

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Sillay v State of Queensland (Queensland Corrective Services)* [2024] QIRC 082

PARTIES: **Sillay, Norman**
(Applicant)

v
State of Queensland (Queensland Corrective Services)
(Respondent)

CASE NO.: TD/2024/13

PROCEEDING: Application in existing proceedings

DELIVERED ON: **15 April 2024**

MEMBER: Hartigan DP

HEARD AT: On the papers

ORDER: **Leave is granted for the Respondent to be legally represented pursuant to s 530(1)(e)(ii) of the *Industrial Relations Act 2016* (Qld).**

CATCHWORDS: APPLICATION FOR REINSTATEMENT-
APPLICATION FOR LEGAL
REPRESENTATION – where respondent
has applied for leave to be legally
represented – where applicant opposes
application – factors to be considered by the
Commission in determining whether to allow
legal representation – circumstances of the
case – where leave is granted for legal
representation.

LEGISLATION: *Industrial Relations Act 2016* (Qld), s 530

CASES: *State of Queensland (Department of Premier and*

Reasons for Decision

Introduction

- [1] The Applicant, Mr Norman Sillay, has filed an application for reinstatement, seeking, *inter alia*, reinstatement to his former position ('the proceeding').
- [2] The Respondent, State of Queensland (Queensland Corrective Services) ('QCS') has applied for orders that it be granted leave to be legally represented pursuant to s 530(1)(e)(ii) of the *Industrial Relations Act 2016* (Qld) ('the IR Act').
- [3] Mr Sillay objects to leave being granted for QCS to be legally represented. Mr Sillay is represented in the proceedings by a registered employer organisation, Together Queensland, Industrial Union of Employees ('Together Queensland').

Relevant background

- [4] Mr Sillay commenced employment with QCS in January 2017, and his employment was terminated on 24 January 2024. Mr Sillay's employment was terminated after a lengthy disciplinary process which involved an Ethical Standards Group investigation with respect to 5 allegations.
- [5] On 29 February 2024, QCS filed a Form 101 Application ('Application') and supporting affidavit, of a solicitor from Holding Redlich, in the proceedings seeking leave to be legally represented.
- [6] On 25 March 2024, Mr Sillay, through Together Queensland, filed a Form 102 Response ('Response') and supporting affidavit of his union representative, Mr Hatchett, objecting to QCS' application for legal representation.
- [7] The Commission issued directions for the parties to file further submissions with respect to QCS' application. QCS filed written submissions on 28 March 2024. Mr Sillay did not provide submissions in reply and sought to rely on the material filed on 25 March 2024.
- [8] The question for my determination is whether leave should be granted for QCS to be legally represented in the proceeding.

Relevant legislation

[9] Section 530 of the IR Act provides for legal representation in the following terms:

530 Legal representation

...

- (1) A party to proceedings, or person ordered or permitted to appear or to be represented in the proceedings, may be represented by a lawyer only if -
 - (e) for other proceedings before the commission, other than the full bench -
 - (i) all parties consent; or
 - (ii) for a proceeding relating to a matter under a relevant provision - the commission gives leave; or

...

- (4) An industrial tribunal may give leave under subsection (1) only if -
 - (a) it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter; or
 - (b) it would be unfair not to allow the party or person to be represented because the party or person is unable to represent itself, himself or herself; or
 - (c) it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings.

Examples of when it may be unfair not to allow a party or person to be represented by a lawyer -

- a party is a small business and has no specialist human resources staff, while the other party is represented by an officer or employee of an industrial association or another person with experience in industrial relations advocacy
 - a person is from a non-English speaking background or has difficulty reading or writing
- (5) For this section, a party or person is taken not to be represented by a lawyer if the lawyer is -
 - (a) an employee or officer of the party or person; or
 - (b) an employee or officer of an entity representing the party or person if the entity is -
 - (i) an organisation; or
 - (ii) a State peak council; or
 - (iii) another entity that only has members who are employers.

- (7) In this section -

industrial tribunal means the Court of Appeal, court, full bench, commission or Industrial Magistrates Court.

proceedings -

- (a) means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar; and

- (b) includes conciliation being conducted under part 3, division 4 or part 5, division 5A by a conciliator.

relevant provision, for a proceeding before the commission other than the full bench means –

- (a) chapter 8; or
- (b) section 471; or
- (c) chapter 12, part 2 or 16.

[10] In *State of Queensland (Department of Premier and Cabinet) v Dawson*¹, his Honour O'Connor VP referred to the involvement of legal representation and the efficient conduct of litigation, and the consideration of those matters in various authorities as follows:

- 22. The involvement of Counsel in the efficient conduct of litigation was expressed in *Application by R.A.v* where Deputy President Sams wrote:

[18] Invariably, I have found the skills and expertise of an experienced industrial legal practitioner will be more of a help than a hindrance, particularly bearing in mind a legal practitioner's professional obligations to the Commission and the Courts. In this respect, I refer to the comments of Mason CJ in *Giannarelli v Wraith*:

[A] barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case.

- [19] More recently, a Full Bench of the Commission in *E. Allen and Ors v Fluor Construction Services Pty Ltd* said at para [48]:

A lawyer's duty to the Commission is paramount and supercedes a lawyer's duties to their client. A grant of permission to appear pursuant to s.596(1) of the Act is based upon a presumption that the representative to whom leave is granted will conduct themselves with probity, candour and honesty. The duty of advocates in that regard has been long recognised by the Commission.

