DECISION

Fair Work Act 2009
s.596 – Representation by lawyers and paid agents

Jane Massey & Ors

v

Brighter Access Ltd & Ors
(U2023/12620 & Ors)

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD

SYDNEY, 23 AUGUST 2024

Various Industries

Applications under section 596 for representation by lawyers and paid agents – 46 applications to be represented by paid agent in dismissal matters lodged pursuant to s.365 and s.394. Whether conduct of nominated paid agent a factor in exercising the discretion under s. 596. Conduct of paid agent in past matters and in the matters under consideration found to be relevant factors. Permission to be represented not granted.

Introduction & Background

[1] Forty-six matters have been referred to us to deal with the question of whether the applicant in each of those matters should be granted permission to be represented by Employee Claims Pty Ltd t/a Employee Dismissals (ED). Each application is brought under the *Fair Work Act 2009* (FW Act). Of those, 16 are applications brought under the general protections provisions pursuant to s.365 and 30 are brought under the unfair dismissal provisions pursuant to s.394 of the FW Act. The reference arises from the conduct of ED in another matter where ED was granted permission to represent an employee who challenged his dismissal under s. 365 of the FW Act.

[2] This unusual task arises from a Statement of the President issued on 21 February 2024 in *Samuel Howell v Elite Elevators*[1] (President's Statement) which required us to determine two matters. The first, whether a certificate should issue pursuant to s.368 of the FW Act in the dispute between Mr Howell and Elite Elevators Pty Ltd over whether Mr Howell was dismissed in contravention of Part 3-1 of the FW Act. That matter was subsequently settled, and no certificate is required. The second matter was whether permission should be granted for ED to appear as a paid agent on behalf of the applicant pursuant to s.596 of the FW Act in respect of any proceedings filed since February 2024 which identify ED as the applicant's representative. This decision deals with that matter.

[3] A decision of a Full Bench of the Commission in *Howell v Elite Elevators* [2023] FWCFB 265 sets out the background to Mr Howell's matter. Put briefly, Mr Howell's application disputing his dismissal by Elite Elevators Pty Ltd (Elite Elevators) and filed by ED, identified ED as Mr. Howell's paid agent. ED represented Mr Howell in a private conference before the Commission during which a settlement was reached. The settlement required the payment of an amount of $2,692 in compensation. That amount was paid to ED. Mr Howell did not receive any of the compensation and instead was issued an invoice from ED for $4,490. ED later filed a notice of discontinuance on Mr Howell's behalf. After an exchange of correspondence where Mr Howell complained to the Commissioner who conducted the conference that he had not received the settlement sum and had not authorised ED to file the notice of discontinuance, Mr Howell requested that there be a further conciliation conference.

[4] The dispute over the notice and request for a further conference was referred to a Full Bench of the Commission. Mr Howell contended that he did not at any point instruct or authorise ED to discontinue his application. He also submitted that, while he signed terms of settlement following the conference before the Commissioner, he did not properly understand them, and they were not explained to him. He also did not recall seeing any communication to him from ED quoting a figure to act on his behalf. He understood the settlement sum would be paid into his own bank account. ED contended that it had authority to receive the funds and discontinue the proceedings in accordance with the deed of settlement signed by Mr Howell. It submitted that Mr Howell had also signed an authority for payment of the settlement sum to be made into its nominated bank account instead of his own. ED further submitted that Mr Howell ought to have understood from the contract he signed engaging it as his representative that the settlement sum would be applied towards its fees for acting on his behalf and that he would only receive any excess after its fees were paid.

[5] The Full Bench found that the purported notice of discontinuance filed by ED was invalid and a nullity. In its decision, the Full Bench noted that there is no regulatory scheme governing the qualifications, conduct, ethics or financial dealings of paid agents. The Commission has an overriding obligation to perform its functions and exercise its powers in a manner which is fair, just, open and transparent. The proper discharge of this obligation would not permit the Commission to allow paid agents who have been granted permission pursuant to s.596 to conduct themselves in proceedings before the Commission in a manner which is significantly inconsistent with the applicable professional obligations of lawyers in equivalent circumstances. Accordingly, the Full Bench proceeded on the basis that a paid agent may only file a notice of discontinuance on behalf of an applicant if they have been expressly instructed or authorised to do so, and such instruction or authorisation has been given after the provision of appropriate advice. The Full Bench noted that the terms of settlement signed by Mr Howell made no reference to the filing of a notice of discontinuance. It also found that there was no evidence of any such instruction or authorisation having been given by Mr Howell. The parties, along with ED, were directed to attend a further conference to resolve the dispute over Mr Howell's dismissal.

[6] The further conference was conducted by the President on 19 January 2024. A recommendation was issued at the conclusion of the conference to the effect that ED repay Elite Elevators the settlement payment and that Elite Elevators make payment in the same amount to Mr Howell. The decision of the Full Bench and the recommendation of the President set out the background to the matter. That background included correspondence between Mr Howell and ED. As the correspondence in that matter has some resonance with communications in the matters before us, it is useful to refer to it.

[7] The first communication was an email sent from ED to Mr Howell which purported to certify that Mr Howell's claim was not frivolous or vexatious and enjoyed a reasonable prospect of success. The President noted that the email contained no advice or description of the legal action that was contemplated and certified as having reasonable prospects of success. The email also made reference to a claim against "your former employer in an industrial tribunal seeking reversal of your dismissal and the payment of compensation for economic loss". The President noted that this was an inadequate, inaccurate and misleading description of the action that was lodged, being an application under s. 365 of the FW Act. It implied that the Commission had the power to reverse the dismissal and award compensation, which it does not as the Commission can only mediate or conciliate under s.368. The power to arbitrate such claims only arises by consent. In a matter brought under s.365 the reversal of Mr Howell's dismissal and any award for compensation can only be made by a Court of competent jurisdiction or through consent arbitration.

[8] The first email also stated that ED's fee, of $4,490 plus GST, was subject to a "No Win No Fee Guarantee". The President noted that the guarantee was not explained in the email. The email went on to state that the law imposed strict timetables on dismissal related claims and required Mr Howell to sign ED's "terms of engagement" by the close of business on the following day. The President noted that the deadline put on Mr Howell to sign the "terms of engagement" likely imposed pressure on him to respond quickly. The deadline was also unwarranted because there was still 14 days before the statutory time limit for the making of the application passed.

[9] The President noted that Mr Howell responded to the email two minutes after he received it and commented that this should have raised a concern with ED as to whether the email had been read and understood. For its part, ED responded to Mr Howell 30 minutes later seeking that he sign a document entitled "Terms and Conditions and Instructions to Act". The President noted this document was six pages long, was drafted by a lawyer, was complex and was intended to be a binding agreement. The President described the document as having many problems and set out the following examples:

- The claim that ED had reversed more than 1,000 dismissals for employees around Australia was untrue.
- The scope of work was ambiguous as to whether the fee charged extended to ED representing Mr Howell in settlement discussions or to the final determination of the claim.

[10] The "No Win No Fee Guarantee" was couched in terms that required seven conditions be met. Those conditions, read together, meant that any settlement offer made that was less than ED's professional fee resulted in an obligation for Mr Howell to pay the amount offered to ED whether the settlement offer was accepted or not. Further, if any settlement offer was accepted it must be paid to ED and the settlement amount paid would equal the fee payable to Mr Howell resulting in him receiving no payment. The President observed that if a "win" for the purposes of the guarantee included Mr Howell receiving nothing, this should have been explained to him.

[11] Mr Howell signed the document, attaching it to an email 10 minutes later. The President noted that Mr Howell did not read the letter, and ED should have been aware of this fact. The President expressed the view that it was unconscionable for ED to rely on the terms of the letter.

[12] The email also required Mr Howell to execute an irrevocable authority for ED to receive any settlement funds by electronic transfer into a bank account held by ED. Mr Howell was requested to do so in an email. He returned a signed version of the document less than a minute after receiving the email. The President observed that it was clear that Mr Howell did not read what he signed, and this would have been obvious to ED. The document also included a misleading statement that the Commission would determine his matter.

[13] We will set out later the correspondence between ED and the applicants in these matters. The correspondence described in the President's statement is in much the same terms as the correspondence between ED and the applicants here.

[14] In Mr Howell's matter, ED filed an application under s.365 of the FW Act. At the first conference before the Commission, a settlement was reached that was less than ED's professional fee. No explanation was provided to Mr Howell at the conference that this meant that the entire settlement amount would be paid to ED, and he would receive nothing. Following the conference, ED sent an email to Elite Elevator's representative, without sending a copy to Mr Howell, confirming that the settlement amount should be remitted to ED's bank account. Elite Elevators paid the amount to ED. The ED email was sent, and the payment made, before Mr Howell had signed the deed of release which reflected the terms of settlement reached at the conference. Mr Howell did not become aware that the payment had been made to ED until after he complained to the Commission that he had not received the settlement sum. He was made aware by ED that payment had been made. ED then filed a notice of discontinuance without Mr Howell's instructions to do so. The Full Bench found that the notice of discontinuance was invalid and a nullity.

[15] The President's Statement went on to list 30 other published decisions of the Commission in which ED's conduct was found to be problematic. We note that a review of the decisions published in the calendar year 2023 alone reveals criticisms of ED's representation before the Commission as follows:

- Non-payment of fees leading to the dismissal of applications for unfair dismissal remedies or contraventions involving dismissal.
- Lack of communication with clients leading to delays and confusion in proceedings.
- Not responding to correspondence from clients, other parties and the Commission.
- Causing delay and confusion during proceedings.
- Lodging multiple proceedings concerning a single dismissal.
- Failing to file notices of discontinuance where matters settled.

[16] After setting out these matters the President concluded at [22] that:

> (1) Employee Dismissals has engaged in misleading and unethical conduct in connection with its representation of Mr Howell as paid agent in this matter, and has not acted in his best interests.
>
> (2) While it may be accepted that the respondent (and its legal representative) acted in good faith in paying the settlement sum to Employee Dismissals, I do not accept that this constituted compliance with the terms of settlement which Mr Howell had entered into.

[17] The President made the recommendation already referred to, that ED reimburse the payment made to Elite Elevators and that Elite Elevators remit the settlement sum to Mr Howell. The recommendation was accepted by Elite Elevators. Following attempts by the President's chambers to contact ED, it became clear that ED was not complying with the recommendation.

[18] That non-compliance gave rise to the President's Statement on 21 February 2024 and the referral to us. The matter left for us to determine is whether, in light of ED's conduct, permission should be granted for any of the applicants to be represented by ED as a paid agent. The Commission's staff took steps to ensure all matters filed under s. 365 and 394 of the FW Act which identified ED as a representative were referred to us.

[19] We do not understand that we are required to make a ruling generally concerning requests for permission to be represented by ED under s.596 and we do not propose to do so.

[20] By 15 March 2024, 46 matters had been referred to us. We issued a statement and directions in relation to each of those matters[2]. In our statement we noted that the Full Bench of the Commission in *NSW Bar Association v Brett McAuliffe* [3] observed that in exercising the general discretion under s.596 of the FW Act the Commission may have regard to the fact that a particular paid agent in relation to whom permission is sought has been the subject of adverse findings in earlier Commission decisions[4]. Subsequently, a further 10 matters were referred to us, bringing the total number to 56. Statements and directions were also issued in relation to those matters. The applicants in 10 of the 56 matters have advised that they no longer wish to be represented by ED. Those 10 matters have been referred for conciliation and are no longer before us. The matters before us are listed in Schedule A to this decision.

[21] We issued an order for production to ED in each of the applications. The order sought all documents concerning ED's representation of the applicants in each matter. The documents produced, comprising email correspondence between ED and each applicant with some attachments, were similar in each matter. They were also similar to the material described in Mr Howell's matter. Briefly stated, the communications reveal in each case that the applicant sought assistance from ED in relation to the termination of their employment. They received an initial email from ED requesting further information, in most cases within 24 hours. The applicant provided the information, in most cases in the timeframe requested. ED sent each applicant a further pro forma email a short time after receiving the material stating it had the view the applicant's case had reasonable prospects of success and attaching terms of engagement to be signed and returned within a further 24 hours. In some cases, the applicant requested further information about the quantum of compensation that might be achieved if they proceeded and received a standard response. In all cases, ED prepared and filed an application either under s. 365 or s. 394 of the FW Act and provided a copy to the applicant. The application forms nominated ED as the applicant's representative and paid agent.

[22] The communications in the material produced in each case were in very similar terms. We set out the key features of them here because we consider them relevant to the issue of whether each applicant should be granted permission to be represented by ED.

