

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Smith v State of Queensland (Queensland Health) & Anor* [2022] QIRC 462

PARTIES: **Smith, Paul Joseph**
(Applicant)

v

State of Queensland (Queensland Health)
(First Respondent)

&

Webb, Robert
(Second Respondent)

CASE NO.: GP/2022/18

PROCEEDING: Application in existing proceedings

DELIVERED ON: 28 November 2022

MEMBER: Power IC

HEARD AT: On the papers

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

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – GENERAL PROTECTIONS – application for legal representation – where First and Second Respondents have 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 – efficiency of proceedings – where leave is granted for legal representation

LEGISLATION: *Human Rights Act 2019* (Qld), s 15

Industrial Relations Act 2016 (Qld), ss 447 and 530

CASES: *State of Queensland (Department of Premier*

and Cabinet) v Dawson [2021] QIRC 118

State of Queensland (Queensland Health) v Hume [2022] ICQ 001

Wanninayake v State of Queensland (Department of Natural Resources and Mines) [2014] QIRC 079

Reasons for Decision

Introduction

- [1] On 20 September 2022, Mr Paul Joseph Smith ('the Applicant') filed a general protections application ('the Application') in the Queensland Industrial Relations Commission ('the Commission') pursuant to ch 8 pt 1 div 3 of the *Industrial Relations Act 2016* (Qld) ('the IR Act').
- [2] The Applicant appointed his wife, Dr Susannah Sherlock, as agent to represent him in the proceedings.
- [3] On 14 and 21 October 2022 the State of Queensland (Queensland Health) ('the First Respondent') and Dr Robert Webb ('the Second Respondent') (together, 'the Respondents') each filed an application in existing proceedings, seeking leave to be legally represented.
- [4] The First Respondent applied for leave to be legally represented pursuant to the then ss 530(1)(d) and 530(4)(a) of the IR Act. The Second Respondent applies for leave to be legally represented pursuant to the then ss 530(1)(d) and 530(4)(a) and (c) of the IR Act.¹
- [5] The Applicant objects to the Respondents being granted leave to be legally represented.
- [6] The question for determination is whether leave should be granted for the Respondents to be legally represented in the proceedings.

Legislative framework

- [7] Section 530 of the IR Act relevantly provides:

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—

¹ Section 530 of the IR Act was recently amended under s 53 of the *Industrial Relations and Other Legislation Amendment Act 2022* (Qld) whereby s 530(1)(d) was renumbered to s 530(1)(e).

...

- (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 the party's or person's interests in the proceedings; 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 organisation or another person with experience in industrial relations advocacy
- a person is from a non-English speaking background or has difficulty reading or writing

...

- (7) In this section—

...

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

- (a) chapter 8;

...

[8] 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 the party's or person's interests in the proceedings; 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.

[9] In *State of Queensland (Queensland Health) v Hume ('Hume')*,² Deputy President Merrell opined the following with respect to the construction of s 530(4)(a) of the IR Act:

- [34] First, the purpose of the combined effect of s 530(1)(a)(ii) and s 530(4) of the IR Act is to confer on the Court discretion to give leave, for a party or person ordered or permitted to appear or to be represented in proceedings before it, to be represented by a lawyer if the Court forms one of the value judgments in s 530(4)(a) to (c).
- [35] Secondly, it is clear that the power conferred on the Court is discretionary and not obligatory. The use of the verb 'may' in s 530(4) of the IR Act logically imports an element of discretion on the part of the Court. The discretionary character is not displaced by the mandatory requirement that the Court must form a value judgment about whether, relevantly to the present case, the giving of the leave sought would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter. That is to say, if the Court forms that value judgment, then there is still a discretion to be exercised. The formation of one of the value judgments in s 530(4)(a) to (c) does not dictate that the discretion is automatically exercised in favour of an applicant seeking leave to be represented by a lawyer.
- [36] Thirdly, s 530(4)(a) of the IR Act refers to the question of whether leave would enable '... the proceedings' to be dealt with more efficiently, having regard to the complexity of '... the matter.'
- [37] Chapter 11, pt 5, div 3 of the IR Act is headed 'Conduct of proceedings.' Division 3 contains s 529 and s 530 of the IR Act. Section 529(1) of the IR Act provides that a person or party may be represented in the proceedings by an agent appointed in writing or, if the party or person is an organisation, an officer or member of that organisation. In s 529(2)(a) of the IR Act, the noun 'proceedings' is relevantly defined to mean proceedings under the IR Act or another Act being conducted by the Court, the Commission, an Industrial Magistrates Court or the Registrar. The noun 'proceedings' is relevantly defined in the same way in s 530(7) of the IR Act.
- [38] Having regard to that context, when s 530(4)(a) of the IR Act refers to '... the proceedings', my opinion is that phrase, relevantly to matters such as the present, refers to an application for relief made by a person which an industrial tribunal has jurisdiction to grant.
- [39] By contrast, s 530(4)(a) of the IR Act then refers to the complexity of '... the matter.' Because of the different phrase used, my opinion is that '... the matter' is a reference to the particular controversy or controversies requiring determination by the industrial tribunal so as to make a decision about the application for relief or, put another way, to determine the proceedings.
- [40] Fourthly, s 530(4)(a) of the IR Act is otherwise to be construed according to the ordinary meaning of the words used in that provision. A value judgment has to be formed as to whether or not the giving of leave to a party or person to be represented by a lawyer would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter. The matter does not have to be complex, or compared to other matters that have or may become before the Court, be more complex; but regard must be had to the complexity of the matter.
- [41] Further, in having regard to that complexity, a judgment has to be formed as to whether allowing the party or person to be represented by a lawyer would enable the proceedings to be dealt with more efficiently. Section 530(4) of the IR Act is relevantly concerned with whether or not discretion should be exercised in favour of a party seeking leave to be represented by a lawyer in proceedings before the Court. As a consequence, my opinion is

