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|  | Civil and Administrative TribunalNew South Wales |

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| Case Name:  | FNN v Cumberland City Council |
| Medium Neutral Citation:  | [2022] NSWCATAD 169 |
| Hearing Date(s):  | 9 and 10 February 2022, 14 March 2022 |
| Date of Orders: | 25 May 2022 |
| Decision Date:  | 25 May 2022 |
| Jurisdiction:  | Administrative and Equal Opportunity Division |
| Before:  | H J Dixon SC, Senior Member |
| Decision:  | The application by the Applicant dated 28 February 2022 for the recusal of the presiding member is refused and the application is dismissed. |
| Catchwords:  | ADMINISTRATIVE LAW - Procedure – application for disqualification – bias – perceived bias |
| Legislation Cited:  | Civil and Administrative Tribunal Act 2013; Interpretation Act 1987; Privacy and Personal Information Protection Act 1998; Workers’ Inquiry Management and Workers’ Compensation Act (NSW) 1998 |
| Cases Cited:  | Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337; Department of Education and Training v GA (No 3) [2004] NSWADTAP 50; Department of Education and Training v ZR (No 2) [2009] NSWADTAP 44; Gaudie v Local Court of New South Wales & Anor [2013] NSWSC 1425; OD v Department of Education and Training (GD) [2005] NSWADTAP 74; Polsen v Harrison [2021] NSWCA 23; Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 |
| Category:  | Procedural rulings |
| Parties:  | FNN (Applicant)Cumberland City Council (Respondent) |
| Representation:  | FNN Applicant (Self-represented)General Counsel, Cumberland City Council (Respondent) |
| File Number(s):  | 2021/00185000 |
| Publication Restriction:  | Pursuant to s 64 of the Civil and Administrative Tribunal Act 2013 the publication or broadcast of the name of the Applicant in these proceedings is prohibited. |

Reasons for decision

Background

1. By Application dated 28 February 2022 the Applicant sought that I recuse myself from further hearing of the review application made pursuant to the provisions of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) (Review Application). The application was heard on 14 March 2022.
2. At the conclusion of the hearing on 14 March the Applicant sought leave to identify the parts of the oral recordings of the proceedings so as to set out precisely which particular passages in the transcript (recording) [...] wished to rely upon for the purposes of [...] grounds and submissions for recusal.
3. [...] was granted leave to do so within 2 weeks from the hearing.
4. By email dated 29 March 2022 the Applicant notified the Registry that [...] chose not to provide the details or any further evidence or submissions in regard to [...] recusal application at that time and has not done so.
5. Having considered all the materials and submissions of the parties I ordered on 3 May 2022 that the application be dismissed. These are my reasons for so ordering.
6. The Applicant is a former employee of the Cumberland City Council, the Respondent in this matter (the Council). [...] was employed and worked within the Council’s children’s services area during 2016. The Applicant’s last day of work was on 16 December 2016 although [...] resigned in April 2017.
7. On 8 April 2021 the Applicant made a privacy complaint for internal review pursuant to the *Privacy and Personal Information Protection Act 1998* (PPIP Act) addressed to the Respondent.
8. The specific conduct complained of as set out in [the] application form was as follows:

**1.**   **On 7 July 2020, Ms Zammit made misleading/ inaccurate/ incomplete statements about me**

a.   “Essentially, it was the Ombudsman’s Office that conducted the further investigation…” – Ms Zammit

The NSW Ombudsman denies conducting such an investigation.

b.   “Council did not change it’s position on a past internal investigation…” – Ms Zammit

Council reversed its findings against me from “unsubstantiated” on 22 February 2017, to “sustained sexual misconduct” on or around April – October 2017.

c.   “we did not contact OCG.” – Ms Zammit

Council’s GM advised me that Council did contact the OCG.

(see highlighted documents attached, dated 07 07 2020, 11 02 2019 and 29 03 2021)

**2.   Withholding information**.

I believe Ms Zammit has intentionally withheld key contextual information from me for around four years. She led me to believe a witness said my alleged behaviour was “inappropriate reportable conduct”, AFTER the same witness changed her story of the nature of my alleged conduct to from inappropriate, to just awkward.

**3.   Lack of documentation/ records**

I do not believe this key contextual information of the allegation being “awkward” was ever appropriately documented

**4.   Misuse of information**.

I do not believe this key contextual information of the allegation being “awkward” was adequately considered when Cumberland Council conducted investigations against me in 2017-2019, or when Council made findings against me that triggered an interim bar on my Working With Children Check in 2017.

1. By way of additional complaints made on 10 May 2021 the Applicant relied upon the following:
2. Ms Zammit allegedly misleading and inaccurate statement that she kept the Applicant informed during an investigative process; and
3. an alleged false reference from Ms Zammit going to the timing of her informing the Applicant of findings (Additional Items).
4. The Council’s findings and reasoning in respect of the Applicant’s internal review application of 8 April 2021, as set out in its notice of 17 June 2021, were as follows:
5. Statements attributed to Ms Zammit did not comprise personal information about [...] “in the contexts of s. 4 of the Act and the meaning of an individual under s. 21 of the *Interpretation Act 1987*”.
6. It was unclear what information was said to have been withheld. The Applicant’s perception as to Ms Zammit’s classification of the applicant’s conduct is not borne out by information held on Council’s files.
7. It was unclear how a purported lack of records relates to a breach of an Information Protection Principle under the PPIP Act. If going to an allegedly inaccurate record, the applicant had not detailed which record was inaccurate.
8. The Applicant referred to the description of an incident being awkward and appeared to rely on that as a justification to assert inadequate or inappropriate outcomes for later investigations and findings and a decision on working with children check. However, later investigations and findings considered a range of information, not just this one description of one incident. The Applicant did not know the full range of considerations undertaken with later investigations and findings and the weight attributed to the “awkward” incident to draw conclusion on the manner in which such information was used, or, allegedly, misused. A decision on the Applicant’s working with children check was not made by the Council and the basis for that decision remains unknown.
9. Alleged misleading, inaccurate or incomplete statements and inferences attributed to Ms Zammit did not go to personal information within the meaning of the Act and were not reviewable.
10. Following the internal review of the Applicant’s privacy complaint the Council by its notice of 17 June 2021 to the Applicant advised [...] that having completed the review the Council determined to take no further action on the matter.
11. The Applicant then sought a review by the New South Wales Ombudsman followed by [...] Review Application to the Tribunal.

