APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00887
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MS J AUERBACH- BOARD MEMBER MS J LOVE- BOARD MEMBER
HEARD	**:**	WEDNESDAY, 11 DECEMBER 2019
DELIVERED	**:**	FRIDAY, 20 DECEMBER 2019
FILE NO.	**:**	PSAB 15 OF 2019
BETWEEN	**:**	NICOLE MARIE STAPLES Appellant AND PATHWEST LABORATORY MEDICINE WA Respondent

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Catchwords	**:**	*Industrial Relations Law (WA) - Application for recusal of Appeal Board member on the basis of apprehended bias by association - Application considered - Necessary threshold of association not established - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 80H
Result	**:**	Order issued

Representation:

Counsel:

Appellant	**:**	No appearance
Respondent	**:**	Ms J Vincent of counsel

Solicitors:

Respondent **:** State Solicitor's Office

Case(s) referred to in reasons:

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438

Johnson v Johnson (2000) 201 CLR 488

Webb & The Queen (1994) 181 CLR 41

Case(s) also cited:

Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530

Philip Danala v The Minister for Health [2010] WAIRC 01035; (2010) 90 WAIG 1793

Reasons for Decision

KENNER SC:

1 To the extent that it is necessary for me to do so, I agree with Ms Auerbach's reasons in not acceding to the respondent's application that she not sit as a member of this Appeal Board and hear this appeal. For those reasons, the application for recusal is dismissed.

MS AUERBACH:

Introduction

2 This application relates to an appeal by Ms Staples, the appellant in these proceedings, against the respondent's decision to take disciplinary action by way of a reprimand in the form of a written warning dated 24 July 2019. On 30 October 2019 the respondent filed an application seeking that I recuse myself from sitting as an Appeal Board member on the grounds of reasonable apprehension of bias. This interlocutory application was listed for hearing on 11 December 2019.

The respondent's case

3 As I understand the respondent's submissions, there is no suggestion of any actual bias, but of apprehension of bias by reason of my association with the Australian Medical Association (WA), and in turn, the appellant (see par 9 of the Schedule to the respondent's application).

4 Specifically it is submitted that I have a direct association with the AMA by reason of being a senior industrial officer of the AMA and that the AMA is in turn, directly associated with the appellant by reason of the appellant being a member of the AMA, with another officer of the AMA having provided some assistance and/or advice and/or advocacy to the appellant in the course of the disciplinary process.

5 The respondent has pointed to two email communications between Ms Thorp, who was an Industrial Officer of the AMA at the time, and the respondent, in which Ms Thorp sought to set up a meeting. The respondent also relied upon a couple of emails from the appellant to the respondent, in which the appellant

confirms that she has sought or is seeking advice from the AMA, prior to responding to the allegations of misconduct.

6 The respondent therefore submits that I would be placed in the invidious position of reviewing, and being open to critiquing, document(s) and/or correspondence produced by the appellant, potentially on the advice or with the assistance of the AMA, and that this could be perceived as an impediment to me bringing an impartial mind to the matter before the Appeal Board.

The legal principles

7 The test for determining whether there is a reasonable apprehension of bias has been set out by the High Court in *Johnson v Johnson (No3)* (2000) 201 CLR 488, where at par 11, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated:

> "….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 the judge is required to decide…".

8 The test is based on the rationale that justice must not only be done, but also seen to be done, in order to maintain public confidence in the administration of justice. In *Webb & The Queen* (1994) 181 CLR 41 at 69, Deane J stated that "the test is an objective one and the standard to be observed in its application is that of a hypothetical fair minded and informed lay observer". Furthermore at 76, "the standard which such an observer would require of each will vary according to the functions being discharged and the particular circumstances".

9 It was recognised in *Webb*, that there are at least four common categories, sometimes overlapping, of apprehended bias: by interest, by conduct, by association and by extraneous information. The third category, apprehended bias by association, is said to consist of cases where "the apprehension of pre-judgement or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings": *Webb* at 74.

10 However, as stated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, by Gleeson CJ, McHugh. Gummow and Hayne JJ, at 345:

> "The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed".

11 And, as noted by McHugh J in *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 461-462:

> "…no conclusion of apprehended bias by association can be drawn until the court examines the nature of the association, the frequency of contact, and the nature of the interest of the person associated, with the decision-maker. It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary interest or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances."

