

FEDERAL COURT OF AUSTRALIA

Jamsek v ZG Operations Australia Pty Ltd (No 2) [2020] FCAFC 179

Appeal from: *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119

File number: NSD 495 of 2019

Judgment of: **PERRAM, WIGNEY AND ANDERSON JJ**

Date of judgment: 23 October 2020

Catchwords: **INDUSTRIAL LAW** – whether Respondents’ defence of appeal ‘unreasonable’ under s 570(2)(b) *Fair Work Act 2009* (Cth)

Legislation: *Fair Work Act 2009* (Cth) s 570(2)(b)

Cases cited: *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119

Registry: New South Wales

Division: Fair Work Division

National Practice Area: Employment and Industrial Relations

Number of paragraphs: 4

Date of last submissions: 18 September 2020 (First Applicant)
11 September 2020 (Respondents)

Date of hearing: Determined on the papers

Counsel for the Applicants: Ms R Francois with Mr A Crossland and Ms K Hooper

Solicitor for the Applicants: Watson Law

Counsel for the Respondents: Mr S Wood QC with Mr D Ternovski

Solicitor for the Respondents: Agnew Legal

ORDERS

NSD 495 of 2019

BETWEEN: **MARTIN JAMSEK**
First Applicant

**DANIEL CIVTANOVIC AS TRUSTEE FOR THE
BANKRUPT ESTATE OF ROBERT WILLIAM WHITBY**
Second Applicant

**STEPHEN HUNDY AS TRUSTEE FOR THE BANKRUPT
ESTATE OF ROBERT WILLIAM WHITBY**
Third Applicant

AND: **ZG OPERATIONS AUSTRALIA PTY LTD ACN 060 142 501**
First Respondent

ZG LIGHTING AUSTRALIA PTY LTD ACN 002 281 601
Second Respondent

ORDER MADE BY: PERRAM, WIGNEY AND ANDERSON JJ

DATE OF ORDER: 23 OCTOBER 2020

THE COURT ORDERS THAT:

1. Order 6 of the orders dated 16 July 2020 be revoked.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 On 16 July 2020 the Full Court allowed the appeal and ordered the Respondents ('ZG') to pay Mr Jamsek's costs: *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119. At the time the Court did not advert to s 570 of the *Fair Work Act 2009* (Cth). It provides:

570 Costs only if proceedings instituted vexatiously etc.

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

(2) The party may be ordered to pay the costs only if:

- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- (c) the court is satisfied of both of the following:
 - (i) the party unreasonably refused to participate in a matter before the FWC;
 - (ii) the matter arose from the same facts as the proceedings.

2 Mr Jamsek submits that s 570(2)(b) is engaged because ZG's defence of the appeal was 'unreasonable'. It was unreasonable because on the facts found at trial there could be no serious argument that Mr Jamsek never had any capacity to generate goodwill; had no real independence or control over his work; could not have used his truck to serve others; was a representative of the Respondents; and had never worked for anyone else.

3 The primary judge thought that there was no employment relationship but the Full Court took a different view. We do not accept that ZG's defence of the appeal was unrealistic, as Mr Jamsek submitted. This area is a notoriously difficult area upon which minds may legitimately differ. We do not accept therefore that the exception in s 570(2)(b) is engaged.

4 Accordingly, the costs order will be revoked.

I certify that the preceding four (4) numbered paragraphs are a true copy

of the Reasons for Judgment of the
Honourable Justices Perram, Wigney
and Anderson.

Associate:

Dated: 23 October 2020