[2023] FWC 843

The attached document replaces the document previously issued with the above code on 6 April 2023 to amend references to ‘Applicant’ to ‘Respondent’.

Associate to Deputy President Dobson

Dated 6 April 2023

DECISION

Fair Work Act 2009
s.789FC - Application for an order to stop bullying

Alexis Jephcott
(SO2022/609)

DEPUTY PRESIDENT DOBSON BRISBANE, 6 APRIL 2023

Application for recusal – reasonable apprehension of bias – application refused

Introduction and Background

[1] On 7 December 2022, Ms Alexis Jephcott (**Jephcott / the Respondent**) made an application pursuant to s.789FC of the *Fair Work Act 2009* (**the Act**) to the Fair Work Commission (**the Commission**) for an order to stop bullying. The Respondent's employer was at the relevant times and continues be Freezone Public Health Pty Ltd Trading as Freezone (**Freezone / the Employer**) and the person named in the application is Mr Nathan Scheuer (**Mr Scheuer / the Person Named / the Recusal Applicant**).

[2] The matter was allocated to me on 15 December 2022, and I listed the matter for a conference on 22 December 2022.

[3] During the conference on 22 December 2022, I shuttled between the parties conveying various offers from both parties to the other in an attempt to resolve the matter. These were not my personal views but the offers made between the parties upon which I expressed no views.

[4] During the conciliation Mr Scheuer gave the Commission an undertaking, on transcript, that he would not have contact with Ms Jephcott and would instead direct any requests for information to the Employer's external accountant. The matter was not able to otherwise be resolved through conciliation by me and I issued directions for the filing of material. The matter was set for a substantive hearing on 16 and 17 March 2023 in person in Brisbane.

[5] On 6 January 2023 my chambers received correspondence from Ms Jephcott that Mr Scheuer had breached the undertaking and had sent her an email at 6.58am that day, that she alleged constituted further bullying. The email was:

> **"Subject:** Re: Freezone URGENT (KCL 172349) [KCL-ACTIVE.FID84449]
>
> Alexis,
> Once again your lack of experience is glaring!
> Your attempts to not look in the mirror are palpable as it's a pretty ugly financial image

> You know you have increased wages and bled the company dry with cash stock purchases and machinery purchases (to leave nothing to distribute?) which whilst achieving the purpose of making sure I didn't get a distribution has put mum and dad's house at risk.
> You might be better off going back to law as they may need a lawyer soon.
> Any further besmirching of my character etc and Jeremy will have an endless budget to rectify "

[6] I called a conference for later that same day and gave the parties an opportunity to explain the breach of the undertaking. Mr Scheuer claimed it was an accident, a genuine mistake that he accidentally pressed the send button rather than delete. He claimed he had sent this email previously. Ms Jephcott disputed this. On the basis of the breach of the undertaking, I issued interim orders[1] which were reflective of the undertaking given by consent by Mr Scheuer as I believed without them there was an ongoing risk to the safety of Ms Jephcott that needed to be addressed pending the full hearing.

[7] The parties were offered another Member Assisted Conference (MAC) in an attempt to resolve the matter, which was agreed and was conducted on Tuesday 14 March 2023. The Respondent, Ms Jephcott and the Employer, Mr Jephcott, were self-represented. Mr Scheuer was represented by Mr Daniel Bean (who came in and out through the conference and my associate dialled him back in) and Ms Gemma Sibley-Lewis from KCL Law. Mr Bean sought leave to legally represent Mr Scheuer on the basis of s.596(2) complexity, efficiency and fairness. Ms Jephcott objected noting that Mr Scheuer is legally qualified (as is she) and that she was self-represented. Despite Ms Jephcott's objection, I granted leave for Mr Scheuer to be represented because of the complex issues in contention, the fairness to the parties and the fact that the person named was a key witness in the matter.

