REASONS FOR DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Prof Andrew Timming
v
Royal Melbourne Institute of Technology
(C2023/8129)

COMMISSIONER CONNOLLY MELBOURNE, 12 APRIL 2024

Application to deal with contraventions involving dismissal – application of recusal on grounds of apprehended bias – recusal application dismissed.

[1] On 22 December 2023, Professor Andrew Timming lodged a Form F8 General Protections application involving dismissal with the Fair Work Commission alleging that on 21 December 2023, he was dismissed from his employment at Royal Melbourne Institute of Technology (RMIT), the Respondent, in contravention of s.365 of the Fair Work Act 2009.

[2] On 15 January 2024, the matter was allocated to my Chambers.

[3] The matter was first listed for a conciliation conference on 6 February 2024. However, on 31 January 2024, the Applicant sought an adjournment to this conference to no earlier than mid-April 2024 on the basis that the Applicant had begun an appeal under clause 35 of the *RMIT Enterprise Agreement 2018* and that the Respondent had only just formed an Independent Investigation Panel. With the Respondent's consent, I granted this request. This conference was vacated and an update on the matter was requested in the first week of April 2024.

[4] On 29 February 2024, the Respondent's representatives advised my Chambers that the appeal process lodged by the Applicant in relation to his summary termination had concluded and the decision was upheld and communicated to the Applicant on 15 February 2024. The Respondent now sought that the Applicant advise the Commission whether he would proceed with his application or discontinue.

[5] On the same day, the Applicant indicated to my Chambers that he would press his application. However, later on in the day, the Applicant's representative sought a further adjournment to this matter up until early May 2024 on the following basis:

> *"Dear all,*
>
> *We would make some observations in light of the below correspondence.*

1. This is not the only challenge that is in train, e.g. there is one with WorkSafe which is still being pursued, which is unlikely to be resolved soon, based on recent correspondence with them. We have pressed for a date, but they have been vague.
2. Given the conduct of the NTEU, and now the decision in question, we will now need to consider whether the NTEU are also defendants, including in respect of their officers in a personal capacity.
3. The FSU has heavily limited availability due to other activities in the coming weeks, and thus we would seek to list in early May, when 1. and 2. are likely to be resolved.

Best wishes,

Free Speech Union of Australia"

[6] The Respondent did not consent to this further adjournment.

[7] On 1 March 2024, the parties were advised that the adjournment request was refused and the matter was listed for 13 March 2024. The Applicant sought an adjournment to this conference on the basis of unavailability on 13 March 2024.

[8] Accordingly, the parties were requested to liaise with each other and provide Chambers a range of mutually convenient alternative times and dates in March 2024

[9] The parties advised my Chambers of their availability's, and, on 7 March 2024, the matter was listed for conciliation conference on 25 March 2024 in Melbourne.

[10] On 25 March 2024, after discussing preliminary matters during the conference, the Applicant indicated they were seeking I recuse myself from the matter. Accordingly, I indicated the Commission would arrange to hear from both the Applicant and the Respondent on the recusal application and made arrangements to conduct a hearing for this purpose.

[11] After a short adjournment, a Hearing was conducted.

[12] Following submissions from both parties, I adjourned proceedings to consider a decision. Shortly thereafter, the Hearing resumed, and I advised the parties that for reasons set in detail below the recusal application was dismissed. The matter then proceeded as a private and confidential conference pursuant to s.368(2) of the Act.

Applicant's Submissions

[13] Professor Timming's represented himself in the proceedings and was also assisted by Mr Kirkham, a representative of an entity described as the Free Speech Union of Australia. In submissions, the Applicant advanced two principal reasons that I should be recused from the application.

[14] The first, related to identified flags that had been affixed to the bottom of emails sent from my Chambers in its management of this case that offended Mr Timming and indicated political views contrary to his own. As a person with obsessive compulsive disorder (OCD), it was alleged these flags and their offense to his views, formed a sense of apprehended bias in

Mr Timming's mind that my ability to be an effective mediator and conciliator was compromised as he now perceived that I held political views contrary to his own.

