

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *BA, DC, FE v State of Queensland* [2022] QCAT 332

PARTIES: **BA**
DC
FE
(applicants)

v

STATE OF QUEENSLAND
(respondent)

APPLICATION NO/S: ADL065-22

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 2 September 2022

HEARING DATE: On the Papers

HEARD AT: Brisbane

DECISION OF: Member Fitzpatrick

ORDERS: **1. BA and DC may conduct these proceedings as applicants, without the need for a litigation guardian.**

THE TRIBUNAL DIRECTS THAT:

- 1. If any party considers that the Tribunal does not have jurisdiction to require a litigation guardian to be appointed for FE, they should file in the Tribunal one (1) copy and give to each other party and the Human Rights Commissioner one (1) copy of submissions addressing the jurisdiction of the Tribunal and the course of action they propose should be adopted to meet the circumstances involving FE, by: 4.00 pm on 9 September 2022.**
- 2. Any party may file in the Tribunal one (1) copy and give to each other party and the Human Rights Commissioner one (1) copy of submissions in response, by: 4.00pm on 23 September 2022.**
- 3. If parties comply with direction 1 or direction 2 above, the Tribunal will determine the issue on the papers, not before 30 September 2022.**
- 4. If parties do not comply with direction 1 or direction 2 above, the legal representatives of FE must:**

- (a) **arrange for a litigation guardian for FE; and**
 - (b) **file in the Tribunal one (1) copy and give to each other party and the Human Rights Commissioner one (1) copy of a Consent of Litigation Guardian Form 13 as provided for in s 95(1) of the *Uniform Civil Procedure Rules* 1999 (Qld), modified by reference to the Tribunal proceedings, by: 4.00pm on 30 September 2022.**
5. **Further directions will issue in relation to the conduct of the proceeding upon compliance with these directions.**
 6. **If no submissions are received and no litigation guardian is appointed, the complaint will proceed with only BA and DC as applicants.**

CATCHWORDS:

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – PERSONS UNDER LEGAL INCAPACITY – JURISDICTION AND POWERS – where young persons under 18 years made complaints to the Human Rights Commission – competence to conduct litigation in the Tribunal – need for litigation guardian

Anti-Discrimination Act 1991 (Qld) s134

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 10, s 35, s 43(2)(b), s 101, s 120, s 218

Queensland Civil and Administrative Tribunal Rules 2009 (Qld), r9, r11

Australian Solicitor's Conduct Rules 2012, rr 8.1, 4.11, 3.1

Department of Health and Community Services (NT) v JWB and SMB (Marion's Case) (1992) 175 CLR 218

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

Haines v Leves (1987) 8 NSWLR 442

IW v City of Perth (1997) 191 CLR 1, 11;

Masterman-Lister v Brutton & Co [2003] 3 All ER 162

N (on behalf of her son) v State of Queensland (Acting through the Department of Education and the Arts) [2007] QSC 208.

Simonova v State of Queensland (costs) [2021] QCAT 45.

Waters v Public Transport Corporation (1991) 173 CLR 349

APPEARANCES & REPRESENTATION:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

- [1] On 30 June 2022, the Queensland Human Rights Commission referred a matter to the Tribunal. Three complainants allege age discrimination in the area of administration of State laws and programs and limitations of their human rights.
- [2] The three complainants are all under the age of 18 years. One of the complainants will turn 18 in September this year, he describes himself as having an intellectual disability. The nature of that disability is not known. The second complainant is 16 years of age and says that he has attention deficit hyperactivity disorder. The third complainant is 14 years of age.
- [3] All three complainants refer to support by a parent.
- [4] Different facts attend the circumstances of each young person; however, they all complain about detention in the Cairns watch house for periods in excess of 2 days, the conditions attending that detention and failure to fully segregate children from adult detainees.
- [5] The complaint as originally filed in the Queensland Human Rights Commission seeks that the matter be dealt with as a representative action under s146 and s147 of the *Anti-Discrimination Act* 1991 (Qld) (AD Act). That request is maintained in the proceeding in this Tribunal.
- [6] Before making directions for the progress of the matter the Tribunal required submissions from the parties and the Human Rights Commissioner, in relation to the following matters:
 - (a) as to whether the proceedings before the Tribunal are properly constituted, in that BA, DC and FE are young persons, under the age of 18 years, where no person has been authorised in writing by the Commissioner to act on behalf of each of them:
 - (i) to complain about an alleged contravention of the AD Act, under s134(1)(c) of the Act; and
 - (ii) to make a human rights complaint under s64(1)(c) and (2) of the *Human Rights Act* 2019 (Qld) (HR Act).
 - (b) Whether s134(1)(c) of the AD Act and s64(1)(c) and (2) of the HR Act is a fetter on BA, DC and FE complaining to the Commissioner or whether they may do so in any event, independently of a person in the nature of a litigation guardian.
 - (c) Whether BA, DC and FE as young persons, under the age of 18 years may participate in proceedings before the Tribunal, independently of a person in the nature of a litigation guardian.
 - (d) Whether young persons under the age of 18 years are capable of forming members of a class for the purpose of a representative complaint.
- [7] The Tribunal's concerns were prompted by the position which prevails in the civil courts in this State that a litigation guardian is required for a person under the age of 18 years to bring proceedings.

