DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Oliver Doherty
v
Defend Fire Services Pty Ltd T/A Defend Fire
(U2024/74)

COMMISSIONER RIORDAN SYDNEY, 20 MARCH 2024

Application for an unfair dismissal remedy – recusal application – application denied

[1] On 2 January 2024, Mr Oliver Doherty (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by Defend Fire Services Pty Ltd T/A Defend Fire (**the Respondent**) on 12 December 2023.

[2] The matter was listed for a preliminary Conference/Directions by telephone on Thursday, 15 February 2024. A resolution was unable to be reached at this Conference and Directions were agreed to by the parties for programming of the Arbitration Hearing.

[3] Following this Conference, the Respondent provided email correspondence to Chambers making a formal application for me to recuse myself from conducting the Arbitration Hearing (**Recusal Application**).

[4] Directions were therefore set in relation to the Recusal Application, and the substantive directions were put on hold.

[5] This Decision determines the Recusal Application.

Respondent's Submissions

[6] In support of its Recusal Application, the Respondent submitted that as a result of the Conference on 15 February 2024, it has lost confidence that the outcome of an Arbitration conducted by me will be impartial, fair and just. The Respondent noted that the matter should be decided in accordance with:

> "• *the requirements of procedural fairness (Natural Justice);*
>
> • *consistent with the Guiding Principles of the Fair Work Commission. (Refer to 2. About the Commission; 3. Guiding principles and 4. Applying the guiding principles on the Commission's website).*"

[7] The Respondent submitted that in the event I do not recuse myself from hearing this matter, the application of principles above will be in doubt.

[8] The Respondent submitted that the 'Guiding Principles' require that Members perform their functions in a manner that:

> "• *Upholds public confidence in the Commission and in the administration of justice.*
>
> • *Enhances public respect for the Commission.*
>
> • *Ensures a safe work environment*."

[9] The Respondent submitted that the Commission's website states that, to achieve these objectives, Members are required to discharge their official functions in an impartial, safe and respectful manner. Further, it requires that "*Any conduct that potentially put these objectives at risk must be carefully considered*".

[10] The Respondent submitted that it therefore requests careful consideration of whether the events during the 15 February 2024 Conference occurred in accordance with the above principles and if not, whether it could be reasonably be concluded that the events are likely to have "*irremediably undermined*" the Respondent's confidence in a fair and just outcome of an Arbitration Hearing conducted by me.

[11] The Respondent submitted that considerations as to whether a fair process could be expected if I am to decide the matter, include:

> "• *Whether Defend Fire will be fully and properly heard - including be provided full opportunity to present all relevant facts and have these properly considered (and that the scope of the proceedings will be contained to the issue in dispute and not be muddled by consideration of issues not relevant to the fairness of the termination of the Applicant's employment);*
>
> • *Whether the matter will be progressed impartially/without bias to Defend Fire; and*
>
> • *Whether the proceedings will be conducted in a safe and respectful manner*."

[12] The Respondent submitted that 'aspects 1 and 2 above' relate to the essential requirements of procedural fairness and natural justice. The Respondent noted that these requirements include that the parties have a fair opportunity to present their case and be heard and that the decisionmaker must be impartial and free from bias. The Respondent submitted that these requirements cannot be achieved in the absence of a safe and respectful hearing environment.

[13] The Respondent outlined the events of the Conference of 15 February 2024 that it relies on in submitting that it has considerable doubts that an Arbitration Hearing conducted by me will fully comply with the above requirements:

"*1. Head Speaker for Defend Fire was not Fully and Properly Heard:*

The management of the conference did not allow Defend Fire sufficient opportunity to be heard:-

• Mrs Zylia Nuthall (as owner of Defend Fire) was identified at the commencement of the conference as the main spokesperson for Defend Fire. Regardless, the Commissioner made an abrupt and unilateral decision to either drop her from the call or have her silenced in the background; thereby interrupting her participation during the break-away session with Defend Fire. This was when she briefly experienced a phone reception technical difficulty. She was not afforded sufficient opportunity to restore the connection, with the result that Defend Fire's main spokesperson was not heard during the break-away session.

