IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 7**

	Reference No. HRRT 076/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**TE RINGA MANGU NATHAN MIHAKA**
	PLAINTIFF
AND	**HOUSING NEW ZEALAND CORPORATION**
	DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:
Mr RPG Haines QC, Chairperson
Ms DL Hart, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr TRMN Mihaka in person assisted by Ms K Raue as *McKenzie* friend
Ms FJ Cuncannon and Ms S Shaw for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **2 March 2017**

DECISION OF TRIBUNAL DISMISSING RECUSAL APPLICATION[1]

BACKGROUND

[1] The hearing of this case will resume on 3 and 4 April 2017. By email dated Sunday 19 February 2017 Mr Mihaka has applied for the recusal of Hon KL Shirley, a member of the Tribunal convened to hear this case and who participated in the hearing on 3 August 2016. In this decision we explain our reasons for dismissing the application.

[1] [This decision is to be cited as: *Mihaka v Housing New Zealand Corporation (Recusal Application)* [2017] NZHRRT 7]

History

[2] Mr Mihaka has been a tenant of Housing New Zealand (HNZC) since 28 November 2003.

[3] By letter dated 31 October 2014 he was given 90 days formal notice that the tenancy would end on 11 February 2015. On application by HNZC, the Tenancy Tribunal granted HNZC a possession order on 24 April 2015. Mr Mihaka has appealed against the grant of that order to the District Court. That appeal has been stayed pending determination of the present proceedings before the Tribunal.

[4] By statement of claim filed on 30 November 2015 Mr Mihaka alleges he has been indirectly discriminated against on the grounds of age and race.

[5] HNZC denies the allegations and the statement of reply filed on 23 December 2015 sought an urgent hearing given the temporary stay granted by the District Court.

[6] By decision dated 4 March 2016 the Tribunal referred Mr Mihaka's complaint back to the Human Rights Commission for mediation. See *Mihaka v Housing New Zealand Corporation (Referral Back to Human Rights Commission)* [2016] NZHRRT 8. Although the parties attended mediation on 14 March 2016 no resolution was reached. The Chairperson accordingly convened a case management teleconference on 8 April 2016. On the application of Mr Mihaka an adjournment to 15 April 2016 was granted.

[7] At the reconvened teleconference on 15 April 2016 a hearing date of 4 and 5 July 2016 was agreed to and case management directions given for the filing by the parties of their written statements of evidence. On the application of HNZC the hearing date was later adjusted to 3 and 4 August 2016 as its principal witness had been scheduled for a medical operation and would not be available on 4 and 5 July 2016.

[8] Mr Mihaka then sought an adjournment of the August fixture for an indefinite period so that he could prepare his case in the light of information requested from the New Zealand Police, information which he claimed had not been provided to him.

[9] By *Minute* dated 9 June 2016 the application was declined but revised case management directions had become necessary. The *Minute* also recorded that in preparation for the hearing the Chairperson had allocated Panel member Dr Huhana Hickey to be one of the three Tribunal members to hear these proceedings. By letter dated 2 May 2016 the Tribunal had given notice of this assignment and disclosed Dr Hickey herself was a tenant of HNZC. The parties were asked to advise whether they objected to Dr Hickey's participation in the case. By memorandum dated 5 May 2016 HNZC advised it did so object given what was said to be ongoing and past dealings between Dr Hickey and HNZC in respect of her tenancy. In view of this objection Dr Hickey recused herself. The *Minute* dated 9 June 2016 at paras [22] and [23] recorded:

> **The recusal issue**
>
> **[22]** It is correct that Panel member Dr Hickey is herself a tenant of HNZC and that by memorandum dated 5 May 2016 HNZC has objected to her participation in this case. In these circumstances Dr Hickey has recused herself. The bias test as set out in *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11] is whether a fair-minded and informed lay observer might 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 question the judge is required to decide.
>
> **[23]** The Panel members who will hear the case are (presently) the Chairperson and Panel members Ms Deborah Hart of Wellington and Mr Ken Shirley of Wellington.

[10] By email dated 10 June 2016 from Ms Raue, Mr Mihaka complained of the recusal of Dr Hickey and raised the possibility he would object to the participation of Mr Shirley in this case.