[8] At the beginning of the MAC, I made it clear that the purpose of the MAC was to see if the matter could be resolved prior to proceeding to arbitration and that while I would remain impartial about the matters, I may express some preliminary views about the strengths and weaknesses of the case based on the material presently before me. As per the ordinary course of a conference before me, I explained that any preliminary view would be based only on the evidence before me at that time and this view could change as a result of further evidence given at hearing including witness evidence and cross examination of witnesses which could substantially change the preliminary views I might express at the MAC. I asked the parties if they agreed to proceed on this basis. They all said yes. All parties stated that they would not have an objection to me arbitrating the matter should it not be resolved in the MAC.

[9] The matter did not resolve at the MAC with it ending on the basis that Mr Scheuer would consider the last offer put by Ms Jephcott and would respond by the end of the day. More fulsome details about the conduct of the MAC follows later.

[10] At 4:40pm that day (14 March 2023) Mr Scheuer advised my chambers that Ms Jephcott's offer was rejected.

[11] Given the matter was listed for hearing on 16 March 2023 and having reviewed the material filed by the parties in preparation for that hearing, my chambers wrote to the parties on 15 March 2023, at 11.22am, providing information about the hearing (in respect of parking, the digital court book and relevant practice notes) and advising the parties:

> "***Corporations Act 2001 – Section 853C***

> *The Deputy President raises that on the basis of the material raised by the parties, it appears the parties have raised concerns which may go to the fit and proper test of a Director pursuant to the Corporations Act 2001. The Deputy President has* ***not*** *formed a view on this, however in the interests of procedural fairness, will be seeking the views of the parties in this respect.*"

[12] Later that day, an email was received from Ms Sibley-Lewis at 3.54pm, alerting my chambers that Mr Scheuer was intending to make an oral application for my recusal the following day.

[13] At the hearing on the morning of 16 March 2023, Ms Jephcott was self-represented and the Employer, Mr Jephcott, was also self-represented. Mr Scheuer was represented by Mr Ryan Haddrick of Counsel, instructed by Ms Sibley-Lewis.

[14] Immediately prior to the hearing commencing, I was provided with two affidavits; one of Mr Bean of 27 paragraphs and the other of Ms Sibley-Lewis of 5 paragraphs which stated that she agreed with the contents of the affidavit of Mr Bean.

[15] After appearances were taken, Counsel for Mr Scheuer raised an oral application on behalf of Mr Scheuer that I should recuse myself on the grounds of apprehended bias. He tendered the two witness statements stating that Mr Bean was unable to swear in his evidence but that Ms Sibley-Lewis would be available to do so.

[16] Counsel for Mr Scheuer put to me that the entire evidence before the Commission from which I should make a decision to recuse myself was the two affidavits albeit that Mr Bean was not available to have his evidence sworn or tested in cross-examination. I permitted a short adjournment to arrange for Ms Sibley-Lewis to give evidence. Counsel for Mr Scheuer put in submissions that if I didn't recuse myself from hearing the substantive matter, Mr Scheuer would seek to have the matter heard by a Full Bench of the Commission or the Federal Court.

[17] I concluded to adjourn the recusal hearing, primarily on account of the speed at which it was being conducted, and as Mr Bean was not available to give oral evidence. I was also aware that Mr Bean had not been present for the entirety of the MAC on 14 March 2023, as my Associate needed to dial him back into the MAC. This had not been covered in his affidavit. Nor had there been inclusion in the witness statement of important comments I had made at the beginning of the conference which set the context for the MAC.

[18] Directions were shortly issued from my chambers providing for Mr Scheuer to file submissions, evidence and notes by 4.00pm on 20 March 2023 and Ms Jephcott, and Mr Jephcott, the Employer by 4.00pm on 23 March 2023 with the matter listed for hearing on 4 April 2023.

[19] Mr Scheuer submits in his submissions, that in conducting the MAC, I:

> "necessarily placed pressure on one (and possibly all) parties to compromise the stop bullying application. In doing so, the Deputy President necessarily revealed to Mr Scheuer that she had formed firm views about the appropriate outcome of the yet-to-be heard stop bullying application, and the remedy or remedies that ought to be ordered. Mr Scheuer (and his legal representatives) are not critical of Deputy President Dobson for expressing firm views about the

> merits of Mr Scheuer's position as part of the Member Assisted Conciliation; the difficulty arises when (as has happened) the matter was not settled in the Member Assisted Conciliation, and now a hearing must be held by a member of the Commission who is (and is seen to be by a fair minded observer) independent, impartial, and not formed views about the appropriate outcome of the matter."

