

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 32
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 CULTURES SAFE NZ LIMITED (IN
 LIQUIDATION)
 Second Plaintiff

AND HAMILTON CITY COUNCIL
 Defendant

Hearing: On the papers

Appearances: A Halse, first plaintiff, in person
 No appearance for the second plaintiff
 M Hammond, counsel for the defendant

Judgment: 28 February 2024

**INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE J C HOLDEN
(Application for recusal (No 2))**

[1] This judgment resolves an application by Mr Halse for my recusal. For the reasons set out, Mr Halse’s application is unsuccessful.

[2] Mr Halse challenges a determination of the Employment Relations Authority, in which the Authority ordered Mr Halse and CultureSafe NZ Ltd (the second plaintiff) to comply with a settlement agreement dated 14 February 2014, and for each of Mr

Halse and CultureSafe NZ Ltd to pay a penalty of \$9,000.¹ CultureSafe NZ Ltd is now in liquidation and is not participating in these proceedings.

[3] Mr Halse’s challenge was filed in February 2022, and a hearing is to commence on Tuesday, 5 March 2024. This application was filed on Friday 16 February 2024. Mr Halse has not provided any explanation for why the application for recusal has only just been filed; the most recent of the matters he relies on dates back to September 2023. The late filing of this application meant it needed to be dealt with expeditiously. Directions for filing and serving submissions, and for the application to be dealt with on the papers were given.

[4] On 28 February 2024, after both Mr Halse and the Hamilton City Council had filed their submissions, Mr Halse sent an email requesting a hearing on the application for recusal. Given the commitments of the Court, it was not possible to accommodate Mr Halse’s request.

[5] This is the second time Mr Halse has applied for me to recuse myself from dealing with these proceedings.² His first application was dealt with by Chief Judge Inglis. The reason for this was not, as is suggested by Mr Halse, an acknowledgement of the need for “an independent review” but because I was on leave overseas when the application was filed.³

[6] As recorded in her judgment dated 7 August 2023, the Chief Judge declined Mr Halse’s application.⁴

[7] Mr Halse’s present application for recusal is on the ground of “apparent bias”, which he says leads to a real possibility that I may not be impartial or that a fair-minded, objective and fully informed observer might reach the view that there is a real possibility that I may not be impartial. He has filed an affidavit and submissions in support of his application. The same ground was the basis for Mr Halse’s previous application.

¹ *Hamilton City Council Ltd v Halse* [2022] NZERA 34 (Member Ryan).

² He has unsuccessfully applied for my recusal on two other occasions, in different proceedings.

³ *Halse v Hamilton City Council* [2023] NZEmpC 118, [2023] ERNZ 518 at [1].

⁴ At [26].

[8] There is no connection between me and any of the parties to these proceedings; I have no personal or financial interest in the outcome of the proceedings. None is suggested by Mr Halse. Rather, and as with his previous applications, his application is based on the reasoning, findings and decisions recorded in previous judgments and minutes.

[9] In his affidavit and submissions filed in support of the application for recusal, Mr Halse traverses the history of these proceedings and notes other proceedings, involving different defendants/respondents in which he has been involved and on which I was the judge. Most of the matters referred to have previously been raised by him and were addressed in the Chief Judge's decision on the earlier application for recusal.⁵ Nothing further needs to be said about them.

[10] The only substantive matter that has arisen in these proceedings since the Chief Judge's judgment is costs on Mr Halse's unsuccessful application for summary judgment. As is routine, the application for costs from the Hamilton City Council was dealt with on the papers. The Hamilton City Council sought costs of \$10,214, which included a claim for an uplift. In the judgment dated 12 September 2023, costs of \$9,300 were ordered.⁶ The costs judgment has not been the subject of an application for leave to appeal to the Court of Appeal.

[11] Mr Halse also refers to another judgment issued after the Chief Judge's judgment. That judgment, dated 11 September 2023, involved different entities as respondents, and, while it addressed applications for my recusal and for a stay, it was primarily on costs.⁷ The amount sought for costs by the second respondent, who was the successful party in that case, was \$40,869, and costs of \$30,800 were ordered to be paid by Mr Halse. No application for leave to appeal the judgment has been filed in the Court of Appeal but Mr Halse has filed an application for judicial review that includes it.