[11] By *Minute* dated 21 June 2016 the Chairperson explained to Mr Mihaka the legal test for identifying when circumstances give rise to an appearance or apprehension of bias. The *Minute* also provided the background information on Mr Shirley requested by Mr Mihaka. The *Minute* recorded that if Mr Mihaka intended applying for the recusal of Mr Shirley that application had to be filed and served no later than 5pm on Friday 1 July 2016. The *Minute* recorded that full and proper grounds were required to support any such application:

> **The recusal issue**
>
> **[9]** Mr Mihaka once again complains at the recusal of Dr Hickey. This issue has already been addressed in the *Minute* of 9 June 2016 at [22].
>
> **[10]** Then Mr Mihaka raises the possibility he will object to the participation of Mr Ken Shirley in this case.
>
> **[11]** As mentioned in the earlier *Minute*, the bias test as set out in *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11] is whether a fair-minded and informed lay observer might 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 question the judge is required to decide. In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [5] it was said such observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the decision-maker's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of the New Zealand judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. The case law also establishes that an allegation of bias cannot be made lightly. Proper grounds must be demonstrated and the factual enquiry is a rigorous one.
>
> **[12]** Mr Mihaka asks for background information on Mr Ken Shirley. That information follows:
>
> > Mr Shirley first entered Parliament in the 1984 elections when he stood as the Labour Party candidate in the Tasman electorate. He represented Tasman in the period 1984 to 1990 and held Cabinet rank as Minister of Fisheries, Associate Minister of Agriculture, Associate Minister of Forestry and Associate Minister of Health. In the period 1984 to 1987 he was a member of the Housing Corporation's allocation committee in Nelson. From 1996 to 2005 he was a list MP for the ACT New Zealand party and was at one point deputy leader.
> >
> > In 2006 Mr Shirley was appointed Executive Director of Organics Aotearoa New Zealand, the industry body representing the organic sector. In September 2007 he took up an appointment as the Chief Executive Officer of the Researched Medicines Industry Association. Since July 2010 he has been chief executive of the Road Transport Forum, representing road transport interests.
>
> **[13]** If Mr Mihaka is to apply for the recusal of Mr Shirley or of Ms Deborah Hart or of the Chairperson, that application must be filed and served no later than 5pm on Friday 1 July 2016. Full and proper grounds must be provided in support of any such application.

[12] No recusal application was filed by the deadline of 1 July 2016. However, by email dated 1 July 2016 Ms Raue made request on behalf of Mr Mihaka for further information regarding Mr Shirley, particularly "his position and beliefs regarding justice and social housing and other policy matters". The *Minute* issued on 7 July 2016 at para [16] ruled it was not appropriate for a Tribunal member to be interrogated on such matters but the *Minute* did provide further information about Mr Shirley's role on the HNZC Nelson allocation panel. The relevant paragraphs of the *Minute* follow:

The recusal issue

[15] The *Minute* of 21 June 2016 required any recusal application to be filed by 1 July 2016. As earlier mentioned, no such application has been filed. Instead Mr Mihaka requests further information regarding Mr Shirley:

> … regarding the involvement of Mr Shirley in both the Act party - such as information regarding his position and beliefs regarding justice and social housing and other policy matters, and also Mr Shirley's involvement with HNZC and his role on the allocation panel etc. It would appear that if Mr Shirley formerly worked for HNZC this would constitute a conflict of interest, particularly when viewed in the context of the commonly known policies of the Act Party.

[16] As to this it is not appropriate for a Tribunal member to be interrogated on "his position and beliefs regarding justice and social housing and other policy matters".

[17] Mr Mihaka requests more information about Mr Shirley's role on the HNZC Nelson allocation panel. He is accordingly advised Mr Shirley served in his capacity as the Labour member of Parliament for the Tasman Electorate. The Committee comprised representatives of community groups and was tasked with allocating the available state housing stock to tenants on a waiting list based on their respective needs. Mr Shirley has never been employed by HNZC. It is understood allocation committees were restructured or disestablished in the mid-1980s. Mr Shirley's membership of the Nelson allocation panel ended in 1987, some 29 years ago.

[18] If in the light of this information Mr Mihaka is to apply for the recusal of Mr Shirley, such application must be filed and served no later than 5pm on Friday 15 July 2016. Full and proper grounds must be provided in support of any such application.

[13] No recusal application was filed by the new deadline of 15 July 2016.

[14] The hearing commenced on the morning of 3 August 2016. At that hearing Ms Raue was recorded as saying on behalf of Mr Mihaka that no recusal application would be made in respect of Mr Shirley. See the transcript at p 17 line 25:

> We thought carefully about applying for the recuse [sic] of Mr Shirley but we didn't and we knew that he'd been on the Housing Corp allocation panel but we're dealing in good faith with everybody. We don't think that that means that he's biased or that his political leanings mean he's biased.

