SUPREME COURT OF QUEENSLAND

CITATION:	*Berenyi v Maynard & Anor* [2016] QSC 25
PARTIES:	**MARGARET THERESA BERENYI** (applicant) **v** **IAN GRAHAM MAYNARD, DIRECTOR-GENERAL, QUEENSLAND HEALTH** (first respondent) **AND** **SUE RICKERBY, DIRECTOR-GENERAL, THE DEPARTMENT OF SCIENCE, INFORMATION TECHNOLOGY, INNOVATION AND THE ARTS** (second respondent)
FILE NO:	SC No 7058 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions provided on 2 and 3 December 2015
JUDGE:	Philippides JA
ORDER:	**The parties are to provide a draft order in terms of the orders made in [21].**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE – where applicant succeeded on first issue but failed on second issue in case – where first issue involved whether the decision to terminate the applicant's employment was amenable to judicial review – where second issue involved whether this was affected by jurisdictional error – where applicant submitted there be no order to costs – where respondents sought costs based on the event being the outcome of the hearing – where respondents sought indemnity costs based on offers made *Judicial Review Act* 1991 (Qld), s 49 *Public Service Act* 2008 (Qld), s 188 *Uniform Civil Procedure Rules* 1999 (Qld), r 681 *Alborn & Ors v Stephens & Ors* [2010] QCA 58, followed *Berenyi v Maynard & Anor* [2015] QSC 370, considered

Firebird Global Master Fund II Ltd v Republic of Nauru [No 2] [2015] HCA 53, cited
Hamcor Pty Ltd v Marsh Pty Ltd [2013] QCA 395, followed
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, followed
Murdoch v Lake [2014] QCA 269, followed
Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship (2013) 251 CLR 322; [2013] HCA 53, cited
Ross v Leach [2014] QCA 144, cited

COUNSEL: R W Haddrick for the applicant
S E Brown QC with J K Carter for the respondents

SOLICITORS: Fisher Dore for the applicant
Minter Ellison for the respondents

PHILIPPIDES JA:

Background

[1] The applicant brought an originating application dated 31 July 2014 seeking judicial review pursuant to the Supreme Court's inherent jurisdiction in respect of four decisions, being the first respondent's decision to terminate the applicant's employment and each of the first respondent's decisions to make a disciplinary finding in respect of three allegations. The applicant sought orders against the respondents that the decision of the first respondent to terminate the employment of the applicant be declared void; a declaration that the applicant remains an employee of the second respondent pursuant to the *Public Service Act* 2008 (Qld) (the PSA); alternatively orders in the nature of *certiorari* and *mandamus* in respect of the applicants continued employment by the second respondent. The applicant filed a further application dated 21 January 2015 seeking to amend the originating application (the amending application).

[2] The respondents argued that the application should be dismissed on the basis that the decision to terminate the applicant's employment was an exercise of contractual power and not amenable to judicial review and that the decision to terminate was not constrained by, or at variance with, the PSA and could not be subject to prerogative or declaratory relief so as to render it amenable to the Court's inherent supervisory jurisdiction. It was also argued that, in any event, there was no jurisdictional error made by the decision maker in terminating the applicant's employment.

[3] There were thus two central issues before the court. The first concerned whether the decision to terminate the applicant's employment was amenable to judicial review pursuant to the Court's inherent jurisdiction, the respondent contending that the termination of employment was merely an exercise of contractual power and therefore not properly the subject of judicial review. The applicant, on the other hand, argued that the contract of employment was terminated pursuant to the statutory power in s 188 of the PSA to take disciplinary action considered reasonable in the circumstances. In those circumstances, it was amenable to review for jurisdictional error. The second issue, which

arose if the applicant succeeded on the first issue, was whether there was any jurisdictional error demonstrated as alleged by the applicant.

[4] The applicant succeeded on the first issue but failed on the second.[1] Orders were made on 18 December 2015 dismissing the applicant's originating application and the amending application dated 21 January 2015. The parties were invited to make submissions as to costs.

[5] It was not disputed that the statutory source for the power to order costs was r 681 of the *Uniform Civil Procedure Rules* 1999 (the UCPR) (since the proceeding was not bought pursuant to the *Judicial Review Act* 1991, so that s 49 of that Act was not engaged).

Applicant's submissions as to costs

[6] The applicant contended that there ought to be no order as to costs.

[7] The first three submissions advanced in support of that position were inter-connected and concerned the proposition that the applicant had suceeded on the largest and most contentious issue in the matter, which concerned the court's inherent to review, *inter alia*, the decision to terminate the applicant "as a public service employee where the termination was done for disciplinary reasons, and the termination was said to be effected by operation of a contractual power". While it was accepted that to obtain the orders sought the applicant needed also to succeed in identifying jurisdictional error, nevertheless it was argued that the majority of the hearing was taken up by submissions on the jurisdiction point, on which the applicant succeeded. It was the central focus of the substantive hearing on 20 November 2014 and was the subject of two post hearing mentions and further submissions. In advancing the submission that the event should be considered in terms of the separate issues raised for determination, the applicant placed reliance on the following observation in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*:[2]

> "The disposition of the costs of the litigation is in the discretion of the Court. Usually, in the exercise of this discretion, it is ordered that the costs should follow the event. In some case, the 'event' may be contestable, especially where separate issues have fallen in different ways."

