14/88

SUPREME COURT OF VICTORIA

POWER v THE EQUAL OPPORTUNITY BOARD and THE STATE of VICTORIA

Kaye J

23 February 1988

JUDICIAL AND QUASI-JUDICIAL OFFICERS – DISQUALIFICATION FOR BIAS – EQUAL OPPORTUNITY BOARD – HEARING OF COMPLAINT COMMENCED – PRESIDENT OF BOARD ENDORSED AS POLITICAL PARTY CANDIDATE – WHETHER BIAS OUT OF INTEREST SHOWN – WHETHER REAL LIKELIHOOD OF BIAS: *EQUAL OPPORTUNITY ACT* 1984, S46.

W., president of the Equal Opportunity Board (`Board') commenced to hear a complaint alleging discrimination against P, an inmate at the Kew Cottages. During the course of the hearing, W. became an endorsed candidate for the Legislative Assembly seat of Kew, drew the parties' attention to the question of bias and sought assurances from them that they were satisfied there was no bias or appearance of bias. One party was unable to indicate this and submitted that objection would have been made to the Board's continuing with the hearing due to certain statements attributed to W. in a newspaper. The statements related to allegations of waste and mismanagement by the Victorian Government in respect of another hospital in the Kew electorate. W. then disqualified herself on the ground that a reasonable suspicion may be engendered in the minds of the public that the complaint may not be decided on its merits. Upon originating motion for a declaration that the Board continue to hear and determine the complaint—

HELD: Order that the Board continue to hear and determine the complaint.
1. Expression of comment or opinion will not, *ipso facto*, establish bias unless there is a ground for concluding from the expression that there is a real likelihood of pre-judgment or lack of impartiality. Firmly established and reasonable apprehension means that the expression in the context in which it was made manifested lack of required judicial impartiality.

***R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, referred to.**

2. In the present case, W.'s candidature did not show bias out of interest because the questions to be decided by the Board did not involve any political implications. The questions required findings of fact with no political overtones. There was no real likelihood of bias engendered in the minds of the parties and fairminded members of the public would not reasonably suspect that the Board's decision would be likely to be influenced by W.'s political aspirations.

KAYE J: [1] By originating motion, the plaintiff seeks a declaration and orders in the course of proceedings before the Equal Opportunity Board by way of hearing and determination of a complaint pursuant to s46 (1) of the *Equal Opportunity Act* 1984 as amended by Act No. 10247 of 1985.

The plaintiff is the mother and litigation guardian of Geoffrey Allan Power, who is 29 years of age, and profoundly and multiply disabled. Since the age of six years he has been an inmate of the Kew Cottages, which is a residential training centre for intellectually disabled persons. The cottages are conducted and controlled by the Office of Intellectual Disabled Services, which is a division of the Community Services Victoria. The **[2]** Community Services is a department of the State of Victoria under the provisions of the *Public Service Act*.

On 14th May 1985, pursuant to s44 of the Act, the plaintiff on behalf of Geoffrey Allan Power (to whom I shall refer to as the "complainant") lodged with the Registrar of the Equal Opportunity Board a written complaint alleging discrimination against him by the State of Victoria. By his notice it was alleged that the complainant was subject to discrimination in his living conditions, by the unavailability of access to training and recreational programmes, and by a failure to provide specifically for his visual impairment. On 19th August 1986 the Commissioner for Equal Opportunity, having failed to resolve the complaint by reconciliation, referred the complaint to the Board for hearing and determination. Over a period of five days during the month of August 1987, the Board, comprising Mrs J Wade, as President, and Messrs. Dr L. Darvall and Mr C.

George, as members, heard the complaint and adjourned the further hearing. During four sitting days in October 1987 the Board further heard the complaint. It was listed for resumed hearing on 17th December 1987, when it was adjourned until 22nd February 1988, for which a full week was set aside.

