CITATION:	*Khail v RTA Gove Pty Ltd & Anor (No 2)* [2024] NTSC 53
PARTIES:	KHAIL, Sayed v RTA GOVE PTY LTD (ACN 000 453 663) and CONTITECH AUSTRALIA PTY LTD (ABN 97 000 468 780)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	IN THE MATTER of an appeal under Section 116 of the *Return to Work Act*
FILE NO:	2023-01466-SC
DELIVERED:	21 June 2024
HEARING DATE:	23 May 2024
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Appellant:	BJ Doyle KC with MS Doyle
First Respondent:	JW Roper SC
Second Respondent:	D McConnel SC with J Nottle

Solicitors:

Appellant:	Tindall Gask Bentley
First Respondent:	Minter Ellison
Second Respondent:	Hunt & Hunt Lawyers

Judgment category classification:	C
Judgment ID Number:	Kel2405
Number of pages:	9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Khail v RTA Gove Pty Ltd & Anor (No 2) [2024] NTSC 53
No. 2023-01466-SC

BETWEEN:

SAYED KHAIL
Appellant

AND:

RTA GOVE PTY LTD
(ACN 000 453 663)
First Respondent

AND:

CONTITECH AUSTRALIA PTY LTD
(ABN 97 000 468 780)
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 June 2024)

[1] This is an application by RTA Gove Pty Ltd ("RTA") for an order that the appellant pay its costs of the appeal on an indemnity basis. The appellant resists such an order and contends that RTA should pay the appellant's costs to be taxed on the standard basis in default of agreement.

[2] On the hearing of the appeal, I clarified with counsel that the only grounds of appeal pressed were those dealt with in the appellant's written

submissions. Counsel for the appellant summarised the appeal grounds as follows:

(a) The trial judge erred in law in determining that the appellant was not suffering any loss of earning capacity arising from his accepted 5 September 2019 low back injury at the time of the cancellation notice (and further erred in law in not making an order against RTA in favour of the appellant for arrears of weekly payments and interest from 6 June 2020 when the cancellation of weekly payments took effect pursuant to RTA's s 69 notice). (Appeal grounds 1 and 2)

(b) The trial judge erred in law in dismissing the appellant's claim against Contitech Australia Pty Ltd ("Contitech") for arrears of weekly payments despite having found that Contitech's cancellation notice was invalid. The appellant contends that unless and until the judge made an order for the cessation or reduction of compensation under s 69(2)(d), the trial judge should have made an order for weekly payments and interest against Contitech (from 6 June 2020) irrespective of her Honour's finding as to whether the appellant had suffered a compensable mental injury on 19 November 2019. (Appeal ground 3) (This was described by counsel for the appellant as narrow and technical in that the appellant concedes that *Alexander v Gorey and*

Cole[1] is authority for the proposition that the Work Health Court has power to make such an order "retrospectively".)

(c) The trial judge's finding that the appellant did not suffer a compensable mental injury on 19 November 2019 was vitiated by errors of law. (Appeal grounds 4, 5 and 6) There are four aspects to this group of appeal grounds:

(i) The appellant contends that the trial judge effectively reversed the onus on this issue: the onus was on Contitech to prove that the appellant did not suffer an aggravation of a pre-existing PTSD on 19 November 2019.

(ii) The appellant contends that the trial judge made errors of law in assessing the credit of the appellant.

(iii) The appellant contends that the trial judge erred in law by failing to engage with the real issues that were presented by the appellant on the question of whether Contitech had proved that the appellant did not suffer from an aggravation of PTSD on 19 November, and failed to engage with the appellant's evidence on these issues.

1 (2002) 117 FLR 31

(iv) The appellant contends that the trial judge denied the appellant procedural fairness in cutting short the appellant's cross-examination of a medical witness.

[3] The respondent to Grounds 1 and 2 was RTA; the respondent to the other grounds was Contitech.

[4] On the second day of the hearing of the appeal, Contitech was given leave to file a notice of cross appeal, appealing against the trial judge's decision that its s 69 notice (disputing liability to pay weekly benefits in respect of the claim for an aggravation of the appellant's PTSD) was invalid; the appellant was given leave to make any necessary amendment to its notice of appeal; and both parties were given leave to file and serve written submissions on the issues raised within seven days.

[5] The orders made on the appeal were as follows:

- Appeal Grounds 1 and 2 (respondent RTA):

  These grounds of appeal will be allowed and the matter remitted to the trial judge to make the following determinations, given her Honour's existing findings that the appellant's NWE was $3,171.83 and the amount a car park attendant could reasonably earn was $1,184 per week. *[There followed a series of questions for the trial judge, later modified by the consent of the parties to contain reference to the onus of proof on the issues remitted.]*

- All other grounds of appeal are dismissed.

- There is no need for any order on Contitech's cross appeal.

[6] That is to say, the appellant was successful against RTA on the appeal grounds to which RTA was the respondent, and unsuccessful against Contitech on the appeal grounds to which Contitech was the respondent. It follows that unless there is something to displace the usual rule in relation to costs following the event: RTA should pay the appellant's costs of the appeal in relation to the grounds of appeal to which RTA was the respondent and the appellant should pay Contitech's costs of the appeal in relation to the grounds on which Contitech was the respondent.

[7] In my view, there is nothing to displace the usual rule.

[8] RTA has argued that the appellant should pay its costs of the appeal as between RTA and the appellant on the ground that the appellant unreasonably refused an offer to compromise the appeal by agreeing to remit the matter to the trial judge to determine various questions.

[9] I do not agree that these offers were such as to justify depriving the successful appellant of his costs, let alone an award of indemnity costs in favour of the unsuccessful respondent.