Procedural Orders

1. On 2 August 2021 the Tribunal made orders in the Review Application requiring the Applicant to provide points of claim detailing:

i.   which privacy principles under the PPIP Act were alleged to have been breached;

ii.   in each case, what act or omission of the Council led to the breach and when it was breached;

iii.   the remedies sought and the legislative basis for such remedies.

The Applicant’s Points of Claim

1. Pursuant to the order of the Tribunal the Applicant filed points of claim on 24 August 2021 consisting of some 15 pages (116 paragraphs).
2. In the Points of Claim the Applicant addressed four main privacy conduct concerns as follows:
3. Item 1 relates to various written statements prepared and used by Ms Zammit on 7 July 2020 regarding [...], which are false, misleading and incomplete.
4. Item 2 relates to a disclosure made by Ms Zammit in her written statement of 7 July 2020, that during a follow-up interview, an unnamed individual “*changed their account*” by telling Ms Zammit that [...] conduct was “*awkward, rather than being inappropriate*”.
5. The privacy breach in Item 2, is that Ms Zammit intentionally withheld contextual information from [...], known to her, that the same witness who claimed his conduct was “*inappropriate*” later changed her opinion regarding his conduct to “*awkward, rather than inappropriate*”.
6. Item 3 relates to Council’s failure to adequately document item 2.
7. Item 4 relates to Council’s continued misuse of “*inappropriate*” conduct attributed to [...] *after* it was revealed to Ms Zammit and Ms Campisi, another employee of the Council, that the context of his alleged conduct was “*awkward, rather than being inappropriate*”.
8. In respect of Item 1 of the specific conduct complained of the Applicant further provided the following further explanation by reference to the statement of 7 July 2020:

1(a)

Ms Zammit stated that the NSW Ombudsman “*conducted the further investigation*”.

The Acting NSW Ombudsman reviewed this statement and said:

*“The Ombudsman did not initiate the investigation, and Ombudsman staff did not investigate, any of the allegations made in this matter under s25G of the Ombudsman Act”.*

Ms Zammit’s statement is inaccurate/misleading/incomplete as she insinuates the NSW Ombudsman conducted the investigation, when it did not.

It was Ms Zammit (or “Cumberland Council”) who made the findings that triggered the 2 ½ year-long interim bar on my WWCC.

1(b)

Ms Zammit stated “*Council did not change it’s position on a past investigation…*”

This is not true.

During 2017, Council reversed it’s findings against me from “unsubstantiated” to “sustained sexual misconduct”.

Council changes its position again in early 2018 following the O’Connell Group Investigation.

… and again in early 2019 following the Wise Workplace investigation.

This is all documented.

1(c)

On 7 July 2020: Ms Zammit stated: *“We did not contact the OCG*”.

On 11 February 2019: Mr McNulty stated: “*A further notification was made to the NSW Ombudsman and the Office of the Children’s Guardian in early 2018”*.

Both statements are written and signed off by each staff member. One of them must be lying.

1. The Additional Items of complaint referred to above were further set out as follows:

1.   Ms Zammit’s statement that “*we kept the Applicant informed during this process*” is misleading and inaccurate.

Ms Zammit kept me informed of bugger all

Even though I pressed her for information numerous times, she said “*there is no further information Council can provide you with*.” – 22 February 2017.

I only received her word that my accuser changed her story of the allegation when I received Ms Zammit’s statement (dated 7 July 2020) on 11 August 2020.

2.   Her statement inferring that she informed me of Council’s finding first and “*then*” I returned to work is false. Ms Zammit did not inform me of her finding until 10 February 2017 – four months *after* I returned to work.

1. In respect of Item 2 of the conduct complained of (withholding information) the Applicant points to the following passage of the written statement of 7 July 2020 which stated:

“Melissa Campisi and I investigated the matter and found the person making the report changed their story and considered the Applicant’s actions just looked very awkward, rather than being inappropriate. Following our other inquiries, at this time there was nothing to substantiate reportable conduct on the part of the Applicant. We kept the Applicant informed during this process and informed [...] of our finding. {...] then returned to work.

Where we failed in this matter was a lack of clear documentation about our interview with the person making the original complaint and how they changed their account”.

1. The Applicant relies on Privacy Principles 10, 11, 12, 13, 14, 15 and 16 set out in the PPIP Act.
2. In order to understand these claims and contentions it is necessary to explain the nature and purpose of the statement by Ms Zammit referred to, namely, the 7 July 2020 Statement.
3. In 2020 the Applicant made an application under the *Workers’ Inquiry Management and Workers’ Compensation Act (NSW) 1998*. In respect of that application and proceedings which followed, an employee of the Council, Ms Zammit, then Manager of Children Youth and Families, made a written statement consisting of 11 pages dated 7 July 2020 and signed on 8 July 2020 (the 7 July 2020 Statement).
4. The Applicant appears to have become aware of the contents of the 7 July 2020 Statement made by Ms Zammit sometime in August 2020. The statement was provided to [...] by the solicitors acting for [...] in respect of [...] claim for workers’ compensation. As appears from the complaints outlined above the Applicant extracted certain portions of that statement for the purposes of his Review Application.

