IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 229
EMPC 377/2015
EMPC 277/2016
EMPC 215/2017
EMPC 297/2017

IN THE MATTER OF	EMPC 377/2015 and EMPC 277/2016 challenges to determinations of the Employment Relations Authority
IN THE MATTER OF	EMPC 215/2017 and EMPC 297/2017 proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for recusal
BETWEEN	PETER D'ARCY LORIGAN Plaintiff
AND	INFINITY AUTOMOTIVE LIMITED Defendant

Hearing:	On the papers
Appearances:	P Lorigan in person R Towner, counsel for the defendant
Judgment:	16 December 2020

INTERLOCUTORY JUDGMENT (NO 8) OF JUDGE B A CORKILL
(Application for recusal)

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[1] Mr Lorigan has applied for an order that I recuse myself with regard to the proceedings between him and Infinity Automotive Ltd (Infinity).

Background

[2] There are a number of unresolved proceedings before the Court which, either by challenge or removal, relate to issues first considered in five determinations of the Employment Relations Authority.

[3] Since the various proceedings were filed in this Court, a number of interlocutory issues have had to be dealt with; to this point, seven interlocutory judgments and one costs judgment have been issued.[1]

[4] The background circumstances giving rise to the parties relationship problems have been fully explained in previous judgments.[2]

[5] For present purposes, it suffices to say that, on the basis of Mr Lorigan's current pleadings, it is alleged that Infinity:

(a) breached obligations of good faith which were owed to Mr Lorigan;

(b) was responsible for diverse unjustified actions which constitute a continuing pattern of conduct towards him, thus constituting an unjustified disadvantage personal grievance;

(c) unjustifiably dismissed him;

(d) is responsible for the unlawful enforcement of a restraint of trade provision; and

(e) breached his employment agreement by failing to pay commissions.

[6] A range of remedies have been sought.

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1 *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153; *Lorigan v Infinity Automotive Ltd (No 2)* [2018] NZEmpC 63; *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88; *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89; *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 104; *Infinity Automotive Ltd v Lorigan* [2018] NZEmpC 133; *Lorigan v Infinity Automotive Ltd (No 5)* [2018] NZEmpC 143; *Lorigan v Infinity Automotive Ltd (No 6)* [2018] NZEmpC 146; *Lorigan v Infinity Automotive Ltd (No 7)* [2019] NZEmpC 118.

2 *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 at [3]–[13]; *Lorigan v Infinity Automotive Ltd (No 2)*, above n 1, at [4].

[7] For its part, Infinity has also issued proceedings, alleging that, after the termination of Mr Lorigan's employment, he breached the confidentiality obligations of his individual employment agreement; it claims an injunction, a compliance order and a range of financial orders, including penalties.

Summary of interlocutory matters

[8] In 2017 and 2018, I considered a range of interlocutory issues. I ruled in favour of Mr Lorigan on some of these and in favour of Infinity on others.

[9] In 2018 a fixture was established for the hearing of the question as to whether Mr Lorigan is able to pursue a personal grievance for unjustified disadvantage (EMPC 377/2015); alternatively, whether he should be granted leave to pursue such a grievance out of time under s 114 of the Employment Relations Act 2000 (EMPC 277/2016).

[10] I continued to deal with interlocutory issues. On 11 September 2018 I issued a costs judgment relating to two of the interlocutory judgments.[3] Because these sums were not paid, on 12 November 2018 I issued compliance orders.[4]

[11] At approximately the same time, I was required to consider timetabling issues. I made an unless order against Mr Lorigan, which was partially complied with. Infinity sought an order striking out the proceeding which was about to be heard, in EMPC 377/2015 and EMPC 277/2016, on the basis there had not been complete compliance. I dismissed the application. Infinity sought leave to appeal. While the application was pending, these proceedings were stayed, and the fixture did not go ahead. Ultimately, the Court of Appeal dismissed Infinity's application.[5]

[12] The matter then returned to this Court. On 8 July 2019 Infinity sought a sanction against Mr Lorigan based on his failure to pay the previous costs orders. On 5 September 2019 I granted a stay and compliance order.[6]

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3 *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 104.
4 *Infinity Automotive Ltd v Lorigan* [2018] NZEmpC 133.
5 *Infinity Automotive Ltd v Lorigan* [2019] NZCA 161, [2019] ERNZ 123.
6 *Lorigan v Infinity Automotive Ltd (No 7)* [2019] NZEmpC 118 at [47].

[13] On 10 September 2019, Mr Lorigan filed a Memorandum stating I should recuse myself. In a minute of that day, I indicated the issue was academic until the outstanding costs had been paid, because until then the proceeding would be stayed.

[14] On 14 October 2019, Mr Lorigan filed an application in the Court of Appeal seeking leave to appeal the Court's judgment of 5 September 2019.[7]

[15] On 31 July 2020 the Court of Appeal declined that application.[8]

[16] Now Mr Lorigan has confirmed he wishes to advance his application for recusal, even although the costs have not been paid. Infinity has also filed an application; further sanctions and orders for costs are sought. In these circumstances, it is first necessary to resolve the application for recusal.

