the RTWA, such arrears having been agreed in the amount of \$398,154.73.*
 4. *Subject to Order 5 hereof, the first employer is to pay the worker's costs of the proceeding on a standard costs' basis (as between party and party), such costs to be calculated at 100% of the Supreme Court scale and taxed in default of agreement.*
 5. *In respect of Order 4 hereof, the first employer is entitled by way of set off, to reduce the quantum payable to the worker in respect of Order 4, by the quantum that the Worker is required to pay first employer by reason of Order 5 of the Orders of 17 September 2021.*
 6. *That part of the proceeding comprised in the remittal from the Supreme Court is certified fit for senior counsel."*
5. The First Employer submits the Worker should pay its costs up to and including the 1st of September 2022 on a standard basis 100% of the Supreme Court scale certified fit for senior counsel and the First Employer should be responsible for the Worker's cost for the balance of the proceeding at 50% of the Supreme Court scale. The orders are reflected in the Short minutes of order filed in court today and reflected below:
- "1. The workers appeal against the first employer's 22 May 2020 notice of cancellation of weekly payments made pursuant to section 69 of the RTWA (the Notice) is allowed*
 - 2. the Worker is entitled to recover from the first employer arrears of weekly payments for the period from the date of the Notice to the end of the last week of the balance of the relevant 260 week period provided for in s 65 (1BA) of the RTWA, in the amount of \$398154.73(the arrears)*
 - 3. the first employer is to pay the worker interest on the arrears under section 89 of the RWA in the amount of \$72892.38*
 - 4. the worker is to pay the first employers costs of and incidental to these proceedings, to and including 1 September 2022, on the standard basis as taxed of agreed, such costs to be fixed at 100% of the Supreme Court Scale and certified fit for Senior Counsel*
 - 5. the First employers is to pay the worker's cost of and incidental to the balance of September 2022 hearing, limited to those costs associated with the worker's proceedings in that period against the first employer on the standard basis as taxed or agreed, such costs to be fixed at 50% of the Supreme Court Scale*

6. the first Employer pay the worker's costs of and incidental to the hearing of the remitted questions on the standard basis as taxed or agreed such cost to be fixed at 100% of the Supreme Court Scale and certified fit for Senior Counsel."

6. This matter has a long and tortured history and the issue of costs between the parties was always going to be complicated given that history and my decision to dismiss the worker's claim for psychiatric injury against the second employer and psychological sequelae against the first employer.
7. It is important to note that the basis upon which I dismissed both of those claims was because I found the worker to be an untruthful and unreliable witness willing to lie to his own advantage. It is also important to note that at least 50% of the time spent in at the hearing in first instance was focussed on the psychiatric/psychological claim.
8. It is trite that this Court has an unfettered discretion to order costs and that discretion should be exercised judicially.
9. Any order for costs should consider which party was successful and costs will usually follow the event. This is complicated when parties are only partially successful, however the courts have generally found that a party who has on the whole succeeded in its claim ought to be awarded its costs unless there are circumstances which warrant an order to the contrary¹.
10. It is also accepted authority that although a party may fail on particular issues of fact or law if they are substantially successful then they ought to be granted their costs and not discouraged from canvassing all issues at trial.²
11. In the present case the Worker appealed the decision to cancel his benefits arising from the physical injury and also claimed originally pleaded that he was totally incapacitated for work because of a psychological sequelae (or a separate psychiatric injury). There was a consolidation of the actions and necessary amendments of pleadings were made. On the second day of the hearing there was a lengthy discussion about the worker's pleadings and that resulted in the Worker amending his pleadings to reflect his claim that he continued to be incapacitated for work because of his physical injury and/or psychological sequelae or psychiatric injury.
12. In the end the Worker was successful in arguing that the first employer had not discharged its onus to prove the substance of its section 69 cancellation of benefits and did not satisfy the court that the most profitable employment was reasonably available to the Worker at the relevant time on its counterclaim.
13. The First Employer submitted that up to the amendment of the Worker's pleadings in September 2022 they only faced a challenge to the technical validity of the section 69 notice and the counterclaim was only pleaded should the worker be successful in his appeal against the section 69 notice. The first employer argued in these circumstances the first employer should

¹ *Colgate-Palmolive Ltd v Cussons Pty Ltd* (1993) 46 FCR 225

² See *Cretazzo v Lombardi* [1975] 13 SASR 4

not be responsible for the worker's costs up to the date in September 2022.

14. The Worker made some submissions about the Worker's attempts at settlement prior to the hearing and suggested that the offers made by the worker were less than he was awarded by this court and those efforts should be taken into account when considering costs.³
15. At this point I observe that in my view at least 50% of the time spent at hearing concentrated on the Worker's psychological/psychiatric injury which he was ultimately unsuccessful on because of my view of his untruthfulness and unreliability as witness. It is my view that finding creates circumstances which support a costs order against the Worker for some of the proceedings even though he was successful in his claim for compensation for his physical injury.
16. The First employer's argument that the Worker ought to pay their costs up to the second day of hearing cannot be sustained. While the First Employer had up to that day prepared their defence regarding the technical validity of their section 69 notice, they also had prepared for their counterclaim alleging the Worker was not totally or partially incapacitated arising out of his physical injury.
17. Given all of those circumstances and in the interest of justice my orders are as follows:
 1. The Worker's appeal against the first Employers 22 May 2020 notice of cancellation of weekly payments made pursuant to section 69 of the *Return to Work Act* is allowed.
 2. The First employer to pay the Worker arrears of weekly benefits for the period from the date of the notice to the end of the last week of the balance of the relevant 260 week period provided for in section 65 (1BA) of the *Return to Work Act*, such arrears having been agreed in the amount of \$398,154.73.
 3. The first employer to pay the worker interest on the arrears under section 89 of the *Return to Work Act* in the amount of \$72892.38.
 4. The first employer to pay the workers cost of and incidental to the proceedings up to the first day of the hearing on a standard basis calculated at 100% of the Supreme Court Scale. Such costs are limited to the costs as against the First Employer. Those costs to be taxed in default of agreement.
 5. The First employer to pay 50% of the Workers cost of the September 2022 hearing limited to those associated with the worker's proceedings against the first employer to be taxed or agreed those costs to be fixed at 100% Supreme Court cost scale.

³³ Section 110 of the *Return to Work Act*

6. The first employer pay the workers costs of and incidental to the hearing of the remitted questions on the standard basis as taxed or agreed such costs to be fixed at 100% of the Supreme Court Costs scale.
 7. The costs of and incidental to the proceeding at first instance and upon remittal questions is certified fit for senior counsel.
 8. Costs of the second employer remain reserved
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