Relief Sought in Review Application

1. In [...] Points of Claim the Applicant seeks the following remedies, namely, that the Tribunal instruct the Council or a third party investigator to:

(a)   correct all the inaccurate statements regarding [...] on Ms Zammit’s statement of evidence dated 7 July 2020 (the legislative basis for this request being under s 55(2) of the PPIP Act);

(b)   provide [...] with a copy of the revised accurate statement (the legislative basis for this request being s 55(2)(e) of the PPIP Act); and

(c)   instruct Ms Zammit to acknowledge and apologise for spreading disinformation about [...] in her statement of evidence of 7 July 2022 (the legislative basis for this request being s 55(2)(e) of the PPIP Act).

Legislative Context

1. The Tribunal’s jurisdiction in respect of an application made for review of the Council’s decision under s 55 of the PPIP Act is limited to a review of the conduct that was the subject of the internal review application, such that “the Tribunal cannot review any conduct that was not the subject of the application to the agency”: *Department of Education and Training v GA* *(No 3)* [2004] NSWADTAP 50 at [7]; *Department of Education and Training v ZR (No 2)* [2009] NSWADTAP 44 at [17]. This is so as it is “a fundamental premise” of the PPIP Act that the agency first be given an opportunity to review the conduct: *OD v Department of Education and Training (GD)* [2005] NSWADTAP 74 at [13].
2. The Tribunal cannot review matters which were not raised in the course of the internal review made under s 53 of the PPIP Act. The scope of the Tribunal’s review is, therefore, delimited by the scope of the internal review application to the Council made by the Applicant on 8 April 2021.
3. It is also relevant that the guiding principle to be followed in the proceedings is to facilitate just, quick and cheap resolution of the real issues in the proceedings (s 36(1) of the *Civil and Administrative Tribunal Act 2013* (the CAT Act). Further, the Tribunal is to ensure that all relevant material is disclosed to the Tribunal to enable it to determine all relevant facts in issue in the proceedings (s 38(6) of the CAT Act).
4. In support of [...] Review Application the Applicant further filed and served a document received on 18 November 2021 consisting of some 62 pages (315 paragraphs) entitled “Applicant’s Outline of Legal Arguments". That document contained more than legal argument. Included in the document was material which is in the form of assertion and also paragraphs more in the form of evidence which the Applicant was seeking to rely upon. Subject to certain rulings on specific parts of the document, it was admitted into evidence on that basis whilst reserving to the Council the right to argue relevance and what weight should be attached to the material.

Grounds for Recusal

1. The Applicant set out [...] is grounds for my recusal in three pages attached to [...] application of 28 February 2022.
2. The Applicant sought to rely on portions of a Tribunal decision in 2021. That decision, however, did not relate to any question of bias, and nor was it relevant to anything which has occurred in this matter.
3. The Applicant has not identified whether [...] relies on actual bias or perceived bias on my part.
4. I do not set out verbatim what is set out as the grounds for recusal in the application of 28 February 2022 because it is sufficient, in my view, to summarise the grounds and state them broadly as follows:

(i)   it was evident to the Applicant that during the hearing of the evidence I had at that stage not understood [...] case very well and [...] was compelled to explain each concept of multiple parts of [...] case to me multiple times, rephrasing it in several ways and [...] did not sense that [...] comments were received (first ground);

(ii)   I entertained an interruption from the Council’s representative whilst [...] was sharing very personal experiences about the damage and impact the conduct of the Council had on [...] and there was no empathy regarding [...] situation at all (second ground);

(iii)   the Applicant had made clear in [...] written submissions how the conduct complained of related to specific principles in the PPIP Act but during the hearing I kept asking [...] how the conduct fell under the PPIP Act, as if [...] written submissions were not read/understood (third ground);

(iv)   The Applicant contended that it was clear that the conduct complained of in [...] internal privacy review “did not compute” with me, as I was “hung up on the heading: “Misuse of Information””.

(v)   I treated the Respondent more favourably in respect of my ruling concerning paragraph 117 of the Applicant’s written material which I refer to at paragraph 25 above [check] (fifth ground);

(vi)   by admitting into evidence a document sought to be tendered by the Respondent, namely a Deed of Settlement made between the Applicant and the Council in respect of a worker’s compensation claim the Applicant had made. Also [...] received less favourable treatment than the Council and I would not in respect of that proposed tender entertain comments by the Applicant that there was “some funny business” going on. Further, the Applicant raised my response to what [...] describes as [...] objection to the tendering of late evidence by saying “did you just ignore my objection to the late evidence (the Deed of Settlement) being tendered?” to which I had responded with words to the effect that [...] would have his chance to make submissions on the weight and credibility of the tendered evidence (sixth ground);

(vii)   I allowed one of the witnesses to raise irrelevant information in her (Ms Zammit’s) answers to cross-examination but “shut [...] down” when I did not understand why [...] was asking questions which felt unbalanced to [...]. Further, I had reminded the Applicant that I wanted the proceedings to be finished in the timeframe set for the hearing and [...] felt rushed in seeking to explore discrepancies in the witness statements of evidence and, further, even if [...] was given the chance to highlight the discrepancies in the witness statements of evidence, [...] did not feel as though it “would have been of any interest to” me (seventh ground);

