QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Ralph & Anor v Bell* [2015] QCATA 31
PARTIES:	Lindy Ralph State of Queensland (Applicants) v Karen Bell (Respondent)
APPLICATION NUMBER:	APL458-14
MATTER TYPE:	Appeals
HEARING DATE:	16 February 2015
HEARD AT:	Brisbane
DECISION OF:	**Acting Senior Member Endicott** **Member Browne**
DELIVERED ON:	27 February 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal is granted.** **2. The appeal on Ground 1 is allowed and the decision of the Tribunal on 18 September 2014 is set aside.** **3. The application for costs is returned to the Tribunal for reconsideration according to law and the findings disclosed in these reasons for judgment.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – Application for costs – interests of justice – where damages awarded under the *Anti-Discrimination Act* 1991 (Qld) – whether interests of justice require an order for costs *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 100, s 102, s 105, s 107, s 142, s 146 *American Express International v Commissioner of State Revenue* [2003] VSC 32; cited *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364; cited

Bell v State of Queensland & Anor [2014] QCAT 495
Bell v State of Queensland & Anor (No 1) [2014] QCAT 297
Lovell v Lovell (1950) 81 CLR 513; cited
Pickering v McArthur [2005] QCA 294
Queensland Building Services Authority v Johnston [2011] QCATA 265; cited
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412; cited
Tamawood Ltd & Anor v Paans [2005] QCA 111

REPRESENTATIVES:

APPLICANT:	Lindy Ralph and State of Queensland represented by Mr C J Murdoch of counsel instructed by Crown Law
RESPONDENT:	Karen Bell represented by Mr D Pratt of counsel instructed by NR Barbi Solicitor Pty Ltd

REASONS FOR DECISION

Acting Senior Member Endicott

[1] I have had the advantage of reading the draft reasons prepared by Member Browne. I agree with them and the orders she proposes.

Member Browne

[2] On 6 March 2014 the Tribunal awarded Mrs Bell the sum of $9,000.00 to be paid jointly and severally by the State of Queensland and Ms Ralph (the applicants) for compensation for sexual harassment under the *Anti-Discrimination Act* 1991 (Qld) ('QAD Act').[1]

[3] Mrs Bell's complaint under the QAD Act involved complex issues of fact and law and both parties were legally represented. There were four alleged incidents of sexual harassment. There was also an assertion made by Mrs Bell about abusive management by Ms Ralph and that the '*changed management style'* was evidence of the sexual harassment complained of because it was '*tantamount to punishment for failing to accept [Ms Ralph's] alleged request for sex'*.[2]

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1 Mrs Bell was awarded the sum of $7,000.00 for compensation for psychological injury and the sum of $2,000.00 for embarrassment and humiliation to be paid jointly and severally by Queensland Health and Ms Ralph. See *Bell v State of Queensland & Anor (No 1)* [2014] QCAT 297, [105].

2 *Bell v State of Queensland & Anor (No 1)* [2014] QCAT 297, [4].

[4] Mrs Bell as the complainant had the burden of proof under the QAD Act to satisfy the Tribunal '*on the balance of probabilities'* that the applicants contravened the QAD Act.[3]

[5] The learned Member presided over the 5-day hearing that involved witnesses giving evidence for both parties. She found that only one out of the four of the alleged incidents of sexual harassment amounted to a contravention of the QAD Act.

[6] The learned Member also made findings about the *relevance* of the aggressive treatment of Mrs Bell (by Ms Ralph) and said that it (the treatment) had aggravated a pre-existing anxiety that was a psychological injury arising from the proven sexual harassment incident. The learned Member said:

> Accordingly, I find that the relevance of the aggressive treatment of Mrs Bell by Ms Ralph in 2012 is that it aggravated a pre-existing anxiety and predisposition to psychological injury, existing in Mrs Bell as a result of the incident of sexual harassment at the Paddington Tavern, which in turn gave rise to a psychological injury.[4]

[7] Mrs Bell made an application to the Tribunal for her costs. On 18 September 2014, the learned Member decided that the applicants are to pay Mrs Bell's costs of and incidental to the proceeding, including reserved costs (if any) on the standard basis of assessment in accordance with the District Court Scale of Costs.[5]

