



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Christopher Patterson

v

Re-Engage Youth Services Incorporated T/A Re-Engage Youth Services
(U2017/8214)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 20 OCTOBER 2017

Application for an unfair dismissal remedy – section 596 representation – representatives acting for both parties prior to hearing – representation at hearing opposed by employer – non-advocacy role for employer representative at hearing – jurisdiction issue raises complexity – employer not truly self-represented - permission granted for representation

[1] Mr Christopher Patterson has applied to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy in relation to his (alleged) dismissal by Re-Engage Youth Services Incorporated (Re-Engage). He claims to have been unfairly dismissed on 10 July 2017.

[2] Re-Engage oppose the application and raise a jurisdictional issue. The employer says that Mr Patterson was not dismissed but resigned from his employment.

[3] Conciliation of the matter on 31 August was unsuccessful. The matter is listed for hearing of all matters (jurisdiction, merit and remedy) in Adelaide on 25 October 2017 (with 27 October reserved).

[4] On 15 September 2017 I issued directions in the matter. Those directions required the parties to give notice whether they sought to be represented by a lawyer or paid agent in the proceedings.

[5] Mr Patterson seeks to be legally represented at the hearing. Re-Engage opposes that course. Both parties filed written submissions with the Commission setting out their reasons.¹

[6] I conducted a hearing by telephone on 20 October (the telephone hearing) to allow the parties to address me on the representation issue, to expand on their written submissions on that topic and to take my questions arising from their submissions. At that telephone hearing both parties were in attendance in person and also represented; Mr Patterson by a lawyer (Mr Bourne), and Re-Engage by a paid agent (Ms Sadler). Neither opposed the other being granted permission to be represented for the purpose of the telephone hearing on representation. I considered that permission should be granted for that telephone hearing only under section 596 having regard to the efficiency of that hearing. During that hearing I addressed questions to the representatives and also, at my discretion, directly to the parties.

[7] This decision concerns Mr Patterson’s request for legal representation. As will be apparent from these reasons, were Ms Sadler to accompany an officer of Re-Engage at the hearing of the matter she too would require permission to do so.

The Legal Principles

[8] Section 596 of the FW Act provides as follows:

“596 Representation by lawyers and paid agents

(1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.

(2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:

(a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

(a) where a person is from a non English speaking background or has difficulty reading or writing;

(b) where a small business is a party to a matter 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 workplace relations advocacy.

(3) The FWC’s permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2 3 or 2 6 (which deal with modern awards and minimum wages).

(4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:

(a) is an employee or officer of the person; or

(b) is an employee or officer of:

- (i) an organisation; or
- (ii) an association of employers that is not registered under the Registered Organisations Act; or
- (iii) a peak council; or
- (iv) a bargaining representative;

that is representing the person; or

- (c) is a bargaining representative.”

[9] The meaning of section 596 was recently considered by a Full Bench of this Commission in *Fitzgerald v Woolworths*². While that decision concerned whether a lawyer not acting as an advocate could be said to be “representing” a party, the Commission made the following general observations about the application of section 596 and its legislative history:

“[30] There is little authority on the scope or operation of s.596. Only two decisions are of significance. In *Warrell v Fair Work Australia*³ the Federal Court (Flick J) dealt with a situation where, in an unfair dismissal proceeding before Fair Work Australia (as the Commission was then known), a lawyer was permitted to appear on behalf of the employer in a proceeding without the Senior Deputy President hearing the matter having given consideration to the requirements of s.596. The Court said:

[24] A decision to grant or refuse “permission” for a party to be represented by “a lawyer” pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere “formal” act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted “only if” one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequent exercise of the discretion conferred by s 596(2): i.e., “FWA may grant permission...”. The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting “permission”.

