IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 11**

	Reference No. HRRT 028/2012
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**DOUGLAS JOHN APPLEBY**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Dr SJ Hickey, Member

REPRESENTATION:
Mr FJ Fehling in person
Mr MM Bell for defendant

DATE OF DECISION: 17 March 2014

DECISION OF TRIBUNAL ON RECUSAL APPLICATION

Introduction

[1] These proceedings will be heard at Hokitika on 26 and 27 May 2014.

[2] Mr Appleby, by memoranda dated 6 December 2013 and 30 January 2014, seeks the recusal of those members of the Tribunal who comprised the panel which heard and determined the proceedings in *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012).

Background

[3] On 7 May 2012 a panel of the Tribunal comprising Mr RPG Haines QC, Chairperson, Ms J Grant MNZM, Member and Ms S Scott, Member heard proceedings brought by Mr Fehling under the Privacy Act 1993 against the South Westland Area School. At the

relevant time Mr Appleby was the chairperson of the board of trustees of the school and he attended the hearing held at Hokitika. He did not give evidence. His role appeared to be that of support person for the then Principal of the school. She, together with the school caretaker were the only witnesses called by the school.

[4] In a decision given on 6 July 2012 as *Fehling v South Westland Area School* [2012] NZHRRT 15, Mr Fehling was successful. He obtained:

> **[4.1]** A declaration under s 85(1)(a) of the Privacy Act 1993 that South Westland Area School interfered with his privacy by refusing to disclose the personal information requested by him. The School did not have proper grounds to withhold the information.
>
> **[4.2]** Damages of $10,000 under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

[5] In finding for Mr Fehling the Tribunal made favourable comments about his credibility but also found that it did not follow from the acceptance of Mr Fehling as a credible witness that therefore the two school witnesses were not also credible witnesses:

> **[58]** We found Mr Fehling to be a credible and compelling witness who was at pains to present his case in a clear, accurate and succinct manner. He was forthright and direct when responding to questions. We are of the view he has conscientiously provided a true account of the events in question.
>
> **[59]** Mr Fehling is an intelligent and articulate individual who cares passionately about his deeply held convictions. It would appear that some mistake his passion and intensity for "anger" or intimidation. For example, Ms Sloane said in her evidence that she had felt that in the course of presenting his case to the Tribunal, Mr Fehling had exhibited threatening behaviour or verbal harassment. None of the Panel members share that view. No such behaviour was detected. It is possible that his idiosyncratic vocabulary may at times require decoding. This requires understanding and patience on the part of the listener, qualities which he may not encounter often in his daily activities.
>
> **[60]** It does not follow from the acceptance of Mr Fehling as a wholly credible witness that therefore Ms Sloane and Ms Adamson were not also credible witnesses. We are of the view that both have faithfully reported events as seen from their respective perspectives. The difficulty, however, is that in her brief of evidence Ms Sloane largely reported the untested but nevertheless prejudicial views of others. When in her evidence she attested to matters within her in own knowledge, the evidence of Ms Sloane was largely in favour of Mr Fehling or at least neutral.
>
> **[61]** As to Ms Adamson, we accept she is sincere in her belief that she does not feel safe in the presence of Mr Fehling. But we are equally of the view that on the evidence we have heard, this belief is not based on rational grounds. It was telling that her belief is based on events which occurred between twelve and seventeen years ago. Equally telling of her acute over-sensitivity to Mr Fehling is her insistence on the relevance of the incident in which her eldest daughter presented a rifle at a person who was not Mr Fehling. Her irrational fear of Mr Fehling has seemingly been inherited by her eldest daughter. She (the daughter) apparently can not walk past a property on which Mr Fehling's van is parked because of the "events" which are said to have occurred twelve to seventeen years ago. While their irrational fear of Mr Fehling is real to Ms Adamson and her eldest daughter, those fears cannot properly play a part in assessing whether the School has established proper grounds for withholding personal information from Mr Fehling. Those grounds must necessarily be founded on objective and rational facts.
>
> **[62]** An unfortunate aspect of the case is that although not expressly articulated, the evidence for the School conveyed the flavour of a man who, without authority, had taken up summer residence beside the School swimming pool, had been seen using the toilet and shower facilities, was a man with an alleged history of threatening behaviour and verbal harassment of people in the community and a trespass notice had been required to remove his unwanted presence. The inference was that children on the School premises and those using the School swimming pool and toilets were unsafe as long as he was present. Yet when these

