**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2017] NZEmpC 149**
**EMPC 62/2017**
**EMPC 170/2017**
**EMPC 231/2017**

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| IN THE MATTER OF | challenges to determinations of the Employment Relations Authority |
| AND IN THE MATTER | of applications by the plaintiff for recusal and rehearing |
| BETWEEN | P<br>Plaintiff |
| AND | A<br>Defendant |

Hearing: 2 October 2017

Appearances: P, plaintiff in person
J Douglas, counsel for defendant

Judgment: 27 November 2017

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M E PERKINS**
**APPLICATION FOR RECUSAL**

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[1] P, the plaintiff in these proceedings, has asked me to recuse myself. This follows an interlocutory judgment I issued on 28 July 2017 in which I granted an extension of time to the defendant and leave to file a statement of defence for one of two challenges which P has filed to determinations of the Employment Relations Authority (the Authority).[1]

[2] It should be mentioned, incidentally, that one of the determinations of the Authority being challenged partly relates to an application P made to the Authority

1 *P v A* [2017] NZEmpC 92.

for an order prohibiting publication of his name and that of A. That application was declined by the Authority. However, on an interim basis, the Authority made an order prohibiting publication to enable P time to file a challenge to the Court. Having considered that matter, I extended the interim order until further order of the Court to enable the challenge to be argued and not render the challenge on that point nugatory. I discuss a minor ambiguity, which has arisen on that matter, later in this judgment.

[3] P has not made a formal application that I recuse myself. However, in a memorandum he filed on 31 August 2017 relating to an application for a rehearing of the matters contained in my judgment of 28 July 2017, he sought "A very polite recusal from His Honour in further proceedings in the matters presently before the Honourable Court, with immediate effect". No grounds were contained in the memorandum as to why I should recuse myself, apart from those which may be obscurely contained in the following paragraphs from the memorandum.

> 2 With due respects, this obviously is not to cast an personal aspersions, intentionally or unintentionally on His Honour however more due to circumstances in question.
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> 3 With more due respects, this view has been formed by the plaintiff for reasons/grounds including and post the interlocutory judgment dated 28/7/17 and the procedures followed by the Honourable Court thereof.

[4] P's application for a rehearing is presently held in abeyance pending my decision on recusal. While not dealing with the application for rehearing in this judgment, I note that in one of the grounds contained in that application by P, he alleges an apparent or real bias against him and in favour of the other party. This is elaborated upon in para 11 of the application, which reads:

> 11 In short there are unfair, critical, harsh and hostile remarks and unfounded criticism about me without any basis whatsoever. Such statements/passages reveal an apparent or actual bias against me. One just has to stand back and go [through] the [judgment]. ([A]lso see para 24.. [I] have caused the delay & 27... my opposition was unwarranted..!)

[5] Ms Douglas, counsel for A, treated the memorandum of 31 August 2017 as an application for recusal by P and filed a notice of opposition. The grounds of opposition are:

a. There is no evidence of apprehended bias;

b. There has not been a miscarriage of justice;

c. There has been no breach of natural justice.

[6] Ms Douglas filed a memorandum in support of the notice of opposition. In her memorandum, Ms Douglas also partly dealt with P's application for rehearing of the judgment held in abeyance pending resolution of the application for a recusal. Following receipt of the notice of opposition and to advance the application for recusal, I set a hearing date so that P and Ms Douglas could address me more formally on the issues. At the hearing on 2 October 2017, I heard submissions on the recusal application from both P and Ms Douglas.

[7] In his submissions, P made two primary points. The first was that in adjudicating upon the application for an extension of time, I had failed to act impartially. The second was that I had showed bias. He relied upon the decisions of *Muir v Commissioner of Inland Revenue*[2] and the Supreme Court's decision in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*.[3] In respect of the *Muir* decision, P quoted the following passage in the Court of Appeal's judgment:

> [61] In our view, the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct.

[8] From *Saxmere*, P referred to the statement of the Supreme Court that a Judge should recuse themselves:[4]

> ... "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".

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2 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495.

3 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122, [2010] 1 NZLR 76.

