IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 12**

	Reference No. HRRT 014/11
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**FRANK DELIU**
	PLANTIFF
AND	**NEW ZEALAND LAW SOCIETY**
	DEFENDANT
	Reference No. HRRT 045/11
BETWEEN	**FRANK DELIU**
	PLANTIFF
AND	**LAWYERS NATIONAL STANDARDS COMMITTEE**
	DEFENDANT

AT AUCKLAND

Before:
RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Ms PJ Davies, Member

Mr F Deliu in person
Mr WC Pyke for the defendants

Date of hearing: 3 August 2012
Date of last submissions: 22 March 2013 & 5 April 2013
Date of decision: 15 April 2013

DECISION OF TRIBUNAL ON SECOND RECUSAL APPLICATION

[1] This is Mr Deliu's second recusal application. The first was dismissed by a decision delivered on 11 October 2011.

The present application

[2] On 8 February 2012 the Tribunal declined to make an interim order preventing the Lawyers National Standards Committee from laying disciplinary charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[3] At the conclusion of its decision the Tribunal noted that the application by the defendants to dismiss the proceedings would be heard on 23 and 24 February 2012 and that the *Minute* of the Chairperson issued on 6 December 2011 had (inter alia) prescribed a timetable for the filing by the parties of their submissions on that application. The hearing was later vacated on the application of Mr Deliu owing to his other professional commitments. See the *Minute* issued by the Chairperson on 9 March 2012 at [5]. The dismissal application has yet to be heard.

[4] By application dated 22 March 2012 Mr Deliu sought an order that all three members of the Tribunal hearing these proceedings recuse themselves. The grounds in support of the application are, in summary:

> **[4.1]** By addressing Mr Deliu as "Mr" instead of "Dr", actual or apparent bias has been shown.
>
> **[4.2]** Mr Deliu had lodged a complaint against the Chairperson with the New Zealand Law Society's Lawyers Complaints Service alleging that by addressing him as "Mr" instead of "Dr", the Chairperson had failed to treat him with respect and courtesy.
>
> **[4.3]** That the Tribunal, in finding at [56] of the interim order decision given on 8 February 2012 that there was no evidence to establish discrimination on the basis of political opinion, had:
>
> > **[4.3.1]** Intentionally ignored every piece of evidence tendered by Mr Deliu on the issue.
> >
> > **[4.3.2]** Improperly manipulated the record to make it appear Mr Deliu had not provided any, as opposed to insufficient, evidence.
>
> Because the Tribunal had purposely disregarded the evidence, it was not possible for Mr Deliu to receive a fair trial before the three Tribunal members who determined the interim order application.

The notice of opposition by the defendants

[5] By notice dated 30 March 2012 the defendants set out three grounds of opposition to the new (ie second) recusal application:

> **[5.1]** A fair-minded lay observer would not apprehend that a failure to refer to a title meant that the Tribunal as presently made up would not bring an impartial mind to the case.
>
> **[5.2]** There is no logical connection between the claimed disregard of title and any feared deviation by the Tribunal as presently constituted from dealing with the case on the merits.
>
> **[5.3]** The applicant too lightly throws the bias ball in the air – if his second recusal application were to be allowed on such a flimsy basis eventually no Tribunal could be convened to deal with his case on the merits.

[6] We deal first with the question whether the Tribunal displayed actual or apparent bias by addressing the plaintiff as "Mr Deliu" instead of "Dr Deliu".

THE 'DR' ISSUE

The circumstances in which the issue has arisen

[7] In an email to the Secretary dated 11 October 2011 Mr Deliu made a request that he be addressed by his "appropriate title" of "Dr Deliu":

> …
>
> Incidentally, in future Tribunal documents kindly refer to me by my appropriate title of Dr Deliu, thank you.

[8] By email dated 1 February 2012 the Secretary asked Mr Deliu to advise the basis of this request:

> In your email of 11 October 2011 to the Tribunal, you asked that you be referred to by the title of "Dr Deliu".
>
> Can you please let me know the basis for this request?

[9] On 3 February 2012 Mr Deliu replied:

> I hold a doctorate in law and it is thus my appropriate title.

[10] As mentioned, on 8 December 2012/2011 the Tribunal published a decision in which it declined to make an interim order preventing the laying of charges against Mr Deliu. In that decision Mr Deliu is referred to as "Mr Deliu". By email dated 9 February 2012 addressed to the Secretary, Mr Deliu enquired why his "correct title" was not used:

> Thank you for the decision, can I ask why my correct title was not used?
>
> …

[11] On 9 February 2012 The Secretary replied:

> As to the title issue, the Tribunal is of the view that the title "Dr" is appropriate for the holder of a PhD degree, not the holder of a JD degree.
>
> When you first asserted the right to be addressed as "Dr" the Tribunal assumed you held a PhD. As you have since confirmed that that is not the case, the Tribunal will no longer employ the title.
>
> You mentioned that you have been unable to comply with the timetable directions given by the Tribunal on 6 December 2011. If you are seeking new directions, an application will have to be made on notice to Mr Pyke.

[12] The present recusal application followed on 22 March 2012.

Mr Deliu's evidence

[13] Mr Deliu's evidence is that he was awarded the degree of Juris Doctor on 28 December 2001 by Syracuse University in the State of New York, USA. In addition, on 7 March 2011 he was admitted to the degree of Master of Laws in Public Law by the University of Auckland.

