SUPREME COURT OF QUEENSLAND

CITATION:	*Gramotnev v Queensland University of Technology (No 2)* [2018] QSC 81
PARTIES:	**DMITRI GRAMOTNEV** (plaintiff) **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (defendant)
FILE NO/S:	No 6286 of 2010
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers: submissions filed 15 March 2018, 29 March 2018 and 4 April 2018
JUDGE:	Flanagan J
ORDER:	**The plaintiff pay the defendant's costs, other than the defendant's costs of and incidental to the application for the determination of separate questions heard on 26 and 27 March 2013 and the costs of and incidental to the application to adjourn the trial on 10 May 2017 to be assessed on the standard basis if not otherwise agreed**
CATCHWORDS:	PROCEDURES – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – whether the plaintiff's rejection of an offer to settle was imprudent PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – NO ORDER FOR COST – whether the conduct of the defendant constituted misconduct so as to disentitle it to costs – whether the litigation was in the public interest – whether costs should follow the event *Uniform Civil Procedure Rules* 1999, r 353, r 361, r 681 *Anderson v AON Risk Services Australia Ltd & Anor* [2004] QSC 180, applied *Colgate-Palmolive Company & Anor v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225, applied *Emanuel Management Pty Ltd (in liquidation) & Ors v*

Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299, applied
Gramotnev v Queensland University of Technology (No 2) [2015] QCA 178, cited
Gramotnev v Queensland University of Technology [2018] QSC 37, considered
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) [2005] VSCA 298; (2005) 13 VR 435, applied
Mott v Philip & Ors; Prosser v Philip & Ors (No 2) [2017] QSC 255, applied
Rathie v ING Life Ltd [2004] QSC 146, applied
Schofield v Hopman & Anor (No 2) [2017] QSC 324, applied

COUNSEL: The plaintiff appeared on his own behalf
D Kelly QC, with D de Jersey, for the defendant

SOLICITORS: The plaintiff appeared on his own behalf
Minter Ellison Lawyers for the defendant

[1] On 8 March 2018 the Court made orders dismissing the plaintiff's claim. Subsequent directions were made for the filing of submissions in respect of costs. These Reasons deal with the costs of the claim.

[2] The defendant seeks an order that the plaintiff pay the defendant's costs, other than the defendant's costs of and incidental to the application for the determination of the separate questions heard on 26 and 27 March 2013 and the costs of and incidental to the application to adjourn the trial on 10 May 2017, assessed on the standard basis up and until 2 December 2011 and thereafter on the indemnity basis.

[3] The defendant does not seek the costs of the determination of the separate question as pursuant to the order of P Lyons J of 7 December 2012, the defendant is not entitled to claim costs of and incidental to the application for the orders made pursuant to r 485 of the *Uniform Civil Procedure Rules* 1999 (UCPR).

[4] Nor does the defendant seek the costs of and incidental to the application to adjourn the trial on 10 May 2017. The adjournment arose in circumstances where on the second day of trial, after the plaintiff (who is self-represented) had closed his case, the defendant sought leave to amend its defence. These amendments were sought to ensure that the parties properly joined issue in respect of the issue of causation. In relation to the first and second alleged breaches of the employment contract the plaintiff had pleaded that these breaches caused the termination of his employment with the defendant.[1] By its original defence the defendant sought to meet the plaintiff's causation case by a bare denial that it had breached the employment contract. Having been granted leave to amend the defendant pleaded that the real and effective cause of the termination of the employment contract was the plaintiff's conduct. The

[1] Further Amended Statement of Claim, [196] and [209]-[220].

adjournment of the trial was therefore necessitated by the defendant seeking and being granted leave to amend its pleadings.[2] As is recorded in the transcript of 10 May 2017, the Court intimated that irrespective of the outcome of the trial the plaintiff should not be liable for any costs of and incidental to the application to adjourn the trial on 10 May 2017.[3]

[5] The defendant seeks costs on the indemnity basis after 2 December 2011, relying on its offer to settle the proceedings made pursuant to r 353 of the UCPR dated 18 November 2011. The offer was for an amount of $100,000 plus standard costs to be assessed if not agreed. That offer to settle remained open for acceptance for a period of 14 days from the date of service. The plaintiff rejected this offer by email dated 21 November 2011.