Initial Email

[23] In the material produced, there are no records of any of the applicants' initial contact with ED. We assume each applicant communicated interest in challenging their dismissal to ED and provided at least their email contact details. As a consequence, the applicant received

the initial email. It was in identical terms. It requested information within 24 hours to enable ED to complete what is described as a "complimentary and strictly confidential assessment of your case, so that we can ascertain the action that may be taken against your former employer". The information sought was:

> "1. A copy of your termination letter and any Employment Separation Certificate (if available);
> 2. A recent payslip (required);
> 3. A detailed timeline of the events leading up to your dismissal (please provide the relevant date alongside each event);
> 4. Details of any complaints you have made in relation to your employment;
> 5. Your contract of employment;
> 6. Details of any leave you have recently taken, including medical certificates; and
> 7. Any additional information you believe may be relevant to your claim."

[24] The initial email also included the following:

> "You do not want to lose your right to claim because you left it too late and missed the deadline. This could make it harder for you to get a new job in the future, because the Fair Work Regulations 2009 (Cth.) requires employers to retain a record of your dismissal for at least six years from the date you were dismissed unless the dismissal is reversed. Many dismissed employees leave it too late, only to lose their right to pursue maximum compensation and the reversal of their dismissal. Don't lose your right to try and get your name cleared, and prevent your former employer from telling future employers that you were dismissed from your job for poor performance or misconduct. Act promptly!"

[25] We make the following observations about the initial email. First, requiring the applicant to respond within 24 hours and exhorting them to act promptly displayed a sense of urgency that was unwarranted. Claims challenging dismissal are required to be filed within 21 days of dismissal (s.366 and s.394(2)) of the FW Act. No reference to this time limit was made in the email. Second, the reference to the *Fair Work Regulations 2009* is wrong and misleading. The requirement is that records specified in the regulations be kept for 7 years, not 6 years (see s.535(1) of the FW Act). The records to be kept are described in reg 3.44 as a record which sets out whether the employment was terminated by consent, by notice, summarily, or in some other manner (specifying the manner), and the name of the person who acted to terminate the employment. The record does not include the reason for the dismissal. The record is to be kept for the purposes of the FW Act, and it can be accessed by specified persons such as inspectors or holders of right of entry permits and by the person whose employment was terminated. They are not public documents that can be accessed by potential employers. Consequently, we consider it misleading to say that these records will make it harder for a person to find a job in the future. Third, as the President observed in Mr Howell's case, the email does not specify the type of action contemplated, which is significant because in s.365 applications, the Commission's role is limited to mediation and conciliation. Determination by the Commission can only occur if both parties consent to an arbitration. The Commission cannot, as suggested in the email, reverse the dismissal or award 'maximum compensation' unless there is consent for the Commission to arbitrate. This is a significant omission.

Further email

[26] After the applicant sent the required information to ED, they received a further email, usually the following day, which included the following:

> "We are pleased to advise that we have completed our complimentary assessment of your case. In the course of doing so, we have undertaken a detailed consideration of the documentation and information provided to us.
>
> We have an obligation to certify that every claim we lodge in an industrial tribunal on behalf of a former employee is not frivolous or vexatious, and that it enjoys a reasonable prospect of success. Such certification is intended to provide you with a degree of protection in the event of an unsuccessful outcome.
>
> We are pleased to advise that ED is prepared to provide the following to you on the condition that you agree to our terms of service by returning a signed copy of our terms of engagement to us on or before [time] on [date]:
>
> - Certification that your claim is not frivolous or vexatious, and that it enjoys a reasonable prospect of success; and
> - Representation to you as your industrial agent in a claim against your former employer in an industrial tribunal seeking the reversal of your dismissal and the payment of compensation for economic loss sustained as a consequence of the dismissal, on the terms outlined in our terms of engagement."

[27] A number of observations may be made about this email. First, the email is a pro forma response sent to each applicant without variation and with no reference to the individual circumstances of their case. There is no explanation for ED's "certification" that the claim is not frivolous or vexatious, and that it enjoys a reasonable prospect of success. Second, the short timeframe in which it is sent suggests that a detailed consideration of the documents sent through by the applicant did not occur. Third, there is no obligation to certify that every claim lodged with the Commission is not frivolous or vexatious or that it enjoys a reasonable prospect of success. There are cost implications for applicants if a claim is found to have been made vexatiously or without reasonable cause or that it should have been reasonably apparent that the application had no reasonable prospects of success, (see s.611 of the FW Act). Orders may also be made against lawyers and paid agents who encourage applicants to bring or continue matters which have no apparent prospects of success (see ss.376 and 401 of the FW Act) but there is no obligation that every claim be certified as suggested by the email. The suggestion in the email that such a certificate would provide a degree of protection in the event of an unsuccessful outcome is similarly specious. Fourth, the email continued the flaw in the first email of suggesting that ED would bring a claim to reverse the dismissal or seek 'maximum compensation' from the Commission in circumstances where in s.365 matters the Commission does not have the power to do so unless both parties consent to arbitration.

[28] The Terms of Engagement attached to the emails were required to be returned to ED within 24 hours of the further email, regardless of the timeframe in which any application to the Commission was required to be filed. The email goes on to provide advice about the 'Professional Fee' which was $4,990 plus GST in most of the applications before us[5] and requested that the client advise by return email whether they wished to instruct ED to lodge "a claim against [their] former employer challenging the termination of [their] employment."

Terms of Engagement

[29] The Terms of Engagement attached to the further email is a seven page document. It dealt with 11 matters under the following headings:

- Scope of Work
- Nature of this Agreement
- Administration Charge
- Tribunal Fee and Hardship Waivers
- Professional Fee and Invoices
- No Win No Fee Guarantee
- Payment of Settlement Proceeds
- Communication, Confidentiality and Privacy
- Terminating our Engagement
- Legal Advice Disclaimer
- Moving Forward – Here to Help

[30] The observations made by the President in Mr Howell's matter set out earlier apply equally to the pro forma Terms of Engagement provided in these cases. We adopt them without repeating them.

[31] We note that earlier versions of the Terms of Engagement required the applicant to authorise the payment of any funds by the employer into a bank account held in the name of ED. Later versions contain this requirement but also provide that if the employee receives payment of any settlement proceeds directly, they agree that they will be invoiced and required to make payment of ED's professional fee in a timely basis.

[32] We also note that under the heading "Legal Advice Disclaimer", the Terms of Engagement provide the following:

> ED is not a law firm and we do not provide legal advice. We are specialist industrial agents advocating only for employees in connection with the termination of their employment. You agree that you have not construed, and will not construe, anything on our website, in this document, or in any of our telephone or email communications, as constituting legal advice or representation. You acknowledge that you have had the opportunity to seek independent legal advice concerning the merits of your claim against your former employer, and the nature and effect of this offer to represent you.

[33] Given the timeframes set by ED for the applicants to return the document, it was unrealistic to expect an acknowledgement that the applicants were given an opportunity to seek independent legal advice.

Queries about Compensation

[34] In a number of the applications the applicant asked ED about the quantum of compensation they were likely to receive. For example, in Ms Tasneem Sayed's application[6] the applicant was employed for a period of five days. On 7 February 2024, about an hour after receiving the further email from ED, Ms Sayed sent an email to ED which states she was happy to proceed but wanted to know, given the $4,490 plus GST fee, how much her claim was worth and what she might be left with if successful. Ten minutes later, ED sent Ms Sayed a lengthy response, The response explained that ED seeks financial compensation in all cases of dismissed employees, but the amount depends on various factors, some beyond their control. It gave the example of unfair dismissal claims having the maximum compensation of 26 weeks' pay. The example did not apply to Ms Sayed who could not bring an unfair dismissal claim as she was not protected from unfair dismissal having not served the minimum employment period

required in s.382(a) of the FW Act. Reference is made in the email to other claims which may not have a statutory limit, but states practical limits exist based on factors like employment length, economic loss, claim strength, employer's representation, similar cases, and trial costs. The email described ED's practice of advising clients to seek 8-26 weeks' salary as compensation and mentions its track record of obtaining non-monetary benefits, such as dismissal withdrawal and references. The email said ED cannot guarantee a specific compensation amount but assured Ms Sayed that it will act on the employee's instructions and aim for a favourable outcome.

[35] Ms Sayed's request was made after ED "certified", without identifying the basis for doing so, that her claim enjoyed a reasonable prospect of success. We note that that not only was ED's response sent with alarming speed, but also that it was not specific to Ms Sayed's query and was in identical terms to other responses to queries about the quantum of compensation that were made by other applicants in matters before us.[7]

Content of the Applications

[36] There was no prior communication with the applicants about the type of application that was to be made, the reason the application was made under the provision that it was, or even the applications available to be made. It appears ED decided whether an application for an unfair dismissal remedy under s.394 or a general protections dispute notice under s.365 was filed. There was no written communication with the applicant seeking instruction on the nature of the application to be made. This is relevant particularly for those applicants whose claim was made under s.365, given their matter could only be subject to conciliation in the Commission and ED, not being lawyers, could only play a role in the determination by the Commission if the respondent consented, and could play no role in any further proceedings to finally determine the claim if an application to a court of competent jurisdiction was required.

[37] It also appears from the material produced that if an applicant's case met the jurisdictional requirements to make an unfair dismissal application, an application for an unfair dismissal remedy was filed. If the applicant was not eligible to make an unfair dismissal application, a general protections application was made. We note the initial email sought "Details of any complaints you have made in relation to your employment"; and "Details of any leave you have recently taken, including medical certificates." These questions direct attention to the general protections afforded by ss.340 and 351 of the FW Act and provide a basis for commencing proceedings under s.365.

[38] We make a number of observations about the applications filed. Section 585 of the FW Act requires applications to the Commission be in accordance with the procedural rules. The *Fair Work Commission Rules*, at rule 9, require that applications be made using approved forms. For applications under s.365, the approved form is a form F8. For s.394 applications, the approved form is form F2. The forms require an applicant to identify the nature of their case, provide relevant background, and identify the remedy they seek. There are corresponding forms to allow the employer to provide a response to the case that is brought against them. The Commission is not a court of pleading. The evident purpose of the forms is to elicit sufficient information from an applicant so as to enable the Commission and the parties to have some indication of the nature of the claim or claims to be advanced in a matter and the response to those claims. The applications before us were completed by ED on behalf of each applicant. They were made using the approved forms. The information provided in the applications falls well short of providing sufficient information to meet that purpose.

[39] The Form F2 – Unfair Dismissal Application requires three sections to be filled out in relation to:

1. The employment.
2. The remedy sought.
3. And the circumstances of the dismissal.

[40] The first section seeks contact details of the applicant, the former employer, and any representative, the employment period, confirmation that the application has been lodged within the 21 day time period, and that no other claim has been made in relation to the dismissal. In the applications before us, this section is completed with the relevant information for each applicant.

[41] The second section of the form asks what outcome is sought. Each of the s.394 applications before us seek the same remedy which merely parrots the provisions of s.391 of the FW Act:

> The Applicant respectfully seeks the following Orders, which it is submitted are appropriate in all the circumstances and which would have the effect of placing the Applicant in the same position that the Applicant was in prior to the dismissal:
>
> a. The Respondent reinstate the Applicant pursuant to subsection 391(1) of the Fair Work Act 2009 (Cth.) (the Act) by reappointing the Applicant to the position in which the Applicant was employed immediately before the dismissal, or by appointing the Applicant to another position with the Respondent (or an associated entity of the Respondent) on terms and conditions no less favourable than those on which the Applicant was employed immediately before the dismissal;
> b. The Respondent pay the Applicant an amount for the remuneration lost, or likely to have been lost by the Applicant because of the dismissal pursuant to subsection 391(3) of the Act or, alternatively, should the Commission consider that an Order pursuant to subsection 391(1) of the Act is not appropriate in all the circumstances, that the Respondent pay compensation to the Applicant pursuant to subsection 392(1) of the Act; and
> c. The Respondent maintains the Applicant's continuity of employment and the continuous service of the Applicant pursuant to subsection 391(2) of the Act.

[42] Section 3 of the form seeks information about the dismissal. Question 3.1 of the form asks what reasons were given for the dismissal and requests that the notice of termination be provided. Question 3.2 asks why the applicant considers the dismissal was unfair.

[43] Most applications before us have a one word or one sentence response to question 3.1. The letter of dismissal is not attached to any of the applications, despite being provided by the applicant to ED in most cases.

[44] The information provided in question 3.2 in each application also follows a standard format. Each application states the commencement date, job title, work location and weekly remuneration. The responses very briefly outline some facts associated with the dismissal, which are copied from the brief timeline provided by the applicant in the first email sent by the applicant to ED. That information is followed in each application by standard wording as follows:

- The Applicant submits that the dismissal was harsh, unjust and/or unreasonable in all the circumstances.
- It is submitted that there was no valid reason for the termination of the Applicant's employment related to capacity or conduct. The Applicant further submits that the reasons for termination were not defensible or justifiable on an objective analysis of the relevant facts.
- The Applicant submits that the Respondent did not consider the economic and personal consequences which could flow from the dismissal, and that its failure to consider such potential consequences renders the dismissal harsh.
- It is respectfully submitted that options other than termination were available to the Respondent.

