CITATION:	*Caitlin Antella V James O'Brien* [2021] NTLC 037
PARTIES:	Caitlyn ANTELLA
	V
	James O'BRIEN
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	22119165
DELIVERED ON:	15 December 2021
DELIVERED AT:	Darwin
HEARING DATE(s):	6 October 2021
DECISION OF:	Greg Macdonald

CATCHWORDS:

Personal Violence Restraining Orders Act – sections 4, 5, 9, 14, 15 & 16.

REPRESENTATION:

Counsel:

Applicant:	self-represented
Defendant:	self-represented

Decision category classification:	B
Decision ID number:	037
Number of paragraphs:	28

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21806757

BETWEEN:

Caitlyn ANTELLA
Applicant

AND:

James O'BRIEN
Defendant

REASONS FOR DECISION

(Delivered 15 December 2021)

JUDGE MACDONALD

Background

1. On 11 June 2021 Ms Caitlin Antella (Applicant) made Application in respect of Mr James O'Brien (Defendant) for a personal violence restraining order (PVRO) under the *Personal Violence Restraining Orders Act* (Act). No referral of the matter to the Community Justice Centre (CJC) for mediation of the dispute under s14 of the Act occurred, including due to the Defendant's reservations in that regard. The Applicant's position in relation to mediation is not apparent from the court file, however I note the complexities involved in the dispute below.

2. The Application was listed for hearing on more than one occasion, and was ultimately heard on 6 October 2021. Evidence in chief comprised Affidavits sworn by the Applicant on 11 June, 12 July and 15 July 2021. The Defendant's Affidavits were sworn 21 June and 21 July 2021. The background and circumstances surrounding the nature of the relationship between the Applicant and Defendant are well evidenced in the Affidavits.[1]

3. At the commencement of the hearing it was appropriate for me to disclose previous dealings with and knowledge of each of the parties, which was done. Neither party made application that I recuse myself. The Applicant then took an oath, confirmed the truth of her Affidavit evidence to the best of her knowledge, and answered questions put by the Defendant. The same process was then applied and complied with by the Defendant.

[1] The Application also sought that the PVRO extend to protection of the cat Daniel M. The jurisdiction provided by the Act does not extend to protection of animals, the *Animal Welfare Act 1999* being the relevant legislation.

The Act

4. Section 9 prescribes the object of the Act as; "*...to ensure the safety and protection of persons who experience personal violence*", with the meaning of "*personal violence*" being determined through the definition of "*personal violence offence*" provided by s4 of the Act. That concept may be constituted by "*an offence*" against various provisions of the Criminal Code or, alternatively, one or more of various conduct prescribed by s4(b) of the Act.[2] Sections 5, 6 and 7 of the Act then define some of the conduct identified by s4(b), including "*intimidation*", for which various subsets are then provided. Subsection 5(2) also makes clear that the court may consider any "*pattern of conduct in the person's behaviour*" in considering whether "*intimidation*" is made out. Section 5 provides;

> ***5 Intimidation***
>
> *(1)* ***Intimidation*** *of a person is:*
>
> *(a) harassment of the person; or*
>
> *(b) any conduct that causes a reasonable apprehension of:*
>
> *(i) violence to the person; or*
>
> *(ii) damage to the property of the person, including the injury to or death of an animal that is the person's property; or*
>
> *(c) any conduct that has the effect of unreasonably controlling the person or causes the person mental harm.*
>
> *(2) For deciding whether a person's conduct amounts to intimidation, consideration may be given to a pattern of conduct in the person's behaviour.*
>
> *Examples of harassment for subsection (1)(a)*
>
> *1 Regular and unwanted contacting of the person, including by mail, phone, text messages, fax, the internet or another form of electronic communication.*
>
> *2 Giving or sending offensive material to the person.*
>
> *Example of conduct for subsection (1)(b)(i)*
>
> *Sexually coercive behaviour.*

5. Despite the term "*and*" linking paragraphs (a) and (b) of s4, indicating that those provisions might be read conjunctively, *Atkinson v Bardon & Ors* [2018] NTSC 9 makes clear that a "*personal violence offence*" may be established by proof on the balance of any of the criteria provided by s4(a) or, alternatively, s4(b). His Honour Justice Mildren noted that; "[t]*he conduct that may be the subject of an order is therefore quite far reaching, and is not limited to threats or attempts to commit acts of violence on a person or an individual, such as common assault. The words "personal violence" in section 9(1) must be construed in this light*".[3]

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[2] Most notably, "*causing harm*", "*damaging property*", "*intimidation*", or "*stalking*".
[3] At paragraph [27] of *Atkinson*.