[6] The plaintiff submits there should be no order as to costs or alternatively, that the defendant's costs be capped at a maximum of $5,000. As a further alternative, the plaintiff seeks an order that costs be delayed until the completion of any appeal process. No basis for this further alternative order is identified. Judgment having been given dismissing the plaintiff's claim, it is appropriate that the Court proceed to determine the issue of costs.

Should the Defendant be awarded indemnity costs?

[7] The defendant's offer to settle was expressly stated to be made pursuant to r 353 which falls within chapter 9 part 5 of the UCPR. Part 5 includes r 361 which provides:

> "(1) This rule applies if –
>
> (a) The defendant makes an offer that is not accepted by the plaintiff and the plaintiff does not obtain an order that is more favourable to the plaintiff than the offer; and
>
> (b) The court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
>
> (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must –
>
> (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer; and
>
> (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer.
>
> (3) However, if the defendant's offer is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders –
>
> (a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and

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2 Transcript, 10 May 2017, 2-13, line 1 to 2-15, line 34.
3 Transcript, 10 May 2017, 2-15, lines 41-43.

(b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis.

(4) If the defendant makes more than 1 offer satisfying sub-rule (1), the first of those offers is taken to be the only offer for this rule."

The word "order" in r 361(1)(a) is defined in Schedule 4 to the UCPR to include a judgment.

[8] The defendant accepts that as the plaintiff failed to obtain any judgment in his favour r 361 does not apply and costs are in the discretion of the Court. There are a number of cases which have held that where a plaintiff has failed to obtain any judgment in their favour r 361 does not apply.[4] The rationale for this approach was explained by McMurdo J (as his Honour then was) in *Anderson v AON Risk Services Australia Ltd & Anor*:[5]

> "Rule 361 provides for the case where an offer is made by a defendant which is refused and the plaintiff obtains a judgment but one which is not more favourable to the plaintiff than the offer. In that case, r 361(2) provides that the usual order would be that the defendant pays the plaintiff's costs on the standard basis up to the service of the offer, and thereafter the plaintiff pays the defendant's costs calculated on the standard basis. A case of the present kind, where the plaintiff refuses an offer but then recovers nothing, is not within r 361."

[9] As r 361 does not apply, costs are in the discretion of the Court in accordance with r 681 which provides:

> "**681 General rule about costs**
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> (1) A cost of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Sub-rule (1) applies unless these rules provide otherwise."

[10] As observed by McMeekin J in *Schofield v Hopman*[6] it is well-accepted that where there has been an imprudent rejection of an offer this may provide a ground on which to award indemnity costs.[7] In *Mott v Philip & Ors; Prosser v Philip & Ors (No 2)*[8] McMeekin J identified six relevant considerations for determining whether an offer has

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4 *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299 per Chesterman J (as his Honour then was) at [36]-[39]; *Rathie v ING Life Ltd* [2004] QSC 146 per Wilson J at [52]-[53]; *Anderson v AON Risk Services Australia Ltd & Anor* [2004] QSC 180 per McMurdo J (as his Honour then was) at [10] and *Schofield v Hopman & Anor (No 2)* [2017] QSC 324 per McMeekin J at [4]-[6].

5 [2004] QSC 180 at [10].

6 At [7].

7 Referring to *Colgate-Palmolive Company & Anor v Cussons Pty Ltd* [1993] FCA 536 at [24]; (1993) 46 FCR 225.

8 [2017] QSC 255 at [23].

been imprudently rejected by reference to the decision of the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*:[9]

> "(a) the stage of the proceeding at which the offer was received;
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> (b) the time allowed to the offeree to consider the offer;
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> (c) the extent of the compromise offered;
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> (d) the offeree's prospects of success, assessed as at the date of the offer;
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> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for an indemnity cost in the event of the offeree's rejecting it."

[11] As to (a), the defendant submits that the offer was made twelve days after the plaintiff filed his reply and three days after a mediator's certificate was filed. According to the defendant by that stage the matters in issue in the proceeding "were apparent from the pleadings".[10] The defendant's offer to settle was made at an early stage of proceedings. At that stage the plaintiff was and remained self-represented. It was not until the decision of the Queensland Court of Appeal[11] that there was a definitive ruling that clause 44 of QUT's Enterprise Bargaining Agreement 2005-2008 (Academic Staff) (the EBA) constituted a term of the plaintiff's employment contract. The plaintiff alleged two breaches of clause 44 of the EBA. Further, it was not until judgment was given in the present case that there was any judicial determination as to whether the procedures set down by the Grievance Policy were contractual. Although I ultimately concluded that the Grievance Policy was not contractual, this required a detailed examination of the Grievance Policy.[12] Additionally, at the time the defendant's offer to settle was made the parties had not properly joined issue in respect of causation, which ultimately required the defendant to seek leave to amend its defence on the second day of the trial. I therefore do not accept the defendant's submission that, at the time of the making of the offer to settle, the matters in issue in the proceedings were apparent from the pleadings.