(viii)   in respect of the latter issue the Applicant complains that despite [...] scepticism as to who wrote Ms Zammit’s statements I did not appear to have any interest in resolving who wrote the statements that she signed (eighth ground);

(ix)   during cross-examination the Applicant asked Ms Zammit whether she now admitted that one of the statements that had been made in her statement of 7 July 2020 in the worker’s compensation proceedings was false and misleading (to which she had responded that at the time she wrote the statement she believed the contents to be true) and I did not require the witness to answer the question as to whether the statements were false and misleading. This told the Applicant that I accepted the witnesses’ non-answer as an answer and did not understand or want to understand the argument the Applicant was trying to make to the Tribunal of an admission of guilt to the conduct complained of as Part 5(1) of his internal privacy review form (ninth ground);

(x)   lastly, the Applicant complained that orders made at the conclusion of the hearing for the filing of written submissions allowed the Respondent four weeks more than the Applicant to submit its written closing submissions, [...] had requested written reasons for those orders which [...] had not yet received and those orders clearly favoured the Respondent’s case as it gave it an extra month to carefully consider the Applicant’s closing submissions and prepare theirs, orders being unnecessary and unfair (tenth ground).

Principles for Recusal

1. In determining the application I had regard to the following decisions and analysis of the principles to be followed in dealing with the application.
2. As was held by Justice Gaudron in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [83]:

It is not in doubt that the requirement that courts be and appear to be impartial dictates the result that a judge is disqualified by actual bias and, also, by the appearance of bias. The test in this country with respect to the appearance of bias is “whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question [he or she] is required to decide. (Footnote omitted)

1. In *Gaudie v Local Court of New South Wales & Anor* [2013] NSWSC 1425 an analysis of apprehended bias and actual bias was set out as follows by Justice Johnson:

[78]   The governing principle is that, subject to qualifications relating to waiver, necessity or possibly special circumstances (none of which arise in this case), a judicial officer is disqualified if a fair-minded lay observer or bystander (hereinafter “the bystander”) might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question or questions that the Judge is required to decide: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at 344 [6]: *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; 242 CLR 283 at 331 [139], 333-335 [146]-[152]. The question is one of *“possibility (real and not remote), not probability”: Ebner v Official Trustee in Bankruptcy* at 345 [7].

[79]   In practice, the application of this test involves the following steps:

(a) the party seeking disqualification must identify what it is that might lead the judicial officer to decide the case other than on its legal and factual merits: *Ebner v Official Trustee in Bankruptcy* at 345 [8];

(b) the party seeking disqualification must then articulate the logical connection between the matter suggesting bias and the feared deviation from the course of deciding the case on its merits: *Ebner v Official Trustee in Bankruptcy* at 345 [8].

[80]   Once the matter suggesting bias has been identified and the logical connection between the matter and the feared deviation has been articulated, the party seeking disqualification must establish that there is an ensuing apprehension of bias and that that apprehension is reasonable: *Ebner v Official Trustee in Bankruptcy* at 345 [8].

[81]   A judicial officer should not automatically or too readily accede to an application that he or she is subject to a reasonable apprehension of bias and so recuse himself or herself too readily from hearing a matter: *Livesey v New South Wales Bar Association* [1983] HCA 17; 151 CLR 288 at 294; *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 at 504 [45]. 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 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: *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342 at 352. However, the principle that a judicial officer should not disqualify him or herself too readily is not "a blanket that smothers the effect of disqualification where it has already arisen": *Antoun v The Queen* [2006] HCA 2; 224 ALR 51 at 60 [35] (Kirby J).

[82]   Where (as here, at least in part), prejudgment is relied upon, what must be firmly established is a reasonable fear on the part of the bystander that the decision-maker's mind is prejudiced in favour of a conclusion already framed, so that he or she will not alter that conclusion irrespective of the evidence or arguments presented. That reasonable fear must be firmly established because it is to be expected that judicial officers may have formed views or inclinations of mind with respect to particular subjects in the course of their professional careers, which will be put to one side in the determination of proceedings on the evidence and on the merits: *CUR24 v Director of Public Prosecutions* at [36].

[83]   It is necessary to keep firmly in mind the distinction between apprehended bias and actual bias. This is important given statements made by the Magistrate in his judgment of 9 May 2013 (emphasised at [75] above) and submissions made with respect to those statements.

[84]   As the test is objective, it is important to keep an inquiry about apprehension of bias distinct from any inquiry about actual bias: *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; 244 CLR 427 at 437 [33].

[85]   In a case of actual bias, the actual state of mind of the judicial officer is in issue. In a case of apprehended bias, the focus is on the apprehension of the bystander. The latter test is usually easier to satisfy: *Spencer v Bamber* [2012] NSWCA 274 at [16].

[86]   The actual thought processes of the judicial officer need only be enquired into in deciding whether the judicial officer has been actuated by actual bias: *Ebner v Official Trustee in Bankruptcy* at 345 [7]; *Spencer v Bamber* at [107]. Application of the apprehended bias test requires no prediction about how the judicial officer will in fact approach the matter: *Ebner v Official Trustee in Bankruptcy* at 345 [7]. This serves to explain why the existence of a judicial oath is not an answer to a claim of apprehended bias, although (as will be seen) it is a matter which the bystander may take into account.

[87]   As the rule is concerned with appearance of bias, and not the actuality, it is the perception of the bystander that provides the yardstick - it is the public's perception of neutrality with which the rule is concerned: *British American Tobacco Australia Services Limited v Laurie* at 331 [139].