[10] RTA relies on two emails sent by its solicitors to the appellant's solicitors, proposing that the matter be remitted to the trial judge. RTA submits that that is the order that was in fact made on the appeal and that the whole of

the costs of the appeal from the date of the first email could have been avoided if the appellant had taken up that offer. Instead, the appellant's solicitors ignored the offer.

[11] The first email was sent on 23 May 2023, within a month of the filing of the Notice of Appeal. The offer was in the following terms:

> We refer to your email on 18 May 2023.
>
> Worker's Appeal
>
> We also refer to the worker's Notice of Appeal filed 27 April 2023.
>
> In relation to Ground 1 of the worker's appeal, we consider the matter should be remitted for determination of the following questions:
>
> 1. Having found that:
>
> a) the First Employer's Notice of Decision of 22 May 2020 was valid [100];
>
> b) there was insufficient evidence to support a finding of an adjustment disorder as a psychological sequelae to the physical injury [109],
>
> had the Worker discharged his reversionary onus as to satisfy the Court that the Worker was partially incapacitated for work, as a result of the physical injury, at any time post 22 May 2020?
>
> 2. If so, what was the extent of the Worker's partial incapacity for work.
>
> Please note that this correspondence will be relied on for the purpose of costs.
>
> We look forward to hearing from you within 7 days.

[12] The email was not expressed to be "without prejudice" but RTA concedes that the likely effect of s 131 of the *Evidence (National Uniform Legislation) Act* would be that it was. RTA nevertheless contends that that does not prevent RTA from relying on the letter on the question of costs. So much may be conceded. Section 131(1)(a) provides that evidence is not to

be adduced of a communication that is made between persons in dispute in connection with an attempt to negotiate a settlement of the dispute; but s 131(2)(h) provides an exception to that prohibition where the communication or document is relevant to determining liability for costs.

[13] The offer in the first email is that the matter be remitted for the appellant to demonstrate that he remained partially incapacitated, whereas, as both parties are now agreed, the onus was on RTA to prove that he was not. It can hardly be said, therefore, that it was unreasonable for the appellant not to have accepted that offer.

[14] The second email was sent on 22 June 2023. It was in the following terms:

> Worker's Appeal
>
> We refer to our letter dated 23 May 2023 and note your absence of any response.
>
> We understand the worker's argument to be, at least in part, that Her Honour, at [110] of her reasons, ostensibly found that the income the worker could derive in the position of a car park attendant eclipsed his Normal Weekly Earnings.
>
> The Employer does not concede that is the effect of Her Honour's reasons.
>
> That being said, and even if we were to assume that was the effect of Her Honour's finding, there remains the question of whether such a finding:
>
> a) constitutes an error of law rather than fact; and
>
> b) if an error of law, was such as to give rise to a real possibility that the same impacted her ultimate decision (see *Phelps v Development Consent Authority & Ors* (2012) 31 NTLR 51).
>
> Even assuming the Worker can surmount the difficulties facing him in this appeal, at least in so far as the First Employer is concerned, the matter will likely be remitted to Her Honour below.
>
> In the circumstances and given the likely costs of the appeal, the First Employer remains of the view that the matter ought simply be remitted

> to Her Honour below, with appropriate orders to be agreed delineating the scope of the questions Her Honour need address.
>
> We invite you to say, by return, whether the Worker is prepared to dispose of the appeal against the First Employer on the basis that the matter is simply to be remitted to Her Honour and, if so, on what terms?
>
> We put you on notice that should the Worker ultimately succeed in the Appeal and the matter be remitted as a result, the Employer will rely upon this and our earlier correspondence in support of orders as to costs and ought ultimately to bear them.
>
> This correspondence is without prejudice save as to costs.
>
> We look forward to hearing from you.

[15] The appellant's solicitors did not respond to that email either. Counsel for RTA submitted that by this email, RTA was "clearly communicating a preparedness to consider a remittal of the proceedings on wider grounds than those the subject of the first email".

[16] I am not sure how "clear" that message was. What is clear is that it was rude, verging on unprofessional, for the appellant's solicitors to simply ignore correspondence from RTA's solicitors. Nevertheless, I do not consider that discourtesy to be grounds for depriving the appellant of his costs of the appeal and ordering the appellant to pay RTA's costs on an indemnity basis.

[17] At no stage did RTA put to the appellant an unequivocal offer to agree to an order remitting the matter to the trial judge to determine whether the appellant was partially incapacitated and, if so, to determine the compensation payable in accordance with s 65 (the order made on appeal) on the understanding that RTA bore the onus of disproving that issue; and put

the appellant on notice that RTA would be relying on that offer to seek indemnity costs against the appellant if the offer was refused.

[18] In those circumstances, although it was certainly discourteous, I do not think it was unreasonable for the appellant not to respond to those emails with a counter-proposal that the matter be remitted for determination of those questions with the onus on RTA to establish that the appellant did not suffer from any incapacity.

[19] ORDERS:

(A) RTA is to pay the appellant's costs of and incidental to the appeal grounds to which RTA was the respondent (identified in the judgment on appeal at [18](a) and [19] – and at [2] and [3] above - as "appeal grounds 1 and 2") to be agreed or taxed on the standard basis.

(B) The appellant is to pay Contitech's costs of and incidental to the appeal grounds to which Contitech was the respondent (identified in the judgment on appeal as [18](b) and (c) and [19] – and at [2] and [3] above - as "appeal grounds 3, 4, 5 and 6") to be agreed or taxed on the standard basis.

(C) RTA is to pay the appellant's costs of this costs application.

(D) Both the appeal and the costs application are certified as proper for the attendance of two counsel including senior counsel.
