PARTIES:	DEW Barry Earnest and DEW Mark Earnest and DEW AND ASSOCIATES PTY LTD v THE DELEGATE OF THE ANTI-DISCRIMINATION COMMISSIONER AND THE ANTI-DISCRIMINATION COMMISSIONER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	3 of 1995
DELIVERED:	19 SEPTEMBER 1997
HEARING DATES:	15 August 1997
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Procedure - Costs - General rule that costs follow the event - Exceptions to general rule - Whether departure from general rule justified where plaintiff successful but raised issues that failed - Event which determines the disposition of costs may extend to fate of each and every issue argued in the proceedings -

Supreme Court Rules 1987 (NT), r63.05
Donald Campbell & Co Ltd v Pollak [1927] AC 732 at 809, referred to.
Cretazzo v Lombardi (1975) 13 SASR 4 at 14, 16, referred to.
Hughes v Western Australian Cricket Association (Inc) [1986] ATPR 48,134 at 48,136, referred to.

S v Minister for Youth and Community Services and Ors (1986) 23 A Crim R 113 at 121, referred to.
Jamal v Secretary of the Department of Health (1988) 14 NSWLR 252 at 271, referred to.
Commissioner of the Australian Federal Police v Razzi & Ors (No. 2) (1991) 30 FCR 64 at 69, approved.
Re Elgindata Ltd (No. 2) (1993) 1 All ER 232 at 237, 239, 241, referred to.
Spargo v Haden Engineering P/L & Anor (1993) 60 SASR 39 at 57-58, referred to.
Mok v Minister for Immigration, Local Government and Ethnic Affairs & Anor (No. 2) (1993) 47 FCR 81, referred to
Minister for Immigration, Local Government and Ethnic Affairs & Anor v Mok (1995) 55 FCR 375, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Mr J Reeves
Defendant:	Ms S Gearin

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Parishs

Judgment category classification:	B
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mar97041

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

No. 3 of 1995

BETWEEN:

BARRY EARNEST DEW AND MARK EARNEST DEW AND DEW AND ASSOCIATES PTY LTD
Plaintiff

AND:

THE DELEGATE OF THE ANTI-DISCRIMINATION COMMISSIONER
First Defendant

AND:

THE ANTI-DISCRIMINATION COMMISSIONER
Second Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 19 September 1997)

This is a ruling on a costs application where the plaintiffs, although being successful in the outcome, had raised issues or made allegations that failed. It is put that in those circumstances a departure from the general rule that costs

follow the event is justified. In the well known words of Viscount Cave L.C. in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 809:

> "... there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds can not be judicial."

Cases also show, however, that the event which determines the disposition of costs is not limited to the ultimate fate of the litigation, but may extend to the fate of each and every issue argued in the proceedings, (Powell J. in *S v Minister for Youth and Community Services & Others* (1986) 23 A Crim R 113 at p121). In *Jamal v Secretary of the Department of Health* (1988) 14 NSWLR 252 at p271 Mahoney JA. said that the general rule was subject to exceptions, and gave as one of them:

> "... if the costs ... have been increased by an issue on which the successful parties failed and those costs are of sufficient significance to warrant a special order, the party who succeeded on that issue should have the costs of it, to be set off against the general costs of the appeal: see, *eg*, *Cracknall v Janson* (1879) 11 ChD 1 at 23."

In *Commissioner of the Australian Federal Police v Razzi & Others (No.2)* (1991) 30 FCR 64 at p69 Wilcox J. noted that the parties before him accepted the accuracy of the summary of principles expounded by Mahoney JA. In that case the respondent Mrs Razzi had failed on an issue which his

Honour categorised as being "logically a separate question, tendered as a separate issue and vigorously contested ...". It was not "something of incidental or peripheral importance" and the effect of her decision to contest the issue upon which she had failed was to greatly increase the Commissioner's costs. In the result she was deprived of one half of the costs although she had successfully defended the proceedings. Justice Wilcox went on:

> "I recognise the importance of the general principle which Mahoney JA. referred. But I do not think that courts should be reluctant to recognise the existence of exceptional cases. In these days of extensive court delays and high legal costs the courts should use all proper means to encourage parties to consider carefully what matters they will put in issue in their litigation. If parties come to realise that they will not necessarily recover the whole of their costs, even though they have unsuccessfully raised a discrete issue, they are likely better to consider whether the raising of that issue is a justifiable course to take."

With respect, I share his Honour's view.

The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but it is said that where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs, per Nourse LJ. in the Court of Appeal in *Re Elgindata Ltd (No. 2)* (1993) 1 All ER 232 at 237. At p239 his Lordship said that the acid test on the question of costs is

whether the party was entitled to submit the matter for the court's consideration. At p241 Beldam LJ. expressed the view that:

> "... it is only if it is possible so to isolate an issue in the case that it can properly be said that it is unnecessarily pursued as having no bearing on the real questions in the suit that it would be proper to deprive the successful party of all costs of that issue."