…

[97]   The bystander is taken to have knowledge of all the material and objective facts: *Webb v The Queen* [1994] HCA 30; 181 CLR 41 at 67, 73-74. The bystander is assumed to have sufficient knowledge to put the remarks of the Judge in their proper context: *Lee v Cha* at [45].

…

[101]   In addition, the bystander will be aware of a number of laws, practices and procedures to which reference will shortly be made: cf *British American Tobacco Australia Services Limited v Laurie* at 329 [132]; *CUR24 v Director of Public Prosecutions* at [57]; *Duncan v Ipp* [2013] NSWCA 189 at [154]-[156]; Groves, *“The Imaginary Observer of the Bias Rule”* [2012] 19 AJ Admin L 188 at 190ff. There was no real dispute at the hearing before me that the bystander should be taken to have knowledge of the range of matters referred to in this judgment.

1. In *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 it was held (per Gleeson JA with whom Emmett JA and Tobias AJA agreed) as follows:

[68]   A finding of actual bias is a grave matter: *Sun v Minister for Immigration and Ethnic Affairs* (1997) (*Sun v Minister)* 81 FCR 71 at 127 per Burchett J. Authority requires that an allegation of actual bias must be distinctly made and clearly proved; that such a finding should not be made lightly; and that cogent evidence is required: *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97] and the authorities there cited.

[69]   Where the issue is actual bias in the form of prejudgment, the appellant had to establish that the primary judge was “so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented”: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]). See also Kirby J at [127].

[70]   As Gleeson CJ and Gummow J observed in that case at [71]:

“The question is not whether a decision-maker’s mind is blank; it is whether it is open to persuasion.”

[71]   In the same case, Hayne J noted at [185] the several distinct elements underlying the assertion that a decision-maker has prejudged or will prejudge an issue, or the assertion that there is a real likelihood that a reasonable observer might reach that conclusion. The first is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. The second is the contention that the decision-maker will apply that opinion to the matter in issue. The third is the contention that a decision-maker will do so without giving the matter fresh consideration in light of whatever may be the facts and arguments relevant to the particular case.

[72]   His Honour observed at [186] that allegations of actual bias through prejudgment often fail at the third step he had identified. This was because notwithstanding whatever expression of preconceived opinions by the decision-maker, it does not follow that the evidence will be disregarded.

[73]   The test of actual bias in the form of prejudgment requires an assessment of the state of mind of the judge in question: *Michael Wilson & Partners Limited v Nicolls & Others* [2011] HCA 48; 244 CLR 427 at 437 [33]. However, actual bias need not be confined to an intentional state of mind. Bias may be subconscious, provided it is real: *Bilgin v Minister for Immigration and Multicultural Affairs (Bilgin v Minister)* (1997) 149 ALR 281 at 289-290 per Finkelstein J; *Sun v Minister* at 127 per Burchett J and 135 per North J. As Finkelstein J said in *Bilgin v Minister* at 290:

“The wrong involved is the failure to decide a case impartially. Whether that failure was deliberate or not should be beside the point insofar as the validity of the decision is concerned.”

1. In respect of apprehended bias his Honour set out the following principles:

[75]   A judge should not sit to determine a case if a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial and unprejudiced mind to the resolution of the question to be determined: *Michael Wilson & Partners Limited v Nicholls & Others* at [31].

[76]   The test of apprehension of bias is objective. It does not require an assessment of the state of mind of the judge, as is necessary on an inquiry about actual bias: *Michael Wilson & Partners Limited v Nicholls & Others* at [33]. Accordingly, this Court is not required or permitted to form a view as to whether the primary judge could be relied upon to determine the case impartially and on the evidence before her: *Rouvinetis v Knoll* [2013] NSWCA 24 at [24] per Basten JA (Ward and Barrett JJA agreeing).

[77]   An allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge *might* not bring an impartial mind to bear upon the issues that are to be decided. The question is not whether the judge had *in fact* prejudged an issue: *Michael Wilson & Partners Limited v Nicholls & Others* at 446 [67].

[78]   It is necessary to keep in mind that claims of apprehension of bias are to be considered in the context of ordinary judicial practice. Active case management, as part of modern litigation, often requires that trial judges intervene in the conduct of cases. Judges are not expected to wait until the end of the case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. Accordingly, the expression of tentative views, which reflect a certain tendency of mind of the judge, are not on that account alone to be taken to indicated prejudgment. Moreover, counsel are usually assisted by hearing the judges’ tentative opinions on matters in issue and being given an opportunity to deal with them: *Johnson v Johnson* [2008] HCA 48; 201 CLR 488 at [13] (a case of alleged apprehension of bias) which referred to earlier comments in *Vakauta v Kelly* [1989] HCA 44; 167 CLR 568 at 571 (a case where actual bias was alleged).