• Furthermore, once joint Conference was recommenced, the Commissioner cut Mrs Nuthall off and said: "Now you just be quiet", in a very disrespectful manner, while he continued the conference with the other participants - again excluding Defend Fire's main spokesperson from participation. Noting also that Mrs Nuthall remained respectful and abided by conference etiquette throughout.

There is a reasonable concern that these actions and disrespectful behaviour towards Mrs Nuthall reflect a discriminatory attitude to and a bias against females, which would be fatal to a fair hearing where Mrs Nuthall will again be the main spokesperson for Defend Fire. It is proposed that this could be avoided if the matter would be allocated to a female alternative Commissioner.

In light of the above, there is considerable doubt that Defend Fire and its main spokesperson will be afforded a full opportunity by the current Commissioner to present its views and discuss its submissions during the arbitration and also doubt as to whether the merits of its presentations and submissions would be properly considered.

2. Lack of Impartiality / Bias

As mentioned above, Defend Fire's concerns (including relating to the Commissioner's bias and lack of impartiality) are based on the accumulation of the actions, comments, manner and tone of the Commissioner over the course of the conference of 15 February 2024. Some examples that caused apprehension of bias, if not concerns about actual bias, include:

• The Commissioner identified with the Applicant at the commencement of the conference by commenting that he (the Commissioner) also was a tradesperson. He further expressly stated that he sympathises with the Applicant's complaint about the heat in Darwin. By these comments and by advocating for him afterwards, the Commissioner created a perception of solidarity with the Applicant, which served to affirm and embolden the Applicant to proceed with his unrealistic compensation claim and prevented the possibility of a settlement during this conference.

• The Commissioner further demonstrate his lack of impartiality by advocating for the Applicant through his enquiries and implying (by his tone and manner) inappropriate supervision, and also questioning adequate wage renumeration of the Applicant (which allegations were easily refuted by the facts then presented by Defend Fire).

The above conduct created concerns as to whether the Commissioner was exercising his power appropriately, as the facts presented in the submissions prior to the conference clearly showed that the summary termination of Applicant employment was warranted and inevitable given the facts. Work circumstances, e.g. supervision and Darwin's climate, renumeration etc are not the subject of the matter before the Commission and not relevant factors to determine whether termination of employment is fair. Grounds for improper exercise of power by decision-makers recognised by law include taking irrelevant considerations into account, failing to take relevant considerations into account, exercising discretionary powers in bad faith or without proper regard for the merits of the case. It should be considered whether the Commissioner's conduct reflected these improper procedural aspects.

• The impression that the Commissioner was not impartial and was in fact using his position to advantage the Applicant to the detriment of Defend Fire was accentuated by the fact that the Commissioner did not give similar weight to the submissions of Defend Fire or acknowledge the valid issues Defend Fire had with the Applicant's conduct, and substance abuse, that have led to the termination of his employment. As a result, the conference was a missed opportunity to achieve a settlement, which would have prevented further unnecessary waste of resources, time and efforts of the Commission and Defend Fire.

• A further example of the Commissioner's bias is the Commission's respective assistance to the parties to participate in the conference, e.g. the Commissioner's Associate dialled in the Applicant at the commencement of the conference, but when the identified main spokesperson and owner of Defend Fire, Mrs Nuthall, briefly experienced technical difficulties to participate during the break-away session, the Commission did not allow time for the main spokesperson to resolve the temporary issue, nor did the Commission dial the main spokesperson in (as was done for the Applicant), but the Commissioner proposed abruptly and unilaterally to cut the main spokesperson out of the discussion, or otherwise have her silenced in the background.

Given the above circumstances (to quote the Fair Work Commission's website, 4. Applying the guideline principles) 'a fair-minded lay observer might reasonable apprehend that the Member might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide".

3. Absence of a Safe and Respectful Hearing Environment

A safe and respectful environment during proceedings of the Commission is indispensable to ensure Natural Justice.