- [20] Informality is one thing, but there is still a statutory foundation which must be observed in the exercise of all the Commission's powers and functions. In my experience, the prospects of a case being run more efficiently and focused on the relevant issues to be determined, is more likely where competent legal representation is involved. I agree with what was said by the Full Bench in *Priestley*:

- [13] In our view DPS has established that representation would assist DPS to bring the best case possible. Representation by persons experienced in the

¹ [2021] QIRC 118.

relevant jurisdiction will be of undoubted assistance in this regard. We are satisfied that the particular counsel has the capacity to assist the DPS and assist the Tribunal in performing its functions

(citations omitted).

Should leave be granted for the Respondents to be legally represented?

[11] The discretion to grant leave for a party to be legally represented is outlined in s 530(4) of the IR Act. The Commission may grant leave if:

- (a) it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter; or
- (b) it would be unfair not to allow the party or person to be represented because the party or person is unable to represent itself, himself or herself; or
- (c) it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings.

Efficiency and complexity

[12] Mr Sillay objects to QCS' application for legal representation, particularly in circumstances where he contends that QCS has an internal Human Resources function and legal practitioners, and where representation by lawyers "should be the exception and not the rule" in Commission matters. Mr Sillay further submits that he does not agree with QCS' assertion that the involvement of legal representation will assist in resolving the dispute as quickly, inexpensively and efficiently as possible. Rather, that the involvement of private lawyers, especially during a conciliation conference, has "the potential for discussions to devolve into highly technical legal arguments" and "may lead to delays in settling matters due to private lawyers frequently not having the authority to make decisions regarding the settlement of matters".

[13] Whilst Mr Sillay's submissions appear to express his opinion, or perhaps his representatives' opinion, regarding the involvement of lawyers, he provides no factual foundation for the opinion he expresses.

[14] The statement of Mr Sillay that legal representation should be "the exception rather than the rule" appears to have been made with little regard to s 530 of the IR Act and the matters the Commission must have regard to when considering if leave should be granted for a litigant to be legally represented.

[15] Relevantly, I do not accept the broad submissions that the involvement of legal practitioners would add to the inefficiency and complexity of the proceedings.

- [16] Legal representatives are bound by their respective professional duties to the court and their clients. These duties, together with the supervision of the Commission, should ensure that each party and their respective representatives act in good faith and in a manner which will ensure the proceedings, including any conciliation conference, proceeds efficiently.
- [17] Mr Sillay submits that the matter is not legally complex, rather, "the facts of this matter are a fairly standard disciplinary process resulting in termination of employment."
- [18] Given that the matter has yet to proceed to a conciliation conference, I have elected not to list the details of the allegations which were found to have been substantiated. Needless to say, they can be characterised as being serious allegations. A lengthy investigation process, followed by a show cause process, was embarked upon. The allegations together with the subsequent processes that were adopted will no doubt need to be considered by the Commission.
- [19] Indeed, at this preliminary stage of the proceeding, the Application and the Employer's Response are together many hundreds of pages in length. The Commission will be assisted by the expertise and skill of experienced legal representatives who regularly appear in the jurisdiction and are familiar with Commission procedures and processes. It is also expected that an experienced legal representative will aid in the efficient resolution of the matter by utilising appropriate forensic skills during the course of the matter.
- [20] Mr Sillay further contends that the involvement of legal representation provides temptation for the State of Queensland to pursue costs against an applicant in the Commission which increases the perception of an adversarial process. Mr Sillay notes that he would be more amenable to consenting to the involvement of legal representation if QCS were to provide an undertaking that they would refrain from pursuing costs in the matter.
- [21] This submission has the appearance, at least, of being scandalous. There is no factual basis to assert that by granting leave for the State to be legally represented that it will seek to pursue costs against Mr Sillay. Such a submission has no regard to the following:
- (a) that the cost provisions in s 545 of the IR Act provide, *inter alia*, that the default position is that each party bears its own costs;
 - (b) that the Commission may only award costs in limited circumstances, including where the party has made the application or responded to the application vexatiously or without reasonable cause, or it would have been reasonably apparent to the party that the application or response to the application had no reasonable prospect of success;
 - (c) the fact that the State is bound by the model litigant principles; and

- (d) the matters that must be considered pursuant to s 530 of the IR Act.

Fairness

- [22] Mr Sillay resists QCS' application on the basis that legal representation would not aid in fairness between the parties, as Together Union has comparatively fewer resources than QCS both in terms of financial resources and human resources/legal staff. Mr Sillay further submits that the introduction of private lawyers will inevitably increase costs associated with the proceedings.
- [23] In the circumstances of this matter, I consider that the involvement of legal representation will balance fairness between the parties because it will aid in the proper case and courtroom management, particularly in circumstances where Mr Sillay is represented by Together Queensland.
- [24] Another factor that weighs in favour of the granting of the application is that the State is bound by the model litigant principles in instructing its legal representatives, and has a paramount duty to the administration of justice and the Commission, and requires, *inter alia*:
- (a) the power of the State be used for a public good and in the public interest; and
 - (b) the principles of fairness are adhered to in the conduct of all litigation.
- [25] Finally, Together Queensland is an employee organisation that appears regularly before this Commission in a variety of industrial matters. For this reason, I do not accept that Mr Sillay would be disadvantaged if leave were granted in circumstances where he has the benefit of being represented by Together Queensland.

Conclusion

- [26] For the forgoing reasons, I consider that there are a number of factors that weigh in favour of the exercise of the discretion to grant leave for the Respondent to be legally represented.

Order

- [27] Accordingly, I make the following order:

Leave is granted for the Respondent to be legally represented pursuant to s 530(1)(e)(ii) of the *Industrial Relations Act 2016* (Qld).