[12] As to (b), the defendant submits that the offer was open for a period of 14 days which allowed ample time for the plaintiff to consider it and take any necessary advice. The plaintiff, in his written submissions as to costs, reproduces his email of 21 November 2011 to the defendant rejecting the offer to settle.[13] This email refers to the plaintiff's belief that the defendant and its solicitors repeatedly alleged that the plaintiff was attempting to extort money from the defendant and from the Chancellor of QUT, retired Major General Peter Arnison. According to the email, this allegation of attempted extortion did not permit the plaintiff to either discuss, negotiate or accept financial offers of settlement from the defendant. The email relevantly states:

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9 (2005) 13 VR 435, 442 at [25].
10 Defendant's Written Submissions as to Costs, [6].
11 *Gramotnev v Queensland University of Technology (No 2)* [2015] QCA 178.
12 See *Gramotnev v Queensland University of Technology* [2018] QSC 37 at [154]-[165].
13 Written Submissions of the Plaintiff in relation to Costs, [17].

> "3. As I have already explained myself, under these circumstances and under such outrageous, unjustified and damaging allegations and propositions from you and QUT, my moral principles, behavioural standards, and my concepts of what is right and what is wrong do not allow me to discuss, negotiate, or accept financial offers of settlement from your client.
>
> 4. It is therefore entirely your and QUT's responsibility for creating the current situation in which I do not have any choice other than to reject financial offers from QUT.
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> 5. On the basis of the above, I repeat again that I will not discuss, negotiate, or accept financial offers of settlement from QUT administration in relation to this matter."

[13] In subsequent offers by the plaintiff to the defendant (outlined in the plaintiff's written submissions) the plaintiff sought to have the defendant withdraw any accusations or allegations of misconduct against him and to assist him in finding an academic position with another institution. The plaintiff also sought compensation for unused sick leave and annual recreational leave.[14]

[14] The defendant submits in its reply submissions that the position taken by the plaintiff in paragraph 5 of his email rejecting the offer of settlement "demonstrates the imprudence of his rejection of the defendant's Calderbank offer, because it shows he was not prepared to negotiate, or even discuss, settlement of his claim on the terms that were offered in the Calderbank letter, or any terms involving payment of a settlement sum by the defendant to the plaintiff".[15] The plaintiff's conduct however, must be understood in the context of being a self-represented litigant who believed he was the subject of allegations of seeking to extort money. As is evident from my Reasons, what informed the plaintiff's case was his belief that from 2007 to 2009 he was "repeatedly and systematically subjected to bullying, harassment, workplace modelling, intimidation, discrimination, impediment and retaliation" by the defendant.[16] By these proceedings the plaintiff sought to establish four breaches of his employment contract, which he alleged resulted in the wrongful termination of his employment with the defendant. The case was of sufficient complexity that a period of 14 days for a self-represented person to assess the offer to settle cannot be considered to be of such "ample time" as to warrant an award of indemnity costs.

[15] As to (c), the defendant submits that the offer proposed generous terms of compromise, namely the payment of $100,000 plus costs to be assessed. However, had the plaintiff been successful in establishing that one of the breaches of contract resulted in his termination and was causative of loss, the damages sought by the plaintiff were substantial.[17]

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[14] Written Submissions of the Plaintiff in relation to Costs, [21] and [26].
[15] Defendant's Reply Submissions as to Costs, [3].
[16] *Gramotnev v Queensland University of Technology* [2018] QSC 37 at [8].
[17] The plaintiff sought damages in the amount of $2,426,746. Even on the defendant's calculations, the plaintiff's lost income was in the order of $140,000 subject to a further reduction for contingencies: Written Submissions of the Defendant (at trial), [98].

