



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Joel Robert Knapek v Games Workshop OZ Pty Ltd Trading as Warhammer [2023] TASIC 2

PARTIES: Joel Robert Knapek (Applicant)

Games Workshop OZ Pty Ltd Trading as Warhammer (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T15002 of 2023

HEARING DATE(S): Heard on the papers

HEARING LOCATION:

DATE REASONS ISSUED: 14 February 2023

MEMBER: President D J Barclay

CATCHWORDS: Application by Respondents solicitors for leave to appear at conference – s 28 *Industrial Relations Act 1984*.

REPRESENTATION:

Appellant: Joel Knapek

Respondent: Sarah Saliba and Louise Rumble

**JOEL ROBERT KNAPEK v GAMES WORKSHOP OZ PTY LTD TRADING AS
WARHAMMER**

REASONS FOR DECISION

14 FEBRUARY 2023

[1] By letter of 31 January 2023 the Respondent's solicitors made submissions in respect to leave to appear. Leave is sought in respect to hearings and/or conferences. I propose to deal with the question whether or not the respondent can be legally represented at the conference in this decision. If the matter is not capable of resolution at the conference then I will consider any application for leave for the Respondent to be represented at the hearing as a separate application.

[2] I do so because, in my view, some considerations for the conference and the hearing are different. For example, whilst issues of prejudice may be greater at a hearing than a conference, because a hearing is much more technical and the advantages of an experienced legal practitioner representing a party are obvious, the assistance which may be provided by a legal representative to the Commission at a hearing may mitigate against the prejudice which might be suffered by the unrepresented party.

[3] The Applicants submissions are brief (which is not surprising given the applicant is unrepresented). They are in the following terms:

"I am writing in response to the attached correspondence. It is my view that Morgan Wynn as the HR manager is sufficiently trained in his field to represent the company and I don't feel this to be a conflict of interest.

If the Commissioner feels there to be a significant conflict of interest then I believe the company should be represented by a Tasmanian State lawyer to ensure Tasmanian legislation is properly adhered to."

[4] The Respondent's submissions are in the following terms:

(a) this matter is inherently complex due to the application of the Long Service Leave Act 1976 (Tas) and circumstances in which pro-rata long service leave is not payable due to termination of employment due to serious and wilful misconduct of the employee;

(b) legal representation would allow the matter to be dealt with more efficiently and will ensure that the evidence, including documentary and witness statement evidence is dealt with accurately and efficiently;

(c) Games Workshops' HR Manager / People Partner ANZ, Mr Morgan Wynn (Mr Wynn) is based in New South Wales and is the only Human Resources personnel based in Australia on behalf of Games Workshop;

(d) should the matter not resolve at the Conference and proceed to final hearing, Mr Wynn would not be available to appear on behalf of Games Workshop because he is a main witness. We are also instructed that there are no other persons employed by Games Workshop in Australia that would be capable of representing it at a contested hearing before the Commission."

[5] Leave to represent a party is governed by section 28 of the *Industrial Relations Act 1984* which provides:

“28. Representation

(1) Subject to this section, a party to any proceedings before the Commission, or before the Registrar under Part V, may appear in person or by his agent.

(2) In subsection (1) party includes an intervener.

(3) An association referred to in section 63 (1) or an organization shall be deemed to have appeared in person in proceedings before the Commission or the Registrar if it is represented by an officer or employee of the association or organization.

(4) A party appearing by an agent in any proceedings before the Commission or the Registrar is bound by the acts of that agent.

(5) The following persons are not entitled to be agents for the purposes of subsection (1) except with the leave of the Commission or the Registrar:

(a) a barrister or practitioner;

(b) an interstate legal practitioner and an Australian-registered foreign lawyer.

(6) Where a State employee or an officer or employee of an organization is a barrister or practitioner, nothing in subsection (5) prevents that State employee, officer, or employee from appearing as the agent for a party to any proceedings before the Commission or the Registrar –

(a) if he is employed to perform functions that may be performed by persons other than barristers or practitioners; or

(b) those proceedings relate to the determination of an industrial matter that affects his own salary or other conditions of employment.

(7) In this section –

Australian-registered foreign lawyer means an Australian-registered foreign lawyer within the meaning of the Legal Profession Act 2007 ;

Barrister means a barrister within the meaning of the Legal Profession Act 2007 ;
interstate legal practitioner means an interstate legal practitioner within the meaning of the Legal Profession Act 2007 ;

Practitioner means an Australian legal practitioner.”

[6] No guidance is given by the section as to the way in which the Commission should exercise its discretion to grant leave. In my view some assistance may be gained from the relevant provision in the *Fair Work Act 2009* which provides that a person may only be represented with the permission of the Fair Work Commission. Section 596 of the Fair Work Act relevantly provides as follows:

“(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.”

[7] Given that the discretion under the *Industrial Relations Act* is unfettered it would not be proper to regard the criteria set out above from the *Fair Work Act* as being the only matters to which the commission can have regard. In my view the overriding consideration is to ensure that the unrepresented party does not suffer prejudice to the extent that the advantage to the represented party creates unfairness which cannot be cured by the limited assistance which the Commissioner can give the unrepresented party at the conference (or hearing). The assistance which a Commissioner can provide to an unrepresented party is generally limited to assistance with the procedure to be followed during the hearing and to ensure that party understands the way in which the conference of hearing is progressing.

[8] So where one or more of the criteria referred to in the *Fair Work Act* are present it may still nevertheless be inappropriate to grant leave for representation if the prejudice to the unrepresented party is too great.

[9] Turning to the Respondents submissions, it is clear that those submissions are directed at least in part to the *Fair Work Act* criteria. I will deal with each submission in turn.

[10] The Respondent submits that the matter is inherently complex due to the application of the long service leave legislation in circumstances in which pro rata long service leave is not payable because of alleged serious and wilful misconduct. In my view this case is not one which is inherently complex. From the materials lodged it does not seem that there will be any particular dispute regarding the facts. Rather the questions for consideration will relate to the significance of those facts and whether the circumstances evidenced by those facts amount to conduct disqualifying the Applicant from pro rata long service leave. Fundamentally that is a question for the Commission.

[11] The Respondent submits that legal representation would allow the matter to be dealt with more efficiently including dealing with the evidence. Given that I have limited the question of leave to the conference this criterion is not presently relevant. However it seems to me that a Commissioner can give some assistance to an unrepresented party to enable him or her to efficiently deal with their evidence, including documentary evidence. Obviously the more complex the evidence and documentation the more likely permission is to be granted. Here the materials are relatively simple.

[12] The Respondent submits that the Human Resources Manager (HR manager) Mr Wynn, who is based in New South Wales, is the only human resources personnel based in Australia. Further, if the matter does not resolve at conference the Respondent submits that Mr Wynn would not be available to appear as he is the main witness. The latter of those submissions is not presently relevant. In respect to the former submission the Respondent does not expand on the difficulties which would be created by its HR manager appearing for it because he is the only HR person based in Australia. This submission might have more force for the hearing (given that it is likely the hearing will take longer and may require an appearance in person) but again I am dealing only with the conference. In light of the fact the Respondent does not advance any consequences of Mr Wynn being the only HR personnel in Australia, the submission does not assist the Respondent.

[13] In my view having regard to the circumstances of the case as a whole, and having regard to the fact that I am dealing with the conference only, I am of the view that leave ought not to be granted to the Respondent to be legally represented at the conference.