Evidence of the Applicant in the Recusal Application

[20] Mr Scheuer relies upon the materials of the affidavit sworn by Mr Bean on 15 March 2023 but dated 16 March 2023,[2] the further affidavit sworn by Mr Bean on 20 March 2023[3] and the affidavit of Ms Sibley-Lewis sworn on 16 March 2023.[4]

[21] Mr Bean stated in his first affidavit[5] that he was instructed by his client that I had made remarks suggesting his client should leave the Employer, at the first MAC on 22 December 2022 and that I granted his client leave to be legally represented at the second MAC on 14 March 2023 and throughout the remainder of the proceedings.

[22] Mr Bean stated that I asked the parties at the outset whether they took issue with me conducting the hearing should the matter not resolve at the MAC and that he conveyed on behalf of his client that he would not.

[23] Mr Bean stated that he believed I had formed a view, evidenced through my tone and comments, some of which he claimed was overtly negative, that I did not think his client had any case to be advanced at trial and that I had used words to the effect that it would "*be hard to convince me of the merits of his defence*". Mr Bean stated that at one point I said words to the effect that emails between the parties "*being clear and on the record*" and "*how could you try to defend your client's actions*." He believed I intimated that I had already made a decision about the matter and the remedies that would be applied and that whatever evidence his client was to produce would not make a difference to that outcome. Mr Bean further stated that he formed the impression I had formed clear, hard and fast views of his client and the merits of his defence and that I had made up my mind without his client being afforded the opportunity to adduce evidence or dissuade me from the views I had already formed.

[24] Mr Bean stated that in the presence of all parties, I said that one particular email amounted to sexual harassment and that I viewed the remaining allegations of bullying were substantiated. He stated that I admonished him when he put forward his clients first offer, that I said it was "*completely inappropriate*" and that it would not be conveyed to the other side.

[25] Mr Bean also stated that when conveying offers or making comments to me, that he was met with long pauses and silence which he interpreted to be an attempt to intimidate his client into agreeing to terms unfavourable to him. He stated that the way offers were conveyed were also designed to put pressure on his client to accept them, including by advising his client that Mr Jephcott had foreshadowed also making a further bullying application against him and that his client should avoid that further application by compromising on his position.

[26] Mr Bean stated that the offers I conveyed were that his client should, in essence capitulate, that as his legal representative he had an obligation to pressure his client to do so, that all of the offers involved his client selling and relinquishing his shareholding and/or

directorship in the company and that his client would likely suffer reputational damage should the matter go to hearing.

[27] Mr Bean stated that when he requested an extension of time to consider an offer from the Respondent, Ms Jephcott and the Employer, Mr Jephcott that I queried why he wanted that time and when granting the extension, I did so on the basis that he was not to make a counteroffer.

[28] After receiving a copy of the transcript from the morning of the hearing on 16 March 2023, (which was vacated a short time after beginning due to the recusal application), Mr Bean filed a further affidavit acknowledging that he recalled part of my Statement (set out at paragraph [54] of this decision), specifically "*stating words to the effect that she may make comment on the strength and weaknesses of the parties' cases, that the evidence is not finalised at that point, and that further evidence is yet to be heard, and that evidence will be produced at the hearing, should the matter proceed.*" Mr Bean stated that he recalled the words being briefly stated and that no extra additional emphasis was placed on them that made them more obvious than any other words in the pre-amble before the MAC commenced. Mr Bean further stated that he didn't recall the words verbatim but viewed them as a "*standard disclaimer,*" that it was not a disclaimer that went to any great extent nor stood out to him as an emphasised point and that in his recollection the way in which the MAC was conducted was in such a manner that any evidence adduced by his client at hearing would have no effect on my pre-formed view against his client.

[29] I will deal further with the issues that arose from cross examination by the Respondent and some questions from myself. The most significant issue raised by the Respondent was the absence of any reference to my opening Statement (see paragraph [54]) in Mr Bean's first affidavit, given in her view that it was such a significant fact in the circumstances.