² [2022] ICQ 001.

that the adverb 'efficiently', in the context that it is used in s 530(4)(a) of the IR Act, is concerned with, at least, timeliness.

- [42] Fifthly, if the Court forms one of the value judgments in s 530(4)(a) to (c) of the IR Act, s 530 is otherwise silent as to the factors the Court must consider in terms of exercising the discretion. In such a case, the relevant considerations must be determined from the scope and object of the provision conferring the discretion.
- [43] The object of s 530 of the IR Act is to set out the circumstances by which a party or person may be represented in the proceedings by a lawyer. The circumstances described in s 530(4), which enliven the discretion of the Court to give leave, concern efficiency in the conduct of the proceedings. The circumstances also concern fairness, having regard to the particular circumstances of the person or party seeking leave to be represented by a lawyer, and also fairness having regard to the other parties or persons in the proceedings.
- [44] As a consequence, depending on the circumstances of a particular case, matters such as efficiency and, or in the alternative, fairness, may be relevant considerations as to whether or not the discretion, once enlivened, should be exercised.

First Respondent's submissions

- [10] The First Respondent submits that, with regard to s 530(4)(a) and the decision of *Hume*, the matter does not need to be complex to satisfy the Commission that the granting of leave would enable the proceedings to be dealt with more efficiently. Further, the First Respondent contends that a matter which is not complex may nevertheless be dealt with more efficiently by allowing the parties to be legally represented.
- [11] Where leave is granted, the First Respondent submits that its legal representatives would assist the Commission to efficiently deal with the Application by:
 - (a) narrowing the matters at issue;
 - (b) preparing concise and relevant evidence and submissions;
 - (c) testing the evidence before the Commission by examining the witnesses; and
 - (d) identifying and applying relevant legal principles.
- [12] The First Respondent highlights that it is bound by the model litigant principles in instructing its representatives, who has a paramount duty to the administration of justice and the Commission.
- [13] The First Respondent submits that there are no relevant factors militating against leave being granted and outlined four 'significant factors' that would favour the granting of leave for legal representation as follow:

First, ... the State submits that allowing it to be legally represented will assist the Commission to efficiently deal with the proceedings.

Second, the Related Proceedings will soon be before the Commission. The State will seek leave for its legal representatives to continue to act for it in the Related Proceedings. The facts in issue in the Application flow directly from the Related Proceedings. The State respectfully suggests it would be efficient for the Application to be determined with the Related Proceedings, and the Application appears to seek that outcome. That approach would save unnecessary replication of evidence, pleadings, hearings, and procedural steps such as conferences and mentions. There is

significant factual and legal complexity in matters raised by the Application and Related Proceedings, and legal representatives could assist the Commission to efficiently deal with those matters.

Third, in determining the Application (and the Related Proceedings), the QIRC can award uncapped damages and make significant findings about the State and its employees (for whom the State may be vicariously liable). The State bears a reverse onus in defending the Application. The State should therefore be afforded the opportunity to present the most cogent legal defence available, and will be assisted in that regard by legal representation.

