CITATION: *Bailey-Green v Longmuir [2018] NTLC 018*

PARTIES:	Howard BAILEY-GREEN v George LONGMUIR
TITLE OF COURT:	Local Court
JURISDICTION:	Civil
FILE NO:	21806757
DELIVERED ON:	21 June 2018
DELIVERED AT:	Darwin
HEARING DATE(s):	1 June 2018
JUDGMENT OF:	Greg Macdonald

CATCHWORDS:

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

REPRESENTATION:

Applicant:	self-represented
Defendant:	self-represented

Judgment category classification:	A
Judgment ID number:	018
Number of paragraphs:	20

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

No. 21806757

BETWEEN:

Howard BAILEY-GREEN

Applicant

AND:

George LONGMUIR

Defendant

REASONS FOR JUDGMENT

(Delivered 22 June 2018)

Judge Macdonald:

Background

1. On 6 February 2018 Mr Howard Bailey-Green (Applicant) made Application in respect of Mr George Longmuir (Defendant) for a personal violence restraining order (PVRO) under the *Personal Violence Restraining Orders Act* (Act).[1] On 27 February 2018 the parties were referred to the Community Justice Centre (CJC) for mediation of the dispute under s14 of the Act. On 29 March 2018 the Director of the CJC provided a written report to the court in compliance with s14(6) of the Act, which report essentially advised that

[1] The Application on the court file is a stamped 6 January 2018, however I infer from other information on the Application, including in relation to the accompanying Affidavit in support together with the first return date, that the proceeding was commenced on 6 February 2018.

the dispute had not been resolved by mediation because; "[t]*he applicant declined the offer of mediation*".[2]

2. On 9 April 2018 the Application was listed for hearing, with various procedural directions being made for the filing of evidence in chief by Affidavit. Those directions were made against the background of an Affidavit in support filed, so apparently sworn, on 6 February 2018 by the Applicant. That Affidavit included an allegation that the Defendant, during a conversation with the Applicant at Woolworths Nightcliff on 4 February 2018, '*swore at me and visually intimidated myself - he was in my face*'. That conversation, and various other interpersonal interactions which ultimately found their way into evidence, was in the context of the Applicant having been employed as a Security Officer by Wilson Security at Batchelor Institute from May 2016, in circumstances where the Defendant was his supervisor. The February 2018 interaction was said to have resulted following the Applicant having sought relief in some other forum in respect of workplace or employment issues.[3]

3. In addition to his Affidavit of 6 February 2018, the Applicant also relied on an Affidavit filed 11 April 2018, which evidence became Exhibits A2 and A1 respectively. The Defendant also filed sworn evidence dated 6 April and 8 May 2018, which became Exhibits R1 and R2 respectively.

4. On 13 February 2018 the Applicant sought and was issued a summons, directed to the manager of Woolworths Nightcliff, requiring production of video footage (CCTV) from 4 February 2018 between 3:00pm and 4:00pm '*of the baby milk and food area Isle* (sic) *and the whole check out Isle* (sic) *area*'. That Summons was personally served by the Applicant on the manager of Woolworths Nightcliff at 3:30pm 14 February 2018, returnable 2:00pm 19 February 2018. Although the Applicant appeared before the court

[2] See Exhibit R6.

on the return date, the Court File endorsement does not record that the summons was called upon, and I infer that it was not. The next occasion on which the issue of CCTV arose was at hearing on 1 June 2018. Due to the hearing having been fixed for almost 2 months, and the various interests inherent in determination of such applications, the hearing proceeded on that date, rather than being adjourned.

5. It is also to be noted that one or more witnesses, particularly from Wilson Security, may have had some potentially relevant evidence. This was particularly in relation to assertions contained in the supplementary sworn evidence in chief of the Applicant and Defendant, arising out of their employment with Wilson Security. No person other than the parties gave evidence, in answer to a summons or otherwise.

The Act

6. 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 phrase may be constituted by "*an offence*" against various provisions of the Criminal Code or, alternatively, one or more of various conduct described by s4(b) of the Act.[4] Sections 5, 6 and 7 of the Act then define some of the conduct identified by s4(b), including "*intimidation*". Section 5(2) makes clear that in determining whether a defendant's conduct amounts to intimidation, the court may consider any "*pattern of conduct in the person's behaviour*".

7. 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

[3] This may have been under the *Fair Work Act 2009* (Cth) or the *Return to Work Act*. The court made clear to the parties that the existence of any other proceeding was not directly relevant to its function under the Act.
[4] Most notably, "*causing harm*", "*damaging property*", "*intimidation*", or "*stalking*".

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*".[5]

8. 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[6]. 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[7] 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

9. The Application was heard on 1 June 2018, with a brief mention also occurring on 21 June 2018.[8] Prior to the hearing each party had endeavoured to follow procedural directions of the court, and diligently sought to prepare for the hearing. However, aspects of the hearing on 1 June 2018 demonstrated the difficulties generally inherent in determining disputes where litigants are self-represented. This was particularly in relation to being able to cross-examine with any precision, and to clearly articulate their respective cases through submissions. Unfamiliarity with court

[5] At paragraph [27] of *Atkinson*.
[6] In the absence of such satisfaction, the court is duty-bound to dismiss the application; s15(2).
[7] As defined by the *Criminal Records (Spent Convictions) Act*, so includes quashed convictions and proof of offending without conviction.
[8] At which time some documentation filed with the court but not formally exhibited on 1 June 2018 became Exhibits A6 and A7, and R4 to R6. Those tenders were by consent, including Exhibit A6,

procedure also resulted in the summons to Woolworths being ineffective. Towards the end of the hearing the Applicant also asserted that the Defendant had relevant evidence on his personal computer, which he had hoped to access.