[15] The second, related to my previous employment as ACTU Assistant Secretary. The basis of this ground for recusal was that Mr Timming is a leading figure, founding member and advocate for the Free Speech Union of Australia, an organisation not affiliated to the ACTU, that is publicly known to support and advocate against ACTU affiliated unions, such as the NTEU. Further, that ACTU Officers have publicly attacked and described the Free Speech Union as a "fake union".

[16] The Applicant submits, that as a former officer of the ACTU, an organisation whose leaders have described an organisation the Applicant is a prominent member of, I have an apprehended bias against the Applicant to the extent that Mr Timming's perceptions are that I will be biased against him in the conduct of any conciliation conference.

[17] In support of these submissions, the Applicant referred the Commission two copies of email correspondence between his representative and my Chambers outlining his concerns, seeking an apology and the removal of the flags at the bottom of emails sent from my Chambers.

[18] The Applicant further indicated he had made these concerns known to the President of the Fair Work Commission, Justice Hatcher, in the days leading up to this conference in an attempt the have their concerns addressed and to avoid the necessity of a recusal application.

[19] In further support of their position, the Applicant submitted a series of press clippings from the *Spectator* titled *"The Case against unions'* authored by Professor Timmings; from the *Guardian* titled "*A trade union for free speech"* and correspondence with Mr Brian J Lacy AO, NTEU Independent Review Panel Chair and former Commission Member outlining further concerns.

Respondent's Submissions

[20] The Respondent was represented by Mr Will Spargo (Lander & Rogers), who was granted leave pursuant to s.596 of the Act. The Respondent opposed the application for recusal.

[21] The grounds identified by the Respondent to support its position were, firstly, that it is a high bar for the Commission member to recuse themselves from an application on grounds of apprehended bias and that significant authorities support a view that recusal applications are not to be lightly granted, particularly given the nature of the Commission as an industrial tribunal.

[22] Secondly, that the leading authorities from the High Court in *Re JRL v; Ex Parte CJL* do not support the Applicant's submissions on the following grounds.[1]

[23] First, that there is no evidence to support a perception that the views expressed by my Chambers are in any way reflective of the views of the Commission member. Second, that flags and political views not relevant to Mr Timming's application and the limited jurisdiction of the Commission under the General Protections provisions to conduct a conference to conciliate a settlement to the dispute, or alternatively, issue a certificate in the event the

Commission is satisfied all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful. Thirdly, that the Applicant has presented no evidence that a Commission Member's former role in any way creates a prejudice, apprehended or otherwise, to the role of the Commission member in this conciliation conference.

Consideration

[24] It is well established that a Commission member should not hear a case if there is a reasonable apprehension that they are biased.[2] What constitutes a reasonable apprehension of bias involves deciding whether a "fair minded lay observer' would reasonably apprehend that the decision maker would not decide a case impartially and without prejudice.[3]

[25] The High Court set out the objective test of the "fair-minded lay observer' in *Johnson v Johnson*[4] as follows:

> "It has been established by a series of decisions of this court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of pre-judgement) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial an unprejudiced mind to the resolution of the question the judge is required to decide."[5]

[26] This test is repeated in *Ebner v Official Trustee*[6] and is based on the need for public confidence in the administration of justice. As the High Court further identified in *Johnson v Johnson* the test is an objective one that:

> "The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial.'"[7]

[27] In *Ebner*, the High Court articulated the application of the objective test as a two-step process requiring identification of relevant matters followed by connection of those matters to the case being decided as follows:

> "The apprehension of bias principle admits 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 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." [8]

[28] The "fair minded lay observer" is taken to have some knowledge of the actual circumstances of the case:

> "In assessing what the hypothetical reaction to a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case. In other words, the observer would take account of the circumstances which led to the bringing of the defamation action and the filing of defences. While it would not be proper to attribute to the fair-minded observer the understanding that a lawyer would have of the capacity of the members of the Tribunal to make an independent decision uninfluenced by previously expressed opinions and conflicting interests (see Vakuta v Kelly), such an observer must be taken to appreciate the defences filed by the Tribunal do not amount to assertions of belief or admissions."[9]

[29] It is further accepted that whilst it is important that justice be seen to be done, it is of equal importance that Commission members discharge their duty to hear the evidence and decide the matter.[10] This means that Commission members should not too readily accept the suggestion of apprehended bias[11] and simply refer matters to be allocated to other members.