[45] These standard responses make no attempt to address the provisions of the FW Act to the specific facts of each case. For example, the criteria the Commission must consider in determining whether a dismissal in harsh, unjust or unreasonable are set out in s.387 of the FW Act. No attempt is made to engage with those matters.

[46] Similarly, each of the applications filed under s.365 of the FW Act follows a template. The Form F8 – General protections application involving dismissal[8] requires information in three sections:

1. Description of the employment and the dismissal.
2. The remedy sought.
3. How the dismissal is said to contravene the general protections provisions of the FW Act.

[47] Like the unfair dismissal form, the first section requires contact details for the applicant, the respondent, any representative, the employment period, confirmation that the application has been lodged within 21 days, and that no other claim has been made in relation to the dismissal. This section is filled in with information relevant to each application.

[48] The second section asks what outcome is sought by the applicant. All of the applications pursuant to s.365 respond in identical terms. They seek the following remedy:

> The Applicant seeks the issuance of a certificate pursuant to section 369 of the Fair Work Act 2009 (Cth.) to enable the commencement of a General Protections Court Application in the Federal Court of Australia (Court) against the Respondent and those individuals involved in the contraventions. The Applicant intends to seek remedies which include the following:
>
> (i) Compensation in respect of, inter alia, adverse action taken against him by the Respondent and in which employees of the respondent were involved;
>
> (ii) Imposition of a pecuniary penalty against both the Respondent and those individuals involved in the contraventions, in respect of contraventions of one or more civil remedy provisions of the Fair Work Act 2009 (Cth.); and
>
> (iii) Other orders as the Court considers appropriate and as may be sought by the Applicant in his statement of claim.

[49] We note that the reference to s.369 is wrong. A certificate is issued pursuant to s.368((3)(b).

[50] The third section of the form asks the applicant to describe the actions of the employer that led to the making of the application and asks that the applicant attach any letter of dismissal and/or separation certificate provided by the employer. It also asks which section(s) of the FW

Act are said to have been contravened. The form asks the applicant to identify the contravention by ticking a box next to the relevant section of the FW Act that has been contravened and to explain how the actions of the employer have contravened the section(s) of the FW Act identified.

[51] Most applications before us have a two sentence description of the action of the employer which comprises the date of dismissal, and the reason provided for the dismissal. There is otherwise no attempt to describe the relevant facts and circumstances. The letter of dismissal is not attached to any of the applications, despite being provided by the applicant to ED in most cases, making it difficult to ascertain the reasons for, and circumstances surrounding, the dismissal.

[52] Twelve of the sixteen s.365 applications before us identified a contravention of s.340 of the FW Act, which prohibits dismissal for holding and/or exercising workplace rights, and four applications alleged breach of s.352, which prohibits dismissal for temporary absence due to illness or injury.

[53] The explanation for how the employer's conduct contravened the section in each application takes the same format. The application states the commencement date, job title, work location and weekly remuneration. In applications alleging breach of s.340, it is simply stated that the applicant "raised concerns" with the respondent. In applications alleging breach of s.352, there is a reference to the applicant taking sick leave. The applications give a brief outline of the facts, generally in two to three lines or dot points, and conclude by stating:

- On [date], the Applicants employment was terminated.
- The Applicant notes that the Respondent took adverse action against her/him.
- The Applicant submits that the Respondent took adverse action against her/him in contravention of Section 340 of the Fair Work Act by reason of having raised complaints/enquiries in relation to her/his employment. (or)
- The Applicant submits that the Respondent took adverse action against her/him in contravention of Section 352 of the Fair Work Act by reason of being temporarily absent from work.

[54] The applications filed generally contain one or more of the following statements:

- During the Applicant's employment with the Respondent, she/he had been provided with positive feedback in her/his role.
- The Applicant performed beyond her/his duties.
- The Applicant maintains that she/he loved her/his job and gave her/his personal best to the role and the Respondent.

[55] The basis for these statements in some of the applications was unclear, as they did not appear to be based on material provided by the applicant to ED.[9]

Specific applications

[56] Thirty unfair dismissal applications have been referred to us. A majority of those involved dismissals grounded on allegations of misconduct or breach of a code of conduct. These are:

1. Ms Jane Massey v Brighter Access Ltd

2. Brent Cameron v BHP
3. Danielle Windsor v Helping Hand Aged Care Inc
4. Lee Follett v BHP WAIO Pty Ltd
5. Ms Leah Haak v Optimum Performance Training Pty Ltd
6. Jemaya Schubert v Crown Worldwide Australia Pty Ltd
7. Hanna Wittner v Glad Security Pty Ltd
8. Mark Giddings v Alcoa of Australia Limited
9. Mr Deng Mabuoc v Marathon Food Industries Proprietary Limited
10. Tanisha Vargas v The Trustee for Brightlite Unit Trust
11. Jenna Robertson v Australian Leisure and Hospitality Group Pty Limited
12. Mr Darren Ferguson v Reid Stockfeeds Pty Ltd
13. Mr Billy Angelis v Arthur, Shaun Nicholas
14. Ms Jo-Anna Mealamu v Connectability Care Services Pty Ltd
15. Mr Darrell Kay v Fulton Hogan Construction Pty Ltd
16. Mr Faiga SuA v Darley Aluminium Trading Pty Ltd
17. Mr Shawn Stowe v Karuah Local Aboriginal Land Council
18. Ms Sharon Phillis v Ultimate Cleaning & Gardening Solutions Pty Ltd
19. Mr Ric Belic v DNA Construction Pty Ltd
20. Ms Rachael Kumar v Healthx Group Pty Ltd
21. Mr Liam Christinus v Mercy Education Limited
22. Mr Mark Dowley v Sandalford Wines Pty Ltd
23. Mr Robert Dalrymple v Etex Holding Australia Ii Pty Ltd
24. Mr Justin Wei v Coles Supermarkets Australia Pty Ltd
25. Ms Tracey Bradshaw v Skyline Landscape Management Pty Ltd
26. Mr Peter Williams v Meridan State College P&C Association
27. Mr David Thomson v Young Guns Container Crew (Qld) Pty Ltd
28. Ms Rachael Tucker v B & T BEANS PTY LTD
29. Mr Kaliam Simpson v South Coast Mariculture Pty Ltd
30. Mr Matthew Cahill v The Athenaeum Club

[57] Sixteen general protections applications were referred to this Full Bench.

[58] The following applications alleged that the applicant was dismissed in breach of s.340 of the FW Act:

1. Ms Nancy Lopez v Safe Steps Family Violence Response Centre Inc
2. Mr Mathew Vendittelli v Crushing Services International Pty Ltd
3. Pucho Paye v Plumb Now Pty Ltd
4. Mr Antony Zebisch v MTM Critical Metals Limited
5. Gaelle Danre v Drummond Street Services Incorporated
6. Ms Sarah Wallace v The Trustee for Kemp Family Trust
7. Ms Tasneem Sayed v Goldstar Assets Pty Ltd
8. Mr Jeremy Johnston v Odell Resources Pty Ltd
9. Mr Anthony Harpur v Rebian Investments Pty Ltd
10. Mr Michael Brook v Australian Postal Corporation
11. Mr David Mcintosh v Mulpha Hotel Pty Ltd TA Hayman Island
12. Mr Giorgio Gava v Laguna Beach Pty Ltd

[59] The following applications alleged that the applicant was dismissed in breach of s.352 of the FW Act:

1. Ms Karen Westergreen v Southern Cross Care Tasmania Inc
2. Mr Troy Leyshon v Mexican Express Pty Ltd
3. Mr Dylan Carroll v Indco Pty Ltd
4. Mr Stuart Peters v The Trustee for the Motorcycle Holdings Group Unit Trust

Witness Statement – Brendan Cohen

[60] In support of the applications for permission to be represented, ED has provided a witness statement from its sole director, Brendan John Cohen. The statement was in large part opinion, commentary and submission directed at the criticisms of the company in the Howell matter. Mr Cohen addressed the circumstances associated with Mr Howell's claim. He asserts that Mr Howell signed settlement terms and authorised ED to act on his behalf. Mr Cohen states he was not immediately aware of the Full Bench decision in the Howell matter and complains that ED was not given a fair chance to respond or participate in the proceedings. Mr Cohen states he believed ED was authorised to receive the settlement funds from Elite Elevators and apply them towards Mr Howell's fees. Mr Cohen provided a response to the President's Recommendation and described it as defamatory. Despite disagreeing with the recommendation, ED ultimately accepted it to maintain a positive relationship with the Commission and returned the funds on a "without prejudice" basis. Relevant to the current matters, Mr Cohen states that ED has since implemented procedural changes, including no longer lodging notices of discontinuance on behalf of clients and modifying its fee structure to limit direct receipt of settlement proceeds. Mr Cohen attested to ED's commitment to ethical conduct, compliance with laws, and constructive engagement with the Commission. Mr Cohen annexed ED's submission to the Commission's Paid Agents Working Group, a review being undertaken by the Commission due to ongoing concerns about the conduct of paid agents, and states that those submissions reflect ED's dedication to addressing issues and improving practices. Mr Cohen points to ED's track record of successful representation before the Commission, the implementation of changes based on past experiences, and the commitment to maintaining ethical standards to highlight its focus on integrity and professionalism in client representation.

[61] We note that Mr Cohen's statements that there has been a change in ED's practices is not borne out by the material provided in response to the notice to produce. That material shows that very little has changed in the way ED secures applicants as clients and the way that it deals with those clients. Importantly, the terms of engagement document continues to be complex, onerous and confusing, especially in relation to the "No Win No Fee" guarantee. We have also identified concerns with ED's ongoing practices in compiling and completing Commission forms.

ED's submissions

[62] ED filed written submissions on behalf of the applicant in each application. The submissions were in identical terms. The submissions seek permission to be represented under subsection 596(2)(a) of the FW Act. Reliance is placed on the complexity of each case and the need for efficiency in dealing with contested facts involving serious issues. It is submitted that even in cases that may not be deemed complex initially, factors may arise contributing to the need for representation. ED argues that granting permission for representation by a paid agent would enable a more efficient handling of matters. It submitted that where the respondent is

represented, s.596(2)(c) of the FW Act applies and permission should be granted taking into account fairness between the parties.

[63] The submissions assert that denying permission for ED to represent the applicants would be extraordinary, given ED's extensive experience representing clients and the potential detriment to applicants if representation is denied.

[64] ED submitted that it was not the subject of an "adverse integrity finding" in the decision of the Full Bench in *Howell v Elite Elevators* dated 22 December 2023, and that the opinions expressed in the President's Recommendation and the President's Statement do not amount to an "adverse integrity finding" as contemplated by the Full Bench in *NSW Bar Association v Brett McAuliffe* [2014] FWCFB 1663.

[65] ED submits that it has never been publicly sanctioned by a consumer protection authority or found by a Court to have engaged in misleading and deceptive conduct or having acted in contravention of the Australian Consumer Law. ED's contractual terms have been the subject of detailed scrutiny by numerous judicial officers, and all consumer litigation to which it has been a party, which proceeded to contested hearing in 2023, was determined in ED's favour following detailed scrutiny of the contractual documentation and other documents relevant to those cases. ED is entitled to accept at face value a representation, given by a client, that they have read and understood its contractual terms and wish to engage its services on the basis disclosed in the contractual document. Members of the Commission should not be considering matters outside the scope of the Commission's statutory function. Such matters should be left to the appropriate consumer protection authority such as the ACCC.

[66] ED submits it has, and is, continuing to perform its contractual obligations pursuant to its agreements with the applicants. The Commission should not be interfering with the applications on the basis that a particular representative allegedly did, on one isolated instance, file an "invalid" or "void" document, particularly when the representative services a significant volume of clients. ED submits that Mr Howell's case was an isolated instance and should be given little weight in the course of determining the question of permission.

Respondent submissions

[67] Submissions were also filed on behalf of six respondents opposing the applications for permission to be represented by ED.

[68] In Mr Troy Leyshon's case the respondent, Mexican Express Pty Ltd, submitted that the matter does not meet the criteria for legal representation to be granted. The respondent will be self-represented during the proceedings. There are no complex jurisdictional issues or technicalities. The case is simple and factual and is not complex in nature. The respondent suggested that the introduction of legal representation in this case would impede the proceedings and prolong the mediation process by introducing external parties. It was a performance-based termination and does not involve any complex facts.

[69] In Mr Darrel Kay's case the respondent, Fulton Hogan Construction Pty Ltd, submitted that granting permission for the applicant to be represented in the present circumstances would not enable the matter to be dealt with more efficiently, given ED's conduct in *Howell*. The respondent also submitted that granting permission for the applicant to be represented in these circumstances raises questions of fairness, in circumstances where ED's conduct in *Howell*

caused the respondent there to incur unnecessary costs and caused uncertainty in respect of assumptions, which may ordinarily be made, of a represented applicant. The submission noted that in *Howell* the terms of settlement agreed between the parties were not explained to Mr Howell, and ED acted without instruction or authorisation from Mr Howell.