4 Quoted from *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at 344.

[9] Going on to deal with the specific submissions that P then made, I quote the following paragraphs from his submissions:

> 8 The plaintiff submits that plainly just a perusal of the Interlocutory Judgment dated 28 July 2017 raises a reasonable apprehension of bias against the plaintiff and favour to the defendant, even if the demonstrated errors of fact and/or law in the said judgment or some disputed findings are ignored (reference plaintiffs rehearing application), even though some of which appear to be deliberately overlooked and regardless of the final decision made.
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> 9 The plaintiffs considers that his case is exceptional in the sense that he has pleaded de novo challenges to both determinations and alleges that both of them were tainted with lack of jurisdiction including breaches of principles of natural justice, bad faith, apparent bias on the part of the ERA and has sought orders to quash the determinations among other remedies; in support of his claims there were about 60 pages of documents with the Employment Court up until the date of interlocutory judgement, which includes about 6 pages of affirmed affidavit evidence.
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> 10 The plaintiff submits that while the judgment itself was interlocutory to consider to file statement of defence out of time, the critical, negative and scrutinising remarks about the plaintiff nevertheless reveal a personal hostility and were totally uncalled for particularly given the nature of challenges being pleaded by plaintiff after what he alleges happened at the ERA well supported by 60 pages of documents, some of which were rock solid proven evidence which sadly was hardly acknowledged at all and the views expressed suggest closed mind to even a cursory look at those, though the plaintiff realizes it was still at an early stage of hearing.
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> 11 Finally the final part of the judgment of 28/7/17 backtracked on an earlier direction of Court just 2 days before on 26/7/17 that the interim order for non publication shall continue until the substantive hearing, and there will now be need to be an interlocutory hearing for extending such interim orders for non publication.
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> ...
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> 15 The last telephone conference was held on 4 sept (sic) 2017 however the plaintiff does not think he was treated well with courtesy and respect, though he did not complain but it appeared that His Honour was talking at him but engaging with Ms Douglas and apparently His Honour did not seem to be happy with the plaintiff.
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> 16 The plaintiff understands the professional association with lawyers may be much more than first time litigants like the plaintiff however it appeared it was little over the board because some exchanges happened and I felt left out but I admit that those were later consented by me but the participation was missing.
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> 17 My clear recollection is I would have been cut short at least 3 times by His Honour with words Stop there.
>
> ...

> 20 When seen in perspective the plaintiff submits that aforesaid actions or statements have given rise to inferring bias and/or the attitude is leading to bias ... actual or apparent.
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> ...
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> 25 To sum up may the plaintiff be excused when he says apparently the defendant and the defendants counsel are getting a White Privilege .. !

[10] P then dealt in his submissions with the issue of costs, stating that he opposed any costs against him if he failed in his application. However, if costs were to be awarded, he asked that they be modest given his financial difficulties, he being on a sickness benefit and having had to recently pay filing costs for multiple applications which he had made.

[11] Ms Douglas in her submissions in reply confirmed the defendant's opposition to recusal. Two particular reasons for the defendant's opposition are submitted to be:

a) That the granting of any recusal might result in the plaintiff then alleging to have grounds for his rehearing application. The defendant's concern at this would be that this may cause further costs and delay in progressing the challenges. It is submitted that there is no basis for revisiting the findings in the interlocutory judgment.

b) The Court is bound by conventions and rules which regulate its procedure. To the extent that the plaintiff seeks to revisit decisions that are not in his favour by questioning the integrity of the decision maker without good reason, the defendant is concerned that this is not a proper way to navigate the judicial system.

[12] In respect of the first point made by Ms Douglas, even if recusal is not granted in this case, P still has outstanding his application for rehearing of the leave application. He has indicated, however, that it is not his intention to seek to have the judgment set aside, but simply to have alleged errors corrected.

[13] Ms Douglas in her submissions has set out the legal principles which apply to recusal and in particular refers to the passage in the *Saxmere* decision, also referred

to by P. The underlying test for determining whether there is apparent judicial bias is set out in the *Saxmere* decision as follows:[5]

> ... subject to qualifications relating to waiver or necessity, a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".

[14] The judgment in *Saxmere* recognises that "justice should both be done and be seen to be done". Ms Douglas in her submissions then referred to three further paragraphs from that judgment. At paragraph [4] of the *Saxmere* decision, the Court established that the enquiry to be made as to whether a judge should recuse him/her self is to be determined through a two-step enquiry:

> (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
>
> (b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

[15] At paragraph [5] of the judgment, the Court stated:[6]

> The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision.

[16] And at paragraph [10] of the judgment, the Court stated:

> ... the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all.

