IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 118
EMPC 52/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for recusal
BETWEEN	ALLAN HALSE First Plaintiff
AND	CULTURESAFE NZ LIMITED (IN LIQUIDATION) Second Plaintiff
AND	HAMILTON CITY COUNCIL Defendant

Hearing:	On the papers
Appearances:	A Halse, plaintiff and for the second plaintiff M Hammond, counsel for defendant
Judgment:	7 August 2023

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for recusal)

Introduction

[1] Mr Halse and CultureSafe NZ Ltd (CultureSafe) are the plaintiffs in proceedings between themselves and Hamilton City Council (the Council). An application has been filed for Judge Holden, who is dealing with the proceedings in this Court, to recuse herself on the basis of apparent bias. Judge Holden has not been

available to deal with the application, having been out of the jurisdiction on leave, and I am dealing with it in these circumstances.

[2] I pause to note that the second plaintiff is in liquidation.[1] The liquidators would need to give consent to the proceedings continuing, including any application on its behalf. No notice of consent is before the Court. I treat the application as being advanced by Mr Halse, as first plaintiff.

[3] An affidavit and submissions have been filed in support of the application. The defendant has filed submissions in opposition; Mr Halse has filed a reply and I proceed to deal with the application on the papers.

[4] In order to deal with the application it is necessary to set out some of the background. In a determination of the Employment Relations Authority dated 9 February 2022, Mr Halse and CultureSafe NZ Ltd were found to have breached a record of settlement between Mr Halse and the Council.[2] The Authority awarded penalties and made a compliance order against both Mr Halse and CultureSafe. Mr Halse has challenged this decision on a de novo basis. Judge Holden is the judge dealing with the challenge. She has since declined an application by Mr Halse for summary judgment and indicated that the challenge is ready for hearing.[3] The application for recusal arises against this backdrop.

Framework for analysis

[5] Apparent, not actual, bias is alleged. Both parties accept that the test for apparent bias is whether "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".[4] The question is one of possibility, not probability, but the possibility should be "real and not remote".[5]

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1 "CultureSafe NZ Limited (in liquidation) – Notice of Appointment of Liquidators" (3 August 2022) *New Zealand Gazette* No 2022-al3238.
2 *Hamilton City Council v Halse* [2022] NZERA 34.
3 *Halse v Hamilton City Council* [2023] NZEmpC 77.
4 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
5 At [4].

[6] A two step-process applies:[6]

Step 1: Identification of what it is said might lead a judge to decide a case other than on its legal and factual merits.

Step 2: Articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[7] The Court described the fair-minded observer in *Saxmere* as follows:[7]

> …before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[8] A fair-minded observer is presumed to be intelligent, to view matters objectively and to understand three matters relating to the conduct of judges:[8]

> The first is that a judge is expected to be independent in decision making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[9] Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated.… Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel… counsel are not judged. They are, rather, a trusted element of the judicial system.

[9] The Supreme Court also relevantly observed that:

> [10] Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the judge as to what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular judge was in

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6 *Ebner*, above n 4, at [8].
7 *Saxmere,* above n 4, at [5], citing *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031 (HL) at [3].
8 At [8].
9 Oaths and Declarations Act 1957, s 18.

> fact affected by disqualifying bias[10] and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

[10] I pause to note that Mr Halse submits that a low bar should apply when dealing with an application for recusal on the grounds of apparent bias. I disagree. The Supreme Court has made it clear, citing a High Court of Australia decision, that the bar should not be set too low for the following reasons:[11]

> [I]t 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.

The grounds on which recusal is sought

[11] I turn to consider each of the points raised by Mr Halse. Three grounds are relied on. First, that numerous rulings have been made against him in the past by Judge Holden. Second, that the judge has made "critical and disparaging comments" about his conduct. Third, that the judge has previously made a finding that he was "vexatious". The third overlaps with the first two and I deal with it accordingly.

[12] Judge Holden has dealt with a number of matters involving Mr Halse over time, including of an interlocutory nature. A number have gone against him. The Court of Appeal dealt with an allegation of apparent bias in a similar context in *Muir v Commissioner of Inland Revenue*:[12]

> [98] It has to be accepted that there are occasions when a judge's prior rulings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, *this could be relevant to the question of judicial bias only in the rarest of circumstances*.

