

INDUSTRIAL COURT OF QUEENSLAND

CITATION: *Together Queensland, Industrial Union of Employees v State of Queensland* [2018] ICQ 008

PARTIES: **TOGETHER QUEENSLAND, INDUSTRIAL UNION OF EMPLOYEES**
(appellant)
v
STATE OF QUEENSLAND
(respondent)

FILE NO/S: C/2018/6

PROCEEDING: Appeal

DELIVERED ON: 4 October 2018

HEARING DATE: 21 August 2018

JUDGE: Martin J, President

ORDER: **1. The Appeal is dismissed.**

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – DEFINITIONS AND INTERPRETATION – OTHER MATTERS – where the State of Queensland was a party to the relevant dispute – where the Appellant had applied for a declaration that Crown Law is not permitted to represent another public sector unit of the State of Queensland in an industrial cause – where that application for declaration was refused – where the Appellant now appeals that decision – whether a person employed by the State of Queensland may only represent the State of Queensland if the person is employed in the public sector unit relating to the relevant dispute – whether a lawyer employed in Crown Law may represent another public sector unit of the State of Queensland in an industrial cause without the need for the leave of the Commission or the consent of the parties

Acts Interpretation Act 1954 (Qld), Schedule 1

Crown Proceedings Act 1980 (Qld), s 8

Industrial Relations Act 2016 (Qld), ss 9, 529 530, 944

Legal Profession Act 2007 (Qld), ss 12, 44

Public Service Act 2008 (Qld), s 11

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389

State of Queensland v Queensland Teachers' Union of Employees [2014] ICQ 12

COUNSEL: K McKay of Together Queensland, Industrial Union of
Employees for the appellant
J Murdoch QC for the respondent

SOLICITORS: G R Cooper, Crown Solicitor for the respondent

Introduction

- [1] The issue in this appeal is whether a lawyer employed in Crown Law may represent another public sector unit of the State of Queensland in an industrial cause without the need for the leave of the Commission or the consent of the other parties.
- [2] A Full Bench of the Commission decided that the State of Queensland, as employer, may be represented by a lawyer who is an employee or an officer of the State of Queensland, including a lawyer who is an employee or officer in Crown Law.¹ In reaching that conclusion, the Full Bench said:

“[28] The effect of s 944 is to ensure the interests of the State of Queensland are protected in an industrial cause before an industrial tribunal. The section is, as submitted by the respondent, designed to ensure that someone who is proximate to the employment issue is available to give instructions and to take responsibility for the conduct of the matter.

[29] The use of the word “representation” in s 944 as contrasted with the use of the words “legal representation” in s 530 highlight a subtle but nevertheless important distinction. Section 944 assigns the responsibility for representing a public sector unit, or a person in a public sector unit who is concerned as an employer to the chief executive of that public sector unit or someone nominated by the chief executive. The use of the words “concerned as an employer” is used to identify which department is obliged to represent the interests of the State of Queensland.

[30] Section 944(1) does not limit the respondent from being legally represented nor does it affect the State of Queensland as a party to the proceedings. Rather, s 944(2) allows the unit or person to be represented by a lawyer in circumstances where another provision of the Act allows the unit or person to be represented by a lawyer or agent.

[31] Section 944(2) brings into play s 530 which specifically deals with legal representation of a party in proceedings under the Industrial Relations Act.

[32] Section 530 permits representation in an industrial tribunal in various ways including: by right; and, in some circumstances by either consent or by leave. However, s 530(5) of the Act permits a category of lawyer as identified in s 530(a)

¹ *Together Queensland, Industrial union of Employees v State of Queensland* [2018] QIRC 046, [39].

and (b) to avoid the limitations on representation which would otherwise apply under s 530.

[33] We accept the respondent's submission that s 944(2) enables s 530(5)(a) to operate to allow representation by a lawyer or agent notwithstanding the provisions of s 944(1).

[34] The respondent argues, correctly in our view, that there is nothing within s 944 which contradicts or overrides the effect of s 530(5) of the Act.

[35] Accepting that the State of Queensland is a party to the proceedings, the effect of s 530(5)(a) is to allow a lawyer employed by Crown Law being an employee of the State of Queensland to act as the legal representative.

[36] Section 944 is not concerned with who is the employer or who is the party to the proceedings. Rather it is a provision which operates to identify who must represent a public sector unit that is "concerned as an employer".