[14] He claims that by virtue of his JD degree he is entitled to be addressed as "Dr". See his memorandum of submissions in support of the recusal application (19 April 2012) at para 10:

> … There is thus no properly adduced evidence to rebut the Plaintiff's documented assertion (Ibid at "A", "B", "L" and "M") that he is a professional doctorate degree holder fully entitled to be addressed accordingly as "Doctor".
>
> The Tribunal thus lacked any basis to refuse to address him accordingly.

[15] The letters "A", "B", "L" and "M" refer to Exhibits annexed to Mr Deliu's affidavit sworn on 22 March 2012. Exhibit A is the degree certificate from Syracuse University and Exhibit B is the degree certificate from the University of Auckland. Exhibit L is an article by Kathleen Maher "Lawyers are Doctors Too" (2006) 92 ABAJ 24 while Exhibit M is "*Informal Opinion 1152 – Public Use of Title 'Dr' and Juris Dr. Degree*" (25 February 1970) published by the ABA Committee on Professional Ethics and Grievances.

[16] Whether these documents (Exhibits L and M) support the proposition for which they have been cited is an issue we address shortly.

[17] First it is necessary to address the memorandum filed by Ms Coleman in which she too makes reference (inter alia) to *Informal Opinion 1152* and the article by Kathleen Maher ie Exhibits L and M.

The position of the Attorney-General

[18] By memorandum dated 21 March 2012 Ms Coleman, counsel for the Attorney-General, advised that the Attorney-General did not wish to be heard on the recusal issue itself but nevertheless filed, by way of assistance to the Tribunal, six pages of background material addressing the question whether the holder of a Juris Doctor (JD) degree is entitled to be addressed as "Dr".

The plaintiff's response to the Attorney-General's memorandum of 21 March 2012

[19] In an email dated 20 April 2012 addressed to Ms Coleman and copied to the Tribunal Mr Deliu stated that he "required" Ms Coleman for cross-examination at the hearing of the recusal application "to be questioned on her evidence provided in her memorandum of 21 March 2012".

[20] By memorandum dated 11 July 2012 Ms Coleman submitted that s 129 of the Evidence 2006 allowed the admission as evidence of any published documents which are reliable sources of information on the subjects to which they relate. It was submitted that counsel can refer to such documents in legal submission without the need for that evidence to be introduced through a witness. In the alternative, s 106(1)(d) of the Human Rights Act 1993 permitted the Tribunal to receive as evidence the information in the memorandum whether or not it would be admissible in a court of law. The memorandum concluded:

> 6 Counsel submits that the published documents referred to in the 21 March 2012 memorandum are reliable sources of information relevant to the issue of whether a holder of a JD degree is properly entitled to be referred to as "Dr". Counsel notes that the plaintiff does not appear to contest the reliability of the publications.
>
> 7 Since the purpose of the s 129 is to enable a court or tribunal to take account of reliable evidence without the need for it to be introduced through a witness, it would be inconsistent with that purpose for counsel to be cross examined on the content of that evidence. It is not counsel's evidence. Rather it is the evidence of the author of the publication. Counsel is simply referring to that evidence in submission.

[21] Given that Mr Deliu had on 20 April 2012 written to Ms Coleman requiring her for cross-examination, the parties were advised by the Secretary on 25 July 2012 that the Tribunal would not of its own motion issue a witness summons requiring the attendance

of Ms Coleman before the Tribunal to give evidence. Ms Coleman subsequently advised that she did not intend attending the hearing of the recusal application scheduled for 3 August 2012.

[22] No witness summons application was made by Mr Deliu for Ms Coleman. However, at the commencement of the recusal hearing on 3 August 2012 he advanced four grounds of objection to the Tribunal taking into account Ms Coleman's memorandum of 21 March 2012:

> **[22.1]** The Attorney-General had given notice that he did not wish to be heard on the recusal application.
>
> **[22.2]** The Attorney-General had improperly and unethically filed evidence from the Bar so that it could not be challenged in the normal way.
>
> **[22.3]** The Attorney-General had engaged in a "secret investigation" of Mr Deliu's files. This was an abuse of process. This objection was based on the citation in Ms Coleman's memorandum of *Solicitor-General v Bujak* HC Christchurch CIV-2007-485-000522, 12 December 2011 at fn 31.
>
> **[22.4]** Section 129 of the Evidence Act had no application as no documents had been filed. All the Tribunal had were the references and citations given in the memorandum.

[23] Mr Pyke submitted that as no notice of the "secret investigation" allegation had been given by Mr Deliu, the proceedings should be adjourned to allow Ms Coleman an opportunity to be heard.

[24] To avoid yet further delay in these proceedings the Tribunal gave an oral ruling that the admission of the materials cited by Ms Coleman in her memorandum fell to be determined in accordance with the Evidence Act and the Human Rights Act. The complaints made by Mr Deliu in relation to the alleged secret investigation would need to be pursued separately in other fora.

The submissions for the defendants

[25] The defendants submitted:

> **[25.1]** As Mr Deliu claimed entitlement to the title of "Dr", it was for him to demonstrate his right to use it and to demonstrate that judicial bodies and tribunals are obliged to refer to him by that title.
>
> **[25.2]** Mr Deliu had not placed in evidence any information as to whether the institution that conferred his JD degree approved the use of the title "Dr", by reference to Mr Deliu's JD degree.
>
> **[25.3]** Little evidence of practice inside or outside New Zealand had been adduced by Mr Deliu.
>
> **[25.4]** The material set out in Ms Coleman's memorandum dated 21 March 2012 could be received in evidence by the Tribunal pursuant to s 106 of the Human Rights Act and no case for cross-examination had been made out either procedurally or on the merits.

