TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29 application for hearing of industrial dispute

Dr Stephen Bennett
(T12903 of 2007)

And

Minister Administering the State Service Act 2000
(Department of Health and Human Services)

COMMISSIONER JP McALPINE HOBART, 16 November 2009

Industrial dispute - alleged breach of The Salaried Medical Practitioners Industrial Agreement 2003 - threshold matters - apprehended bias and procedural fairness - matter to remain adjourned sine die until completion of matters T12723 of 2006 and T12919 of 2007 under appeal

REASONS FOR DECISION

[1] On 7 March 2007 Dr Stephen Bennett (the applicant) applied to the President for a hearing with respect to an alleged breach of award or registered agreement by his employer the Minister Administering the State Service Act 2000 (the Minister), Department of Health and Human Services (DHHS).

[2] The applicant alleged that the DHHS breached Clause 10(a) - Managerial Allowance of the Tasmanian Salaried Medical Practitioner's Industrial Agreement by failing to pay him a Managerial Allowance on two occasions. He alleged he was entitled to the Managerial Allowance for the periods he was the Acting Senior Medical Officer (Acting SMO) at the Clarence Community Health Centre, 10 May 2005 to 18 May 2005 and from 22 August 2005 to 1 March 2006.

[3] In his application the applicant claimed that he was appointed to the position of Acting SMO from 10 January 2005 until the position was filled on a permanent basis. He argued that the position was not filled permanently until March 2006.

[4] The applicant brought three significant matters before the Commission in close proximity, namely T12723 of 2006, T12919 of 2007 and the instant matter T12903 of 2007. It was the Commission's view that although the genesis of each the matters occurred over the same period of time it would be more manageable for them to be heard separately. As it transpired much of the evidence in matters T12723 of 2006 and T12919 of 2007 was common.

[5] On 6 June 2008 a decision on matter T12919 of 2007 was handed down by the Commission, the application was dismissed. The applicant appealed this decision to the Full Bench of the Tasmanian Industrial Commission. The Minister argued before the Full Bench that there was no provision in s70 of the *Industrial Relations Act 1984* (the Act) that an order for the dismissal of an application can be appealed. The Full Bench found that the applicant could indeed appeal the Commission's decision.

[6] The Minister, pursuant to s72 of the Act, challenged the decision of the Full Bench and applied to the Supreme Court of Tasmania, by motion supported by affidavit, for an order *nisi* calling on the Full Bench to show cause why the decision should not be quashed in whole or in part. The Minister obtained an order *nisi.* The return of the order nisi was heard by a judge of the Supreme Court of Tasmania.

[7] The learned judge made the order *nisi* absolute, ordering that the ruling of the Full Bench made on 17 December 2008 that the order of the Commissioner was one made pursuant to s31(1) and therefore capable of being appealed, be quashed.

[8] Subsequently the applicant appealed to the Full Court of the Supreme Court of Tasmania. On 19 October 2009 the Supreme Court of Tasmania (Full Court) dismissed the applicant's appeal.

[9] The instant matter was set down for hearing on 20 January 2009.

[10] Prior to this, on 3 December 2008, Mr Baker, for the Minister, informally notified the Commission that it was his intent to seek a deferral of the matter. On 19 December the Commission received a formal request from the Minister to have the matter deferred. The Minister argued that the substance of the matter on foot had already been determined by this Commission in matter T12919 of 2007 and that that decision was still under appeal. He further argued that it would be inappropriate to continue the matter.

[11] The Commission saw merit in the respondent's proposition and sought a view from the applicant. The letter[1] from the Commission to the applicant, dated 23 December 2008, states in part:

> *"...*
>
> *The Minister argues that the substance of matter T12903 of 2007 is inter-related with the matters T12723, T12919 and subsequently T13167. In my view the Minister is correct.*
>
> *The proposition of the applicant's position asserted in T12903 has been addressed in matter T12919, now under appeal. In matter T12723 aspects of the applicant's position with respect to hours of work is being considered.*
>
> *I believe consideration of the outcome of appeal T13167, as well as consideration of the finding in matter T12723 are advisable as a prelude to addressing the matter T12903.*
>
> *..."*

[1] Exhibit A.9

[12] On 24 December 2008 the applicant opposed the Minister's application arguing that it was procedurally unfair that the matter be deferred. The Commission did not agree with the applicant's view.