[37] Section 944(2) does not, as submitted by the applicant, restrict the circumstance to where the respondent has "...a statutory right to be represented by a lawyer". Rather, s 944(2) is a provision which permits s 530(5) to operate to allow representation by a lawyer notwithstanding s 944(1).

[38] Section 530(5) permits a lawyer to appear in proceedings notwithstanding the restrictions contained in s 530. It does so because the party is "taken not to be represented" by a lawyer. The person is still an Australian Lawyer. However, the restrictions on the right of appearance which would otherwise apply under s 530 do not have any application in circumstances where the person is an employee or officer of the party, in this case, the State of Queensland.

[39] The respondent as the employer may be represented by a lawyer who is an employee or an officer of the respondent including a lawyer who is an employee or officer in Crown Law." (footnotes omitted)

[3] For the reasons set out below, that conclusion is correct.

The Appeal

[4] The appellant appeals that part of the decision of the Commission which concerns the interpretation of s 530(5) and s 944 of the *Industrial Relations Act 2016* (the Act), and not the part of the decision relating to whether the Commission had the jurisdiction to make a declaration.

[5] The appellant relies on the following grounds of appeal:

"...

2. The full bench of the Commission erred as a matter of law in deciding not to grant the application for a declaration as sought by the appellant. In particular the error of law was in deciding that section 530(5) of the *Industrial Relations Act 2016* was a provision of the *Industrial Relations Act 2016* that allows the unit or person to be represented by a lawyer or agent as contemplated by section 944(2) of the Act.

3. The full bench of the Commission acted in excess of jurisdiction in deciding not to grant the application for a declaration as sought by the appellant and engaged in jurisdictional error in deciding that section 530(5) of the *Industrial Relations Act 2016* was a provision of the *Industrial Relations Act 2016* that allows the unit or person to be represented by a lawyer or agent as contemplated by section 944(2) of the Act.

4. The full bench of the Commission identified a wrong issue or asked a wrong question in deciding not to grant the declaration as sought by the appellant, by considering whether the provisions of 530(5)(a) and (5)(b) are provisions that enables lawyers in those categories to avoid the limitations that would otherwise apply as a consequence of section 530 and thus it was a provision of the *Industrial Relations Act 2016* that allows the unit or person to be represented by a lawyer or agent.

5. The full bench of the Commission identified a wrong issue or asked a wrong question in deciding not to grant the declaration as sought by the appellant, by considering the provisions of 530(5)(a) and 5(b) permits a lawyer to appear in proceedings.”

[6] Each of the grounds of appeal is only a slight variation of each of the others.

The Agreed Facts

[7] The following were agreed by the parties:

- A department is not a separate legal entity to the State of Queensland;
- A claim by or against a department is made and enforced by a proceeding by or against the State of Queensland;²
- Crown Law is a business unit of the Department of Justice and Attorney-General;
- Persons who work within Crown Law are employed in the Department of Justice and Attorney-General and are public service employees for the purposes of the *Public Service Act 2008*;
- Each public service employee in a department is employed by the State of Queensland;
- Persons who work within Crown Law and who are employed in the Department of Justice and Attorney-General are employees of the State of Queensland;
- Lawyers employed in Crown Law are government legal officers pursuant to s 12 of the *Legal Profession Act 2007*;

² *Crown Proceedings Act 1980* (Qld), s 8.

- Government legal officers engaged in government work are entitled to engage in legal practice in Queensland pursuant to s 44 of the *Legal Profession Act 2007*;
- The Department of Justice and Attorney-General, and each other department of government, is a public sector unit for the purposes of s 944 of the *Industrial Relations Act 2016*;
- This is an industrial matter for the purposes of s 9 of the *Industrial Relations Act 2016*.

The Legislative Scheme

- [8] Division 3 of the Act concerns the conduct of proceedings in the court, Commission, an Industrial Magistrates Court or the registrar.
- [9] Section 529 deals with representation of parties generally:

“529 Representation of parties generally

- (1) In proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings, may be represented by—
- an agent appointed in writing; or
 - if the party or person is an organisation—an officer or member of the organisation.
- (2) In this section—

proceedings means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar.”

