

Reference No. HRRT 003/2013
UNDER THE HUMAN RIGHTS ACT 1993
BETWEEN MATTHEW RICHARD BROWN
PLAINTIFF
AND OTAGO POLYTECHNIC
DEFENDANT

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UNDER THE HUMAN RIGHTS ACT 1993
BETWEEN MATTHEW RICHARD BROWN
PLAINTIFF
AND PROGRESSIVE ENTERPRISES LIMITED
DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr MR Brown in person

Mr BCS Dorking for Otago Polytechnic

Mr MR Crotty and Ms JL Hardacre for Progressive Enterprises Ltd

DATE OF DECISION: 4 February 2014

DECISION OF TRIBUNAL ON RECUSAL APPLICATION

Introduction

[1] Mr Brown currently has two sets of proceedings before the Tribunal:

[1.1] HRRT003/2013: Brown v Otago Polytechnic (filed 21 February 2013).

[1.2] HRRT004/2013: Brown v Progressive Enterprises Ltd (filed 19 March 2013).

[2] In both proceedings he faces a strike out application. It had been intended that those applications be heard at Dunedin on 12 and 13 December 2013 but when Mr Brown sought the recusal of the Chairperson it became inevitable that the recusal issue would have to be determined first. The projected dates of 12 and 13 December 2013 were accordingly vacated.

[3] The recusal application is based primarily on alleged bias on the part of the Chairperson.

[4] We intend providing an overview of the procedural history of both cases before addressing the recusal application itself. In providing that history we will necessarily make reference to the Minutes issued by the Chairperson in both proceedings. In the main those Minutes were issued following teleconferences convened for the purpose of giving pre-trial management directions.

HRRT003/2013 – OTAGO POLYTECHNIC – THE CURRENT POSITION

[5] In these proceedings Mr Brown alleges that Otago Polytechnic discriminated against him because of his disability (learning difficulties and dyslexia) and that it victimised him because he sought to rely on his rights under the Human Rights Act 1993 (HR Act).

[6] The Chairperson held teleconferences on 23 May 2013, 4 July 2013 and 5 September 2013. *Minutes* were issued at the conclusion of each conference. A fourth *Minute* was issued by the Chairperson on 22 November 2013. We do not intend reciting the detail of those *Minutes*. They do, however, provide the necessary background to our decision and are to be treated as incorporated by reference.

[7] Otago Polytechnic initially sought particulars and was successful in obtaining an order that Mr Brown file and serve the further and better particulars sought. See the *Minutes* dated 23 May 2013, 4 July 2013 and 5 September 2013. On 16 August 2013 Otago Polytechnic filed an application to strike out Mr Brown's claim and a teleconference was convened on 5 September 2013 for the purpose of setting a date for Mr Brown to file a response to that application. At that teleconference Mr Brown's support person, Mr V Scott, spoke for Mr Brown although Mr Brown was present, did speak from time to time and explicitly endorsed the suggestion by Mr Scott that Mr Brown seek qualified legal assistance. Mr Brown said that he would that afternoon go and see a lawyer and apply for legal aid. The formula agreed to was that Mr Brown would report to the Secretary the outcome of his legal aid application immediately such outcome was known. If the legal aid application was successful, the lawyer instructed would have four weeks thereafter to file a response to the strike out application. If the application was unsuccessful, Mr Brown, with the assistance of Mr Scott, was to file his response to the strike out application within the same four week period. The Secretary would then convene a teleconference at an early date for further case management directions to be given as required.

Making of complaint against the Chairperson

[8] By letter dated 10 October 2013 the Secretary wrote to Mr Brown drawing attention to the fact that in terms of the *Minute* issued on 5 September 2013 he was to provide by 4 October 2013 an update of his legal aid application but had not done so. By letter dated 17 October 2013 Mr Brown replied that he would “not entertain being misled by the Tribunal and Mr Dorking”:

In connection with my two phone conversations of late September and early October and your correspondence of 10 October 2013, I believe I make my position quite clear.

I will not entertain being misled by the Tribunal and Mr Dorking and allow the Tribunal to unethically strike out my legitimate claim against Otago Polytechnic.

