

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Alderton v Fraser Coast Regional Council* [2019] QIRC 058

PARTIES: **Alderton, Sally**
(Applicant)

v

Fraser Coast Regional Council
(Respondent)

CASE NO: TD/2018/40

PROCEEDING: Application in an existing proceeding regarding legal representation

DELIVERED ON: 17 April 2019

HEARING DATES: 5 April 2019
16 April 2019

MEMBER: Thompson IC

HEARD AT: Brisbane

ORDER: **Leave for the Respondent to be legally represented is granted**

CATCHWORDS: INDUSTRIAL LAW – Legal Representation - Leave granted

LEGISLATION: *Industrial Relations Act* 2016, s 530

CASES: *Wanninayake v State of Queensland (Department of Natural Resources and Mines)* [2014] QIRC 079
Le Pierres v Herzfeld Pty Ltd [2000] 163 QGIG 124

APPEARANCES: Ms S. Alderton, Applicant
Mr D. Chen of NB Lawyers for the Respondent

Reasons for Decision

Background

[1] In respect of matters relating to legal representation that come before the Commission, the relevant legislation to be applied is s 530 of the *Industrial Relations Act 2016* (the Act) which states:

(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 -

...

(d) 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

...

(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

...

[2] At a mention held on 5 April 2018 the Fraser Coast Regional Council (respondent) sought leave pursuant to s 530(4) of the Act to be legally represented in the substantive application.

[3] The respondent relied upon the following grounds:

- having legal representation would enable the Commission to deal with the proceedings in a more efficient manner;
- there would be a large amount of complex material before the proceedings; and

- the respondent had persons in their employ capable of adequately representing the employer in the proceedings:
 - Rachel Paton (Paton) Employee Relations Manager; and
 - Caitlin Noble (Noble) Senior Employee Relations Advisor.

However, as both Paton and Noble were to be called as material witnesses in the proceedings, the respondent would be prejudiced if one or either were required to conduct the case in such circumstances.

[4] The application for leave was opposed by Sally Alderton (applicant) on grounds that included:

- respondent was a member of the Local Government Association of Queensland (LGA) an employer association who were capable of adequately representing the respondent in the proceedings;
- the issues before the proceedings were not complex in nature with up to 80 per cent of the documentation forming part of the proceedings having been generated by the respondent;
- as a self-represented litigant, it was unfair to the applicant to have legal representation granted to the respondent when such an option was not available to her; and
- if the respondent sought costs associated with the outcome of the hearing, the engagement of legal representation would have the potential to cause hardship to the applicant.

[5] In response to the applicant's objection to the granting of leave for the respondent to be legally represented, the respondent raised issues that included:

- the respondent had the right to determine their own level of representation and not be restricted by their membership of an employer association;
- whilst a majority of the documentation before the proceedings may have been generated by the respondent, there were significant complexities contained within that documentation which included referrals by the applicant to external agencies;
- if the respondent was to seek some form of costs, that would be a matter for determination of the Commission; and

- the potential unfairness to the applicant as a self-represented litigant with the respondent being legally represented could be addressed with reference to the matter of *Wanninayake v State of Queensland (Department of Natural Resources and Mines)*¹ (*Wanninayake*) where Neate IC had stated:

To the extent that a self-represented party considers it likely that they will be at some disadvantage in proceedings where the other party is, or parties are, represented by lawyers, the self-represented party should proceed on the basis that the Commission will attempt to ensure that the proceedings are conducted fairly within the time allotted for the hearing.

Conclusion

[6] The application for reinstatement was lodged with the Industrial Registrar on 12 April 2018 and Schedule 1 of the application, provided a 35-page document setting out what were said to be the "causes, incident surrounding and details of the dismissal and any other relevant circumstances which have led to the application for reinstatement". The content included references to having filed complaints with:

- the Crime and Corruption Commission; and
- Workplace Health and Safety.

