TASMANIA

Tasmanian Industrial Commission

State Service Act 2000

Applicant 1/2017

and

Tasmanian Health Service

Decision published as being in the public interest – redacted so as to prevent identification of the Applicant.

PRESIDENT D J BARCLAY HOBART, 9 MAY 2017

Review Selection – process issues - allegations of actual and apprehended bias of chair of selection panel - no actual or apparent bias

DECISION

[1] The Applicant filed an Application for Review of a Selection relating to the position of [deleted], Mental Health North West dated 26 April 2017 and filed 27 April 2017.

[2] The basis of the objection to the selection is in respect to process. The application and the Applicants statutory declaration[1] disclose that the grounds relied on are that:

- [the] Chair of the selection panel was actually biased against the Applicant due to a complaint made by the Applicant to the Anti-Discrimination Commission (**ADC**) in June 2013 alleging discrimination on the grounds of industrial activity;
- [the Chair] was actually biased against the Applicant due to the Applicants industrial activity;
- There is an apprehension of bias on the part of [the Chair] against the Applicant due to the aforesaid reasons;
- There is an apprehension of bias in respect to panel members Ms SM and Mr AA in that they would not bring an independent mind to the task of selecting the appropriate person due to being under the influence of [the Chair].

[1] Exhibit A1

[3] During the Applicants closing his representative Mr Digney whilst not formally abandoning actual bias conceded that there was no clear and cogent evidence of actual bias on the part of any member of the selection panel.

[4] Further, in respect to bias on the basis of industrial activity Mr Digney agreed that the applicant did not press industrial activity. That was appropriate. The Applicant in his evidence agreed that the basis for the allegations of bias arose from the complaint to the ADC.[2] The only evidence about industrial activity came from D Wareing[3] but ultimately that was not relied on to found a basis for the allegation of bias.

[5] The Applicant also relied on an asserted breach of a duty of [the Chair] to inform the delegate of the potential bias issue.

[6] The Respondent, represented by [the Chair], denies that there was any actual bias or the possibility of an apprehension of bias. Further it submits that the Applicant has waived his right to now assert bias.

The Test for bias

[7] The foundation of the rule in relation to bias is that (in the circumstances if this case) a fair and impartial selection process must not only be undertaken but must be seen to have been undertaken.

[8] Accordingly a decision maker who does not (actual bias) or might not (apprehended bias) bring an impartial mind to the decision making process is precluded from being involved in the decision making[4].

Actual Bias

[9] A claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and because of partiality against the affected person, could not be swayed by the actual merits of the case.

[10] Actual bias has on occasion been described as the decision maker being "invincibly biased" against the person affected. The descriptor swerves to illustrate the nature of the proof required in a case of actual bias. Unlike the objective assessment required to be undertaken for apprehended bias, a case of actual bias is assessed by reference to conclusions which might reasonably be drawn about the actual views and behaviour of the decision maker.

[11] A claim of actual bias requires clear and direct evidence that the decision maker was in fact biased. Actual bias is not made out by suspicion, possibility or equivocal evidence. The requirement is difficult to satisfy.[5]

Apprehended Bias

[2] Transcript p. 13
[3] Transcript p. 38
[4] *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337
[5] See for example *Sun v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505 at 552

[12] The leading authority relating to apprehended bias is *Ebner v Official Trustee in Bankruptcy*[6]. The test to be applied in cases of apprehended bias is now well understood:

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if 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. 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 tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle. (footnotes omitted)

[10] The test is therefore whether a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question the decision maker is required to decide.

The Fair Minded lay Observer

[11] In *Johnson v Johnson*[7] Kirby J said:

> There is no simple answer to the foregoing questions. As is usually the case when a fiction is adopted, the law endeavours to avoid precision. The nature of the fiction involved in this instance is illustrated by the many ways in which the hypothesised bystander is described. Phrases that have been used include the "lay observer", "fair-minded observer", "fair-minded, informed lay observer", "fair-minded people", "reasonable or fair-minded observer", "reasonable and intelligent man", the "parties or the public", a "reasonable person", or (as has sometimes been favoured in England and Canada) the somewhat quaint and circular phrase, a "right-minded" person. Obviously, all that is involved in these formulae is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias. It must be remembered that, in contemporary Australia, the fictitious bystander is not necessarily a man nor necessarily of European ethnicity or other majority traits.
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> The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at

[6] Ibid, footnote 1.
[7] (2000) 227 CLR 457

> a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious. (footnotes omitted)

[12] Accordingly the test which I will apply is whether a fair-minded lay observer (an observer who would be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstance, who would know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers) might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

The evidence

[13] Fundamental to the case is the complaint to the Anti-Discrimination Commission. It is this complaint which grounds the allegation of bias (both actual and apprehended). That is, because the Applicant made a complaint to the ADC Ms Crave is actually biased against the Applicant or in the alternative there is an apprehension of bias.