[70] The respondent noted that the applicant has made no submissions in respect of s.596(2)(b) of the FW Act, and that the respondent is not presently represented and has not previously been represented in other proceedings relevant to the current application.

[71] In Mr Peter Williams' case the respondent, Meridan State College P&C Association submitted that ED has filed an application with the Commission when it knew, or ought to have known, that the applicant would receive little or no compensation. It is submitted that this conduct is prejudicial to both the applicant and the respondent in unfairly raising the applicant's expectations and taking up the respondent's limited resources to respond to an unmeritorious claim. The respondent submitted that the proper jurisdiction for the applicant's claim is the Queensland Industrial Relations Commission. The Respondent is a Parents & Citizens' Association created under the *Education (General Provisions) Act 2006* (Qld) and *Education (General Provisions) Regulation 2017* (Qld). In the decision of *Arhturell v Jimboomba Outside School Hours Care*,[10] Deputy President Asbury (as she then was) concluded that Parents & Citizens Associations created under this legislation are not national system employers and are not covered by the FW Act. ED knew or ought to have known that the application as formulated would fail for want of jurisdiction.

[72] In Mr Mark Dowley's case the respondent Sandalford Wines Pty Ltd submitted that the submissions of ED are clearly a general defence of the organisation and not a specific response to the directions issued by the Commission. The submissions make no reference to Mr Dowley or his claim against the respondent. ED has failed to obtain information from Mr Dowley regarding his termination. By not obtaining that information, ED has failed a basic test for claiming it is in Mr Dowley's interests to be represented by them. The respondent further submitted that ED have misrepresented the nature of their role by reference to success through conferences, when it is clear that a significant difference between the parties as to the reasons for termination is just as likely to result in an arbitrated hearing as it is to a conciliated outcome.

[73] In the application by Pucho Paye, the respondent Plumb Now Pty Limited submitted that the adverse findings made about ED's conduct described in the Full Bench decision of 22 December 2023, the recommendation of 24 January 2024 and the President's Statement warrant a refusal to grant permission for the Applicant to be represented by ED.

[74] In relation to ED's ability to aid in efficiency of the matter being dealt with, the respondent submitted that ED failed to copy the respondent's legal representatives in on important correspondence in ED's email to Deputy President Wright's Chambers on 5 April 2024 enclosing the Applicant's Submissions on Permission to be Represented. ED hindered the efficiency of the matter being dealt with by deliberately failing to include the respondent's legal representatives in on crucial correspondence to the Commission. The respondent also relies upon this matter to support its objection to permission being granted for ED to represent the applicant.

[75] In the application made by Mr Mathew Vendittelli, the respondent Crushing Services International Pty Ltd, submitted that the applicant has not established how the requirements of s.596(2)(a) have been met. Having regard to the applicant's outline of submissions on legal

representation and given the brevity of the applicant's Form F8, a total of 8 brief statements that go to the merits of the application, the respondent contended that there is no demonstrated 'complexity' including technical legal points or otherwise in considering whether legal representation would enable the matter to be dealt with more efficiently.

[76] The respondent noted that it had not engaged a lawyer, or paid agent and that the respondent is represented by its own human resources employees. None of the respondent's human resources employees have specialist experience in presenting and arguing matters in the Commission. The respondent's human resources employees are predominantly involved in the day-today management of the business, and the development of people and culture. In this context it is not evident how a decision to refuse permission for the applicant to be represented, would create unfairness when taking into account fairness between the applicant and the respondent. There is no reason, the that the applicant, a supervisor who holds a trade qualification as an engineering tradesperson and who has completed nationally recognised training in communicating information and showing leadership in the workplace, is unable to represent himself or represent himself effectively. The respondent concluded by submitting that the applicant has not established that any of the criteria under s.596(2) of the Act have been enlivened.

Legislation

[77] Section 596 of the FW Act outlines the conditions under which a person may be represented by a lawyer or paid agent in a matter before the Commission. Unless the party is represented by a lawyer or paid agent employed by their union or employer association, such representation may only occur with the permission of the Commission. Permission may be granted if it would enable the matter to be dealt with more efficiently, if it would be unfair not to allow representation due to the person's inability to represent themselves effectively, or if it would be unfair not to allow representation considering fairness between the person and others in the same matter.

[78] Section 596 reads:

> **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.

[79] The *Fair Work Commission Rules 2024* include procedural rules concerning representation by lawyers and paid agents. Rule 11 permits a person to nominate a lawyer, paid agent or other specified person to be the person's nominated representative. Rule 18 permits a nominated representative to sign a document lodged with the Commission on behalf of a party to a proceeding. Rule 12 permits a person to notify the Commission that a lawyer or paid agent acts for the person in relation to an application made to the Commission. Notification may be given by specifying on an originating application form who the lawyer or paid agent is or by lodging a specific form dealing with representation. A person may do this for the purpose of indicating that they are incurring costs that may be recoverable under the FW Act.

[80] Rules 13 and 14 are made for the specific purpose of s.596(1) of the FW Act. Rule 13 is in the following terms:

13 Representation by lawyers and paid agents

(1) In any matter before the FWC, a person:

(a) must not, without the permission of the FWC, be represented in the matter by a lawyer or paid agent participating in a conference or hearing relating to the matter; but

(b) may otherwise, without the permission of the FWC, be represented by a lawyer or paid agent in the matter.

Note 1: This rule is made for the purposes of subsection 596(1) of the Act.
Note 2: See subsection 596(4) of the Act for when a person is taken not to be represented by a lawyer or paid agent for the purposes of that section.

(2) Despite paragraph (1)(a), a person may, without the permission of the FWC, be represented in a matter by a lawyer or paid agent:

(a) participating in a conference or hearing in relation to the following:

(i) a matter arising under Part 2-3 of the Act (modern awards);

(ii) a matter arising under Part 2-5 of the Act (workplace determinations);

(iii) a matter arising under Part 2-6 of the Act (minimum wages);

(iv) a matter arising under Part 2-7 of the Act (equal remuneration);

(v) a matter arising under section 510 or 512 of the Act (entry permits); and

(b) participating in a conference conducted by a member of the staff of the FWC, whether or not under delegation, in relation to the following:

(i) an unfair dismissal application;

(ii) a sexual harassment FWC application;

(iii) an application under section 789FC of the Act for an order under section 789FF of the Act to stop bullying or sexual harassment.

(3) Despite anything in this rule, the FWC may, in relation to a matter before the FWC, direct that a person is not to be represented in the matter by a lawyer or paid agent except with the permission of the FWC.

(4) To avoid doubt, nothing in paragraph (2)(b) is to be taken as permitting a person to be represented in a matter by a lawyer or paid agent participating in a conference before a FWC Member in relation to a sexual harassment FWC application, an unfair dismissal application or an application under section 789FC of the Act without the permission of the FWC.

[81] Rule 14 reads:

14 Notice—proposed representation in a conference or hearing

(1) If:

(a) a person proposes to be represented in a matter before the FWC by a lawyer or paid agent participating in a conference or hearing relating to the matter; and

(b) the participation requires permission under rule 13;

the person must lodge a notice with the FWC informing the FWC that the person will seek the FWC's permission for a lawyer or paid agent to participate in the conference or hearing.

Note 1: The notice must be in the approved form: see rule 9.
Note 2: See subsection 596(4) of the Act for when a person is taken not to be represented by a lawyer or paid agent for the purposes of section 596 of the Act.

(2) The FWC may permit a person to be represented by a lawyer or paid agent in a matter before the FWC even if the person fails to comply with subrule (1).

[82] We note that rule 13(1)(a) makes clear that a person must not be represented in a conference or hearing in any matter without permission of the Commission. Rule 13(2)(b) provides that despite rule 13(1)(a), a person may be represented by a lawyer or paid agent participating in a conference conducted by a member of staff of the Commission, as opposed to a member of the Commission, in relation to an unfair dismissal application, although under rule 13(3) the Commission may direct that a person is not to be represented except with the permission of the Commission.

Cases

[83] The Federal Court in the case of *Warrell v Walton* (2013) 233 IR 335 considered the approach to be taken under s.596. The Court emphasised that the normal position is that a party must appear on their own behalf unless permission is granted based on the requirements of s. 596(2). The legislative intent is to maintain informality in proceedings and to limit the appearance of lawyers to avoid unnecessary formality. In that regard the Court said:[11]

[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 subsequence 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.
> ...
> 1. In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.

[26] Neither on a review of the reasons for decision of the Senior Deputy President nor the transcript of the proceedings does it appear that any consideration at all was given to the constraints imposed by s 596(2). Nor was there any apparent consideration given to the manner in which the discretion was to be exercised – even if s 596(2)(a), (b) or (c) was satisfied. These matters cannot be regarded as some mere oversight assuming no real importance or exposing Mr Warrell to no real prejudice. Given the nature of the issues to be resolved by the Senior Deputy President and the difficulties confronting Mr Warrell, it is not self evident that Bacto Laboratories could have readily satisfied one or other of those constraints.

[27] It is thus concluded that the Senior Deputy President either erred in granting permission for Mr Butterfield to represent Bacto Laboratories or in failing to consider whether one or other of the constraints imposed by s 596(2) had been satisfied. A decision which fails to properly address whether permission should be granted or refused in the present proceeding had the consequence that the hearing was not "fair and just" as required by s 577(a). The Full Bench, it is respectfully concluded, erred in not so concluding."

[84] The proper approach to s.596 has also been the subject of observation in a number of Full Bench decisions of this Commission.

[85] In *Priestley v Department of Parliamentary Services* [2011] FWAFB 5585 permission was granted for the respondent to be represented on the basis that representation would assist the respondent to bring the best case possible, representation by persons experienced in the relevant jurisdiction will be of undoubted assistance and because the particular counsel has the capacity to assist the respondent and assist the Tribunal in performing its functions.

[86] The Full Bench in *G & S Fortunato Group Pty Ltd v Stranieri* [2013] FWCFB 4098, following *Warrell,* made it clear that even if one or more of the requirements in s.596(2) is satisfied, that does not dictate that the discretion should automatically be exercised in favour of granting permission to appear. The Full Bench declined to grant the appellant in that matter permission to be represented as none of the requirements in s.596(2) were met. After declining permission, the Full Bench allowed a short adjournment for one of the appellant's managers to be briefed to represent the appellant.

[87] In *E. Allen and Ors v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 the Full Bench stated: (footnotes omitted)

> **[48]** In this context it is important to appreciate that legal representatives have a duty to bring all relevant authorities to the attention of the Commission, whether or not they assist the party they represent. 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. As a Full Bench noted in *AFMEPKIU v Energy Developments Ltd:*
>
> > "It is a long standing principle of this Commission and its predecessors that there is a duty on persons appearing before the Commission to ensure that there is full and frank disclosure of all matters which are relevant to the proper determination of the matter before the Commission (see *Municipal Officers Association of Australia v City of Greater Brisbane* (1927) 25 CAR 932 at 935 per Lukis J.)"

[88] In *Oratis v Melbourne Business School* [2014] FWCFB 3869, in a case upholding a decision for the respondent to be represented by a lawyer, the Full Bench noted at [8] that it would be open, should the circumstances underpinning the grant of permission change, for an application to be made under s.603 that the decision granting permission to be represented be revoked. The Commission would then consider such application based upon the facts applying at that time.

[89] In *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 the Full Bench on appeal observed that a decision made under s.596 is an interlocutory one which did not require the consideration of evidence and may be made on the basis of written submissions containing a number of uncontested factual assertions, and that the determination of whether one or more of the requirements in s.596(2) are met involves the making of an evaluative judgment akin to the exercise of a discretion[12].

[90] A later Full Bench of the Commission in *Grabovsky v United Protestant Association of NSW Limited* [2018] FWCFB 4362 observed that 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[13] and 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.

[91] The approach taken in *Grabovsky* was followed by the Full Bench in *Lee v Superior Wood Pty Ltd* [2020] FWCFB 1301. In *Lee* the Full Bench went on to say the assessment of whether permission should be granted under s.596 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". It is only where the first step is satisfied that the second step arises and involves a consideration as to whether, in all of the circumstances, the discretion should be exercised in favour of the party seeking permission.

[92] In *Neil Emery v City of Stirling* [2019] FWCFB 4015 the Full Bench quashed a decision of a single member who denied both parties permission to be represented in unfair dismissal proceedings. The Full Bench noted that even where both parties sought to be represented and did not oppose the other being represented, the Commission is not bound to accept the consent position of the parties but is required to make an independent determination on the statutory tests in s.596(2). The Full Bench went on to observe that where both parties agree that a matter is complex and would be dealt with more efficiently with representation, their views should be given appropriate weight in the exercise of discretion under s.596.