[13] On 5 January 2009 the Commission informed both parties that the matter was adjourned *sine die* pending the outcome of the appeal T13167 of 2008 as well as the determination of matter T12723 of 2006.

[14] On 11 July 2009, after a lapse of six months, the applicant wrote to the President seeking the instant matter T12903 of 2007 be heard by the Full Bench of the Commission.

[15] Subsequently the Commission convened a hearing to accept argument on the merit of the matter being heard prior to both the appeal process against matter T12919 of 2007 and the determination of T12723 of 2006, then on foot. The matter was set down for 5 August 2009.

[16] The decision in matter T12723 of 2006 was handed down on 29 July 2009. The application was dismissed. The applicant appealed the decision.

[17] At the onset of the hearing on 5 August 2009, the applicant raised threshold issues and sought them to be heard in place of the intended argument. The Commission agreed to hear the threshold matters before hearing argument on the substantive issue for which the hearing had been convened.

[18] The applicant asserted that in his view the Commission had *"… breached two broad common law rules, or rules of natural justice: the hearing rule, and the bias rule …"* (Transcript p.2 L.20)

[19] The applicant cited the authority *Kioa v West*[2], paragraph 31, where the view is expressed that there is a common law duty to act fairly according to procedural fairness in *"… the making of administrative decisions which affect rights, interests and legitimate expectations …"* of proponents in a matter.

[20] The applicant argued that by adjourning the hearing in January the Commission 'did not act fairly' and denied him the opportunity to seek the Commission's disqualification on the grounds of apprehended bias. He further argued that he was not afforded procedural fairness because he was not given sufficient time to prepare a case against the matter's deferral. He also argued that the Commission exhibited actual bias by prejudging the outcome of any argument by him against deferring the hearing, by the act of deferring the said hearing.

[21] The applicant proceeded to cite a number of authorities addressing various aspects of his argument. He was, however, somewhat imprecise in tying the examples cited to specific aspects of the Commission's handling of the matter.

[22] The applicant cited authority *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs*[3] with regard to the prejudgment of a matter. At page 58:

> *"Actual bias exists where the decision-maker has prejudged the case … and was not open to persuasion in favour of the applicant." … "The courts have*

[2] Exhibit A.1 - Kioa v West [1085] HCA 81; (1985) 159 CLR 550 (18 December 1985)
[3] Exhibit A.2 - Sun Zhan Qui v Minister for Immigration & Ethnic Affairs [1997] FCA 1488 (23 December 1997)

rarely found actual bias to exist. That is principally because, at common law, a reasonable apprehension of bias suffices to disqualify a judicial officer."

[23] The applicant cited the authority *Ebner v Official Trustee in Bankruptcy*[4] with regard to the principle of apprehension of bias. At paragraph 6:

"… 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."

[24] The applicant cited the authority *Magazzu v Business Licensing Authority*[5] with regard to the adherence to procedural fairness by other decision making entities beyond the judicial.

[25] The applicant referred to the authority *Southern Equities Corp Ltd & Ors v Bond & Ors*[6] with respect to prejudging matters. Although the following quote could not be found in the authority, he stated:

*"A fair-minded observer might reasonably apprehend that a conclusion on the facts to be litigated at the trial, have been reached, or upon the credit of witnesses who would give evidence at the trial." (*Transcript p.6 L.40)

[26] Further on the same topic the applicant cited the authority *Laws v Australian Broadcasting Tribunal*.[7] At page 20:

"When suspected prejudgement of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion, irrespective of the evidence or argument presented to him or her."

[27] The applicant had earlier mentioned the fact that the matter having been adjourned was a prejudgement on the part of the Commission. He was not clear in adducing this authority whether he was confirming his original assertion or was addressing the Commission's agreement with the Minister that the instant matter, at least in part, had been addressed in the two aforementioned matters.