1. In *Polsen v Harrison* [2021] NSWCA 23 the Court of Appeal emphasised the following propositions (per Ball P; Basten JA and Simpson AJA):

[46]   (x) the inquiry as to whether a judge might reasonably be apprehended to deviate from bringing an impartial mind to the resolution of a particular issues “requires no prediction about how the judge … will in fact approach the matter” and “admits of the possibility of human frailty”;

…

(xii)   interventionist comments or conduct by a judge will not unilaterally create an apprehension of bias in the mind of the reasonable lay observer, who is taken to understand that such interventions are often motivated by the judge’s desire to understand the evidence and to advance the trial process;

…

(xiv)   there is to be attributed to the fair-minded observer a broad knowledge of the material objective facts as ascertained by the appellate court and the “actual circumstances of the case” as though the observer was sitting in the court;

(xv)   the fair-minded lay observer is taken to know the nature of the decision, the circumstances which led to the decision and the context in which it was made;

(xvi)   the context which must be considered includes the legal, statutory and factual context in which the decision is made, and “the totality of the circumstances”, although the fair-minded lay observer will not be taken to have a detailed knowledge of the law or legal principles;

…

(xxi)   the fair-minded lay observer would not reasonably apprehend bias on the part of a judge from a short and emotional exchange taken out of context and weighed in isolation;

(xxii)   the fair-minded lay observer will have regard to the cumulative effect of comments made by a judge and not to particular individual statements removed from their context; and

…

1. Their Honours (at [47] to [49]) emphasised that statements made or exchanges between a trial judge and an applicant should not be considered or viewed in isolation or taken out of the context in which they were made. That context is very important.
2. Their Honours continued relevantly thus:

[50]   A reasonable observer of the exchange between the trial judge and Mr Bartley would have observed and or be taken to know of or to have informed him or herself of the following matters:

(i)   at the time the exchange upon which the applicant relies occurred, the trial judge was not ruling on the admissibility of either the joint report or any expert report of Dr Selwyn Smith and would know that that would occur later in the course of the trial;

…

(iii)   the trial judge was “flagging” initial concerns she had with the joint report because Mr Bartley had indicated that he would be relying on it to some extent to support or explain his amendment application;

…

(vi)   the trial judge had responsibility for managing the trial in order to facilitate:

\* the just determination of the proceedings;

\* the efficient disposal of the business of the court;

\* the efficient use of available judicial and administrative resources; and

\* the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and

(vii)   that this included a desire to understand the evidence and to advance the trial process;

…

(xiii)   that the trial judge had not reached a final or concluded view about the matters in relation to which she had expressed her views.

Consideration

1. To the extent that the Applicant sought to rely on actual bias, [...] failed to make out a case and no more needs to be said about it.
2. The current application turned principally on matters raised during the evidentiary cases put forward by the parties.
3. As set out above, the context in which the conduct in question is raised is important.
4. In dismissing the application I had particular regard for the following:
5. the stage of the proceedings relied upon by the Applicant, namely, the first two days of the hearing which were devoted to brief oral opening submissions and the then taking of evidence;
6. the parties were yet to make closing submissions on 10 May 2022 both written and oral submissions;
7. apart from rulings on evidence no part of the Applicant’s case, or that of the Respondent, had been ruled upon;
8. no opinion had been expressed by me, or indication given, as to the merit or otherwise of the respective cases before the Tribunal and none of their claims or responses had been rejected or stated as untenable;
9. there was no issue raised during the proceedings that would indicate that ultimately fresh consideration would not be given to all relevant matters raised;
10. the relevant context for the questioning of the Applicant, namely:
11. the broad ranging claims supported by [...] document the “Applicant’s Outline of Legal Arguments”;
12. the need to ensure that the review did not stray beyond its legitimate scope as provided in the PPIP Act (as referred to above);
13. that two days had been set aside for the hearing of the review and that it appeared to me during the second day that the Applicant might not conclude [...] cross examination of the Council’s sole witness, which commenced on 9 February 2022 and which was occupying a substantial, if not all, of the next day, even with a shortened lunch break to afford the Applicant more time.
14. In my view, the grounds raised by the Applicant for recusal did not satisfy the test for apprehended bias, set out in some detail above, in that:
15. the Applicant’s views and apprehensions were purely subjective and the fair-minded lay bystander, with knowledge of all the material and objective facts, and the proper context in which I raised the matters complained of with the Applicant, would not reasonably apprehend that I might not at the end of the hearing, and having heard all that the parties wish to put or emphasise, bring an impartial and unprejudiced mind to the resolution of the questions within the scope of the review;
16. there is in the context outlined above no logical connection between the matters raised as suggesting bias and a valid basis for feared deviation from the course of deciding the contested matters yet to be decided;
17. my questioning of the Applicant would be viewed and understood in the mind of the reasonable lay observer as motivated by a desire to understand the evidence and to advance the review process.
18. In addition, the following matters were relevant to my decision not to recuse myself:
19. first, the Applicant’s stated perception of what I understood, or did not yet understand, about [...] case is entirely subjective;
20. secondly, there was no obligation on my part during the hearing of the evidence to explain to the Applicant the extent of my understanding, or lack thereof of the application;
21. thirdly, questions asked of a party to better understand his or her case, or course of questioning of evidence to be led or relied upon during presentation of the evidence does not provide an objective basis for recusal when there was no view expressed as to the merits or otherwise of what was sought to be pursued;
22. fifthly, the complex issue not yet fully addressed by the parties in any detail, whether the source document of the Applicant’s complaint under the PPIP Act, namely, the 7 July 2020 Statement made for the purposes of responding to the Applicant’s worker’s compensation claim was “personal information” of the Applicant within the scope of the Principles under the PPIP Act and how the Applicant’s case related to that issue.
23. In relation to the first and third grounds relied upon by the Applicant I concluded that they did not form a basis for recusal. In my view, an attempt to ensure a better understanding of the Applicant’s case did not satisfy the relevant test.
24. In addition, ground 1 is not supported by the facts. The Applicant was not compelled to explain each concept of his case, [...] was not compelled to explain each concept on multiple times.
25. In respect of the second ground, namely, that I apparently lacked empathy with the Applicant’s sharing of personal experience, it was my view that it would not be consistent with impartiality to show empathy to one side during a submission. The Applicant did not identify what precisely the interruption was that [...] complains of and how it impacted on [...].
26. In respect of the fourth ground, namely, the various enquiries made of the Applicant during his cross examination about the phrase “misuse of information”, the Applicant’s case relied on the misuse of information as a central part of [...] case set out above. It was difficult to understand, at that stage of the proceedings, how the questioning went to a misuse of information. In that regard, I also considered the following paragraphs of the Applicant’s document “Applicant’s Outline of Legal Arguments”, namely, paragraph 110, paragraph 118(d), paragraph 119, paragraph 138, paragraph 140, paragraph 146 each of which suggest a complaint of a misuse of information.
27. Questions by me during cross examination aimed at identifying how the questions related to a misuse of information do not, in my view, give rise to an apprehension of bias. The evidence was not rejected and the case based on that evidence is yet to be decided.
28. In respect of ground four, the subjective view of whether or not the conduct of the Council complained of in the internal privacy review application did, or did not, “compute with me” at that stage of the proceedings would in my view be irrelevant to the fair-minded objective bystander test set out above.
29. In respect of the fifth ground of appeal my ruling concerning paragraph 117 of the Applicant’s document “Applicant’s Outline of Legal Arguments” on 9 February related to reliance by the Applicant on a letter from a New South Wales Government Department said to have been received by the Council on 18 April 2017 containing “anonymous allegations” in circumstances where the letter was not to be tendered in evidence. I had ruled that in the absence of that letter being in evidence the Tribunal could not assess the matters relied upon in the paragraph and therefore I would not allow the paragraph into evidence.
30. In my view the fair-minded lay observer would not, in those circumstances, regard this ruling as a basis for a conclusion that I would not be able to bring an impartial and unprejudiced mind to bear on the issues ultimately required for resolution.