[25.5] Were Mr Deliu to be addressed as "Dr Deliu" there was a real risk that people in New Zealand will be misled into believing that he holds a post-graduate doctoral degree (obtained by thesis), which he does not hold.

[25.6] Any refusal to refer to Mr Deliu as "Dr" did not mean that an independent and not overly sensitive informed observer would think that the Tribunal would decide the case on anything other than the merits. Such observer might think that Mr Deliu is over-sensitive about the matter, and that his title really had nothing to do with the real issues, and that the Tribunal was not going to be influenced by such a minor complaint (the subjective feelings of Mr Deliu not being relevant).

Discussion

[26] Addressing first Exhibits L and M produced and relied on by Mr Deliu, we are of the view that they are to be admitted into evidence under s 129 of the Evidence Act and under s 106(1)(d) of the Human Rights Act.

[27] Addressing first Exhibit L, being the article by Ms Kathleen Maher "Lawyers are Doctors Too" (2006) 92 ABAJ 24 the following points may be noted:

[27.1] The appellation "juris doctor" is "of fairly recent vintage" and that from approximately the mid to late 1960's more and more law schools phased out bachelor of law (LL.B) degrees in favour of the "more popular" JD. Now most law school students receive a juris doctor degree.

[27.2] Professional conduct rules "never have been clear" on whether it is permissible for a lawyer holding a JD degree to be known as doctor.

[27.3] In 1969 the ABA Committee on Professional Ethics (which later became the Standing Committee on Ethics and Professional Responsibility) issued an opinion advising lawyers not to refer to themselves as doctors. In ABA *Formal Opinion 321*, the committee said that its long-standing position was derived from prohibitions against "self-laudation" set forth in the ABA Canons of Ethics.

[27.4] However, in ABA *Informal Opinion 1152* (1970) the committee "reversed course".

[27.5] Several States concur with *Informal Opinion 1152* while others hold to the prior rule.

[27.6] The ABA Model Rules of Professional Conduct, which superseded the Model Code in 1983, do not directly address a lawyer's use of doctor, nor do most legal ethics codes at the State level. As a result, guidance on the issue continues to come primarily from State ethics opinions. These opinions generally turn on the question whether using doctor or any other title constitutes a false or misleading communication about the lawyer or the lawyer's services.

[28] Turning now to Exhibit M, being *Informal Opinion 1152* (25 February 1970), it reads:

> **Public Use of Title "Dr." And "Juris Dr. Degree"**
>
> February 25, 1970
>
> You have inquired of the Committee whether under the Code of Professional Responsibility an individual possessing LL.B and LL.M. degrees is entitled to the use of the term "Doctor". DR 2 – 102 (F) permits the use by a lawyer of "an earned degree or title derived therefrom indicating his

> training in the law". This clearly permits the use of the term "Doctor" by the holder of a J.D. degree, and as a LL.M. degree indicates a more advanced stage of training in the law than does a JD degree, it is the opinion of the Committee that under this language the holder of such a degree would be entitled to use and permit the use of the term "Doctor" in connection with his name.
>
> It should be pointed out that the foregoing opinion is rendered under the Code of Professional Responsibility, as under the Canons of Ethics as interpreted by this Committee's Formal Opinion 321, a contrary result would be reached.

[29] The status of this "informal" opinion has not been explained but we take it to be just that – an informal opinion. It is also at best ambiguous, the last paragraph suggesting that in a different context, a contrary result would be reached.

[30] We observe also that according to *Informal Opinion 1152* a LLM degree "indicates a more advanced stage of training in the law than does a JD degree" and that the holder of such degree would be entitled to use the term "Doctor". Three points may be noted in this regard. First, the JD degree is here regarded as less advanced than a masters degree. Second, in the New Zealand context it would not be acceptable for the holder of a masters degree to use the term "Doctor", unless the individual is also the holder of a PhD degree or a doctor of medicine. Third, the unarticulated reasoning process in *Informal Opinion 1152* appears to be that because "juris doctor" uses the "doctor" word, the holder of the degree is a "Doctor".

[31] Be that as it may, we conclude that the evidence relied on by Mr Deliu as to his entitlement within the State of New York or indeed anywhere in the USA to use of the term "Dr" is at best ambiguous, contradictory, confused and only marginally supported by an ***informal*** opinion. We have not been referred to any evidence establishing that a JD degree holder has a right to be known as "Doctor". As noted by Kathleen Maher in her article, professional conduct rules in the USA have never been clear on whether it is permissible for a lawyer holding a JD degree to be known as doctor.

[32] In view of the quality of Mr Deliu's evidence and the conclusions we have drawn from it, we find it unnecessary to rely on the material cited in Ms Coleman's memorandum dated 21 March 2012.

[33] Nevertheless, in the alternative, that material is similarly admitted under the provisions of the Evidence Act and Human Rights Act referred to. There is nothing to the point that the material must be physically exhibited to an affidavit or memorandum given that s 105 of the Human Rights Act requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities. We intend referring to only two aspects of the material cited by Ms Coleman.

[34] The first is her para 3 which we reproduce here, but without the footnote citations:

> 3 The American Bar Association ("ABA"), the accreditation body for programmes in legal education, defines the JD degree as "the first professional degree in law granted by a law school". "First-professional degrees" are further described by the US Department of Education as follows:
>
> > First-professional degrees represent a category of qualifications in professional subject areas that require students to have previously completed specified undergraduate course work and/or degrees before enrolling. They are considered graduate-level programmes in the US system because [they] follow prior undergraduate studies, but they are in fact first degrees in these professional subjects. Holders of first-professional degrees are considered to have an entry-level qualification and may undertake graduate study in these professional fields following the award of the first-professional degree. *Several of these degrees use the term "doctor" in the title, but these degrees do not contain an independent research component or require a*

> *dissertation (thesis) and should not be confused with PhD degrees or other research doctorates*. [Emphasis in original].