[16] As to (d), the defendant submits that the plaintiff's prospects of success, assessed as at the date of the offer, were nothing more than speculative.[18] I do not accept this submission. The first and second alleged breaches of the employment contract were resolved upon a proper construction of clause 44 of the EBA. It cannot be said that the construction advocated by the plaintiff was either unarguable or without merit.[19]

[17] As to (e), it may be accepted that the offer was expressed in clear terms without any conditions or reservations. However as to (f), the offer itself did not foreshadow a claim for indemnity costs in the event it was rejected. Although the offer was made under chapter 9 part 5 of the UCPR, no rule within that part, including r 361, would have alerted the plaintiff to the fact that a consequence of rejecting the offer could be an order for indemnity costs. A defendant's entitlement to indemnity costs (subject to the Court's discretion to otherwise order) only arises under r 361(3) in circumstances where the defendant's offer to settle is served on the first day or later day of the trial. Even in those circumstances, the defendant is only entitled to costs on the indemnity basis for those costs incurred after the opening of the Court on the day the offer is served.

[18] Having regard to the above discussion in relation to each of the six relevant matters, I would exercise my discretion to award costs on the standard basis only.

The costs orders sought by the plaintiff

[19] The plaintiff's primary submission is that each party should bear its own costs, that is, that there should be no order as to costs. The order sought by the plaintiff would require a departure from the general rule that costs follow the event. This is in circumstances where the plaintiff's claim was dismissed and the defendant has been wholly successful.

[20] The plaintiff seeks departure from the general rule for the following reasons:

(a) the proceedings were in the public interest;

(b) the defendant engaged in misconduct leading to the proceedings;

(c) the defendant imprudently rejected two offers of settlement made by the plaintiff on 28 June 2011 and 3 July 2013.

None of these reasons, in my view, warrant a departure from the general rule that costs should follow the event. As to (a), the public interest identified by the plaintiff is that the proceedings were "caused by systematic and conscious administrative malpractice and wrongdoings at [an] Australian public university".[20] It cannot be said that the plaintiff conducted the present proceedings in the public interest. By the proceedings the plaintiff sought damages for breach of contract. The determination of this claim did not require the Court to make any determination as to whether the conduct of senior

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[18] Defendant's Written Submissions as to Costs, [9].
[19] *Gramotnev v Queensland University of Technology* [2018] QSC 37 at [99]-[113].
[20] Written Submissions of the Plaintiff in relation to Costs, [32(a)].

staff of the defendant, including the Vice-Chancellor, constituted bullying, harassment and/or discrimination.[21]

[21] As to (b), the plaintiff relies on the same allegations of bullying, harassment and/or discrimination of the plaintiff by the defendant as constituting misconduct on the part of the defendant leading to the litigation. As previously observed, the mere fact that the plaintiff held a belief that he was bullied, harassed and/or discriminated and repeatedly made this allegation in contemporaneous correspondence does not constitute a proper basis for determining that such conduct was actually engaged in by the defendant.[22]

[22] As to (c), the plaintiff's settlement offers of 28 June 2011 and 3 July 2013 required the defendant to withdraw all allegations of misconduct or serious misconduct in relation to the plaintiff. As is evident from the reasons for judgment, the plaintiff's employment was terminated for serious misconduct in accordance with clause 44 of the EBA. The plaintiff failed to establish any alleged breach of the EBA in having his employment terminated by the defendant. The defendant has therefore been successful in establishing that it was contractually entitled to terminate the plaintiff's employment. Accordingly, there was nothing imprudent or unreasonable in the defendant not accepting the plaintiff's offers to settle.

[23] In the alternative, the plaintiff seeks an order that the defendant's costs be capped at a maximum of $5,000 in total. The plaintiff filed an affidavit on 29 March 2013 detailing both his financial status and the state of his health. I accept that an award of costs, even on the standard basis, would result in an adverse financial impact on the plaintiff. It was the plaintiff however, who initiated proceedings against the defendant for damages for breach of contract. Although he was self-represented, the plaintiff must have appreciated that if he was unsuccessful at trial he could be exposed to an order that he pay the defendant's costs of the proceedings.

Disposition

[24] The order will be that the plaintiff pay the defendant's costs, other than the defendant's costs of and incidental to the application for the determination of separate questions heard on 26 and 27 March 2013 and the costs of and incidental to the application to adjourn the trial on 10 May 2017, to be assessed on the standard basis if not otherwise agreed.

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21 *Gramotnev v Queensland University of Technology* [2018] QSC 37 at [9].
22 *Gramotnev v Queensland University of Technology* [2018] QSC 37 at [9].