[28] The applicant raised the issue that the Commission had challenged the reliability of his evidence in earlier matters. He cited the authority *Refugee Review Tribunal*[8] addressing the matter of witness credibility. At paragraph 30:

"… the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question."

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[4] Exhibit A.3 - Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337; 176 ALR 644: 75 ALJR 277 (7 December 2000)
[5] Exhibit A.4 - Magazzu v Business Licensing Authority [2001] VSC 5 (31 January 2001)
[6] Exhibit A.5 - Southern Equities Corp Ltd & Ors v Bond & Ors No.SCGRG-96-113 [2000] SASC 450 (20 December 2000)
[7] Exhibit A.6 - Laws v Australian Broadcasting Tribunal [1990] HCA 31; (1990) 170 CLR 70 (28 June 1990)
[8] Exhibit A.7 - Refugee Review Tribunal; Ex parte H [2001] HCA 28; (2001) 179 ALR 425; (2001 75 ALJR 982 (24 May 2001)

[29] The applicant cited a commentary on a decision in *Fox v Percy*[9] before the High Court of Australia (Full Court) with regard to witness credibility. In this particular matter, although the witness was unimpressive, it was established that she was truthful in her evidence.

> *"If a decision maker has made credibility findings against a particular party in one application, it is wrong for that decision maker to hear another application involving the same party, where that party's credibility would again be an issue."*

[30] The applicant did not draw any particular conclusion from this authority. I have assumed that he was inferring that regardless of his competence as a witness, he was truthful.

[31] The applicant cited the contents of the Commission's letter[10] of 23 December 2008 as evidence of prejudgement bias on two occasions. The first, "*In my view the Minister is correct.*"; and secondly "*I believe consideration of the outcome of appeal T13167, as well as consideration of the finding in matter T12723 are advisable as a prelude to addressing the matter T12903."*

[32] The applicant claimed there was an opportunity for the argument advanced by the Minister to be heard as a preliminary matter at the hearing scheduled for 20 January 2009. In accepting the Minister's argument for a deferral of the proceedings, he asserted that the Commission had denied him procedural fairness and, as such, the applicant had apprehended bias on the part of the Commission.

[33] The applicant proceeded to raise issues which had been addressed in the aforementioned matters and when challenged acknowledged that these issues may form part of the appeals he had on foot.

[34] The applicant returned to the topic of his witness credibility. He argued that his witness credibility was sound and attempted to revisit a single element raised in matter T12919 of 2007 to prove this. The Commission made the point that it does not assess the credibility of witnesses on a single example alone.

[35] The applicant cited from the decision in matter T12919 of 2007 at paragraph 305:

> *"Drs Dunbar and Klok were protective of the applicant and their responses reflected this. However, I believe they responded to what was asked of them openly."*

[36] And at paragraph 306:

> *"Dr Cerchez and Ms Green, in the main I found their responses to be open and honest. There were times when their evidence was imprecise and I accept that as being by dint of the time lapsed since the various incidents, not an intent to mislead."*

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[9] Exhibit A.8 - Fox v Percy [2003] HCA 22; 214 CLR 118; 197 ALR 201; 77 ALJR 989 (30 April 2003

[10] Exhibit A.9

[37] The applicant argued that the Commission showed unconscious bias by diminishing, in his view, the value of his witnesses. Again it was pointed out to the applicant that his opinion should better form part of an appeal.

[38] The applicant cited an authority *Nais v Minister for Immigration and Multiculturalism and Indigenous Affairs (2006)* (not produced as an exhibit) which, he said, in a majority decision the High Court of Australia held that an excessive delay did impair the quality of an administrative decision. The applicant argued that in his view he was treated unfairly because of the time it took for decisions to be reached in matters T12919 of 2007 and T12723 of 2006.

[39] The applicant expressed the following:

> *"I acknowledge, Commissioner, I've looked at your various cases that you've handled, and I know that you've had the greatest workload of the number of commissioners, it appears to me in the last year, in fact, probably twice the number of any other commissioner …*

[40] It was pointed out to the applicant that the number of matters before a Commissioner is not a measure of workload, but more that the content and substance of each matter dictates the time dedicated to a decision. The applicant made no attempt to specify what he saw as an acceptable timeframe for a decision to be handed down.