[30] Ms Sibley-Lewis in her affidavit attests[6] to attending the MAC on 14 March 2023 and that she agreed with Mr Bean's statement based on her own observations.

[31] In cross examination by the Respondent, Ms Sibley Lewis was unable to explain why she also had omitted any reference to my opening Statement (see paragraph [54]) again given that it was material to the matters in contest. On one particular question, Ms Sibley Lewis gave 3 different responses which I will refer to later.

Evidence of the Respondent

[32] The Respondent relied upon her own statement at pages 254-255[7] of the Digital Court Book (DCB), sworn in as her evidence in chief at the hearing on 4 April 2023.

[33] The Respondent contended[8] that at the beginning of the MAC, I asked the permission of the parties to hear the matter on 16 March 2023 and that all agreed. The Respondent noted that I stated at the outset, while all parties were present, that I would express preliminary views based on the current evidence but that these views may change once the evidence is tested and new evidence is adduced at the hearing.

[34] The Respondent stated that I asked her about the progress of another complaint against Mr Scheuer that she had made in the Australian Human Rights Commission and that she explained there was a lengthy delay in processing that complaint. The Respondent stated that the parties were then separated.

[35] The Respondent also stated that while the parties were present, she was left with no impression that I had prejudged the merits of her case in a favourable way, nor did I make any representations about the merits of her application or Mr Scheuer's defence nor the merits of that defence.

[36] The Respondent stated that I did not make the statements referred to in Mr Bean's affidavit which were that an email of 5 May 2020 "*was sexual harassmen*t" or that I "v*iewed the remaining allegations of bullying in dispute were substantiated*."

[37] The Respondent stated that during the private session various offers were put forward to settle the matter which I conveyed to Mr Scheuer and that in her presence, the Employer named, Mr Jephcott, advised me that he intended to make an application for a stop bullying order himself, against Mr Scheuer. The Respondent further stated that at no time did I express any views during the private conversations that would lead her to believe that I had prejudged the merits of her case in a favourable manner.

[38] Under cross examination, the Respondent gave evidence that she was admitted as a solicitor and it is my view there were no departures of relevance from the Respondent's evidence in chief.

Evidence of the Employer

[39] The Employer, Mr Jephcott relied upon his own statement at pages 256-257[9] of the DCB, sworn in as his evidence in chief at the hearing on 4 April 2023.

[40] Mr Jephcott contended[10] that he was in attendance at the MAC on 14 March 2023 together with myself, Mr Scheuer, Mr Bean, Ms Sibley-Lewis and my associate. Mr Jephcott stated that I said this was "*not a hearing"*, that "*no firm views had been made"* and that "*conciliation was in the interest of all parties"* and that I discussed how the MAC would run and with separating the parties.

[41] Mr Jephcott stated that he did not hear me say that the email (of 5 May 2020) was sexual harassment.

[42] Mr Jephcott contended that he did not hear me say that I "viewed the remaining allegations of bullying still in dispute were substantiated."

[43] Mr Jephcott stated that he never heard me say that it would be hard to convince me of the merits of Mr Scheuer's defence.

[44] Mr Jephcott claimed that during the MAC, I put forward the offer that Mr Scheuer was prepared to make to settle the matter. That offer was that Mr Scheuer would remain in the Company and would only communicate with Mr Jephcott. He stated further that he told me that he no longer speaks to Mr Scheuer due to a relationship breakdown caused by Mr Scheuer's actions and that this is the reason the Respondent is now the target of Mr Scheuer's behaviour. Mr Jephcott said there was no way that Mr Scheuer could remain in the Company as, in his opinion, Mr Scheuer's actions towards Ms Jephcott "*have been reprehensible and irreparable*".

[45] Mr Jephcott also stated that he told me he intended to make an application to the Commission for an order to stop bullying against Mr Scheuer for himself as he thought he had also been bullied by Mr Scheuer during his time as a Director of the Company. He went on to state that he told me he would buy Mr Scheuer out and put an offer to him which he asked me to relay to Mr Scheuer and that after further offers the matter was unable to be resolved.