6. Section 15 of the Act then provides that to make a PVRO, the court must first be satisfied to the relevant standard that "*…a personal violence offence has been committed, or is likely to be committed"* by a defendant in relation to an applicant[4]. Section 16 also obliges the court to give paramount importance to the safety and protection of the applicant in deciding any application, which includes to consider any "*criminal record*" of the defendant[5] and the defendant's "*previous conduct*" in relation to the applicant or anyone else. Section 16 enables and ensures that the court's consideration of potentially relevant facts or circumstances is particularly broad.

The hearing and evidence

7. The Application was heard on 6 October 2021. In addition to the Affidavit evidence in chief referred to at [2] above, the parties were permitted to cross-examine in relation to that evidence. The importance of putting the crux of their case and positions to the other party in cross-examination was also made clear to each party prior to that process commencing.[6] Although the Defendant may be taken to have some forensic experience, aspects of the hearing on 6 October 2021 demonstrated the difficulties generally inherent in determining disputes where litigants are self-represented. This included in relation to being able to cross-examine with precision, and to fully articulate their respective cases through oral submissions, which concluded the hearing.

8. Having regard to the evidence, it must be noted that any applicant under the Act bears an onus of proof, on the balance of probability. Despite that the civil standard applies, and notwithstanding the direction of s16(1) that paramount importance is be given to the safety and protection of the person for whose benefit the application is made, the consequences of a formal decision to make a PVRO invoke consideration of the *Briginshaw* principle.[7] That is;

> "*…it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*"

[4] In the absence of such satisfaction, the court is duty-bound to dismiss the application; s15(2).
[5] As defined by the *Criminal Records (Spent Convictions) Act,* so includes quashed convictions and proof of offending without conviction.
[6] Towards satisfaction of the principle from *Browne v Dunn* (1839) 6 R 67.
[7] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

9. The terms of the Act must also be read and interpreted having regard to its context and purpose; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34.

10. It would appear from the evidence in chief of each of the Applicant and Defendant that, for a range of reasons, hostility and animus has subsisted between them for many years.[8] Nonetheless, having regard to the provisions of the Act, I consider that the basis on which the Application is put can only fall within the concept of *Intimidation* provided by ss 4(b)(iii) and 5(1)(a) of the Act. That is, in my view the only criterion on which the Applicant might possibly establish "*intimidation*" is on the basis of "*harassment*".[9] There is no allegation by the Applicant that the Defendant has expressly threatened any physical violence to her and, except for the incident alleged on 19 December 2020 dealt with below, it would appear on the Applicant's account that the most strident words from the Defendant have been "*Go home Caitlyn*.[10]

11. Despite the large number of interactions which appear to have occurred between the Applicant and Defendant, only two incidents could possibly give rise to an objective basis for the making of a PVRO. Those incidents occurred on 21 February 2019 and 19 December 2020.

12. Other incidents complained of included communications and decisions of the Darwin Golf Club in September and November 2017, and the execution of a search warrant at the Applicant's residence on 25 March 2019. There is no evidence of any involvement or influence by the Defendant in relation to the Darwin Golf Club deciding under Clause 5.4(a) of its Constitution to reject an application for social membership by the Applicant. Similarly, the search warrant referred to (seeking blue paint and associated items) was issued by a Justice of the Peace on 25 March 2019, and there is no evidence that the Defendant had any role in drafting the Information for Warrant, seeking its issue, or in its execution.[11]

13. The incident of 21 February 2019 was the arrest of the Applicant by the Defendant around 6am in a public thoroughfare contiguous to the Defendant's residence.[12] On that date a contested Local Court hearing was to proceed, and the Applicant states she was gathering

[8] On the Applicant's account, since late 2005 as a result of tree pruning by Darwin City Council, for which they charge the Defendant; Paragraph [2] of Applicant's Affidavit sworn 15 July 2021 and several paragraphs of the Defendant's Affidavits of 21 June and 21 July 2021.

[9] But noting the construction applied in *Atkinson* (supra).

[10] See Annexure K6 of Applicant's Affidavit sworn 12 July 2021. In oral submissions on 6 October 2021 the Applicant did raise concern that the Defendant owned or possessed one or more firearms, but no evidence going to s 5 of the Act was before the court. As the Defendant is a serving member of NT Police, access to service arms is an ongoing incident of his office.

[11] I note the warrant was issued approximately one month after the Applicant was arrested on 21 February 2019 in a drainage way contiguous with the Defendant's premises, where she was apparently taking measurements in preparation for a contested criminal hearing that day. Presumably the "blue paint" was irrelevant to that hearing. That criminal charge was withdrawn in March 2019.