[7] Further at Schedule 2, the applicant described the relevant facts and circumstances that specified the dismissal was unfair and included an allegation that the respondent had "erred in law by breaching my workplace rights by taking adverse action" in respect of:

- I was terminated by the Respondent on 22 March 2018;
- I was injured as a result of my employment; subject to the outcomes of my review application filed with the Workers Compensation Regulator on 12 April 2018;
- My position was altered to my prejudice. I was terminated by the Respondent on 22 March 2018 during a temporary absence from work due to mental injury;
- I was discriminated against in the form of victimisation, in accordance with the information provided in Schedule 1.

Respondent's grounds for leave to be legally represented

[8] The respondent effectively relied upon the legislative provisions at s 530(4)(a) and (b) of the Act to enable the Commission to exercise a discretion to grant leave to be legally represented in the substantive proceedings.

¹ *Wanninayake v State of Queensland (Department of Natural Resources and Mines)* [2014] QIRC 079

Section 530(4)(a) of the Act would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter

- [9] The respondent argued in general terms that the nature of the material to be considered in determination of the application by the Commission was complex and the involvement of a legal practitioner would assist in having the matter dealt with more efficiently.
- [10] The respondent's position is supported by references contained in the applicant's grounds for reinstatement which dealt with complaints to external agencies and allegations of adverse action and discrimination in the form of victimisation against her.
- [11] The very matters identified by the applicant are complex in nature in their own right and are of a level of complexity which would, in my view, enliven the provisions contained in s 530(4)(a).

Section 530(4)(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

- [12] The respondent in defending the application for reinstatement will call evidence from the Employee Relations Manager (Paton) and the Senior Employee Relations Advisor (Noble) and as such the two in-house persons best positioned to conduct the case on behalf of the respondent are material witnesses in the proceedings. In the absence of the two senior employee relations officers by virtue of their witness status, it does in my view support the respondent's application that in the circumstances it would be unfair not to allow the respondent to be represented on the basis of an inability to represent itself.

Legal representation verses employer association representation

- [13] In the notice of listing (dated 26 April 2018) the LGA were identified as a party representing the respondent at a conference scheduled for 3 May 2018.
- [14] On 27 November 2018 a *Form 36 - Notice of change of lawyer or agent* was filed with the Industrial Registrar which advised the LGA was no longer representing the respondent and there was a new representative in the form of NB Lawyers.
- [15] The respondent had exercised the right to no longer be represented by the LGA and even in circumstances where leave may not be granted for a respondent to be legally represented, the Commission does not have the jurisdictional authority to direct that the LGA or any other organisation be engaged as their representative as submitted by the applicant.

Prejudice to the applicant if legal representation application was granted

- [16] In circumstances where the applicant is self-represented, that is not a sufficient ground on its own for an application for legal representation to be rejected. I defer to the previous citation in *Wanninayake* which is just as relevant in these proceedings as it was in those proceedings.

Questions of law

- [17] In all reinstatement applications, there is potential for questions of law to arise and particularly so in this application, based upon the applicant's material filed to date in the proceeding.
- [18] In the matter of *Le Pierres v Herzfeld Pty Ltd*² (*Le Pierres*) the then Vice President Linnane stated:

There are clearly questions of law to be determined in any unfair dismissal application. In the present application, the Commission will be required to determine, amongst other matters, whether the evidence of misconduct, if any, is of such a serious nature as to warrant summary dismissal of the Applicant. I concur with the view expressed by Drake-Brockman J in *Re Metal Trades Award* (1948) IIB 289 where it was stated that in matters involving points of law it is important to have legal representation to assist the Court.

- [19] This is a proceeding of the type that would benefit from legal representation to assist the Commission in matters involving points of law.

Finding

- [20] On having considered the submissions and material before me, I am of the view that the respondent had established, based upon the requisite standard of proof, that pursuant to s 530(4)(a) and (b) of the Act, leave for the respondent to be represented by a lawyer in the substantive proceedings should be granted.
- [21] I so order.

² *Le Pierres v Herzfeld Pty Ltd* [2000] 163 QGIG 124