**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2017] NZERA Auckland 99
5429629

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| | BETWEEN | SANDRA MARX<br>Applicant |
| | AND | SOUTHERN CROSS CAMPUS BOARD OF TRUSTEES<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Applicant in person<br>Laura Cole, Counsel for the Respondent |
| Investigation: | On the papers |
| Submissions: | From the applicant on 3 April 2017 |
| Determination: | 4 April 2017 |

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**SECOND DETERMINATION OF THE AUTHORITY**

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**An application for recusal**

[1] This determination deals with an application by Sandra Marx for another Authority member to carry out the investigation of her personal grievance claim against her former employer, the Southern Cross Campus Board of Trustees (SCC). By letter on 28 March 2017 Mrs Marx requested my removal from the investigation. She did so because she was dissatisfied with a preliminary determination issued by me about which of her grievances the Authority had jurisdiction to consider.[1] She wrote that she felt that determination accused her of being a liar and was "biased in favour of [SCC]" so that, if I were to continue the investigation of her grievance, I "would lack the personal inclination to measure out a fair process".

[2] Mrs Marx was dismissed from her post as a Resource Teacher, Learning and Behaviour for SCC on 7 May 2013. She raised a personal grievance about her

[1] *Marx v Southern Cross Campus Board of Trustees* [2015] NZERA Auckland 308.

dismissal on 2 August 2013. It was not until 16 April 2015 that she lodged an application seeking an Authority investigation of that grievance, and others. SCC's statement in reply, lodged on 11 May 2015, questioned whether Mrs Marx was in time to pursue some of the other grievances she sought to have investigated and whether she was also out of time to make a penalty claim. The Authority's preliminary determination, issued on 1 October 2015, agreed with SCC's view that the law limited the Authority to investigating only Mrs Marx's dismissal grievance and whether a bullying grievance had also been properly raised in time.

[3] The preliminary determination has since been subject to two decisions in the Employment Court.[2] The first dismissed Mrs Marx's challenge to that determination. The second declined an application for a rehearing of her challenge by the Court.

[4] Mrs Marx's attempts to have that preliminary determination reversed meant the Authority's investigation could not sensibly continue until the Court had decided the challenge (which it did on 10 June 2016) and then whether she could have a rehearing of that challenge. On 27 January 2017 the Court held she could not.

[5] The Court's last decision set a timetable for costs submissions on the challenge and rehearing matters that ran into early April. On 22 March 2017 Mrs Marx wrote to the Authority. Her correspondence referred to "resurrecting" her statement of problem and said she would like the Authority to investigate the complaints she lodged on 16 April 2015. In response to that request the Authority began arrangements for a case management conference to set timetable directions for continuing its investigation, which Mrs Marx referred to as having been "shelved for the last two years".

[6] On 27 March Mrs Marx and SCC's counsel were sent a Member's Minute about topics that needed to be discussed at the case management conference, by telephone, including setting timetable directions for the Authority's investigation meeting. The Minute advised that dates in July had been reserved for that purpose. At my request the Authority Officer contacted the parties to make the arrangements for that conference call to be held on 7 April. Mrs Marx's letter of 28 March indicated she would attend the telephone conference but expected it would be with a

[2] *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71 (10 June 2016) and *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4 (27 January 2017).

different member of the Authority. She wrote that she did not accept the Authority's determination or the Court's decisions, which she described as having denied her constitutional and human rights to a fair hearing. She asked her case now be assigned to an Authority Member with "a proven record of passion for justice, democracy and determinations based on Civil law".

[7] Both parties were advised that I would consider the application for recusal on the papers. The advice included a brief explanation that such applications were normally considered by the Member who had been asked to recuse him or herself. Both parties were given an opportunity to comment further on the application. SCC's legal counsel advised that SCC had no objection to the present member continuing and would abide by the Authority's decision on the recusal application.

[8] Mrs Marx took the opportunity provided to make further comments. She did so by way of a 14-page submission lodged on 3 April. Its contents ranged widely. It included Mrs Marx's account of the train of events that lead to her dismissal, information and her views about the costs incurred by SCC for legal representation in the Authority and the Court, and some lines from a popular poem by William Blake often sung as the anthem *Jerusalem.* From what Mrs Marx wrote in her 3 April submission and 28 March letter I discerned the following propositions for consideration. They were that I should recuse myself because:

(i) The preliminary determination was wrong and amounted to an "extreme professional error".