[30] On receiving a recusal application, it is incumbent on that member of the Commission to hear the application and consider whether there are grounds to recuse oneself from dealing with the matter. As was said by the Full Bench in *Loretta Woolston v The Uniting Church in Australia Property Trust (Q.) t/a Blue Care Bli Bli Aged Care Facility*[12]:

> "…in the Australian legal system, any application that a decision maker, whether a judge of a court or a member of an arbitral or administrative tribunal or a person conducting an inquiry should recuse herself or himself from hearing and deciding a matter on the ground of actual or apprehended bias, is to be made and determined in the first instance by the decision maker."

[31] It is well established that the Commission has followed these principles in its consideration of applications of apprehension of bias and I have adopted them to this present case. (see for example *UFU v MFESB*[13], *Priestely v Department of Parliamentary Services*[14]).

[32] I will address the Applicant's submissions of apprehended bias in accordance with the two grounds identified.

[33] At this point, it is important to note that there is no requirement for the decision to refer to every piece of evidence and every submission in a decision, provided that the decision maker deals with those matters which are centrally relevant and sets out reasoning which leads to the outcome which is determined.[15] My consideration of each of the centrally relevant assertions with regard to each ground of apprehended bias is set out below.

First Ground of Apprehended Bias

[34] The first ground related to identified flags that had been affixed to the signature block at the bottom of emails sent from my Chambers that offended Mr Timming and indicated political views contrary to his own.

[35] For completeness, a copy of the signature block and flags identified as the basis for the apprehension of bias are reproduced below:

"…

Associate to Commissioner Connolly

Fair Work Commission

Australia's national workplace relations tribunal

T: [REDACTED] **| E:** Chambers.Connolly.C@fwc.gov.au

Level 4, 11 Exhibition Street, Melbourne, VIC, 3000
PO Box 1994, Melbourne, Vic, 3001

At the Fair Work Commission we respect and celebrate the diversity of our communities and we are committed to creating a safe and welcoming space for all.
We acknowledge that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander people. We acknowledge their continuing connection to Country and pay our respects to their Elders past and present. This email was sent from Wurundjeri Woi Wurrung Country.

Important: This message may contain private or confidential information. If you think this email was sent to you by mistake, please immediately notify the sender and delete all copies of the email from your system. Please refer to our privacy policy for more information on how we collect and handle personal information."

[36] The Applicant submits that during the course of correspondence with Chambers, they identified their above concerns with the flags that adorned the signature block on emails from my Chambers, specifically the Pride flag, and sought variously an explanation, apology and the removal of the flag claimed to be offensive to the Applicant. In response to these requests, my Chambers advised the Applicant that the process for progressing complaints in regard to conduct of my Chambers was set out on the Commission web page in the following terms:

"…

Any concerns or issues outlined below can be directed to our website for Feedback and complaints | Fair Work Commission (fwc.gov.au)."

[37] The Applicant further indicated he raised these concerns with the President of the Fair Work Commission, Justice Hatcher. A copy of the President's response to the Applicant dated 22 March 2024 was provided to my Chambers. Relevantly, this correspondence advised the Applicant:

"Dear Dr Kirkham,

RE: Matter C2023/8129

…

In relation to the signature block, I note the following:

1) The signature block is a standardised design adopted by the Fair Work Commission for emails. It includes a diversity statement, an Acknowledgment of Country and a privacy statement. Staff are encouraged to use it but it is not required.

2) All Commission external emails include the Australian Coat of Arms in the header and in the signature block. The Coat of Arms is the formal symbol of the Commonwealth of Australia and is used by Australian Government departments and agencies, statutory and non- statutory authorities, the Parliament and Commonwealth courts and tribunals. The inclusion of the Australian flag at the foot of the email would therefore be both unnecessary and inappropriate.

3) The three small flag symbols in the footer are intended to symbolise the Commission's commitment to inclusivity and diversity, reflecting values which are embedded in the *Fair Work Act 2009* (Cth) (*Fair Work Act*). They are not intended to convey a political view about anything.

4) The inclusion of personal pronouns is a matter for the individual signatory of any email and is not required.

5) Commissioner Connolly was not in any way involved in the design or adoption of the standard signature block.