Fourth, the State does not oppose Mr Smith or Dr Webb being represented. If Mr Smith is not legally represented that 'is no reason to deny the other party or parties legal representation'. Mr Smith is represented by Dr Sherlock, who has experience appearing on his behalf in a previous QIRC hearing, and in the Related Proceedings (both in his complaint and her own).³

Second Respondent's submissions

[14] The Second Respondent relies upon the submissions of the First Respondent.

[15] The Second Respondent further submits the following regarding the efficiency of the proceedings:

... Dr Webb and the State are likely to file a single set of pleadings and evidence, and could respond to issues such as disclosure collectively. That would substantially improve the efficiency of the proceedings. It would allow the Commission and Mr Smith to more easily understand the Respondents' collective position, reduce the need for doubling up directions (including lengthy processes such as disclosure), and reduce the volume of material before the Commission.

[16] With respect to fairness regarding the Second Respondent and the other parties to the Application, the Second Respondent submits that he has no legal training or relevant litigation experience. The Second Respondent highlights that, even with legal representation, it will likely involve significant stress having to commit significant time and energy into the proceedings. Where the Second Respondent proceeds without legal representation, the Second Respondent submits that those issue will be amplified 'many-fold'.

[17] The Second Respondent submits that, having regard to the fact that the First Respondent may be granted leave to be legally represented and the Applicant being represented by Dr Sherlock, it would be fair to allow him to be legally represented.

[18] As to whether the Commission should exercise its discretion to grant leave, the Second Respondent submits the following:

In bringing the Application, Mr Smith is asking the Commission to make very serious findings about Dr Webb. If made, those could have a significant detrimental impact upon Dr Webb personally and professionally. The Commission can also award uncapped damages, amongst other orders. Dr Webb will face a reverse onus of proof in defending that Application. Dr Webb submits that he should be afforded the opportunity to present the most cogent legal defence available, and he would be substantially assisted in that regard by legal representation.

Applicant's submissions

³ The 'Related Proceedings' relate to complaints made by the Applicant under the *Anti-Discrimination Act 1991* (Qld) that are currently before the Queensland Human Rights Commission.

[19] In response to the First Respondent's submissions regarding s 530(4)(a) of the IR Act, the Applicant submits, in summary, that:

- (a) the arguments made by the First Respondent has already reduced the efficiency for the Commission in dealing with this matter;
- (b) the First Respondent already has lawyers who are capable of providing adequate representation;
- (c) the case of *Hume* concerned a complex appeal regarding an application of the wrong legal test and is not applicable to this matter;
- (d) the complexity of the matter must be considered when considering efficiency; and
- (e) the matter is required to be complex to satisfy the first issue and a matter which is not complex is unlikely to be dealt with more efficiently by allowing the First Respondent to be legally represented.

[20] The Applicant submits that it would not be unfair to deny the First Respondent legal representation as the First Respondent has legal resources at its disposal and that using taxpayer funds is wasteful and potentially protracts the case by ensuring that conciliation does not occur.

[21] The Applicant further submits, in summary, that:

- (a) the legal representatives will ensure 'aggressive defence' of the First Respondent's behaviour;
- (b) a factor to be considered is whether it is fair for the Applicant to 'face an unequal opponent' when he has a right to equal protection against discrimination under s 15(4) of the *Human Rights Act 2019* (Qld);
- (c) the IR Act is 'intended for informal hearings as the default mode';
- (d) where the First Respondent seeks to combine the noncomplex acts with the more complex historical acts yet to be argued in the related proceedings, it will simply overcomplicate matters, reducing efficiency;
- (e) the Commission is equally bound by the model litigant principles to ensure fairness pursuant to s 447(2)(b) of the IR Act;
- (f) the Applicant considers that 'not seeking to take advantage of an impecunious opponent' under the model litigant principles be considered;
- (g) the Applicant is at considerable disadvantage due to actions and omissions by the First Respondent;
- (h) the matter is not complex, rather, is simply difficult to defend; and

- (i) where leave is granted will result in the First Respondent having an unfair advantage over the Applicant.
- [22] In response to the Second Respondent's submissions, the Applicant acknowledges the Respondents, in filing a single set of pleadings, would result in the proceedings to be dealt with more efficiently, satisfying s 530(4)(a) of the IR Act.
- [23] In respect of the issue of fairness, however, the Applicant submits that the Second Respondent is an experienced executive who is 'more than capable in representing himself especially if joined to the State who will provide Counsel'.
- [24] The Applicant submits that the Second Respondent has not discharged his onus in satisfying the Commission, that he is unable to represent himself. The Applicant highlights that the Second Respondent will likely join the First Respondent who will have in house legal counsel.
- [25] The Applicant submits the following factors outlined by the Second Respondent to be irrelevant, that:
- (a) the claim regarding stress is irrelevant and 'pales' in comparison to the stress of the Applicant, submitting that any stress of the Second Respondent is a 'direct result of his own actions';
 - (b) the Second Respondent's time spent to defend his actions is irrelevant; and
 - (c) in defending the proceedings may result in personal and professional harm is irrelevant.

