TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
s29(1) application for hearing of an industrial dispute

Health Services Union, Tasmania Branch
(T14878 of 2021)

and

Minister administering the State Service Act 2000/Tasmanian Health Service

PRESIDENT BARCLAY HOBART, 31 DECEMBER 2021

Application in relation to threatened or impending termination of employment – jurisdiction – whether an industrial dispute – alleged impartiality of investigator – Employment Direction 5 – whether rule against bias of decision makers applies to the investigator

DECISION

[1] The Health Services Union, Tasmania Branch (the HSU) has made an application for an order "that the current ED-5 process be discontinued on the basis of the defect in compliance with the ED-5 procedure". The procedure relates to the employment of Mr Burgess. The defect in procedure alleged is that the Secretary of Health appointed an investigator to carry out an investigation pursuant to Employment Direction 5 (ED 5) who was not (as required by ED 5) impartial.

[2] The HSU seeks an urgent order on the basis that the Applicants employment will be terminated on 3 January 2022.

[3] The Respondent has submitted that the Commission has no jurisdiction to determine the matter on the basis that there is no "industrial dispute" within the meaning of s 3 of the *Industrial Relations Act 1984 (the Act)*. Further the Respondent submits that in any event there is no relevant bias or partiality which would disqualify the investigator from carrying out the investigation.

[4] The parties have agreed that I am to decide the Application on the papers. I do so with some reticence as there is no evidence before me other than some assertions said to constitute relevant bias or partiality from the investigators position with the Tasmanian Health Service (THS) and what the investigator may have done in respect to Mr Burgess' matter prior to her appointment as the investigator. While it is not usual for a decision maker against whom bias or partiality is alleged to give evidence in a case such as this, the investigator is not the decision maker in this case and it is likely her evidence would have been of significance to any potential outcome. I note however that the investigator would be the Respondents witness and there is of course no requirement for the Respondent to provide any evidence from her.

[5] Due to the urgency of the matter, the wishes of the parties and the fact that the investigator may not have been called to give evidence if the matter had proceeded to a full hearing I have decided to proceed on the papers.

Background

[6] Mr Burgess (in respect of whom the HSU brings this application) is an employee of the THS who has failed to provide evidence of his vaccination status or that he has an exemption from the requirement to be vaccinated against the COVID-19 virus. Such a requirement to provide that information stems from directions made by the Director of Health. I have previously written a decision about Mr Burgess in relation to actions taken in respect of his employment. I venture to set out the background to which I referred in that decision[1]:

> "[6] On 7 October 2021 the Director made the Direction. It applies to various premises including residential aged care facilities and medical or health facilities and applies to various people including anyone employed or engaged in working at such premises. The effect of the Direction is that it prevents persons who are not vaccinated against the COVID-19 virus from entering those premises.
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> [7] It is common ground that the Direction applies to the Applicant. It is also common ground that the validity of the Direction is not in question.
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> [8] Prior to the Direction the Director had made previous directions of like effect. The Respondent wrote to employees of the Department of Health, including the Applicant on various dates regarding the Direction and previous directions, which correspondence amongst other things required the provision of information regarding employees' vaccination status.
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> [9] In the Respondents Position Statement it attached a number of documents including emails sent from the Respondent to its employees regarding the Direction and preceding directions to like effect. The emails and correspondence also relate to subsequent directions including Direction 10 dated 31 October 2021.
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> [10] A summary of the emails, in so far as they are relevant to the issues raised, is as follows:
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> (a) Email dated 24 September 2021 - advising of the Director's direction, that it applies to all employees of the Department of Health and noting that "by 30 October all employees will either need to provide evidence that they are vaccinated against COVID-19, or evidence that they are exempted from being vaccinated against COVID-19 due to medical contraindication".
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> (b) Email dated 5 October 2021 – noting among other things that the "Public Health Direction specifies that staff must provide their vaccination evidence by 31 October 2021 to be able to work".
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> (c) Email 14 October 2021 – noting that the obligation to provide evidence of vaccination status "is a legal requirement of you as an employee" which must be done by 31 October 2021.
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> (d) Email 20 October 2021 – reminding employees of the obligation to provide the vaccination information and contained advice that if an employee failed to provide the information:

[1] Burgess v Tasmanian Health Service RO23 of 2021/22

"• You will be unable to enter a medical or health facility in Tasmania to engage in employment or an engagement to work, volunteering, a placement or work experience.