10. Although civil proceedings, the process of discovery does not generally apply to applications under the Act.[9] Regardless, given the oral nature of the incident of 4 February 2018 which precipitated the Application, and having regard to the documentary evidence received into evidence in the proceeding, any application for discovery would almost certainly have been declined.

11. The sworn evidence in chief given at hearing is referred to at [2] and [3] above. Each party was also afforded opportunity to orally cross-examine the other, following being sworn. 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.[10]

12. 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.[11] 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*

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being an invoice dated 13 June 2018 and associated letter to Wilson Security, provided to the court by the Applicant on 21 June 2018

[9] No doubt in appropriate cases the court could make relevant directions under s17 of the *Local Court (Civil Procedure) Act* "*…for the conduct of the proceedings as it thinks conducive to the effective* [or] *complete … determination of the proceedings*", however no such occasion arose here.

[10] Towards satisfaction of the principle from *Browne v Dunn* (1839) 6 R 67.

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."

13. The Defendant has an imposing stature, and is robust and direct in his communication.[12] However, in the court's view on the basis of all of the evidence, and having regard to the Defendant's demeanour in the box and at the bar table, the Defendant's communication and bearing is generally professional and appropriate.

14. Parliament's express provision for mediation of any application through s14, and what occurred in this case, has been referred to.[13] Consistent with the direction of s14(8), I have taken the Director's report comprising part of Exhibit R6 into account, however that consideration has not been determinative of the Application. Nonetheless, I note that the Defendant's Affidavit evidence indicated he would enter and participate in mediation in a genuine and meaningful fashion[14], which I accept. Although the court has discretion in relation to ordering parties to mediation, it was considered on 19 February 2018 to be an appropriate course. Following the hearing of 1 June 2018 and having regard to the evidence received, I can only respectfully agree that mediation was entirely appropriate to the circumstances of the case and the allegations made.

15. Regardless, the application is to be determined having regard to the considerations prescribed by sections 15 and 16 of the Act. Careful attention was paid to the demeanour of the witnesses at hearing, and to the various

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[11] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pages 362.
[12] This was apparent from both the sworn evidence in chief (including annexures) and oral responses in cross-examination.
[13] Paragraph [1] above.

propositions put in advancing their respective cases[15] and responses given on oath. I also note the Defendant's evidence in chief in relation to the incident of 4 February 2018 that; "[t]*hroughout the whole encounter which lasted less than 30 seconds, my eight year old son was holding my hand and in no way did I threaten or intimidate Mr Bailey-Green as he alleges. At no time did I raise my arms or my voice and neither did I advance into his personal space.* ***There was nothing I said or did that could be considered in any way threatening***"[16] (my **emphasis**).

Findings

16. Hindsight may now indicate that the Defendant would best not have engaged the Applicant in conversation at Woolworths on 4 February 2018. I accept the Defendant's evidence that; "… *my first concern was with his health and I asked him how he was and if he was recovering from whatever ailed him. His reply and attitude were very hostile*."[17]

17. Having regard to the considerations prescribed by ss15 and 16 of the Act, it is noted that the Applicant's evidence did not include any allegation that he apprehended "*violence*" to his person[18], or damage to his property. Although there is some evidence of "*mental harm*", that evidence is insufficiently cogent or precise to enable attribution to the incident of 4 February 2018.[19]

18. There was no evidence of any relevant criminal record and, in the circumstances of the other related proceedings referred to, I do not consider the circumstances of the "*previous conduct*" asserted by the Applicant are

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[14] Second paragraph on page 2 of Exhibit R1
[15] Including the Affidavit evidence in chief.
[16] First paragraph on page 2 of Exhibit R1.
[17] Last paragraph on page 1 of R1.
[18] And if that position had been taken and proven, the apprehension would then also have to be proven to be "*reasonable*".
[19] Exhibit A7 refers, noting that neither Dr Albaghdady's report of 17 April 2018 nor Ms Stathis' report of 3 May 2018 makes any reference to the Woolworths incident on 4 February 2018. I make no findings in relation to interpersonal interactions and management in the workplace. Despite those aspects ultimately comprising part of the evidence in a collateral fashion, it was the incident of 4 February 2018 which was the foundation of the Application. I also note that those issues are the subject of other proceedings in a different forum.

matters which are properly within the purview of the Application in this case.

19. Lastly, I consider that reading the Act as a whole, the "*harassment*" contemplated by s5(1)(a) would require the more than one utterance of an expletive. Even if the defendant had on 4 February 2018 used the vernacular asserted by Exhibit A2 (which I do not find), in the circumstances of the unsatisfactory manner in which that interaction developed, such a statement would not in my view constitute "*intimidation*" to the necessary threshold provided by s5 of the Act. In reaching that conclusion I have also been mindful of s5(2), entitling the court to have regard to any "*pattern of conduct in the person's behaviour*" in weighing whether that criterion is proven.

20. The Application is dismissed.

Dated this 22 June 2018

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Greg Macdonald
Local Court Judge