6) The use of the standard signature block or personal pronouns by the Commissioner's Associate, who is a staff member of the Commission and a member of the Australian Public Service, cannot be taken as indicative of any view held by the Commissioner. He holds a separate and independent statutory office.

If, notwithstanding the above, any party in matter C2023/8129 considers that the Commissioner has conducted himself in a way which gives rise to a reasonable apprehension of bias or indicates actual bias, then the appropriate course under Australian law is for the party to make an application to the Commissioner for him to recuse himself from the matter. An application for permission to appeal under s 604 of the *Fair Work Act* may be made by an aggrieved party in respect of any decision which the Commissioner makes concerning any such recusal application.

…

> Thank you for raising your concerns with me. I hope the information I have provided addresses those concerns and gives you a better understanding of the Commission's functions and procedures.
>
> Yours sincerely…"

[38] It is the Applicant's submission that the inclusion of flag in the signature block purportedly expressing a political view contrary and objectionable to that of the Applicant leads to an apprehension of bias. The Applicant has not presented any evidence to suggest that emails sent from my Chambers are no mere administrative function but are, or at least can reasonably be perceived to be, an expression of my views as member of this Commission. Nor has the Applicant been able to identify any 'logical connection' between the alleged apprehension of bias, his general protections application involving dismissal under s.365 of the Act and the impartiality it would bring to the statutory discharge of my functions under s.368 of the Act.

[39] A reasonable, fair-minded lay observer would not consider this to a basis of bias, and I am satisfied that the Applicant has not reasonably identified what might lead me to make any decision in this case other than in accordance with the provisions of the Act. Further, I am not satisfied that the Applicant has articulated the logical connection between the signature block and the feared deviation from the course of exercising my statutory obligations under s.368.

Second Ground of Apprehended Bias

[40] The second related to my previous employment as ACTU Assistant Secretary.

[41] It is the Applicant's submission that my former role as ACTU Assistant Secretary, an organisation whose officers are publicly opposed to an entity the Applicant is member of and advocate for, in itself leads to an apprehension of bias and that any reasonable, fair-minded objective person would be drawn to this conclusion.

[42] The fact that the ACTU and the entity the Applicant is associated with hold opposing views and that these views have been publicly expressed is not disputed. However, the Applicant has not presented any evidence of views it purports to be offensive being expressed by myself in any of my former roles.

[43] It is well established that the former roles of members of the Fair Work Commission cannot be, and are not an automatic bar to the fair, impartial and judicial performance of their statutory functions.[16]

[44] On this basis, absent any further evidence from the Applicant, I am satisfied that a reasonable, fair-minded lay observer would not consider my former role at the ACTU to be a basis of bias.

Conclusion

[45] Therefore, I am satisfied that the Applicant has not reasonably identified what might lead me to make any decision in this case other than on its legal and factual merits; and has not

articulated the logical connection between the two grounds identified above and my ability to exercise the statutory functions set out in s.368 of the Act.

[46] For these reasons, the Applicant's application that I recuse myself from this matter is dismissed.

COMMISSIONER

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[1] (1986) 161 CLR 342.

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

[3] *Dain v Bradley & Grant* [2012] FWA 9029 at [14]; citing *British American Tobacco Australia Services v Laurie* (2011) 242 CLR 238 at [104].

[4] (2000) 201 CLR 488.

[5] Ibid, pp 492, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[6] (2000) 205 CLR 337, at pp 344 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[7] (2000) 201 CLR 488, pp 493.

[8] (2000) CLR 205 337, pp 345.

[9] (1990) 170 CLR 70, pp 87-88, per Mason CJ and Brennan J; see also p.95, per Deane J, p.98, per Gaudron and McHugh JJ

[10] *Re J.R.L Ex Parte C.J.L* (1986) 161 CLR 342 at [352].

[11] Ibid

[12] [2016] FWCFB 278 [10]; citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 357, [74]

[13] (2005) 141 IR 438 at [79] and [84] per Ross VP, Hamilton DP and Gay C.

[14] [2011] FWA 672 at [11] per Watson VP.

[15] *Ross Kennedy v Qantas Ground Services Pty Ltd* [2020] FWCFB 394 at [23].

[16] [2010] FWA 2263.