IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 45
EMPC 22/2015

IN THE MATTER OF	an application for a rehearing
BETWEEN	JAN SUSAN BRACEWELL Plaintiff
AND	RICHMOND SERVICES LIMITED Defendant

Hearing: (on the papers dated18 and 25 March 2015)

Counsel: Dr J Cook, agent for the plaintiff
P Shaw, counsel for the defendant

Judgment: 10 April 2015

RECUSAL JUDGMENT OF JUDGE B A CORKILL

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[1] This judgment deals with an application made for Ms Bracewell to the effect that I should recuse myself for the purposes of the application for rehearing, and if it is granted, the rehearing itself.

[2] The background, briefly, is that in a substantive judgment of 1 July 2014[1] I dismissed Ms Bracewell's challenge to a determination of the Employment Relations Authority;[2] granted an injunction for the return of confidential information; and ordered Ms Bracewell and any agent of hers not to directly or indirectly use or disclose any of Richmond Services Ltd's (Richmond) confidential information, including any information relating to Client A; a penalty of $2,000 was imposed on Ms Bracewell for breach of the employment agreement. The Court of Appeal subsequently declined leave to appeal on any question of law.[3]

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1 *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111.
2 *Bracewell v Richmond Services Ltd* [2013] NZERA Auckland 481.
3 *Bracewell v Richmond Services Ltd* [2014] NZCA 629.

[3] On 27 January 2015, Ms Bracewell applied for a rehearing on seven grounds, asserting in summary that her natural justice rights were breached and that a miscarriage of justice had occurred.

[4] The grounds relied on in support of the application for recusal are firstly that in the course of a telephone directions conference held on 16 March 2015, I made a remark that suggested I was not giving equal attention and weight to the submissions and evidence of the parties. Secondly, it is asserted that errors were made in my substantive judgment such that it is now inappropriate for me to hear the application for rehearing, or if granted, the rehearing itself.

[5] For Richmond it is submitted that this request has to be considered in light of the dicta of the Supreme Court in *Saxmere Company Ltd v New Zealand Wool Board Disestablishment Company Ltd;*[4] it is further submitted that having regard to the principles of that case, there is no conflict of interest or any other basis for assuming bias, so that the *Saxmere* test is not met. As regards the remark made in the telephone conference, it is submitted that agreeing with submissions from counsel is commonplace and could not itself be a reason for a Judge to recuse himself.

[6] In this judgment I propose to deal only with the question of whether I should hear the application for rehearing; if that application succeeds, the question of whether I, or another Judge, should hear the matter is an issue that should be addressed at that stage.

[7] I agree that the relevant test is authoritively discussed by the Supreme Court in *Saxmere*. There it was held that a Judge is disqualified if a fair-minded lay observer may 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 issue before him or her. This is to be approached in two stages – firstly by identifying what might lead a Judge to decide a case other than on its legal and factual merits, and secondly, by articulating the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

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

[8] The starting point must be the obligation of the Court to hear a particular case. Mason J, sitting in the High Court of Australia in *Re JRL, ex parte CJL* put that requirement in this way:[5]

> It is important 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.

[9] Turning to the remark made at the recent directions conference, the situation was this. The conference was for the purposes of timetabling Ms Bracewell's application for rehearing. Her agent, Dr Cook, advised that a ruling was being sought from the Ombudsman regarding a New Zealand Police document. It was submitted that this document was needed to support Ms Bracewell's claim that she had a right under the Protected Disclosures Act 2000 (PD Act) to retain confidential documents of Client A until a full investigation had occurred. Counsel for the defendant, Ms Shaw, made a submission to the effect that whatever conclusion the Police document might lead to, that could not give rise to a protected disclosure under the PD Act to a family member of Client A, or to the media. Because family members and media persons cannot be an "appropriate authority" under s 3 of that Act, I expressed a provisional view that I was inclined to agree, since only disclosures to authorities as defined are protected by that Act. However, I was not prepared to rule that the document was entirely irrelevant, which was why I adjourned the timetabling of the application for rehearing to 28 April 2015 so that there was a suitable opportunity for Ms Bracewell to obtain the ruling she seeks from the Ombudsman.

[10] It is well recognised that a Judge may, and commonly will, legitimately give assistance to the parties by expressing what is presently in the Judge's mind. A Judge is not required until the moment of pronouncement of judgment to be as inscrutable as the Sphinx: *Johnson v Johnson*.[6] In that case it was noted that the dialogue between Bench and Bar is helpful in identifying the real issues and

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5 *Re JRL, ex parte CJL* (1986) 161 CLR 342 (HCA) at 352. Mason J's statement was adopted in a unanimous judgment of the High Court of Australia in *Re Polites: Ex parte Hoyts Corporation Pty Ltd* [1991] 173 CLR 78 at 448. See also New South Wales Court of Appeal decision, *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NZWLR 272 at 275-276.

6 *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at 493.

problems of a particular case; that it is appropriate for tentative views which reflect a certain tendency of mind to be expressed, and that this should not alone be taken to indicate pre-judgment.

[11] That is the appropriate principle to apply here in respect of the remark I made; I decline to recuse myself on this ground.

[12] As regards the remaining grounds, the question is whether on an application for rehearing it is appropriate for a trial Judge to hear an application for rehearing where the application asserts that errors were made by that same Judge in the substantive judgment.

[13] In a similar situation, the Court of Appeal[7] and Supreme Court[8] recently considered the question of whether it is appropriate for a trial Judge who has ruled against a party to go on and consider an application for leave to appeal against his or her own decision to the Court of Appeal.

[14] Both those courts held that this is a longstanding and routine practice in that particular context. The Court of Appeal observed that no authority establishes that the fair-minded observer might question a Judge's impartiality in such circumstances. The Court stated:[9]

> Notably, the fair-minded observer must be taken to know something of the legal process. He or she would appreciate that on a leave application the judge is not actually deciding whether the decision was correct, but merely whether an appeal is arguable and raises some issue that merits leave. He or she would appreciate that judges routinely make decisions during the course of a proceeding and are not ordinarily thereby disqualified from continuing. He or she would recognise the obvious efficiency in referring a leave application to the judge who made the decision. He or she would appreciate that reasons must be given for refusing leave.

[15] Such observations are relevant in the present context. Toogood J referred to similar considerations in *Stiassny v Siemer,*[10] where the Judge said:

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7 *Geary v Accident Compensation Corporation* [2014] NZCA 534.
8 *Geary v Accident Compensation Corporation* [2015] NZSC 12.
9 *Geary v Accident Compensation Corporation*, above n 7, at [16]; affirmed in *Geary v Accident Compensation Corporation*, above n 8.
10 *Stiassny v Siemer* [2013] NZHC 154.

> 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.

[16] In this Court, an application for rehearing is normally dealt with by the Judge who conducted the original trial.[11] There can be exceptions to this practice, for example where the trial Judge has ceased to be a member of the Court.

[17] Applying the relevant principles, I do not consider that a fair-minded lay observer would reasonably apprehend that I may not bring an impartial mind to the resolution of the application for rehearing, either because of the remark which was made or because I am required to consider an application in respect of my own judgment.

[18] I decline to recuse myself and reserve costs.

B A Corkill
Judge

Judgment signed at 10.30 am on 10 April 2015

[11] *Yong t/a Yong and Co Chartered Accountants v Chin* [2008] ERNZ 1 (EmpC) at [3].