[41] The applicant addressed a number of the passages in decisions T12919 of 2007 and T12723 of 2006 which he deemed to pejorative and which he claimed attacked his credibility as a witness. One aspect of which was the accuracy of his recollection of events.

[42] In an attempt to pursue the issue of his recollection of fact to be sound, the applicant asserted that in matter T12919 of 2007 Ms Banman had left the hearing to check a statement made by him regarding his attendance to a patient, and that the information she had found "… verified that what I was saying was correct." (Transcript p.27 L.25)

[43] Ms Banman rejected the applicant's interpretation of the said event. She said:

> *"I just object to that entire line … I don't think is being forthright here in that evidence that he's presenting to you. I did leave the Commission to check those records on that day and the records could not be found anywhere at Clarence Community Health Centre, for that patient."* (Transcript p.27 L.35)

[44] Further:

> *"… and they* (the records) *could not be located on that day, nor subsequent days of a search of the entire centre."* (Transcript p.27 L.45)

[45] At the commencement of page 28 of transcript:

> *"THE COMMISSIONER: So the applicant – Dr Bennett's contention that you actually proved him right is not true?*
>
> *MS BANMAN: It's not. It's not correct, because I've never seen that document until today."*

[46] The applicant responded:

> *"I stand correct (sic), then, Commissioner. My apologies."* (Transcript p.28 L.10)

[47] It was pointed out to the applicant the he had used this event as an example of the accuracy of his recall as well as confirming his credibility as a witness.

[48] The applicant responded:

> *"Yes, I understand what you're saying, Commissioner … but it's of no great importance."* (Transcript p.28 L.20)

[49] The applicant posed the question:

> *"…how would an informed observer view the way that you have assessed my witness credibility."* (Transcript p.31 L.25)

[50] The applicant cited *Ebner v Official Trustee in Bankruptcy* (Exhibit A.3) in relation to ostensible bias.

[51] The applicant also stated that:

> *"I think that you've been led into error by the respondent putting forward incorrect information.* (Transcript p.31 L.25)"

[52] Again the applicant was not specific as to what points made by the respondent were 'incorrect', nor at what juncture the Commission was 'led into error' or, indeed, what the nature of the error was. The applicant did not cite where he had brought the 'incorrect information' allegedly put forward by the respondent to the Commission's notice during any particular hearing. It was again pointed out that this allegation should be incorporated in any appeal the applicant pursued.

[53] Mr Baker sought to have the application before the Commission confirmed by the applicant. The application states:

> *"I believe the Department of Health and Human Service may have breached* ***section 10(a) of the Tasmanian Salaried Medical Practitioners Industrial Agreement 2003*** *by refusing to remunerate me with a Managerial Allowance appropriate for performing the Senior Medical Officer position from 10 May 2005 to 18 May 2005. I believe I may be entitled to receive payment for the period 22 August 2005 until 1 March 2006, when the position was filled with a 2 year appointment. I was appointed to the Senior Medical Officer position from 10 January 2005 until the position was filled on a permanent basis."*

[54] The remedy sought in the application was:

> *"The conduct of an Industrial Commission conciliation conference and, if necessary, hearing to facilitate the resolution of the dispute."*

[55] The applicant agreed this was the application, but reiterated that he was seeking the Commission as currently constituted to stand down from hearing it.

[56] Mr Baker cited s21(2)(c) of the Act which addresses the options open to the Commission when hearing a matter:

> *"(2) Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it -*
>
> *(a) …*
>
> *(b) …*
>
> *(c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –*
>
> *(i) that the matter or part is trivial;*
>
> *(ii) that further proceedings are not necessary or desirable in the public interest; or*
>
> *(iii) …*
>
> *(iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;"*

[57] Mr Baker asserted that the applicant's present submission was irrelevant. He argued that the matter should be dismissed because the substantive matter had already been dealt with in matters T12919 of 2007 and T12723 of 2006, both now under appeal.

