

**SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL**

FERGUSON, Ferg

v

CHIEF EXECUTIVE, DEPARTMENT FOR EDUCATION AND CHILD  
DEVELOPMENT

**JURISDICTION:** South Australian Employment Court –  
Education Act 1972 - Appeal – Costs Application

**CASE NO:** 3492 of 2017

**HEARING DATE:** Written submissions received 16<sup>th</sup> January and  
15<sup>th</sup> February 2019

**JUDGMENT OF:** His Honour Deputy President Judge Calligeros  
Her Honour Deputy President Judge Kelly  
Deputy President Magistrate Ardlie

**DELIVERED ON:** 14<sup>th</sup> March 2019

**CATCHWORDS:**

*Respondent to unsuccessful appeal before Full Bench of the Tribunal seeks costs order against Appellant. Held: Usual position is that s 52 applies and parties bear their own costs. The Full Bench has a discretion to make a different costs order under s 67(6) but declines to do so in this instance.*

**REPRESENTATION:**

Appellant: Self-represented  
Respondent: Crown Solicitors Office

- 1 In the decision of the Full Bench of the Tribunal delivered on 13 December 2018 we dismissed Mr Ferguson’s appeal against the decision of a learned Deputy President to grant summary relief to the Respondent. The central dispute between the parties concerns the decision of the Respondent’s Chief Executive to transfer Mr Ferguson from the Ernabella Anangu School to Willsden Primary School. Apart from an appeal on the substantive transfer issue there have been a number of appeals about inter-related matters. The appeal before us concerned only the application for summary relief granted to the Respondent in relation to a part of the overall dispute between the parties, being Mr Ferguson’s complaint about a recommendation by a Jayne Johnston, an officer of the Respondent, who recommended Mr Ferguson partake in a performance support plan.
- 2 At the conclusion of the reasons for decision we noted that the Respondent sought an order that Mr Ferguson pay its costs of the appeal. Both parties have filed written submissions on the question of costs. This decision deals with that issue.
- 3 The Respondent submitted that Mr Ferguson’s appeal about Ms Johnston’s recommendation was not justiciable and that there was no merit to it. The Respondent referred to s 67(6) of the *South Australian Employment Tribunal Act 2014* which provides as follows:

A Full Bench may, on an appeal, make any interim, ancillary or consequential order that the Full Bench considers appropriate (including orders for costs).
- 4 Implicit in the submissions is that s 67(6) gives power to the Full Bench of the Tribunal to make an order for costs including an order against the unsuccessful party. The Respondent goes on to submit that the starting point is that costs follow the event and there is no reason to depart from this rule.
- 5 We disagree that the starting point is s 67(6). Rather the provision in relation to costs, that is s 52, is the appropriate starting point. Section 52 reads as follows:
  - (1) Subject to this Act or a relevant Act, parties bear their own costs in any proceedings before the Tribunal (other than proceedings assigned to the South Australian Employment Court to which section 26B applies).
  - (2) If the Tribunal makes an order for the payment of costs and does not fix the amount of costs, that amount is to be assessed and settled in accordance with the rules.
- 6 It is to be noted that the rule is that parties bear their own costs “in any proceedings before the Tribunal”. We consider that to be the starting point,

but that pursuant to s 67(6) the Full Bench on appeal has a discretion to award costs differently.

- 7 We consider that caution should be used in the exercise of this discretion given the provisions of s 52, especially in a situation where the unsuccessful party is unrepresented and there is no evidence or submission that there had been a warning concerning costs or notification that an application for costs would follow from an adverse ruling by the Full Tribunal. Indeed from Mr Ferguson's submissions it is noted that he understood the position to be that parties would bear their own costs and the he was surprised by the Respondent's application for costs. We consider that Mr Ferguson's argument was without merit but stemmed from an honestly held but misguided understanding of a reasonably complex legal issue.
  
- 8 We therefore decline to exercise our discretion to make the order for costs sought by the Respondent and order that the parties bear their own costs in respect of the appeal before us.