

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 348  
5577914

BETWEEN	SIMON SPACEY Applicant
AND	VICE CHANCELLOR UNIVERSITY OF WAIKATO Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in Person David France for Respondent
Investigation Meeting:	On the papers
Submissions Received:	12 October 2015 from Applicant 19 October 2015 from Respondent
Determination:	10 November 2015

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. The application for recusal is declined.**
  
- B. Costs are reserved.**

**Employment relationship problem**

[1] This determination deals with an application by Dr Simon Spacey that I should recuse myself from investigating and determining his application lodged in the Authority on 12 August 2015. The Vice Chancellor University of Waikato (the University) opposes the application.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Dr Spacey and the University but has stated findings of fact and law, expressed

conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Background**

[3] Dr Spacey lodged a statement of problem in the Authority on 4 December 2014. Dr Spacey's claim included allegations that he had been unjustifiably disadvantaged in his employment as a result of cyberbullying. Dr Spacey also made an application for non-publication orders.

[4] The University responded stating that the allegations set out in Dr Spacey's application had not been raised within the 90 day period as required under section 114 of the Employment Relations Act 2000 (the Act).

[5] An investigation meeting was set down on 20 April 2015 to investigate and determine as preliminary matters, the 90 day issue and the application for non-publication orders. On 23 April 2015 I issued a determination on the preliminary matters<sup>1</sup>.

[6] I found Dr Spacey had raised three personal grievances within the statutory 90 day period but declined the application for non-publication orders.

[7] The parties had previously attended mediation over matters of employment relations issues raised by the University, but had not attended mediation over the issues I identified had been raised as a personal grievance by Dr Spacey. In accordance with my duty under section 159 of the Act I directed the parties to attend mediation and in good faith, attempt to resolve the outstanding matters between them.

[8] Dr Spacey and the University attended mediation on 17 June 2015 and entered into a Record of Settlement (ROS) which resolved all matters arising out of the employment relationship between them.

[9] On 12 August 2015 Dr Spacey lodged a further application in the Authority claiming the University had breached the terms of the ROS and seeks orders from the Authority that:

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<sup>1</sup> *Spacey v Vice Chancellor University of Waikato* [2015] NZERA Auckland 117.

- a) the ROS be considered invalid because the University had entered into mediation in “bad faith” and had broken a fundamental clause in the ROS;
- b) the previous claims lodged on 4 December 2014 be reinstated;
- c) the University email all staff and students (past and present) corrective information to prevent additional damage and breach of confidentiality of mediation;
- d) the ROS not be published by the University; and
- e) the University be prohibited from making further disparaging comments about Dr Spacey or malicious attempts to damage Dr Spacey’s reputation.

[10] Prior to receiving a response from the University, Dr Spacey requested that his new application be transferred to Wellington. The reason for his request was due to a delay he experienced in the Authority in having his matter dealt with and his perception that the Authority Officers in Auckland were acting against his interests. Having reviewed the file, it is apparent that there was one delay of two weeks from the date of lodgement to the date on which the University was served with Dr Spacey’s application. The delay was due to requests from the Authority for further information to be provided by Dr Spacey including a request for a copy of the ROS which had not been appended to his application.

[11] On 4 September 2015 the Chief of the Authority wrote to Dr Spacey and among other things, declined his application that the matter be moved to the Wellington office of the Authority, and set out the process for applying to have the matter removed to the Employment Court if he wished to do so.

[12] On 9 September 2015 the University lodged and served its statement in reply denying Dr Spacey’s claims and seeking an order pursuant to clause 12A, Schedule 2 of the Act that the proceedings be dismissed on the grounds that it is frivolous and vexatious and that costs to be awarded on an indemnity basis.

[13] On 10 September 2015 Dr Spacey formally applied to have his matter removed to the Employment Court at Wellington for hearing and determination. A

response from the University was received on 24 September 2015 opposing the application for removal.

[14] A case management call was held with the parties on 6 October 2015. During that call Dr Spacey requested that I recuse myself from dealing with his application. It was agreed that the recusal application would be dealt with as a preliminary matter on the papers.

[15] A timetable was agreed for the lodging and serving of submissions. Omitted from that timetable was an opportunity for Dr Spacey to respond to the University's submissions which has now been rectified. Dr Spacey has not taken that opportunity.

### **Recusal application**

[16] Dr Spacey is asking that I disqualify myself from conducting an investigation into his application lodged on 12 August 2015 and have no further involvement in it. In support of his application Dr Spacey says he is concerned that if I investigate and determine the matters currently before the Authority I will be in a position to cover up mistakes in my previous determination where I directed the parties attend mediation. Dr Spacey says the direction to mediation was wrong because it was done in the knowledge that he had been bullied by the University and he was unrepresented.

[17] In his submissions Dr Spacey also refers to a conflict of interest but does not expand on that allegation. Dr Spacey also submits that I have an economic interest in this case due, he says, to my professional advancement which he presumes requires Members to have a number of unchallenged judgments.

[18] The University submits that Dr Spacey's application for recusal is an attempt by Dr Spacey to change the Member assigned to investigate and determine the matter because he does not agree with the outcome of the previous determination and he has changed his mind about his decision to enter into the ROS.

### **Recusal principles**

[19] The principles for determining recusal applications were recently addressed by the Employment Court in *Bracewell v Richmond Services Limited*.<sup>2</sup> The

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<sup>2</sup> [2015] NZEmpC 45.