[46] Under a brief cross examination, it is my view that there were no departures of relevance from this evidence.

Relevant Principles

[47] The Commission has generally adopted the approach to apprehended bias set out by the High Court in Ebner.[11] The majority in that judgement said:

> "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.
>
> 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.
>
> 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.'[12][references omitted]

[48] Also relevant is the statement made by Mason J (as his Honour then was) in Re JRL; Ex parte CJL:

> "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."[13]

[49] I also consider the following statement made by Dawson J in the same case to be relevant to this matter:

> "But the whole of the circumstances must be considered and such a conclusion must be firmly established and should not be reached lightly. Moreover, the whole of the circumstances are not confined to the conduct said to afford reasonable grounds for suspecting a lack of impartiality. They include what was done by the judge subsequently, which may be sufficient to eradicate any reasonable apprehension of bias notwithstanding an earlier lapse in the observance of proper procedures."[14]

[50] I note that the Full Bench has noted that s.592 of the Act makes it clear that the conduct of conferences by Members in relation to matters before them, including the expression of opinions, is indeed contemplated by the Act to be an entirely normal and regular feature of the performance of functions and the exercise of powers by the Commission.[15]

[51] Further relevance is found in that "A decision-maker who expresses provisional views which reflect a certain tendency of mind is not, on that account alone, to be taken to indicate prejudgment".[16]

[52] Nor does the expression of provisional views during the course of argument in relation to matters on which the parties are permitted to make full submissions manifest partiality or bias.[17] Rather, the expression of a provisional view on a particular issue or warning parties of the consequences of a provisional view will typically be entirely consistent with the requirements of procedural fairness.[18]

[53] However, a Member's observations can exceed what is a proper and reasonable expression of tentative views.[19] A line is drawn between forthright and robust indications of

provisional views on matters of importance, and an impermissible indication of prejudgement that has the effect of disqualifying a decision maker.[20]

Consideration

[54] In both the conference on 22 December 2022 and again at the MAC on 14 March 2023, I recall prefacing any views expressed as preliminary, made on the basis of the material presently before me at the time of the relevant conference. I went to great lengths on both occasions to express to all parties that when matters proceed to trial, witness evidence is given and cross examination takes place, that it is not possible to predict where that may lead us and that it is likely to change any preliminary view presently held. It was made clear to the parties that no final conclusions could be reached (Statement).

[55] This Statement in my view set the context for the entire conference both on 22 December 2022 and again for the MAC on 14 March 2023. Under cross-examination by the Respondent, Mr Bean acknowledged that he failed to raise the Statement that I had made in his first affidavit as did Ms Sibley-Lewis. I note that Mr Bean acknowledged this fact in his second affidavit after it was raised by me in the brief hearing on 16 March 2023.[21]

[56] Whilst I note in Mr Bean's second affidavit that he viewed that words were "briefly stated"[22] and that "extra emphasis was not placed on those words to cause them to stand out or be made clearer than any other part of the pre-amble",[23] the statement I make is made by me in all MACs. It is a very important statement and I go to great lengths to inform the parties that any preliminary views I express in the MAC are going to be affected by subsequent witness evidence, testimony and cross examination. I don't accept that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the questions I should decide, based on any views I might make following that Statement, the context it established for the entire MAC and my conduct during the MAC which was at all times consistent with the Statement. It is a crucial and important point made for an important reason and that is to demonstrate that a decision or final view has not been formed and cannot be formed at that juncture.

[57] Further I note that Mr Bean was not present throughout the conference on 14 March 2023. The telephone records showing his absence from the call from at least the period between 10.51am and 11:00am when my associate dialled him back in. It was put by Counsel for Mr Scheuer that the conference ended at 1pm. This is factually incorrect. The MAC ended at approximately 11:32am AEST.