[8] The applicants have filed an application for leave to appeal or appeal the learned Member's decision in relation to costs.[6]

[9] Because this is an appeal of a decision made by the Tribunal for costs, leave is necessary.[7] Leave to appeal will usually be granted where there is a '*reasonable argument*' that the decision is attended by error, and an appeal is necessary to correct a '*substantial injustice*' to the applicant caused by that error.[8]

[10] There are four grounds of appeal that raise errors of law.[9] The applicants refer to many errors in the learned Member's reasons in particular the applicants say that the learned Member misapplied s 102 of the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act) in circumstances where the interests of justice did not require such an order and the Tribunal's decision was '*illogical and unreasonable*'.

[11] There are further contentions that address the considerations of whether leave should be granted in particular the applicants say there is a *question*

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3 QAD Act s 204.
4 *Bell v State of Queensland & Anor (No 1)* [2014] QCAT 297, [77].
5 *Bell v State of Queensland & Anor* [2014] QCAT 495.
6 Application for leave to appeal or appeal filed 23 October 2014.
7 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 142(3)(a)(iii).
8 *Pickering v McArthur* [2005] QCA 294, [3].
9 Ground five of the appeal was abandoned at the hearing.

of general importance, a reasonable arguable case that the learned Member made an error and a substantial injustice was caused to the applicants by the learned Member's error.

[12] In the first ground of appeal the applicants say that the Tribunal erred in law in determining the costs application by not considering, or in the alternative, not disclosing how it considered Mrs Bell's failure to prove that three of the four pleaded allegations of sexual harassment were established, or that Mrs Bell's allegation that Ms Ralph bullied and harassed her as a result of her (Mrs Bell's) having failed to accept Ms Ralph's sexual proposition was rejected by the Tribunal.

[13] In the second ground of appeal the appellants say that the Tribunal erred in law in that it made a decision that was '*illogical and unreasonable*' by awarding Mrs Bell her costs of the proceeding in circumstances where major and substantial allegations made by her were heard and rejected by the Tribunal.

[14] In the third ground of appeal the appellants say that the Tribunal erred in law in that it misapplied s 102 of the QCAT Act by ordering that the respondents pay Mrs Bell's costs in circumstances where the interests of justice did not require such an order. This ground of appeal is made on the basis that the Tribunal made findings that substantial allegations made by Mrs Bell were heard and rejected.

[15] In the fourth ground of appeal the appellants say that the Tribunal erred in law in that it misapplied s 102 of the QCAT Act by ordering the respondents to pay Mrs Bell's costs in circumstances where the interests of justice did not require an order for costs at all.

[16] The applicants seek orders from the Appeal Tribunal that the decision of the Tribunal dated 18 September 2014 be set aside and that in substitution thereof, the Appeal Tribunal order that there be no order as to costs. At the oral hearing Mr Murdoch of counsel for the applicants did not dispute that in the event there is a finding of an error of law (and leave given), the Appeal Tribunal may exercise the power under s 146(c) of the QCAT Act to set aside the learned Member's decision and return the matter to the Tribunal for reconsideration.

[17] Mrs Bell argues that there is no error in the learned Member's decision. At the oral hearing Mr Pratt on behalf of Mrs Bell said that the learned Member felt '*compelled'* in this case to exercise the discretion to make an order for costs. Mr Pratt does not dispute however that the learned Member did not set out *forensically* the reasons why she did not accept the submissions made by the applicants. Mr Pratt says that the learned Member did ultimately consider all of the submissions in determining the application for costs.

The Tribunal's power to award costs

[18] The starting position in relation to costs under the QCAT Act is that other than as provided under this Act or an enabling Act, '*each party to a proceeding must bear the party's own costs for the proceeding*'.[10]

[19] The Tribunal has the power under s 102 of the QCAT Act to make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the Tribunal '*considers the interests of justice require it to make the order'*.[11]

[20] In considering whether there should be a departure from the usual order that each party pay its own costs and that the discretion under s 102 of the QCAT Act should be exercised, there are certain matters that the Tribunal '*may have regard to*' in exercising its discretion to make a costs order. This may include, for example, whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding; the nature and complexity of the dispute the subject of the proceeding; the relative strengths of the claims made by each of the parties to the proceeding; the financial circumstances of the parties to the proceedings; anything else the Tribunal considers relevant.[12]