⁵ Above n 3.

⁶ *Halse v Hamilton City Council* [2023] NZEmpC 152 at [16].

⁷ *Halse v Employment Relations Authority* [2023] NZEmpC 151.

[12] The Hamilton City Council opposes the application for recusal; it says there is no proper basis for me to recuse myself.

Judges may need to recuse themselves

[13] Section 222B of the Employment Relations Act 2000 requires the Chief Judge of the Employment Court, in consultation with the Chief Justice, to develop and publish guidelines to assist Judges to decide if they should recuse themselves from a proceeding. In any event, as Mr Halse notes, having guidelines for dealing with recusals ensures public trust and confidence in the judiciary is maintained.

[14] The Employment Court Recusal Guidelines, put in place in accordance with s 222B, confirm that any decision about a judge’s recusal will usually be for that judge alone to make.⁸ That is normal and is consistent with the recusal guidelines for the High Court.⁹

[15] A judge has an obligation to sit on any case allocated to them unless grounds for disqualification exist.¹⁰ Judges are not entitled to pick and choose their cases.

[16] As both parties note in their submissions, a judge should, however, recuse themselves if, in the circumstances, a fair-minded, objective and fully informed observer would have a reasonable apprehension that the judge might not be impartial in reaching a decision in the case. The standard for recusal is one of “real and not remote possibility”, rather than probability.¹¹

[17] Judges should apply the principles firmly and fairly and not accede too readily to suggestions of bias. They should be mindful of the burden that passes to other Judges if they recuse themselves unnecessarily.¹²

⁸ Employment Court of New Zealand “Recusal Guidelines” (25 October 2023) <www.employmentcourt.govt.nz>.

⁹ Justice G J Venning (Chief High Court Judge — Te Kaiwhakawā Matua) “High Court recusal guidelines” (12 June 2017) Courts of New Zealand <www.courtsofnz.govt.nz>.

¹⁰ Recusal Guidelines, above n 8, at [2].

¹¹ At [3]. See also *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

¹² Recusal Guidelines, above n 8 at [13].

[18] A fair-minded and objective observer is presumed to be intelligent, and to understand.¹³

- (a) Judge are expected to be independent in their decision-making and have 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.
- (b) If judges recuse themselves too readily because of suggestions of appearance of bias, parties may be encouraged 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.¹⁴ Clearly that is undesirable.

No basis for recusal

[19] After Mr Halse filed this application, I considered it and, at that stage, saw no basis for me to recuse myself. In accordance with the Recusal Guidelines, I advised the parties of my view by Minute and gave them the opportunity to file submissions.¹⁵

[20] I have considered the additional matters raised in the submissions, but my view has not changed.

[21] As explained by the England and Wales Court of Appeal, the mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse themselves at further hearings: if that were not the case, the same judge could not make two successive interim decisions in a case without risking accusations of bias. It would make it impossible for there to be a designated judge assigned to the hearing of complex cases with multiple interim applications. 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 he or

¹³ *Saxmere Co Ltd*, above n 11, at [8].

¹⁴ Citing *Re JRL, ex p CJL* (1986) 161 CLR 342.

¹⁵ Recusal Guidelines, above n 8, at [8]-[9].

she will have pre-judged, or will not deal fairly with, all future applications by the same litigant.¹⁶

[22] I agree with Hamilton City Council that the point made is apt in the circumstances.

[23] In short, the position remains as described by the Chief Judge; a fair-minded observer would not reasonably apprehend that I might not bring an impartial mind to the resolution of the issues in these proceedings.¹⁷

[24] It is for this reason that Mr Halse's application that I recuse myself is declined.

[25] The costs on this application are reserved.

J C Holden
Judge

Judgment signed at 4.15 pm on 28 February 2024

¹⁶ *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [29].

¹⁷ *Halse v Hamilton City Council*, above n 3, at [26].