Deed of Release (Subject to Previous Limited Disclosure Order)

1. In respect of the sixth ground the context is important. The Applicant appeared in [...] opening written submissions and points of claim to be pursuing a claim for compensation.
2. In respect of that claim the Council submitted in its opening written submissions as follows:

At paragraph 53(c), (the Applicant) seeks financial compensation under s. 55(2)(a) for alleged impacts on [...] mental health, self confidence and capacity to work. There is no causal link established between Council’s actions concerning the 13 October 2016 description of (the Applicant’s) conduct and substantiated loss or damages suffered by (the Applicant) and as such it would be inappropriate to make a s. 55(2)(a) order. (The Applicant’s) concerns may properly be brought and addressed in a workers compensation claim. (The Applicant) has brought such a claim with a commercial settlement reached, without admission of liability on the part of the Council as to the veracity of the claim. In these proceedings, (the Applicant) is seeking to double dip by seeking a further monetary payment. Such payment is contrary to the terms of a deed executed by the parties whereby (the Applicant) has released the Council and any of their respective present or past officers, employees or agents from all claims of any kind arising out of, connected with or incidental to his claimed psychological and physical injuries.

In an attempt to avoid any future dispute with the applicant, enquiries were made of the applicant on 5 October 2021 as to any grounds of objection to filing the deed. Filing will not take place before the time allowed for a response. It is the respondent’s present intention to file / tender the deed.

1. In response the Applicant made the following reply:

[35] Council refers to a deed, which is likely a document held under legal privilege. I have not consented for a deed about me to be disclosed to Mr McFadzean or the Tribunal. I am sceptical of how a deed about me came into the possession of Mr McFadzean. As I have provided no consent, upon face value, this appears to be another breach of privacy.

I have not waived any right to submit a Privacy Review Application to Council, nor any right to seek natural justice as a result of such an application.

There are no clauses in the PPIP Act that prevent the Tribunal from making a compensation order under s. 55(2)(a) in these proceedings.

There is no “double dip”. If the Tribunal makes an order for $40,000 in losses, this – combined with the Workcover monies – would not recover half of my lost wages.

I do not have to make a “claim” for damages in this administrative privacy review. The Tribunal is capable, upon its own initiative, to decide whether an order under s. 55(2)(a) is the correct and preferable decision in these proceedings.