Consideration

- [26] As outlined above, s 530(4) of the IR Act provides that the Commission may grant leave for a party to be legally represented 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 the party's or person's interests in the proceedings; 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.
- [27] In *State of Queensland (Department of Premier and Cabinet) v Dawson*⁴ his Honour O'Connor VP referred to the consideration of legal representation and the efficient conduct of litigation by a number of authorities including the following:

⁴ [2021] QIRC 118.

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 ...

- [28] Section 530(4)(a) of the IR Act provides that leave may be granted if it would enable the matter to be dealt with more efficiently by the Commission. Whilst regard must be had to the complexity of the matter, the matter does not have to be more complex than other matters.⁵ I consider the circumstances of this matter involves complexity given the multiple respondents and potential joinder of a separate proceeding. I accept the submission that if the First Respondent is represented it will allow the matters at issue to be narrowed. In these circumstances, participation in a conference will likely be more productive as irrelevant matters can be excluded at an early stage. In the event the matter proceeds to hearing, legal representation will ensure relevant evidence and legal principles are applied, allowing the Commission to deal with the matter more efficiently.
- [29] The Application alleges that the Applicant suffered adverse action as a consequence of exercising a workplace right. This is not a simple matter given the issues in dispute, the reverse onus and the potential joinder of another matter upon referral from the Queensland Human Rights Commission. The complexity of the matter lends weight to exercising the discretion to permit legal representation. This is not to allow the Respondents to have '*an unfair advantage over the Applicant*' as contended by the Applicant, rather, it is to allow the Commission to deal with the proceedings more efficiently.
- [30] I also note the submission in which the Respondents have indicated that the First and Second Respondents are likely to file a single set of pleadings and evidence and will provide a collective response to disclosure matters. In circumstances where the duplication of materials can be avoided, the proceedings will be dealt with more efficiently if the Second Respondent is also legally represented.
- [31] On the question of fairness, I accept the First Respondent's submission that it is bound by the model litigant principles. These principles require that the power of the State be used for public good and in the public interest, and the principles of fairness are adhered to in the conduct of all litigation. Adherence to the model litigant principles along with the Commission's conduct of the proceedings will ensure the Applicant suffers no unfairness as a consequence of the Respondents' legal representation. This should also allay the Applicant's concerns that legal representatives will engage in 'aggressive defence' of the First Respondent.
- [32] The Second Respondent is an employee of the First Respondent who has no legal training or relevant litigation experience. In circumstances where he is subject to an application for which the Commission may award uncapped damages, it would be unfair to deny him the ability to access legal representation.

⁵ *State of Queensland (Queensland Health) v Hume* [2022] ICQ 001.

[33] It is unclear why the Applicant submits that the granting of leave to be legally represented '*potentially protracts the case by ensuring that conciliation does not occur*'. A conciliation conference will be held irrespective of whether the parties are legally represented.

[34] The Applicant's right to equal protection under s 15(4) of the *Human Rights Act 2019* (Qld) is not compromised by allowing the Respondents to be legally represented. I note the comments made by Neat IC in *Wanninayake v State of Queensland (Department of Natural Resources and Mines)* ('*Wanninayake*')⁶ where it was determined that the decision by the applicant not to engage legal representation did not mean that the respondent should be denied the opportunity to efficiently present its case through legal representation. In *Wanninayake*, Neate IC considered:

... Competent legal representation of at least one of the parties can assist in ensuring that the proceedings remain focused on the real issues of fact and law, that the distinction between evidence and submissions is observed, that evidence is properly adduced (whether by examination in chief or cross examination and by the tendering of relevant documents), and that submissions are confined to the matters which the Commission must decide.

Conclusion

[35] For the reasons outlined above, I grant leave for the Respondents to be legally represented in the proceedings pursuant to s 530(1)(e)(ii) of the IR Act.

Order

[36] I make the following order:

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

⁶ [2014] QIRC 079.