- [10] Section 530 of the Act, 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—
- for proceedings in the court –
 - all parties consent; or
 - the court gives leave; or
 - the proceedings are for the prosecution of an offence; or
 - for proceedings before the full bench – the full bench gives leave; or

- (c) for proceedings before the commission, other than the full bench, under the *Anti-Discrimination Act 1991* – the commission gives leave; or
 - (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; or
 - (e) for proceedings before an Industrial Magistrates Court –
 - (i) all parties consent; or
 - (ii) the proceedings are brought personally by an employee and relate to a matter that could have been brought before a court of competent jurisdiction other than an Industrial Magistrates Court; or
 - (iii) the proceedings are for the prosecution of an offence; or
 - (f) for proceedings before the registrar, including interlocutory proceedings –
 - (i) all parties consent; or
 - (ii) the registrar gives leave
- (2) However, the person or party must not be represented by a lawyer –
- (a) if the party is a negotiating party to arbitration proceedings before the full bench under chapter 4, part 3, division 2; or
 - (b) in proceedings before the commission under section 403 or 475;
 - (c) in proceedings remitted to the Industrial Magistrates Court under section 404(2) or 475(2).
- (3) Despite subsection (1), a party or person may be represented by a lawyer in making a written submission to the commission in relation to –
- (a) the making or variation of a modern award under chapter 3; and
 - (b) the making of a general ruling about the Queensland minimum wage under section 458.
- (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) an association of employers that is not registered under chapter 12; or
 - (iii) a State peak council.

(6) In proceedings before the Industrial Magistrates Court for the prosecution of an offence under subsection (1)(e), the person represented can not be awarded costs of the representation.

(7) In this section –

industrial tribunal means the Court of Appeal, court, full bench, commission or Industrial Magistrates Court.

proceedings means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar.

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.”

- [11] Chapter 15 of the Act then deals with the application of the Act to the State, and to employees of the State. It is within this Chapter that s 944 is found. It provides:

“944 Representation of public sector units

- (1) A public sector unit, or a person in a public sector unit, who is concerned as an employer in an industrial cause must be represented in an industrial tribunal by—
 - (a) the unit’s chief executive; or
 - (b) an officer or employee of the unit authorised by the chief executive.
- (2) This section does not limit another provision of this Act that allows the unit or person to be represented by a lawyer or agent.
- (3) In this section—

industrial tribunal means the court, commission or Industrial Magistrates Court.”

- [12] “Industrial cause” is defined widely and includes an industrial matter and an industrial dispute.³

- [13] The *Acts Interpretation Act* 1954 (Qld), Schedule 1 defines the following terms or phrases:

“ ...

lawyer means an Australian lawyer within the meaning of the *Legal Profession Act* 2007.

...

public sector unit means –

a department or part of a department; or

a public service office or part of a public service office.”

The State of Queensland as “Employer”

- [14] The source of this dispute arises from a matter concerning an employee of the Department of Education (a public sector unit). The Department of Education has no relevant legal personality for the purposes of enforcing or defending proceedings. It is not disputed that a claim by or against a department of the State is made and enforced by a proceeding by or against the State of Queensland. That has been recognised by this Court on other occasions, for example, in *State of Queensland v Queensland Teachers’ Union of Employees*:⁴

³ *Industrial Relations Act* 2016 (Qld) Schedule 5.

⁴ [2014] ICQ 12, [2].

“[2] The appellant has referred to itself in the proceedings in this Court and before the Commission as the Department of Education, Training and Employment (“DETE”). That is, no doubt, a convenient way to describe the ‘employer’ but it is inaccurate. The Department is not an entity capable of employing anyone. The employing entity will be either the State of Queensland or, in some limited circumstances, the Director-General of the Department. ...”

- [15] The relevant party to these proceedings, therefore, is the State of Queensland – the respondent. The lawyers working at Crown Law are employees of the State of Queensland.

The Submissions

- [16] The appellant submits that when the State of Queensland is involved in an industrial cause and where the industrial cause concerns employees employed in a public sector unit, the State of Queensland can only be represented by the chief executive of the public sector unit or an employee authorised by that chief executive provided the employee is employed in the same public sector unit. The only exclusion to this, the appellant says, is that s 944(2) will not limit the State of Queensland being represented by an agent or lawyer where a provision of the Act allows the State of Queensland to be so represented.

