

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 312
5375852

BETWEEN NISHA ALIM
 Applicant

A N D LSG SKY CHEFS NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Anthony Drake, counsel for Applicant
 Joanne Douglas, counsel for Respondent

Investigation Meeting: 9 July 2013

Date of Determination: 22 July 2013

DETERMINATION OF THE AUTHORITY ON RECUSAL APPLICATION

- A. The applicant's request that I disqualify or recuse myself is declined.**
- B. Costs are reserved.**

Application for recusal

[1] Near the end of an investigation of problems that arose in an employment relationship between the applicant Ms Nisha Alim and the respondent LSG Sky Chefs New Zealand Ltd (LSG), a request has been made to the Authority for me, the member conducting that investigation, to disqualify myself from having any further involvement in it.

[2] The request, made by Ms Alim, is not supported by LSG. The company considers that there are no grounds for my disqualification or recusal and that I should

complete the investigation whereupon Ms Alim may exercise her legal right to challenge my determination if for any reason she is dissatisfied with it.

[3] Given the acrimony surrounding the circumstances in which Ms Alim became employed by LSG, and given the history of this prolonged investigation which includes several other applications made on behalf of Ms Alim at different times since commencement, a challenge to the Authority's determination of the substantive employment relationship problems seems likely.

[4] That probability should not however influence any consideration of the present request for disqualification, for if that serious and unusual step is justified it should be taken by me instantly, whatever remedies such as challenge may become available in future to Ms Alim once a determination is issued.

[5] If disqualification is found not to be warranted in principle on the grounds put forward, the Authority should be cautious before recusing itself of its own motion and not discharging its obligation to investigate an employment relationship problem.

[6] Counsel, Mr Drake for Ms Alim and Ms Douglas for LSG, were heard on the disqualification request by the Authority on 9 July 2013. At the outset I inquired of Mr Drake whether he considered another member should determine if disqualification or recusal was warranted. In his view it was appropriate for me to do that.

[7] Mr Drake also advised that he did not intend to present any witness to give evidence in support of the request. LSG also had no witnesses.

[8] Ms Alim's became employed by LSG by statutory entitlement, under Part 6A of the Employment Relations Act 2000, to transfer to that employer from 23 February 2011. Until then she had been employed in the business of PRI Flight Catering Ltd (PRI) a company trading under the name Pacific Flight Catering (PFC), which I shall refer to as PRI-PFC. The object of the transfer was to protect and continue her employment in the work of providing food catering services after PRI-PFC had lost to LSG a contract to provide those services to Singapore Airlines. Ms Alim was one of 40 workers who transferred from PRI-PFC to LSG under Part 6A of the Act.

[9] As no witnesses were called the hearing of the disqualification request proceeded by way of submissions from counsel and also notice taken of earlier decisions of the Authority, the Employment Court and the High Court.

[10] The judgments of the High Court and Employment Court contain observations that are material to a consideration of this disqualification request.

[11] Reference was also made at the hearing of 9 July to preliminary findings of fact issued by me in writing on 25 June 2013 to Ms Alim and LSG.

Grounds for disqualification

[12] These are set out in Mr Drake's memorandum dated 5 July 2013 and in summary are that;

- (a) I have made findings in relation to previous proceedings between the Service & Food Workers' Union Nga Ringa Tota Inc (SFWU) and PRI-PFC, investigated and determined in January 2011, which were critical of the credibility and behaviour of PRI-PFC and Ms Gerda Gorgner the human resources manager of Ms Alim's former employer.
- (b) PRI-PFC in August 2011 complained to the Chief Judge of the Employment Court about my conduct in relation to the investigation of a claim brought by SFWU which had been determined by me in January 2011.
- (c) In a second determination of June 2012 from a second proceeding brought by SFWU and four workers against PRI-PFC, I made a number of comments which were critical of the recollection, credibility and behaviour of Ms Gorgner. These comments were made while the complaint to the Chief Judge of the Employment Court remained undisposed of.
- (d) In the subsequent challenge against the Authority's determination of June 2012 the Employment Court *recognised criticisms of Ms Gorgner based on Authority Member Dumbleton's comments*.
- (e) In the present case between Ms Alim and LSG I have criticised Ms Gorgner and PRI-PFC when they are not party to the investigation and those criticisms have been made without taking evidence from either PRI-PFC or Ms Gorgner, or without giving them an opportunity to be heard before making adverse findings or comments.

