DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Daniel Brewer
v
Benchmark OT Pty Ltd
(U2023/3894)

DEPUTY PRESIDENT EASTON — SYDNEY, 28 JUNE 2023

Application for an unfair dismissal remedy – recusal application – apprehended bias – fair-minded lay observer – double might test – prejudgement v predisposition – active case management – ordinary judicial practice – allocation of matters in FWC – application refused.

[1] On 8 May 2023 Mr Daniel Brewer made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) for a remedy, alleging that he had been unfairly dismissed from his employment with Benchmark OT Pty Ltd.

[2] Mr Brewer was employed for approximately 18 months. He resigned his employment but alleges that during his employment he was bullied, and experienced significant discrimination for having a mental health condition and was constructively dismissed. Benchmark OT says that Mr Brewer was not dismissed but "resigned as an employee of the Respondent" and asked to be engaged as an independent contractor.

[3] A Directions Hearing took place on 13 June 2023 by telephone. At the Directions Hearing a tight timetable was set to hear and determine the significant threshold question of whether Mr Brewer was "an employee who was dismissed" for the purposes of s.386 of the *Fair Work Act 2009* (Cth) (**FW Act**).

[4] Mr Brewer's evidence and submissions on the discrete question of whether he was dismissed were due on 19 June 2023. Mr Brewer did not file any evidence or materials on that day but instead sent an email asking that a different member of the Commission decide his case and raised a complaint about how his case was being handled.

[5] At an interlocutory hearing on 26 June 2023 I heard arguments from Mr Brewer and Benchmark OT and announced to the parties that I would not recuse myself from continuing to deal with Mr Brewer's application. I provided a summary of my reasons for doing so at the hearing and in this decision I provide my reasons in full.

General Principles - Apprehension of Bias

[6] The legal test for apprehended bias is well established: a judge or decision-maker is disqualified if a fair-minded lay observer might reasonably apprehend that the judge or decision maker might not bring an impartial mind to the resolution of the question they are required to decide. In the High Court decision in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [2000] HCA 63 at [3]-[8] the majority said:

> "[3] Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal…
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> [4] The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker. Most often it now finds its reflection and application in the body of learning that has developed about procedural fairness…
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> [5] … That principle is obviously infringed in a case of actual bias on the part of a judicial officer or juror…
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> [6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal)**, 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**. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> [7] The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.
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> [8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. 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. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no

assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[Footnotes omitted, emphasis added]

[7] Although it might seem counter-intuitive, it is practical and appropriate for the decision-maker to whom the matter has been allocated to determine whether to recuse themself. As explained in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 436:

> "… There are obvious reasons why the issue of, for example, whether a particular judge is in fact biased or there is an appearance of bias should not be the subject of factual contest, by evidence and counter-evidence, before the judge. A fortiori, the issue of whether one judge should for such reasons not hear a case cannot be brought before another judge to decide the former's bias, pre-judgment, or the like, or the effect of them. The principle adopted and followed has been that (special cases apart) the matter is to be determined by the judge himself and, if he be wrong, his error is to be corrected on appeal."

General Principles - The fair-minded lay observer

[8] In *Charisteas v Charisteas* (2021) 273 CLR 289 at 299-300, [2021] HCA 29 at [21] the High Court said that the fair-minded lay observer is a member of "the public served by the courts" rather than a member of the judiciary or the legal profession.

[9] The fair-minded lay observer is taken to understand that a judge/decision maker is a person "whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial" (per *Johnson v Johnson* (2000) 201 CLR 488, [2000] HCA 48 at [12]).

[10] The fair-minded lay observer is also taken to have knowledge of the material facts of the case, including the material facts understood in the broader context of the proceedings where appropriate (see *Regional Express Holdings v Hanson* (2021) 306 IR 174 at 201, [2021] FWCFB 2755 at [60]). This broader context may include the fact that the Commission is a specialist tribunal established to deal with matters in a practical, expeditious and effective manner, and that the Commission is required to perform its functions in a manner that is fair and just and is quick, informal and avoids unnecessary technicalities (see s.577 and see also *Tang v Curtin University* [2022] FWC 2865 at [43]).

General Principles - Open mind not an empty mind - prejudgment v predisposition

[11] In *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779 at [102] former Chief Justice Allsop observed:

> "… It is an open, and not an empty, mind that must be kept. The apprehension is of a lack of an open mind or prejudgment, not that the case will or may be determined adversely."