[21] In *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*[13] the then President, Justice Wilson, said that the starting point with costs in QCAT is that each party bears its own costs and that the *presumption* may be *displaced* if the Tribunal considers it in the *interests of justice* to order a party to pay all or part of the costs of another party.[14] Justice Wilson said that '*the interests of justice'* is to be considered according to its '*ordinary or plain meaning'* which confers a '*broad discretionary power'* on the decision-maker.[15] Justice Wilson said:

> The starting point concerning costs in QCAT is that each party must bear its own: QCAT Act, s 100. This presumption may, however, be displaced if the Tribunal considers it in the interests of justice to order a party to pay all or part of the costs of another party: s 102(1). The phrase "*in the interests of justice is not defined in the Act but is to be construed according to its ordinary and plain meaning, which obviously confers a broad discretionary power on the decision-maker".*[16]

[22] In *Ascot v Nursing & Midwifery Board of Australia*[17] the then Deputy President, Judge Kingham, said that the *interests of justice* must require a departure from the starting position under s 100 that each party bear its own costs of the proceeding. Judge Kingham said that the *considerations*

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10 QCAT Act s 100.
11 Ibid s 102.
12 Ibid.
13 [2010] QCAT 412.
14 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412, [4].
15 Ibid, see *Herron v The Attorney General for New South Wales* (1987) 8 NSWLR 601, 613 (per Kirby P).
16 Ibid.
17 [2010] QCAT 365.

set out under s 102(3) of the QCAT are not *grounds* for awarding costs but are *factors* to be taken into account in a particular case. Judge Kingham said:

> The public policy intent of the provisions in the QCAT Act is plain. The tribunal was established as a no costs jurisdiction. That may be departed from where the interests of justice require it. The considerations identified in s 102(3) are not grounds for awarding costs. They are factors that may be taken into account in determining whether, in a particular case, the interests of justice require the tribunal to make a costs order.[18]

[23] In this case the learned Member has exercised her discretion to award costs under s 102 of the QCAT Act. Generally the Appeal Tribunal will not disturb the findings made by the Tribunal unless it can be shown that the learned Member's decision is affected by an error of law.[19] It must be shown that the learned Member's decision is plainly unjust or unreasonable, and involved a clear misapplication of the discretion.[20]

Ground 1 – Error in the Tribunal's exercise of discretion under s 102

[24] The learned Member has correctly identified the circumstances in which the discretion under s 102 to award costs may be exercised and what is required in the '*interests of justice*' as stated by Justice Wilson in *Ralacom's case*.[21] The learned Member said:

> [4] Section 100 of the [QCAT Act] sets the basic principle that each party to a proceeding must bear the party's own costs for the proceeding, unless in the proper exercise of its discretion on the grounds set out in QCAT Act, it is appropriate for an award to be made.[22]
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> [5] This Tribunal may make an order for costs if the interests of justice require it. The Tribunal may have regard to whether a party acted in a way that unnecessarily disadvantaged another, the nature and complexity of the dispute, the relative strengths of the claims, the financial circumstances of the parties and anything else the Tribunal considers relevant.
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> [6] The Tribunal has found in considering claims for costs based on the "interests of justice" ground that the relevant factors must "*point so compellingly to a costs award that they overcome the strong contraindicator against costs orders in section 100".* However, the phrase *"in the interests of justice"* is to be construed according to *"its ordinary meaning, which obviously covers a broad discretionary power on the decision maker."*[23]

[25] The learned Member did not, however, correctly apply the test in s 102 and she has failed to consider all of the circumstances relevant to the exercise of the discretion. In particular the learned Member did not

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18 Ibid [9].

19 *American Express International v Commissioner of State Revenue* [2003] VSC 32, see *Queensland Building Services Authority v Johnston* [2011] QCATA 265, [6].

20 *Lovell v Lovell* (1950) 81 CLR 513.

21 Ibid [29].

22 Reason for decision, [4].

23 Reasons for decision, [5] and [6].

consider in her reasons how Mrs Bell failed to prove that three out of four of the allegations of sexual harassment failed and that the Tribunal did not accept Mrs Bell's contention that Ms Ralph bullied and harassed her because she (Mrs Bell) failed to accept Ms Ralph's sexual proposition.