• For employees, as you are unable to perform work in a medical or health facility or work for or on behalf of the Department of Health regardless of location, you will not be entitled to be paid on and from 31 October 2021 (no work, no pay principle).

• If you are a fixed-term employee of the Department of Health, you will be provided notice of termination of your employment pursuant to your instrument of appointment.

• If you are a permanent employee of the Department of Health, on and from 31 October 2021 we will commence a State Service process to terminate your employment, and you will not be paid on and from 31 October during this process."

(e) Email 25 October 2021 reminding employees of the obligation to provide evidence of vaccination status and repeating the consequences of a failure to do so as set out in the 20 October email.

(f) Email of 27 October 2021 in substantially the same terms as the 25 October 2021 email.

(g) Email 29 October 2021 to employees who had not provided evidence of vaccinations status. The email included the following:

> … Should you not be sufficiently vaccinated or hold an exemption and have provided evidence of it to the Department of Health, I advise that:
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> 1. with effect from 12:01am Sunday 31 October 2021, you will be required to 'stand aside' from your employment and will cease to receive payment of salary or any related remuneration from the Department of Health (except for work completed prior to 31 October 2021), and
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> 2. you will not be able to attend a Department of Health workplace or undertake any work for the Department of Health. Security access to buildings will also be removed, as will your ability to access Department of Health networks, and
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> 3. I intend to commence proceedings that may result in termination of your employment with the Department of Health.

[11] On 31 October 2021 the Secretary of the Department of Health (the Secretary) wrote to the Applicant noting the he had not provided evidence of his vaccination status as required by the Direction (which was now in place). The Secretary notified the Applicant that, in consequence of the Direction, he was unable to carry out his duties and he was therefore "stood aside" from his duties. As a result of being unable to carry out his duties he was told that he would not be entitled to receive salary. The letter also contained a direction to provide evidence of vaccination status (as required by the Direction) by 5 p.m. Sunday 7 November 2021. The letter advised that the failure to comply with the direction to provide the vaccination evidence by the time and date specified may result in the Secretary taking action to determine whether the Applicant had breached the State service

Code of Conduct. The Applicant was further advised that the result of the Code of Conduct investigation may result in the termination of his employment.

[12] Finally on 15 November 2021 the Secretary wrote to the Applicant advising that she had reasonable grounds to believe the Applicant may have breached the Code of Conduct for failing to comply with the direction to provide information regarding his vaccination status as referred to in the letter of 31 October 2021. As a result the Secretary advised that she was commencing an investigation in accordance with Employment Direction 5 to determine whether the Applicant has breached the Code of Conduct."

[7] On 10 December 2021 the Secretary of Health wrote to Mr Burgess referring to the 31 October and 15 November letters. The Secretary notes that she had received the investigation report she referred to in her 15 November 2021 letter and that she was inclined to accept the investigators report. She said there was reasonable evidence to substantiate the allegation that Mr Burgess had failed to comply with the direction to provide evidence of his vaccination status or exemption. She provided the investigation report to Mr Burgess and has sought his response by 5 pm 2 January 2022. The Secretary has said that unless she is persuaded differently by Mr Burgess' response she proposes to terminate his employment effective 3 January 2022.

[8] The Secretary went on to advise Mr Burgess that he has a right to dispute his termination by lodging an application with the Commission.

Jurisdiction

[9] The HSU submits that there is jurisdiction for the Commission to deal with the dispute. Its submissions are as follows[2]:

"1. S. 29(1): An organization may apply to the President for a hearing before a Commissioner in respect of an industrial dispute.

2. S. 3 'industrial dispute' means 'a dispute in relation to an industrial matter – (a) that has arisen; (b) that is likely to arise or is threatened or impending'.

3. An 'industrial matter' includes a 'matter relating to – (ii) the termination of employment of an employee for former employee.

4. It is submitted that words 'relating to' have broad effect.

5. It is submitted that an employee need not be 'terminated' for a matter to relate to 'termination of employment'. This is shown by the definition relating to both 'employees' as well as 'former employees'.