connotations were put to Ms Sloane she was very clear in accepting that in all her years as Principal (she took up her position in 2001) she had never had difficulties with Mr Fehling, had never experienced any threatening behaviour or verbal harassment and at most could say only that some students felt uncomfortable with him being on the School grounds because on one or more occasions he had been seen wearing a dressing gown on top his clothes. She had never known him to have acted inappropriately towards children at the School or towards the teachers. When the connotations were explored with Ms Adamson it was clear that none of the incidents on which Ms Adamson relies for her "fear" of Mr Fehling involve any suggestion of deviant behaviour. It is most unfortunate that in spite of the complete absence of any evidence to suggest inappropriate behaviour on the part of Mr Fehling that unsavoury inferences have nonetheless from time to time been capable of being drawn from the evidence called by the School.

[63] We will proceed on the basis that the inferences were entirely unintended but Mr Fehling is entitled to a clear and emphatic finding by the Tribunal that there is no evidence that he acted unlawfully or improperly at any time while on Mr Costello's property or on any of the occasions on which he has been on the School grounds generally. We accept his evidence that he has never used the swimming pool and had not used the changing room showers or toilets as alleged. When the trespass notice was served on 5 January 2009 he had full permission to be on the Costello property. By being "run out of town" by means of the trespass notice he has been made the victim of a substantial injustice. His request for the names of the people who allegedly made complaints about him must be seen in this light. It is difficult to see what else he could realistically do to challenge the entirely misconceived basis on which the School acted in evicting him from the Costello property.

The recusal application

[6] By memoranda dated 6 December 2013 and 30 January 2014 Mr Appleby has submitted:

[6.1] While the present proceedings are filed under a different statute (ie the Human Rights Act 1993) there may well be issues of credibility which fall to be determined at the forthcoming hearing.

[6.2] Mr Appleby perceives some potential for prejudice if the makeup of the Tribunal is the same as that which heard the Privacy Act case. He says that while he was not a witness in the privacy proceedings he was present during the hearing as a support person in his capacity as chairperson of the board of trustees.

[6.3] Mr Appleby is concerned at the possibility of predetermination. That is, in proceedings where Mr Fehling is also the plaintiff, it will be difficult for the same Tribunal members "to take a fresh look at the matter and to change [their] mind". It is therefore appearance rather than actual bias by reason of prejudgment that is the concern of Mr Appleby.

[6.4] By analogy with *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, (1983) 47 ALR 45 the three members of the Tribunal who heard the proceedings against South Westland Area School are disqualified from hearing Mr Appleby's case.

[6.5] In these circumstances Mr Appleby applies to have these proceedings in HRRT028/2012 heard by a differently constituted Tribunal.

Mr Fehling's response to the recusal application

[7] In his written submissions Mr Fehling:

[7.1] Submits that in these proceedings under the Human Rights Act Mr Appleby should not be permitted to challenge the findings made by the Tribunal in the

Privacy Act proceedings or the remedies granted to Mr Fehling. Retaining the same decision-makers will ensure that the facts found in the Privacy Act proceedings are not used "misleadingly".

[7.2] Mr Fehling also points to the fact that the transcript of the hearing on 7 May 2012 is incomplete in that there is no record of the evidence given by the witnesses called by the school or of the questions put to them by Mr Fehling and by the Tribunal. For this reason there would be an advantage in having the same Tribunal members who heard the Privacy Act proceedings hearing also the present proceedings.

[7.3] There is no need for his (Mr Fehling's) credibility to be examined again in a substantial way.