Legislative framework

- [8] The complaint as referred has been accepted by the principal registrar of the Tribunal without condition.¹ The complaint as referred meets the requirements of the *Queensland Civil and Administrative Tribunal Rules*.²
- [9] There is no express provision in the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) or Rules for a litigation guardian to be appointed in the case of children who are applicants in proceedings. Section 28 of the QCAT Act gives a broad discretion to set procedure for a proceeding. It is possible that the Tribunal could require a litigation guardian for a child applicant and could follow a process similar to that provided for in s95 of the *Uniform Civil Procedure Rules* requiring a litigation guardian to file a consent to so act.
- [10] The respondent has suggested that by s42(1)(c) of the QCAT Act, the Tribunal may order a person to be joined as a party if for some reason it is desirable to do so. In a similar way, by s177 of the AD Act, the Tribunal is empowered to join a person as a party to a proceeding. I do not consider these provisions are apt for use because a litigation guardian is not a party to proceedings, except for the purposes of costs.³
- [11] The AD Act is the enabling Act which gives the Tribunal jurisdiction in the matter.⁴ The AD Act provides at s134(1)(c) for the Human Rights Commissioner to authorise a person in writing to act on behalf of a person “unable to make or authorise a complaint” to make the complaint. The section anticipates authorisation of a person filling a role similar to a litigation guardian.⁵ No such authorisation has been given in the case of the three complainants.
- [12] It is relevant that the QCAT Act refers in various sections to a child being a party to a proceeding.⁶ In particular, at s29 the Tribunal has express obligations to assist a party having regard to the party’s age and the needs of a party who is a child. Those provisions suggest that a child may be in need of that level of assistance in circumstances where there is no litigation guardian.

Do the complainants need a litigation guardian before the matter can proceed?

- [13] The AD Act is beneficial legislation and ought to be given a purposive, fair, large and liberal interpretation.⁷ Section 4(f) and section 48 of the HR Act requires the Tribunal to interpret statutory provisions to the extent possible that is consistent with their purpose in a way compatible with a person’s human rights. I am guided by these points when making this decision.
- [14] It was submitted at the Directions Hearing in this matter that no parent was prepared to act as a litigation guardian in the matter as they did not feel “protected”. I take that to mean that any of the complainant’s parents were not prepared to expose themselves to a potential costs order. No person other than a parent has been

¹ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s35.

² *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld), r9, r11.

³ *Simonova v State of Queensland (costs)* [2021] QCAT 45.

⁴ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s10.

⁵ *N (on behalf of her son) v State of Queensland (Acting through the Department of Education and the Arts)* [2007] QSC 208.

⁶ *Ibid.*, s43(2)(b), s101, s120, s218.

⁷ *IW v City of Perth* (1997) 191 CLR 1, 11; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 372.

suggested as appropriate for the role of litigation guardian. In those circumstances if the children cannot bring the proceedings independently of a litigation guardian, they will be denied access to a forum to have their complaints under the AD Act and HR Act determined.

