IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 735
3201559

	BETWEEN	MELISSA JANE BOWEN Applicant
	AND	NATIONAL AUSTRALIA BANK LIMITED First Respondent
	AND	ANTHONY HEALEY Second Respondent
	AND	ANNIE BROWN Third Respondent
	AND	REBECCA LEE Fourth Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Michael O'Brien, counsel for Applicant Rebecca Rendle and Jess Dellabarca, counsel for First and Second Respondents Penny Swarbrick, counsel for Third and Fourth Respondents	
Investigation:	On the papers	
Submissions and other information received:	2, 9 and 20 November 2023 from Applicant 3 and 13 November 2023 from First and Second Respondents 3 November 2023 from Third and Fourth Respondents	
Determination:	8 December 2023	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Another Member of the Authority is investigating the substantive matter. An issue has arisen regarding the admissibility of disputed evidence in an affidavit Ms Bowen lodged on 9 May 2023, which has not yet been passed on to that Member.

[2] The disputed admissibility issue was allocated to me to determine on 26 October 2023. Ms Bowen objected to my involvement both before and after this matter was allocated to me. Once my involvement was confirmed, Ms Bowen applied for me to recuse myself.

Background

[3] I issued a preliminary determination on disputed admissibility issues on 28 January 2022 in *Bowen v Bank of New Zealand*.[1] Ms Bowen was the unsuccessful party in that matter, as all of the disputed evidence was held to be inadmissible. I issued a costs determination dated 28 February 2022 for that matter, in which Ms Bowen was ordered to contribute $4,500 towards BNZ's costs.[2]

[4] The preliminary determination in *Bowen v BNZ* dated 28 January 2022 that is on the Authority's website is a heavily redacted version, in which paragraphs [8]-[91] were not published, in accordance with the non-publication order recorded in paragraphs [1]-[5] of that determination. However, the parties in this matter have received an unredacted version of the *Bowen v BNZ* preliminary determination.[3]

[5] Ms Bowen unsuccessfully challenged the Authority's preliminary determination regarding the inadmissible evidence to the Employment Court . The court held the challenge was precluded by s 179(5) of the Employment Relations Act 2000 ("the Act"), because it related to the procedure the Authority had adopted regarding its investigation.[4] The Court of Appeal declined Ms Bowen's application for leave to appeal the Employment Court's decision.[5]

[6] I have also issued two further preliminary determinations which varied the non-publication order contained in the 28 January 2022 preliminary determination.[6] The first variation was recorded in *Bowen v Bank of New Zealand* dated 28 October 2022.[7] The second variation was recorded in *Bowen v Bank of New Zealand* dated 1 August 2023.[8]

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[1] *Bowen v BNZ* [2022] NZERA 19.
[2] *Bowen v BNZ* [2022] NZERA 55.
[3] *Bowen*, above n 1.
[4] *Bowen v BNZ* [2023] NZEmpC 29.
[5] *Bowen v BNZ* [2023] NZCA 512.
[6] *Bowen*, above n 1.
[7] *Bowen v BNZ* [2022] NZERA 553.
[8] *Bowen v BNZ* [2023] NZERA 408.

The Authority's investigation

[7] Ms Bowen lodged a recusal application and memorandum of counsel on 2 November 2023. The First and Second Respondents lodged a Notice of Opposition to the recusal application on 3 November 2023. The Third and Fourth Respondents emailed the Authority on 3 November 2023 advising they did not wish to be heard.

[8] The Authority invited the parties to provide it with any information they wanted considered, to enable the recusal application to be determined on the papers.

