

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *McNamara v Queensland Rail Transit Authority
& Ors* [2024] QIRC 087

PARTIES: **McNamara, Juanita**
(Applicant)

V

Queensland Rail Transit Authority
(First Respondent)

AND

Dean, Rebecca
(Second Respondent)

AND

Dirks, Timothy
(Third Respondent)

AND

Goodwin, Whitney
(Fourth Respondent)

CASE NO.: AD/2024/24

PROCEEDING: Application in existing proceedings

DELIVERED ON: **19 April 2024**

MEMBER: Hartigan DP

HEARD AT: On the papers

ORDER: **Leave is granted for the First, Second,
Third and Fourth Respondents to be
legally represented pursuant to s 530(1)(c)**

of the *Industrial Relations Act 2016* (Qld).

CATCHWORDS:

ANTI-DISCRIMINATION – LEGAL REPRESENTATION – where 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 – 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 Cabinet) v Dawson [2021] QIRC 118

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

Reasons for Decision

Introduction

- [1] The First, Second, Third and Fourth Respondents ('the Respondents') have applied for orders that they be granted leave to be legally represented pursuant to s 530(1)(c) of the *Industrial Relations Act 2016* (Qld) ('the IR Act').
- [2] On 1 August 2023, the Australian Federated Union of Locomotive Employees ('AFULE') filed a complaint in the Queensland Human Rights Commission ('QHRC') on behalf of their member, Ms Juanita McNamara, against Queensland Rail Transit Authority ('Queensland Rail') and Mr Timothy Dirks. The complaint was accepted under ss 136 and 141 of the *Anti-Discrimination Act 1991* ('the AD Act') as alleging race discrimination in the area of work,¹ victimisation², and a limitation of the right to recognition and equality before the law³.
- [3] On 15 March 2024, the QHRC referred the complaint to the Commission ('the proceeding'). The Form 85 – Referral lists two additional respondents to the complaint, Ms Rebecca Dean and Ms Whitney Goodwin. It is not immediately apparent from the referral documents how or on what basis Ms Dean or Ms Goodwin were added as Respondents to the proceedings.

¹ *Anti-Discrimination Act 1991* ('the AD Act') ss 7(g), 10, 11, 15.

² *Ibid* ss 129, 130.

³ *The Human Rights Act 2019* (Qld) s 15.

- [4] Ms McNamara objects to leave being granted for the Respondents to be legally represented. Ms McNamara is represented in these proceedings by the AFULE, a registered employee organisation.

Relevant background to the application

- [5] On 1 April 2024, the Respondents filed a Form 101 Application ('application') and supporting affidavit of a solicitor employed by MinterEllison in the proceedings seeking leave to be legally represented.
- [6] On 8 April 2024, Ms McNamara, through the AFULE, filed submissions objecting to the Respondents' application for legal representation.
- [7] Neither party elected to make further oral submissions with respect to their positions and, accordingly, the interlocutory application will be dealt with on the papers.
- [8] The question for my determination is whether leave should be granted for the Respondents' 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 –

...

- (c) for proceedings before the commission, other than the full bench, under the *Anti-Discrimination Act 1991*—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
- (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*⁴, 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

⁴ [2021] QIRC 118.

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 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] Ms McNamara objects to the application in circumstances where she contends that the matter is not focused on complex matters of law, but internal diversity and disciplinary processes which Queensland Rail's in-house lawyers and "industrial relations specialists" have expertise in.

- [13] Ms McNamara further submits that allowing a barrister to represent the Respondents would be inefficient as there is a "lot of water under the bridge" in this matter which that representative has not participated in.
- [14] A letter to the QHRC from Ms McNamara's representative of 22 December 2023 identifies that Ms McNamara alleges victimisation and direct discrimination in contravention of the AD Act. It appears that the Commission will be required to consider issues of mixed facts and law.
- [15] Whilst the complaint does not particularise the conduct of the individual Respondents⁵ relied on by Ms McNamara, it is sufficient to conclude that Ms McNamara, by continuing the proceedings, alleges conduct which she contends amounts to a contravention of the AD Act. Such allegations expose the individual Respondents to potential adverse findings being made against them, together with any consequential relief sought by Ms McNamara.
- [16] Given the potential seriousness of the allegations and the consequence of any adverse findings, I consider that specialist legal practitioners who are familiar with the Commission's processes and procedures and who are generally experienced in litigation will assist to ensure that the proceeding is dealt with efficiently and in a manner that minimises any potential complexity.

Fairness

- [17] Ms McNamara submits that legal representation is not required to ensure fairness to the parties but, rather, would be disadvantageous to her, as:

... both the Respondents and the Applicant have equal access to internal representation through Queensland Rail and the AFULE respectively, with comparable experience advocating before the Commission and knowledge of the policies, processes, and workplace culture relevant to the Applicant's complaint of discrimination.

- [18] The Respondents submit that:
- a. whilst some employees within the First Respondent's Industrial Relations and Legal teams have experience in appearing before the Commission, they do not have experience with discrimination proceedings; and
 - b. a failure to grant leave would be particularly unfair on the Second, Third and Fourth Respondents who do not have any legal or industrial experience to enable them to represent their interests effectively.
- [19] Ms McNamara's submissions do not have regard to the fact that she has purportedly commenced proceedings against individuals together with Queensland Rail.

⁵ Being the Second, Third and Fourth Respondents.

[20] The fact that Ms McNamara has chosen to be represented by her union instead of legal representatives should not be used as a bar for the Respondents, and even more so the individual Respondents, from seeking to be legally represented.

[21] Further, I do not consider the fact that Ms McNamara has chosen to be represented by the AFULE places her at a disadvantage if leave were to be granted. The AFULE is a registered employee organisation that often advocates on behalf of its members in courts and tribunals. The AFULE is a sophisticated industrial advocate in this forum.

[22] Further, in *Wanninayake v State of Queensland (Department of Natural Resources and Mines)*,⁶ Neate IC determined that the decision by an applicant to not engage legal representation did not mean that the respondent should be denied the opportunity to engage legal representation and relevantly held:

... competent legal representation of at least one of the parties can assist in ensuring that the proceedings remain focused on the real questions of facts and law, that the distinction between evidence and submissions is observed, that evidence is properly adduced (whether by cross examination and by examination in chief, or the tendering of relevant documents), and that the submissions are confined to matters which the Commission must decide.⁷

[23] I consider that Ms McNamara has had the benefit of choosing to be represented by the AFULE in this proceeding. That choice should not deny the Respondents an opportunity to choose to be legally represented in this proceeding.

Conclusion

[24] For the forgoing reasons, I have concluded that a number of factors weigh in favour of granting leave for the Respondents to be legally represented in this proceeding.

Order

[25] Accordingly, I make the following order:

Leave is granted for the First, Second, Third and Fourth Respondents to be legally represented pursuant to s 530(1)(c) of the *Industrial Relations Act 2016* (Qld).

⁶ [2014] QIRC 079.

⁷ *Wanninayake v State of Queensland (Department of Natural Resources and Mines)* [2014] QIRC 079 at 7.