(ii) Bias was shown by agreeing to consider first SCC's query about what grievances the Authority had jurisdiction to investigate.

(iii) I had "accused" Mrs Marx of being a "liar" regarding a document.

(iv) Mrs Marx was not provided with more information about how to conduct her case and the Authority should have advised her about problems with her disadvantage claims so she could, instead, have raised them with the Human Rights Commission.

(v) The Authority took too long to decide the preliminary issue and "didn't bother" getting information from her before doing so.

**Recusal: applicable principles**

[9] A recusal application is usually considered by the decision maker who a party seeks to have removed from considering the case.[3]

[10] The starting point must be the obligation of an Authority Member to complete the investigation of any particular case she or he is assigned. A High Court of Australia decision explained the principle in this way:[4]

> It is important justice must be 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 a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[11] The Supreme Court of New Zealand has confirmed the principles applicable in considering a recusal application.[5] Its analysis was summarised in the following way by a subsequent High Court decision:[6]

> [3] … [T]he Supreme Court affirmed the view of the New Zealand courts that the test for disqualification of a Judge on the grounds of apparent bias was 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. As Blanchard J noted in that case, that "principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the ... [Court] be independent and impartial".
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> [4] Importantly, Blanchard J said that the lay observer must also be taken to understand three matters relating to the conduct of Judges. Two of them are relevant here. 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". Second, 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.
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> [5] The other Judges in *Saxmere* agreed with this analysis. Tipping J said, that in considering the appearance of justice being done, "the question is not how the matter appears to a professional Judge, but 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". ...

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[3] See, for example, *Bracewell v Richmond Services Limited* [2015] NZEmpC 45.
[4] *Re JRL, ex parte CJL*, (1986) 161 CLR 342 (HCA) at 352, per Justice Mason.
[5] *Saxmere Company Ltd v New Zealand Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.
[6] *Stiassny v Siemer* [2013] NZHC 154, per Justice Toogood (footnotes omitted).

[12] The High Court Judge also made this observation about how earlier unfavourable rulings should be seen in that evaluation:[7]

> I considered that the proposition that a Judge must be incapable of giving a litigant a fair hearing, or being seen to do so, because the Judge has ruled against the litigant on a prior occasion or occasions ignores the force and significance of the Judicial Oath and without more could not possibly meet the *Saxmere* test.

[13] Authority investigations are judicial proceedings so those principles apply in equal measure to Members carrying out their quasi-judicial role of investigating employment relationship problems.[8] Members take an oath of office to faithfully and impartially perform their duties.[9]

[14] Australia's law on this issue is essentially the same as the law in New Zealand. The Authority's equivalent in Australia is the Fair Work Commission. The Commission's website gives a useful summary of the relevant principles about when one of its Members may recuse themselves from considering a case. It is as apt for application by the Authority here:[10]

> The general principle is that a Member should not deal with a matter if, in all the circumstances, a fair minded observer might have a reasonable concern that the Member might not bring an impartial and unprejudiced mind to the case before him or her. If a party believes the Member is not impartial, they can apply to the Member to disqualify themselves from hearing the matter. Any application will be considered in context, with each decision depending on the particular issues or circumstances raised. Applications are not automatically granted if a Member's past decisions (on questions of fact or law) could lead to a reasonable expectation that they would decide a matter adversely for one of the parties.

**Mrs Marx's application**

[15] Those principles needed to be applied to Mrs Marx's apparent reasons for the recusal application. The question for answer on each point was whether a fair-minded observer, familiar with the facts and how the Authority investigates and determines employment relationship problems, might reasonably be concerned the Member might not bring an impartial and unprejudiced mind to dealing with the remainder of the case between Mrs Marx and SCC.