[9] Ms Bowen lodged submissions dated 9 November 2023. The First and Second Respondents emailed comments to the Authority on 13 November 2023. Ms Bowen lodged reply submissions dated 17 November 2023.[9]

The Applicant's basis for recusal

[10] Ms Bowen's recusal application can be summarised as involving allegations that:

(a) The allocation of the disputed admissibility issues to me to determine was irregular and/or improper;

(b) A comment made in an email from the Authority to the parties dated 30 October 2023, that noted I had determined the status of the 31 January 2017 meeting in the *Bowen v BNZ* preliminary determination dated 28 January 2023, showed bias and/or predetermination;[10] and

(c) I had "wholly determined" the issues in the *BNZ v Bowen* preliminary determination "so would be unlikely to go against [my] previous determination" when determining the disputed admissibility this matter.[11]

Comments made by the First and Second Respondents

[11] On 13 November 2023 the First and Second Respondents emailed the Authority that they did not wish to provide substantive submissions and would abide by the

[9] 17 November 2023 was a public holiday in Christchurch, where the submissions were lodged, so I got them on 20 November, the next working day.
[10] *Bowen*, above n 1.
[11] *Bowen*, above n 1.

Authority's recusal decision. However, they also made the following comments, which Mr O'Brien responded to in his reply submissions:

(a) They considered that recusal was a matter of procedure, which will not have a substantial and irreversible effect on Ms Bowen;

(b) Mr O'Brien's allegations about counsel inappropriately influencing the case allocation in this matter were not accepted, and they pointed out it was up to the Authority to decide which Member should determine the disputed admissibility issues; and

(c) They drew the Authority's attention to *Marx v Southern Cross Campus Board of Trustees* and *Stiassny v Siemer*.[12]

Legal test

[12] The Supreme Court's decision in *Saxmere Company Limited v Wool Board Disestablishment Company Limited* is the leading case on the circumstances in which a recusal should occur.[13]

[13] The Supreme Court in *Saxmere* confirmed the principle from the leading cases that a Judge should be disqualified from hearing a matter:[14]

> If 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.

[14] The Supreme Court in *Saxmere* approved a two stage test:[15]

(a) First, the identification of what is said that might lead a Judge to decide a case other than on its legal and factual merits; and

(b) Second, 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."

[15] The guiding principle is that an Authority Member, as is the case here, should recuse themselves if a fair-minded, objective and fully informed lay observer would

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[12] *Marx v Southern Cross Campus Board of Trustees* [2017] NZERA 99; and *Stiassny v Siemer* [2013] NZHC 154 at [12].
[13] *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72.
[14] *Saxmere,* above n 13 at [3].
[15] *Saxmere,* above n 13 at [4].

reasonably believe that the decision maker might not be impartial in their decision making.

[16] The standard for recusal is one of real possibility, rather than probability, in which an objective fair-minded lay observer is assumed to be intelligent and not sensitive or suspicious.[16] Recusal is not appropriate simply because the party making the allegation of bias believes they may get a more favourable outcome from a different decision maker, or wants a different decision maker to be involved.

[17] The Employment Court in *Halse v Employment Relations Authority* recognised it was common for an unsuccessful party to allege bias against a decision maker who had made a decision that was adverse to them.[17]

[18] The court stated that recusal on such grounds would only be warranted in "the rarest of circumstances", because a fair-minded and informed observer would not assume that a previous adverse decision against one party meant the decision maker would not deal with subsequent matters fairly.[18]

[19] Accordingly, a previous adverse decision, without more, does not meet the test for recusal. The 'duty to sit' that applies to Judges also applies to Authority Members, who are obliged to investigate the matters allocated to them.

[20] The Employment Court in *Halse* warned against acceding too readily to allegations of bias in the absence of credible evidence of bias, to avoid allowing an aggrieved litigant to swap decision makers to someone they thought would be more likely to decide the case in their favour.[19]

Issues to be determined

[21] The following issues are to be determined:

(a) Was the case allocation of this matter irregular or improper?

(b) Did the 30 October 2023 email from the Authority to the parties evidence bias and/or predetermination?

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[16] *Halse v Employment Relations Authority* [2022] NZEmpC 82 at [12]-[14].
[17] *Halse*, above n 16 at [15].
[18] *Halse*, above n 16 at [15].
[19] *Halse*, above n 16 at [11].