[58] A further point arises from Ms Sibley-Lewis's evidence in both her affidavit and her evidence at hearing. When asked in the recusal hearing on 4 April 2023 if Mr Bean was present throughout the conference on the 14 March 2023, Ms Sibley-Lewis affirmed that he was. In re-examination, Ms Sibley-Lewis was asked if she was in a different room to Mr Bean and therefore could it be possible that she didn't see Mr Bean leave for a short time, to which Ms Sibley-Lewis agreed. It appears that Ms Sibley-Lewis' evidence may have reflected a failure to accurately recall what occurred. This is so because I distinctly recall Ms Sibley-Lewis telling me during the MAC that Mr Bean had left to make a call to counsel. When I enquired of this with her in the recusal hearing after the re-examination, Ms Sibley-Lewis conceded that this is what occurred.

[59] In respect of Mr Bean's evidence that, inter-alia, it was through my tone and comments that he concluded I had reached a view that his client did not have a case to be advanced at trial,[24] I consider that my Statement would have set the context clearly. Mr Bean stated that I had said "*in the presence of all parties, words to the effect that it would be hard to convince [her] of the merits of his defence*."[25] This evidence was not supported by the evidence of Ms Jephcott nor Mr Jephcott. I reject that I conveyed that message. I do however recall in private discussions with Mr Scheuer during the MAC, discussing one particular email. Mr Jephcott had sent an email to Mr Scheuer, attaching proudly a photograph of Ms Jephcott in her graduation robes, to which Mr Scheuer responded by email saying he would prefer to see a photograph of Ms Jephcott in her bikini. I do recall asking Mr Bean how he would defend that and I did explain that whilst the definition of bullying was that the conduct was required to be repeated, this was not so in the definition of sexual harassment.[26] This is entirely consistent with my initial comments that I may express a preliminary view about the material before me. It was a question open to Mr Scheuer to consider and to put his case at the appropriate time.

[60] In respect of Mr Bean's claims that I said "*words to the effect of "the emails clear to see and on the record"* and *"how could you try to defend his [my client's] actions?*"[27] It appears to me Mr Bean has misconstrued my attempts to draw to his attention to the potential weaknesses in his client's material based on the material before me at that time. It is well founded that an important aspect of the work of the Commission is to proceed as informally as the circumstances of the case permit, without unnecessary technicality.[28] Section 577 of the Act provides that the Commission must perform its functions and exercise its powers in a manner that:

> (a) is fair and just, and
> (b) is quick, informal and avoids unnecessary technicalities, and
> (c) is open and transparent, and
> (d) promotes harmonious and cooperative workplace relations.

This has been described as a 'statutory mandate to get to the heart of matters as directly and effectively as possible'.[29]

[61] Further, expressing a preliminary view is an accepted case-management tool that can guide the parties in presenting their case by directly addressing, clarifying, or narrowing issues in dispute. Expressing a provisional view may assist parties by focusing their argument, acquainting them with matters they may need to address,[30] and providing them with an opportunity to deal with them.[31]

[62] Mr Bean stated in his first affidavit that I said in the presence of all parties that an email "was sexual harassment". The Respondent, Ms Jephcott and the Employer, Mr Jephcott both gave evidence that this was not said or heard in the opening session when all the parties were together. I did make a comment to Mr Bean and his client about this email in private conference which I have set out in preceding paragraph [59].

[63] Mr Bean also stated that I said in the presence of all parties that I viewed the remaining allegations of bullying as substantiated.[32] The Respondent, Ms Jephcott and the Employer, Mr Jephcott both gave evidence that this was not said or heard by them at any time. I reject that I

made that statement. Such a statement is inconsistent with my opening remarks about preliminary views and the importance of witness evidence, testimony and cross examination and a proper hearing after which is the only time such final conclusions could possibly be made.

[64] Mr Bean stated that my tone was overtly negative towards him and his client and that his offers were met with long pauses and silence that he construed as having the purpose of attempting to intimidate his client into agreeing to unfavourable terms. In my view, it appears that Mr Bean has misunderstood. I do my utmost to ensure that parties have time to consider the issues before them including any offers made. I often pause and provide parties time to reflect, often offering them further time alone if required. I also take that time to reflect myself on how I might assist the parties to reach a resolution ensuring any comments are measured, considered and consistent with my opening remarks.