Employment Court noted the relevant test set out by the Supreme Court in *Saxmere Company Limited v New Zealand Wool Board Disestablishment Company Limited*:<sup>3</sup>

...a Judge is disqualified if a fair-minded lay observer may reasonably apprehend that there is a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the issue before him or her. This is to be approached in two stages – firstly by identifying what might lead a Judge to decide a case other than on its legal and factual merits, and secondly, by articulating the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[20] In applying the tests set out in *Saxmere* the High Court in *Siemer v Attorney-General*<sup>4</sup> stated that the apprehension of bias must be founded on proper grounds having a real and not fanciful connection to the possibility of bias.<sup>5</sup>

[21] Further, Authority Members, including myself are expected to be independent in decision-making. I have taken an oath to “...*faithfully and impartially perform [my] duties*..”.

[22] Authority Members are expected to investigate and determine any case allocated to the Member unless grounds for disqualification exist. Authority Members are not entitled to pick and choose their cases, which are randomly allocated.<sup>6</sup>

### **Direction to mediation**

[23] The Authority is bound by the provisions of the Act which has as one of its objects “*to promote mediation as the primary problem-solving mechanism*.”<sup>7</sup> Section 159 of the Act places a positive duty on the Authority to consider whether an attempt has been made to resolve the matter by use of mediation and must direct that mediation or further mediation be used before the Authority investigates the matter. This is the case whether the consideration of mediation occurs before, or in the course of, investigating any matter.

[24] The exceptions to this requirement are where the Authority considers that the use of mediation:

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<sup>3</sup> [2009] NZSC 72, [2010] 1 NZLR 35.

<sup>4</sup> [2013] NZHC 1111.

<sup>5</sup> *Ibid*, at [6].

<sup>6</sup> See comments by Toogood J, in *Siemer*, *ibid* at [7].

<sup>7</sup> Employment Relations Act 2000 (the Act) section 3(a)(v).

- a) Will not contribute constructively to resolving the matter; or
- b) Will not, in all the circumstances, be in the public interest; or
- c) Will undermine the urgent or interim nature of the proceedings; or
- d) Will be otherwise impracticable or inappropriate in the circumstances.<sup>8</sup>

[25] The parties had attended mediation prior to Dr Spacey lodging his original application in December 2014. The purpose of that mediation was not to address the allegations of bullying raised by Dr Spacey but to address employment relationship issues the university had raised with Dr Spacey.

[26] Given my finding that Dr Spacey had raised a personal grievance within the requisite 90 days and that the parties had not had the benefit of mediation to resolve that personal grievance, I considered mediation would contribute constructively to resolving, if not all, at least some of the matters raised by Dr Spacey. In that regard I was proven to be correct because the parties entered into a ROS resolving all matters between them.

[27] If Dr Spacey was unhappy with the orders made in my earlier preliminary determination he was entitled to challenge all or part of that determination in the Employment Court. Dr Spacey was notified of his challenge rights in correspondence from the Authority attaching the Preliminary Determination served on him on 23 April 2015. Dr Spacey was advised:

Section 179 of the Employment Relations Act 2000 states that if a party is dissatisfied with the determination it can be challenged in the Employment Court. You can challenge parts of the determination or the whole determination.

You must apply to the Employment Court within 28 days after the date of the determination. To do this you need a special form; you will need to contact your nearest Employment Court for assistance on how to do this.

[28] Dr Spacey was provided with the contact details for the Employment Court in Auckland.

[29] I am satisfied that a fair minded observer would find nothing irregular about the direction to mediation. I had a statutory duty to consider mediation and was required to direct the parties to mediation unless the criteria set out in section

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<sup>8</sup> The Act at section 159(1)(b).

159(1)(b) was met. I was satisfied in making my direction to mediation that the criteria did not apply to Dr Spacey's allegations and that mediation was appropriate in all the circumstances.

[30] With respect to his complaint that he was unrepresented at mediation, Dr Spacey was entitled to be represented at all times throughout all of the processes in both the Authority and mediation. Section 153 of the Act requires mediators to act independently and be independent of any parties appearing at mediation. Mediators are experienced in ensuring lay litigants such as Dr Spacey, are not disadvantaged by electing to be unrepresented. Dr Spacey's decision to attend mediation without representation is not a basis for recusal.

### **Conflict of interest**

[31] I am not aware of any conflict of interest in dealing with Dr Spacey's application. Dr Spacey's claims in the regard are without foundation and provide no basis on which I should recuse myself.

### **Economic interest**

[32] I have no economic interest in the outcome of these proceedings. Dr Spacey's claims in this regard are without foundation and provide no basis on which I should recuse myself.

[33] Dr Spacey's claim that my professional advancement is dependent on the number of unchallenged determinations is incorrect and is also made without foundation and provides no basis on which I should recuse myself.

### **Determination**

[34] There is no sound basis for me to recuse myself. The grounds on which the recusal application is based do not demonstrate any lack of impartiality on behalf of either myself or the Authority.

[35] I am satisfied that no fair minded lay observer informed of the facts and aware of the general legal workings of the Authority and mediation processes would apprehend that I would not decide the matters before me impartially.

[36] The application for recusal is declined.

**Steps to be taken to progress Dr Spacey's claims**

[37] The applications by Dr Spacey for removal to the Employment Court and the University for the dismissal of the 12 August 2015 proceedings will now be progressed to an investigation meeting. It seems logical to deal with the application for dismissal of proceedings in the first instance and if that application is declined, to then deal with the application for removal lodged by Dr Spacey.

[38] The parties can expect a call from the Authority in the next day or two, to arrange a case management call to discuss and set timetables for investigating and determining the two applications.

**Costs**

[39] Costs are reserved and will be dealt with following the determination of the applications for dismissal and removal.

Vicki Campbell

Member of the Employment Relations Authority