(c) Did the preliminary determination in the Bowen v BNZ matter "wholly determine" the disputed admissibility issues in this matter?

(d) Would an objective fair-minded lay observer believe there was a real possibility I might not determine this matter on its merits?

Was the case allocation of this matter irregular or improper?

[22] Mr O'Brien made a number of unfounded allegations regarding the allocation by the Authority of the disputed admissibility issues to a particular Member to determine.

[23] There was nothing irregular or improper about the allocation of the disputed admissibility issues in this matter to me to determine. This matter was allocated to me in the same way the previous three *Bowen v BNZ* matters were allocated to me, namely in accordance with the Act.[20]

Did the 30 October 2023 email from the Authority to the parties evidence bias and/or predetermination?

[24] The email the Authority sent the parties on 30 October 2023 stated:

> - Ms Bowen's objection to Member Larmer was noted, however the allocation of work to Members is an internal Authority matter;
> - Member Larmer issued the directions last week;
> - Member Larmer will be determining this admissibility issue, because she has already determined the status of the 31 January meeting in the Bowen v BNZ [2021] NZERA 19;[21]
> - If the parties need more time to provide the Authority with their views on the disputed admissibility issues, then they are welcome to propose an alternative timetable.

[25] A fair and objective lay observer is capable of reading an email and understanding its proper context. The information conveyed in the email was intended to move the matter forward. The email would likely be viewed by a fair-minded lay observer as a brief explanation of why the matter had been allocated to me, notwithstanding Ms Bowen's objections to my involvement.

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[20] *Bowen*, above n 1; *Bowen*, above n 6; and *Bowen*, above n 7.
[21] The reference to [2021] in the quoted email was incorrect as the preliminary determination was issued in 2022.

[26] The factually accurate statement in the Authority Officer's email of 30 October 2023 would not cause a properly informed fair-minded lay observer, who was not sensitive or suspicious, to conclude that the disputed admissibility issues in this matter would be decided other than on their legal and factual merits.

[27] Mr O'Brien's submission that the email is evidence of predetermination is not accepted. No comment was made about the outcome of the disputed admissibility issues in this matter. Nor did the email create a real risk that I would not impartially determine the disputed admissibility issues in this matter.

[28] The Authority's email on 2 November 2023 to the parties calling for them to provide it with information on the disputed admissibility issues in this case is evidence that the Authority intended to determine this matter on its own merits, based on the information the parties had lodged in this matter.

[29] There is no logical connection between the explanation for the allocation of this matter to me given by an Authority Officer to the parties in an email and the feared deviation from the determination of the disputed admissibility issues in this matter on the merits.

Did the preliminary determination in *Bowen v BNZ* "wholly determine" the admissibility issues in this matter?

[30] The Authority has not been provided with all of the information on the disputed admissibility issues in this matter, so the particular issues in this matter have not yet been identified or determined.

[31] The Authority has been provided with a marked up copy of Ms Bowen's affidavit dated 9 May 2023, which showed there are differences between the disputed evidence in this matter and the disputed evidence in the *BNZ v Bowen* preliminary determination.[22]

[32] However, the Authority acknowledges that both cases involved a dispute (among other things) about the admissibility of evidence relating to the 31 January 2017

[22] *Bowen*, above n 1.

facilitated meeting. The parties have not provided their evidence or submissions on that yet in this matter.

[33] Nor has Ms Bowen explained to what extent she intends to make different submissions or rely on different evidence or case law in this matter than she did in the *Bowen v BNZ* matter.[23] It is therefore premature at this early stage for the Authority to be able to properly assess what if any differences there are between the two cases, and Ms Bowen has not yet provided that detail.

[34] If there are no material differences, then that would appear to raise a question about whether the objection to my involvement in this matter is an instance of 'Member shopping', in which Ms Bowen hopes a different Member would reach a different conclusion on the same facts and law which the Employment Court concluded she was precluded from challenging, which the Court of Appeal would not let her appeal.[24] Recusal in such circumstances is not appropriate.

