

Recusal Guidelines

Recusal Guidelines for judges of te Kōti Take Mahi o Aotearoa | the Employment Court of New Zealand, pursuant to s 222B of the Employment Relations Act 2000

The Chief Judge, after consultation with the judges of the Employment Court and the Chief Justice, publishes these guidelines for determining issues about potential conflicts of interest and recusals.¹ The procedures described are intended as guidance. Decisions about recusal are very much fact-dependent and the approach taken in particular cases may vary accordingly. Any decision about a judge's recusal will usually be for that judge alone to make. Judges are bound to act, in this regard and generally, pursuant to [the Guidelines for Judicial Conduct](#).

General Principles

1. The following are general principles endorsed by the Chief Judge to which an individual judge considering a question of recusal should give consideration.
2. A judge has an obligation to sit on any case allocated to them unless grounds for recusal exist.
3. The guiding principle is that a judge should 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 of the case. The standard for recusal is one of "real and not remote possibility", rather than probability.

Process

4. Judges will need to address questions of potential recusal. Such questions will usually arise when a file is allocated to a particular judge for pre-trial preparation and ultimate hearing and decision. At this point, judges have a responsibility to familiarise themselves with relevant parts of the court file as it then stands to consider whether any potential recusal issue may arise.
5. If, after a file has been assigned to a judge and its contents seen, the judge realises that there is some matter concerning their prospective involvement that the judge considers

¹ These Guidelines replace earlier Guidelines published on 25 October 2023.

warrants recusal, the judge should stand aside and advise the Registry and the Chief judge accordingly. Allocation of files to individual judges will usually take place in sufficient time before a substantive hearing to enable alternative arrangements to be made for the case, if the originally scheduled judge is to recuse themself.

6. Where the issue of potential recusal is not clear-cut, it should be formally disclosed to the parties by the judge (usually by way of Minute) regardless of the initial view the judge has formed of the basis for recusal. This is because there may be circumstances not known to the judge that may be raised by the parties consequentially upon such disclosure. Disclosure should be made as early as possible before the hearing, advising the parties of the issue identified, and seeking their views, which the judge will consider before reaching a view on whether they should preside over the case. The Minute should contain sufficient detail to avoid placing the parties in the position of requesting further information.
7. The issue of potential recusal also may arise after the identity of the judge assigned to a case becomes known to the parties. At that point, objection to a given judge sitting may be raised for the first time by one or more of the parties. That objection may be made known to the Registry and then directed by the Registry in the first instance to the judge affected. Alternatively, a party who objects to the judge sitting may elect to file a notice of application for an order that the judge recuse themselves. Any such objection should be disclosed to the other parties.
8. Where the issue of recusal arises, the judge will consider the points raised by the parties and may, at that point, decide to stand down from the case, in which case the file will be reallocated, and the parties advised. If, however, the judge decides not to stand down from the case at this stage, the parties should be informed of this by a Minute issued by the judge.
9. If a party maintains an objection, the parties will have an opportunity to file brief written submissions and, if appropriate, affidavits. The matter of recusal will then be determined either on the papers or following an oral hearing, possibly by telephone, by the challenged judge who will issue a judgment determining the question of recusal, with reasons.
10. A party remains entitled to seek to challenge a judge's decision not to recuse themself in the usual way.

11. In multi-judge (full Court) cases, the Chief Judge or the presiding judge will determine the procedure to be followed.
12. Very late (including hearing day) applications for recusal will generally not be considered appropriate unless they could not have been reasonably foreseen. If a recusal issue is raised at this late stage, the affected judge will need to deal with the matter there and then. The principles set out in these guidelines should, as appropriate, be applied in such circumstances.
13. Where a possible conflict of interest is identified after the hearing of a matter but before the judgment is delivered, the procedures set out at paragraphs [5] to [11], with necessary modification, will apply.

Determination of Issues of Recusal

14. The judge should consider a two-step test: first, ascertaining the circumstances relevant (or said by a party to be relevant) to the possible need for recusal because of apparent (or actual) bias and, second, whether those circumstances lead to a reasonable apprehension that the judge might not be impartial. This second step requires ascertainment, first, of what it is that might possibly lead to a reasonable apprehension that the judge might decide the case other than judicially and on its merits. Second, it requires consideration of whether there is a logical and sufficient connection between those circumstances and that apprehension. The judge 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.
15. If, following the judge's careful consideration, the judge concerned is satisfied that there is a real possibility that they cannot act impartially, or is satisfied that a fair-minded, objective and fully informed observer would have a reasonable apprehension that the judge might not be impartial in reaching a decision of the case, the judge will determine not to hear and decide the relevant case.

Reviews of these Guidelines

16. These guidelines will be reviewed periodically and may, after the statutorily required consultation with the Chief Justice, be amended and republished by the Chief Judge.

17. These guidelines are issued by the Chief Judge pursuant to s 222B of the Employment Relations Act 2000 following consultation with the Chief Justice.

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Kaiwhakawā Matua | Chief Judge

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