[15] As matters turned out, the hearing did not progress far on 3 August 2016 because Mr Mihaka applied successfully for an adjournment to enable him to approach the Director of Human Rights Proceedings with a request that the Director provide representation in these proceedings. The hearing was adjourned to 28 and 29 September 2016.

[16] Unfortunately owing to a series of mishaps the application for representation made by Mr Mihaka to the Director appeared to have been lost in transmission. Mr Mihaka sought a further adjournment. By *Minute* dated 21 September 2016 that application was granted and the hearing adjourned to 15 and 16 November 2016.

[17] That hearing was cancelled as a consequence of the 7.8 magnitude Kaikoura earthquake which struck at 12:02am on Monday 14 November 2016. All Ministry of Justice sites in Wellington were consequently closed while buildings were checked by engineers. The Tribunals Unit did not reopen until Wednesday 16 November 2016.

[18] On 30 November 2016 the Tribunal received a copy of an email sent by Ms Raue to Ms Shaw, one of the lawyers instructed by HNZC. In this email Ms Raue asserted that Mr Shirley "should have recused himself".

[19] Although the email in question was not addressed to the Tribunal the Chairperson issued a *Minute* on 2 December 2016 addressing (inter alia) the reference which had been made to Mr Shirley's recusal. The *Minute* relevantly stated:

> **[9]** Yet in her most recent email of 30 November 2016 (addressed to Ms Shaw, not the Tribunal) Ms Raue (and presumably Mr Mihaka) now contends Mr Shirley "should have recused himself" and his participation in the case is "strongly opposed":
>
> > We have received legal advice that confirms that Ken Shirley should have recused himself as he formally worked for HNZC and apparently received remuneration for doing so, and we strongly oppose his sitting in judgement on Mr Mihaka given his previous association with HNZC, as well as public statements made by Ken Shirley in which he implies that Maori in general are liars, and in particular after the manner in which Dr Hickey's recusal was engineered over a "perceived" conflict of interest over her own previous involvement with HNZC.
>
> **[10]** As to this, the *Minutes* referred to have provided clear guidance to Mr Mihaka as to what must be established by a party who claims a tribunal member is disqualified from hearing a case due to actual or apparent bias. He has also been given ample opportunity to file an application for recusal. No such application has been filed and indeed Ms Raue is on record as stating on 3 August 2016 that a decision had been made not to seek the recusal of Mr Shirley. It is also to be noted the allegations now made in respect of Mr Shirley have not been made in the context of any direct communication with the Tribunal. Nor has any application for recusal been filed.
>
> **[11]** On one view it is now too late for Mr Mihaka to raise a credible objection to Mr Shirley's participation in the forthcoming hearing. However, if Mr Mihaka is to apply for the recusal of Mr Shirley, that application must be filed and served no later than 5pm on Friday 16 December 2016. For the reasons set out in the earlier *Minutes*, full and proper grounds must be provided. All allegations against Mr Shirley must be particularised and supported by an affidavit. It is not acceptable for Mr Mihaka to simply repeat the vague and unparticularised allegations which appear in the email earlier referred to. Unless a factual foundation can be established it would be unfortunate were the application to be made because the law is clear: where an allegation of bias is made the factual inquiry must be rigorous. See *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62]:
>
> > First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air.
>
> **[12]** The relevant case law is collected in the Tribunal's recent decision in *Brown v NZ Post Ltd (Recusal Application)* [2016] NZHRRT 37 (1 December 2016).

[20] The *Minute* concluded by directing that any application by Mr Mihaka for the recusal of Mr Shirley be filed and served no later than 5pm on Friday 16 December 2016. The application was required to provide full and proper grounds for the application. It was also to be accompanied by a sworn affidavit and by submissions. The direction read:

> **[13.2]** Any application by Mr Mihaka for the recusal of the Hon Ken Shirley must be filed and served no later than 5pm on Friday 16 December 2016. That application must provide full and proper grounds for the application. The application must be accompanied by a sworn affidavit and by submissions.

[21] No such application was filed.

[22] Finally, by email dated Sunday 19 February 2017 from Ms Raue, Mr Mihaka "formally applied" for the recusal of Mr Shirley. The email is two sentences in length:

> As previously discussed we strongly oppose Ken Shirley sitting on the panel "judging" the application of Mr Mihaka and we wish to formally apply for his recusal on the grounds that he previously worked for Housing New Zealand and therefore has a conflict of interest, and that statements he made in parliament clearly demonstrate contempt for Maori and inferences that Maori are liars. The contrast between the ease with which Dr Hickey was recused and the

refusal of Ken Shirley to do the right thing is utterly outrageous and blatantly biased and prejudiced.