Either the Chairperson will strike out my claim, in which case I will appeal to the High Court, or the Chairperson will allocate a hearing date for the Tribunal.

[9] By memorandum dated 23 October 2013 Mr Dorking for Otago Polytechnic drew attention to the fact that both the Tribunal and Otago Polytechnic had yet to be advised by Mr Brown of the status of his application for legal aid. Furthermore Mr Brown had not filed a response to the strike out application. Otago Polytechnic sought an order that Mr Brown file such response and that that application be determined.

[10] By subsequent letter dated 8 November 2013 Mr Brown alleged (inter alia) that the Chairperson was biased, prevaricated and had made “false statements about the fundamental mechanisms of the Tribunal in order to violate [Mr Brown’s] right to a fair and public hearing by an independent and impartial Tribunal”. He also alleged that Mr Dorking for Otago Polytechnic had made “false statements to mislead and coax [Mr Brown] into making unfavourable decisions”. The full text of his letter follows:

I write following on from my telephone conversation with you on the morning of Tuesday, 5 November.

As I am a layperson and lack professional knowledge of the mechanisms of the Tribunal, I believe Mr. Haines or the Police have informed the respondents for the defendants that I cannot read or write and I have no professional experience at representing myself in the Human Rights Tribunal.

Mr. Haines’ adjudication of my complaints at the review Tribunal has been biased and he prevaricates; he has made false statements about the fundamental mechanisms of the Tribunal (sic) in order to violate my right to a fair and public hearing by an independent and impartial tribunal.

From the outset of communication via the teleconference Mr Haines has, I reiterate, intentionally misled me over the alternative options I could have elected to ensure impartiality and equality.

For example, Mr. Haines has allowed Mr. Dorking, respondent for the Otago Polytechnic, to intentionally make false statements to mislead and coax me into making unfavourable decisions.

Mr. Haines adjudication of my complaints amounts to transparent violations of my Civil Rights and the Crimes Act, and therefore it is only fitting that Mr. Haines stand down as adjudicator of my complaints.

Mr Brown requested to give particulars of his complaint

[11] As it was not clear whether this letter was a complaint in relation to the Otago Polytechnic proceedings (HRRT003/13) or those against Progressive Enterprises Ltd (HRRT004/13) or both, the Secretary of the Tribunal wrote to Mr Brown on 19 November 2013 seeking clarification:

I am in receipt of your letter dated 8 November 2013 (attached) in which you assert that the Chairperson of the Tribunal, Mr Haines QC, should stand down as an adjudicator of your complaints.

While your letter does not specifically name the files, given that you are referring to complaints in the plural, the registry is taking this to mean that your letter relates to both your HRRT 003/13 and HRRT 004/13 matters. Clarification from you is required.

Once I have your written reply, your correspondence will be referred to the Chairperson with a view to him giving directions as to the procedure to be followed. This may include the filing of a formal application together with a supporting affidavit. In any event, it will be necessary to allow the defendant (or defendants) an opportunity to be heard.

Please reply by return mail.

[12] In an email response dated 19 November 2013 Mr Brown did not provide the clarification sought. Instead he stated:

I have viewed your email in response to my complaints against the Chairperson, Mr. Haines.

I can be very specific as to his illegally and impartial conduct if that pleases the Tribunal.

I request that the Tribunal does not correspond with me by email and only by hard copy.

I will file a complaint with the Head Office of the UN too.

[13] It was in these circumstances the Chairperson issued a further *Minute* on 22 November 2013 noting that it was unacceptable for the complaints to be unparticularised. Particulars were ordered in the following terms:

[10] So that Mr Dorking and the Chairperson can address and respond to the complaints, those complaints must be fully particularised. Specifically Mr Brown must provide full particulars of the grounds on which it is alleged:

[10.1] That the Chairperson or the Police have informed the respondents for the defendants that Mr Brown cannot read or write and has no professional experience at representing himself in the Human Rights Review Tribunal.

[10.2] That the Chairperson has been biased and prevaricates and has made false statements about the fundamental mechanisms of the Tribunal in order to violate Mr Brown's right to a fair and public hearing by an independent and impartial tribunal.