[8] A second line of argument was advanced that the applicant's proceeding was of significant public utility – the judgment it was said would "result in the State no longer seeking to discipline public servants and then purporting to dismiss them by operation of a contractual power". This was said to follow from the judgment standing as authority for propositions which have a significant impact on the way "the executive government of Queensland manages its public service workforce". Additionally, it was said that the proceeding has eliminated the need for any public servant who is subsequently terminated to demonstrate the reviewability of the disciplinary decision. The judgment demonstrated that a public service disciplinary decision was judicially reviewable, even where the employment relation is subject to a contract of employment.

[9] A third argument was that the respondents "benefitted financially" from the applicant's proceeding, as it had the result of converting the applicant's claim for service and

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1 [2015] QSC 370.
2 (2013) 251 CLR 322 per Kiefel and Keane JJ at 393.

separation payment into an entitlement that the applicant is no longer able to recover. The applicant submitted that she had foregone substantial separation and service payments in correctly pressing this court to conclude that the termination was for disciplinary grounds.

Respondents' submissions as to costs

[10] The respondents submitted that there were no special circumstances to warrant departure from the general rule that costs should follow the outcome of the hearing: r 681 of the UCPR. The applicant was not successful in her ultimate argument to the extent that, irrespective of how the court's jurisdiction to review was engaged, no jurisdictional error as alleged was demonstrated.

[11] It was submitted that there was no basis for approaching the relevant "event" on an issue by issue basis rather than having regard to the outcome. In that regard, reference was made to *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]*.[3] In that case it was stated:[4]

> "In any event, the preferable approach in this case is the one usually taken, that costs should follow the outcome of the appeal. This is not a case where it may be said that the event of success is contestable, by reference to how separate issues have been determined. There are no special circumstances to warrant a departure from the general rule, and good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like …"

[12] The partial success that the applicant enjoyed as to whether judicial review was available was immaterial to the overall outcome of the hearing. It followed that an order should be made that the applicant pay the respondents' costs of the proceeding.

[13] It was further submitted that, although costs of the proceeding did not include costs of an application in the proceeding unless the court orders otherwise (r 693(1)), given the amendment application was determined adversely to the applicant because of the Court's conclusions in the proceeding, costs of the proceeding should be ordered to include costs of that application. Alternatively, costs of that application ought to follow the event, there being no basis for departing from the general rule in respect of that application.

[14] The respondents referred to two offers to settle the proceeding made to the applicant (on 16 September 2016 for $25,000 and 22 April 2015 for $60,000) which were rejected. It was submitted that each of the offers was genuinely made and it was unreasonable for them to be refused. Those offers were made in accordance with the *Calderbank* principles and should "predispose the court to order that the offeror should be entitled to indemnity costs from the date of service of the letter".[5] There were no discretionary factors militating against that predisposition. The applicant, it was thus argued, should pay the respondents' costs on indemnity basis from the date of the offers.

[15] It was submitted that the applicant should pay the respondents' costs of the proceeding and the amendment application with costs awarded on the standard basis until 16 September 2014 and on the indemnity basis thereafter.

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3 [2015] HCA 53.
4 [2015] HCA 53 at [6].
5 See *Ross v Leach* [2014] QCA 144 at [4].

Consideration

[16] I do not consider that there is any merit in the applicant's third argument that the financial implications for the parties of the orders made by the court on 18 December 2015 ought to be considered in relation to the question of costs. The point simply highlights the ironical outcome of the judgment for the applicant.

[17] There is merit in the argument that the "event" ought to be approached as two separate issues. In *Murdoch v Lake*,[6] Morrison JA (with whom the other members of the Court agreed) said:

> "When one refers to the usual rule as being that the costs of a proceeding follow the event, the 'event' was explained by Muir JA in *Alborn & Ors v Stephens & Ors*:
>
> > '[8] The "event" is not to be determined merely by reference to the judgment or order obtained by the plaintiff or appellant, but is to be determined by reference to "the events or issues, if more than one, arising in the proceedings." However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.'" (citations omitted)

[18] In *Hamcor Pty Ltd v Marsh Pty Ltd* [2013] QCA 395, the Court stated:

> "In considering the general principle that costs follow the event, it is appropriate to have regard, not only to the order obtained by the appellants but, to the range of issues ventilated on appeal and the appellants' success in respect of those issues (*Alban & Ors v Stephens & Ors* [2010] QCA 58 at [8], *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26, 60-61)."

[19] The jurisdictional issue, on which the applicant succeeded, was treated by the parties from the outset as a quite distinct issue and was the subject of lengthy oral and written submissions. While success on that issue was ultimately a Pyrrhic victory for the applicant, the issue was nevertheless a central one that was required to be determined. It was not the subject of any concession by the respondents, who strongly contested the issue and sought orders dismissing the originating application on the basis of their submissions on that issue alone. The issue involved determining questions of some complexity as to the nature and source of the power exercised to terminate the applicant, who held a position as a public servant. And while the applicant's claims as to the scope of the judgment in terms of precedent value are overstated, the jurisdictional issue has potentially broader relevance beyond the facts of this case.

[20] Nor do I consider that the rejection of the offers made by the respondent ought to sound in an order for indemnity costs, given the significance of the jurisdictional issue. It was not stated in the offers that indemnity costs would be sought and the larger offer was made at a quite late stage of the proceeding.

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[6] [2014] QCA 269 at [20].

[21] In respect of the jurisdictional issue the subject of paras [35] to [56] of the judgment of 18 December 2015, the respondents should pay the applicant's costs on the standard basis. The applicant should pay the respondents' costs, on the standard basis in respect of the second issue the subject of paras [57] to [112] of the judgment. The applicant should also pay the respondents' costs in respect of the amending application on the standard basis.

Orders

[22] The parties are to provide a draft order in terms of the orders made in [21].