In this context, it should be considered that, following his dismissal, the Applicant has repeatedly made (witnessed or in writing) threats to the life and safety of the main

spokesperson of Defend Fire (Mrs Nuthall); e.g. he stated he will 'throw the fat bitch out of the window' and 'he will see how smart the SA slut is when he visits her in the office'. Furthermore, the Applicant's post termination, in person attendance at the Defend Fire office where the police had to be called due to the Applicant's aggressive and fight provoking behaviour; which was witnessed on video and by the police representative, during the phone call made to 000.

In context of this threatening behaviour, it is a concern if the Commissioner appeared to identify with the Applicant, side with him during the proceedings and, like the Applicant, acted in a disrespectful manner to Mrs Nuthall. This created an expectation that the Arbitration may not be psychologically safe for the main spokesperson if Commissioner Riordan would preside."

[14] The Respondent noted that the examples quoted above "*only partly demonstrate the concerns of [the Respondent]*". The Respondent submitted that the "*manner and tone*" with which I conducted the conference "*accumulatively led to [the Respondent's] conclusion*" that a fair and just outcome cannot be expected if I determine the substantive matter.

[15] The Respondent submitted that, given the events that took place during the 15 February 2024 Conference, it holds significant doubts that its views will be fully heard and properly considered in an unbiased/impartial manner if I do not recuse myself, and continue to hear the substantive application. The Respondent therefore maintained its request that I recuse myself, and submitted that:-

"*This may also prevent spending further unnecessary time, effort and resources by the Commission and Defend Fire, on later formal complaints and/or Appeals due to apprehension of bias or improper proceedings, if the matter is not satisfactorily concluded*."

[16] The Respondent submitted that if I do not recuse myself, it requests:-

"*1. An opportunity to Appeal his decision not to recuse himself (considering that a right to appeal is part of fair administrative process); and*

2. That Defend Fire's concerns be escalated as a formal complaint with respect to the conduct of Commissioner Riordan."

Applicant's Submissions

[17] The Applicant provided brief reply submissions via email correspondence, as follows:

"*…the judge was perfectly fine she was not cut off from anything and the judge cut her off and told her to be quiet because she was nutting* (sic) *in and cutting him off I would like to keep the same judge thankyou he was perfectly fine zaylia just expects everything her way and throws her toys out of the prame* (sic) *when she doesn't get her own way and she was the one bringing different issues into the conversation the judge had every right to cut her off because she is well known for doing this*".

Consideration

[18] It is well established that a Commission Member should not hear a case if there is a reasonable apprehension that they are biased.[1] As the High Court of Australia put it in *Ebner v Official Trustee in Bankruptcy*,[2] "*…bias whether actual or apparent, connotes the absence of impartiality*".[3] A claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[4] The test for apprehended bias is whether "*a fair-minded lay observer might reasonably apprehend that the* [decision maker] *may not bring an impartial mind to the question the* [decision maker] *is required to decide*".[5]

[19] The Commission is bound to deal with matters before it in accordance with equity, good conscience and the substantial merits of the case. The Objects of Part 3-2 of the FW Act state that the procedures and remedies relating to unfair dismissal are intended to ensure that a "*fair go all round*" is afforded to both the employer and the employee concerned. The Commission is also bound to afford parties natural justice. It is of equal importance that Commission Members discharge their duty to hear the evidence and decide the matter.[6] This means that Members should not accept the suggestion of apprehended bias too readily, and simply refer matters to be allocated to other Members.

[20] At the start of the Conference of 15 February 2024, I advised the parties that the Conference would be conducted on a without prejudice basis, and I enquired to each participant whether they would allow me to proceed on the basis that I would not prejudice myself. I explained what that meant, and both parties agreed – including Ms Nuthall.

[21] In private conference, I encouraged both sides to try and seek an outcome, but the parties were too far apart and the offer put by the Applicant was rejected by Respondent, and the offer put by the Respondent was rejected by Applicant. The Applicant then said he wanted to go to hearing and wanted directions set for the filing of materials.

[22] During the course of the Directions, Ms Nuthall interrupted me in an aggressive tone and said "*this is ridiculous, that they were going to make a new application in a different jurisdiction in relation to the Applicant*". I advised her that the issues that she raised and the actions she wished to take were outside the jurisdiction of the FW Act and that she should not interrupt me again.