[35] The description of the JD degree as "the first professional degree in law granted by a law school" in the USA accords with the description given by Kathleen Maher in her journal article and with the statement in *Informal Opinion 1152* that a LLM degree indicates a more advanced stage of training in the law than does a JD degree. We are of the view this reinforces our conclusion that in the USA a JD degree holder does not have the right to be addressed as a doctor.

[36] The second relates to the references to the New Zealand qualification framework. At the hearing the Tribunal drew attention to the New Zealand Qualifications Framework which has statutory recognition under the Education Act 1989. Mr Deliu objected to the Tribunal taking the Framework into account and submitted that the very act of referring to the Framework and handing a copy to him established bias. As to this, the Framework has statutory recognition and we have determined that it is to be admitted into evidence just as Exhibits L and M have been admitted. No surprise can be claimed because the Framework is referred to by Ms Coleman at para 20 of her memorandum. There is no proper basis for Mr Deliu objecting to a New Zealand tribunal wishing to take into account the qualification framework which applies in New Zealand and which, for New Zealand purposes, describes how educational achievement is to be recognised. The Framework sets out in clear terms the level of complexity of each particular qualification and the kinds of skills a learner could expect to gain by completing that qualification. There are ten levels to the Framework. All qualifications on the framework are assigned one of the ten levels. We set out below the level descriptors and qualification types on the New Zealand Qualifications Framework:

LEVEL	NAMING SEQUENCE
10	Doctoral Degree
9	Master's Degrees
8	Postgraduate Diplomas and Certificates, Bachelor Honours Degree
7	Bachelor's Degrees, Graduate Diplomas and Certificates
6	Diplomas
5	
4	Certificates
3	
2	
1	

[37] In the interests of brevity we set out only the New Zealand Qualification Framework description of a Doctoral Degree. The defining characteristic is that it is a research degree:

> **Doctoral Degree**
>
> The Doctoral Degree is a research degree whereby the individual becomes an increasingly independent scholar who makes a substantial and original contribution to knowledge.
>
> It is normally the culmination of study which begins at the bachelor level and reaches a stage beyond the masters. For the PhD/DPhil and the named doctorate (e.g. D Mus) the development takes place under the guidance of recognised experts in the field of study and under circumstances that allow the individual access to appropriate research resources.
>
> The contribution to knowledge is judged by independent experts applying contemporary international standards of the discipline. The hallmark will be the individual's capacity for substantial independent research or scholarly creative activity as attested by his/her educational institution and/or as demonstrated by submitted work.

> The major component of all doctorates is original research. The body of work that leads to the award of a doctorate will be one or more of the following:
>
> - a thesis (the PhD/DPhil)
> - creative work in the visual or performing arts (the PhD/DPhil)
> - a thesis or equivalent creative work in combination with cause work (the named doctorate)
> - a creative work in the visual or performing arts (the named doctorate) with a thesis (the named doctorate)
> - published work.
>
> ...

[38] It is clear from the Kathleen Maher article and from *Informal Opinion 1152* that the claimed use in the USA of the title doctor comes from the deployment of the words "Juris Doctor" to describe a bachelors degree. The title does not describe a research degree. As noted in the extract from the US Department of Education cited by Ms Coleman in her memorandum:

> Several of these degrees use the term "doctor" in the title, but these degrees do not contain an independent research component or require a dissertation (thesis) and should not be confused with PhD degrees or other research doctorates.

[39] At the present time no New Zealand law school awards a JD degree and as best the Tribunal is aware, the title "Dr" is recognised in a New Zealand court or tribunal setting only where the particular individual is either the holder of a Doctoral Degree or is a Doctor of Medicine. We are not aware of any practice in New Zealand which recognises the holder of a JD degree as being entitled to be addressed as "Dr". Nor indeed has our attention been drawn to any practice in the USA whereby JD degree holders are addressed by courts or tribunals as "Dr". If anything, whether there is a right of a JD holder to use the title "Dr" appears, at best, to be a controversial issue.

[40] In these circumstances we see no reason to depart from the Tribunal's practice described in the Secretary's email of 9 February 2012, namely that the title "Dr" is appropriate for the holder of a PhD degree, not the holder of a JD degree.

[41] We address later the submission by Mr Deliu that failure to address him as "Dr" is evidence of actual or apparent bias.

[42] We turn now to the second ground of the recusal application, namely the fact that Mr Deliu has lodged a complaint against the Chairperson.

THE COMPLAINT TO THE LAWYERS COMPLAINTS SERVICE

[43] By email dated 19 February 2012 Mr Deliu made complaint about the Chairperson in the following terms:

> I wish to lodge a complaint against Mr Rodger Haines QC because he has refused to recognize me as a "Doctor" in breach of his obligations to afford due respect to a fellow colleague. As you know, the NZLS and NSC are defendants in proceedings I have brought in the HRRT and he has there, as chair, without any explanation (much less justification) refused to address me by my correct title. Of course, you will notice I have not afforded this Queen's Counsel the same disrespect in referring to him. I look forward to hearing from you.

[44] It would appear that Mr Deliu assumed the complaint would be dealt with by the National Standards Committee, one of the defendants in the present proceedings. Mr Deliu accordingly advanced before the Tribunal (inter alia) two propositions:

[44.1] The Chairperson could not "fairly sit in further judgment in these matters" (application for recusal para 2).