[10.3] That the Chairperson has intentionally misled Mr Brown over the alternative options Mr Brown could have elected to ensure impartiality and equality.

[10.4] That the Chairperson has allowed Mr Dorking to intentionally make false statements to mislead and coax Mr Brown into making unfavourable decisions.

[10.5] That the Chairperson's adjudication of Mr Brown's complaints amounts to transparent violations of Mr Brown's civil rights and the Crimes Act and that it is only fitting that the Chairperson stand down as adjudicator of Mr Brown's complaints.

[14] Noting that Mr Brown would also need to establish the factual basis on which his allegations were made, the Chairperson further directed that Mr Brown do this by way of a sworn affidavit. Otago Polytechnic would then have opportunity to file a response by way of a notice of opposition and an affidavit in reply. The *Minute* also noted that the recusal application meant that the proposed hearing of the strike out application at Dunedin on 12 and 13 December 2013 would have to be vacated.

[15] The deadline of 6 December 2013 for Mr Brown to file and serve a statement of particulars and an affidavit passed without the required documents being filed. However, on 20 December 2013 Mr Brown filed a "submission". In this document Mr Brown made further unparticularised allegations against the Chairperson. Those further allegations being:

[15.1] Mr Brown has been subjected to arbitrary discrimination by (inter alia) the Chairperson:

The Appellant has been subjected to arbitrary discrimination by Commission staff members, by Robert Hallowell, legal Counsel for the Human Rights Commission, and by Mr Rodger Haines QC, Chairperson of the Tribunal.

[15.2] The Chairperson has “unethically favoured the defendants”:

The Appellant reports that the Chairperson of the Tribunal, Mr Rodger Haines, has unethically favoured the Defendants, asserting to the Appellant that he could not summons a witness to a Tribunal hearing under any circumstances. Despite the fact that the Appellant has fulfilled all the requirements of reply via the Application of Reply, Memorandum and Submission, and Applications Opposed to Strike Out, Mr Haines claims that the Appellant has failed to comply with the Statement of Reply.

[15.3] It is “discriminatory and unethical” for the Tribunal to “feign” that Mr Brown could “win out” in a paper war against two experienced lawyers:

The Appellant is not an experienced lawyer like Mr Dorking or a highly qualified Q.C. like Mr Crotty. It is discriminatory and unethical for the Tribunal to feign that the Appellant could win out in a paper war against two experienced lawyers.

[15.4] The Chairperson is guilty of “prejudicial treatment” of Mr Brown, has violated the law and breached ethical principles:

Mr Haines’ (the Chairperson’s) prejudicial treatment of the Appellant, and his unprofessional violation of the law, breaches the ethical principles of the protective mechanisms which promote inalienable rights, fundamental freedoms, and social progress. Therefore, the Chairperson must step down and the Tribunal should allocate hearing dates.

The response by Otago Polytechnic

[16] By notice of opposition dated 15 January 2014 it was submitted by Otago Polytechnic that in relation to the complaints listed in the *Minute* dated 22 November 2013 at [10]:

[16.1] The only comments made to counsel for Otago Polytechnic regarding Mr Brown’s learning difficulties and lack of experience have been made by Mr Brown himself both in the documents he has filed and during the various teleconferences. It is submitted that Mr Brown is clearly able to read and write.

[16.2] At no time during the various teleconferences in which counsel for Otago Polytechnic has taken part has there been any conduct by the Chairperson which could reasonably be described as bias and prevarication, or any statements made about the “fundamental mechanisms of the Tribunal” which could reasonably be described as misleading.

[16.3] Similarly, at no time during the various telephone conferences in which counsel for Otago Polytechnic has taken part could there be any reasonable suggestion that the Chairperson has misled Mr Brown as to his options for proceeding.

[16.4] Mr Brown made clear during the teleconferences that he views any denial of the allegations he makes against Otago Polytechnic as falsehoods by counsel representing Otago Polytechnic. The Chairperson has attempted to explain to Mr Brown how the adversarial system of adjudication works, but Mr Brown is unable, or unwilling, to understand.