[12] The Defendant is a senior officer with the Police Force of the Northern Territory and, in my understanding, resorted to his statutory power of arrest provided by s123 of the *Police Administration Act*.

information to assist her cross examination of a witness at the imminent hearing, which included the use of the balls of wool and at least one pair of scissors to obtain measurements of distance. I accept the Applicant's explanation concerning her presence and purpose adjacent to the Defendant's premises that day. The interaction resulted in the Defendant arresting the Applicant and a charge of aggravated assault being laid, which was subsequently withdrawn.

14. Aspects of that incident are of definite concern. However, on 18 April 2019 Assistant Commissioner Bacon wrote to the Applicant, which advice included; "*The evidence was independently assessed by the office of the Director of Public Prosecutions (DPP) and it was established that a prima facie case existed for your initial arrest and therefore your arrest and subsequent detention was deemed lawful*".[13] That advice also included that Mr O'Brien "*…asserts that you threatened him with a pair of scissors*" and that he had also denied some aspects alleged by the Applicant.

15. It is also noted that the situation would have been one of 'oath on oath'. Although questions arise in relation to that incident, the Applicant bears an onus as discussed above, to prove "*intimidation*", which may relevantly be made out by proof of one or more of "*harassment*", "*violence*"[14], or "*conduct that has the effect of unreasonably controlling the person or causes the person mental harm*".[15] In relation to the incident of 21 February 2019, the onus has not been made out on the evidence to the necessary standard.

16. Despite the lengthy period over which interactions between the Applicant and Defendant have occurred, and regardless of reservations which attend what occurred on 21 February 2019, it is not my conclusion that the incident that morning should be considered as a "*pattern of conduct*" in the Defendant's behaviour.[16] The Applicant did not alleged that the Defendant had exercised his statutory powers in relation to her any way prior to 21 February 2019.[17]

17. The second incident occurred on 19 December 2020. That comprised 2 episodes of a person directing derogatory abuse towards the Applicant on that date. The first episode was an occupant or driver of a motor vehicle driving past the Applicant and yelling out "*slut*". The

[13] Letter of Assistant Commissioner Bacon comprising Annexure G2 to Applicant's Affidavit sworn 15 July 2021. Annexure E also refers.

[14] Noting an additional aspect would be necessary in the circumstances of arrest, being 'unlawful use of force'

[15] Section 5(1)(a), (b) and (c) of the Act.

[16] The Affidavit evidence is that the majority of interactions, starting with a handwritten letter being placed in the Defendant's letterbox (paragraph 2 of the Applicant's Affidavit sworn 15 July 2021), and through the various Complaints lodged by the Applicant with NT Police over the period October 2016 through to March 2017; Annexures K1 through to K7 of Applicant's Affidavit sworn 12 July 2021.

[17] Or directed any profanity or expletive insult at her prior to 19 December 2020.

Applicant did not see the person who uttered the insult, and had no specific evidence concerning the make or Registration of the vehicle, but was adamant that at the time, she "*noticed his voice, his motor vehicle and his vehicle number plate*".

18. The second alleged episode on 19 December 2020 was half an hour following the first episode when the Appellant was approaching the Defendant's residence, at which time the Defendant "*was sitting on a chair beside his de-facto … on their verandah looking into Carnoustie Circuit*" and the Applicant heard the expletive "*fuckhead*" which she considered was uttered at her. The evidence did not include that the Applicant saw the Defendant speak that insult, so also lacked precision and detail. The court is asked to make adverse findings in relation to the events of 19 December 2020 against the Defendant by inference.

19. Both episodes were reported to NT Police and were the subject of complaints under the *Ombudsman Act*, however no contemporaneous NT Police records of attendance or investigation comprised any part of the evidence. The evidence did include various correspondence from NT Police, lastly being a letter from Commander Hollamby on 4 June 2021 which included; "*On 14 May 2021 I spoke to the police officer concerned and he denied the incident as described by you had in fact occurred*".

20. In relation to the first and second episode the Defendant deposed that "*This allegation is denied. I do not use language like this towards Ms Antella and I do not engage with Ms Antella in any way*". Potentially more relevant, the defendant also deposed on 21 June 2021 that "*Ms Antella states she has made several complaints about my actions* ***however I am not aware of any***" (**emphasis** added).[18] The second proposition is in clear contradiction with the contents of letters written by Assistant Commissioner Bacon and Commander Hollamby which were admitted into evidence, and cannot be accepted.[19]

21. Although the court was in some position to gauge the demeanour and presentation of the Applicant, including as to volatility, various aspects of the Defendant's Affidavits which go beyond lay experience have been disregarded for the purpose of determining the issues in the Application. If determination of the fundamental issue in dispute simply relied upon some preference of one party's evidence over the other, a PVRO might be more readily made. However, various other aspects are also relevant.

