

SUPREME COURT OF QUEENSLAND

CITATION: *Hehir & Another v Smith* [2002] QSC 136

PARTIES: **JOHN HEHIR**
(first appellant)
and
FINANCIAL ADVISERS AUSTRALIA PTY LTD
(second appellant)
v
SANDRA SMITH
(respondent)

FILE NO: S 6622/01

DIVISION: Trial Division

PROCEEDING: Appeal from Anti-Discrimination Tribunal

DELIVERED ON: 16 May 2002

DELIVERED AT: Brisbane

JUDGE: Wilson J

ORDER:

1. **That the appeal be allowed;**
2. **That the order of the Anti-Discrimination Tribunal that the appellants pay the respondent the sum of \$17,000.00 by way of compensation within 60 days of the date of the order be set aside;**
3. **In lieu thereof, that the appellants pay the respondent the sum of \$14,000.00 by way of compensation on or before 31 May 2002;**
4. **That the costs of the proceedings before the Anti-Discrimination Tribunal be remitted to the Tribunal for it to determine, taking account of submissions already made to it, the extent of the appellants' success in the appeal to the Supreme Court, and any further submissions it may receive on costs;**
5. **That as for the costs reserved by the Chief Justice on 23 August 2001, the appellants pay the respondent's costs of and incidental to the interlocutory application to be assessed on the standard basis;**
6. **Otherwise, that the respondent pay the appellants' costs of and incidental to the appeal to be assessed on the standard basis, those costs to be limited to the costs of the hearing on 22 February 2002 and one half of all other costs of and incidental to the appeal;**

7. That the respondent be granted an indemnity certificate in respect of the appeal pursuant to s 15(1) of the *Appeal Costs Fund Act 1973*.

CATCHWORDS: PROCEDURE – COSTS – appeal to Supreme Court from Anti-Discrimination Tribunal – where appellant succeeded in having compensation reduced - where respondent made appellant offer equal to result on appeal

Anti-Discrimination Act 1991 (Qld), s 209(1)(b), s 213
Appeal Costs Fund Act 1973 (Qld), s 15(1)

Deepcliffe Pty Ltd v Gold Coast City Council [2001] QCA 396, Appeal No 10673 of 2000, 25 September 2001, considered.

Griffith University v Ivory, SC No 1818 of 1997, 9 May 1997, considered.

JB Geraghty & ors v Dairy Industry Tribunal & ors [2001] QSC 145, SC No 1466 of 2000, 19 May 2000, considered.

Tector v FAI General Insurance Co [2000] QCA 426, Appeal No 7391 of 1999, 17 October 2000, considered.

COUNSEL: DP O’Gorman for the appellants
 SJ Keim for the respondent

SOLICITORS: Lynch & Company for the appellants
 Susan Moriarty for the respondent

[1] **WILSON J:** When I published my reasons for judgment in this matter on 10 April 2002, I agreed to receive written submissions on costs (both before the Anti-Discrimination Tribunal and on appeal) and on the form of the order. Such submissions were subsequently received.

[2] The appellants sought orders -

- (i) that the respondent pay the appellants' costs of the appeal to be assessed on the standard basis;
- (ii) that the respondent be granted an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act 1973* concerning its costs of the appeal;
- (iii) that the appellants pay two-thirds of the respondent's costs of the Tribunal proceedings to be calculated in accordance with Magistrates Courts scale F;
- (iv) that the costs awarded to the appellants in the Supreme Court be set off against the costs which the appellants must pay to the respondent for the Tribunal proceedings;

- (v) that the appellants have 3 months in which to pay the compensation of \$14,000.00.

[3] The respondent sought orders –

- (i) that the appellants pay the respondent's costs of the appeal including all reserved costs on an indemnity basis, such costs to be agreed, and, failing agreement, to be assessed;
- (ii) that the issue of the costs of the parties before the Tribunal be remitted to the Tribunal to be determined by the Member who originally conducted the proceeding in the Tribunal, with the direction that such costs be determined taking into account the decision on appeal and, otherwise, on the evidence before and submissions received by the Tribunal, provided that the Tribunal may hear such further submissions on the issue of costs as it considers appropriate;
- (iii) that the appellants pay the respondent the substituted sum of \$14,000.00 within 28 days of the date of the submissions (ie within 28 days of 12 April 2002).

Costs before the Tribunal

[4] Section 213 of the *Anti-Discrimination Act* 1991 provides –

"The tribunal may order a party to pay such costs as the tribunal considers reasonable."

[5] The Tribunal made the following order for costs –

"I give the parties leave to make written submissions with respect to costs within fourteen (14) days of the date of this decision. Failing such submissions being made, I will order that the respondent pay the complainant's party and party costs calculated in accordance with the scale appropriate to matters in the District Court where the sum recovered is less than \$50,000.00, the amount of such costs to be agreed by the parties within twenty-one (21) days of the date of this decision and, failing such agreement, the amount is to be settled by the Tribunal. I give the parties leave to apply with respect to the issues of costs."

