



# DECISION

*Fair Work Act 2009*  
s.789FC - Application for an order to stop bullying

**Benjamin Legge**  
(AB2019/265)

COMMISSIONER HAMPTON

ADELAIDE, 7 AUGUST 2019

*Application for a stop-bullying order – preliminary jurisdictional issue to be subject to a hearing – whether foster care parent a worker for the purposes of the jurisdiction - whether respondent should be given permission to be represented under s.596 of the Act in the hearing – self-representing applicant – complexity of matter considered – significant legal issue with potential broader implications– relevant complexity found – matter more efficiently dealt with if representation permitted – fairness to applicant considered and taken into account – discretion to be exercised in all of the circumstances – permission granted.*

## 1. What this decision is about

[1] Mr Benjamin Legge has applied to the Fair Work Commission (the Commission) under s.789FC of the *Fair Work Act 2009* (the FW Act) seeking a stop-bullying order. Mr Legge is a foster carer in the Australian Capital Territory under arrangements involving Barnardos Australia, which operates as ACT Together in the territory.

[2] Mr Legge contends that he is a worker within the meaning of s.789FC(2) of the FW Act and as a result is eligible to bring this application. Barnardos Australia contends otherwise and posits that Mr Legge is not an employee or a volunteer worker as, amongst other matters, he does not perform work **for** it.

[3] Following a preliminary conference, arrangements have been made for the Commission to hear and determine the jurisdictional issue as to whether Mr Legge is a worker for present purposes. In accordance with directions issued, the parties have now each lodged written submissions and evidence ahead of the hearing that is to be conducted on 26 August 2019.

[4] At the time of the directions being issued, the Commission was advised that both parties intended to be represented by lawyers and arrangements were made for them to provide brief submissions supporting the granting of the required permission. Ultimately, Mr Legge advised that he was not intending to be represented but Barnardos Australia has confirmed its request for representation under s.596 of the FW Act. That request is opposed by Mr Legge on a number of grounds.

[5] This decision deals with s.596 request by Bernados Australia to be represented by a lawyer in the hearing of the jurisdictional issue in this matter.

## 2. The legal framework and principles involved

[6] 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.”

[7] The circumstances contemplated by ss.596(3) and (4) do not apply. Accordingly, Barnardos Australia requires permission under s.596(2) if it is to be represented by a lawyer in the hearing of this matter.<sup>1</sup>

[8] The proper approach to s.596 of the FW Act was recently summarised by the Full Bench in *Grabovsky v United Protestant Association of NSW Limited*<sup>2</sup> in the following terms:

“[35] Subsection 596(1) provides that a person ‘may’ be represented in a matter before the Commission by a lawyer or paid agent ‘only’ with the permission of the Commission. Subsection 596(2) provides that the Commission *may* grant permission ‘only if’ it is satisfied as to the existence of one of the circumstances set out in s.596(2)(a) to (c). The use of the word ‘may’ makes it clear that a decision about whether to grant permission to be represented is discretionary. But that discretion is only enlivened if the Commission is satisfied as to the existence of one or more of the circumstances set out in s.596(2)(a) to (c).

[36] Even if one of the requirements in s.596(2)(a) to (c) is satisfied that is simply the condition precedent to the exercise of the discretion conferred by s.596(2). The satisfaction of any of the requirements in s.596(2)(a) to (c) does not of itself dictate that the discretion is automatically to be exercised in favour of granting permission.

[37] While a decision to grant or refuse permission for a party to be represented by a lawyer or paid agent is an interlocutory decision, it is not properly characterised as a mere procedural decision. As Flick J observed in *Warrell v Watson*:

‘It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted.’

[38] For completeness we would note 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 does it empower the Commission to choose which member of a party’s legal team might represent the party in proceedings.” (references and footnotes omitted)

[9] In *Warrell v Watson*,<sup>3</sup> Flick J also reinforced that it is apparent from the terms of s.596 of the FW Act that a party in a matter before the Commission must normally appear on their 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 only where one or other of the requirements imposed by s 596(2) have been taken into account and satisfied.

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<sup>1</sup> The *Fair Work Commission Rules 2013* at rule 12, in effect, provide reviewable permission by default for a lawyer to file documents, correspond with the Commission, and provide written submissions in relation to a matter before the Commission. That default permission does not extend to a hearing of this nature.

<sup>2</sup> [2018] FWCFB 4362.

<sup>3</sup> [2013] FCA 291.

[10] As a result, in applying the approach set out above the assessment of whether permission should be granted under s.596 potentially involves a two-step process. The first is consideration as to whether one or more of the criteria in s.596(2) is satisfied. The consideration required by this first step “involves the making of an evaluative judgment akin to the exercise of discretion”.<sup>4</sup> Only where the first step is satisfied, the second step arises, and involves a consideration as to whether in all of the circumstances the discretion created should be exercised in favour of the party seeking permission.<sup>5</sup>

### **3. The positions advanced by the parties**

#### **3.1 Barnardos Australia**

[11] Barnardos Australia rely upon s.596(2)(a) of the FW Act; namely that the matter is complex and that having a legal representative will enable the matter to be dealt with more efficiently. In support of that proposition, it contends that:

- The Commission has not previously considered the question of the availability of the anti-bullying jurisdiction for foster carers, which therefore necessitates the application of the principles of statutory interpretation against the unique facts and circumstances of this particular case;
- There is also factual complexity having regard to a range of issues raised by the Mr Legge including the nature of the arrangement by which the applicant is a foster carer, the work performed, and the means by which the work is or is not directed: *Aly v Commonwealth Bank of Australia* [2015] FWC 3604; and
- Taking into account the complexity of the matter, the granting of permission has the capacity to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

[12] Barnardos Australia also contend that legal representation could assist the Commission and the parties to focus their attention on the matters in issue more efficiently, taking into account the complexity of the matter.