[14] I have already noted that the applicant does not rely on industrial activity separate from the ADC complaint.

[15] It is important to understand that there was no finding by the ADC (as there could not have been without admission by [the Chair][8]) that there was discrimination including discrimination based on industrial activity. However I need not reach any conclusions about that given it is the fact of the complaint to the ADC of itself which is alleged to give rise to bias.

[16] The applicant gave evidence. On the whole I have no reason to disbelieve his evidence. However his evidence cannot not relevant to the issue of apprehended bias. That question is to be tested objectively applying the test referred to above. As to actual bias the applicant gave no evidence of any circumstances which were suggestive of a bias being displayed by [the Chair] in respect to him.

[17] I should note that the Applicant displayed some tendency to overstate his case. The applicant referred, in respect to the issue of failing to notify the panel of the bias

[8] It is for the Anti-Discrimination Tribunal to make findings of actual discrimination.

issue, to having no faith in the department to deal with the issue appropriately due to the way it had dealt with other complaints. As it transpired the only complaint he could bring to mind was the issue which led to the ADC complaint.

[18] Dr Wareing also gave evidence. His evidence was relevant to his belief that [the Chair] was actually biased against the Applicant. His evidence was centred on his letter to [the Chair] dated 12 April 2013 and his belief that the complaint which led to the ADC referral was inappropriately dealt with. Again this evidence is only relevant to actual bias.

[19] Dr Wareing also gave evidence in respect to complaints he made to the ombudsman and the Integrity Commission. Those complaints related to a belief that the initial complaint against the Applicant has been improperly pursued after he (the Applicant) had apologised for his behaviour. The apology was given pursuant to an undertaking that the initial complaint would be at an end once the apology had been made. Dr Wareing felt that this undertaking was breached and the complaint pursued.

[20] It transpired that the belief was wrong. All that occurred after the apology was given is that the complaint was closed off by an email from [the Chair] to the Applicant in accordance with standard procedure.

[21] Interestingly Dr Wareing asserted he had not seen that email. I note however it is clear he was sent a copy of it.

[22] Nothing in Dr Wareing's evidence amounts to clear and direct evidence of actual bias on the part of [the Chair].

Bias because to the complaint to ADC

[23] In respect to the allegation that there is bias because of the fact of the complaint to the ADC I note that the fair minded lay observer would know:

- that the complaint to the ADC was made;
- that it was made in June 2013, some 3 ½ years before the selection issue arose;
- that the complaint related to one issue occurring at the Queenstown Hospital and the way the issue was subsequently dealt with;
- the ADC complaint was settled;
- that there is no evidence on any ongoing issues between [the Chair] and the Applicant;
- that the evidence of the relationship between the applicant and [the Chair] is to the effect that there was nothing to suggest that [the Chair] demonstrated any ill will towards the applicant.[9]

Actual Bias

[24] As to actual bias I am not satisfied that there is sufficient evidence to establish that [the Chair] was actually biased against the Applicant because of the complaint to the ADC. Indeed there is in fact no evidence regarding how [the Chair] felt about the ADC complaint. There is no evidence she expressed any views about it. Put simply

[9] . Indeed the applicant described the relationship as superficial: Transcript p. 19

there is no clear and direct evidence how the decision maker felt about the ADC complaint. I have noted above that so much is accepted by the Applicant.

Apprehended Bias

[25] In my view a fair minded lay observer would also not be of the opinion that [the Chair] might not bring an impartial mind to the resolution of the issues she was required to decide.

[26] I have identified the matters which a fair minded lay observer would know at [23]. At its highest the Applicants case is that because of an ADC complaint which was settled with no findings against anybody, some 3 ½ years later there was possibility that [the Chair] might not bring an independent mind to the issue of selection in circumstances where there is no evidence of the relationship in the intervening period save that in the last few months it was superficial.

[27] In my view there is no apprehension of bias. No fair minded observer would think that [the Chair] might not bring an impartial mind to the task with which she was dealing. Just because there was one complaint some 3 1/3 years before does not give rise to an apprehension of bias.

[28] To put it another way in my opinion there is no apprehension that [the Chair's] mind might be so closed that she was unable to bring an impartial mind to the appointment.