6. The dispute 'relates' to the Secretary of the Department of Health, Ms. Katherine Morgan-Wicks (the HoA) threatening 'termination of employment' of a member of the Applicant employee, Mr. Brett Burgess (see letter of 10 December 2021 attached at Annexure 1)."

[10] I have referred to the 10 December 2021 letter where the Secretary said that unless otherwise persuaded by Mr Burgess' response to the Investigators report "it is my intention to terminate your employment effective 3 January 2022".

[2] Statement in support of the Application

[11] Section 3 of the Act provides relevantly:

> "**industrial dispute** means a dispute in relation to an industrial matter –
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> (a) that has arisen; or
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> (b) that is likely to arise or is threatened or impending;
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> **industrial matter** means any matter pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes –
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> (a) a matter relating to –
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> (i) the mode, terms and conditions of employment; or
>
> (ii) the termination of employment of an employee or former employee;
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> …"

[12] The intention to terminate Mr Burgess' employment is clearly a threat to terminate his employment. It is also obvious that in light if the Secretary's letter termination is impending. The Respondent agrees that the letter constitutes an intention to terminate effective on a day in the future[3] but submits that does not relate to termination. In my view the threat to terminate Mr Burgess' employment falls within that part of the definition of industrial dispute in s 3 of the Act which refers to a dispute that is likely to arise or is threatened or impending. The termination is both threatened and impending.

[13] The Respondent submits that nevertheless "[t]here is no 'industrial dispute' because the Applicant's contention of bias on the part of the investigator is one step removed from the Secretary's decision to terminate Mr Burgess's employment, such that it is not a dispute relating to termination (or any other 'industrial matter')".[4]

[14] In my opinion that submission is not to be accepted. The conduct of the investigator in preparing the investigation report is the linchpin to the decision to terminate. The Secretary said[5]

> "I have now been provided with the Investigator's Report…I have reviewed the Report in full and I am inclined to accept the Investigator's findings, being that, *based on the evidence obtained during the investigation, I find there is reasonable evidence to substantiate the allegations that you have failed to comply with the lawful and reasonable direction".* (my emphasis)

[15] It may be seen that the entirety of the matters the Secretary has taken into account to reach her decision is the investigation report. If that report was infected by bias or partiality then it follows, on the facts of this case, that the decision is infected by the same bias or impartiality. There is no other material upon which the Secretary could (on the material before me) rely to reach her decision. The alleged bias of the investigator is not one step removed from the decision to terminate. It is the whole basis upon which the decision has been reached.

[16] The Respondent also submits that the dispute does not have a collective element as required by *Newtown Timber and Hardware Pty Ltd v Gurr*[6]. The difficulty with that submission is that disputes about unfair termination will very rarely, if ever have a

[3] Respondents Position Paper paragraph 1(A)(i)
[4] Email from Assistant Solicitor- General dated 24 December 2021
[5] Letter of 10 December 2021 to Me Burgess
[6] (1995) 5 Tas R 71

collective element. The dispute is about whether a particular employee's employment was unfairly terminated. The examination of that issue relates to the individual employee and his or her employment. It is difficult to see how there is a collective element to such a dispute. However disputes about unfair termination have been accepted to be industrial disputes in respect of which industrial tribunals have jurisdiction throughout the Commonwealth.

[17] The plain reading of the definition of industrial matter includes the termination of an employee or former employee's employment. Further s 29 of the Act enables an individual employee or former employee to bring an application in respect to the termination of their employment. In my view there is nothing in the text or context of the Act which requires a reading down of the right to bring a claim in respect of the termination of employment by requiring a collective element to the dispute. Not only do the terms of the legislation not require such a construction but such a construction would in effect preclude most claims. That cannot in my opinion have been the intention of Parliament when it enacted the right for a former employee to make an application for an unfair dismissal remedy.