[58] Mr Baker confirmed that for the period 10 May 2005 to 18 May 2005, which was after the applicant's second contract of service to act as SMO had expired, he was not paid a Managerial Allowance. During the hearing of matter T12723 of 2006 there was some confusion as to whether the applicant had been paid an allowance for this time or not. The respondent, at that time, undertook to check the pay records. In subsequent correspondence it was confirmed that the applicant had not received a Managerial Allowance for this period.

[59] Mr Baker referred to two exhibits from matter T12919 of 2007, Exhibit M03(c) and Exhibit M03(d), which were the instruments of appointment for the Acting SMO position for two consecutive time periods ending on 10 May 2005. He said:

> *"I think it's quite clear from the proceedings that have been previously dealt with in 12723 and in 12919 that this whole issue about whether or not the applicant either was appointed, saw himself appointed as the acting SMO, in fact has been dealt with. And it has been dismissed in both those decisions, and having said that, it then falls that we say that the matter in T12903 should therefore be dismissed."* (Transcript p.37 L.20)

[60] At this point in the hearing the applicant voiced his opinion that it was inappropriate the Commission should hear argument on the substantive matter before making a decision on the threshold issue he had introduced. The Commission explained that it was common practice to hear argument in its entirety and address all the points raised in the subsequent decision, inclusive of any threshold issue.

[61] Mr Baker addressed the issue of apprehended bias, to which he argued that the instant matter is based on the existence or not of a contract and not dependent on witness credibility. He further argued that it was his view that the applicant had been afforded procedural fairness in all matters which had been dealt with by the Commission.

[62] The applicant claimed that his entitlement to the position of Acting SMO was not before the Commission in the previous matters. He said:

> *"It was a peripheral matter that was dealt with. It was dealt by my advocate as a mitigating circumstance which led to the dispute. The actual issue itself was not tested in full terms."* (Transcript p.41 L.35)

[63] The applicant argued that in dealing with the legitimacy of his claim to the Acting SMO position it was analogous to giving weight to an "*obiter comment*".

[64] The applicant said:

> *"Now, what Mr Baker is advancing are arguments about, as I understand the legal principle of issue estoppel, …"* (Transcript p.38 L.23)

[65] Unfortunately the applicant took his argument no further than reiterating that the Commission should disqualify itself from hearing the matter.

FINDINGS

[66] Initially I turn to the substantive issue of hearing the instant matter before the appeal of matters T13167 of 2008 and T12723 of 2006 have been finalised.

[67] The legitimacy of the applicant's assertion that he had an ongoing entitlement to the position of Acting SMO over the period in question was, in my view, pivotal in both of the previously heard matters, T12919 of 2007 and T12723 of 2006. Indeed some considerable time was spent between both matters, but particularly by the applicant's advocate in T12919 of 2007, in attempting to establish the legitimacy of the claim that the applicant had some right to act as SMO beyond the end of the later of his two fixed-term contracts.

[68] Conversely, the applicant also expended significant energy in attempting to show that Dr Cerchez had been improperly appointed to the position. However, his view was not supported by the internal or external reviews which took place. The legitimacy of Dr Cerchez's appointment was confirmed, and accepted by the Commission.

[69] In the decision of matter T12919 of 2007 the Commission stated, in the introduction to the Findings at paragraph [296], that a principal question to be answered was: "*Did the applicant have a legitimate claim to the SMO position?"* At paragraph [307] the Commission stated: *"The genesis of the matter on foot appears to have been the applicant's assertion that he had a legitimate claim to the Acting SMO position …".*

[70] In fact at page 39 of the decision the Commission took the step of dedicating a separate section entitled *"Legitimacy of the SMO Role"*. In this section of the decision, at paragraphs [308] to [311], the Commission addressed the documentation adduced as evidence which included the original advertisement for the role of Acting SMO; a notice of the applicant's appointment; the recommendation of the selection panel; and two

contracts of service signed by the applicant. The conclusion was that the applicant did not have a legitimate claim to the Acting SMO position beyond the cessation of the second contract of service (Fixed Term contracts).