[7.4] If any member of the Panel which heard the Privacy Act proceedings does not sit in the present proceedings, Mr Fehling seeks for each such member a witness summons to give evidence as to the findings of the Tribunal.

[8] As to the first point, the submissions for Mr Appleby dated 30 January 2014 stress that Mr Appleby is not trying to overturn the Privacy Act decision. It is expressly acknowledged that the decision was not appealed and that the doctrine of estoppel applies.

Recusal – the law

[9] The Tribunal has recently considered recusal applications in *Deliu v New Zealand Law Society (Recusal Application)* [2011] NZHRRT 22 (11 October 2011), *Deliu v New Zealand Law Society (Second Recusal Application)* [2013] NZHRRT 12 (15 April 2013) and *Brown v Otago Polytechnic (Recusal Application)* [2014] NZHRRT 5 (4 February 2014). In each decision it has followed and applied the following statement of the law in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 where there was unanimity in relation to the following passages 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.

[10] The bias test was more recently succinctly expressed 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.

[11] As mentioned, Mr Appleby relies on the decision of the High Court of Australia in *Livesey v New South Wales Bar Association*. There the facts were unusually strong. Not only had two of the three members of the court made damning credibility findings in relation to a key witness intended to be called by Mr Livesey, they had also determined in the previous proceedings that Mr Livesey had actively and knowingly participated in the arrangements which led to the witness depositing bail moneys falsely pretending that they were her moneys and that she was a party to a corrupt agreement designed to enable the prisoner to purchase his freedom with his own money. In these circumstances the High Court held that a fair-minded observer might have entertained a reasonable apprehension that the views which the two members of the court had formed might result in the proceedings against Mr Livesey being affected by bias by reason of prejudgment.

[12] More recently, in *Russell v Taxation Review Authority* [2011] NZCA 158, [2011] NZAR 310 the same judge, sitting as the Taxation Review Authority, had in approximately 65 cases consistently disallowed Mr Russell's objection to tax assessments made by the Commissioner of Inland Revenue. The Authority had made comments in the template judgments that were forcefully adverse to Mr Russell. The Court of Appeal held that the Authority should have recused himself from deciding whether Mr Russell's own, but related scheme was tax avoidance. In reviewing the relevant case law the Court cited *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 (CA) and in particular the following passage which the Court noted has been widely endorsed in both New Zealand and the United Kingdom:

> [25] … The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

[13] After reviewing other case law drawn from New Zealand, the United Kingdom and after also referring specifically to *Livesey v New South Wales Bar Association* the New Zealand Court of Appeal concluded at [23] that every application for recusal must be decided on the facts and circumstances of the individual case:

[23] The nature of Mr Russell's allegation of apparent bias causes us to mention three further cases, and jurisprudence developed in the United States. The first of the cases is the English Court of Appeal's decision in *Locabail (UK) Ltd v Bayfield Properties Ltd*. In a passage that has subsequently been widely endorsed in both New Zealand and the United Kingdom, the Court said this:

> [25] … The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

However, the earlier judgment of the High Court of Australia in *Livesey v New South Wales Bar Association* demonstrates that there can be exceptions to the statement in *Locabail*. In *Livesey* two of the three Judges of the Court of Appeal of the Supreme Court of New South Wales had, in an earlier case, decided two of the central issues they were again required to deal with. And, in the previous case, both had discredited a critical witness who gave evidence in the later trial. The High Court was unanimous in its decision that the two Judges were disqualified from hearing the subsequent case. The third case is this Court's decision in *R v Palmer*. Coincidentally, the issue there was also whether two of the three Judges who had heard an appeal should have recused themselves. This Court had little difficulty in holding that the two Judges were not disqualified. All this underlines the observation of the English Court of Appeal in *Locabail* that "every application [for recusal] must be decided on the facts and circumstances of the individual case".

