

CASENOTE: *Purvinas v Wyse* [2024] FCA 1122 (25 September 2024)

Mr Stephen Purvinas (also '**Applicant**') was Federal Secretary of the Australian Licenced Aircraft Engineers Association ('**ALAEA**' or **Union**). The Respondents comprised the Federal Executive ('**Executive**') of the ALAEA, some 12 of whom sought indemnity costs.

ALAEA is an employee association and an organisation, with approximately 2,000 members, registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth) ('**RO Act**'). The RO Act operates alongside the *Fair Work Act* 2009 (Cth) ('**FW Act**'), the latter being the principal workplace legislation. The ALAEA is entitled to represent persons employed in connection with licenced maintenance engineers in the aircraft industry.

Background

The Executive of the Union (including the First Respondent) is the supreme decision-making body of the ALAEA. Since about November 2023, there was antagonism between the Applicant and the Executive. The Executive considered that Mr Purvinas attempted to conduct Union affairs without the direction from the Executive required under the ALAEA's rules.

-Basis of the Application –

On 20 February 2024 the ALAEA's Executive passed a resolution to the effect that the Federal Executive had no confidence in the Applicant. The resolution also prohibited Mr Purvinas from making any representation on behalf of the ALAEA, without first seeking direction from the Executive. Mr Purvinas responded by alleging that such a resolution:

- was in breach of the Union's rules and he called to his aid, ss 164(4) (the power to issue an interim order), 164A(4) (rectifying a breach of a rule) and 164B(3) (making a declaration that one or more of the rules of an organisation are unlawful) of the RO Act; and
- contravened the Union's Rules and was therefore invalid and of no effect, and that the respondents be restrained from taking any steps to give effect to it.

None of these rules altered the fundamental power relationship between the Executive and Mr Purvinas – namely that the Executive's direction prevailed. The Applicant sought this relief against members of the Executive of the ALAEA. Of these members, twelve opposed the proceeding. Those twelve active members sought costs of the proceeding.

Raper J heard the costs application. Her Honour noted that the costs application was made pursuant to section 329 of the RO Act, which included two elements. The section provides (in part):

329 Costs only where proceeding instituted vexatiously etc.

- (1) *A person who is a party to a proceeding (including an appeal) in a matter arising under this Act must not be ordered to pay costs incurred by any other party to the proceeding unless the person instituted the proceeding vexatiously or without reasonable cause.*

The Executive's case was that the Applicant's application was vexatious. Raper J noted the very limited consideration 'vexatiously' under the RO Act (or its predecessor legislation), or under a similar provision in the FW Act. Her Honour found that the test required the Court to

examine all facts and circumstances to determine whether costs (including indemnity costs) were warranted.

Evidence

Her Honour considered the three affidavits of the Applicant, and found following cross-examination that the Applicant as not a reliable witness – as his evidence seemed pedantically linked to documents, even when a matter would be within the litigant's own knowledge. Raper J accepted the evidence of the Applicant only when corroborated by documents (not of his own making).

The costs applicants relied upon affidavits of Mr Rodney Wyse, Mr Peter Gill and Mr Paul Staddon. Mr Wyse was the current president of the Executive. Her Honour accepted Mr Wyse's evidence with qualifications – and other witnesses more conclusively.

Consideration

Her Honour took a temporal approach to examining the merits of the costs application, considering:

- a. the period before the application was issued, during which Mr Purvinas threatened to bring an application in the Court, and falsely claimed that the proposed motion (similar to the one set out above) would have the effect of preventing staff from doing their duties for the Union;
- b. the period during the application (before it was discontinued), in which Mr Purvinas wrongly claimed that the motion which actually passed was unlawful and interfered with his capacity to delegate authority to staff; and
- c. Mr Purvinas' conduct after the application was discontinued.

In each period, her Honour also noted consistent with the Applicant attempting to exercise Union powers without the Executive, and using the Court application to pressure the Executive.

In concluding, Raper J noted that where brought predominantly for an ulterior or collateral purpose, a claim may justify a costs order on an indemnity basis: Packer v Meagher.¹ Her Honour made the costs order, to be assessed by a Registrar.

-Rationale of the decision-

This case is an unusual one. Costs in workplace cases are a rarity; and indemnity costs *doubly* so.

Two further observations are worth making. The first is that – in circumstances where threatened proceedings are followed by an unmeritorious claim, this increases the likelihood of there being a successful costs application.

Second – attempts to pressure or harass litigants in workplace law are remarkably frequent. Relatively few come with the consequences found in this case. Practitioners would be wise to warn parties in marginal or unmeritorious cases that they may be later visited with an application for costs, or indemnity costs.

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¹ (1984) 3 NSWLR 486 at 499 per (Needham J).