[citations omitted]

[12] In *Dennis v Commonwealth Bank of Australia* (2019) 272 FCR 343, [2019] FCAFC 231 at [32] the Full Court observed at [32] that it is prejudgment, not predisposition, which engages the apprehended bias rule:

> "… The aspect of the apprehended bias rule in issue in this case is prejudgment. It is important to note that it is prejudgment, not predisposition, which engages the rule. As Gleeson CJ and Gummow J said in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 at [71]:
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>> ... All that was necessary to constitute bias, it was said, was an inclination or predisposition of mind. Under pressure of argument, this was qualified by the addition of adjectives such as "wrongful" or "improper". The precise content of those adjectives, in the context, is not clear. Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decisionmaker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias."

General Principles - Active case management and ordinary judicial practice

[13] The majority in *Johnson v Johnson* (2000) 201 CLR 488 at 493, [2000] HCA 48 at [13] made the following observations about active case management and ordinary judicial practice:

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* [(1989) [1989] HCA 44; 167 CLR 568 at 571] Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case". Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."
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> [Footnotes omitted.]

General Principles - A serious matter

[14] The test has been described as a "double might" test, that a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind, which lowers the burden of proof below that of probabilities (see *Chamoun v District Court of New South Wales* [2018] NSWCA 187 at [39]).

[15] In *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 at [36] the Court observed that an allegation of bias, including an allegation of apprehended bias, is a serious matter that must be distinctly made and clearly proved:

> "… an allegation of bias against a judge on the basis of prejudgment is a serious matter not the least because it carries with it the suggestion that the judge has failed to honour his or her judicial oath as such might be questioned by the fair-minded observer. As is also the case where such an allegation is made against an administrative officer, the allegation must be "distinctly made and clearly proved" (*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 at [69] per Gleeson CJ and Gummow J)."

[16] Finally, it has been long recognised that judges and decision makers must not agree to a recusal application too readily. As Mason J emphasised in *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352, 1986] HCA 39 at [5]:

> "… Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

General Principles – apprehended bias and the allocation of matters in the Commission

[17] In *Amec Foster Wheeler Australia Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2021) 307 IR 119 at 131-132, [2021] FWCFB 3191 at [27]-[30] a Full Bench made the following observations:

> "[27] It is necessary to begin by explaining the basis upon which matters are allocated within the Commission. The power to allocate matters to particular members of the Commission or Full Benches for determination rests with the President by the issue of directions under s 582 of the FW Act. The President's powers in this respect include, in s 582(4)(d), the power to make "a direction about the transfer between FWC Members (including a transfer between Full Benches) of one or more matters being dealt with by the FWC". In day-to-day practice, this power is often exercised by other presidential members of the Commission by way of a delegation of power by the President pursuant to s 584(1). Members are required to comply with directions made under s 582: s 582(5). There is no express indication in the FW Act that these powers are exercisable upon application by parties to particular proceedings, nor that the exercise of these powers constitutes a "decision" within the meaning of s 598 capable of being appealed under s 604.

> [28] Separate to this, the President has power under s 615 to direct that a matter be dealt with by a Full Bench and, under s 615A, is required to direct that a matter be dealt with by a Full Bench if an application is made by a party who has made, or will make, submissions for consideration in the matter or by the Minister, and the President is satisfied that it is in the public interest to do so. Section 615A operates in contradistinction to s 582 (and s 615) since it expressly contemplates an application being made for referral to a Full Bench. Because the power in s 615A is only exercisable upon application, this may give rise to a decision within the meaning of s 598.
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> [29] The above provisions operate subject to the duty to afford procedural fairness, which is a fundamental common law doctrine not excluded by the FW Act and is therefore applicable to the exercise of the Commission's powers and functions. The observance of the rules of procedural fairness, which include the rule against bias, is an implied condition of the exercise of the Commission's jurisdiction. Therefore, if a member in the course of dealing with a matter engages in conduct which gives rise to a reasonable apprehension of bias (or demonstrates actual bias), the member is disqualified from further dealing with the matter and must recuse themself. In that circumstance, it would be necessary for the President, or a delegate, to reallocate the matter pursuant to s 582.
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> [30] Absent any disqualification because of a breach of the rule against bias, we do not consider that a single member of the Commission who has been allocated a matter to deal with to finality has the power to cease dealing with it and transfer it to another member on the basis of an "objection" by a party that the member has conciliated the matter. As earlier stated, Amec submitted that such a power exists in s 589(1) of the FW Act and that this power may be exercised on application by a party pursuant to s 589(3)(b). We disagree. Section 589(1) confers a broad procedural power upon the Commission as to "how, when and where a matter is to be dealt with". We do not consider this provision, when read in the context of the other provisions of the FW Act to which we have just referred, is to be understood as empowering a single member who has been directed to determine a matter to simply cease dealing with it and transfer it to another member. The words "how, when and where" are not apt to describe such a power, nor can they be read as operating inconsistently with the obligation of a member to comply with an allocation direction made pursuant to s 582 or the power conferred on the President exclusively (subject to the delegation power) by s 582(4)(d) to direct the transfer of a matter between members."