[24] The United States jurisprudence is discussed by Richard E Flamm in his text *Judicial Disqualification: Recusal and Disqualification of Judges*. Based largely on the judgment of the United States Supreme Court in *Liteky v United States*. Flamm observes:

> The maxim that adverse rulings, standing alone, do not warrant disqualification applies regardless of whether the motion to disqualify is predicated on the judge's rulings in the same proceeding, a prior or different proceeding involving one or more of the same parties, or a proceeding that is only factually similar to a pending matter. The rule also applies without regard to the subject matter of the rulings, the type of case in which they were rendered, or whether the rulings were of a legal, factual, or evidentiary nature.

[14] While in *Russell v Taxation Review Authority* the decision-maker was held on the facts to be disqualified by earlier forceful comments adverse to Mr Russell, the mere fact that in an earlier case a decision-maker has made adverse or critical comments of a witness does not lead to recusal. See, for example, *Inform Group Ltd v Fleet Card (NZ) Ltd* [1989] 3 NZLR 293 (CA). It was held at p 297 line 10 that the fact that the High Court Judge had earlier not accepted the evidence of the general manager of Fleet Card did not justify recusal. The reasonable bystander would conclude that if the witness was careful with his later evidence there was no good reason why the Judge should not accept what he said on subsequent matters even though on an earlier matter he had not.

Recusal – application to the facts

[15] In the present case the facts are very different to *Livesey v New South Wales Bar Association* and *Russell v Taxation Review Authority*. No unfavourable credibility finding has been made in relation to Mr Fehling or in relation to Mr Appleby. Further, Mr Appleby was neither a party nor a witness in the Privacy Act proceedings and indeed in finding that Mr Fehling was a credible witness the Tribunal specifically stated that that finding did not mean that the two witnesses called for the school were not also credible witnesses. See the Privacy Act decision at [60] and [61]. Furthermore, the present proceedings are under a different statute and will necessarily raise different issues.

[16] The fact that Mr Appleby may feel a degree of discomfort that Mr Fehling was found to be a credible witness (as were the two witnesses called by the school) is not the test.

Rather, as stated in *Siemer v Heron [Recusal]*, 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 decision-maker might not bring an impartial mind to the resolution of the issues the decision-maker is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. On the facts we see no rational, objective basis for finding that the fair-minded and informed lay observer might reasonably apprehend that there is a real possibility that any member of the original panel might not bring an impartial mind to the resolution of the issues in the present proceedings.

[17] The recusal application is accordingly dismissed.

[18] In any event the issue is largely academic:

> **[18.1]** Ms J Grant is no longer a member of the Panel maintained under s 101 of the Human Rights Act as her term of appointment expired on 8 November 2012.
>
> **[18.2]** Ms Scott is not available for the hearing in May 2014 owing to other professional commitments.

[19] In the result, the only member common to the two panels convened for the hearing of Mr Fehling's proceedings will be the Chairperson. As the decision of the Tribunal is the decision of the majority (see 104(3)) this may go some way to alleviate the subjective concerns held by Mr Appleby. Mr Fehling, in turn, may find reassurance in the fact that there is at least some continuity between the two panels. However, it needs to be emphasised that Mr Fehling does not, as the plaintiff in the present proceedings, enjoy a credibility "head start" (as one of his submissions appears to suggest). To the contrary, all issues of credibility will be at large. The earlier favourable credibility finding made in relation to both Mr Fehling and the witnesses from the school will be firmly placed to one side as being irrelevant to the determination of these proceedings under the Human Rights Act.

Witness summonses

[20] We now turn to Mr Fehling's request for the issue of witness summonses for those members of the Tribunal who heard the Privacy Act proceedings and who will not sit in the present proceedings under the Human Rights Act. The application must be declined in principle because the decision given by the Tribunal in *Fehling v South Westland Area School* speaks for itself and s 117 of the Act requires the seal of the Tribunal to be judicially noticed in all courts and for all purposes. Those members of the Tribunal who delivered the decision cannot be called to give evidence as to the content of the decision or as to the findings made in it.

CONCLUSION

[21] The recusal application made by Mr Appleby is dismissed as is the application by Mr Fehling for the issue of witness summonses to members of the Tribunal.

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Dr SJ Hickey**
Chairperson	**Member**	**Member**