[17] As Ms Douglas submitted, the principles in *Saxmere* have been applied in various other cases, including *Re: de Vries, ex parte Bartercard Exchange Ltd*.[7] The following statements were made in that decision:[8]

> [36] The starting position is that a judge has an obligation to sit on any cases allocated to him or her unless grounds for recusal exist.

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5 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

6 Footnotes omitted.

7 *Re: de Vries, ex parte Bartercard Exchange Ltd* [2017] NZHC 1851.

8 Footnotes omitted.

...

> [102] ... a judge should apply the principles regarding the application for recusal "firmly and fairly, and not accede too readily to suggestions of bias". To do so would be to allow every aggrieved litigant the ability to swap judges when they choose, without a credible source of bias and despite the oath taken when a judge is sworn to view matters objectively, and to act impartially and independently.

[18] Finally, Ms Douglas referred to s 222B of the Employment Relations Act 2000, which provides for the establishment of guidelines on recusal. These guidelines have been established.[9] Ms Douglas pertinently referred to paragraphs [10] to [12] of the Guidelines which read as follows:

> 10. The guiding principle is that a Judge is disqualified from sitting if, in the circumstances, there is a real possibility that in the eyes of a fair-minded, objective and fully informed observer, the Judge might not be impartial in reaching a decision of the case. This will include instances where a Judge has a material interest in the outcome of a case but there may also be other circumstances in which the appearance of bias in law arises.
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> 11. The Judge should consider a two-step test requiring consideration, first, of the circumstances relevant to the possible need for recusal because of apparent bias and, second, whether those circumstances lead to a reasonable apprehension that the Judge may not be impartial. This test requires ascertainment first, of what it is that might possibly lead to a reasonable apprehension that the Judge might decide the case other than judicially and on its merits. Second, the test requires consideration of whether there is a logical and sufficient connection between those circumstances and that apprehension.
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> 12. If, following the Judge's careful consideration and discussion with the Chief Judge, the Judge concerned is satisfied that there is a real possibility that he/she cannot act impartially, or is satisfied that a fair-minded, objective and fully informed observer might reach that view, the Judge will determine not to hear and decide the relevant case.

[19] Applying the principles which have been referred to by both P and Ms Douglas in this matter, P has not established any grounds for me to recuse myself. He has referred to the judgment dated 28 July 2017 and also a subsequent directions conference, which was convened on 4 September 2017 to endeavour to settle procedural matters to enable P's applications and eventually his challenges to be advanced so that they can be heard. The application for a rehearing and this present

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[9] Chief Judge Graeme Colgan "Recusal Guidelines for Judges of the Employment Court pursuant to s 222B Employment Relations Act 2000" (1 March 2017) Employment Court of New Zealand https://www.employmentcourt.govt.nz/about/recusal-guidelines/.

recusal application have now intervened in precluding the challenges being advanced.

[20] Insofar as the judgment of 28 July 2017 is concerned, I can find nothing which would confirm P's submissions that there were unfair, critical, harsh and hostile remarks and unfounded criticism about him with any basis whatsoever. In the judgment, I endeavoured to deal with the defendant's application on legal principle and applying those principles to the factual position which had been set out in the evidence in support of the application. In addition, I considered P's own submissions and evidence contained in the notice of opposition and his subsequent memorandum of submissions. I required him to have his submissions sworn, as he had not filed any affidavit in support of his notice of opposition.

[21] In the judgment, I did criticise P in two respects, although not in a harsh or hostile way. The first related to delay which P himself raised. I considered that many of the periods of delay in this matter had been occasioned by P's own actions. That delay is a matter of record. The second area, which P might perhaps regard as criticism, was my indication in reliance upon the Supreme Court's judgment in *Almond v Reid*[10] that I regarded his opposition to the application for leave as being unwarranted. The defendant's delay, which had occurred in filing the statement of defence, was a matter of two days and had been occasioned by administrative oversight.

[22] Insofar as the telephone directions conference on 4 September 2017 is concerned, I understand that P submits that I spent more time discussing procedural matters with Ms Douglas rather than with him and that he perceived this, and an attitude which he claims to have sensed, to be some discrimination against him. A directions conference, of course, is not recorded, but I do not believe that during that telephone directions conference I favoured one party over the other. I certainly tried to deal with the outstanding procedural matters as efficiently as I could. When dealing with a lay litigant, as P is, and where he is ignorant of the Court procedures to a large degree, then there may be a tendency to rely more heavily upon matters raised by experienced legal counsel, as Ms Douglas is, to gain assistance in ensuring

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10 *Almond v Reid* [2017] NZSC 80.

that proper procedural directions are given which will ensure progress in the case. As these are challenges made by P, advancing the matter expeditiously is within his interests. I conducted the directions conference with that purpose in mind. During the conference, I did ask P to stop speaking on more than one occasion as he was speaking over either myself or Ms Douglas when we were speaking. He was also straying into substantive matters beyond the scope of the conference. I interrupted him simply to ensure that the conference proceeded in an orderly fashion. I do not perceive that P was deprived of the opportunity to put his positon on the procedural steps being discussed.