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[7] *Stiassny v Siemer,* above n 6, at [12].
[8] Employment Relations Act 2000, s 176(2).
[9] Employment Relations Act 2000, s 168.
[10] *https://www.fwc.gov.au/disputes-at-work/how-the-commission-works*

*Was the preliminary decision was wrong?*

[16] Mrs Marx maintained the Authority was wrong in the conclusions reached about what it could continue to investigate. An objective and informed observer would not consider such disagreement with the earlier determination was grounds for recusal. Such an observer would understand that the means by which the Employment Relations Act 2000 (the Act) allows parties to check whether a determination of the Authority accords with the prevailing law is a challenge under s 179 of the Act. Mrs Marx exercised that right. The Court did not agree with her criticisms of the Authority's preliminary determination. Having the assurance of that check by the Court, which considered evidence and submissions from Mrs Marx before making its decision, it could not reasonably be said the Authority's earlier determination amounted to what Mrs Marx called professional error.

*Was dealing with the preliminary issue first an instance of bias?*

[17] An informed, objective observer would know that the Authority routinely deals with preliminary issues that concern its jurisdiction to carry out an investigation of a party's claims. A typical example is whether a grievance met the statutory standard of being raised in time and with sufficient detail. It is often raised by employers responding to grievance claims. In this case SCC raised the question only in relation to a number of disadvantage claims, not Mrs Marx's dismissal claim which SCC accepted was raised in time. The fair-minded observer would not conclude that looking into and then deciding that jurisdictional issue demonstrated bias by me that would reasonably raise a concern that I might then not impartially and fairly investigate the grievances that were found to be within the necessary statutory scope.

*Was Mrs Marx accused of being a liar?*

[18] Mrs Marx suggested I would be "unsuitable" as the Member to continue to investigate her case because she felt I had accused her of being a liar, specifically in relation to a letter she said had been sent to SCC on 9 May 2013. Her concern appeared to relate to the following passage at paragraph [26] of the preliminary determination:

> Mrs Marx provided two other sources that might have established whether all her alleged grievances were raised within the statutory period. One was what appeared to be the text of a letter which Mrs Marx submitted (in her 28 August 2015 letter to the Authority) was sent to the Board on 9 May 2013.

> As far as I can tell from the Authority file this document was not provided with her application to the Authority on 16 April 2015. Her application included many tables and lists of what Mrs Marx said were relevant documents. The Board submitted that the letter supposedly sent on 9 May 2013 had only appeared as an attachment to an email from Mrs Marx to the Authority on 13 August 2015 and the Board's chair was unable to identify it as ever having been received by the Board at or around its purported date. I was not satisfied the provenance of the document provided on 13 August 2015 (and said by Mrs Marx to be a copy of a letter sent on 9 May 2013) was sufficient to accept it as evidence of having been sent to the Board in May 2013.

[19] An informed, objective observer would understand the conclusion drawn was not that Mrs Marx had not sent the letter. Rather the conclusion was that her evidence of having done so was not sufficient. In that sense it was a conclusion about whether she had met the evidential burden on her to prove, as more likely than not, that she had raised a grievance by way of that letter at the time.

[20] The Court drew a firmer conclusion in relation to the 9 May letter, at paragraph [28] of its decision on the challenge (emphasis added):

> The second document was dated 9 May 2013 and again referred to Mrs Marx's alleged illegal suspension and other issues, including in relation to bullying. The third was dated 24 July 2013 and stated that Mrs Marx wished to raise a personal grievance for unjustified dismissal, disadvantage and discrimination. **I am not satisfied that either document was actually sent to the defendant.** Mr Parussini's evidence was that extensive searches had failed to uncover the documentation. A grievance is not raised if the employee has not made, or taken reasonable steps to make, the employer aware of it. That is sufficient to deal with these documents. In any event, the first lacked sufficient specificity to raise a personal grievance. The second fell outside the 90-day timeframe.

[21] The situation had changed by the time the Court considered whether it should agree to rehear the challenge. Further investigation by SCC identified it had received the 9 May letter. The Judge did not accept SCC's board chairman Peter Parussini had lied under oath in the earlier hearing as he said he could not recall receiving the letter but accepted in evidence that he may have. However the important point was the Judge's conclusion about the 9 May letter, as it was then before the Court (emphasis added):

> And while a document which comes to light subsequent to a hearing, and which might have led to a different result, may be grounds for a rehearing, the letter of 9 May 2013 related to the dismissal and came too late in terms of the 90-day timeframe for raising a disadvantage grievance. Accordingly **it would not have made a material difference to the outcome**.