12 In the specific case of a member of the court or tribunal having previously provided legal advice to a party to the proceedings, *Re Polites; Ex Parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 confirms at 87-88 that:

> "A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before the tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate."

Issues arising

13 There is no suggestion of actual bias made by the respondent. For the avoidance of any doubt, however, I can categorically state that I have never had any dealings with the appellant, with respect to the matter before the Appeal Board or indeed any other matter. If I had provided advice or assistance to the appellant in relation to the matter before the Appeal Board, I would not have allowed myself to be nominated to sit on this appeal.

14 If any advice or assistance was provided to the appellant, it was provided by Ms Thorp, who was an industrial officer with the AMA until early October 2019.

15 From the material adduced by the respondent, it is difficult to ascertain what advice, if any, was provided by Ms Thorp. It appears that she attempted to assist in setting up a face to face meeting between the appellant and the respondent, and that she may have advised the appellant the she should "clarify all the errors" contained in the complaint about her. If this was indeed the extent of the advice, it seems to consist of little more than common sense and general assistance with the processes to be followed in the course of responding to an allegation of misconduct.

16 Even if more substantive advice was provided, however, and even assuming that any advice given was actually heeded, I have difficulty in accepting that the necessary threshold set out in *Hot Holdings* has been met for apprehended bias by association, in terms of addressing the nature of the association, the frequency of contact and the nature of the interest.

17 Moreover, with respect, the respondent appears to have misconceived the purpose of the appeal process. The Appeal Board is not examining any advice given to the appellant or actions taken by her in reliance on any advice, or the appropriateness of any responses provided by the appellant to the allegation. The Appeal Board will be required to examine the decision of the respondent in the disciplinary proceedings and the appropriateness of any such decision in the context of the events which gave rise to the disciplinary proceedings. It is the respondent's decision alone which is under review, not the correctness of any advice given to the appellant in relation to the disciplinary process.

18 Furthermore, it is necessary to consider the formation of the Appeal Board under section 80H of the *Industrial Relations Act 1979*. Section 80H of the Act seems to aim at striking a fair balance by requiring a nomination from both the employer and the union, with the Presiding Member of the Appeal Board being a member of the Commission.

19 It is inherent in the purpose and business of a union that it provides assistance to its members before, during and after any disputes a member may be having with their employer. That is what a union does. Similarly, the employer's own Human Resources or Industrial Relations consultants assist their managers and decision makers in going through performance management and/or disciplinary processes with their employees. That is what Human Resources or Industrial Relations advisers do.

20 Any person nominated by the employer and by the AMA will, by reason of their nomination alone, have some association with the body nominating them, either as an employee, or an officer or a member, or by being a co-worker or colleague (within the wider Department of Health) of the human resources adviser involved in the employer's decision making process. The nomination by either the employer or the union is not likely to be of a "person off the street" with no association with the nominating body, nor does that seem to be envisaged by the legislation. If there was a requirement for no association, s 80H of the Act would have said so.

21 Furthermore, regardless of any necessary association, Appeal Board members are required and agree to act independently. They do not sit on the Appeal Board as a member or an employee of the nominating body, and they do not represent the interests of the party which nominated them. They are to act and do act independently.

Conclusion

22 On the basis of the above, I do not consider I should accede to the respondent's application and I decline to recuse myself from continuing to sit on the Appeal Board to hear this appeal.

MS J LOVE:

23 I agree with Ms Auerbach's reasons in this application.

24 The nature of Ms Auerbach's employment with the AMA and the material submitted does not meet, in my view, the threshold for a reasonable apprehension of bias by association in accordance with the legal principles noted in these reasons.

25 The legislative construct of the *Industrial Relations Act 1979* would support some level of association by virtue of the requirements of s80H(4). Similar to Ms Auerbach's reasoning, the practical application of this section for an employer's representative is to ensure that they have had no dealings with the matter before the Appeal Board before accepting an employer's nomination.

26 I note the requirement for Appeal Board members to act impartially and independently. Whilst they are nominated by an association or employer, they do not represent the interests of the party that nominated them.

27 I support the dismissal of this recusal application.