On 18th February 1988, at the request of the President, the Board, counsel and solicitors for both parties, attended to consider the future conduct of the hearing of the complaint. The President was then and is now the endorsed Liberal Party candidate for the Legislative Assembly seat of Kew. A by-election for the seat, caused by the resignation of **[3]** the sitting member, will be conducted on 19th March. The President will be nominated for the seat before nominations close on 24th February. At the hearing on 18th February, the President advised the parties that it would be desirable for her to leave the Board as soon as possible, but that before doing so the hearing and determination of the complaint should be completed. She proposed that the case should continue on 22nd February, for which a full week had been allocated, and, if necessary, the Board would sit for longer than usual hours. By doing so, the Board anticipated that it would hand down its decision before the by-election. She then drew the parties attention to the question of bias, and noted that the case involved a Government institution in the electorate of Kew. She stated that she considered assurances from both parties that they were satisfied that there was no bias or appearance of bias should be given before the resumed hearing.

Counsel for the complainant announced that the complainant was anxious to bring the case to conclusion and considered that the hearing could be completed within the time frame proposed. Counsel added that her client was satisfied that there was no bias or appearance of bias on the part of the President. Counsel for the respondent stated that he did not consider the case could be completed by 26th February. He said that he would not be able to state whether his client was satisfied about the question of bias. Members of the Board indicated they would be prepared to sit on Friday, 19th February, during the week-end of 20th and 21st February, as well as during the following week days, in order to complete the hearing of the complaint, provided that the question of bias could be satisfactorily resolved.

Counsel for the respondent announced that he would not be available, due to other **[4]** commitments on 19th, 20th and 21st February. He added that if the question of bias had not been raised by the President, he would have objected to her continuing to sit, on the ground of certain statements attributed to her in "The Age" newspaper. Those statements related to alleged waste or mismanagement arising out of the conduct of St. George's Hospital, situated in the electorate of Kew, by the present Victorian Government.

In the course of announcing her ruling, the President said:

> "While I believe that I bring a fair and unprejudiced mind to the case, I consider that a suspicion may reasonably be engendered in the minds of the public that the case may not be decided on its merits. In reaching this view I have taken into account that the case involves a Government institution in the electorate of Kew and that one of the parties is the State of Victoria. After hearing counsel for the respondent, I also consider that it is doubtful whether I will be able to properly complete the hearing and hand down my decision in the case prior to 19th March 1988. It appears that the appropriate course is to disqualify myself from the further hearing of the matter and I do so. As the *Equal Opportunity Act* 1984 requires cases to be heard by the President and two other members of the Board, and as there is no provision in the Act for a case to be continued before two members, the case cannot proceed on 22nd February 1988."

The relief and remedies which the plaintiff now seeks in the present proceedings are as follows:

> 1. A declaration that the Equal Opportunity Board is required to continue to hear and determine the complaint between the plaintiff as complainant and the State of Victoria as respondent.
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> 2. A mandatory injunction requiring the Board to continue to hear and determine forthwith the complaint according to law.

[5] Constraints of time make it necessary that my judgment in this matter should be delivered *instanter*. For this reason, notwithstanding the competent and thorough manner in which submissions have been addressed to me by all counsel, I have not been able to make my own

researches of authorities as extensively as I would have wished had time permitted. Nevertheless, I am confident that the conclusion which I am about to deliver is my firm opinion.

I turn then to consider whether the President ought to have disqualified herself from further hearing the complaint on the ground of bias. There are various circumstances which may give rise to bias; its existence or potential might become demonstrable by different means. First, there is a bias through interest. This may arise by the judicial officer having some association or relationship with one or more of the parties, or by having a pecuniary interest in one of the parties such as shareholder in a company or membership of a club or organisation which is a party to the proceedings. In those instances, bias or the risk of bias is self-evident upon the disclosure of interest by the judicial officer. In other circumstances, bias might arise by an expression of an opinion or comment about a matter or the credibility of a person.

The requirement warranting disqualification for bias was discussed by the High Court in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 261-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11. In that case, the majority of the court, comprising Barwick CJ, Gibbs, Stephen, Mason JJ, after reviewing **[6]** and in the course of reviewing a number of authorities relating to the question of bias, in the passage which I am about to read, referred to the decision of the High Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100; (1953) ALR 461 where it was held that a delegate of the Australian Stevedoring Industry Board was not disqualified from holding an inquiry because he had made some comments from which it might well have been inferred that he had prejudged some aspects of the case. Their Honours then cited from the passage of the judgment of Dixon CJ and Williams, Webb and Fullagar JJ as follows: (at ALR p465)

> "But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions, though it is unfortunate that a Judge should have any, do not constitute such a bias nor even the expression of such opinions for it does not follow that the evidence will be disregarded', per Charles J in *R v The London County Council; Ex parte the Empire Theatre* (1895) 71 LT 638 at p639."