- [17] The appellant argues that s 530(5) is a deeming provision:

“...that is, in certain circumstance [sic], a party or person is not regarded as being represented by a lawyer if certain preconditions are met, therefore any provision of section 530 that either provides a right or a restriction for a party or person to be represented by a lawyer are not applicable.”⁵

- [18] The appellant submits that if the employee in the Department of Education was a lawyer, then s 530(5)(a) operates to deem that the State of Queensland is not represented by a lawyer, so any aspect of s 530 that enables a party to object to lawyers appearing in a matter do not apply. Likewise, the appellant says, there is no automatic right for the State to be represented by a lawyer, nor is there any possibility for the Commission to grant leave, or for the parties to consent to the State being represented by a lawyer.

- [19] The respondent argues that s 944(2) of the Act permits the operation of another provision within the Act which allows the public sector unit to be legally represented. The respondent argues that s 530(5) is such a provision. Section 530 operates to outline when legal representation may occur, detailing a number of preconditions that must be met. Section 530(5) permits a category of lawyer (for example, an employee of the relevant party) to avoid the limitations set out in s 530. A lawyer who is an employee of the party merely does not have to satisfy the requirements of s 530 before representing the party.

- [20] The respondent also made submissions as to the relevance of s 944. Section 944(1) assigns responsibility for representation to the chief executive of a relevant public sector or an authorised officer or employee of that unit. This ensures that someone close to the relevant

⁵ Written submissions, [35].

event or familiar with the facts is able to give relevant instructions and to take responsibility for the matter. It does not alter the status of the State of Queensland as the relevant party and employer.

- [21] Fundamentally, and most crucially, the respondent submits that at all material times the State of Queensland is the relevant legal entity that is a party to a proceeding concerning persons employed to work in government departments.

Interpretation of the Act

- [22] The correct starting point for any analysis of legislation is to examine the text of the legislation. The proper approach is to examine the words in the legislative context in which they appear. The meaning of a word, a phrase or, relevantly, a provision, cannot be interpreted in isolation from the rest of the division, chapter or statute in general.⁶
- [23] Section 944(1) uses the word “must”. Section 32CA(2) of the *Acts Interpretation Act* 1954 (Qld) provides:

“In an Act, the word *must*, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.”

- [24] But, s 944 does not confer a power, it mandates that a particular action must occur. It might seem curious that the statute would impose such a requirement. Some idea of why it is expressed in that way can be gleaned from the section’s history.
- [25] Section 16.5 of the *Industrial Relations Act* 1990 provided:

“16.5 Representation of public sector units.

(1) In this section, and in section 16.6, the expression “unit of the public sector” has the meaning assigned to the expression by the *Public Sector Management Commission Act* 1990.

(2) A unit of the public sector, or any person in such a unit, that is concerned as an employer in any industrial cause must be represented in the Industrial Court or Industrial Commission or an Industrial Magistrates Court by one of the following persons, or where this Act so permits, by counsel, solicitor or agent on behalf of one of the following persons, to the exclusion of all other persons:-

(a) the chief executive of the department or an officer of the department who is nominated for the purpose generally or in a particular case by such chief executive, unless the Minister of the Crown for the time being responsible for the unit of the public sector concerned as an employer in the industrial cause furnishes to the Minister for the time being responsible for the administration

⁶ *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396-7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), quoting *R v Brown* [1996] 1 AC 543, 561 (Lord Hoffman).

of the department a request in writing that such representation be in accordance with paragraph (b);

(b) if a request referred to in paragraph (a) is so furnished, the chief executive, or officer in charge, of the unit of the public sector concerned as an employer in the industrial cause, or a person employed in the unit who is nominated for the purpose by such chief executive or officer in charge.”

[26] The successor to that section was deleted by the *Industrial Relations Legislation Amendment Act 1995* and replaced with s 522. It removed the requirement to seek permission for the Chief Executive or an officer of the public sector unit to appear. It provided:

“522. (1) In this section –

“court” means the Industrial Court, the Industrial Commission or an Industrial Magistrates Court.

(2) A unit of the public sector, or a person in a unit of the public sector, who is concerned as an employer in an industrial cause must be represented in court by –

- (a) the unit’s chief executive or an officer or employee of the unit authorised by the chief executive;
- (b) the department’s chief executive or an officer or employee of the department authorised by the chief executive; or
- (c) if allowed by this Act – a lawyer or agent.”