[16.5] The proposition that the Chairperson has violated Mr Brown's civil rights and the Crimes Act 1961 lacks any foundation and can only be described as irrational.

[17] For Otago Polytechnic it was further submitted that because no affidavit has been filed by Mr Brown there is no evidence to support his allegations. More specifically there is no evidence that Mr Brown has been subjected to arbitrary discrimination by the Chairperson or that the Chairperson has favoured the defendants or that Mr Brown has received prejudicial treatment from the Chairperson.

[18] Otago Polytechnic submits also that the submission by Mr Brown dated 20 December 2013 that he has "fulfilled all the requirements of reply via the Application of Reply, Memorandum and Submission, and Applications Opposed to Strike Out" is plainly incorrect:

[18.1] Mr Brown's failures are set out in the Otago Polytechnic Application to Strike Out Parts of the Plaintiff's Claim dated 16 August 2013, as are the jurisdictional issues in respect of some of Mr Brown's claims and the absence of a reasonable cause of action in respect of others.

[18.2] At the teleconference on 5 September 2013 Mr Brown agreed to seek legal aid or legal representation and to advise the Tribunal and Otago Polytechnic immediately he knew the outcome of that endeavour, and to file a response to the Application to Strike Out within four weeks of that date.

[18.3] Mr Brown has failed to advise the outcome and in response to a follow up from the Secretariat replied (on 17 October 2013) that he would not allow the Tribunal to strike out his claim and that he would appeal if it did so.

[18.4] Mr Brown then made allegations regarding the Chairperson's independence, which have been treated by the Tribunal as an application that the Chairperson be recused.

[18.5] To avoid further delays while the recusal application was heard Mr Brown was required by the *Minute* dated 22 November 2013 to file a response to the Strike Out Application by 6 December 2013. Mr Brown had failed to comply with this order.

[19] Counsel for Otago Polytechnic then noted that none of the alleged conduct on the part of the Chairperson had been detected. To the contrary:

Counsel for [Otago Polytechnic] observes that in all dealings with the plaintiff the Chairperson has proved a model of helpfulness and patience assisting the plaintiff, to the extent the plaintiff will allow, to comply with the reasonable requirements placed on plaintiffs who make claims against others.

[20] Finally, Otago Polytechnic submits that defendants have rights too:

The right to be told exactly what they are accused of, the right not to have to be put to the trouble and expense of defending claims which cannot possibly succeed on the alleged facts, and the right to insist that a claimant provides evidence in support of a claim.

HRRT004/2013 – PROGRESSIVE ENTERPRISES – THE CURRENT POSITION

[21] In these proceedings Mr Brown alleges that Progressive Enterprises Ltd (Progressive Enterprises) contravened the following provisions of the HR Act:

[21.1] Section 21(1)(b)(i) – discrimination on the grounds of marital status (being single).

[21.2] Section 44 – discrimination in the provision of goods and services.

[21.3] Section 65 – indirect discrimination.

[21.4] Section 66(1)(a)(i) and (ii) - victimisation.

[22] The Chairperson convened teleconferences on 2 September 2013 and 21 October 2013 and *Minutes* were issued at the conclusion of each conference. A third *Minute* was issued by the Chairperson on 22 November 2013. As in the case of HRRT003/2013 (Otago Polytechnic) we do not intend reciting the details of those *Minutes*. Nevertheless they provide a necessary background to our decision and are to be treated as incorporated by reference.

[23] In a statement of reply filed on 16 April 2013 Progressive Enterprises drew attention to the fact that the three original defendants cited by Mr Brown were employees of the company and should be removed as parties with Progressive Enterprises substituted as the only defendant. Progressive Enterprises also applied to have the proceedings struck out on various grounds which do not need to be elaborated here.

[24] At the direction of the Chairperson Mr Brown was on 7 May 2013 required to file a response to the strike out application by 7 June 2013. That direction was complied with.