[25] The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality. The legislative desire for informality and a predisposition to parties not being represented by lawyers emerges, if not from the terms of s 596, from the terms of the Explanatory Memorandum to the Fair Work Bill 2008 which provided in relevant part as follows:

1. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee or an organisation of which they are a member, or a bargaining representative. Similarly, an organisation can be represented by a member, officer or employee of the organisation. In both cases, a person from a relevant peak body can be a representative.
2. However, in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, cl 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission...In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.

.....

[32] The other authority is the Full Bench decision in *NSW Bar Association v McAuliffe*.⁴ That decision is, for relevant purposes, authority for two propositions. The first is that the power to grant or refuse permission for legal representation in s.596(2) does not carry with it the power to select who that legal representative would be either by reference to the individual identity of the lawyer or whether the lawyer is a barrister or solicitor, nor did it empower the Commission to choose which member of a party's legal team might represent the party in proceedings. Section 596(2) was not intended to interfere with a party's right to choose who its legal representative would be. The second proposition is that an error in the application of s.596 at a hearing does not necessarily require the decision that results from the hearing to be quashed if it does not result in any prejudice to a party."

[10] The following extract of the decision of the Commission in *CEPU v UGL Resources Pty Ltd*⁵ is also relevant:

"...Before permission to be represented can be granted, a person must be unable to represent himself, herself or itself effectively, and following the plain language definitions of the Macquarie Dictionary (Revised Third Edition) and the Australian Concise Oxford Dictionary (Third Edition), this means the person must be unable to represent himself, herself or itself in a manner that creates a "striking impression", or which has an "impressive" effect or which is "powerful in effect".⁶

The Submissions

[11] Mr Patterson says that his application raises a complex matter because the employer is challenging his claim that he was dismissed.⁷ His case requires the Commission to inquire into whether he resigned, and if so, whether his resignation was forced by the conduct of the employer within the meaning of section 386 of the FW Act. He says this issue is relevant to both jurisdiction and to remedy.⁸

[12] Mr Patterson also says that he would not be able to represent himself "effectively" within the meaning of section 596(2)(b). He says that the test of 'effectiveness' is a higher bar than simply whether he could represent himself 'satisfactorily'.⁹ He says effectiveness in

presenting a legal argument is not the same as effectiveness in setting out facts. Mr Patterson says that any issue of unfairness between the parties can be dealt with by allowing both parties to be represented.¹⁰

[13] Re-Engage say that the jurisdictional issue is not complex. It says that the facts concerning the alleged resignation are simple.¹¹ It further says that Mr Patterson would be able to effectively represent himself because (it claims) he has legal training and experience having previously been employed as a police officer and practised as a solicitor in South Australia.¹²

[14] Re-Engage also contend that granting permission to Mr Patterson would be unfair between the parties. It says it is a small organisation (of about 50 employees) in the not for profit sector with no dedicated human resource capability.

[15] In reply, Mr Patterson informed me at the telephone hearing of the following: he holds legal qualifications and has been admitted to practise as a solicitor in South Australia; he only practised as a solicitor between 2000 and 2004, and has not done so since; when practising as a solicitor he did so in personal injury matters and not on industrial issues; prior to 2000 he worked 34 years as a police officer as part of the CIB criminal investigation unit with only limited exposure to court processes.

[16] At the telephone hearing both parties agreed that these facts were uncontested and that I could reply upon them in making this decision without Mr Patterson given sworn evidence to this effect.

The Status of the Parties

[17] At the telephone hearing Mr Bourne advised that Mr Patterson intends to be represented at the hearing by senior counsel accompanied by an instructing solicitor. In other words, he would be represented by two lawyers.

[18] I note that Mr Patterson's application of 31 July was lodged by his solicitor and he has had the assistance of Mr Bourne in the management of his application to date.

[19] Re-Engage says it has not sought representation for itself at the hearing due to cost but would be forced to incur those costs if permission was granted to Mr Patterson.¹³

[20] There is, however, relevant context to Re-Engage's position. Ms Sadler is an Associate Director and Human Resource Consultant of Axia People Pty Ltd. She is a paid agent of the employer in this matter. The employer's response to the application (Form F3 dated 15 August 2017) was lodged under Ms Sadler's name. Ms Sadler confirmed at the hearing on 20 October that she has been, and continues, to provide professional assistance to the employer in the matter.