- [15] Although the Human Rights Commissioner did not utilise s134(1)(c) of the AD Act to authorise a person to make a complaint on behalf of the children, I accept the Commissioner's submissions that the provision is procedural, and that it does not act as a fetter on the right of the complainants to complain. The Commissioner submits and I accept that the purpose of s134(1)(c) is to ensure all person, regardless of legal capacity have the opportunity to pursue protection of their rights under the AD Act. The Commissioner says that the provision is meant to broaden rather than fetter the protection of people who are unable to make complaints for themselves. I accept the Commissioner's submissions that even if an appointment under s134(1)(c) of the AD Act should have been made this does not render the acceptance of the complaint or referral to the Tribunal invalid.
- [16] I find that the complainants fall within s134(1)(a) of the AD Act being persons subjected to an alleged contravention of the Act. On that basis the complaint has been made within the terms of the AD Act and appropriately referred to the Tribunal. This interpretation of the legislation is most compatible with the complainants' human rights.
- [17] The Commissioner has stated that if it appears that a child is not capable of understanding the nature and consequences of what they are doing, it will be appropriate for the Tribunal to appoint a person in the nature of a litigation guardian to act on their behalf.
- [18] In relation to the latter point, the complainants are legally represented. Given the obligations owed by lawyers to the Tribunal and to their clients⁸ I would expect that any lack of capacity brought about by age or intellectual disability has been addressed by the complainants' legal representatives to ensure that the litigation in this Tribunal is properly conducted.
- [19] I rely upon the affidavit of Ms Burton, the lawyer with carriage of this matter on behalf of BA, DC and FE. She has affirmed that it is her belief that BA and DC are able to give instructions and that they understand the nature and possible consequences of the decisions in these proceedings and that they are competent to provide instructions directly in the matter.⁹
- [20] However, Ms Burton says that although FE is able to directly express his views and wishes, instructions about the litigation is not taken from him due to his age and other vulnerabilities. Instructions are taken from FE's mother, however she has not given instructions to be named as a complainant in the proceedings.
- [21] The respondent has submitted that the appointment of a parent or agent to bring the proceedings may best avoid doubt regarding the capacity of the applicants. I agree that would be the preferable situation, however, at the moment that does not seem to be possible in terms of any person being willing and able to do so.

⁸ Australian Solicitor's Conduct Rules 2012, rr 8.1, 4.11, 3.1

⁹ Affidavit of Bridget Burton affirmed 15 July 2022, filed 15 July 2022.

- [22] I have been referred to the decision of *Haines v Leves*.¹⁰ It is useful for observations it makes in relation to the capacity of a child to participate in proceedings in the New South Wales Anti-Discrimination Tribunal without a litigation guardian. I note that there are relevant differences in the New South Wales Anti-Discrimination legislation to that prevailing in Queensland. In particular, in New South Wales the only requirement to appoint a representative for the purpose of a complaint is where there is intellectual disability. That can be compared with s134(1)(c) of the AD Act. Also, in Queensland the Tribunal is given the function of hearing and determining the complaint, with the consequent need for many decisions to be taken by a litigant. The Tribunal is not given an investigative function, which is reserved to the Human Rights Commission. The investigative character of the NSW Tribunal's functions was a key element to the reasoning in *Haines* case, together with an express right for a "person" to appear in the Tribunal, without qualification.
- [23] Apart from those considerations the New South Wales Court of Appeal considered that the common law rules as to standing and capacity should not be grafted onto a statutory scheme, particularly where to do so would frustrate the purposes of the legislation.¹¹
- [24] Given the Tribunal's obligations under s29 of the QCAT Act and the fact that the complaints have been accepted by the Human Rights Commissioner as falling within s134(1)(a) of the AD Act, I am prepared to find that the statutory regime governing this matter contemplates that a person under the age of 18 years may bring a complaint and that complaint may be properly referred to the Tribunal, where the Tribunal will assist the young person in his litigation, without the need for a litigation guardian. On this reasoning I find that the proceedings are properly constituted.
- [25] Apart from the age of the complainants, the ability of the young people to give reliable instructions in the matter is relevant. On the basis of Ms Burton's evidence, I find that BA and DC are able to instruct her and her practice. If the young people's circumstances change the Tribunal should be immediately advised. I do not consider BA and DC's youth or other circumstances prevent them being applicants in this proceeding. I note that BA will soon turn 18.
- [26] Lord Scarman's analysis in *Gillick v West Norfolk and Wisbech Area Health Authority*¹² has been adopted in Australia as good guide for how decision-making power by children is recognised by the Courts:

...Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law...is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child...parental rights yield to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.

¹⁰ (1987) 8 NSWLR 442

¹¹ Ibid., p 25 per Kirby J.

¹² [1986] AC 112.