#### **3.2 Mr Legge**

[13] Mr Legge accepts that this matter involves a complex legal issue, but rejects the notion that permission would facilitate a just, quick and cheap resolution of the issue. He does so on the following basis:

- The notion of efficiency must refer to the “Respondents ‘steamrolling’ me at the hearing and not allowing my arguments to be heard”;
- Barnardos Australia is a large organisation that would have significant in-house resources to effectively handle the matter and which has already had access to a lawyer to assist with its written submission; and

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<sup>4</sup> See also *Asciano Services Pty Ltd v Hadfield* [2015] FWC 2618 at [19].

<sup>5</sup> See also *Calleri v Swinburne University of Technology* [2017] FWC 4187 at [36].

- Whilst capable of representing himself in these proceedings, Barnardos Australia was in an equal position to do so.

[14] Mr Legge also contends that it would be unfair to him to permit representation to Barnardos Australia and that ultimately it would be more efficient for both parties to be self-represented. In that respect, he also contends that the late filing of the submission for representation has left him in a position where he has not had the opportunity to raise the necessary funds to seek representation beyond the consultations he has already conducted with a Solicitor.

#### 4. Consideration

[15] Although there is a dispute about whether permission should be granted, it is common ground that the present matter involves legal complexity. This is the case as the coverage of the FW Act in this area to persons in the circumstances of Mr Legge is largely untested. There is also an important issue to be resolved that is likely to have broader consequences for the stop-bullying jurisdiction, and potentially beyond, given the reliance upon the *Work Health and Safety Act 2011* for the definition concerned in s.789FC(2) of the FW Act.

[16] Without discounting other issues, one of the central considerations is likely to be whether Mr Legge is performing work **for** Barnardos Australia, as he contends, or performing work, in effect, under the Authority of the Director-General under the *Children and Young People Act 2008* (ACT), as contended by the respondent. Although the scope of working for an entity has been dealt with in a number of decisions of the Commission,<sup>6</sup> the application of that concept to the circumstances of this case is genuinely in dispute. Further, the meaning of “work” in the context of a foster carer providing care in a domestic environment is itself a major issue.

[17] I note that there is significant evidence relied upon by Mr Legge, principally involving documents supporting his notion that Barnardos Australia is heavily involved in the care of the children concerned. The extent of that material potentially adds to the complexity of the hearing in the matter, however on its own, this would not in my view establish the required complexity. In this case, it is the legal complexity, combined with the need to test the relevant evidence and the capacity to raise factual issues that will largely lie with the respondent as part of the hearing that create the potential efficiency.

[18] This is important, as the Full Bench in *King v Patrick Projects Pty Ltd*,<sup>7</sup> indicated that the fact that the proceedings might be more efficient with representation is not directly relevant, unless such arises from the complexity of the matter itself. This is satisfied in this case as the Commission will reasonably expect a represented party to be in a position to deal with these matters.

[19] I would emphasise that the efficiency is not gained through any “bulldozing” of Mr Legge’s position or evidence. Such would be the complete antithesis of the fair hearing required under the FW Act. I will return to this theme shortly.

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<sup>6</sup> Including *Balthazar v McGuire; Department of Human Services (Commonwealth)* [2014] FWC 2076; *Trevor Yawirki Adamson*, [2017] FWC 1976; *Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others* [2019] FWC 1314.

<sup>7</sup> [2015] FWC 2679.

[20] This satisfies the precondition set out in s.596(2)(a) of the FW Act.

[21] As to whether the discretion should be exercised, the strongest factor militating against permission being granted is that Mr Legge is not being represented. Mr Legge is clearly an intelligent, educated and articulate person who has already demonstrated his capacity to advance his position. He is however not familiar with the practice or procedures of the Commission and will be advancing his own case, including the evidence. These elements are important considerations that I have taken into account. They are not, in themselves decisive, and must all be weighed along with all of the circumstances including the Commission's responsibility and capacity to facilitate a fair hearing of the matter irrespective of whether one of the parties is represented.<sup>8</sup> I also observe that it is the responsibility of the representatives to conduct their respective cases in a manner consistent with the statutory charter of the Commission and to assist it to determine the application according to the FW Act.

[22] In relation to timing of the permission submissions, these were filed by Barnardos Australia on 17 July 2019; being two days later than scheduled in the revised directions that were issued to accommodate some personal circumstances of Mr Legge. However, as early as 18 June 2019 Barnardos Australia had placed the Commission and Mr Legge on notice that it was intending to seek representation and it was jointly anticipated at that point that both parties may seek to do so. Further, Barnardos Australia was not aware that Mr Legge was not intending to be represented until at least 15 July 2019 (when he did not file any permission submissions) and it is highly unlikely that the 2 days involved with the late submissions has materially impacted upon Mr Legge's capacity to be represented or to seek funding in that regard.

[23] I also observe that the determination of the permission request has been made within a few days of the scheduled date<sup>9</sup> for final submissions on the matter and this decision has been issued well ahead of the hearing.

## 5. Conclusions

[24] In all of the circumstances of this matter, I am satisfied that the precondition set out in s.596(2)(a) of the FW Act has been met and on balance that it is appropriate to exercise my discretion to grant permission for Barnardos Australia to be represented by a lawyer.



COMMISSIONER

<sup>8</sup> See also *Meenakshi Callychurn v Australia and New Zealand Banking Group t/a ANZ* [2015] FWC 5254 at [17].

<sup>9</sup> Due on 5 August 2019.

*Written submissions:*

17 July 2019, from Barnardos Australia.

23 July 2019, from Mr Legge.

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