[27] The Explanatory Note for the Bill illuminates the policy reasons sitting behind the provision:

“Part 2 of this Bill seeks to change existing legislation thus enabling public sector units to assume greater responsibility for the management of industrial relations by allowing them to provide their own representation before Queensland industrial tribunals without furnishing a request to the Minister for Employment, Training and Industrial Relations.”

[28] The Explanatory Note goes further:

“The new provisions provide public sector units with the right to make their own arrangements for representation before industrial tribunals.”

[29] In the Second Reading Speech of the Bill, the relevant Minister offered the following background to the provision:

“Currently, the Act provides that exclusive right of representation in industrial tribunals rests with the chief executive or a nominated officer of my own Department of Employment, Vocational Education, Training and Industrial Relations. If other Ministers seek to have officers or agents of their departments appear, they are obliged under current legislation to go through

the cumbersome procedure of making written requests to the Minister for Employment, Training and Industrial Relations. The proposed amendment allows for departments or agencies to send their own officers or agents to tribunals.”

- [30] The purpose of s 522 (now s 944), therefore, was to devolve to other departments the responsibilities for their own internal industrial relations. There was no express intention to prevent those departments from seeking legal representation which was otherwise allowed by the Act.
- [31] There is no explanation in any of the extrinsic material for the use of the word “must” instead of “may”. Indeed, it appears to be inconsistent with the expressions “allows” or “allowing” which appear in the Explanatory Note or the Second Reading Speech. That does not affect the meaning of s 944(2).
- [32] The question that needs to be answered is contained in s 944(2): is there another provision of the Act “that allows the unit or person to be represented by a lawyer or agent”?
- [33] Section 530 provides when a party may be “represented by a lawyer”. A party may be “represented by a lawyer”:
- by right, for example s 530(1)(a)(iii);
 - by leave, for example s 530(1)(a)(ii);
 - by consent, for example s 530(1)(a)(i).
- [34] Section 530(5) also provides that a party is *taken not to be* “represented by a lawyer” if a lawyer falls within an identified category. The effect of this provision is to exclude certain categories of lawyer from the need to otherwise satisfy the preconditions in s 530. Those categories are:
- “(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) an association of employers that is not registered under chapter 12; or
 - (iii) a State peak council.”
- [35] Therefore, a lawyer who is an employee of the relevant party to the proceedings is not required to “run the gauntlet” of the various pre-conditions previously outlined in s 530.
- [36] Section 944 is concerned with designating the relevant responsibility of public service employees with the chief executive of the relevant public sector unit. This is consistent

with s 11 of the *Public Service Act 2008* which provides that the “chief executive of a department is, for the State, responsible for the employment of public service employees of that department”. Section 944 does not alter the status of the State of Queensland as the relevant party or employer.

- [37] When the history of s 944 is taken into account, the notion of representation of a “public sector unit” can be understood. It does not seek to interfere with the legal position of employer and employee so far as the State of Queensland is concerned. It does not substitute a public sector unit as the appropriate respondent in an application before the Commission.
- [38] The key to Mr Mackay’s argument is his proposition that s 530(5) is not a provision that allows a party to be represented by a lawyer. He says that it is a provision which provides that, in some circumstances, a party is taken not to be represented by a lawyer.
- [39] Section 530(5) does not have the effect of changing the fact that someone is a lawyer. Rather, it works by deeming a lawyer not to be a lawyer for the purposes of s 530 and thus not caught by the earlier proscriptions in that section. It goes no further than that. So much can be seen from the introductory words of s 530(5): “For this section ...”. In other words, where a lawyer is an employee or officer of a party etc., that party may be represented by the lawyer and the restrictions in the preceding sub-sections do not apply. Thus, it is a provision which works to allow a unit to be represented by a lawyer and, therefore, comes within s 944(2).
- [40] For all of these reasons, the State of Queensland is entitled to be represented by a lawyer in its employ when it is party to a proceeding and, it follows, that s 944(1) does not prevent a public sector unit being so represented.

Conclusion

- [41] The Commission did not err in holding that the respondent, as the employer, may be represented by a lawyer who is an employee of the respondent, including a lawyer who is an employee of Crown Law.

Orders

The appeal is dismissed.