[18] Until the right for a former employee to make such a claim was included in the Act such an former employee was unable to bring a claim as the claim related to former employment and there was no longer an industrial dispute about an industrial matter. However by including the right for a former employee to bring a claim parliament must have intended to extend the right to claim to an individual where previously there had been no such right because there was no industrial dispute about an industrial matter. I also note that the provisions relating to termination of employment are remedial and should not be read down unless to text or context of the legislation clearly requires such a reading. Nothing in the legislation requires such a reading down.

[19] Indeed in Newtown Timbers Underwood J (as he then was) after a lengthy examination of the Act and noting in essence the task was one of statutory construction said[7]:

> "Whatever may have been the generally accepted meaning of the expression "industrial dispute", there is nothing in the legislative prescription just set out that requires those words to be read down so that a dispute relating to the dismissal of a particular employee means but only one which involves an organisation of employees and/or industrial disharmony. In their ordinary meaning, the words used for the legislative definition include a dispute between a former employee and his or her former employer."

[20] Finally when considering jurisdiction I note that the reason for bringing the application and its factual basis for the dispute is the threatened termination of Mr Burgess' employment. The fact he is seeking a remedy which does not relate to the termination itself but rather seeks to challenge some steps on the way to termination does not change the existence of jurisdictional facts necessary to ground jurisdiction in the Commission. Indeed rather than wait for the termination to take place and to assert as part of that case that the process went awry as a result of the bias or partiality of the investigator and in that way the termination was unfair and should be set aside, the HSU is seeking to challenge and cure that alleged defect before the termination takes place.

[21] I conclude that the Commission has jurisdiction to deal with the matter it being an industrial dispute which is threatened or impending about the termination of Mr Burgess' employment.

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[7] Ibid p 97

Is the Applicant entitled to its remedy?

[22] The Applicant seeks that the ED 5 process be discontinued as the investigator is biased in the sense that there is an apprehension of bias. It is no part of the Applicants case that the investigator is in fact biased in any way.

[23] The Applicant relies on ED 5 paragraph 7.1 which provides:

> "Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach of the Code in accordance with these procedures. The Investigator must be impartial and must report to the Head of Agency in accordance with Clause 7.9 on the outcome of their investigation."

[24] The Applicant relies on the requirement that the investigator is to be impartial and alleges that there is an apprehension of bias in the sense that there is an apprehension that she is not impartial.

[25] Both parties have approached the question on the basis that the law relating to bias of decision makers applies. The seminal case is *Ebner v Official Trustee in Bankruptcy*[8] where it was said that "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".[9]

[26] The principle applies to administrative decision makers. What is clear however is that the principle relates to decision makers.

[27] The Applicant relies on *Isbester v Knox City Council*[10] as authority for the proposition that incompatibility of roles is sufficient to give rise to an apprehension of bias. In Isbester a council officer had been the moving force behind a prosecution of a dog owner alleging that his dog was a dangerous dog. The dog owner pleaded guilty. Thereafter the council officer arranged for a panel of three delegates of the council, including herself, to conduct a hearing to determine whether to recommend that the dog should be destroyed. The panel conducted the hearing, deliberated and recommended that the dog should be destroyed. It was not disputed that the officer participated fully in the decision-making of the panel following the hearing. The High Court held that there was an incompatibility of roles between that of "prosecutor" in the first instance and sitting on the penal to decide the fate of the dog in the second. It is clear that the council officer was a decision maker in the second instance. The decision in my view does not extend to roles of persons who are not decision makers.

[28] I know of no cases where the bias rule has been held to apply to anyone who is not a decision maker. Indeed the genesis of the rule arises because it is fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal.[11] The principle has not been extended to non-decision makers.

[29] In the present case it is not suggested that the investigator was involved with the decision making process.

[30] That however is not an end to the matter. Employment Direction 5 specifically requires the appointed investigator to be impartial. The words used are that the "investigator must be impartial". No doubt that is because, in the usual run of matters

[8] (2000) 205 CLR 337
[9] Ibid at 344
[10] [2015] 255 CLR 135
[11] Ebner, supra at paragraph 3

under ED 5 the decision maker will adopt the findings of the investigator when determining the outcome of an investigation. As such impartiality must extend to the fact finding and any conclusions reached as well as the ultimate decision.

Was the investigator impartial?