[13] I agree with the defendant that the fact that rulings have gone against Mr Halse may simply reflect an application of the law to the facts, rather than bias on the judge's part. A similar point was made by the Court of Appeal:[13]

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10 *Webb v R* (1994) 181 CLR 41 at 71.
11 *Saxmere*, above n 4, at [8], citing *Re JRL, ex p CJL* (1986) 161 CLR 342 at 352.
12 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) (emphasis added).
13 *Muir*, above n 12. See also *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 133 at [29].

> [99] … Every judicial ruling on an arguable point necessarily disfavours someone — Judges upset at least half of the people all of the time — and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling…
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> [101] We know of no common law jurisdiction which accepts that a judge's adverse rulings are disqualifying per se. The problem is rather whether an aggrieved litigant should be permitted to seek recusal on the basis of rulings that are either so patently erroneous or so disproportionate as to suggest that something untoward must have motivated them. Even a statistical approach cannot obtain here: most judges will be able without any difficulty to recall trials in which regrettably they have had to endorse every single point which has been advanced against a particular party.

[14] In other words, the fact that Judge Holden has ruled against Mr Halse on 17 out of 21 occasions is not the relevant question. The relevant question is whether the 17 rulings were "patently erroneous". Some of those rulings are now subject to the appellate process, and it is not appropriate to second-guess the outcome. Suffice to say that having reviewed the rulings referred to in support of the application, I do not consider that, individually or cumulatively, they fall within the "patently erroneous" descriptor for the purposes of dealing with the current application.

[15] The other ground relied on by Mr Halse centres on adverse comments made against him, including that one of the applications advanced by Mr Halse was "vexatious". Again, the Court of Appeal's judgment in *Muir* is instructive. There the Court made the following observation:[14]

> [102] Turning now to adverse comments, judges are duty bound to refrain from making unnecessary comments. The various codes of judicial conduct — including the Australasian ones — call on judges to be courteous to the litigant, observe proper decorum, and to be particularly cautious and circumspect in their language. And judges should not issue oral condemnations that are unrelated to the furtherance of the cause to be decided or are simply gratuitous.
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> [103] Comments as such will ordinarily not suffice to warrant recusal. What is important is that commentary should not however demonstrate that the judge has formed a fixed opinion as to the ultimate merits of the matter pending before him or her. It has to be shown, in short, that the judge does not have an open mind.

[16] In *Muir* the trial judge had made a number of comments about Dr Muir in the context of rejecting his evidence. It was argued by Dr Muir that this indicated apparent

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14 *Muir*, above n 12.

bias because the comments were "unnecessary, gratuitous, and unduly severe".[15] The Court of Appeal disagreed:

> [106] The Judge's findings were undoubtedly firm, but they were in measured terms. And as the Judge correctly noted, he was under a duty to give reasons for rejecting Dr Muir's evidence, particularly given the importance of the evidence to issues in the case.

[17] The Court of Appeal's observation that comments required to be made for the context of the decision are less likely to give rise to apparent bias was also made in a recent decision of the High Court,[16] and are also of particular relevance in the present case. That is because some of the comments arose in the course of a penalty action against Mr Halse personally, requiring the judge to consider his conduct and explain why she had reached the conclusions she had in terms of the basis for a penalty to be imposed and the quantum of it.[17]

[18] I have reviewed each of the comments Mr Halse refers to in his affidavit. Many simply reflect findings necessary to deal with the matters then before the Court and cannot reasonably be described as disparaging.[18] However, I refer to a particular observation made by the judge which Mr Halse cites:

> Again, it is ironic that a person [referring to Mr Halse] who holds himself out as an advocate for people who suffer bullying in the workplace, and who claims to have a good understanding of the impact that bullying has on people, has deliberately adopted such behaviour himself.

[19] While I accept that the observation is critical of Mr Halse, it must be read along with the judge's other observations:

> [88] Mr Halse shows no understanding of, or remorse for the behaviour he adopted. In his Facebook posts, including those made after the second determination, and in evidence before the Court, he indicated every intention of repeating this behaviour or behaviour like it. Again, it is ironic that a person who holds himself out as an advocate for people who suffer bullying in the workplace, and who claims to have a good understanding of the impact that bullying has on people, has deliberately adopted such behaviour himself.
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> …

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15 At [104].

16 *G S v Family Court at Manukau* [2022] NZHC 555 at [332].