[71] Further, the Commission noted at paragraph [108] of the decision that CaseAction, the external investigators, ascertained that the applicant's opposition to Dr Cerchez appointment was unfounded. Also, at paragraph [312] the Commission noted the conclusion drawn by Dr Breheny, Manager Internal Investigations, who conducted the internal investigation that Dr Cerchez's appointment to SMO was legitimate and tested against the Public Service Procedures.

[72] In matter T12723 of 2006 this Commission, in the introduction to the Findings, ascertained at paragraph [192]:

> *"The matters in dispute had their genesis in the conflict which arose within the Centre, driven by the applicant's attitude to Dr Cerchez's appointment as SMO and the applicant's subsequent behaviour towards Dr Cerchez. The number and nature of grievances raised by the applicant and the subsequent counter grievances would attest to this."*

[73] The applicant also referred to a forthcoming matter, that being the instant matter:

> *"… It will be the subject of a further hearing … relating to an application I had for the higher duties allowance for the time that I was SMO.*
> (T12723 of 2006, Transcript p.5 L.10 dated 25.11.08)

[74] The comment inferred that the applicant saw himself as the Acting SMO for the periods for which he was claiming the Managerial allowance. This premise was addressed and dismissed.

[75] The applicant then proceeded to argue the validity of his appointment as the Acting SMO beyond the two fixed-term contracts already alluded to, which had already been argued by his advocate in matter T12919 of 2007. Similar points were made to the Commission in both matters.

[76] The Commission's attention was drawn to the applicant's assertion in the instant matter with regard to this Commission's determination of his status as Acting SMO on the aforementioned matters. He said:

> *"The matter of the SMO – entitlement to the SMO position, it was not the actual application before you. … It was a peripheral matter that was dealt with. It was dealt with by my advocate as a mitigating circumstance that led to this dispute. The actual issue itself was not tested in full terms."* (Transcript p.41 L.35)

[77] And in the same paragraph of transcript:

> *"… an obiter comment, Commissioner …"*

[78] The Commission acknowledges that the matter of the applicant's entitlement to the Acting SMO position was not the application before it in either of the aforementioned matters. However, the resolution of this aspect of the argument was pivotal to the determinations in both matters. The applicant's case in both matters, in my view, relied upon the legitimacy of his claim to have a contract for the Acting SMO position beyond the end of the latter of his fixed-term contracts.

[79] For the applicant to assert that the argument around the legitimacy of an ongoing contract for him to the Acting SMO position was 'peripheral' and only in mitigation for his actions as well as being *obiter dictum* defies the most cursory review of the transcript of proceedings as well as the content of both decisions. The evidence adduced in both matters regarding his claim to have been the legitimate Acting SMO was extensive and, to the Commission's knowledge, comprehensive.

[80] The applicant did not adduce any evidence which had not already been submitted and tested to support his assertion that he had a contract from January 2005 until March 2006 for the Acting SMO position. He did not intimate at any point during the hearing that there was evidence not already addressed.

[81] In the course of deciding the two aforementioned matters, the weight of evidence educed saw this Commission find the applicant had no entitlement to the position of Acting SMO beyond the end of the latter fixed-term contract. This finding was a significant factor in both matters being dismissed. Two decisions have already found the applicant had no entitlement to the Acting SMO position as described. Both these matters have been appealed. Until tested and a higher court finds against the Commission's decisions, the decisions stand.

[82] With regard to the initial deferral of the hearing of the instant matter, the Commission's reasoning is as outlined above. The Commission relied on s21 of the Act, Procedure of the Commission and associated matters and specifically subsection 2(g):

> *"Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it –*
>
> *(g) adjourn to any time and place"*

[83] The facility to adjourn a hearing is open to the Commission.

[84] The applicant failed to convince the Commission that the instant matter should be heard before the appeal processes against decisions T12919 of 2007 and T12723 of 2006 have reached a conclusion, and I so find.

[85] The adjournment of the instant matter is to continue until the appeal processes against the two noted matters have been exhausted, as conceded by the applicant, and I so find.