Authority's preliminary findings of fact

[13] In a subsequent memorandum dated 12 July 2013 made on behalf of Ms Alim with reference to the meeting on 9 July, it is contended that the principal issue in this recusal application is that I have made findings of credibility in relation to PRI-PFC and Ms Gorgner without having examined Ms Gorgner, or any representative of PRI-PFC, in this proceeding. This is a reference to ground (e) above of the application.

[14] The preliminary findings at para.[10] of my 25 June memorandum in particular are referred to in this regard. They were made in relation to the major issue in the present case as to the pay rate Ms Alim had been entitled to under her employment agreement with PRI-PFC immediately before her transfer. My finding is expressed as follows:

[10] The pay rate was increased by PFC/PRI from \$15.96 per hour to \$17.68. This occurred without prior notification to Ms Alim or discussion with her. On 23 May 2011 the rate was purportedly increased again, to \$18.03 which is the rate for a Supervisor under the collective agreement. The letter written on 23 May 2011 by Ms Gorgner about the increase (No.50 of Bundle of Documents) is not reliable evidence as to the reason for the increase.

[15] The last sentence of para.[10] is contended to indicate bias or prejudice against Ms Gorgner in relation to the current matter between Ms Alim and LSG. Ms Gorgner's letter of 23 May 2011 was produced to the Authority in a Bundle of Documents prepared by LSG. It reads:

Dear Nisha,

We are writing to apologise for the mistake in calculation your hourly rate affected from 31.1.11.

As per CEA your new rate was \$18.03 per hour; however we paid you \$17.68 per hour.

We understand now that you are on a Kiwi Saver holiday and we mistakenly deducted the Kiwi Saver contribution from your hourly rate.

To cover the difference for the period from 31.1.11 to 20.2.11 we will be making a payment of \$34.38 into your account.

Our apologies for the mistake and thank you for raising the issue with us.

Please, do not hesitate to contact us if you have any further questions.

Yours sincerely,

*Gerda Gorgner
Pacific Flight Catering*

[16] Para.[11] of my preliminary findings is also relevant in this regard;

[11] The pay rate was not altered by PFC/PRI to reflect the seniority of Ms Alim's position, or supervisory content of it. She had not been employed by PFC/PRI as a team leader or supervisor. The pay rate was not altered to correct a "mistake".

Test for disqualification

[17] The decision of the Supreme Court in *Saxmere Company Ltd v. Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76 (SC) provides the highest recent authority in this regard. From that case the test as submitted by Mr Drake is, *whether a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question the judicial officer is required to decide.*

[18] As far as quoted that is correct, but there is more to the test. Principles articulated in *Saxmere* make it clear that apprehended bias is to be assessed by how it would appear to an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances including the general workings of the legal system. It is the views of the intelligent lay observer reasonably informed about the circumstances that are to be taken account of and not those of a particular party to the matter. They may be the least objective observer of all.

[19] Also, the test of bias is one of an apprehension of a real, not remote, possibility of bias. The test requires first the identification of what it is said might lead a judicial officer to decide a case other than on its legal and factual merits; and second, an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. This approach indicates that the apprehension of bias must be founded on proper grounds having a real and not fanciful connection to the possibility of bias. These principles were applied by Justice Toogood recently in his judgment in the High Court case of *Siemer v Attorney-General* [2013] NZHC 1111, the decision from which I referred counsel to.

[20] I consider that a fair-minded lay observer reasonably informed of the relevant circumstances surrounding Ms Alim's application currently being investigated, would not apprehend bias in my preliminary findings. First, my finding is expressed to be in relation to *the letter* of 23 May 2011 and its reliability as evidence of the reason for

the pay increase purportedly made by PRI-PFC to Ms Alim just before she transferred to LSG. There is nothing unusual in judicial proceedings about a finding being made that a letter by itself may not be reliable evidence as to the truth of its contents but that what is required is for the author of the letter to verify it.

