IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 82
EMPC 406/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for recusal
BETWEEN	ALLAN HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	TURUKI HEALTHCARE CHARITABLE TRUST Second Respondent
AND	CULTURESAFE NEW ZEALAND LTD Third Respondent
AND	TRACEY SIMPSON Fourth Respondent

Hearing:	On the papers
Appearances:	A Halse, applicant in person A F Drake and R Judd, counsel for the Turuki Healthcare Charitable Trust
Judgment:	17 May 2022

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for recusal)

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[1] Mr Halse has applied for judicial review in relation to three determinations of the Employment Relations Authority (the Authority)[1] and the "issuing of proceedings by Turuki Healthcare Charitable Trust ("Turuki") against [Mr Halse] in 2018". That judicial review proceeding has been allocated to me as the Judge.

[2] Mr Halse has formally applied for my recusal from this judicial review.

[3] Mr Halse says recusal is appropriate as a fair-minded, objective and fully informed observer would not consider I could be impartial in reaching a decision in this case.

[4] Mr Halse:

(a) says I have "publicly endorsed" the Authority overriding and contravening statute;

(b) refers to a case in which I represented WorkSafe New Zealand (WorkSafe) when in practice;[2]

(c) refers to an unrelated case where I presided;[3]

(d) makes various allegations about Turuki, its solicitor and the former Chief of the Authority;

(e) criticises my decision on Mr Halse's challenge to the second determination;[4]

(f) says my presiding over this case would potentially cause substantial damage to the New Zealand judicial system.

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1 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95 (Member Crichton) *[the first determination]*; *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136 (Member Crichton) *[the second determination]*; *Turuki Health Care Services v Makea-Ruawhare* [2018] NZERA Auckland 177 (Member Crichton) *[the third determination]*.

2 *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485; *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

3 *Kennedy v Chief Executive of Oranga Tamariki - Ministry for Children* [2020] NZEmpC 58.

4 *Culturesafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165, [2020] ERNZ 398.

Mr Halse refers to several matters

[5] This matter has not followed the process set out in the Court's Recusal Guidelines, as Mr Halse has filed a formal application. Mr Halse and Turuki have filed written submissions and Mr Halse also filed an affidavit in support of his application. Accordingly, it is appropriate to now issue a judgment.

[6] As noted by Mr Halse, I represented WorkSafe New Zealand in the High Court and Court of Appeal in proceedings brought against it by Ms Osborne.[5] It is a matter of public record that the Supreme Court overturned the decision of the Court of Appeal.[6] No criticism was made of counsel and the case is completely unrelated to Mr Halse's application for judicial review.

[7] I commenced as a Judge of the Employment Court on 8 September 2017. At that time, I took the judicial oath.[7]

[8] I was the Judge in *Kennedy v Chief Executive of Oranga Tamariki – Ministry for Children*, the case referred to by Mr Halse.[8] *Kennedy* also is completely unrelated to the case now being brought.

[9] I was the Judge in *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*.[9] That judgment dealt with the challenge to the second determination. The judgment also refers to the first determination.

Judges have obligations to hear cases

[10] The starting point is that Judges are obliged to hear cases allocated to them. It is important that justice is 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

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5 *Osborne*, above n 2.
6 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.
7 Oaths and Declarations Act 1957, s 18.
8 *Kennedy*, above n 3.
9 *CultureSafe*, above n 4.

a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[10]

[11] To readily accede to an application for recusal would allow aggrieved litigants the ability to swap Judges when they choose, without a credible source of bias and despite the oath taken when a Judge is sworn in to view matters objectively, and to act impartially and independently.[11]

A Judge ought to recuse if there is a real and not remote possibility that they might not be impartial

[12] Judges, however, ought to recuse themselves in situations where a fair-minded lay observer may reasonably apprehend that there is a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the issue before them. This test is approached in two stages – first by identifying what might lead to a reasonable apprehension that the Judge might decide a case other than on its legal and factual merits, and second, by considering whether there is a logical and sufficient connection between those circumstances and the feared deviation from the course of deciding the case on its merits.[12]

[13] Applications for recusal usually arise where a Judge has a previous association with a party or witness. In rare cases, the association will be with a representative. It also will be appropriate where a Judge has a material interest in the outcome of a case. None of those issues arise here. However, there may also be other circumstances in which the appearance of bias in law arises.

[14] A fair-minded lay observer is presumed to be intelligent and to view matters objectively. They are neither sensitive, nor suspicious, nor complacent about what may influence the Judge's decision.[13] The matter is not to be tested by reference to the perhaps particular and certainly motivated views of a specific litigant who has

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10 *Re JRL, ex parte CJL* (1986) 161 CLR 342 (HCA) at 352; *Bracewell v Richmond Services Ltd* [2015] NZEmpC 45, [2015] ERNZ 647 at [8].

11 *De Vries v Bartercard Exchange Ltd* [2017] NZHC 1851 at [102].

12 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35 at [3]-[4]; see also Employment Court of New Zealand "Recusal Guidelines" (1 March 2017) <www.employmentcourt.govt.nz> at [11].

13 At [5].

made an allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all.[14]

[15] A Judge's prior ruling against an applicant on law or evidence is a common basis for an allegation of actual bias. However, an application for recusal on this ground will succeed only in the rarest of circumstances. The fair-minded and informed observer does not assume that because a Judge has taken an adverse view of a previous application or applications, that they will have pre-judged, or will not deal fairly with, all future applications by the same litigant.[15] That suggestion ignores the force and significance of the judicial oath and, without more, could not possibly meet the test for recusal.[16]

[16] Further, as Judges are impartial in the performance of their judicial functions, Judges are not compelled to rule consistently with a ruling in another case that addressed similar issues, where the legal and factual merits of the case before the Judge merits them departing from that prior ruling.[17]

Most of the grounds raised are misguided

[17] Mr Halse has made several strongly worded allegations. Most of these are not relevant to the issue of recusal. The application appears to show a misunderstanding on Mr Halse's part of the role of counsel and of Judges, and the matters that would be relevant to an application for recusal.

[18] In particular, that Mr Halse agrees with the decision of the Supreme Court in *Osborne* and disagrees with my decision in *Kennedy* is not relevant to the issue of recusal.

[19] The one ground that requires some consideration surrounds my hearing the challenge Mr Halse brought against the second determination. He raises similar issues in the application for judicial review as were raised in the challenge.

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14 *Saxmere*, above n 12, at [10].
15 *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [29].
16 *Stiassny v Siemer* [2013] NZHC 154 at [12].
17 *Taunoa v Attorney-General* [2006] NZSC 94 at [4].

[20] There also is an unresolved application from Turuki to strike out the judicial review proceedings. One of the bases on which Turuki seeks to strike out the proceedings is that they are an attempt to relitigate matters already determined by the Court and amount to an abuse of process.

[21] I acknowledge that the proceedings now before the Court therefore involve most of the same parties, some very similar arguments advanced by the same representatives, and an application to strike out.

[22] The present proceeding, however, is an application for judicial review, which gives rise to different considerations than arise in a challenge. The position remains that, if the arguments made by Mr Halse in these proceedings merit a finding in his favour, there is no barrier to my making such a finding. There is no basis for suggesting a fair-minded and informed observer would consider I would not act in accordance with the judicial oath that I took on commencing my appointment as a Judge.

[23] The application for recusal is declined.

[24] Costs are reserved.

J C Holden
Judge

Judgment signed at 1.10 pm on 17 May 2022