[22] A fair-minded observer would not conclude the Authority's determination on this aspect of evidence concerning documents had amounted to an accusation Mrs Marx was a liar. However, even if a negative inference was taken about her evidence, such an observer would also understand that an Authority Member frequently makes such conclusions during the course of an investigation without then forming a partial or unfair view of a party's evidence on other aspects of their case. It was not grounds to warrant recusal in this case.

*Was Mrs Marx entitled to more information and advice from the Authority?*

[23] Mrs Marx suggested the Authority was partial and unfair by not doing more to advise her about how to conduct her case and its prospects for success. If that were done, she considered she could have pursued some of her disadvantage claims, relating to alleged discrimination, through the procedures of the Human Rights Commission.

[24] A fair-minded observer would understand the Authority cannot fairly provide one party with advice about how better to present their case. Neither would such an observer consider the Member might be partial or unfair to either party by declining to give one or other of them such advice or information.

*Had the Authority taken too long and not gathered necessary information?*

[25] Mrs Marx's 3 April submission criticised the time taken from when she lodged her statement of problem in April 2015 until the Authority issued its determination on the preliminary issues in October 2015. She also suggested that the Authority "didn't bother" to call for evidence and information from the parties before making that determination. It was a description at odds with the communication to and from Mrs Marx during that period.

[26] A case management conference was held with Mrs Marx and SCC's counsel on 8 June 2015, after SCC had lodged its statement in reply, and a timetable was set for submissions to be lodged in June and July 2015. Mrs Marx sought an extension to that timetable due to illness. She lodged written submissions on 4, 5, 13, 27 and 28 August 2015. The demands of other Authority matters delayed issue of the preliminary determination to 1 October 2015.

[27] In light of the material that Mrs Marx had the opportunity to provide, and did, a fair-minded observer would not conclude the Authority had not 'bothered' to collect information and evidence relevant to the issues to be determined, and specifically from Mrs Marx.

[28] Delay in investigating the remainder of Mrs Marx's case, since the 1 October 2015 determination, has resulted from the time taken since by Mrs Marx's unsuccessful challenge to that determination and her unsuccessful application for a rehearing of the Court's decision. It has not been a result of any unwillingness by the Authority to proceed with its investigation.

**Conclusion**

[29] I am satisfied "an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances",[11] including the Authority's jurisdiction and procedures, would not reasonably apprehend there was some real, rather than remote, prospect that I may not bring an impartial mind to the investigation of Mrs Marx's substantive claim about her dismissal, and the alleged bullying grievance, because my earlier determination found the Authority lacked jurisdiction to investigate her other grievances. I decline to recuse myself from continuing the investigation and reserve costs.

**Next steps**

[30] The Authority's standard covering email or letter that will likely be sent with this determination to the parties refers to the right of challenge to the Employment Court within 28 days of a determination being issued. However, in respect of this particular determination, the parties should note that a determination declining a recusal application is not ordinarily open to that sort of challenge at this stage or time in the proceeding.[12] The issue determined here is one of procedure, not substance, so a statutory bar applies to any challenge of it: s 179(5)(a) and (b) of the Act. A right to challenge in this matter will come into existence once the Authority has completed its

[11] *Saxmere*, above n 5, at [38] per Justice Tipping.
[12] *Owen v The Chief Executive of the Department of Corrections* [2015] NZEmpC 201 at [40] and [41]. See also *Nisha v LSG Sky Chefs New Zealand Limited* NZEmpC 160 at [23].

investigation of the substantive issues and provided a written determination on those issues.

[31] As a result, I will now proceed with the 7 April case management conference and make the arrangements necessary to continue the investigation.

[32] I respectfully adopt and affirm the following observation made by Employment Court Judge Inglis in her decision issued on 27 January:

> During the course of hearing Mrs Marx made it clear that she was upset that it had been more than three years since her dismissal and her main claim has yet to be substantively investigated. I agree that it would be desirable for matters to be progressed and brought to a final conclusion. The respondent also has an obvious interest in bringing the litigation process to an end.

[33] I encourage both parties to co-operate in the Authority's continuation of its investigation of the two claims that the decisions of the Court have confirmed the Authority can go ahead and investigate.

Robin Arthur
Member of the Employment Relations Authority