[44.2] Even were the complaint to be dismissed:

> … It will still give the appearance that the Chair is sitting in Judgment over a party who made (unsubstantiated) allegations against him that would then objectively indicate a conflict between the bench and bar that should not be allowed to exist or continue … (memorandum of submissions in support of recusal application, para 17).

[45] As matters turned out, the complaint was addressed not by the National Standards Committee but by the Canterbury Westland Branch Standards Committee 1. In a decision given on 18 July 2012 (No. 5681) it resolved to take no action on the complaint. By email dated 30 July 2012 the decision was circulated to the parties by the Secretary to the Tribunal. The Committee relevantly stated:

> 4. Mr Deliu wishes to be known by the title of Dr. In the decision of the Human Rights Review Tribunal he has been referred to as Mr. Whether or not Mr Deliu is the holder of a qualification which would entitle him to append the descriptor "Dr" in front of his name is not a matter that the Committee is required to consider. Mr Haines as chairperson of the Human Rights Review Tribunal has referred to Mr Deliu with the title of Mr in the decision. The Committee does not accept that in doing so, Mr Haines QC has failed to show due respect to Mr Deliu.
>
> 5. Lawyers practising in New Zealand are entitled to be shown respect by fellow lawyers. Equally they are expected to display a degree of robustness and resilience, and not to take umbrage at every perceived slight. Mr Haines has shown due respect to Mr Deliu. The subject matter of this complaint is trivial and unimportant.

[46] At the hearing on 3 August 2012, in closing his oral submissions, Mr Deliu said that he abandoned ground 2 of the recusal application. When Mr Pyke queried whether the abandonment was unequivocal, Mr Deliu said in reply that it was indeed unequivocal as the complaint had not been dealt with by the National Standards Committee.

Discussion

[47] In view of the abandonment of the second ground of the recusal application it is necessary to observe only that the abandonment, late though it was, was probably inevitable in light of *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11] to [13].

[48] We turn now to the third and final ground of the recusal application.

FAILURE TO CONSIDER EVIDENCE – MANIPULATING THE RECORD

The case for Mr Deliu

[49] This ground for recusal is based on the Tribunal's decision delivered on 8 February 2012 in which it dismissed the interim order application. Mr Deliu asserts that in finding that there was no evidence to establish discrimination on the basis of political opinion the Tribunal intentionally ignored every piece of evidence tendered on this issue. Instead the Tribunal "improperly manipulated the record" so as to make it appear that Mr Deliu had not provided any, as opposed to insufficient, evidence.

[50] As developed in his memorandum dated 19 April 2012 at para 4, Mr Deliu submitted that he had filed a "plethora of materials" from which the Tribunal was asked to infer that the real reason that he is being prosecuted is not his language or tone of the complaints, but rather "because these are two very senior and powerful governmental actors he has dared complain about". Then at para 9 it is submitted:

9. The Tribunal in its interim decision showed its hand in wilfully disregarding the Plaintiff's evidence. To wit, it did not say that the Plaintiff's evidence was insufficient or wanting, not credible or otherwise deficient such that there is no sufficiently arguable case at that juncture to make the orders sought. Nor did it analyze the affidavits and annexures and related legal arguments to draw the conclusion that there was "no" evidence. Instead, it made a sweeping and unsubstantiated finding that there was "no" evidence which would given an outsider not privy to the files the wholly wrongful impression that the Plaintiff made serious allegations of discrimination without any factual basis. As the Plaintiff is a lawyer and the Defendants are his law society and an ethics committee this would be adverse to his ongoing reputation and membership thereof.

The case for the defendants

[51] The principal points made by the defendants were:

> **[51.1]** The recusal application is a collateral challenge to the interim order decision of the Tribunal given on 8 February 2012, a decision which was neither appealed by Mr Deliu nor made the subject of judicial review proceedings.
>
> **[51.2]** It was not necessary for the Tribunal in its interim order decision to recite in detail the evidence of Mr Deliu and the copious materials he has produced.
>
> **[51.3]** Grappling with the issues was hampered by Mr Deliu's sparse pleadings. Specifically, there was no particularisation or analysis of how anything done by the defendants amounted to discrimination based on the asserted political opinion.

Discussion

[52] The pleadings point is well taken. In HRRT014/2011 the original statement of claim dated 14 June 2011 asserted that the decisions to investigate and prosecute were a form of prohibited discrimination on the basis of Mr Deliu's political opinion. But as Mr Pyke points out, there was no particularisation or analysis of how anything done by the defendants amounted to discrimination based on the asserted political opinion.

[53] As to HRRT045/2011, the statement of claim in those proceedings was at first (and for some time thereafter) almost without meaningful content. The circumstances in which this arose are described in the *Minute* issued on 6 December 2011.

[54] In support of the interim order application Mr Deliu filed an affidavit dated 12 July 2011 which was two paragraphs in length. This affidavit annexed a "memorandum of submissions" and declared that "the factual assertions or other forms of evidence contained therein" were true and correct. The affidavit and memorandum comprised four bound volumes of approximately 1031 pages. A further affidavit sworn on 12 August 2011 comprised a separate bound volume of 233 pages.

[55] It is submitted by Mr Deliu that the inference to be drawn from the five volumes of material is that the decision to investigate and to prosecute discriminated against him by reason of his political opinion.