1. At the hearing of the review application the Applicant was cross examined in relation to [...] workers’ compensation claim and to establish whether the claims were for psychological injury only. The Council’s representative enquired of the Applicant whether [...] had signed a deed of release and sought to tender the document.
2. Prior to the deed the subject of the proposed tender being provided to the Tribunal to view, I raised the issue of whether it contained clauses which are typically found in deeds of settlement, namely, a confidentiality clause concerning the terms of the deed, or terms of settlement confidential between the parties.
3. The Council’s representative made clear that the Respondent sought to rely upon a term, namely, the bar against any actions, suit or proceedings in connection with any of the matters referred to in the deed.
4. The Applicant complained about the lateness of the production to the Tribunal of the deed. [...] then indicated that [...] wished to seek advice from [...] solicitor about the tender of the document. [...] was permitted to do so overnight after the conclusion of the first day’s hearing.
5. On the second day of hearing the Applicant’s main concern was that the Respondent had been ordered to put on all its evidence earlier and had not done so and therefore the deed should be excluded from evidence.
6. I enquired of the Applicant as to whether, if the Tribunal allowed the Respondent the indulgence it sought, to tender the document at the hearing whether the Applicant in those circumstances objected to the tender of the deed. It appeared that the Applicant still objected. I admitted the deed subject to the rights of the parties to make whatever submissions as to relevance and weight.
7. I regarded the deed as potentially relevant to the Applicant’s claim for compensation. Attached to the deed is an employee claim form which appears to have been signed by the Applicant on 15 November 2018. There is also attached to that form a document submitted with the claim form via email under the heading “WHAT HAPPENED”. There appeared to be an overlap of what is there set out and the Applicant’s contentions for compensation from the Tribunal raising the question of whether the claim is barred by the terms of the deed.
8. The Council has not yet outlined to the Tribunal precisely what use can or should be made of the deed of release given its terms, and neither party has addressed the Tribunal in respect of that topic yet.
9. On first reading at least, the deed suggested to me that the matters complained of in the workers’ compensation claim brought by the Applicant had the potential for overlapping significantly with the matters that [...] complained about in the Tribunal including what [...] said to the Tribunal in opening and the treatment [...] received from the Council impacting on [...] psychological health. I also had regard to s 38(6) of the CAT Act.
10. The course adopted by the Council appeared to me to be conventional and permissible. In that context, I did not entertain a statement at the time by the Applicant that there was “some funny business going on”. That did not amount to less favourable treatment.
11. This exchange, in my view, could not give rise to an apprehension of bias. I took the view that the seventh ground could not be sustained. The Applicant was not “shut down”. My questions posed to understand the course of cross examination did not amount to shutting the Applicant down. In viewing this ground I also concluded that the Applicant’s feelings could not come into consideration in the test for apprehended bias. I also did not consider that objectively there was a valid basis for those feelings.
12. I regarded the encouragement to the Applicant to try and finish the evidence at the end of the second day as entirely consistent with the guiding principles to be adopted by the Tribunal. The Applicant was afforded extensive time for cross examination. Towards the conclusion of proceedings on the second day of hearing [...] was asked whether there was further cross examination which [...] wished to pursue and was told that I wished to ensure that [...] had finished. The Applicant did not indicate that [...] had not finished or that [...] wanted more time for cross examination.
13. In circumstances where a matter in the Tribunal is listed for two days and where it is apparent to the Tribunal that the matter may not finish, the fair-minded lay observer in my view might not reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the issues required to be decided by reason of encouraging a party to be aware of the time restraints and that time is running out. That is particularly so where some matters are capable of being addressed in submissions.
14. The eighth ground also does not support the Applicant’s application. The Applicant’s perception of any interest I may have had as to who wrote Ms Zammit’s statements is not relevant. Ms Zammit was asked in cross examination whether the words in her statement were her own, which she confirmed. She was not challenged about her answer. To the extent that the Applicant wished to make submissions about her answers to questions at the time of closing submissions [...] remains entitled to do so.
15. In respect of the ninth ground the cross examination of Ms Zammit in order to obtain an “admission of guilt” must be put in its proper context. One of the complaints the Applicant made in relation to Item 1 of [...] complaints is that in the 7 July 2020 Statement in the workers’ compensation proceedings Ms Zammit had stated: “we did not contact the OCG” (Office of Children Guardian).
16. In her evidence which was filed prior to the commencement of the hearing and her 5 October 2021 statement which was then tendered into evidence Ms Zammit stated that at the time of making that statement she had the opportunity to review filed paperwork of the Council and noted that the Council did in fact make a report to OCG as it was required to do under the relevant legislation. Ms Zammit stated that she could not recall why she had made the statement in the 7 July 2020 Statement to contrary effect but attributed it to the fact that it was some two and a half to three years after the event and it had slipped her mind or it could be that the earlier statement was prepared in response to some particular aspect of the Applicant’s worker’s compensation claim.
17. During cross examination by the Applicant she was asked whether she now admitted that the statement she had made was false and misleading. Ms Zammit responded that at the time she wrote those statements she believed them to be true.
18. Ms Zammit had also already conceded in her cross-examination that the statement was not correct and that she believed, at the time it was made that it was true.
19. In light of the fact that she had admitted that her previous statement was not correct there could be little additional benefit in pressing the witness in cross examination as to whether the statement was false and misleading. It was clearly open to the Applicant in final submissions to address the question as to whether it was false and misleading if relevant and [...] was told that [...] could make submissions about the answers at the time of closing submissions.
20. There is no requirement in the review for the witness to make an ‘admission of guilt’ as contended by the Applicant.
21. I also took the view that it would, of course, be open to the Applicant to indicate any discrepancies in the witness evidence in [...] submissions which were yet to be heard on 10 May 2022.
22. In respect of the tenth ground I took the view that there was in fact a benefit to the Applicant and the Tribunal in the Applicant receiving the Council’s submissions prior to the day set aside for closing submissions. It would allow the Applicant and the Tribunal to know, in advance of final closing submissions, what the Council had to say about the Applicant’s submissions.
23. The Applicant persisted in submitting to me that the course I adopted, the Applicant going first, was not the usual way and it was unfair. In my view, there was nothing unfair about that process and it did not show any impartiality against the Applicant.
24. None of the grounds raised by the Applicant either separately or cumulatively warranted my recusal and, accordingly, the order of 3 May 2022 dismissing [...] application was made.

Orders

1. The application by the Applicant dated 28 February 2022 for the recusal of the presiding member is refused, and the application is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Amendments

05 October 2022 - On 27 September 2022 a further order under s 64(1) of the Civil and Administrative Tribunal Act 2013 reference to certain words in paragraphs numbered 1, 2, 3, 4, 6, 8, 10, 11, 12, 15, 18, 22, 23, 27, 28, 30, 31, 40, 43, 45, 47, 48, 49, 54, 55, 57, 60, 65, 68, 70, 71, 75, 77, 80 be no longer published or disclosed.