The material facts

[18] Mr Brewer has made an application for unfair dismissal relief. Mr Brewer was employed for approximately 18 months. He resigned his employment but alleges that he was constructively dismissed.

[19] In his Form F2 application Mr Brewer said that he was given a formal warning after his manager allegedly abused him. He said that his manager had bullied him and that "they refused to allow me to change manager to ensure I'd resigned". He said an investigator "withheld evidence and e-mails which proved I was telling the truth and lied about the timeline" and said he was "subject to significant workplace bullying and harassment, bullied under a 'wellness plan' and experienced significant discrimination for having a mental health condition."

[20] In its Form F3 Response Benchmark OT said that Mr Brewer was not dismissed but "resigned as an employee of the Respondent." Benchmark OT denied that Mr Brewer was coerced into resigning and said that "the Applicant requested that the Respondent engage him as an independent contractor because, amongst other things, the arrangements for independent contractors were different to those for employees and suited his personal circumstances."

[21] A Directions Hearing took place on 13 June 2023. At the Directions Hearing a tight timetable was set to hear and determine the significant threshold question of whether Mr Brewer was "an employee who was dismissed" for the purposes of s.386 of the FW Act, and therefore whether his unfair dismissal claim can progress.

[22] At the Directions Hearing:

(a) an agreed hearing date was set that accommodated the availability of the parties and the Commission;

(b) a timetable was set for the filing of evidence and submissions prior to the hearing;

(c) I referred the parties to the Unfair Dismissal Benchbook and to the template documents available on the Commission's website and encouraged the parties to review this material prior to preparing their own evidence and submissions;

(d) I referred to a matter that I decided recently, *Rongqin He v Smartech Systems Oceania Pty Ltd* [2023] FWC 932 and provided the parties with a copy of my decision. In that decision I cited the relevant principles and ultimately found that the Applicant was not dismissed;

(e) I told the parties to focus their attention on the specific question of whether Mr Brewer resigned, and observed that it was unlikely that events over the whole 18 months of employment will be relevant to the discrete question at hand;

(f) Benchmark OT indicated an intention to ask for permission to be represented by lawyers. Mr Brewer indicated that he opposed Benchmark OT's application. Benchmark OT's application for permission was not determined and instead Benchmark OT was allowed the opportunity to file a short written submission, to which Mr Brewer would have the opportunity to respond;

(g) Mr Brewer asked that the Hearing take place on Microsoft Teams. I suggested to Mr Brewer that an in-person hearing might be less stressful, but I allowed Mr Brewer to choose to have the hearing online; and

(h) I told the parties that any communications sent to the Commission must also be sent to the other party.

[23] At the conclusion of the Directions Hearing the following Directions were made:

1. **Daniel Brewer (Applicant)** must file and serve the following documents in relation to whether or not he was dismissed from his employment **by no later than 4.00pm on 19 June 2023:**
   a) witness statements for each of the witnesses he intends to call at the hearing; and
   b) any other documents he intends to rely on as evidence at the hearing; and
   c) an Outline of Submissions that address the matters referred to in s.386 of the *Fair Work Act 2009*.

2. **Benchmark OT Pty Ltd (Respondent)** must file and serve the following documents in relation to whether or not the Applicant was dismissed from his employment **by no later than 4.00pm on 26 June 2023:**
   a) witness statements for each of the witnesses the Respondent intends to call at the hearing; and
   b) any other documents the Respondent intends to rely on as evidence at the hearing; and
   c) any application for permission to be represented by a legal practitioner under s.596 of the *Fair Work Act 2009* (Cth), accompanied by a written submission of no more than two pages supporting the application; and
   d) an Outline of Submissions that address the matters referred to in s.386 of the *Fair Work Act 2009*.