[56] The defendants have from the outset sought further and better particularisation of both statements of claim. The *Minute* of 6 December 2011 recorded:

> **[19]** … Mr Pyke also drew attention to the following:
>
> > **[19.1]** …
> >
> > **[19.2]** With the filing of the new proceedings in HRRT 045/2011:

> **[19.2.1]** The existing statement of claim in HRRT 014/2011 would have to be recast.
>
> **[19.2.2]** As there was no statement of claim in HRRT 045/2011 apart from pro forma allegations of the most minimal kind, a full and comprehensive statement of claim would have to be filed in those proceedings.
>
> **[19.3]** The NZLS and NSC were seeking fully particularised statements of claim which (inter alia) identified with clarity and precision how it is alleged that the NZLS and/or the NSC discriminated against Dr Deliu on the grounds of his political opinion. Where reliance was based on inferences to be drawn from documentation or similar material, the specific inferences together with the relevant documents or material would need to be specified and identified. Also sought was a detailed articulation of the political opinion in respect of which the discrimination allegedly occurred.
>
> These are clearly matters which will have to be addressed at the close of the hearing of the interim order application.

[57] The *Minute* went on to direct that Mr Deliu file full and particularised amended statements of claim by 7 February 2012:

> **[21]** The following directions are made:
>
> **[21.1]** The hearing of the interim order application is to resume at 12noon on 21 December 2011. The venue is to be notified by the Secretary when known. If possible Mr Pyke is to file a synopsis of his submissions.
>
> **[21.2]** In HRRT 014/2011 a full and particularised amended statement of claim is to be filed and served by Dr Deliu by 5pm on Tuesday 7 February 2012.
>
> **[21.3]** In HRRT 045/2011 a full and particularised statement of claim is to be filed and served by Dr Deliu by 5pm on Tuesday 7 February 2012.

[58] In the result the interim order application was heard on 5, 6 and 21 December 2011 without the Tribunal or the defendants having the benefit of properly particularised statements of claim. The deadline of 7 February 2012 was subsequently extended at the request of Mr Deliu to 23 March 2012, a month after the interim order decision was delivered. See the *Minute* dated 9 March 2012. Identical amended statements of claim were filed on 23 March 2012. At common para 9 of the amended statements of claim some ten particulars are now pleaded and include (inter alia) the assertion that:

- The decisions to open a file, investigate and prosecute the Plaintiff were not for the purpose expressed in the 12 November 2010 decision, but rather for the ulterior motive of persecuting him for his political opinion.
- The New Zealand Law Society and National Standards Committee are acting as proxies of the Justice and the Chief High Court Judge.

[59] The Tribunal did not have the benefit of the ten particulars when it dealt with the interim order application. It may be stating the obvious but articulating a claim with proper particulars is far more effective in promoting an understanding of a case than expecting the decision-maker to fossick through five volumes of evidence largely unaided by meaningful particulars. This is not a mere pleading point. See *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 where, in delivering the judgment of the Court, McGechan J said:

> It has become fashionable in some quarters to regard the pleadings as being of little importance. There was an echo of that approach in the implicit suggestion floated in this case that exchange of briefs of evidence before trial might be seen as curing any lack of particularity in the pleadings. Any such view is misguided. Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or

should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.

We are not casting aspersions on the pleadings in this case which, leaving aside issues about necessary particularity, are well drawn on each side. Nor are we advocating a pedantic approach to the topic. Pleadings should be read as conveying what they would reasonably convey, in the context of the case, to a sensible legal mind. Even less are we advocating prolixity of pleadings, or the raising of every conceivable cause of action irrespective of its potential for success; this type of pleading often contains the additional flaw of overlooking R114 which requires each cause of action to be separately pleaded. What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

[60] The point is that the hearing of the interim order application proceeded in the absence of any properly particularised statement of claim, as noted by the Tribunal at [22] and [24] of the interim order decision:

> **[22]** For the NZLS Mr Pyke has pointed out that no or no meaningful particulars are given in the statement of claim of the political opinion relied on by Mr Deliu, a potentially important point given the need for the alleged discriminatory act (ie the laying of charges) to be causally linked to a "political opinion" held by Mr Deliu.
>
> …
>
> **[24]** The statement of claim in HRRT 045/2011 presently contains no meaningful information. Given the circumstances in which it was filed it is a perfunctory document and does not assist in addressing Mr Pyke's point about the difficulties caused by the absence of a particularised articulation of the political opinion relied on. A direction was made in the *Minute* of 6 December 2011 that a full and particularised amended statement of claim be filed and served by Mr Deliu by 5 pm on Tuesday 7 February 2012.

[61] It is unhelpful, even on an interim order application, for a plaintiff to file "a plethora of materials" (Mr Deliu's words at para 40 of his memorandum dated 19 April 2012) and to ask the Tribunal "to infer that the real reason that he has been prosecuted is not his language or tone of the complaints, but rather because these are two very senior and powerful governmental actors he has dared complain about". In its rulings on the pleadings and in the views it has expressed about the adequacy of the evidence, the Tribunal has kept open for Mr Deliu, on a more appropriately pleaded case and with a more focused marshalling of his evidence, the opportunity to persuade the Tribunal that his complaints against one or both defendants are in fact made out. If there were perceived deficiencies in his case he at least now has the opportunity to remedy them before the substantive hearing. See particularly [3] of the interim order decision:

> **[3]** As this is an interim order application it is not intended that the evidence presently before the Tribunal and the competing submissions be referred to in detail except to the degree necessary to determine the interim order application. It is also recognised that it is not appropriate for a final determination to be made of the substantive merits of the two proceedings filed in HRRT 014/2011 and HRRT 045/2011.