[25] At a teleconference held on 2 September 2013 Progressive Enterprises was by consent substituted as the only defendant and the teleconference was adjourned to enable counsel for Progressive Enterprises to take instructions as to whether the strike out application was to be pursued. During the course of the teleconference Mr Brown enquired whether any of the three original defendants could be summonsed by him to give evidence. As to this, the *Minute* of 2 September 2013 at [11] recorded:

[11] Mr Brown raised the question whether any or all of the three named persons could be summonsed by him to give evidence should the case proceed to a substantive hearing. It is not the role of the Tribunal or Chairperson to advise Mr Brown. He will need to take advice on the issue. It is appropriate, however, to point out that s 109 of the Human Rights Act provides that the Tribunal may, if it considers it necessary, on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing. The effect of s 111 is that it is the responsibility of the party requesting the summons to pay the witnesses' fees, allowances and travelling expenses.

[26] By email dated 6 September 2013 Progressive Enterprises advised the strike out application would be pursued and on 21 October 2013 there was a further teleconference at which the filing of pleadings and submissions on the strike out application were timetabled.

[17] The following directions are made:

[17.1] By 5pm on Monday 4 November 2013 Progressive Enterprises is to file and serve a re-pleaded strike out application together with its submissions in support of that application.

[17.2] By 5pm on Monday 18 November 2013 Mr Brown is to file and serve a copy of his response to the re-pleaded strike out application together with his submissions in opposition.

[17.3] By 5pm on Friday 22 November 2013 Progressive Enterprises is to file its submissions (if any) in reply.

[17.4] A decision whether the strike out application is to be dealt with on the papers, at a teleconference or following an oral hearing is to be advised by the Tribunal through the Secretary once all submissions have been filed. If there is to be an oral hearing, that hearing will be convened at Dunedin with half a day to be set aside.

[17.5] Mr Brown is to contact the Human Rights Commission to request a full copy of the complaint lodged by him under s 76(2)(a) of the Human Rights Act 1993. Those documents are to be provided to the Secretary of the Tribunal. Mr Brown is to make this request no later than Friday 1 November 2013. Confirmation of the making of this request is to be provided to the Secretary on the same date as the request is made to the Commission.

[17.6] Leave is reserved to both parties to make further application should the need arise.

[27] It is relevant to note that on 21 October 2013 Mr Brown advised early in the teleconference that:

... he would be representing himself and would be taking all necessary steps to defend himself "at a higher realm". He said that he was not willing to negotiate with Progressive Enterprises. Mr Brown also claimed that he had been misled by the Tribunal. Asked to explain and to particularise this allegation Mr Brown said that he would not as he would be challenging the decision of the Tribunal in the District Court and High Court which were more properly his "realm". Mr Brown also stated that he did not wish to participate further in the teleconference and would be terminating the call. As matters turned out, he continued to participate in the teleconference until it had reached its natural conclusion.

[28] On 4 November 2013 Progressive Enterprises filed an amended strike out application together with a memorandum setting out detailed submissions.

[29] The Tribunal then received Mr Brown's letter of 8 November 2013 the text of which has been set out earlier in this decision at para [10] alleging, inter alia, that the Chairperson was biased. There then followed the Secretary's letter dated 19 November 2013 and Mr Brown's reply of 19 November 2013.

[30] On 21 November 2013 Progressive Enterprises filed a further amended strike out application (dated 18 November 2013) and amended submissions.

[31] By *Minute* dated 26 November 2013 the Chairperson required Mr Brown to provide particulars of his allegations. The terms of this order were identical to the order made in HRRT003/2013 (Otago Polytechnic). See para [13] above.

[32] As in the case of HRRT003/13 (Otago Polytechnic) Mr Brown did not meet the deadline of 6 December 2013. He did, however, on 20 December 2013 file the "submissions" which are detailed at para [15] above and in which he made further unparticularised allegations against the Chairperson.

The response by Progressive Enterprises

[33] By notice of opposition dated 28 January 2014 counsel for Progressive Enterprises submitted that there was no evidence to support Mr Brown's allegations and went on to say:

6. In Progressive's view, Mr Brown has not disclosed any fact, nor provided any evidence that indicates bias by Mr Haines QC. Contrary to Mr Brown's application, in all teleconferences conducted to date, counsel's view is that Mr Haines QC has been even handed when dealing with the parties and has appropriately assisted Mr Brown, as a lay person, where possible.