[31] The Applicants submissions are in the following terms (albeit in terms of decision maker's bias):

> "19. Identification of the source of bias: There was an apprehension of bias in respect of Merrick's appointment and performance of her role as an investigator because of:
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> a. Her interest. She had a direct interest in the proceedings. When Agencies in the State Service, including the Department of Health, commence and continue an ED-5 process they assign a human resource officer to do the leg work in formulating, writing and sending correspondences and essentially managing the disciplinary process. This person is represented as the 'contact'. In all cases a HoA will send sign and send correspondences in their name but on the top of such letters the name of the human resource officer who is the 'contact' is included. It is the contact's email address that is provided. The provision of the HR 'contact' email address is to allow an employee or their representative a person to contact the person that has carriage of the case rather than directly the HoA themselves. The letter (dated 15 November 2021) provided to Mr. Burgess at Annexure 3 of the application shows Merrick as the 'contact'. It is submitted that Merrick likely drafted or assisted in drafting the allegation expressed in the letter. Merrick as the 'contact' person was responsible for sending the letter outlining what the allegation against Burgess to him. [reference omitted]
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> b. Her conduct. As described above Merrick had responsibility for handling the ED-5 proceeding on the Department's behalf.
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> c. Her association. This includes not only her association with Burgess (which was akin to a prosecutor/defendant relationship) but her association with the HoA as the ultimate decision maker."
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> 20. Explanation as to how Merrick's interest, conduct and association affected her impartiality:
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> a. Interest/conduct: Merrick's role as the Human Resource officer appointed as the 'contact' meant she was effectively tasked with preparing or assisting in the presentation of allegations and the case against Burgess. She effectively was appointed to the role of both the prosecutor and investigator. The situation has some parallels to circumstances in Isbester v Knox City Council [2015] HCA 20; [2015] 255 CLR 135. In that case the majority applied Ebner's two-fold test and found a reasonable apprehension of bias arose from the involvement of a council official in two different proceedings about an allegedly dangerous dog. An apprehension of bias was found to have arisen because the official who was the 'moving force' of the first case (to prosecute the dog owner) possessed enough interest in the outcome of the subsequent administrative hearing to require she not participate. Justices Kiefel, Bell, Keane and Nettle by reference to Ebner's step process, and suggested the only novel element of the case was the proper characterization of the official's interest. Their Honours accepted that the official was akin, though not quite equivalent, to a prosecutor in the first case. That role made her participation in the subsequent administrative

proceedings undesirable because the likely desire for vindication of anyone in such a position was an interest sufficient to create an apprehension of bias.

Their Honours in Isbester reasoned that where the interest identified in Ebner's first step is an 'incompatibility of roles…which points to conflict of interest', the decision required by Ebner's second step 'is obvious'.
Merrick clearly had incompatibility of roles. Her 'interests' were in conflict. Her role in assisting in the prosecution of allegations meant she had an interest in seeing that work vindicated.

b. Merrick's relationship with the HoA was anything but independent. She was drafting/preparing or assisting in drafting/preparing correspondence making allegations on behalf of the HoA, HoA was signing the correspondence, and she was sending it to Burgess. The HoA and Merrick had a direct Master and Servant relationship. The HoA had authority to direct and control Merrick in the performance of her duties which directly included assisting in the development and administration of disciplinary proceedings.

The HoA had publicly expressed her intention was to 'pursue termination' for her unvaccinated work force leading up to the date the vaccine mandate was to take effect (31 October 2021). In the ABC News article, 'Unvaccinated Tasmanian healthcare workers warned of 'termination' as deadline nears to get Covid jab' (see attached), it was reported that 'Hundreds of unvaccinated Tasmanian healthcare workers have been warned they will be sacked from next month in order to protect patients and the rest of the workforce from coronavirus'. The HoA spoke at a press conference on 20 October 2021 giving health workers an ultimatum: 'For those that refuse to vaccinate and do not have an exemption on October 30, you will no longer be paid. I will be pursuing termination action on and from October 31 for each and every individual.'

The zeal in which the HoA has 'pursued termination' for the unvaccinated has also been exhibited in the unprecedented haste in which the ED-5 process has been carried out. Matters that may normally be taken in excess of a year have been compressed into a little over a month and timed to conclude over the Christmas and New Year break. The HoA's pre-determination was sufficiently 'specific' and it was 'intense'.