[65] In respect of Mr Bean's assertion that I rejected his first offer as "inappropriate" and that I admonished him for putting it forward,[33] I recall that I highlighted that the offer made was the same as the last offer made at the previous conference and that it was previously rejected by the Respondent, however I would not characterise that as an admonishment. Regardless, I did go on to say that if that was the offer that Mr Scheuer wanted me to put I would do so and I did do so. Mr Jephcott gave uncontested evidence that I put that offer to him.[34]

[66] In respect of Mr Bean's statement that my communication to his client that Mr Jephcott was foreshadowing a further bullying application from himself,[35] and as such that his client ought to compromise his position,[36] it is misconceived. I was conveying what Mr Jephcott had asked me to convey. Mr Jephcott gave evidence of this at hearing which was uncontested.[37]

[67] Mr Bean makes more of the offers that were conveyed and stated that they all required that his client sell and relinquish his shareholding and/or directorship of the Company. The Respondent, Ms Jephcott and the Employer, Mr Jephcott both gave evidence that this is because these were the terms of offer that they asked me to convey.[38] This evidence was uncontested at hearing. That evidence is an accurate account of the circumstances in respect of the offers made.

[68] Mr Bean's evidence characterises offers made by the Respondent and Mr Jephcott as my own views. Those offers made were relayed on behalf of the Respondent and Mr Jephcott, are a normal part of a conciliation process and they therefore could not have been designed to put pressure on Mr Scheuer to accept them.[39] Whether those offers involved the relinquishing of Mr Scheuer's shareholding[40] or not was not of my making, however I do note that one of the offers did indeed provide for Mr Scheuer to retain his shareholding and in that offer the relevant terms of the Corporations act and the Company constitution would govern those holdings.

[69] Mr Bean makes a number of claims including that I intimated that I had already made a decision as to the outcome and the further remedies to be applied, [41] that "*whatever evidence my client was to produce at hearing would not make a difference to the likely outcome of that hearing*"[42] and that he was "*left me (sic) with the unshakable impression that Deputy President Dobson had already formed clear, hard and fast views, of our client and the merits of his defence.*"[43] My opening Statement, the evidence of the Respondent, Ms Jephcott and the Employer, Mr Jephcott and my recollections of my conduct throughout the MAC, are at odds with Mr Bean's (and therefore Ms Sibley-Lewis') evidence.

[70] Any reference to reputational damage[44] was one made to both parties and is not indicative in any way as to any final view formed on the matter. A decision published by the Commission is publicly available and regardless of its contents, has the potential to cause effect on the reputation of any party, whether the decision is favourable to them or not.

[71] When Mr Bean requested an extension of time to consider the offer put by the Respondent until close of business that day, I was concerned that it would limit the ability of the parties to reach a resolution. We were approximately 1 ½ hours into the MAC which had been scheduled for 2 hours, the hearing was set down to occur 2 days later and given my schedule in those two days, I realised that I would not have any further time to assist the parties with respect of any counter offers. I explained this to Mr Bean and Mr Scheuer. Mr Bean also claims in his affidavit that I informed him as a legal practitioner that he was obliged to "*in essence*" pressure his client to accept the capitulation offers made.[45] I can only conclude that Mr Bean has misconstrued[46] my explanation and my attempt to provide his client with information to assist him in considering whether to negotiate a resolution of all matters with the Respondent.

[72] I note that I granted Mr Scheuer leave to be legally represented in circumstances where Mr Scheuer is legally qualified and the Respondent objected strongly to such leave being granted.

[73] I note that in his closing submissions, Counsel for Mr Scheuer suggested that the manner by which I asked questions of his client's witnesses with the preface of "I put it to you", should be considered as descending into the arena of advocacy. I reject this assertion. In my view it was more important from a procedural fairness perspective, that the witnesses had an opportunity to comment on issues that were part of my considerations.

[74] In considering the first step as set out in Ebner,[47] it requires the identification of the factor which it is said might lead the judge or tribunal member to decide a case other than on its legal and factual merits. Given my Statement which set the context of the MAC and my considerations of the issues raised during the MAC, I don't believe there have been any factors identified that would lead me to decide this case other than on its legal and factual merits.