22. The Applicant's evidence concerning the second incident is in the nature of recognition or identification evidence. Although the Application is in the civil jurisdiction of the Local Court, I consider the relevant caution demanded in more onerous proceedings must play some role in

[18] Paragraphs [7] and [8] of Affidavit sworn by the Defendant 21 June 2021.
[19] Annexures G and H to Applicant's Affidavit sworn 15 July 2021, each of which pre-dated the Defendant's Affidavit of 21 June 2021.

assessing whether the evidence amounts to reasonable satisfaction, including having regard to the *Briginshaw* principle.[20] The evidence is also of an 'oath on oath' character.

23. Regardless, the crucial issue is whether the derogatory and expletive language directed to the Applicant on 19 December 2020 could amount to "*harassment*", having regard to the contextual interpretation required by the Act.[21] If "*harassment*" is to be found, that criterion must be proven to an objective standard, and also established in the subjective sense, in that the applicant must have actually experienced that criterion. I have no doubt someone directed derogatory and abusive terms towards the Applicant on 19 December 2020 and that she genuinely believes the Defendant was responsible. It is also potentially relevant that the Applicant presents as a resilient rather than timorous individual, who capably speaks up for herself, and is willing and able to 'give as good as she gets'.[22] Nonetheless, the Applicant's ongoing tensions and conflict with the Defendant also clearly cause her a degree of anxiety and mental distress.[23]

24. The Applicant's immediate response following each episode on 19 December 2020 was to report the incident by telephone to NT Police. On police attendance that day the Applicant ultimately advised that she intended to seek a PVRO.[24] That course was eventually taken by the Applicant 6 months later, on 11 June 2021, following receipt of Commander Hollamby's letter dated 4 June 2021. There is no evidence of any further or similar incident which might be characterised as harassment between December 2020 and the hearing on 6 October 2021.

25. As noted above, a contextual interpretation of ss 4 to 9 of the Act is required, including having regard to ss 15 and 16. In this case that construction is against the background of the ongoing interactions manifest in the numerous complaints made by the Applicant other than in relation to the incident of 19 December 2020.[25] A crucial consideration is whether the insult and expletive heard by the Applicant could, if uttered by the Defendant, amount to harassment. In my view it could not. There is clearly an ongoing ill-will between the Applicant and Defendant, however it is not my conclusion that if the offensive words were proven to be spoken by the Defendant, the words *per se* would amount to "*harassment*" in the circumstances. Although the High Court's consideration of "*harass*" in *O'Sullivan v Lunnon* does not assist, including due to need for intent and the composite nature of the phrase to be

[20] For example *Festa v The Queen* (2001) 208 CLR 593 at 610 and *Smith v The Queen* (2001) 206 CLR 650 at 668.
[21] And noting the breadth of construction decided in *Atkinson* (supra).
[22] See various statements made by the Applicant to the Defendant set out in Annexure's K1 to K7 of the affidavit sworn 12 July 2021.
[23] Noting there is no evidence of any "*mental harm*" provided by s 5(1)(c), which would also likely be constrained to such harm caused 'unreasonably'.
[24] First bullet point of Annexure H to Affidavit sworn 15 July 2021.
[25] The incident of 21 February 2019 has been dealt with at paragraph [19] above.

interpreted in that case, the Federal Court in *ACCC v MUA & Ors* is authority supporting the proposition that a definite degree of persistence or frequency is required for "*harassment*".[26] Associated with that, previous interactions together with what is alleged against the Defendant from 19 December 2020 would not in my view produce a finding of "*pattern of conduct*".

26. The concept of "*harassment*" must take some colour from the other proscribed conduct constituting a "*personal violence offence*", and the direction provided by s 16 of the Act to the "*paramount importance*" of the "*safety and protection of the person*". It is my conclusion that the Applicant's safety is not appreciably at risk and a clear need for "*protection*" from the Defendant is not indicated or required.[27]

27. Had the Application comprised allegations of recurrent expletive and derogatory insults over the duration of the unpleasant relationship between the Applicant and Defendant, if proven to the necessary standard, the making of one or more PVROs would have been open. That was not the case in the Application.

Orders

28. The Application is dismissed.

Dated this 15th day of December 2021

GREG MACDONALD
LOCAL COURT JUDGE

[26] (1986) 67 ALR 423 at 427 - 428 and (2001) 187 ALR 487 at 499 respectively, although noting that the content of a single communication might in some circumstances be sufficient. For example, the threat of some immediate or future action or event.

[27] Provided the Defendant refrains from exercising any of his powers as a member of NT Police, which conflict of interest should generally ensure (except in the most extreme of circumstances). Any behaviour by an off-duty member of NT Police may not fall within the *Ombudsman Act 2009*, however I have no doubt the *Code of Conduct* has potential application to members at all times.