[62] The Tribunal was careful to qualify key findings with the term "presently":

> **[55]** Both parties addressed submissions to the meaning of "political opinion" in the context of HRA s 21. Authority can be found for both wide and narrow readings of this provision. It is not necessary for the purpose of determining the present application for a view to be taken because the difficulty faced by Mr Deliu is not the definitional challenge but rather the absence of evidence that the reason for the NSC decision was Mr Deliu's political opinion (however defined). The evidence presently before the Tribunal unequivocally establishes that the decisions by the NSC were based not on the allegations made by Mr Deliu and such political opinion as might be inferred from those allegations. Rather it was the intemperate manner in

> which the allegations were made. The express language of the determinations makes this abundantly clear:
>
> Investigation 2606 ... the intemperate and persistent manner in which Mr Deliu has made complaints against Harrison J....
>
> Investigation 2983 ... the intemperate manner in which the allegations were made against Randerson J and the making of the allegations seemingly without a substantial basis.
>
> **[56]** There is presently no evidence to establish, even to the slightest degree, that the investigation by the NSC and its decision to lay charges is for reason of any political opinion held by Mr Deliu.
>
> …
>
> **[64]** On the facts presently before us we do not consider that any case at all has been made out to question the decision of the NSC, let alone a strong or compelling case.

[63] These qualifications were made to emphasise that the Tribunal, in ruling on the interim order application, had reached no final conclusion on the ultimate merits of a case which had yet to be properly pleaded. For similar reason it did not embark upon a detailed analysis on the unfocused "plethora of evidence". Unassisted by properly pleaded and particularised statements of claim the Tribunal could not realistically be expected to find a case in that plethora and then address each and every of the documents in the five volumes and make a determination whether those documents, viewed singularly or in combination, either did or did not support the case which the Tribunal had imagined or constructed.

[64] The specific context and this combination of factors underline why, on an interim order application, the decision-maker should not ordinarily enter upon a detailed consideration of the merits of the substantive application. It is not its function, nor is it possible to do so at this time. See in this regard *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (Gendall J) at 236:

> Turning to matters which I have to consider where interim relief is sought under s 8(1) of the Judicature Amendment Act 1972, the Court cannot and does not enter upon a detailed consideration of the merits of the substantive application. It is not its function, nor is it possible to do so at this time. The discretion vested in the Court to make an interim order exists:
>
> > … if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant …
>
> Generally speaking, except for the purposes of passing the threshold test for the granting of interim relief, it is not appropriate to go into a detailed consideration of the exercise of the statutory power that is under review when dealing with interim applications such as these. *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368.

[65] By not engaging in a detailed analysis of the evidence the Tribunal also hoped to avoid an allegation by one or other of the parties that the Tribunal was disqualified by having predetermined the evidence. It is ironic, therefore, that by following general practice and by allowing Mr Deliu maximum opportunity to amend his pleadings and to better present his evidence, the Tribunal now faces the allegation that it has "wilfully disregarded" Mr Deliu's evidence and has "improperly manipulated the record to make it appear that [he] had not provided any, as opposed to insufficient, evidence".

[66] We are of the view that there is no substance to any of these allegations. They proceed upon a mistaken view of what the Tribunal said in its decision of 8 February

2012. It also obscures the fact that in arriving at its decision, the Tribunal took into account other factors apart from the "no evidence" point.

[67] The complaint now made by Mr Deliu is, in essence, that he disagrees with the Tribunal's assessment of his case as originally pleaded and the evidence as articulated in support of the interim order application. If there were proper grounds to do so he could have appealed or brought judicial review proceedings. Neither course was taken. Merely because he disagrees with the decision and believes it was wrong does not give rise to a claim that the Tribunal is biased. Nor can he deploy a recusal application as a disguised form of rehearing or as a substitute for challenge by way of appeal or application for judicial review.

[68] Against this background we turn to the recusal application.

RECUSAL – THE LAW

[69] As noted in the Tribunal's decision dated 11 October 2011 given in the context of the first recusal application, the law on recusal has been comprehensively examined.

> **[15]** The law in this area has recently been comprehensively examined by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35. There was unanimity in relation to the following passage from the judgment of Blanchard J at paras [3] to [5]:
>
> > [3] There was no disagreement before us concerning the test for apparent bias. After some semantic differences, the test in the United Kingdom and the test in Australia have become essentially the same. In *Muir v Commissioner of Inland Revenue*, the Court of Appeal brought New Zealand law into line. In the Australian case of *Ebner v Official Trustee in Bankruptcy* the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, 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". As that judgment proceeds to observe, 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 (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.
> >
> > [4] It was pointed out in *Ebner* that the question is one of possibility ("real and not remote"), not probability. The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:
> >
> > (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
> >
> > (b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".
> >
> > [5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in *Helow v Secretary of State for the Home Department* that:
> >
> > > before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its

> overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[70] As more recently stated in *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11]:

> [11] It is well-established that apparent bias arises only if a fair-minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what is said that might lead a judge to decide the case other than on its merits and, secondly, to evaluate the connection between that matter and the feared deviation.

Discussion

[71] Mr Deliu submits (memorandum dated 19 April 2012 at para 18) that the "unreasoned (and untenable)" finding of "no evidence" plus the alleged disrespect of him as a person satisfies the apparent bias test. He also goes on to submit that if the recusal application is refused, he will face a "show trial" where the outcome is predetermined:

> 18 Ultimately the Plaintiff's submission is that the apparent bias test is clearly met when the decision makers in question disrespect him as a person and also disregard the crux of his case and make an unreasoned (and untenable) finding of "no" evidence. This indicates that if recusal is refused then the Plaintiff faces a show trial where the outcome is predetermined and all that is being given is the pretense of justice since the Plaintiff will effectively be proceeding to trial on substantially the same evidence.