[21] Re-Engage says that it intends to appear at the hearing and have its case presented by its CEO Ms Curyer. However, in response to questions from me at the telephone hearing, Ms Sadler advised that she intends to attend the hearing and accompany Ms Curyer to provide support. Later in the hearing Ms Sadler advised that this would be for moral support only and in an unpaid capacity.

[22] I draw the attention of the parties (as I did during the telephone hearing) to the recent observations of the Full Bench of this Commission in the matter of *Fitzgerald v Woolworths*:

“...s.596 operates in conjunction with rules 11 and 12 in respect of unfair dismissal applications in the following way. Where an applicant engages the services of a lawyer or paid agent, representation begins at the point that the application to the Commission is made on the applicant’s behalf. All dealings with Commission undertaken on behalf of either party from that point onwards in connection with the application constitute representation. Rule 11(1) operates to require the lawyer or paid agent to lodge a “notice of representative commencing to act” as soon as representation in the sense discussed commences. However, notwithstanding that representation has commenced in relation to the application, permission under s.596(2) for any representational activities undertaken prior to or outside of a conciliation conference, determinative conference, or interlocutory or final hearing will generally not be required because rule 12(1) exempts, subject to any contrary direction made under rule 12(2), the making of written applications and written submissions, the lodgement of documents with the Commission and correspondence with the Commission from the general prohibition in s.596(1).¹⁴

[23] The effect of that decision is that if any party is receiving assistance (in the form of representation as described) on an application that has been made to the Commission from a lawyer or paid agent, then its lawyer or paid agent needs to lodge in the Commission (and serve on the other party) a notice of representational activity. Further, if that representative seeks to attend a conference or hearing in the Commission (even as an adviser rather than advocate) then prior permission of the Commission is required.

[24] Leaving to one side the issue of whether Ms Sadler for the employer would be involved in the hearing in a paid capacity, it is apparent from the material before me and in light of the decision in *Fitzgerald v Woolworths* that both the applicant and the respondent in this matter are already represented within the meaning of the FW Act. Mr Bourne and Ms Sadler have been representatives of the applicant and the respondent respectively since proceedings have been lodged and responded to; both representatives have had their presence noted in the application (F2) and the employer response (F3) and have needed to (but have not as yet) lodged a Notice of Representative Commencing to Act¹⁵; and both will require the Commission’s permission to be represented under section 596 of the FW Act at the hearing of the matter on 25 October. Mr Patterson has made such an application; Re-Engage has, as yet, not done so.

Consideration

[25] It is apparent from the operation of section 596 that Mr Patterson (or Re-Engage for that matter) can only be represented by a lawyer (or paid agent) at the hearing with permission of the Commission.¹⁶ Whether to grant permission is a discretionary matter to be made having regard to the three factors set out in subsection (2): efficiency (in the context of the complexity of the matter); fairness (in the context of a person’s capacity to effectively represent themselves); and fairness between the parties.

[26] For present purposes, a relevant starting point for the exercise of my discretion under section 596 is that granting permission should be seen as a departure from the default position that a party in a matter before the Commission must normally appear on its own behalf (to

paraphrase the words of Flick J in *Warrell*). This proposition is consistent with the statutory scheme:

“FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves.”¹⁷

[27] I accept that an application which raises a jurisdictional issue (such as whether the applicant was dismissed) involves an additional degree of complexity. Even where facts associated with a jurisdictional issue are simple, determining that question is a legal matter. Whether an employee’s resignation was, at law, a dismissal is sometimes a very fine judgment. Narrow though it may be, that line must be closely drawn and rigorously observed.¹⁸ That can be a difficult exercise applying facts (even simple facts) to the law. In this context I agree with the general observation of the Commission in *CEPU v UGL Resources Pty Ltd* where it was said:

“...where the Respondent (in this case) seeks to agitate a jurisdictional issue then it would follow that representation by a lawyer would be a reasonable course. Jurisdictional issues by their nature are prospectively complex in their own right, and/or else may require a degree of familiarity with court and tribunal jurisprudence or authorities¹⁹

[28] Accordingly, the fact that a jurisdictional issue requires determination in this matter is a factor which weighs in favour of granting permission, particularly in the context of section 596(2)(a) considerations.