[26] In exercising the discretion under s 102, the learned Member identifies a number of '*factors*' raised by Mrs Bell in relation to her application for costs relevant to '*influence the exercise of the Tribunal's discretion in the interests of justice*'.[24] The learned Member identifies that Mrs Bell's case was complex and necessitated legal representation.[25] In her reasons the learned Member refers to the principle expressed by Keane JA in *Tamawood Pty Ltd & Anor v Paans*[26] that where a successful party has reasonably incurred costs of legal representation it is not in the interests of justice '*to allow that success to be eroded'* by requiring that party to bear the costs of the representation.[27]

[27] The learned Member said that she was '*persuaded*' by Mrs Bell's submission in her claim that it is not in the interests of justice to allow '*that success to be eroded*' by requiring her to bear the costs of representation in circumstances where such representation was necessary to '*achieve that outcome*'.[28] The learned Member said:

> [11] Further, Mrs Bell says that the case was complex and necessitated legal representation. Mrs Bell relies on the principle expressed by Keane JA in *Tamawood Pty Ltd & Anor v Paans* that where a party has reasonably incurred the cost of legal representation, and has been successful before the Tribunal, it could not rationally be said to be in the interests of justice to allow that success to be eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome.
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> [12] Mrs Bell also submits that the respondents should have recognized two weaknesses in their case - that Mrs Bell was not raising complaints of sexual harassment to deflect management of poor performance; and the problems inherent in the investigation conducted by Mr Suter. If they had done so they would have been prompted to settle the proceedings. Mrs Bell says that it was unnecessary for the respondents to run a case attempting to destroy her credit and reputation as a hard worker.
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> [13] Finally, she points to the disparity in financial position of the respondents and her. Mrs Bell has sworn an affidavit as to the detrimental impact the costs of the proceeding have had on her and her family.
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> [14] Of these submissions, I am most persuaded by the submission that having succeeded in her claim it is not in the interests of justice to allow that success to be eroded by requiring Mrs Bell to bear the costs

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24 Ibid [9].
25 Ibid [11].
26 [2005] QCA 111.
27 Costs decision, [11].
28 Ibid [14].

> of representation which was reasonably necessary to achieve that outcome.

[28] In her reasons the learned Member identifies many features of the case. She said that the proceedings were by its nature *complex* and that both of the parties were represented by '*experienced counsel*'.[29] The learned Member refers to the '*many witnesses'*, voluminous material and '*difficult issues of credit to resolve'*.[30] The learned Member also considered the applicants' contention that some of Mrs Bell's evidence was *unnecessary*. The learned Member found that the length of the hearing was not '*affected by [her witnesses'] evidence'*.[31] She also found that Mrs Bell's cross examination at the hearing was *substantial* and Mrs Bell had no choice but to participate in lengthy proceedings. Ultimately the learned Member found that Mrs Bell should not be *penalised* for this (the lengthy proceedings) by being denied her reasonable costs.[32] The learned Member said:

> The case was complex, it took 5 days to complete and both parties were represented by experienced counsel. There were many witnesses, voluminous material and difficult issues of credit to resolve. I note the [applicants'] contention that some of [Mrs Bell's] evidence was unnecessary and of itself needlessly inflated the costs of [Mrs Bell] and the [applicants]. There were three short affidavits from witnesses Hubber, Fullick and Eyles which were attributed no weight. I do not consider the length of the hearing was affected by their evidence.
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> A substantial part of the hearing was dedicated to cross examination of Mrs Bell and to Mrs Bell meeting the allegations raised against her. To successfully prosecute her claim Mrs Bell had no choice but to participate in lengthy proceedings. She should not be penalised for doing so by being denied her reasonable costs.
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> I find that Mrs Bell is entitled to payment of her costs on the basis that it is in the interests of justice.
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> In this respect I rely upon the decision of the then President of the Tribunal Wilson J., in *[Ralacom's case]* and His Honour's statement that: *the principles found in Tamawood provide guidance about the circumstances in which it may be in the interests of justice for this tribunal to award costs against parties.*[33]

[29] We accept the applicants' submission that the learned Member did not accept all of Mrs Bell's contentions of sexual harassment under the QAD Act. In her reasons dated 6 March 2014 the learned Member found that the events on 8 December 2011 and the first incident on 17 December 2011 were not '*intended to offend, humiliate or intimidate Mrs Bell*' and that therefore there was no breach of the QAD Act. Mrs Bell was however successful in relation to the second incident on 17 December 2011 involving comments made by Ms Ralph that were found by the learned Member to amount to sexual harassment under s 119 of the QAD Act.