DECISION

Whether recusal application to be dealt with on the papers

[34] The *Minutes* issued by the Chairperson on 26 November 2013 required Mr Brown, Otago Polytechnic and Progressive Enterprises to advise whether, in relation to the recusal application, they sought an oral hearing or a determination on the papers. In fact none indicated a preference.

[35] Our decision is that the application is to be determined on the papers because:

[35.1] It is clear all parties have filed such submissions and supporting material as they wish to rely on.

[35.2] No one has sought an oral hearing.

[35.3] The interests of justice are better served by a hearing on the papers as it will avoid the delay and expense inherent in convening a panel of three Tribunal members in Dunedin.

Recusal – the law

[36] 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 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.

[37] 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.

Recusal – application to the facts

[38] In *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62] it was said that where an allegation of bias is made the factual inquiry should be rigorous:

First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the “bias” ball in the air.

[39] It was for this reason that Mr Brown was required to particularise his allegations and to support them by affidavit. Had there been any factual basis for the allegations it would have been a simple task to provide the requested particulars. Instead, Mr Brown elected to leave the allegations unexplained and unparticularised.

[40] The only allegation to which a specific response is possible is the allegation that Mr Brown was told by the Chairperson he (Mr Brown) could not summons a witness “under any circumstances”. This allegation is plainly unsustainable as can be seen from the *Minute* issued in HRRT004/2013 (Progressive Enterprises) on 2 September 2013:

[11] Mr Brown raised the question whether any or all of the three named persons could be summonsed by him to give evidence should the case proceed to a substantive hearing. It is not the role of the Tribunal or Chairperson to advise Mr Brown. He will need to take advice on the issue. It is appropriate, however, to point out that s 109 of the Human Rights Act provides that the Tribunal may, if it considers it necessary, on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing. The effect of s 111 is that it is the responsibility of the party requesting the summons to pay the witnesses’ fees, allowances and travelling expenses.

Recusal – conclusion

[41] It is our view that a fair-minded and informed lay observer would not reasonably apprehend that there is a real and not a remote possibility that the Chairperson of the Tribunal might not bring an impartial mind to the determination of HRRT003/2013 (Otago Polytechnic) and HRRT004/2013 (Progressive Enterprises). Such observer would take into account the following:

[41.1] By failing or refusing to provide particulars of his allegations Mr Brown has frustrated the rigorous factual inquiry required by the bias test. Expressed in different terms, the “bias” ball has been lightly thrown into the air.

[41.2] The complaint by Mr Brown as to his alleged inability to summons witnesses is demonstrably without foundation.

[41.3] The lawyer representing Otago Polytechnic who participated in all three teleconferences has stated:

[41.3.1] At no point has there been any conduct by the Chairperson which could reasonably be described as bias and prevarication, or any statements made about the “fundamental mechanisms of the Tribunal” which could reasonably be described as misleading.

[41.3.2] At no time during the various telephone conferences could there be any reasonable suggestion that the Chairperson has misled Mr Brown as to his options for proceeding.

[41.3.3] The Chairperson has proved a model of helpfulness and patience assisting Mr Brown, to the extent Mr Brown would allow, to comply with the reasonable requirements placed on plaintiffs who make claims against others.

[41.4] The lawyers representing Progressive Enterprises and who participated in both teleconferences have stated that in their view the Chairperson has been even handed when dealing with the parties and has appropriately assisted Mr Brown, as a layperson, where possible.

CONCLUSION

[42] The recusal application made by Mr Brown is dismissed.

DIRECTIONS AS TO FUTURE CONDUCT OF CASE

[43] In each set of proceedings there is an unresolved strike out application. In neither case has Mr Brown filed a reply. Nevertheless, to avoid further delays the Secretary is directed to arrange for the Tribunal to sit in Dunedin for two consecutive days for the purpose of hearing first, the strike out application in HRRT003/2013 (Otago Polytechnic) and second, the strike out application in HRRT004/2013 (Progressive Enterprises).

Costs

[44] Costs are reserved.

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Mr RPG Haines QC
Chairperson

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Mr GJ Cook JP
Member

.....
Mr BK Neeson
Member