3. **Daniel Brewer (Applicant)** must file and serve any witness statements and other documentary material in reply including any submissions on legal representation **by no later than 4.00pm on 30 June 2023.**

4. The matter is listed for **Hearing by Video using Microsoft Teams** at **2.00pm on 5 July 2023.**

The ground relied upon by Mr Brewer

[24] In one of the eight emails sent by Mr Brewer asking for his application to be heard by a different member, he included the following list of grounds upon which he said that I should recuse myself:

(i) the hearing was listed at a date I'm unavailable, he attempted to move this forward and I said that is not enough time to prepare. I asked to move it later. He asked me if my circumstances would be different in the future as he is not available for most of July. I said my circumstances would be different yes, and I require time and notice. He then changed the date back to the original date I said I couldn't do as I'm out of state and at a wedding. I raised this with the commission. I didn't get a response. This shows me this isn't being taken seriously.

(ii) he asked to move the date forwards even closer. The procedure is for me to submit my piece, the respondent submit their evidence, I then respond. Then we proceed to hearing. I told him I would lose my opportunity to respond in writing to their response and stayed I'm not good at talking on the spot; he said I can just say during the hearing. This invalidated my point and gave me even less time.

(iii) he said I don't need to submit that much evidence so it shouldn't take me a long time while acknowledging he knew nothing about my case. He gave me an example to keep things brief as that is all that's required. It is definitely with absolutely certainty NOT all that is required. My case does require a severe amount of time and a severe amount of preparation and needs to be reviewed thoroughly by someone who is taking this seriously. He repeatedly made it clear this need only be brief and that the vast majority of evidence and circumstances are irrelevant without knowing anything about my case, and acknowledging he knows nothing about my case. This is clearly inappropriate and a sign this is not being taken seriously.

(iv) I requested to complete the trial online, he told me coming in will be less anxiety provoking for me. I explained to him it would not be. I do not feel this was heard.

(v) I was given an example where someone was found not to have been constructively dismissed due to 'unfair' behaviour by the employer. This is regarding as different to constructive dismissal. I was referred to section 386 of the fair work act and forwarded a previous case. He told me I don't know how similar this case is to my case, to which I told him it was not remotely similar. He explained to me this person could have stayed on a performance plan but was treated unfairly. The idea and foundation that someone cannot be constructively dismissed by being treated unfairly is illogical, as by definition someone needs to be treated unfairly for a constructive dismissal to occur. I felt he was essentially calling my application pointless as proving unfair treatment does not equal a constructive dismissal in his viewpoint which is contradictory to what a constructive dismissal is.

(vi) the respondent asked to hire a lawyer to represent them and it was put to me my thoughts. I said no. On the ground that their low resources in their HR department is not my issue and that there is a significant imbalance of power. I was asked how there is an imbalance of power to which I replied that they are the biggest health company in the country attempting to hire a legal expert on their behalf. I am not in a position to do this resource wise and cannot hire an expert to represent me. He proceeded to allow them to apply for a lawyer as part of their lodgement.

(vii) I was given significantly insufficient time to lodge my application. I was given a deadline of less than a week. He told me I wouldn't need to say much and also acknowledged he knows nothing about my case. I definitely do need to submit a lot of evidence. This is all severely relevant and covers a 7-month time period of incidents, all of which are relevant to my constructive dismissal complaint. I am working more than full time hours and was given insufficient notice. This is not fair proceedings.

(viii) he frequently referenced his workload and how this shouldn't need much time. I am telling you that it does need time. It needs a lot of time. This was undermined.

(ix) I am being asked to speak to him about why I want to change after having expressed an intent to make a complaint. This is inappropriate

(x) I was advised to click a link and follow some templates over how to submit my evidence. What I was told I need to do and what we're on this templates did not align. If you need me to use a template you need to send me the exact template you wish me to use as the link took me to a site with documents with different names to my task. This is not clear

(xi) I do have a witness statement by someone who likely cannot attend the hearing in person, therefore I am not allowed to submit her written statement. Her availability should not invalidate what she has written and signed and be excluded from evidence

(xii) Lastly I was told I have to include the other party into all of my correspondences from my personal email address or he would not read it and disregard it. This is not procedure as the below email makes it abundantly clear that the commission can forward emails to both parties should they not be comfortable and again is a clear sign that he is not interested in taking this seriously.