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29 Ibid [15].
30 Ibid.
31 Ibid [15].
32 Ibid [16].
33 Ibid [16] to [18].

[30] There was a further issue considered by the learned Member in relation to the management of Mrs Bell's work and the investigation into the complaints. The learned Member said in her reasons that '*a good deal of evidence at the hearing*' related to Ms Ralph's alleged bullying of Mrs Bell in the context of her work performance and in relation to the Queensland Health's investigation of Mrs Bell's complaints.[34]

[31] The learned Member was satisfied on the balance of probabilities that the allegations of '*aggressive and bullying management'* by Ms Ralph directed to Mrs Bell '*are made out for the period in early 2012*' and found that the aggressive and bullying management was an '*unacceptable method of management*'.[35] The learned Member did not accept, however, Mrs Bell's submission that she was '*subjected to aggressive management because she rejected Ms Ralph's sexual proposition*'.[36]

[32] The findings in relation to the aggressive management style of Mrs Bell were relevant to the learned Members ultimate finding that in 2012 the aggressive management aggravated a pre-existing condition (existing in Mrs Bell).[37] It was because of this finding that the learned Member then determined compensation for hurt and humiliation. The learned Member said:

> Doing the best I can, I intend to adjust the sum assessed for compensation for the psychological injury and award Mrs Bell the sum of $7,000.00. A further sum of $2,000.00 is awarded for embarrassment and humiliation. Queensland Health and Ms Ralph are jointly and severally liable to pay the sum of $9,000.00 to Mrs Bell.[38]

[33] In her reasons (for awarding costs) the learned Member has failed to consider all of the circumstances of the case including the fact that Mrs Bell was not successful with all of her contentions but was only successful in one out of four allegations of sexual harassment. The applicants had been able to respond successfully to three out of four allegations. These are relevant considerations for the purposes of exercising the discretion under s 102 of the QCAT Act.

[34] In this case, the learned member has considered the success of a party in finding that legal representation was ultimately necessary to achieve 'that outcome'. This is but one factor in the exercise of the discretion under s 102. The interests of justice goes both ways and the learned Member must also consider the applicants' case and whether certain contentions were ultimately found to be accepted or rejected by the Tribunal in making its decision. As *Ralacom* said the interests of justice must require a departure from the rule in s 100 in the QCAT Act. The starting point of s 100 that each party bear its own costs in the proceeding is the starting point to be applied in every case be it in circumstances where an applicant

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34 *Bell v State of Queensland & Anor (No 1)* [2014] QCAT 297, [35].
35 Ibid [68].
36 Ibid [76].
37 Ibid [77].
38 Ibid [105].

bringing a complaint under the QAD Act is successful or not successful. There is no provision under the QAD Act for a costs order to be made. A departure from the starting point under s 100 of each party bear its own costs must be because the interests of justice require it and not because it is so *compelling* to do so in the circumstances of the case. Here the learned member erred in not considering and in failing to identify in her reasons all of the factors relevant to the exercise of the discretion under s 102 of the QCAT Act.

[35] I have made findings in addressing Ground 1 of the appeal that the learned Member misapplied the test in s 102 of the QCAT Act. Because of the ruling made in relation to Ground 1 it is not necessary to address the other grounds of appeal.

[36] I am satisfied that leave is necessary because there is an error in the learned Member's decision to make an order for costs. The costs order has serious ramifications for the applicants in this case because the costs payable to Mrs Bell are substantial being approximately $113,131.02. I am satisfied that leave is otherwise necessary to correct a substantial injustice to the applicants caused by the error.

[37] Leave to appeal is allowed. The learned Member's decision should be set aside and the matter remitted to the Tribunal for reconsideration.