[86] For completeness, in matter T12723 of 2006 the applicant made much of the two contracts for service he had accepted from January through to May 2005 as not being 'fixed term contracts'. Although he did not elaborate on how any outcome would alter if these contracts were not 'fixed term', he did cite authority *T9851 of 2001*[11].

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[11] *T9851 of 2001, Abey C dated 7 November 2001.*

[87] The above matter, T9851 of 2001, was heard together with matters T9852 of 2001 and T9853 of 2001. The said matters pertained to an award variation for the provision of Carer's Leave in the *Medical Diagnostic Services (Private Sector) Award, Dentists Award* and the *Medical Practitioners (Private Sector) Award*. The authority did not assist in matter T12723 of 2006 then, or now in the instant matter.

[88] I now turn to the threshold matter raised by the applicant where he sought the Commission as currently constituted disqualify itself from further hearing the instant matter. He muted a number of objections to the Commission hearing the matter and I intend to address them individually.

[89] Initially the applicant cited the Commission had breached the 'hearing rule'. The term was not known to the Commission or the respondent. When questioned, the applicant was unable to articulate what the 'hearing rule' in fact was. However, he did provide, at a later date, a copy of a newsletter issued by the Victorian Government Solicitor's Office containing an article entitled "*Procedural Fairness – The Hearing Rule*", dated September 2007.

[90] The applicant did not specifically identify what aspect of the hearing rule the Commission had breached. On perusing the article however, I have assumed he was referring to a litigant being allowed the opportunity to be heard. As was made clear to the applicant in the letter of 23 December 2008 the matter had been adjourned, it had not been dismissed.

[91] The Butterworths' Concise Australian Legal Dictionary (3rd edition) defines "Adjournment" as follows:

> *"… a court order by which proceedings are postponed, interrupted, or continued at different time or place before the same court."*

[92] The reasoning behind the adjournment as described, in my view, was eminently logical and sought not to waste the applicant's or the Minister's representatives time and resources while there were matters outstanding beyond the jurisdiction of the Commission.

[93] The applicant argued that the Commission did not act fairly by adjourning the matter in January 2009 because it denied him the opportunity to seek the Commission's disqualification on the grounds of apprehended bias. As stated above the Commission, by way of the Act, has the power to adjourn matters.

[94] Further, the applicant did not respond to the letter of 23 December 2008 by notifying the President that he had a threshold issue he wanted to raise with the Commission that could have been addressed on 20 January 2009.

[95] With regard to seeking the Commission's disqualification, it took the applicant six months to request of the President that the matter be set down for hearing. At any time during that period, or before, the applicant could have made a request for the Commission's disqualification. The onus was on the applicant, the adjournment did not deny him the opportunity he sought.

[96] With regard to the apprehension of bias, the applicant cited the authority *Ebner v Official Trustees in Bankruptcy*. In the segment quoted by the applicant it states:

> *"… 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."*

[97] From evidence in matters T12919 of 2007 and T12723 of 2006 the applicant has doggedly refused to accept any decision made by the DHHS, the Office of the State Service Commissioner or this Commission which did not reflect the outcome he wanted. This of course is his right and he naturally has his self interest at heart. However as such, I do not accept that he could promote himself to be a 'fair minded lay person' in matters directly concerning himself.

[98] The applicant argued that the Commission had prejudged the outcome of the matter by referring to decisions previously made without hearing evidence on the specific matter. He cited the authority *Southern Equities Corp Ltd & Ors v Bond & Ors*.

> *"A fair minded observer might reasonably apprehend that a conclusion on the facts to be litigated at the trial, have already been reached …"*

[99] And similarly in *Laws v Australian Broadcasting Tribunal*:

> *"When suspected prejudgement of an issue is relied upon to ground the disqualification of a decision maker, what must be firmly established is a reasonable fear that the decision maker's mind is so prejudiced in favour of a conclusion already formed, that he or she will not alter that conclusion, irrespective of the evidence or argument presented to him or her."*

[100]In the instant matter, again I challenge the notion that the applicant is a 'fair minded observer' as alluded to above with respect to the matter directly involving his interests before the Commission.