[renumbered for ease of reference]

[25] At the hearing of the recusal application Mr Brewer expanded upon some of the above grounds, primarily by arguing that his concern after the Directions Hearing was that I was not going to devote proper time and attention to his application, was not prepared to receive or consider what he thought was important evidence in his case and that his case was not being taken seriously.

[26] At the hearing Mr Brewer conceded that Ground (i) above was misplaced insofar as he accepted that the matter was listed for hearing on a day on which Mr Brewer was available. Mr Brewer also agreed in relation to Ground (iv) that even though I had suggested that he consider an in-person hearing, his request for an online hearing was granted. No further consideration of grounds (i) or (iv) is required.

Consideration – 3 step Process

[27] As referred to above, there is a two (perhaps three) step process recognised in the authorities:

(a) the first step is the identification of what is said might lead a decision maker to decide a case other than on the legal and factual merits;

(b) the second step is whether there is a logical connection between that matter and the feared departure from deciding the case on its merits;

(c) and third step is the consideration of whether the apprehension is reasonable, considered in the totality of the relevant circumstances.

Consideration - Step 1 – identify the claimed grounds.

[28] I have taken each of the grounds raised by Mr Brewer and listed above to be matters that Mr Brewer says might lead me to decide his case other than on its legal and factual merits.

[29] Mr Brewer's grounds can be divided into two key categories: (1) concerns regarding the Directions that were made and (2) concerns regarding statements made by me at the Directions Hearing.

[30] The grounds relating to the terms of the Directions made can be summarised as follows:

(a) that I did not give sufficient time for Mr Brewer to prepare his evidence – Grounds (ii), (iii), (vii) and (viii); and

(b) that I denied Mr Brewer the opportunity to provide written evidence and submissions in reply to Benchmark OT's material prior to the hearing – Ground (ii).

[31] The Grounds relating to statements made in the course of the Directions Hearing on 13 June 2023 can be summarised as follows:

(a) that I told Mr Brewer that he will not need to prepare much evidence and that he should not need much time to prepare his material – Ground (iii);

(b) that I referred to another recently decided matter in which I found that even though the Applicant in that matter had been treated unfairly in his employment, he did not resign his employment because there were options available to him other than resignation - Ground (v);

(c) that I did not make a decision (and reject) Benchmark OT's application for permission to have legal representation at the hearing - Ground (vi);

(d) that what was told to Mr Brewer was "essentially" (cf literally) that he has no chance - Ground (v);

(e) that I referred to my own workload, discouraged the filing of certain evidence and gave the impression that I would not take Mr Brewer's case seriously and would not be prepared to consider all of Mr Brewer's evidence - Grounds (iii), (vii), (viii);

(f) that the links to document templates on the Commission's website were not clear - Ground (x); and

(g) that my direction to each party to include the other in email correspondence was a clear sign that I am not interested in taking his case seriously - Ground (xii).

[32] Ground (ix) stands alone from the other grounds insofar as it does not strictly relate to either the Directions made nor statements made at the direction hearing. Mr Brewer says that my decision to hear and consider his recusal application is inappropriate and a basis to apprehend bias.

Consideration - Step 2 – Logical Connection to prejudgment and apprehended bias

[33] I recognise that Mr Brewer's concerns are strongly felt by him. In at least seven emails to my chambers he has forcefully voiced his objections and concerns. In providing these written reasons I have gone to significant lengths to explain the legal principles and my application of those principles, because the root of Mr Brewer's recusal application seems to be his fear that his case will not be taken seriously.

[34] As the Commission member allocated to deal with Mr Brewer's unfair dismissal claim I am required to make an objective assessment about whether there is a logical connection between any of his stated grounds and the feared deviation from the course of deciding the case on its merits.

[35] In considering each ground objectively, I have concluded that none of the claimed grounds have the requisite logical connection.