[23] Finally, insofar as the allegation of racial discrimination is concerned, there is no basis whatsoever for P to have included that in his written submissions. I totally reject any suggestion that I have favoured the defendant in this matter because of "white privilege", or favoured the defendant over P at all.

[24] Having regard to all the circumstances which have been raised and applying the principles to which both P and Ms Douglas have referred, there is nothing which would persuade me that I should recuse myself. In applying the two-step inquiry, there is nothing raised by P which could be interpreted as leading me to decide his case other than on its legal and factual merits. Certainly, there has been no articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on its merits. Indeed, P has not really endeavoured to articulate such a connection at all. Accordingly, P's application is dismissed.

[25] Obviously, it would be preferable at this stage if the Court could now advance both challenges to a hearing. However, there is still P's application for a rehearing of the defendant's application for leave to be dealt with. As earlier indicated, P has confirmed that he does not seek to have the judgment set aside, but wishes to have errors corrected. It is appropriate that timetabling directions should now be established to enable the application for rehearing to be advanced. It is a matter which can be dealt with on the papers, and I perceive that all that is now required is for submissions to be received from P and Ms Douglas on behalf of the defendant. However, in case there are other matters which P or the defendant wish to raise in respect of the application for rehearing, a directions conference is to be

convened. Prior to that directions conference, P and Ms Douglas are to file memoranda indicating whether there are further matters which need to be attended to, and if not, their proposals as to timetabling for the filing of submissions.

[26] There was one matter raised by P in respect of the judgment of 28 July 2017, which can be dealt with now. P has raised the fact that in the final paragraph of the judgment, I stated that there would need to be a hearing in respect of P's interlocutory application for an order extending the interim non-publication order made by the Authority to preserve his rights of challenge on that point. P submitted that this conflicted with earlier and subsequent minutes issued by me. This apparent conflict does not indicate any error in the judgment, but nevertheless the point should be clarified. In an earlier minute dated 19 July 2017, I had indicated that in order to protect the then current position there would be an order extending the interim non-publication order made by the Authority until such time as P's interlocutory application could be heard and a judgment on the application issued by the Court. In a subsequent minute dated 4 September 2017, para 5 of the minute reads as follows:

> These proceedings are presently the subject of the Court's extension of an interim order made by the Authority prohibiting publication of name and details. The Authority's refusal to grant a permanent order prohibiting publication is the subject of the second challenge. In the meantime the Court's extension of the interim order has effect until further order of the Court. Pending such further order the anonymised version of the intituling of the proceedings is maintained. This minute and its contents remain on the Court file and are subject to the interim order prohibiting publication.

[27] As P pointed out during his submissions in respect of the recusal application, in a handwritten note dated 26 July 2017 endorsed on a memorandum filed by Ms Douglas dealing with the interim non-publication order, I had noted that the interim non-publication order would continue until further order of the Court but would be reviewed at the time that the substantive challenges are heard. P maintains that that handwritten note conflicts with the judgment and the other minutes of the Court. That is a misunderstanding on his part, but nevertheless I agree that there is some ambiguity in the language used. In making the handwritten notation, I was not ruling out that an application on the interim non-publication order would be heard before the substantive challenges are heard. I contemplated that if following an

earlier hearing the interim non-publication orders were extended, the matter would still need to be the subject of final review when P's challenge against the Authority's refusal to grant permanent non-publication was heard. In any event, having now reviewed the matter, I consider that the interim order should continue until that challenge itself is heard, and the Court will then have the opportunity of reviewing the matter substantively based on all the evidence, which will be available at that time.

[28] The final matter needing consideration is the issue of costs. While P has made submissions on the matter of costs, costs on the recusal application will be reserved and considered with all other issues of costs when the challenges have been finally determined on their merits.

M E Perkins

Judge

Judgment signed at 3 pm on 27 November 2017