- [27] “Gillick competency” has been recognised as part of the common law of Australia.¹³
- [28] In the context of conduct of civil litigation, in the United Kingdom where the relevant civil procedure rules anticipate there may be circumstances where a child may conduct proceedings without a litigation friend, the appropriate test has been held by Chadwick LJ to be:
- ...whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem ...¹⁴
- [29] On the basis of Ms Burton’s affidavit, I find that BA and DC are Gillick competent and that they have sufficient understanding to pursue or defend a claim without a litigation guardian.
- [30] I am troubled by FE’s circumstances. Plainly he is not giving instructions to his lawyers. His mother is doing so, yet she is not willing to be a litigation guardian. The complaint is not FE’s mother’s complaint. How can decisions required in the litigation be properly made by FE and relied on by the Tribunal and the respondent? I am not satisfied that legal representatives can make decisions on behalf of a child in contested litigation, where their primary duty is a duty to the court (or the Tribunal). In the case of a child who cannot make decisions for himself or reliably instruct solicitors, a litigation guardian must be appointed to do so for the child. The litigation guardian must be prepared to be subjected to the directions and orders of the Tribunal on behalf of FE. Without that appointment FE’s rights cannot be fairly ventilated.
- [31] Although FE has standing to make his complaint and the complaint is properly before the Tribunal, I require a litigation guardian to be appointed for FE so that FE’s complaint may proceed. I cannot say who that person should be.
- [32] The Tribunal has no formal process for a person becoming a litigation guardian or being appointed a litigation guardian. There is a lacuna in the QCAT Act which should be rectified.
- [33] Despite that observation, I consider that I have the power to require a litigation guardian and to set the procedure for a litigation guardian under s28(1) of the QCAT Act. Further I am able to adopt Rule 95 and Form 13 of the *Uniform Civil Procedure Rules*, under s28(3)(b) of the QCAT Act.

Directions

- [34] I do not have the benefit of submissions from any party on this point. If any party considers that the Tribunal does not have jurisdiction to require the appointment of a litigation guardian for FE, they should file submissions as to the course of action

¹³ *Department of Health and Community Services (NT) v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218, per Mason CJ, Dawson Toohey and Gaudron JJ in the context of consent to medical treatment.

¹⁴ *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162, [75]; applied in *Stokes v McCourt* [2014] NSWSC 61 and *Rappard v Williams* [2013] NSWSC 1279.

which they say should be adopted to meet the circumstances involving FE and give a copy of those submissions to the other parties and to the Human Rights Commissioner by 4.00 pm 9 September 2022. The other parties and if he wishes to do so, the Human Rights Commissioner, must file in the Tribunal and give to the other parties a copy of any submissions in response, by 4.00pm on 23 September 2022,

- [35] If no submissions are received by that date, I direct the legal representatives of FE to arrange for a litigation guardian for FE and that a form of consent as provided for in the *Uniform Civil Procedure Rules*, modified by reference to the Tribunal proceedings, be filed in the Tribunal and a copy given to the other parties and to the Human Rights Commissioner, by 4.00pm on 30 September 2022.
- [36] If submissions are received by the parties the issue will be determined on the papers, not before 30 September 2022.
- [37] If no submission are received and no litigation guardian is appointed, the complaint will proceed with only BA and DC as applicants.
- [38] If a person becomes a litigation guardian for FE, directions will issue in relation to necessary steps in the proceeding.

Order

- [39] In the meantime, I order that BA and DC conduct these proceedings as applicants, without the need for a litigation guardian.
- [40] The proceeding with respect to BA and DC should progress and separate directions will issue in this regard.

Human Rights considerations

- [41] Although it is not apparent at this stage if objection will be taken to the Tribunal's requirement for the appointment of a litigation guardian for FE, I will now set out the basis on which I consider such a course only limits FE's human rights to an extent that is reasonable and demonstrably justifiable¹⁵; and I refer to the human rights relevant to the decision.¹⁶
- [42] The human rights potentially affected by the proposed requirement for appointment of a litigation guardian are the right to recognition and equality before the law,¹⁷ the right to protection of families and children,¹⁸ and the right to a fair hearing.¹⁹
- [43] These human rights are likely to be limited by a requirement that a litigation guardian be appointed before FE can continue to litigate his complaint in the Tribunal. This is especially so if no litigation guardian is prepared to act. FE may not be able to seek redress for the alleged contraventions of the AD Act and the HR Act as an applicant in this Tribunal, despite having standing to do so.

¹⁵ Human Rights Act 2019 (Qld), s8, s13.

¹⁶ *Ibid.*, s58.

¹⁷ *Ibid.*, s15.

¹⁸ *Ibid.*, s26(2)

¹⁹ *Ibid.*, s31.

- [44] Despite this, the limitation is consistent with a free and democratic society based on human dignity, equality and freedom²⁰ because its purpose is to ensure a fair hearing for all parties based on reliable and informed instructions from a party competent to give instructions. The limitation helps to achieve this purpose and is consistent with the fair administration of justice.
- [45] FE's countervailing interest is in ensuring his complaint is heard. The competing public interest is in ensuring the litigation can reliably proceed. In this case the public interest outweighs the private interest.

²⁰ Ibid., s13.