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

18 By way of example, *CultureSafe NZ Ltd*, above n 17, at [44] and [58]; *Halse v Employment Relations Authority* [2023] NZEmpC 69 at [40], [48], [54] and [57].

> [90] In all the circumstances, given his experience, his role at CultureSafe and his continued conduct, a higher penalty is warranted against Mr Halse than against Ms Simpson.

[20] What is apparent from the foregoing is that the judge made the observation in the context of a discussion about the appropriate level of penalty to be imposed against Mr Halse, including by reference to aggravating features of his conduct. While the observation complained about is critical of Mr Halse, and his actions, and was not strictly necessary to explain the judge's reasoning, I am not satisfied that, when viewed in context, it is indicative of bias. And I make the obvious point that it would be difficult for a decision on penalties not to include some criticism of the person being penalised.

[21] It appears that Mr Halse is particularly concerned with the following observation made by the judge in the context of judicial review proceedings pursued by him against the Employment Relations Authority:[19]

> [21] Here, CultureSafe has not looked after the grievants. The Authority records that they are visa-dependent workers for whom English is a second language and that one of them is currently offshore. As the Authority notes, their personal circumstances may put them in a category of employees who are inherently vulnerable. Their interests ought to have been paramount in CultureSafe's engagement with Manuka Health and with the Authority. They were entitled to expect that CultureSafe would progress their claims expeditiously. Unfortunately, CultureSafe has failed to do so, leaving the grievants in limbo. Their interests, and those of Manuka Health and its current and former employees who would be witnesses in these proceedings, have been subsumed in the present argument.
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> [22] This is unsatisfactory. While the grievants could, of course, find another representative, they are unlikely to be knowledgeable about the intricacies of employment law and procedure, and are looking to CultureSafe for advice. They should reasonably expect CultureSafe to act in their best interests, including by providing the Authority with the material sought.

[22] While these observations may not have been strictly necessary to decide the application for judicial review, they provided context to the judge's findings, and I do not consider that, in isolation or in combination with the other observations, they support a claim of apparent bias.

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[19] *CultureSafe NZ Ltd v Employment Relations Authority* [2022] NZEmpC 134, [2022] ERNZ 556 (footnotes omitted).

[23] Mr Halse also claimed that Judge Holden had made a statement that his conduct was "vexatious". While she concluded that his judicial review application was vexatious,[20] this is not the same as saying that Mr Halse himself is vexatious or that his conduct was vexatious. The decision reflects, again, an application of the law to the facts. Mr Halse expanded this argument in his submissions in reply, citing *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*.[21] I understood his concern to be directed at "unsubstantiated" references of vexatiousness advanced against him by the defendant's counsel. These references are, he says, misguided because it is his legal team, rather than himself personally, who has prepared the application for recusal and documentation filed in support; accordingly they cannot be vexatious. I do not consider that these points assist in dealing with the application now before the Court which is focussed on apparent judicial bias.

[24] Nor do I consider that the concerns raised by Mr Halse about what he describes as apparent collusion between counsel for the defendant in these proceedings and counsel in other proceedings in which a recusal application has also been advanced, is of material relevance. That is because the focus of the Court's inquiry must be on the established grounds for recusal and whether any of them are made out in relation to the assigned judge.

[25] Finally, Mr Halse submits that the fact that submissions were filed in opposition to his recusal application "lends further weight to the perception that Judge Holden might not be impartial". He suggests that, if Judge Holden was genuinely not perceived to be biased, the defendants in both proceedings would be content to allow any other judge to deal with the claims. The submission overlooks the fact that the defendant has raised a number of reasons for the application to be opposed, including efficiency in disposing of the proceedings.

Conclusion

[26] While adverse to Mr Halse, and at times critical of his behaviour, I do not consider that the comments referenced in support of the application for recusal meet

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20 *Halse v Employment Relations Authority* [2023] NZEmpC 69 at [54].
21 *Re Erebus Royal Commission* [1983] NZLR 662 (PC).

the threshold of apparent bias. The question is one of possibility, not probability, but the possibility must be real and not remote.[22] The grounds for recusal have not been made out. A fair-minded observer would not reasonably apprehend that Judge Holden might not bring an impartial mind to the resolution of the residual issues in these proceedings.[23] The application is accordingly dismissed.

[27] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 11.30 am on 7 August 2023

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22 *Saxmere*, above n 4, at [4].
23 At [3].