Mr Lorigan's application

[17] In summary, Mr Lorigan complains, in multiple respects, about the way in which the case which he has presented has been treated, stating, for example, that the Court has chosen to ignore relevant facts, has failed to call for critical documents, has ignored obvious evidence, and has displayed a lack of objectivity. Mr Lorigan also made a number of abusive statements about the conduct of his case by the Court, asserting that a lack of impartiality was demonstrated in the various decisions. He also says a panel of judges should be substituted to deal with his case.

[18] Infinity opposes the application. Its counsel, Mr Towner, submits the application is wholly without merit and that there is no basis for recusal on established principles. He argued the application does not support a conclusion of an apprehension of impartiality but, instead, reflects Mr Lorigan's continuing criticism of others when he does not get his way in litigation relating to his personal grievances against Infinity. He says Mr Lorigan has had a string of losses in the Authority, this Court and the Court of Appeal in relation to those grievances and has lashed out repeatedly at others when things have not gone his way. Specifically, in various

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7 Above at para [12].
8 *Lorigan v Infinity Automotive Ltd* [2020] NZCA 320.

documents and submissions, he has attacked Infinity and its senior managers and the defendant's counsel by way of formal complaints; he has also engaged multiple lawyers and then dispensed with their services apparently as a result of dissatisfaction. He also complained about the Authority Member who issued relevant determinations; in two instances the Member rejected the plaintiff's application that he recuse himself.[9]

[19] In his reply submissions, Mr Lorigan repeated many of his previous points, including assertions about counsel for the defendant; these raise issues which are outside the jurisdiction of this Court.

Legal principles

[20] An application of this kind has to be considered in light of the dicta of the Supreme Court in *Saxmere Co Ltd v New Zealand Wool Board Disestablishment Co Ltd*.[10] The Court held that the test for disqualification of a Judge is whether 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.

[21] Two steps are required:[11]

(a) 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) 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".

[22] In *JRL, ex parte CJL*, Mason J, sitting in the High Court of Australia, said this with regard to such applications:[12]

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by

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9 *Lorigan v Infinity Automotive Ltd (No 2)* [2015] NZERA Auckland 357 at [11]; *Lorigan v Infinity Automotive Ltd (No 5)* [2017] NZERA Auckland 239 at [27].

10 *Saxmere Co Ltd v New Zealand Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

11 At [4].

12 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

> acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Analysis

[23] At the heart of Mr Lorigan's concerns is the fact that he does not agree with certain conclusions reached by this Court when dealing with the various interlocutory issues, and as to costs. In respect of the rulings made against him, he considers that different conclusions should have been reached.

[24] One of the difficulties is that Mr Lorigan has, throughout, been unrepresented. On many occasions, it has been apparent that he has a limited knowledge of the processes of the Court. As the many previous judgments indicate, Mr Lorigan has not understood the rules of court relating to the admissibility of evidence, as to legal concepts such as privity of contract, as to the Courts procedural requirements, as to finality when issues have been resolved by the Court, and as to the nature and limitations of the employment law jurisdiction. These have been compounded by his tendency to overstate his case and invoke legal processes that have nothing to do with the employment jurisdiction; for example, he has regularly asserted that the Court should deal with alleged claims for fraud under the Crimes Act 1961, and that it should act under a range of other statutes, some of them derived from overseas jurisdictions.

[25] To address this issue, I have on multiple occasions suggested to Mr Lorigan that he obtain legal advice for the purposes of his case, but this has not occurred. It is of course his right not to obtain such assistance, and to represent himself; but he should realise that by doing so, he is in some respects, the author of his own misfortunes.

[26] With regard to the first stage of the necessary inquiry, I conclude that Mr Lorigan's description as to what has occurred in this Court to date is wholly inaccurate, exaggerated, and lacks credibility.

[27] In my view, a fair-minded lay observer could not reasonably apprehend that, in my consideration of the matters arising in this proceeding I might not bring an

impartial mind to the resolution of the questions I may be required to decide. I also make the obvious point that whilst many rulings have not gone his way, some have.

[28] Accordingly, the criteria of the first step articulated in *Saxmere* are not made out.[13]

[29] Turning to the second step, there is no basis for concluding, from an objective standpoint, that this Court will deviate from its obligation to decide the case on its merits.

[30] Regrettably, it is not unusual for applications for recusal to be made when a party is unhappy with the outcome of a ruling or rulings.

[31] In *Stiassny v Siemer* Toogood J made this observation which is apt in this case:[14]

> I considered that the proposition that a Judge must be incapable of giving a litigant a fair hearing, or being seen to do so, because the Judge has ruled against the litigant on a prior occasion or occasions ignores the force and significance of the Judicial Oath and without more could not possibly meet the *Saxmere* test.

[32] In summary, I am not satisfied that the legal tests for recusal of a judicial officer are made out. Nor is there a sound basis for a panel of judges to be appointed to hear this case. Mr Lorigan's application is dismissed.

[33] I reserve costs.

BA Corkill
Judge

Judgment signed at 9.45 am on 16 December 2020

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13 *Saxmere Co Ltd*, above n 10.
14 *Stiassny v Siemer* [2013] NZHC 154 at [12] (footnotes omitted).