[93] In *McKerlie v RateIt Australia Pty Ltd (t/as RateIt)* [2020] FWCFB 5131 a Full Bench hearing an appeal declined to grant permission for representation noting that there was no particular complexity about the appeal and that it was not persuaded that granting permission "would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter". The Full Bench also observed that the fact the proceeding was an appeal ought not lead to an assumption that the Commission will permit a party to be represented by a lawyer or paid agent.

[94] In *Wellparks Holdings Pty Ltd t/as ERGT Australia v Mr Kevin Govender* [2021] FWCFB 268 the Full Bench referred to the two-step test identified in *Lee* (footnotes omitted):

> [48] The assessment of whether permission should be granted under s 596 involves a two-step process. The first step is to consider 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 a discretion'. It is only where the first step is satisfied that the second step arises, which involves a consideration as to whether in all of the circumstances the discretion should be exercised in favour of the party seeking permission. The satisfaction of any of the requirements set forth 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.

[95] The various decisions going to the exercise of the discretion under s.596 have been usefully summarised in a decision of Deputy President Easton in *Chris Nightingale v Woolworths Group Limited T/A Woolworths Group* [2022] FWC 1733. We respectfully adopt the Deputy President's summary which was as follows (footnotes omitted):

> [4] The following general principles can be drawn from earlier decisions of the Commission and of the Federal Court on permission to appear:

(a) the default position is that each party appears on their own behalf;
(b) permission may be granted "only if" at least one of the requirements of s.596(2) are made out;
(c) the assessment of whether permission should be granted under s.596 involves a two-step process: firstly, considering whether one or more of the criteria in s.596(2) is satisfied, and secondly, considering whether the Commission's discretion should be exercised in favour of the party seeking permission in all of the circumstances of the case;
(d) a decision to grant or refuse permission is not a mere procedural decision, it is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted;
(e) the Commission must perform its functions and exercise its powers in a manner that is fair and just, quick and informal, and avoids unnecessary technicalities;
(f) allowing lawyers to appear in Commission proceedings runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality;
(g) representation by lawyers or paid agents who are familiar with and/or experienced in the Commission's jurisdiction will generally be of assistance;
(h) a grant of permission to appear pursuant to s.596(1) of the Act is based upon a presumption that the legal representative to whom leave is granted will conduct themselves with probity, candour and honesty;
(i) the power to grant permission does not include any power to select who the legal representative will be;
(j) the only test the Commission must apply under s.596(2)(a) is whether granting permission "would enable the matter to be dealt with more efficiently". In applying this test, the Commission must take into account the complexity of the matter, but it does not have to find that the matter is actually complex, nor does it have to find that a matter is more complex than other matters;
(k) experienced legal representatives are more likely to give close regard to the boundaries of the matters subject to the dispute and any proposed remedy. Where competent legal representation is involved, there are greater prospects of the case being run more efficiently and focused on the relevant issues to be determined;
(l) the appearance of a focused, experienced and sympathetic legal practitioner may significantly assist the Commission to deal with difficulties arising from regularly dealing with self-represented litigants, particularly where mental illness is a factor;
(m) the Commission must give reasons for granting permission; and
(n) a decision to grant permission can be reviewed or revoked under s.603.

[96] Of particular relevance to the matters we are dealing with here are the Full Bench observations in *NSW Bar Association v Brett McAuliffe* [2014] FWCFB 1663 at [24] and [25] where it was said:

> **[24]** We also consider that the Commissioner fell into error in another respect. We have earlier set out the process by which the Commissioner determined the question of the ATO's representation in the matter before him. What the Commissioner effectively did on 4 and 5 December 2013 was, in a commingled way, to grant the ATO permission to be represented by its solicitor, Mr Noakes, but refuse it permission to be represented by its counsel, Mr Cross. In doing so, what the Commissioner did in substance was to select who, from the ATO's legal team, would represent it at the hearing. That was not a course authorised by s.596. The power conferred by s.596(2) is simply to "*grant permission for a person to be represented by a lawyer or paid agent in a matter*". Nothing in that language suggests that the power extends to the selection of which particular lawyer or paid agent will represent a party applying for permission.

> In the proceedings below, the duty of the Commissioner was either to grant or refuse permission for the ATO to be represented by a lawyer. It was not within the power conferred on the Commission to choose who that lawyer would be either by reference to the individual identity of the lawyer or by reference to whether the lawyer was a barrister or a solicitor. We do not consider that the power in s.596 was intended to interfere with a party's right to choose who its legal representative (or paid agent) would be if permission was to be granted.
>
> **[25]** We note that in its submissions the ATO went further than this and advanced the proposition that, in the exercise of its power under s.596(2), the Commission could not even have regard to who the lawyer or paid agent representing a party would be if an application for permission was to be granted. This would mean, for example, that in a matter with some minor legal complexity the Commission could not in deciding whether to grant or refuse permission take into account that a party proposed to be represented by senior counsel, or that it could not have regard to the fact that a particular paid agent in relation to whom permission was sought had been the subject of adverse integrity findings in earlier Commission decisions. We doubt the correctness of this submission, given that under s.596(2) and consistent with the analysis in *Warrell* it remains for the Commission to exercise a general discretion as to the grant of permission once any of the prerequisite criteria in s.596(2) have been satisfied. However, we do not consider it appropriate to determine this issue in a definitive way because it is not necessary for the disposition of this appeal to do so and because there was no proper contradictor in the appeal on that issue.

[97] The observation by the Full Bench at [25] that the Commission may have regard to the fact that a particular paid agent had been the subject of adverse integrity findings was highlighted in the Statement and Directions we issued earlier in these proceedings[14]. Submissions were invited on this issue. ED's primary submission was that it has not been the subject of an "adverse integrity finding" in either the decision of the Full Bench dated 22 December 2023, nor in the President's Recommendation nor the President's Statement. ED also submitted that it is unclear that *McAuliffe* constitutes precedent for the proposition that the Commission can consider an adverse integrity finding in determining the question of permission pursuant to s.596 of the Act. It submitted that to do so would run contrary to the position that s.596 does not empower the Commission to decide which representative should be permitted to represent a party to a proceeding but, rather, that the relevant question is whether a party to a proceeding before the Commission should be represented by any lawyer or paid agent. ED submits s.596 should not permit the Commission to 'target' a specific representative that it dislikes, as this was not the legislative intention behind the section. Further, ED submitted that it is not open to the Full Bench to expand the scope of its discretion to include factors that are not expressly articulated within s.596, and particularly not in a way that would empower the Commission to prejudice a party to a proceeding depending on which representative, or firm, they chose to represent them in a proceeding before the Commission.

[98] We reject the primary submission. The President expressed an opinion that ED had engaged in misleading and unethical conduct while representing Mr Howell[15]. In doing so, His Honour also referred to 30 other published decisions of the Commission in which ED's conduct was the subject of criticism. Those cases included criticisms of ED's conduct such as non-payment of fees, failing to communicate with clients, not responding to correspondence, causing delay in proceedings, filing multiple applications, and failing to file notices of discontinuance. We consider these observations in the President's Statement as falling within the description of an "adverse integrity finding" identified in *McAuliffe*.

[99] We repeat our observation in our Statement and Directions that the President's finding brings into sharp focus the passage of the Full Bench in *McAuliffe* at [25]. That passage

suggests the Commission may, in the exercise of the discretion to grant permission to be represented, have regard to the circumstances that a paid agent who is proposed as the representative of a party has been the subject of earlier adverse integrity findings.

[100] ED's submissions contend that s.596 does not empower the Commission to decide which representative should be permitted to represent a party to a proceeding but, rather, that the relevant question is whether a party to a proceeding before the Commission should be represented by any lawyer or paid agent. ED relies on *McAuliffe* at [24]. We do not accept the submission. In *McAuliffe* the first instance decision was to grant permission but to then determine that the respondent in the matter could be represented by its solicitor and not its barrister. The second step was found to be outside the discretion granted by s.596. The Full Bench noted that once it was determined that permission to be represented would be granted, there was no additional power to determine what that representation would be.

[101] As the Full Bench in *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 at [32] stated, the Full Bench decision in *McAuliffe* at [24] is authority for the proposition 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 was not intended to interfere with a party's right to choose who its legal representative would be.

[102] That reasoning sits comfortably with the suggestion at [25] of *McAuliffe* that in the exercise of the discretion to grant permission a relevant factor may be that the proposed representative may not be appropriate due to past known indiscretions, such as findings that they have not acted with integrity. The observation appears to us to be uncontroversial. It is the inverse of observations made in earlier decisions that the Commission will be assisted by legal practitioners who have experience with the jurisdiction of the Commission[16]. It also follows from the observations made in *E. Allen and Ors v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 that a relevant consideration is that representatives have a duty to ensure full and frank disclosure of all relevant matters to the Commission, regardless of whether they assist the party they represent and that this duty to the Commission is crucial[17]. The Full Bench made a related observation that a representative must have the capacity to assist the Tribunal in performing its functions effectively[18].

[103] As we apprehend what is said at [25] of *McAuliffe*, the Full Bench is suggesting that the Commission may take into account, in exercising the broad discretion to grant permission to be represented, that the proposed representative has engaged in past conduct that if repeated would not assist, and may hinder, the fair and efficient conduct of the proceedings. That past conduct may be apparent from adverse findings in earlier proceedings. We consider that this is a relevant factor in the exercise of the discretion. This would particularly be the case if it appeared the conduct the subject of the earlier findings may be repeated.

[104] This is not to say, as ED's submissions suggest, that the Commission is free when exercising the discretion under s.596 to consider factors that would enable it to 'target' specific representatives that it dislikes. As the cases above observe, while one or more of the matters in s.596(2) must be present for the discretion to be enlivened, those matters do not however exhaust the matters which the Commission might properly consider in the exercise of the ultimate discretion. The range of those additional matters are not limitless. They are to be

determined by implication from the subject matter, scope and purpose of the FW Act[19]. For example, as can be seen from the reasoning in *Warrell*, the Court considered that the decision to grant permission to be represented should have regard to the legislative desire for informality and a predisposition to parties not being represented[20]. We agree with ED that the targeting of a representative that the Commission dislikes would not be a proper basis for the denial of permission to be represented. We reject the suggestion that a consideration of past conduct of a representative might amount to targeting of that representative.

[105] We will apply this approach in our consideration of each of the matters before us.

Consideration

[106] In each of these matters, we are first required to make an assessment in each case of whether any of the three requirements in s.596(2) are met and second to determine whether in the circumstances of each case we will exercise the discretion to grant permission to be represented by ED. Submissions were made that the matters fall within s.596(2)(a), going to efficiency and complexity and (c), going to fairness where the respondent is represented.

[107] The matters before us can be considered in two groups based whether the application is for an unfair dismissal remedy pursuant to s.394, or whether the application is made under s.365 for the Commission to deal with a general protections dispute over a dismissal. In considering first whether the requirements in s.596(2) are met, we will take into account the information provided in the applications filed and the material provided to ED by the applicants prior to the application being filed, and to the responses provided by the former employer in each matter, where these are available.

Unfair Dismissal applications

[108] Thirty unfair dismissal applications have been referred to us. A majority of those involved dismissals grounded on allegations of misconduct or breach of a code of conduct. These are the applications by:

1. Ms Jane Massey
2. Brent Cameron
3. Danielle Windsor
4. Lee Follett
5. Jemaya Schubert
6. Mark Giddings
7. Tanisha Vargas
8. Jenna Robertson
9. Mr Darren Ferguson
10. Ms Sharon Phillis
11. Mr Ric Belic
12. Ms Rachael Kumar
13. Mr Liam Christinus
14. Mr Peter Williams
15. Mr David Thomson
16. Ms Rachael Tucker
17. Mr Kaliam Simpson
18. Mr Matthew Cahill

[109] Ms Jo-Anna Mealamu, Mr Darrell Kay and Mr Shawn Stowe were dismissed due to redundancy or unavailability of work.

[110] Ms Leah Haak and Hanna Wittner were alleged to have been unable to fulfil the requirements of their roles. Ms Tracey Bradshaw was terminated after a period of leave without pay following a cancer diagnosis.

[111] Mr Billy Angelis resigned in the heat of the moment which he says was unfairly accepted by the respondent. Mr Deng Mabuoc claimed that he was advised by his employer that his services were no longer required, however text messages provided in the response filed by the respondent indicated that he had resigned. We note that the response invited the application to be withdrawn and has put the applicant on notice that the respondent reserves its right to make a costs order pursuant to s 400A of the FW Act. There is no indication in the documents produced by ED in these proceedings that ED has made the applicant aware of the assertions made by the respondent and the foreshadowed costs application.

[112] In the applications made by Mr Faiga SuA, Mr Mark Dowley, Mr Robert Dalrymple and Mr Justin Wei the reason for dismissal is unclear on the face of the material before us.