[36] The Directions issued set a tight timetable for the preparation of a hearing to determine Benchmark OT's jurisdictional objection. The Commission has published performance measures, including that “90% of threshold jurisdiction (except extension of time) hearings take place within 35 days”. Through a combination of the necessity to set a compact timetable, and the availability of the parties and the Commission, Mr Brewer was given only a short period of time to file his evidence. Mr Brewer did not meet this requirement and new directions have been made to allow him further time to prepare his evidence. There is no possibility that the setting of this timetable, even though it proved to be too tight, could objectively lead a fair-minded lay observer to conclude that I might not bring an impartial mind to the question of whether Mr Brewer was dismissed.

[37] The precise words used at the Directions Hearing are not material to resolving Mr Brewer’s recusal application. My recollection of some aspects of the hearing differ from Mr Brewer’s, but those differences are not important. The matters discussed at the Directions Hearing are summarised at paragraph [22] above.

[38] Unfortunately Mr Brewer has taken my generalised explanations and comments to mean that I do not think his case is strong and I might not be prepared to bring an impartial mind to the resolution of his case.

[39] When dealing with unrepresented parties it is appropriate in many circumstances for the Commission to direct the parties’ attention to the relevant terms of the legislation and the principles under which those terms are applied. The following observations from the Full Bench in *James Jones v Ciuzelis* [2015] FWCFB 84 at [44] are apposite:

> “In circumstances where a party is self represented it cannot be assumed that they will have a complete understanding of the relevant legislative provisions. The Commission has an obligation to provide a fair hearing to all parties and this includes the provision of appropriate assistance to parties in the presentation of their case, particularly self represented parties. In the context of this matter the appropriate course would have been for the Deputy President to direct the parties attention to the terms of s.392 and to invite their submissions as to the various criterion set out in that section. This course was not taken and instead the Deputy President proceeded to make findings in relation to the matters set out in s.392(2) without the benefit of any submissions and those findings provided the basis of the quantum of compensation awarded.”

[40] References to case principles and to areas of particular focus at a first Directions Hearing can only be generalised. At this stage of the process no evidence has been filed or tested. In my view it is appropriate to raise matters of initial concern to assist the parties to understand the case they must make or defend at the later hearing. Providing this information and generalised advice is a standard case management tool, particularly when parties are self-represented.

[41] Some of Mr Brewer’s stated grounds complain that I raised these general principles in a way that caused him to think that I had formed the view that his case has no chance of success. Other stated grounds complain that I professed to know nothing about his case.

[42] I am not satisfied that there is any real possibility that a fair-minded lay observer, with knowledge of the material facts in context of the proceedings, might apprehend that I might not bring an impartial mind to the determination of Mr Brewer's case.

[43] The directions made and the conduct at the Directions Hearing were reasonable and appropriate (which is not the test for a recusal application) and provided Mr Brewer with a fair hearing (which is also not the test).

[44] None of the matters raised at the Directions Hearing, viewed singularly or collectively, were consistent with a possibility of a prejudgment of Mr Brewer's case (which is relevant to the test in a recusal application).

[45] Some grounds relied upon by Mr Brewer are consistent with the possibility of a predisposition towards, in this case, applying the same principles and authorities to Mr Brewer's case as I did in the earlier case to which the parties were referred.

[46] As the authorities make clear however, it is prejudgment that engages the rule, not predisposition.

[47] The other grounds relied upon by Mr Brewer can be dealt with in short compass:

(a) Ground (vi): Benchmark OT asked for the opportunity to provide a short written submission in support of its application for permission to appear by way of a legal representative. As a matter of fairness to Benchmark OT I agreed to its request. No issue of apprehended bias could objectively arise from this process;

(b) Ground (xii): there is absolutely no logical connection between my instruction to both parties to ensure that communications sent to the Commission are copied to the other party, and any apprehension of bias. The instruction given applied equally to both parties; and

(c) Ground (x): Mr Brewer's complaint that the links to document templates on the Commission's website were not clear has no relevance to any apprehension of bias.

Consideration - Step 3 – whether the apprehension is reasonable.

[48] Step 3 is not required because none of the grounds relied upon by Mr Brewer (Step 1) have the requisite logical connection to the feared deviation from the course of deciding the case in its merits (Step 2). There is no objective apprehension of bias that requires assessment at Step 3.

Conclusion

[49] Mr Brewer's application that I recuse myself was rejected and further directions have been made to prepare the matter for hearing before me.

DEPUTY PRESIDENT

Mr *D Brewer*, Applicant
Ms *C McKenna*, for the Respondent

Hearing details:

2023.
Sydney (By Telephone)
June 26.

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