Toohey J. in *Hughes v Western Australian Cricket Association (Inc)* [1986] ATPR 48,134 at 48,136, on this subject:

> "Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster v Farquhar* [1893] 1 QB 564."

In *Cretazzo v Lombardi* (1975) 13 SASR 4 at p14 Bray CJ. thought that the party there being considered should suffer some penalty and costs "for the groundless and conscious exaggeration of his claim". Zelling J. concurred, and at p16 Jacobs J. who agreed with the Chief Justice said:

> "... I would wish to sound a note of cautious disapproval of applications, which are being made with increasing frequency, to apportion costs according only to the success or failure of one party or the other on the various issues of fact or law, which arise in the course of a trial. It is true that in the case of *Forster v Farquhar* [1893] 1 QB 564, which is often relied upon, a successful plaintiff, acting throughout in good faith, was deprived of his costs and ordered to pay the defendant's costs on certain issues. But there are two things to notice about that case. In the first place, it was a jury trial, and the relevant rule (Order LXV, rule 1) under which the general discretion was conferred carried a proviso, that

> "where any action ... is tried by a jury, the costs shall follow the event unless the judge ... shall for good cause otherwise order." The general discretion of the Court was not being invoked. Secondly, the plaintiff claimed damages for breach of contract under four distinct heads, in total some three hundred and ninety-four pounds, but his verdict was for only twelve guineas, being less than half the claim under one head of damage. The three severable heads of damage, in respect of which the defendant was awarded costs, did not flow from the defendant's breach, and in respect of those severable items the claim was misconceived. But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severalty of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues."

See also Perry J. with whom Duggan J. agreed in *Spargo v Haden Engineering Pty Ltd & Another* (1993) 60 SASR 39 at p57-58.

Many of these and other cases are all reviewed in *Mok v Minister for Immigration, Local Government and Ethnic Affairs & Another (No.2)* (1993) 47 FCR 81 by Keely J. and the Federal Court on Appeal at (1995) 55 FCR 375 did not question the principles to which his Honour referred. See also *Cummings v Lewis & Others* (1993) 113 ALR 285 per Cooper J. at p327-328.

None of those judicial remarks are binding, nor do they purport to espouse principles which must be followed. They are to be seen in the context

of the particular case, but may provide useful guidance to the exercise of the discretion in cases where it is put that a successful party should be deprived of any part of its costs, as here.

The rules of this Court recognise the practice of the courts by providing that the court may make an order for costs in relation to a particular question in, or a particular part of a proceeding (r63.05). However, the courts tend towards a single order for costs fixing what proportion of a party's cost is to be paid by the other, thus obviating cross orders or particular orders as to particular items of costs, and the attendant cost and other difficulties which could arise upon taxation. (See generally Williams Civil Procedure Victoria vol 1, par63.04.0 at p5614).

In this case, complaints had been made to the defendant Commissioner by a person alleging sexual discrimination, sexual harassment and victimisation. They were directed almost entirely at Mr Mark Dew, but Mr Barry Dew is alleged to have been involved in one event, and the company was not alleged to have been engaged in any of the prohibited conduct other than that alleged against the Messrs Dew, who were its directors. There were nine heads of attack upon the Commissioner's conduct, but generally speaking, there was little difference as to the arguments relating to any defendant. They were all treated contemporaneously by the Commissioner in like manner, and although the subject of differing complaints, there was no distinction between them as

to the basis of the legal challenges mounted. Broadly put, the challenges were that the Commissioner acted ultra vires and, in any event, in breach of the rules of natural justice. The evidence was by affidavit, and there was no contest on the facts, they being disclosed by documents which were common to all plaintiffs. The plaintiffs were represented by the same legal adviser and counsel. The legal arguments on both sides were directed to the provisions of the statute and the rules of natural justice, and in that regard there is little to distinguish between such discrete issues as there were between the individual plaintiffs and the defendant. It is not put that any distinction should be made between the respective plaintiffs on any issue of costs. The plaintiffs were successful in their claims that the defendant acted ultra vires in relation to the complaints of victimisation and sexual discrimination. That error vitiated decisions later made by the Commissioner that she was entitled to proceed. It was held that the Commissioner did not err in accepting the complaint regarding sexual harassment.

The plaintiffs were unsuccessful in claiming that the Commissioner had wrongly failed to provide better particulars and in failing to authorise their solicitor to act for them. They succeeded in attacking the decision to proceed to a hearing in public because the Commissioner had not asked for their submissions on that, an issue easily disposed of and easily rectified.

It can be seen that the plaintiffs were successful in much of their case. In so far as any of them were not, it is not possible to properly disentangle the issues so as to examine each and every one of them. There was so much common ground both in fact and law. It is not right to hold that the issues upon which any of the plaintiffs failed significantly or substantially increased the overall costs, nor does it seem to me that they unnecessarily pursued an issue having no bearing on the real questions. This was the first occasion in which the Act and the Commissioner's powers thereunder had been before the Court. The hearing took one and a half days only.

Order that the defendants pay the plaintiffs' costs.