I understand that the parties made written submissions on costs. However, before the Tribunal had determined that issue, the appeal to this Court was filed, and the Tribunal declined to determine the costs issue while the appeal was pending.

[6] I am inclined to the view that the respondent (originally the complainant) should have her costs below. However, in all the circumstances that question should be remitted to the Tribunal for determination, with directions that it take into account submissions already made to it on costs, the extent of the appellants' success before this Court, and any further submissions it may receive on costs.

Costs of the Appeal

- [7] The appellants were successful in having the amount of the compensation reduced, although they failed on their numerous other grounds of appeal. Prima facie they should have their costs of the appeal, or a proportion of them.
- [8] An interlocutory application in the appeal came before the Chief Justice on 23 August 2001. At that time there were four grounds of appeal; His Honour ordered that the originating application (by which the appeal was (wrongly) initiated) be amended by the deletion of two of the grounds, and gave directions for the further conduct of the appeal; he reserved costs. Of course, by the time the appeal was heard, many more grounds of appeal had been added. Between the order of the Chief Justice and the addition of the further grounds of appeal, the respondent (ie the complainant below) made a written offer in these terms –

“In accordance with chapter 9 Part 5 of the Uniform Civil Procedure Rules 1999 the Respondent, HEREBY OFFERS to accept the sum of \$14,000.00 plus costs of Appeal Number 6622 of 2001, to the date of this offer, on the Supreme Court scale, assessed on the standard basis, in full and final satisfaction of the Appeal Number 6622 of 2001, from the Applicants, to be paid within 21 days of the date of acceptance of this offer by the Applicants.

This offer is exclusive of the costs of the proceedings below in No HEA/100 of the Anti-Discrimination Tribunal (Queensland) and is not an offer to settle the costs of the proceedings below, in No HEA/100 of the Anti-Discrimination Tribunal (Queensland), which are still to be determined by the Anti-Discrimination Tribunal.

TAKE NOTICE that this offer is open for acceptance for a period of fourteen (14) days after the date of service of the offer on you”.

- [9] The provisions of chapter 9 part 5 of the *Uniform Civil Procedure Rules* do not apply to appeals (*Tector v FAI General Insurance Co* [2000] QCA 426, Appeal No 7391 of 1999, 17 October 2000; *Deepcliffe Pty Ltd v Gold Coast City Council* [2001] QCA 396, Appeal No 10673 of 2000, 25 September 2001), but the fact that the offer was made is still relevant to the exercise of the Court's discretion as to costs. By that offer the respondent indicated her willingness to accept the very amount of compensation to which I found, on appeal, that she was entitled. However, there may have been practical difficulties in having an assessment of costs completed within 21 days.
- [10] In all the circumstances, I consider that the following orders should be made -
- (i) as for the costs reserved by the Chief Justice on 23 August 2001, the appellants should pay the respondent's costs of and incidental to the interlocutory application to be assessed on the standard basis;
 - (ii) otherwise, the respondent should pay the appellants' costs of and incidental to the appeal to be assessed on the standard basis. Those costs should be limited

to the costs of the hearing before me on 22 February 2002 and one half of all other costs of and incidental to the appeal.

Certificate under the *Appeal Costs Fund Act*

- [11] The Tribunal erred in law in awarding aggravated damages, and the appellants have succeeded on that ground of appeal. It is appropriate that the respondent be granted an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act*. See *Griffith University v Ivory*, QSC No 1818 of 1997, 9 May 1997; *JB Geraghty & ors v Dairy Industry Tribunal & ors* [2000] QSC 145, SC No 1466 of 2000, 19 May 2000.

Time within which to pay compensation

- [12] By s 209(1)(b) of the *Anti-Discrimination Act* -
- "209 Orders the tribunal may make if complaint is proven
- (1) If the tribunal decides that the respondent contravened the Act, the tribunal may make 1 or more of the following orders -
- (a)
- (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention".

- [13] I order that the compensation of \$14,000.00 be paid on or before 31 May 2002.

ORDERS

- (1) *That the appeal be allowed;*
- (2) *That the order of the Anti-Discrimination Tribunal that the appellants pay the respondent the sum of \$17,000.00 by way of compensation within 60 days of the date of the order be set aside;*
- (3) *In lieu thereof, that the appellants pay the respondent the sum of \$14,000.00 by way of compensation on or before 31 May 2002;*
- (4) *That the costs of the proceedings before the Anti-Discrimination Tribunal be remitted to the Tribunal for it to determine taking account of submissions already made to it, the extent of the appellants' success in the appeal to the Supreme Court, and any further submissions it may receive on costs;*
- (5) *That as for the costs reserved by the Chief Justice on 23 August 2001, the appellants pay the respondent's costs of and incidental to the interlocutory application to be assessed on the standard basis;*

- (6) *Otherwise, that the respondent pay the appellants' costs of and incidental to the appeal to be assessed on the standard basis, those costs to be limited to the costs of the hearing on 22 February 2002 and one half of all other costs of and incidental to the appeal;*
- (7) *That the respondent be granted an indemnity certificate in respect of the appeal pursuant to s 15(1) of the Appeal Costs Fund Act 1973.*