[23] It is to be noted this application is out of time. In addition it does not provide full and proper grounds for the application. There is no supporting affidavit or submissions. The allegations made against Mr Shirley are entirely unsupported.

RECUSAL – THE LAW

[24] The well-established test for apparent bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide. See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35 where there was unanimity in relation to the following passages from the judgment of Blanchard J at paras [3] to [5]:

> [3] There was no disagreement before us concerning the test for apparent bias. After some semantic differences, the test in the United Kingdom and the test in Australia have become essentially the same. In *Muir v Commissioner of Inland Revenue*, the Court of Appeal brought New Zealand law into line. In the Australian case of *Ebner v Official Trustee in Bankruptcy* the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, a Judge is disqualified "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". As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.
>
> [4] It was pointed out in *Ebner* that the question is one of possibility ("real and not remote"), not probability. The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:
>
> (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
>
> (b) Secondly, 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".
>
> [5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in *Helow v Secretary of State for the Home Department* that:
>
> > before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[25] The bias test was more recently succinctly expressed in *Siemer v Heron [Recusal]* [2011] NZSC 116, [2012] 1 NZLR 293 at [11]:

> [11] It is well-established that apparent bias arises only if a fair-minded and informed lay observer might 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 question the judge is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what is said that might lead a judge to decide the case

> other than on its merits and, secondly, to evaluate the connection between that matter and the feared deviation.

[26] In *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62] it was said that where an allegation of bias is made the factual inquiry should be rigorous:

> First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air.

[27] In *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1 at [66] the Court emphasised the statement by Blanchard J in *Saxmere* at [20] that the party alleging apparent bias must also articulate a logical connection between the alleged disqualifying factor and the "feared deviation" from the course of deciding the case on its merits. In the more recent decision of *A (SC 106/2015) v R* [2016] NZSC 31 at [16] the Supreme Court noted that judges should not recuse themselves without sufficient cause.

[28] All these principles apply with equal force to tribunals and to their members.

THE RECUSAL APPLICATION

[29] As mentioned, the recusal application is contained in a two sentence email from Ms Raue dated 19 February 2017. It is bereft of particulars and of evidence.

[30] The first ground is that Mr Shirley has previously worked for HNZC and therefore has a conflict of interest. The allegation is demonstrably incorrect. What Mr Mihaka was told in the *Minute* of 21 June 2016 is that in the period 1984 to 1987, at a time when Mr Shirley was Member of Parliament for Tasman, he was a member of the HNZC allocation committee in Nelson. When Mr Mihaka requested further information regarding Mr Shirley's role on the allocation panel, he was specifically told in the *Minute* issued on 7 July 2016 Mr Shirley has never been employed by HNZC. The allocation panel comprised representatives of community groups and was tasked with allocating the available state housing stock to tenants on a waiting list based on their respective needs. Mr Shirley's membership of the Nelson allocation panel ended in 1987, which was some thirty years ago.

[31] The second ground is that Mr Shirley has allegedly made statements in Parliament demonstrating "contempt for Maori and inferences that Maori are liars". No evidence has been produced to establish such statements have ever been made by Mr Shirley. If any genuine basis for the making of the allegations existed it would have been a simple matter for such evidence to be produced, particularly given the Parliamentary setting. The absence of such evidence is therefore significant. The truth of the matter is Mr Shirley has never spoken in the manner alleged.

CONCLUSION ON RECUSAL APPLICATION

[32] The recusal application made by Mr Mihaka is not only out of time but is based on an allegation which is demonstrably false (that Mr Shirley previously worked for HNZC) and an allegation which is scandalously false (the alleged statements made in Parliament).

[33] The allegations made by Mr Mihaka underline why in *Muir* it was said that where an allegation of bias is made the factual enquiry should be rigorous and why in *A (SC*

106/2015) v R it was said decision-makers should not recuse themselves without sufficient cause.

[34] In these circumstances Mr Mihaka has conspicuously failed to satisfy the legal requirements for recusal based on apparent bias. The application is entirely without foundation and is dismissed.

.....	.....	.....
Mr RPG Haines QC	**Ms DL Hart**	**Hon KL Shirley**
Chairperson	**Member**	**Member**