Section596(2)(a) – granting permission would enable the matter to be dealt with more efficiently, taking into account its complexity

[113] ED contended in a cursory way that each matter was complex. It provided no submissions by reference to the circumstances of each individual matter. ED's submissions were of no assistance. Of the various unfair dismissal matters, having regard to the documents provided in response to the notices to produce including the information provided to ED by each of the applicants, we are of the view that the cases filed on behalf of the following persons have some complexity because they involve consideration of legal issues such as whether allegations of misconduct can be established to the requisite standard, whether jurisdictional issues arise, and the weight which should be placed on mitigating circumstances to considerations of harshness:

1. Ms Jane Massey
2. Danielle Windsor
3. Lee Follett
4. Ms Leah Haak
5. Jemaya Schubert
6. Hanna Wittner
7. Mark Giddings
8. Tanisha Vargas
9. Jenna Robertson
10. Ms Rachael Kumar
11. Ms Tracey Bradshaw

[114] In Ms Jane Massey's case, paragraph 3.1 of the application filed states that the applicant was dismissed "based on a newspaper article which was published about legal proceedings she was going through." The response filed by the respondent states that the applicant was terminated because she failed to disclose to her employer the outcome of Civil and Administrative Tribunal (NSW) proceedings dated 17 November 2023 as required by the order

of the Tribunal. In the NCAT proceedings, the applicant was found guilty of both unsatisfactory professional conduct and professional misconduct and her registration as an enrolled nurse was suspended for a period of six months. There is no reference to the NCAT proceedings or orders in the application even though the reasons and circumstances surrounding the dismissal and correspondence about this matter was provided to ED by the applicant.

[115] Ms Danielle Windsor was dismissed for misconduct after receiving a first and final warning seven months earlier. The application filed does not provide the applicant's response to the allegations of misconduct and does not engage with whether the allegations of misconduct can be established on the information available and whether they amount to a valid reason for dismissal. However, it can be anticipated that there will be contested evidence and cross examination on the underpinning facts related to the warning and the dismissal. We consider that due to the complexity associated with the likely evidence, representation would assist.

[116] In Lee Follett's and Ms Leah Haak's cases the respondents have raised jurisdictional issues which create potential complexity. The respondent in Lee Follett's case claims that the applicant earned more than the high income threshold. In Ms Leah Haak's case, the respondent claims that the applicant did not meet the minimum employment period due to unpaid leave resulting in employment period being less than 6 months. If established, these issues are fatal to the applications.

[117] In Ms Jemaya Schubert's case the applicant was terminated for serious misconduct after not declaring her mental health condition when she commenced employment. The applicant later declared the condition at a time that it was affecting her work performance. The applicant sent an email to ED in response to the initial email which advised that she signed a health declaration when commencing employment when her mental health was stable and requested that ED read the letter she sent to her employer carefully in response to a 'show cause' notice so they could understand her argument about why she was unfairly dismissed.

[118] The letter explained that after the applicant commenced employment she experienced difficult personal events (which she told to ED) which may led to a deterioration of her mental health and were relevant to the circumstances which led to the dismissal. There was no attempt in the application to engage with the health declaration signed by the applicant and whether the applicant's actions in this regard amounted to misconduct.

[119] In Ms Hanna Wittner's case the response filed by the employer states that the reason for dismissal was because the applicant failed to meet the requirements of the role. Although it was not stated in the application, it appears from the response and the material provided to the Commission that the applicant was employed by a labour hire company to work on the customer service desk at a shopping centre. The shopping centre exercised a contractual right to request the labour hire company remove the applicant from working at its site. The contract between applicant and respondent provided that the applicant would be terminated in these circumstances if it was unable to identify a suitable alternative position for her.

[120] Mr Mark Giddings had been employed for almost 20 years and according to the employer's response was dismissed "due to not advising the medical center of his prescription for cbd oil." The respondent referred to the applicant being previously disciplined with a first and final warning for having a positive THC result and a companywide directive requiring all employees prescribed THC and other medications likely to cause impairment, to be reviewed by the employer's medical centre. The application did not engage with these matters and did

not refer to potential mitigating circumstances, including that the applicant explained his use of medicinal cannabis as due to a long history of insomnia. These matters are sufficiently complex to meet the requirement in s.596(2)(a).

[121] Tanisha Vargas was terminated for serious misconduct after not attending an independent medical examination as directed by her employer. The application does not engage with the lawfulness or reasonableness of the direction. This is relevant as to whether the matter is complex enough to be dealt with more efficiently with representation. We find it is.

[122] Ms Jenna Robertson, who was employed as a Gaming Manager, was dismissed following an altercation with a customer and a staff member which was captured on CCTV. It appears from correspondence between the applicant and the respondent that the applicant admitted to the altercation and provided information about the surrounding circumstances during the investigation. The termination letter acknowledged that the applicant took responsibility for her actions but determined that termination for serious misconduct was appropriate. The application did not explain the reasons for, and circumstances of, the dismissal. The allegations against the applicant appear to be serious but no mitigating circumstances were referred to in the application. Again, the complexity means the matter meets the requirement in s.596(2)(a).

[123] Ms Rachael Kumar's case is the only matter before us where ED provided a detailed explanation about the circumstances of the dismissal. In this matter, the applicant who was employed as a personal care attendant in an aged care facility, was dismissed because of allegations that she had assaulted a client. The applicant denied the assault. The allegation is serious and the issue between the parties is whether it can be established on the evidence.

[124] Ms Tracey Bradshaw was diagnosed with stage 3 cancer and took leave without pay to undergo cancer treatment. The letter of termination noted the applicant's 13 week absence and that she had been in touch requesting to return part time. The respondent advised that there was no part time role available as it had been through a period of change with the loss of a number of contracts, which led to a reduction in staff. The respondent concluded the letter by advising that when the applicant has full medical clearance and is cleared to return to full time work, the respondent would look favourably on an application from the applicant if a suitable position were available. The matter raises a number of issues which are not addressed in the application including the applicant's fitness to return to work and ability to request a further period of leave without pay as an alternative to termination but suggest complexity that would justify permission to be represented.

[125] As we are satisfied that granting permission for the applicants to be represented in these matters would enable the matters to be dealt with more efficiently, taking into account their complexity, the requirement in s.596(2)(a) of the FW Act is satisfied for each matter. As a result, we must consider whether to exercise our general discretion to grant permission for the applicants to be represented by ED. We deal with that issue later.

S. 596(2)(c) – unfair not to allow the person to be represented taking into account fairness between the parties

[126] In the following cases, the respondents seek to be represented by either industry associations, paid agents or internal or external legal representatives. Consequently, we are satisfied that the requirement in s.596(2)(c) is met:

1. Ms Jane Massey v Brighter Access Ltd
2. Danielle Windsor v Helping Hand Aged Care Inc
3. Ms Leah Haak v Optimum Performance Training Pty Ltd
4. Jemaya Schubert v Crown Worldwide Australia Pty Ltd
5. Ms Sharon Phillis v Ultimate Cleaning & Gardening Solutions Pty Ltd
6. Mr Ric Belic v DNA Construction Pty Ltd
7. Mr Mark Dowley v Sandalford Wines Pty Ltd
8. Mr Peter Williams v Meridan State College P&C Association
9. Mr Matthew Cahill v The Athenaeum Club
10. Mr Justin Wei v Coles Supermarkets Australia Pty Ltd
11. Ms Tracey Bradshaw v Skyline Landscape Management Pty Ltd.

[127] The respondents will also need to seek permission to be represented. For the purposes of these applications, we are satisfied that it would be unfair not to allow the applicants to be represented taking into account fairness between them and the respondent in each matter and that the requirement in s.596(2)(c) is met.

[128] As we are satisfied that these matters meet the requirement in s.596(2)(c) of the FW Act, we must consider whether to exercise our general discretion to grant permission for the applicants to be represented by ED. We deal with that issue later.

General protections applications

[129] We note that all of the applicants in the s.365 general protections applications were employed for less than six months, save for Mr Leyshon and Mr Zebisch. The applicants engaged for less than 6 months were not entitled to bring unfair dismissal claims. Mr Zebisch earned in excess of the high income threshold and accordingly was also not entitled to make an unfair dismissal claim. In the initial correspondence with each of the applicants, ED does not explain the criteria which an applicant is required to meet to successfully pursue an unfair dismissal claim. There is no explanation that a person is required to have completed at least the minimum employment period with their employer, and that they must be covered by a modern award or enterprise agreement, or earn less than the high income threshold. There is also no explanation that an employer's compliance with the Small Business Fair Dismissal Code and the exclusion for cases of genuine redundancy are potential obstacles to an employee pursuing an unfair dismissal application. ED appears to have chosen the application to make on the basis of ineligibility to bring an unfair dismissal claim. That choice was not based on instructions arising from advice given as to what application to bring.

<u>Section 596(2)(a) - granting permission would enable the matter to be dealt with more efficiently, taking into account its complexity</u>

[130] We have already described the paucity of information provided in the pro forma applications filed pursuant to s.365 of the FW Act. The applications are of no assistance in determining the complexity of the matters. Again, ED contended in its submissions that each matter was complex but provided no submission by reference to the circumstances in each matter. ED's submissions were of no assistance.

[131] The material produced in the proceedings pursuant to the orders for production, shows that some applicants did not specifically allege that they were dismissed for reasons that may

be regarded as a contravention of s.340 or s.352. The applications do not draw a link between the dismissal and the exercise of a workplace right or a period of temporary illness. A notable exception to this is the case of Mr Giorgio Gava where the applicant (who filed his own application) alleges he was dismissed after he made complaints about being unpaid. Given the paucity of information in the other applications it is impossible to assess whether the matters are complex. Reference must be had to the communications with ED. Even then there is little information to assist in the assessing the complexity of the matters.

[132] In Ms Nancy Lopez's case, there is nothing in the material which substantiates the allegation that the applicant 'had raised ongoing verbal concerns regarding the expectations of the respondent and her responsibilities'. In fact, the material discloses that the applicant believes that she was dismissed because she made a bullying complaint against a colleague when they were both employed by a different employer two years earlier.

[133] Mr Mathew Vendittelli's application asserts that disagreements had taken place with coworkers and that he raised ongoing concerns with his manager regarding experiencing a difficulty in the procurement role which had initially not been his role and was later added on. The respondent claimed that the applicant's employment was terminated during the probation period following several complaints and concerns raised by employees of the respondent with respect to his behaviour in the workplace.

[134] Pucho Paye's application asserts that the applicant was dismissed because he made complaints about getting paid late, the state of his ute, and not having correct tools and equipment. ED produced an email from the applicant which states that the ute he was using for work was too high for him to park in the garage "which is the main reason the work ute got broken into and the tools and work equipment got stolen. So he blamed me for that, and fired me for that reason." On this basis, there appears to be no connection between the applicant raising a complaint and the dismissal.

[135] Antony Zebisch's application alleged exercise of a workplace right (raising concerns to the respondent regarding the Managing Director attending to a job in Canada which the applicant was going to attend to) is part of a chronology provided by the applicant to ED. The applicant does not allege in the chronology that this specific incident caused his dismissal.

[136] Gaelle Danre's application gives no indication from the material provided by ED that the applicant ever alleged that she "raised ongoing concerns regarding her allocated duties and requiring assistance and support in her role" as stated in the application. In her response to ED's initial email about "details of any complaints you have made in relation to your employment", the applicant merely said, "I was made to feel like I could not complain to anyone as my direct supervisor had the final say in regards to my practice."

[137] Ms Sarah Wallace was a casual Sales Assistant working for four weeks at a Bakers Delight Shop. Ms Wallace was terminated after leaving work early due to experiencing a migraine. The respondent claimed that the termination was related to the applicant's performance and service levels and that her absenteeism was not a consideration in the decision.

[138] Ms Tasneem Sayed was employed for a period of five days and claims that she was dismissed after a dispute about her pay. The respondent claimed that it believed that the applicant and respondent had reached an agreement of mutual separation and that when the applicant claimed that this was not the case, the respondent advised the applicant to return and

continue employment. The respondent submitted that the dismissal was due to no contact from applicant in response to its follow up emails regarding employment.

[139] Mr Jeremy Johnston finished work at 8:30am, consumed alcohol at some time during the day while not at work, then was called at 5:21pm to start work at 7:00pm. The applicant advised his employer that he was too tired to attend work but was required to submit to a breathalyser. The respondent then terminated the applicant's employment due to his consumption of alcohol.

[140] Mr Michael Brook was employed as a motorcycle delivery driver. The applicant claims that no reason was provided for the termination of his employment. The respondent claimed that the applicant consistently failed to meet performance and punctuality expectations as well as the inherent requirements of the role.

[141] As noted above, Mr Giorgio Gava alleges he was dismissed after he made complaints about being unpaid.

[142] Mr David Mcintosh was terminated during his probation period, and claims that he had raised ongoing verbal complaints regarding requiring assistance and support in his department. Similarly, Mr Anthony Harpur was terminated during his probation period, and claims that he had raised concerns regarding his role and duties.

