Note: An order prohibiting publication of the name of a party applies to this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 107
3017415

	BETWEEN	X Applicant
	A N D	THE NEW ZEALAND FIRE SERVICE COMMISSION ALSO KNOWN AS FIRE AND EMERGENCY NEW ZEALAND Respondent

Member of Authority:	T G Tetitaha
Representatives:	P. Chemis counsel for Applicant G. Davenport counsel for Respondent
Investigation Meeting:	9 October 2017 at Wellington
Submissions Received:	9 October 2017 from Applicant 9 October 2017 from Respondent
Date of Determination:	30 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant has applied for an order today that the Member recuse herself from sitting. No formal application or submission had been lodged. No evidence filed. Both the Authority and the respondent were surprised by the late application. This matter has already been set down for a one week hearing starting 13 November 2017. Both parties confirmed they wished to have this application determined after hearing oral submissions.

[2] The relevant facts to this matter were set out in the previous determination refusing interim reinstatement[1] (reinstatement determination) and shall not be repeated here. The evidential basis for this application is the reference to misconduct in paragraph 31 of that determination. Mr X submits this evidences predetermination.

[3] Paragraph 31 of the reinstatement determination is set out below:

> **Overall justice**
>
> [31] Standing back from the detail the justice of this case favours the respondent. There is an admission of misconduct. The circumstances surrounding the misconduct and the process leading to dismissal still need to be determined. There is an early substantive hearing available on 13-18 November 2017. There is little detriment to Mr X of the short delay between hearing and disposal.

Determination

Law

[4] The Supreme Court held the governing principle for determining bias or predetermination is "whether a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question the judicial officer is required to decide." [2] The Employment Court has repeatedly reaffirmed and applied that principle in this jurisdiction.[3]

[5] Both Courts have also endorsed the dicta of the High Court of Australia[4] below:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he

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1 *X v The New Zealand Fire Service Commission* [2017] NZERA Wellington 97.

2 *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 (SC).

3 *Bracewell v Richmond Services Ltd* [2015] NZEmpC 45 at [7]; *Alim v LSG Skychefs New Zealand Limited* [2013] NZEmpC 162 at [34].

4 *Alim v LSG Skychefs New Zealand Limited* [2013] NZEmpC 162 at [34] citing the High Court of Australia in *Re JRL, ex parte CJL.13* [1986] HCA 39, (1986) 161 CLR 342 (HC) at 352.

> will approach the issues in the case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established". ... 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.

Application to these facts

[6] Mr X was dismissed because the respondent found Assignment One had been submitted as being authored by him when it was not. This found to be dishonest and false.

[7] Mr X has filed an affidavit in support of his interim application for reinstatement. In respect of Assignment one he stated:

> [33] However, given the way that Ms [A] had assisted me (and others) with assignments generally and given the email from her at 2.13pm attaching the document, I assumed that we must have worked on the assignment together at some point before 10 August 2013. My best explanation given the information I had, was that we had worked on a document together, and Ms [A] then sent me a different document which I sent to [the Tertiary Institution]. This may have been a mistake by Ms [A], but I do not think that is so. I believe I was set up by her, and that she deliberately sent me a different (and false) assignment, knowing I would simply flick it on to [the tertiary institution] thinking it was the one we had worked on together.

[8] Mr Xs evidence accepted he submitted a false assignment in support of his tertiary qualification. This is the misconduct the respondent alleges justifies his dismissal. This evidence gave rise to the conclusions in paragraphs [13] and [14] of the reinstatement determination when assessing the merits of the parties cases.

[9] Paragraph [31] of the determination deals with the overall justice of the case. This can and often does include an assessment of the merits.[5] The reference to admitted misconduct is drawn from the above evidence used in assessing the merits.

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5 *XYZ v ABC* [2017] NZEmpC 40 at [6].

This does not evidence predetermination. It is part of the assessment of the overall justice of granting the interim order sought.

[10] There is insufficient evidence to meet the tests for recusal. The application is dismissed. Costs reserved.

T G Tetitaha
Member of the Employment Relations Authority