[21] Although an ordinary sensible member of the public with the necessary background information could possibly see my finding as a comment about the reliability of Ms Gorgner as a witness, the fair-minded lay observer can be expected to be aware of the judgments or decisions made earlier by Courts in relation to the reasons why pay rates for many of the 40 transferring employees, including Ms Alim, were increased shortly before they transferred from PRI-PFC to LSG in February 2011.

[22] The judgment of the High Court given by Justice Woolford on 25 October 2012 in *LSG Sky Chefs New Zealand Ltd v. Pacific Flight Catering Ltd & PRI Flight Catering Ltd* [2012] NZHC 2810, makes it clear that Ms Gorgner in her evidence at that time to that court was unable to say why pay rises and adjustments to annual leave balances had been made.

[23] Ms Gorgner told the High Court that she had been instructed to make the adjustments by an owner of PRI-PFC, Mr Terry Hay, and that he had not consulted her about them or discussed the adjustments with her as she was not involved with financial decision making.

[24] The High Court found that *the absence of evidence from Mr Hay means it is difficult to draw any firm conclusions as to the reasons why pay rates and leave balances were increased prior to transfer. That this decision has been left unexplained, particularly in light of the evidence of Ms Gorgner, is unfortunate.*

[25] It is also relevant to consider findings made by Judge Perkins in the Employment Court in relation to Ms Gorgner generally. At para.[22] of his judgment of 7 June 2013 in a challenge by PRI-PFC against my determination in favour of four former employees and their union the Service & Food Workers' Union Nga Ringa Tota Inc, he rejected Ms Gorgner's evidence as to the reasons for increases being made, and he found:

[22] *It is hard to understand the position taken by the plaintiffs [PRI-PFC] and Ms Gorgner in particular, in this matter. The only*

explanation can be that this was an attempt to conceal the action of the “poisoned chalice”, as it has been referred to, of the increased liabilities being passed on to LSG. Ms Gorgner and her employers appear to have allowed their overwhelming animosity and antagonism towards their commercial competitor, LSG, to override their obligations to their former employees to be a good and fair employer. I do not accept Ms Gorgner’s evidence before me as to the reasons for these increases being made when they were.

[26] Ms Gorgner could not tell the High Court why these changes had been made and such reasons as she gave the Employment Court were rejected by Judge Perkins, yet in her letter of 23 May 2011 she seemed confident that a ‘mistake’ had been made in relation to the rates for Ms Alim.

[27] In my preliminary findings of fact, I noted the finding of Woolford J that *the evidence at trial however established that the information provided to LSG on that date [23 February 2011] had been deliberately inflated.* I noted that in the High Court Ms Gorgner had claimed to have little or no knowledge of the reason for the increases.

[28] Further, in the judgment of Judge Perkins at para.[24] the Court refers to inconsistencies in the stand taken by Ms Gorgner and finds that allegations made by her *are not tenable.* Also, the actions of Ms Gorgner in relation to the increasing of wage rates and holiday entitlements are referred to by the Court as *underhand.*

[29] I note that in his judgment Judge Perkins refers to the decision of Justice Woolford in the High Court in the matter between LSG and PRI-PFC. He describes that judgment as providing *valuable background* for his consideration of the case before the Employment Court in relation to the transfer of employees and the consequences arising as a result of PRI-PFC’s actions.

[30] It is equally permissible for the Authority to take assistance from the decisions of the High Court and Employment Court. In my view those proceedings and outcome of them are an important part of the background to this case that a fair-minded lay observer would know something about when considering this request that I disqualify or recuse myself from further involvement in this investigation.

[31] Applying the test for disqualification or recusal, upon reflection I consider that my findings or observations to this point have been balanced and moderate and they were reasonably open to be made in view of all of the facts and background before the Authority in the current investigation.

[32] No objection is taken to the making of the preliminary findings as a step in itself but it is the content of those findings, particularly at para.[10], which is complained about by Ms Alim. It is relevant that my findings have been expressly 'preliminary' findings of fact and they were made with an invitation to the parties to provide further evidence if they wish.