[101]It is a fact that fundamental aspects of the applicant's argument which are to be considered in this matter have already been addressed in previous matters. A judgement was made around the pivotal element of the applicant's argument. It was found that there was no basis for his claim to have a contract to the Acting SMO position through to March 2006. The applicant has not intimated to the Commission that there is further evidence yet to be adduced in support of his claim. The two previous matters are the subject on an appeal process. As stated previously, the earlier decisions stand unless tested and overturned by a higher court.

[102]The applicant alleged that the Commission had prejudged the matter. It was a coincidence that the basis of this current matter had been addressed during the other two matters. The Commission came to the conclusion it did in those matters independent of the current matter. The instant matter has not been dismissed, as was sought by the Minister.

[103]The outcome of any appeal process may impact on the original two decisions. Far from the Commission prejudging the matter, the Commission has left every opportunity open for the applicant to adduce additional evidence as well as ensuring that any outcomes from the appeal process are able to be considered.

[104]The applicant argued that the Commission had formed an adverse opinion with respect to his credibility as a witness. He asserted that it would be inappropriate for the Commission to continue hearing matters involving him. He cited a matter he referred to as the "Fox" case. (Exhibit A.8) Where the judge said;

> *"If a decision maker has made credibility findings against a particular party in one application, it is wrong for that decision maker to hear another application involving the same party, where that party's credibility would again be an issue."* (Transcript p.9 L.42)

[105]The applicant, in the instant matter, has asserted he had a contract to the Acting SMO position from 10 January 2005 until 1 March 2006. The existence of such a contract is a matter of fact. In my view witness credibility is not an issue, the contract either exists or it doesn't. The determination of the legitimacy of such a contract is also a matter of fact.

[106]It should be noted that the applicant raised the issue of the accuracy of his recall and his credibility as a witness of his own volition. The example he cited involving Ms Banman showed very clearly that his recall was not without fault and that the assertion he made, in this particular instance, was not true.

[107]After taking the time and effort to present the example, when shown to be inaccurate, and indeed untrue, the applicant's response was simply: *"… but it's of no great importance …"* I disagree with the applicant, this issue is very important and goes to the credibility of the applicant as a genuine litigant.

[108]The applicant, in his endeavour to establish bias by the Commission, argued issues which had been addressed in the previous two matters and argued against the Commission's handling of witnesses. In my view these are matters which should form the basis of his appeals. The Commission, as currently constituted, is not aware of the substance of the applicant's appeals and will comment no further.

[109]The applicant argued that he was treated unfairly because of the time the Commission took over its decisions in matters T12919 of 2007 and T12723 of 2006. The Commission is not aware of any timing benchmark beyond which the delivery of a decision is deemed to be excessive. The applicant did not offer a timeframe which would have been acceptable to him.

[110]Finally, I address the applicant's assertion that the Minister's representative, Mr Baker, raised the matter of 'issue estoppel'. Simply stated, he did not.

[111]The Butterworths' Concise Australian Legal Dictionary (3rd edition) defines "issue estoppel" to be:

> *"A judicial determination directly involving an issue of fact or law which has disposed of the issue so that it cannot thereafter be raised by the same parties …"*

[112]It is my belief that the applicant has misinterpreted the application of 'issue estoppel'.

[113]The Commission in adjourning the instant matter until the appeal processes have been exhausted is an action open to it under s21 of the Act. The instant matter will remain adjourned *sine die* until completion of matters T12723 of 2006 and T12919 of 2007 under appeal.

[114]I do not believe there is any substance in the applicant's objection to the Commission hearing this matter on any of the aforementioned grounds.

[115]As requested by the applicant in correspondence dated 16 October 2009, the decision in this matter has been withheld from issue until his return from leave on 16 November 2009.

James P McAlpine
COMMISSIONER

Appearances:
Dr S Bennett for himself
Mr P Baker for the Minister Administering the State Service Act 2000 with Ms J Fitton and Ms T Banman

Date and Place of Hearing:
2009
August 8
Hobart