[143] Mr Dylan Carroll claims that his employment was terminated after he had emergency surgery. The respondent claims that the applicant's employment was terminated because he was unsuitable for the work that he was engaged to perform (being powder coating).

[144] Mr Stuart Peters' application claims that he was terminated because he was temporarily absent from employment due to illness. In his response to ED's initial email requesting "details of any leave you have recently taken, including medical certificates", the applicant advised that during the course of his employment he "had a few days off due to illness all cover(ed) by medical certificates which I unfortunately don't have as the hard copies were handed to my manager upon return to work." The applicant does not allege in his email to ED that his employment was terminated due to illness. Further, a file note produced by ED records that the applicant was told that he was terminated during his probationary period due to his attitude over the last few weeks.

[145] The termination letters issued to the applicants in Ms Karen Westergreen and Mr Troy Leyshon's cases referred to the reasons for termination as including absence issues, suggesting a link between the dismissal and the taking of leave.

[146] In *Tilers Trade Outlet (Vic) Pty Ltd v Julia Cochrane* [2023] FWCFB 170 the Full Bench described the Commission's jurisdiction in a dispute under s. 365 in this way:

> The Commission's role in relation to applications under s 365 of the FW Act is to deal with such applications by way of conciliation or mediation under s 368 of the FW Act. If satisfied that all reasonable attempts to resolve a dispute under s 365 have been or are likely to be unsuccessful, the Commission must issue a certificate under s 368(3). Section 370 of the FW Act imposes a substantial restriction on applicants by preventing a general protections court application being made unless the Commission has issued a certificate under s 368(3)(a) in relation to the dispute.

[147] Given the role of the Commission in these matters is confined to conciliation or mediation, we consider that the complexity of the matters do not require representation by a paid agent to enable them to be dealt with more efficiently. Had there been jurisdictional objections raised such as whether the applicant was an employee, or whether they were dismissed at all, some legal and/or factual complexity may arise justifying the grant of permission to be represented.

[148] We are not satisfied granting permission for any of the applicants in the s.365 applications would enable the matters to be dealt with more efficiently, taking into account their complexity. We are not currently satisfied that any of the matters are complex and do not consider there are any factors that indicate granting permission will allow for greater efficiency. The requirement in s.596(2)(a) is not met in any case.

Section 596(2)(c) - unfair not to allow the person to be represented taking into account fairness between the parties

[149] In the following cases, the respondents are seeking to be represented by either paid agents or internal or external legal representatives:

1. Mr Antony Zebisch v MTM Critical Metals Limited
2. Pucho Paye v Plumb Now Pty Ltd
3. Gaelle Danre v Drummond Street Services Incorporated
4. Mr Anthony Harpur v Rebian Investments Pty Ltd
5. Mr Dylan Carroll v Indco Pty Ltd

[150] We are satisfied it would be unfair to not allow the applicants in these matters to be represented taking into account fairness between the applicants and respondents. As we are satisfied that these matters meet the requirement in s.596(2)(c) of the FW Act, we must consider whether to exercise our general discretion to grant permission for the applicants to be represented by ED. We deal with that issue next.

Should permission be granted?

[151] We are satisfied that the following matters meet the requirements of s.596(2):

- Ms Jane Massey v Brighter Access Ltd (596(2)(a) and (c))
- Mr Antony Zebisch v MTM Critical Metals Limited (596(2)(c))
- Danielle Windsor v Helping Hand Aged Care Inc (596(2)(a) and (c))
- Lee Follett v BHP WAIO Pty Ltd (596(2)(a))
- Pucho Paye v Plumb Now Pty Ltd (596(2)(c))
- Haak v Optimum Performance Training Pty Ltd (596(2)(a) and (c))
- Schubert v Crown Worldwide (Australia) Pty Ltd (596(2)(a) and (c))
- Wittner v Glad Security Pty. Ltd (596(2)(a))
- Giddings v Alcoa of Australia Limited (596(2)(a))
- Vargas v The Trustee for Brightlite Unit Trust (596(2)(a))
- Robertson v Australian Leisure and Hospitality Group Pty Limited (596(2)(a))
- Mr Anthony Harpur v Rebian Investments Pty. Ltd (596(2)(c))
- Sharon Phillis v Ultimate Cleaning & Gardening Solutions Pty Ltd ((596(2)(c))
- Ric Belic v DNA Construction Pty Ltd ((596(2)(c))
- Ms Rachael Kumar v Healthx Group Pty Ltd ((596(2)(a))

- Ms Tracey Bradshaw v Skyline Landscape Management Pty Ltd (596(2)(a) and (c))
- Mr Mark Dowley v Sandalford Wines Pty Ltd ((596(2)(c))
- Mr Peter Williams v Meridan State College P&C Association ((596(2)(c))
- Mr Dylan Carroll v Indco Pty Ltd ((596(2)(c))
- Gaelle Danre v Drummond Street Services Incorporated (596(2)(c))
- Mr Matthew Cahill v The Athenaeum Club (596(2)(c))
- Mr Justin Wei v Coles Supermarkets Australia Pty Ltd (596(2)(c))

[152] It follows that in the other matters we are not satisfied that any of the criteria in s.596(2) is satisfied. We have decided not to grant permission for the applicants to be represented in these matters.

Discretionary factors

[153] In relation to those matters where we are satisfied that one or more of the requirements in s.596(2) of the FW Act are satisfied, we must consider as the second step in the exercise whether to exercise our general discretion to grant permission for those applicants to be represented by ED.

[154] In relation to the matters that we consider are sufficiently complex to warrant permission being granted because this would enable the matters to be dealt with more efficiently, we are concerned that the complexity was not evident on the face of the applications filed by ED, nor was it identified in ED's submissions in each matter. This is because ED used the template approach to filling in applications that we described earlier, and the failure by ED to address each individual case by reference to its circumstances in its submissions. In these cases, there was sufficient material available from the material produced in response to our order and the responses of the employers to bring that complexity to the Commission's attention. We consider ED's failure to engage with the details of the claims is a failure to act with the sort of candour and honesty and to provide the full and frank disclosure of all matters referred to by the Full Bench in *E. Allen and Ors v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 at [38] as being required of those who represent parties before the Commission. This is a factor that tells against granting permission for the applicants to be represented by ED.

[155] In the communications between the applicants and ED there was no explanation nor advice given about the criteria which an applicant is required to meet to successfully pursue either an unfair dismissal or a general protections claim against their former employer. In the unfair dismissal applications there is no attempt to address the criteria in s. 387. In the general protections matters there is no explanation of a "workplace right" and no mention that the existence or exercise of the protected right must be a substantial and operative reason for the dismissal. It is readily apparent from the material produced that if the applicants met the jurisdictional requirements for an unfair dismissal application, a s.394 unfair dismissal application was made on their behalf, otherwise a general protections application was made. The decision was based on the applicant's answers to question 4 and 6 in the initial email sent from ED. Those questions were "Details of any complaints you have made in relation to your employment" and "Details of any leave you have recently taken, including medical certificates" respectively. No explanation or advice was given about the nature of the applications that were filed. No instructions were received on that topic. These failings to provide advice and gain specific instructions on these important matters tell against granting permission for the applicants to be represented by ED.

[156] ED's conduct in these matters reflects the kind of conduct that ED was criticised for in the earlier *Howell* proceeding, including acting in a misleading way and failing to act in the applicants' best interests. The types of criticisms referred to in the *Howell* matter and the 30 matters referred to by the President included:

a) Misleading and unethical conduct in connection with its representation of Mr. Howell as a paid agent.
b) Failing to act in Mr. Howell's best interests.
c) Pressuring Mr. Howell to sign documents quickly without adequate explanation.
d) Making untrue claims about ED's success rate in reversing dismissals.
e) Ambiguous terms in the 'No Win No Fee Guarantee' that disadvantaged Mr. Howell.
f) Failing to communicate effectively with clients, causing delays and confusion in proceedings.
g) Not responding to correspondence from clients, other parties, and the Commission.
h) Causing delay and confusion during proceedings.
i) Lodging multiple proceedings concerning a single dismissal.
j) Failing to file notices of discontinuance where matters were settled.
k) Non-compliance with the President's recommendation to reimburse the payment made to Elite Elevators and remit the settlement sum to Mr. Howell.

[157] In these matters, ED secured the agreement of the applicants to be their representative through the initial email. The initial email was misleading in many respects. We have already set out our concerns about those communications. For example, by claiming that the applicants must act urgently but failing to provide the timeframe in which applications were to be made. This indicates ED was placing time pressure on the applicants to secure their business. Second, the initial email makes a number of false statements about the consequences of the dismissals in terms of finding future employment which inflated the adverse impact of the dismissal. Again, this indicates ED is impressing upon the applicants the need to engage ED to challenge the dismissal. Third, the initial email does not provide details about the choice of actions that might be commenced and about the limitations on what ED could achieve, both in terms of jurisdictional limits and the forum in which such applications might be determined, and the limits associated with the different types of actions.

[158] After receiving information from the applicants, the further email sent from ED compounded the misleading information in the initial email. The further email made incorrect assertions about ED having an obligation to certify claims and that such certification provided the applicants with a measure of protection. ED then certified that each applicant's case had reasonable prospects of success without making any reference to the nature of the case or the specific facts considered.

[159] The further email attached a document referred to as the "terms of engagement". The terms of engagement was seven pages long, drafted by a lawyer, complex and was intended to be a binding agreement. The document has many problems. A key problem is that the scope of work is ambiguous, especially as to whether the fee charged extended to ED representing the applicant in settlement discussions or to the final determination of the claim. Also, the "No Win No Fee Guarantee" is couched in terms that require seven conditions to be met. Those conditions read together mean that any settlement offer made that is less than ED's professional fee results in an obligation for the applicant to pay the amount offered to ED, whether accepted or not. If any settlement offer is made that is equal to or greater than ED's professional fee then the applicant must pay ED's professional fee in full, whether the offer is accepted or not.

Further, if any settlement less than ED's fee is accepted, the full settlement amount must be paid to ED and the settlement amount is regarded as the fee payable by the applicant, resulting in the applicant receiving no payment. The only circumstances in which an applicant receives any compensation is where the settlement is greater than ED's fee, in which case the applicant receives that portion of settlement monies which exceed the amount of the professional fee.

[160] The terms of engagement require the applicant to acknowledge that the applicant had the opportunity to seek independent legal advice concerning the merits of their claim against their former employer, and the nature and effect of ED's offer to represent them. We are confident, and it would have been evident to ED, given the timeframes required by ED for the document to be signed and returned, that none of the applicants sought such advice.

[161] The applications prepared and filed by ED have been done in a pro forma fashion. They differ only in the identification of the parties; the recording of the length and nature of the employment and they provide the bare minimum in terms of particulars of the claims. They are of little assistance in identifying the basis of the claims being made.

[162] The way in which ED secured the agreement of the applicants to be represented by it, the way in which ED failed to provide adequate advice and to seek instructions on important matters and the way in which it completed the applications filed in the Commission are all factors that tell against granting the applicants permission to be represented by ED.

[163] This conduct also suggests that the practices in relation to representation, both in terms of how ED secured the agreement of the applicants to represent them, the terms upon which ED is engaged, and the manner in which ED subsequently went about representing the applicants, has not changed in response to the decision in *Howell*. This is another factor telling against exercising the discretion to grant the applications.

[164] We are not persuaded by ED's submissions that it has never been publicly sanctioned by a consumer protection authority or found by a Court to have engaged in misleading and deceptive conduct or having acted in contravention of the Australian Consumer Law. Nor are we persuaded by ED's assertion that its contractual terms have been the subject of scrutiny by judicial officers in other cases. The test we apply has nothing to do with the considerations that apply in those matters. We are to be guided by the exhortation in s.577 to exercise the Commission's functions in a manner that is fair and just, quick, informal and avoids unnecessary technicalities and by s.578 to act in accordance with equity, good conscience and the merits of the matters before us.

[165] We also do not accept ED's submission that it is entitled to accept at face value a representation given by a client that they have read and understood its contractual terms and wish to engage its services on the basis disclosed in the contractual document. ED refers to the desirability of the Commission leaving issues of contract to consumer protection bodies. We note the observation of the Full Bench in *Howell* that the proper discharge of the Commission's obligations would not permit it to ignore past conduct in other matters and in current matters that suggests a paid agent may not conduct themselves appropriately and may conduct themselves in a manner which is significantly inconsistent with the type of obligations referred to in *E. Allen and Ors v Fluor Construction Services Pty Ltd*.

[166] ED submits it has, and is, continuing to perform its contractual obligations pursuant to its agreements with the applicants. ED submits the Commission should not be interfering with

the applications on the basis that a particular representative allegedly did, on one isolated instance, file an "invalid" or "void" document, particularly when the representative services a significant volume of clients. ED submits that Mr Howell's case was an isolated one and should be given little weight in the course of determining the question of permission in the matters before us.