[75] In considering the second step set out in Ebner,[48] that there must be an articulation of the logical connection between the matter and the apprehended deviation from the course of deciding the case on its merits. In my view, given the principles I set out at the beginning of the MAC in order to give it context and the manner in which I conducted the MAC thereafter as set out in this decision, there is no logical connection between my comments and actions during the conference and the possibility that I might depart from impartial decision making, either because I have pre-judged this application or for any other reason.

[76] Sometimes described as the third step in Ebner,[49] I have considered the totality of all the relevant circumstances. The test for apprehended bias is not concerned with apprehensions that are fanciful or unreasonable. In forming a view as to whether I might not bring an impartial mind to resolution of the questions for determination, the fair-minded lay observer is taken to have an understanding of the workings of the Commission and the legislative framework within which it operates.

[77] For the reasons above, I am not satisfied that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to resolution of the questions for determination. The recusal application is refused.

[78] A notice of listing will issue from my chambers for a new date for the Hearing of the substantive application by Ms Jephcott.

DEPUTY PRESIDENT

Appearances:

Mr Ryan Haddrick of Counsel for Mr Scheuer.
Ms Jephcott Self-Represented Respondent.
Mr Jephcott Self-Represented Employer.

Hearing details:

Brisbane (via Microsoft Teams) 4 April 2023.

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<PR760944>

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[1] PR749463

[2] Exhibit A1, in the hearing of 4 April 2023.

[3] Exhibit A2, in the hearing of 4 April 2023.

[4] Exhibit A3, in the hearing of 4 April 2023.

[5] Exhibit A1, in the hearing of 4 April 2023.

[6] Exhibit A3, in the hearing of 4 April 2023.

[7] Exhibit R1, in the hearing of 4 April 2023.

[8] Ibid.

[9] Exhibit R2, in the hearing of 4 April 2023.

[10] Ibid.

[11] Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337.

[12] Ibid [6]-[8].

[13] (1986) 161 CLR 342, 352.

[14] Ibid 371-2.

[15] Amec Foster Wheeler Australia Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2021] FWCFB 3191, [32].
[16] *Johnson v Johnson* [2000] HCA 48, [13].
[17] *Concrete Pty Ltd v Paramatta Design and Developments Pty Ltd* [2006] HCA 55, [112] (Kirby and Crennan JJ), cited in *Barkhazen v Conair Australia Pty Ltd* [2016] FWCFB 8129, [18].
[18] *Oram v Derby Gem Pty Ltd* 134 IR 379, [110].
[19] *Concrete Pty Ltd v Paramatta Design and Developments Pty Ltd* [2006] HCA 55, [112] (Kirby and Crennan JJ), cited in *Barkhazen v Conair Australia Pty Ltd* [2016] FWCFB 8129, [18].
[20] *Antoun v R* [2006] HCA 2. (29) (Kirby J) cited in *Regional Express Holdings Ltd v Hanson* [2021] FWCFB 2755, (73).
[21] Exhibit A2 in the hearing of 4 April 2023.
[22] Ibid [6].
[23] Ibid,
[24] Exhibit A1 [10].
[25] Ibid.
[26] Ibid [12].
[27] Ibid [11].
[28] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, [25] (Buchannan J).
[29] Ibid.
[30] *Hills v Chalk (as executors of the estate of Chalk (deceased))* [2008] QCA159, [92].
[31] *Johnson v Johnson* [2000] HCA 48, [13].
[32] Exhibit R1 [10].
[33] Ibid [14].
[34] Exhibit R2, page 256 of the DCB the last dot point on that page. See also paragraph [44] of this decision.
[35] Exhibit R1 [16].
[36] Ibid.
[37] Exhibit R2.
[38] Exhibits R1 and R2
[39] Exhibit A1 [16].
[40] Ibid [17].
[41] Ibid [18].
[42] Ibid [19].
[43] Ibid [24].
[44] Exhibit A1 [20].
[45] Ibid [22].
[46] Ibid [21].
[47] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[48] Ibid.
[49] Ibid