[33] Mr Drake raised a further issue that the Authority should itself have called Ms Gorgner and questioned her about her 23 May 2011 letter to establish her reliability as a witness. It is correct that the Authority is an investigative body which has an obligation to investigate employment relationship problems, but it is also permitted to follow whatever procedure it considers appropriate. The Authority does not have unlimited time to investigate and before itself calling any witness may exercise discretion in deciding whether a witness may be able to assist in the investigation

[34] Ms Alim claims that her terms and conditions of employment with PRI-PFC included the pay rates adjusted upwards by that employer shortly before she transferred. My view is that there is some obligation on the part of Ms Alim to help the investigation by calling those whom she may regard as material witnesses. It has seemed to me an obvious step for her to take would have been to call the other party to the employment agreement to verify the terms and conditions.

[35] Ms Gorgner told the High Court in evidence that PRI-PFC was providing financial assistance and lawyers to Ms Alim and other employees who transferred to LSG, enabling them to pursue claims against LSG. There seems to be no practical reason why PRI-PFC and Ms Gorgner could not have been presented as witnesses if they had been thought by Ms Alim or her counsel to be able to assist this investigation.

[36] I do not consider Ms Alim has any reasonable basis for apprehending that any comments I have made about her former employer might be held against her by the Authority because of her association with PRI-PFC and Ms Gorgner arising out of the employment agreement she had before transfer. Ms Alim was one of 40 employees who transferred from PRI-PFC to LSG. I have previously determined a particular claim involving four of her co-workers who transferred and they were found to be entitled to recover penalties personally as a result of their employer's breaches of law. PRI-PFC was fined a total of \$20,000 in that particular case brought by those workers and their union SFWU, with half of those fines ordered to be paid to the employees.

There is no basis to be found in the result of the case for saying that the sins of the employer PRI-PFC were visited on any former employee of it. Quite the reverse is shown by the record.

The complaints made to the Employment Court Chief Judge

[37] The determination of mine in the case which gave rise to the complaints was challenged *de novo* to the Employment Court and decided by Judge Perkins. His judgment is reported at [2013] NZEmpC 106. He found, in my reading of his judgment, no criticism of the Authority and made no adverse observation about the way the investigation had been conducted or about the determination given from it. The Authority's findings and orders were upheld by the Court and the challenge by PRI-PFC dismissed. In relation to the penalties of \$20,000 in total awarded to the Service & Food Workers' Union and four former employees of PRI-PFC, Judge Perkins observed that higher penalties might even have been appropriate but that the Authority's 'moderate' approach had been correct.

[38] If PRI-PFC in complaining to the Chief Judge in August 2011 did so to seek recusal as a *shield* against bias or the apprehension of bias, the taking of that step should not be turned into a *sword* against the Authority in different proceedings between different parties being investigated at a later period of time.

[39] In my view, applying the test from cases such as *Saxmere*, a fair-minded lay observer would not reasonably apprehend that I was unable to bring an impartial mind to the resolution of the question now to be decided, as it is a different question involving different parties to the one in 2011 which attracted the complaints.

[40] As to the ultimate disposal of the complaints made to Chief Judge Colgan, it lay in the hands of Ms Alim, since her counsel, Mr Drake, has been in communication with Ms Gorgner about them, to provide some evidence as to whether those complaints are being investigated or, if not, what became of them. It seems to me unlikely that nearly two years after the complaints were made the Court would not have had some communication with the Authority about them, if indeed the complaints remain 'extant' as submitted by Mr Drake.

Determination

[41] For the above reasons, I find there is no basis in principle arising from any of the grounds put forward for disqualifying or recusing myself from completing the investigation in this case. Ms Alim's request in that regard is declined.

[42] I also decline to exercise any discretion I might have to step aside from this case of my own volition.

Costs

[43] Costs are reserved until this matter has been concluded with a final determination of the Authority.

[44] The Authority will contact counsel to establish whether further evidence is to be put forward by either party. If so a timetable will be set for that to be done and if not the matter should now proceed to the making of final submissions.

A Dumbleton
Member of the Employment Relations Authority