In the circumstance of HoA's public declaration, approach and pre-determination it is utterly fanciful to suggest that Merrick, as her direct employee, would be able to operate outside of the pressure bought by the HoA to conclude matters by way of termination and to conclude them quickly.

21. If the heart of apprehended bias is to look at perceptions, and considers a matter from the perspective of how it may appear then the appearance of bias in the present case is substantial."

[32] The Respondent submits as follows:

"1. (b) In the alternative, if the application is within jurisdiction, there is no substance to the application. Ms Merrick's employment status does not give rise to a reasonable apprehension of bias. The test for apprehended bias has been described by Nettle and Gordon JJ as:

> 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".
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> There are two steps to the test:
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> > First, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits. What is said to affect a decision-maker's impartiality? Partiality can take many forms, including disqualification by direct or indirect interest in the proceedings, pecuniary or otherwise; disqualification by conduct; disqualification by association; and disqualification by extraneous information. As Deane J said in Webb v The Queen, in relation to disqualification by extraneous information, "knowledge of some prejudicial but inadmissible fact or circumstance [may give] rise to [an] apprehension of bias". Second, a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?
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> In the present case, there can be no reasonable apprehension of bias where the material is incapable of suppo1iing the second limb of the test. The Applicant does not submit that he has complied with the Secretary's lawful direction or that he has not breached the Code of Conduct. In those circumstances, even if he were to establish partiality (which is expressly not conceded) he cannot establish that any such partiality affected the outcome of the decision."

[33] In reference to the Applicant submissions regarding Isbester I have already dealt with them.

[34] In respect to a consideration of impartiality, in my opinion there is insufficient evidence to persuade me that the investigator was in not impartial. The principles relating to bias and decision makers do not extend to an investigator who plays no role in the ultimate decision to be made. The principle underlying the rule about bias does not extend to non-decision makers. As a result I am considering ED 5 and whether there has been compliance with it.

[35] I have ultimately concluded that there is insufficient evidence that the investigator was not impartial. The Applicant is correct that the Respondent had made a decision that unvaccinated employees would be terminated. Correspondence emanating from the Secretary's office had as early as 20 October 2021 indicated that unvaccinated employees would have their employment terminated. A review of the emails summarised in the Background to this decision show a decision to terminate unvaccinated employees was longstanding. It is also true that the investigator was employed in the area dealing with these issues. However there is no evidence to substantiate the submissions made by the Applicant that the investigator was in fact not impartial. The matters pointed to in the Applicants submissions have no evidential basis. They amount to inferences of what the investigator may have done from the fact she held the position she did. However as I have to find that the investigator was in fact not impartial I must have some evidence from which I may reach such a conclusion. I am not dealing with perceptions in the realm of apprehended bias but with the question whether there has been compliance with ED 5.

[36] I note the onus is on the Applicant to establish lack of compliance with ED 5. There is no such evidence in this case.

[37] I should say one further thing. The Respondent has submitted that the Applicant was seeking an order in the form of an injunction and I had no power to make an order amounting to an equitable remedy. I agree that the Commission has no equitable jurisdiction and cannot exercise powers akin to equitable relief in the absence of specific statutory powers. The Applicant submitted that it was seeking a final order which I had power to make.

[38] As drafted the relief sought could have amounted to an order in the form of equitable relief. It would have prevented the ED 5 investigation from proceeding. I would not have been prepared to make such an order.

[39] Section 31 provides in so far as is relevant to this matter:

> "(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, *for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened*, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken." (my emphasis)

[40] An order stopping the ED 5 would not have prevented or settled the industrial dispute which was about the threatened termination of employment. That dispute would still have been on foot. The effect of the order if granted would not have settled or prevented the continuation of the process towards termination. It would merely have delayed it. If the Applicant had relied on some other facts to ground jurisdiction then the case may have been different. However as the case is about the threatened or impeding termination of employment I am empowered only to make orders in compliance with s 31 of the Act which are to be for the purpose of preventing or settling the industrial dispute.

Outcome

[41] I refuse to make the order sought. The Application is dismissed.

Decided on the papers