[72] As to the "disrespect" point we are of the view that a fair-minded and informed lay observer would:

> **[72.1]** Take into account the caution expressed by the US Department of Education that a JD degree is a first professional degree and is not to be confused with a PhD degree.
>
> **[72.2]** Recognise that opinion in the USA is ambiguous, if not divided and that attention has not been drawn to any practice within the USA whereby JD degree holders are addressed by courts and tribunals as "Dr".
>
> **[72.3]** Understand that in the New Zealand setting the holder of a first professional degree in the form of a JD degree from Syracuse University, New York is not to be addressed in a manner that would allow that qualification to be confused with a Doctoral Degree as described in the New Zealand Qualification Framework.

[73] Our conclusion is that a fair-minded and informed lay observer would conclude there is no basis for apprehending that there is a real and not a remote possibility that the Tribunal or any member of it might not bring an impartial mind to the resolution of the two proceedings now before the Tribunal by reason of addressing the plaintiff as "Mr Deliu" rather than his preferred "Dr Deliu".

[74] As to the "no evidence" point we are of the view that a fair-minded and informed lay observer would not regard the Tribunal as having made an unreasoned and untenable finding of "no evidence". To the contrary, the observer would understand that:

[74.1] There are good reasons for not, in an interim order application, going into a detailed consideration of the merits of the substantive case; and

[74.2] Mr Deliu's pleadings were in need of substantial improvement and that while he had been directed to file full and particularised amended statements of claim by 7 February 2012, he had not done so as at the date of the hearing and determination of the interim order application; and

[74.3] The Tribunal determined the interim order application in such a way as to allow Mr Deliu maximum opportunity to amend his pleadings and to better present his evidence. The Tribunal also wished to avoid an accusation that it had predetermined issues in advance of the filing of amended pleadings and in advance of the substantive hearing.

[75] For the reasons we have endeavoured to explain, a fair-minded and informed lay observer would conclude that there is no basis for apprehending that there is a real and not a remote possibility that the Tribunal or any member of it might not bring an impartial mind to the resolution of the two proceedings now before the Tribunal.

[76] As to the claim that if recusal is refused then Mr Deliu faces a show trial where the outcome is predetermined, the issue we must decide is not whether Mr Deliu holds to this view but whether the circumstances may lead a fair-minded observer to that view and in particular, to the view that the Tribunal or any member of it might not bring an impartial mind to the case. The observer will not adopt the perspective of the party seeking recusal unless objectively it is a justified one.

[77] We have concluded that there is no proper basis for the "show trial" point to be advanced. It assumes (inter alia) that Mr Deliu's complaints relating to "disrespect" and "no evidence" have been made out. For the reasons given above, neither of these two points, whether taken on their own or in combination, have any substance or justification.

The new ground for recusal

[78] In the course of preparing the present decision the Tribunal's own research uncovered the decision in *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 which appeared to have potential relevance to the pleadings point taken by the defendants. By *Minute* dated 1 March 2013 the Chairperson offered the parties an opportunity to make submissions by 12 March 2013 on that decision. At the request of Mr Deliu and Mr Pyke this deadline was for various reasons amended to 22 March 2013 (for the defendants) and 5 April 2013 (for Mr Deliu). The further submissions by the defendants were filed on 22 March 2013 and the further submissions by Mr Deliu were filed on 5 April 2013. Both sets of submissions have been taken into account in the preparation of this decision.

[79] In the last paragraph of his submissions dated 5 April 2013 Mr Deliu advanced a new ground in support of the present second recusal application, namely an alleged delay by the Tribunal in issuing a decision on the application:

> This is the first instance trial Court which I must go through to exhaust domestic remedies under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights and so a further ground for recusal is that I have been denied a speedy trial by virtue of the now 10th month of a reserved recusal decision which has otherwise completely stalled the progression of my claims. The Panel has not given any explanation why a recusal decision takes almost a year to be issued, indeed on my research I have not been able to find a single decision of this Tribunal which has taken this long to be rendered. It thus appears that I am being denied

> access to justice by this Panel and this is cause for extreme concern. I preserve the appellate point.

[80] The time which has elapsed between the hearing on 3 August 2012 and the publication of this decision is in fact closer to eight months. If a deduction is made for the time afforded to the parties to make further submissions, the period is seven months. The Tribunal was unable to publish a decision at an earlier date owing to a heavy workload.

[81] We do not accept that a fair-minded and informed lay observer would conclude that the delay, such as it is, provides a basis for apprehending that there is a real and not a remote possibility that the Tribunal or any member of it might not bring an impartial mind to the resolution of the two proceedings now before the Tribunal.

CONCLUSION

[82] The recusal application made by Mr Deliu dated 22 March 2012 is dismissed.

DIRECTIONS AS TO FUTURE CONDUCT OF CASE

[83] As best we understand, the only remaining preliminary matter to be determined is the application by the defendants dated 21 April 2012 that the amended statements of claim be dismissed.

Directions

[84] On delivery of this decision a telephone conference is to be convened at an early date so that timetable directions can be given by the Chairperson for the hearing of the dismissal application and any other matter that may require determination before these proceedings are set down for hearing on their merits.

.....	.....	.....
RPG Haines QC	**Mr GJ Cook JP**	**Ms PJ Davies**
Chairperson	**Member**	**Member**