[35] In any event, so much time has passed since the preliminary determination in *BNZ v Bowen* that a fair minded lay observer would understand that the disputed admissibility issues in this matter will be dealt with afresh.

[36] There will be more than two years between the preliminary determination in the BNZ matter and the determination of the disputed admissibility issues in this National Australia Bank Limited (NAB) matter. That time lapse means there is no real risk of extraneous evidence in the BNZ matter tainting the outcome of this matter.

Would an objective fair-minded lay observer believe there was a real possibility I might not determine this matter on the merits?

[37] In terms of applying the *Saxmere* test for recusal:[25]

(a) The evidence did not objectively establish that anything I had said or done would lead me to decide the disputed admissibility issues in this matter other than on the legal and factual merits; and

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[23] *Bowen,* above n 1.
[24] *Bowen,* above n 4 (EC); and *Bowen,* above n 5 (CA).
[25] *Saxmere,* above n 13.

(b) The matters Ms Bowen raised would not lead a properly informed, fair-minded lay person to believe I may not impartially determine the disputed admissibility issues in this matter.

[38] Members must take an oath "to faithfully and impartially perform their duties".[26] A finding that there is an apparent real risk an Authority Member will breach their oath of office should not be made lightly.

[39] As with other judicial officers, Members have a 'duty to sit', so recusal should not occur too readily.[27] To do so could undermine the administration of justice by encouraging unsuccessful parties to object to a Member who has previously made findings against them in the hope that someone else would decide in their favour.[28]

[40] Ms Bowen's submission that I am not impartial because human nature means I am "unlikely to go against [my] previous decision" and "am not likely to want to contradict my previous determination" is not accepted.

[41] Members are not bound by Authority decisions, including their own. If the evidence and law in this matter lead to a different conclusion than was reached in the *Bowen v BNZ* matter, then that would be reflected in the determination of this matter, which will be based on its own facts.

[42] The High Court in *Stiassny v Siemer* said that an unfavourable decision in itself would not meet the *Saxmere* test for recusal.[29] That is the case here. There is no "firmly established" evidence of bias, which the Employment Court recognised in *Nisaha v LSG Sky Chefs New Zealand Limited*, when citing from *Re JRL, Ex-Parte CLJ*, was necessary.[30]

[43] There is no reason for me to determine this matter other than objectively on the factual and legal merits, in accordance with my oath of office.

[44] Having been allocated this matter I have a 'duty to sit', unless there is demonstrable evidence of apparent bias that could lead a fair-minded and objective lay-observer to believe there is a real possibility that I may not impartially determine the

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[26] Section 168 of the Act; and *Spacey v Vice-Chancellor University of Waikato* [2015] NZERA 348.
[27] *Lorigan v Infinity Automotive Ltd* [2020] NZEmpC 229 at [18].
[28] *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] ERNZ 626; and *Re JRL, ex-parte CLJ* [1986] HCA 39 at [34].
[29] *Stiassny*, above n 12; and *Saxmere* above n 13.
[30] *Nisha*, above n 28.

disputed admissibility issues in this matter. The risk of apparent bias must be real and not remote.

[45] Ms Bowen's evidence falls far short of what is required by the *Saxmere* test to establish a real risk of bias.[31] The matters Ms Bowen sought to rely on are too remote to create a reasonable apprehension in a properly informed, objective lay person that I will not impartially determine this matter.

[46] Recusal is not appropriate because one of the parties believes the decision maker may make an adverse decision against them, which appears to be the case here. What has been referred to as the "duty to sit" therefore prevails in this matter, so recusal is declined.

Costs

[47] Costs are reserved and will be determined on the papers, once the disputed admissibility issues have been resolved.

Rachel Larmer
Member of the Employment Relations Authority

[31] *Saxmere*, above n 13.