

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 364
3024458

BETWEEN

SUSAN KENNEDY
Applicant

AND

THE CHIEF EXECUTIVE OF
ORANGA TAMARIKI –
MINISTRY FOR CHILDREN
Respondent

Member of Authority: Trish MacKinnon

Representatives: Allan Halse, advocate for the Applicant
Hamish Kynaston and Louise Grey, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions [and further 23 May and 28 June 2021 from the Applicant
Information] Received: 11 June 2021 from the Respondent

Date of Determination: 16 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Susan Kennedy commenced proceedings in the Authority in February 2018. She has numerous claims, including that she was constructively dismissed by the Chief Executive of Oranga Tamariki – Ministry for Children (Oranga Tamariki). Other claims made by Ms Kennedy are for unjustifiable disadvantage, bullying, sexual harassment, failure by the employer to provide a safe and healthy workplace, and failure to investigate her concerns or try to resolve the matters she raised.

[2] The Authority has not yet been able to investigate Ms Kennedy's substantive claims. An investigation meeting was scheduled to take place from 11 to 15 November 2019 but was

adjourned *sine die* on 30 October 2019 following advice from Ms Kennedy's representative that she was not sufficiently well to attend. Since then a number of interlocutory matters have taken place, which has further delayed the hearing of Ms Kennedy's grievances. They include challenges to minutes of the Authority regarding procedural issues,¹ Ms Kennedy's application for removal of the matter to the Employment Court, and her challenge to the Authority's declining of that application.²

Recusal

[3] Ms Kennedy now seeks my recusal from the matter. While no formal application for recusal was made, the Authority decided to treat the informal request as an application to be considered before proceeding further. Accordingly, the parties were given the opportunity to make submissions on this matter.

[4] The reasons given by Ms Kennedy for the request that I recuse myself are that she:

- (a) has no confidence that I could hold a safe, non-adversarial investigation meeting;
- (b) considers that I exercised bias and predetermined the outcome of her claims by:
 - (i) issuing non-publication orders;
 - (ii) refusing to recuse myself after exercising bias; and
 - (iii) refusing to remove her matter to the Employment Court, resulting in her being "fined" by the Employment Court;
- (c) considers the factors listed in (b) above contributed to her suicide attempt on 16 December 2020; and
- (d) considers the employment relations process is failing to deal appropriately and safely with her case, and that Authority Members have no knowledge of workplace bullying, mental health and health and safety matters.

¹ *Kennedy v The Chief Executive of Oranga Tamariki – Ministry for Children* [2020] NZEmpC 58.

² *Kennedy v The Chief Executive of Oranga Tamariki – Ministry for Children* [2021] NZEmpC 38.

[5] In Oranga Tamariki's response to the application, it refers to the legal test for recusal, adopted by the Supreme Court of New Zealand in *Saxmere*³, as being 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.⁴

[6] Following an analysis of the application of the test to the current matter, Oranga Tamariki concludes there are no grounds for me to recuse myself. It has said, however, that it will abide by any determination I reach on the matter.

[7] Ms Kennedy's reply submissions reject the relevance of the *Saxmere* test because it pre-dates the Health and Safety at Work Act 2015 (the HSW Act). In her view the ERA is unable to manage a safe and non-adversarial investigation meeting and no legal test for recusal takes that into consideration.

[8] Those submissions also refer to the drawn out proceedings, the length of time since Ms Kennedy raised her personal grievances in 2017 and January 2018 and commenced proceedings in the Authority in February 2018. Ms Kennedy attributes the delays to Oranga Tamariki's refusal to engage in meaningful discussions which led to her December 2018 suicide attempt.

Discussion

[9] The Supreme Court is New Zealand's highest court and, although Ms Kennedy rejects the relevance of *Saxmere*, it is the leading case on judicial bias and recusal. The HSW Act has no relevance to considerations of recusal.

[10] I will deal briefly with each of Ms Kennedy's reasons for seeking my recusal from the matter. Firstly, her claim that I am incapable of ensuring a safe, non-adversarial investigation meeting is at odds with the steps taken so far to accommodate Ms Kennedy's requirements.

[11] On 29 August 2019, by way of a minute to the parties, I proposed a means of hearing Ms Kennedy's claims that would minimise the stress of an investigation meeting for her. I invited the parties to consider that possibility and put forward any other proposal that would

³ *Saxmere Co. Limited v New Zealand Wool Board Disestablishment Co. Limited* [2009] NZSC 72, [2010] 1 NZLR 35.

⁴ N3 at [3].

allow Ms Kennedy to attend and participate in a manner that would minimise any adverse effects on her health. Ms Kennedy did not respond, other than by challenging the minute in the Employment Court.

[12] The challenge was unsuccessful. The Employment Court found that the 29 August 2019 minute was not able to be challenged in the Court and noted that, even if it had been, it would not have succeeded as the directions I made were "sensible ones in the circumstances".⁵ The Court referred to the "careful directions" I had made for the hearing of Ms Kennedy's evidence and to my also allowing for further discussion "on additional protections that may be put in place" stating that the directions were appropriate.⁶

[13] I note that in April 2021 I again offered the parties the opportunity to comment on my proposal for the manner in which Ms Kennedy's health and wellbeing concerns could be accommodated and invited them to put forward any other proposals they may have. Ms Kennedy did not respond.

[14] Turning to allegations of bias, Ms Kennedy cites three different actions of mine as demonstrating that I exercised bias and predetermined the outcome of her claims. The first of these actions is my issuing of non-publication orders. This relates to a minute I issued on 28 August 2019 granting interim non-publication orders, until such time as the Authority determined Ms Kennedy's substantive claims. Ms Kennedy challenged the issuing of those orders. The Employment Court found the interim orders were not open to challenge as they do not have an irreversible and substantive effect, noting that if permanent orders were made, they would be open to challenge.⁷

[15] With respect to the interim non-publication orders I had made, the Court noted that I had rightly, in the Judge's view, found that such orders were warranted. The Court further noted this did not mean that permanent non-publication orders would be made following the Authority's investigation meeting and there would be further opportunity for Ms Kennedy to put forward her views to the Authority if Oranga Tamariki sought such orders.

[16] The second action demonstrating bias and predetermination is alleged to be my refusal to recuse myself from this matter. The first and only application for me to do so that I am

⁵ N1 at [20].

⁶ N1 at [22].

⁷ N1 at [15] and [16].

aware of was made, informally, on 23 May 2021, attaching documents including a Police report and a CultureSafe Facebook post. That informal application is the subject of this determination.

[17] The third action relates to my declining Ms Kennedy's application for removal of her matter to the Employment Court.⁸ The basis for my dismissal of Ms Kennedy's application was that none of the four grounds for removal under the Act was met.⁹ Ms Kennedy's application to the Employment Court for special leave to remove her personal grievances to that Court was also declined on similar grounds.¹⁰ Additionally, the Court noted that the Authority was well placed to deal with Ms Kennedy's case and had already made directions for the hearing of her evidence to take account of her concerns, and also allowing for further discussion on possible additional directions.

[18] Finally, in relation to Ms Kennedy's belief regarding the failure of the employment relations process and of Authority Members, I note that Members are tasked with hearing and determining employment relationship problems, including matters such as those raised by Ms Kennedy in her personal grievances. We are well equipped to deal with the matters that come within our jurisdiction.

Conclusion

[19] I consider there are no grounds for me to recuse myself from this matter and I decline to do so.

Costs

[20] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁸ [2020] NZERA 93.

⁹ Section 178(2) (a) to (d).

¹⁰ N2 at [19].