[23] It would appear that the Respondent expected me to simply dismiss the Applicant's application based on their submissions at the Conference. Obviously, I had no capacity to do so. As frustrating as it may be for the Respondent, the Applicant has a right to have his matter heard, where all of the evidence can be tested under oath, affirmation and cross-examination. If the Applicant has made threats against the Respondent and/or Ms Nuthall in particular, then this conduct can be examined as part of the arbitration proceeding and can be assessed in accordance with s.387 of the FW Act.

[24] I reject the accusation that I rudely or forcefully told Ms Nuthall to stay quiet during the Conference. There was clearly an issue with her phone connection. I stopped the Conference and asked Ms Nuthall to move closer to a window in the hope that the phone connection would

improve. Unfortunately, Ms Nuthall could still not be heard clearly. I was about to adjourn the Conference when Mr Nuthall took over the conduct of the proceeding on the basis of him stating "*I'm the Managing Director and I know the full story*", at which point in time I advised Ms Nuthall that she should remain silent and just listen because she could not be clearly heard or understood. At that point, Mr Nuthall continued with the Conference. At no time did Mr Nuthall relinquish the role of principal advocate back to Ms Nuthall.

[25] The Respondent is not aware of any comments that I made to the Applicant in private conference, nor do I intend to repeat those comments in this Decision. My comments to both parties were "off the record" and "confidential", however, I can say that I did encourage the Applicant to settle the matter and explained the difficulties and consequences of an arbitration and a published decision.

[26] I totally reject the accusation that I displayed bias against Ms Nuthall because she is female. I am a father of four daughters, all of whom have their own independent careers. To suggest that I would be prejudicial against a female representative is without foundation and would condone behaviour that I hope that my daughters will never have to experience.

[27] I accept that I indicated to the Applicant and to the Respondent that I am a qualified Electrician, albeit some 40 years ago. Just because a party is a tradesperson does not give them a "head start" in any arbitration before me. I also hold a Bachelor of Arts and a Bachelor of Laws, yet I have never been accused of showing bias towards a party who has a Tertiary qualification or a Law Degree.

Conclusion

[28] I conducted a Conference to try and assist the parties to reach an agreement. In my 12 years as a Commissioner, this process has helped to resolve hundreds of applications, thereby preventing the necessity of the parties to spend time and money in preparing for an arbitration. During the Conference, the Managing Director of the Respondent volunteered to continue with the Conference when Ms Nuthall could not be heard clearly. They were obviously in different locations. If Ms Nuthall had have advised that her phone problems had been rectified, then obviously, as the principal advocate, she would have been welcome to continue to participate fully in the Conference.

[29] I reject all of the accusations and assertions of the Respondent that I am biased against them in this matter. I made no comment in either the joint or private conferences, to either party, that could be construed as prejudicial to one side or the other. Based on the forms that had been submitted by both parties at this stage, the Applicant is faced with some serious allegations. If the Applicant has threatened the Respondent following his termination, then it is settled law that the Respondent can rely upon these threats when submitting that they had a valid reason to terminate the Applicant.

[30] I find that a fair minded lay observer would not believe that I do not bring an impartial mind to this matter.

[31] For the reasons stated above, the application is dismissed.

[32] However, the resources of the Commission are scarce. The Respondent has already flagged an intention to appeal this Decision if their Recusal Application is dismissed. For a Full Bench to be convened to deal with a matter such as this, would be an absolute waste of the Commission's resources and further delay the substantive proceeding. I cannot allow such a flagrant waste of taxpayers' funds to occur, simply due to my reticence to hand back the file. Therefore, I have decided to return the file to my Regional Co-ordinator to reallocate it to another Member of the Commission.

COMMISSIONER

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[1] *R v Watson; Ex parte Armstrong* (1976) 9 ALR 551, 561–565, cited in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293–294.

[2] (2001) 205 CLR 337.

[3] (2000) 205 CLR 337 at 348.

[4] *Re Medicaments and Related Classes of Goods* (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37] – [39].

[5] *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337 at 344.

[6] *Re J.R.L. Ex parte C.J.L.* (1986) 161 CLR 342, 352.