[167] We do not accept that Mr Howell's case was an isolated incident. As can be seen from our review of the material, ED's conduct in these matters has included the type of conduct criticised in the *Howell* matters.:

a) Making misrepresentations to the applicants to secure them as clients. Those misrepresentations were over a number of matters such as the nature of proceedings challenging a termination of employment, ED's record in proceedings about dismissal and that it was possible to certify that a dismissal application had prospects of success.
b) Impressing on applicants the need to act quickly to secure representation without providing information as to actual timelines provided by legislation and requiring documents to be returned in short timeframes.
c) Asking applicants to sign a complex legal contract that was ambiguous as to the scope of work ED would perform and without providing advice or explanation of key terms such as the professional fee and how its "No Win No Fee Guarantee" operated.
d) Failing to provide at any time considered advice on the prospects of success that took account of the individual circumstances of each applicant's case.
e) Filing applications in the Commission without specific instructions to do so and without providing adequate information outlining the particular circumstances of each applicant's case.

[168] We have referred to our concerns arising generally from the conduct of ED in these matters. That conduct occurred in all of the matters. One specific example of ED's conduct can be seen from its dealings with Ms Leah Haak in relation to her unfair dismissal application. Ms Haak informed us of the following:

- When contacting ED by phone, the only option is to leave a voicemail, which Ms Haak has done on the following occasions, requesting contact:
  18/1/24- 3 x calls - unanswered and not returned
  23/1/24- 2 x calls - unanswered and not returned
  24/1/24- 3 x calls - unanswered and not returned
  11/2/24- 2 x calls - unanswered and not returned
  20/2/24- 2 x calls - unanswered and not returned
- Ms Haak also sent multiple email requests to ED asking for answers, information and for a representative to contact her on 21 January, 13 February, 18 February, 23 February and 18 March 2024. These were all ignored. We note that none of these emails were produced by ED pursuant to the order for production.
- Ms Haak was finally contacted by ED when her matter was referred to this Full Bench. Ms Haak was contacted by 'Malcolm' who advised Ms Haak among other things that ED would pursue legal action against her, as they have done with many others, for the amount stated in the terms of engagement signed by Ms Haak if she ceased working with them.

- Malcolm instructed Ms Haak to contact ED immediately if she was contacted by anyone from the Fair Work Commission and that she was to record the phone call and pass it on to them. Ms Haak raised her concerns and issues around how she has been treated by ED and the lengths she had gone to have contact with someone about her case. Malcolm advised he would pass this on to the Director and the Director or someone with authority within the business would contact Ms Haak that afternoon or the following day. This never occurred.
- Ms Haak received a follow up call from another representative from ED later that week, echoing Malcolm's message, telling Ms Haak not to forget to record and contact ED immediately if Ms Haak is contacted by anyone at the Fair Work Commission. Ms Haak again requested that a representative from ED contact her about her case which did not occur.
- Ms Haak was later contacted by Belinda Solomon of ED, who advised ED would be sending Ms Haak a new contract, with a discounted fee of $1,900. This contract would provide that Ms Haak would be representing herself now and that ED would only be advising her and would provide her with a one hour phone consultation leading up to the hearing. When Ms Haak questioned this, stating that Ms Haak engaged ED to represent her and signed a contract in good faith that ED was able to act on her behalf and represent her in this matter, Ms Solomon tried to reassure Ms Haak that ED would advise her and tell her what to say so that she could represent herself and how that was equal to their representation.
- A day later, Ms Haak received an email sent at 10:30pm, advising that she had never paid her administration fee and that she now owed ED $1,900, and giving her less than 24 hours' notice to respond.

[169] In this example, ED can be seen to fail to communicate effectively. It acted contrary to the terms of engagement that it had reached with Ms Haak, in particular claiming payment contrary to its "No Win No Fee Guarantee" and caused confusion about the proceedings. The instruction to record any communication from the Commission is also of concern.

[170] We also note that ED's terms of engagement in these matters continues to have the same faults identified in the Howell proceedings, including:

a) The document is complex, with many problematic aspects, and is intended to be a binding agreement.
b) The scope of work continues to be ambiguous regarding whether the fee charged extended to representing the applicants in settlement discussions or the final determination of the claim.
c) The "No Win No Fee Guarantee" required seven conditions to be met. These conditions implied that any settlement offer less than ED's professional fee would oblige the applicant to pay the offered amount to ED, regardless of acceptance. If any settlement offer was accepted, which is less than ED's fee it had to be paid to ED, resulting in the applicant receiving no payment.
d) The guarantee did not explain that a "win" included the applicant receiving nothing.

[171] Our concerns about ED's conduct goes to its capacity to represent the applicants effectively and in their interests, its lack of candour demonstrated in the applications it prepared and filed, the misleading nature of ED's communications with the applicants, the circumstances of securing agreement to and the provision of the terms of engagement, and particularly the

"No Win No Fee Guarantee", are all factors that weigh against us granting permission for any of the applicants to be represented by ED.

[172] ED also submitted that it would be extraordinary for the Commission to refuse the employees the right to be represented by its extensive experience representing clients and the potential detriment to applicants if representation is denied. The Full Bench in *McAuliffe* referred to the Commission's Practice Note which deals with representation and in particular the need for parties to be prepared to deal with their matter if they are not granted permission. It is worth setting out the relevant part of the practice note here.

> 50. Parties seeking to be represented in a conference or hearing should not assume that permission will be granted. Parties need to be prepared to proceed with a conference or hearing in the event that their representative is not permitted to appear. In the event that permission to be represented by a lawyer or paid agent is *not* granted the party may seek an adjournment, but whether an adjournment is granted will be a matter for the Member concerned and should not be assumed.

[173] Dismissal matters should in the ordinary course proceed quickly. Resolving the question of representation can result in delay, as it has here. Where representation is sought, the Commission can in most cases rely on the professional responsibilities that legal professionals are bound to follow. Paid agents do not have the same obligations. The Commission may be familiar with some agents and be confident from past practice that the kind of concerns raised in the current cases will not arise. In other cases, it may be necessary to ask an applicant how they came to choose a particular paid agent and require production of any contract or fee agreement to consider whether the arrangements will hinder the fair and efficient conduct of the matter. The nature of the proceedings is also relevant. In exercising the discretion members of the Commission must keep in mind the purpose of the legislation and the overriding obligation to act in a fair and just, quick and informal manner and avoid unnecessary technicalities.

[174] We repeat the observations made by the Full Bench in *McAuliffe* that parties and advocates should be aware that the granting of permission to be represented in the Commission is not a mere formality. Parties and advocates preparing for a proceeding should be conscious that permission may not be granted and should be ready to deal with that scenario.

[175] We have identified above the applications where we have determined s.596(2) of the FW Act is satisfied and the discretion to allow permission to be enlivened. In each of these cases, we decline to exercise our general discretion to grant permission for the applicants to be represented by ED for the reasons identified above. This finding does not prevent the relevant applicants from seeking permission to be represented by a different lawyer or paid agent at the appropriate time.

[176] We note that the applicants' cases have not proceeded while our decision has been reserved. This has caused unavoidable delay. The delay was the result of the need to inform ourselves of the circumstances of the dealings between ED and each applicant. Some delay was also occasioned by ED's application for two members of this bench to recuse themselves. That matter was dealt with in decisions published separately[21]. The unfair dismissal applications and general protections matters that are the subject of this decision will now be allocated within the Commission and progress individually.

[177] For the foregoing reasons we do not grant permission for any of the applicants to be represented by a lawyer or paid agent. The applications will now proceed to be dealt with in accordance with the Commission's usual processes.

DEPUTY PRESIDENT

Hearing details:

Determined on the papers.

Final written submissions:

14 May 2024 by Employee Dismissals.

Printed by authority of the Commonwealth Government Printer

<PR778615>

SCHEDULE A

U2023/12620	Ms Jane Massey v Brighter Access Ltd
U2023/12590	Brent Cameron v BHP
C2024/756	Mr Antony Zebisch v MTM Critical Metals Limited
U2024/633	Danielle Windsor v Helping Hand Aged Care Inc
U2024/451	Lee Follett v BHP WAIO Pty Ltd
C2023/8063	Ms Karen Westergreen v Southern Cross Care Tasmania Inc
C2024/819	Mr Troy Leyshon v Mexican Express Pty Ltd
C2024/822	Mr Mathew Vendittelli v Crushing Services International Pty Ltd
C2024/1058	Pucho Paye v Plumb Now Pty Ltd
C2024/825	Ms Nancy Lopez v Safe Steps Family Violence Response Centre Inc
C2024/832	Gaelle Danre v Drummond Street Services Incorporated
C2024/917	Ms Sarah Wallace v The Trustee For Kemp Family Trust
C2024/945	Ms Tasneem Sayed v Goldstar Assets Pty Ltd
U2024/882	Ms Leah Haak v Optimum Performance Training Pty Ltd
U2024/1434	Jemaya Schubert v Crown Worldwide Australia Pty Ltd
U2024/1682	Hanna Wittner v Glad Security Pty Ltd
U2024/1679	Mark Giddings v Alcoa Of Australia Limited
U2024/1616	Ms Rachael Tucker v B & T BEANS PTY LTD
U2024/1452	Tanisha Vargas v The Trustee For Brightlite Unit Trust
U2024/1425	Mr Kaliam Simpson v South Coast Mariculture Pty Ltd
U2024/1373	Mr Deng Mabuoc v Marathon Food Industries Proprietary Limited
U2024/1298	Jenna Robertson v Australian Leisure And Hospitality Group Pty Limited
U2024/1146	Mr Darren Ferguson v Reid Stockfeeds Pty Ltd
U2024/1673	Mr Billy Angelis v Arthur, Shaun Nicholas
U2024/1986	Ms Jo-Anna Mealamu v Connectability Care Services Pty Ltd
U2024/453	Mr Darrell Kay v Fulton Hogan Construction Pty Ltd
C2024/657	Mr Jeremy Johnston v Odell Resources Pty Ltd
U2024/1154	Mr Faiga SuA v Darley Aluminium Trading Pty Ltd
C2024/1361	Mr Anthony Harpur v Rebian Investments Pty Ltd
C2024/1352	Mr Michael Brook v Australian Postal Corporation
U2024/2339	Mr Shawn Stowe v Karuah Local Aboriginal Land Council
U2024/2692	Ms Sharon Phillis v Ultimate Cleaning & Gardening Solutions Pty Ltd
U2024/2691	Mr Ric Belic v DNA Construction Pty Ltd
C2024/1157	Mr David Mcintosh v Mulpha Hotel Pty Ltd TA Hayman Island

C2024/416	Mr Giorgio Gava v Laguna Beach Pty Ltd
C2024/1622	Mr Dylan Carroll v Indco Pty Ltd
U2024/3430	Ms Rachael Kumar v Healthx Group Pty Ltd
U2024/3241	Mr Liam Christinus v Mercy Education Limited
U2024/3240	Mr Mark Dowley v Sandalford Wines Pty Ltd
U2024/2533	Mr Robert Dalrymple v Etex Holding Australia Ii Pty Ltd
U2024/3028	Mr Peter Williams v Meridan State College P&C Association
U2024/2921	Mr Matthew Cahill v The Athenaeum Club
U2024/2922	Mr Justin Wei v Coles Supermarkets Australia Pty Ltd
U2024/1438	Ms Tracey Bradshaw v Skyline Landscape Management Pty Ltd
C2024/1709	Mr Stuart Peters v The Trustee for the Motorcycle Holdings Group Unit Trust
U2024/3118	Mr David Thomson v Young Guns Container Crew (Qld) Pty Ltd

[1] [2024] FWC 466

[2] [2024] FWCFB 154

[3] [2014] FWCFB 1663

[4] At [25]

[5] In a number of matters the Professional Fee ranged from $1,290 to $9,900 plus GST.

[6] C2024/945

[7] For example, *Jemaya Schubert v Crown Worldwide Australia Pty Ltd* (U2024/1434) and *Mr Dylan Carroll v Indco Pty Ltd* (C2024/1622).

[8] We note the Form 8 was updated 29 December 2023, but ED has not updated its template and all of the applications before us use the version approved with effect from 1 August 2019.

[9] For example, U2024/1154- Mr Faiga Su'A v Darley Aluminium Trading Pty Ltd

[10] (2015) FWC 5102

[11] At the time the matter was decided the Commission was described in the legislation as Fair Work Australia (FWA).

[12] At [19]

[13] At [36]

[14] [2024] FWCFB 154 at [5]

[15] At [22]

[16] eg *Priestley v Department of Parliamentary Services* [2011] FWAFB 5585

[17] At [48]

[18] id

[19] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40.

[20] *Warrell* at [25]

[21] *Applications by Employee Claims Pty Ltd t/a Employee Dismissals* [2024] FWC 2000