The duty to disclose

[29] The Applicant also relied on a failure by [the Chair] to disclose the ADC complaint and its potential to give rise to an apprehension of bias. My finding that there is no relevant bias means that I am not required to rule on this aspect of the matter

[30] The Applicant suggests that [the Chair] had a duty to refer the potential for conflict to the delegate. It was submitted that failure to do so vitiated the selection process. Again my finding that there were no circumstances which gave rise to an apprehension of bias means that there was no duty to refer the matter to the delegate. Nevertheless I will say a little about the claim.

[31] In support of the submission that there was a duty to disclose or refer to the delegate the Applicant relied on a Tasmanian Integrity Commission guide to dealing with conflicts of interest.

[32] There is no evidence before me whether the Department of Health and Human Services has adopted the guide. Even if it had the Applicant has not provided any submissions or authority to suggest that the guide imposes a duty on a decision maker to follow the guide and to disclose. It may well be good practice to follow such a guide. However to say that there is a duty to follow it does not necessarily follow. Even if the

Department had adopted the guide I have doubts that the guide would have the effect of amounting to a directive thus casting a duty on [the Chair] to disclose the potential bias.

[33] The Applicant relied on evidence from [the Chair] that she was alive to the potential bias issue because she appointed another independent person to the panel. This, it was submitted meant that [the Chair] should have notified the delegate of the potential for bias.

[34] Setting aside the difficulty with the status of the guide and whether it imposes a duty on a decision maker, in my view given my finding relating to apprehended bias appointing the additional panel member was an overabundance of caution and in the event unnecessary. It did not amount to a circumstance giving rise to a duty to disclose the potential issue to the delegate.

Waiver

[35] The Respondent submits that the applicant waived his right to raise bias because he should have done so before the panel embarked upon its task.

[36] The Respondent correctly notes that failure to object to a decision maker on the basis of bias may amount to a waiver if the person if fully aware of the circumstances.[10] If a party knows of the circumstances that give rise to the disqualification but acquiesces in the proceeding by not taking objection it is likely that the party has waived the objection.

[37] The Applicant was notified of the makeup of the panel either 4 or 5 days before is interview. However he did not raise the issue. He asserts that was because of his prior experience with the department failing to properly deal with complaints. That is, there was no point raising the issue before the panel commenced its task.

[38] Again it is not necessary to decide this issue. However I have some doubts about the Applicants claim. He was only able to point to the issues which led to the ADC complaint as evidence of the department not dealing with matters properly. He has been involved with unions in various capacities for some 30 years. My impression was that the Applicant simply decided to keep his powder dry. If he was successful, then that would be satisfactory; if not he would raise the issue of bias.

[39] If I had to decide the issue I would have been inclined to find that the Applicant had waived his right to take the bias point before me. He knew of all the circumstances giving rise to the issue said to constitute bias. Indeed he has argued (albeit faintly) that there was actual bias. The event said to give rise to the bias was over 3 ½ years ago. A reasonable person might think that a manager in [the Chair's} position may well have forgotten about the issue. There has been no or little interaction between [the Chair] and the Applicant during that time. It was appropriate that the Applicant raise the matter and his failure to do so likely constituted a waiver. I also note Mr Digney's agreement with my summary that in essence the Applicant had indeed kept his powder dry pending the outcome of the selection process.

[10] See for example *Re Alley* (1995) 64 ALR 6; *Michael Wilson and Partners v Nicholls* [2011] HCA 48 at [76].

[40] I should add that had the applicant informed the selection panel of the potential bias issue, I would expect that the steps [the Chair] took to ameliorate against any perception of bias by appointing a fourth member would have been sufficient to deal with the issue.

Conclusion

[41] In the event I find that [the Chair] was not actually biased against the Applicant. Further I conclude that a fair-minded lay observer would not have apprehended that [the Chair] would not bring an impartial mind to the process of selection with which she was tasked.

[42] Whilst not required to decide, on the material before me I do not regard [the Chair] as having had a duty to disclose the potential for bias nor notify the delegate of same.

[43] Again whilst not necessary to decide I am of the view that the Applicant waived his right to raise the issue of bias before me for his failure to notify the panel of the bias issue when he (the Applicant) was notified of the constitution of the selection panel.

[44] I decline to make the order sought that the vacancy be readvertised. The Respondent may proceed to fill the role with the successful nominee for the position. The Application is otherwise dismissed.

D Barclay
President

Appearances:
Mr L Digney for the Applicant
[The Chair] for the Respondent
Ms M Pengelley for the Respondent

Date and place of hearing:
2017
May 4
Launceston