[29] However, the same cannot be said of section 596(2)(b) considerations. Mr Patterson has legal training and experience as both a solicitor and as a police officer. Although this experience is not contemporary and does not directly concern the industrial jurisdiction it is experience that would, if viewed in isolation, weigh against granting permission. It could not be said that Mr Patterson could not effectively represent himself or that it would be unfair to require him to represent himself in this matter.

[30] Were the employer simply a small not-for-profit business without dedicated human resources and wholly representing itself that too would weigh against a grant of permission having regard to section 596(2)(c). A considerable degree of unfairness would exist between the parties if Mr Patterson was represented by a practising lawyer (or counsel) and if the employer was self-represented.

[31] However, that is not the case at hand. The employer is not truly self-represented. Re-Engage has secured the assistance of an industrial specialist as a paid agent in the course of this matter being before the Commission; and that agent (in some capacity) is proposing to assist the employer at the hearing of the matter. The employer has already elected to incur cost in its response to this matter, whether or not its representative(s) at the hearing are paid or not. This is not a case where the employer has expressly sought to avoid incurring any professional costs in its defence of the application. Nor is it a case where a truly self-represented party would be effectively compelled to secure representation at cost simply in order to overcome unfairness in representation. Re-Engage already has that representation.

[32] In all of the circumstances and having regard to the matters relevant to section 596(2) and especially subsection (2)(a) (complexity), and notwithstanding the underlying statutory scheme, I have decided, on balance, to grant permission to Mr Patterson to be represented in this matter by a lawyer. In the interests of fairness I indicate that I also grant permission to Re-Engage to be represented by a paid agent or lawyer.

[33] This matter remains listed for hearing on 25 October. I advise the parties that I will determine the matter by formal hearing under section 399 of the FW Act and not by conference under sections 397 and 398.



DEPUTY PRESIDENT

Appearances:

Mr C. Patterson and Mr S. Bourne, *with permission, for the Applicant.*
Ms S. Curyer and Ms S. Sadler, *with permission, for the Respondent.*

Hearing details:

2017.
Adelaide.
20 October.

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¹ Submissions of the Applicant on Representation, 2 October 2017 filed 3 October 2017; and Submissions of the Respondent on Representation (undated) filed 17 October 2017

² [2017] FWCFB 2797, 17 October 2017 VP Hatcher, DP Dean, Wilson C

³ [2013] FCA 291

⁴ [2014] FWCFB 1663

⁵ [2012] FWA 2966, Senior Deputy President Richards

⁶ *Ibid* at [16]

⁷ Submissions of the Applicant on Representation at paragraphs 3 to 8

⁸ *Ibid* at paragraph 10

⁹ *Ibid* at paragraphs 14 to 15

¹⁰ *Ibid* at paragraph 18

¹¹ Submissions of the Respondent on Representation at paragraphs 4.2 to 4.4

¹² *Ibid* at paragraphs 3.2 and 5.3

¹³ *Ibid* at paragraphs 6.2 to 6.4

¹⁴ [2017] FWCFB 2797 at [45]

¹⁵ Fair Work Commission Rules 2013 Rule 11 and 12, Form 53

¹⁶ Section 596(4) does not apply in this matter

¹⁷ Explanatory Memorandum to the Fair Work Bill 2008 at paragraph 2291

¹⁸ *ABB Engineering Construction Pty Ltd v Doumit* Print N6999, 9th December 1996

¹⁹ [2012] FWA 2966, Senior Deputy President Richards at [23]