Their Honours' judgment continues:

> "The learned justices in that case appear to have considered that to warrant the grant of prohibition it is necessary that there should be shown a real likelihood of bias, and that the fact that reasonable persons would distrust the result is evidence of, or perhaps a consequence of, that likelihood. However, if doubts were left by that decision as to the correct approach to this question, they were removed by *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546; 43 ALJR 150. In that case it was **[7]** again submitted that observations made by the tribunal against which prohibition was sought suggested that it had prejudged the issue..."
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> **[8]** "It was held that the expression of an attitude of mind by members of the Commonwealth Conciliation and Arbitration Commission on a matter of principle would not justify a reasonable apprehension that those members might not bring fair and unprejudiced minds to the resolution of the question arising before them. In a joint judgment, delivered by all seven members then constituting the Court, it was said:
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> > "The common law principles of natural justice are well understood though they have been variously expressed. It is sufficient here in relation to that aspect of those principles which is called in aid by the applicant to recall the well known passages from *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, as cited and commented upon by Isaacs J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243; 16 ALR 149, and from *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER 233; 93 LJKB 129. A recent exposition is to be found in the judgment of the Master of the Rolls in *Metropolitan Properties Co Ltd v Lannon.* Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who came before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the

> subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

Their Honours then referred to cases of the Supreme Courts in the states where the principles of a reasonable suspicion of bias had been adopted and applied and continued:

> "The view that a judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial, and that if a judge does sit in those circumstances prohibition will lie, is not only supported by the balance of authority as it now stands but is correct in principle."

At page 263 Their Honours continued:

> "It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged **[9]** the case, they cannot have confidence in the decision. To repeat the words of Lord Denning MR which have already been cited, 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'".

The matter was put in somewhat summary form but completely again in *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293; 47 ALR 45; (1983) 57 ALJR 420, by the Court. After referring to *Watson's case*, Their Honours said:

> "That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

In the cases to which I have referred, the Court was concerned with bias which was self-evident from statements of interest of parties. But expression of comment or opinion will not *ipso facto* establish bias unless there is ground for concluding from the expression that there is a real likelihood of pre-judgment or lack of impartiality. Firmly established and reasonable apprehension, as I understand the words used by the authorities, means that the expression in the context in which it was made manifested lack of required judicial impartiality.

Applying these principles, I do not consider that the President of the Board, by her candidature as a Liberal Party member for the seat of Kew (could be said to show) bias out of interest. The three questions of discrimination to be decided by **[10]** the Board do not involve, nor was it suggested by Mr Woinarski, counsel who appeared for the State of Victoria, would involve, any political implications. Those questions require simply findings of fact, with no political overtones. In the event of the Board being satisfied of any one of the alleged complaints of discrimination, the board will be required to consider and determine what ought to be done to redress the complainant's grievance.

The powers given to the board upon the hearing of a complaint under s46(2) of the Act include:

> Power to order that a person with respect to whom complaint was made to refrain from committing any further act of discrimination,
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> To order the respondent to pay within a specified period to the person who made the complaint such damages as it thinks fit to compensate the last mentioned person for loss, damage, or injury suffered by the person in consequence of the act of discrimination,
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> To order the respondent to perform any acts specified in the order with a view to redressing any loss, damage or injury suffered by the complainant, and
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> To order that the complaint be dismissed.

From the matters put before me, it was not suggested that there would be any issue of damages which the board might have to consider in the event of the complaint of or complaints of discrimination being made out. However, Mr Woinarski suggested that in the exercise of those powers the President might appear to show some bias by requiring the State to provide funds where funds have not hitherto been applied. I do not accept that the President could be said to show

bias if she were to be of the opinion that some finding adverse to the government were required to be made or that some order under s46(2) detrimental to the State of Victoria were required to be made.

[11] Whether there is a real likelihood of bias to be engendered in the minds of the parties or in the public raises different considerations. First, in connection with the parties, Mr Woinarski had disclaimed that the State of Victoria has any such apprehension notwithstanding the circumstance that before the board he did not disclaim any such apprehension. However I accept that the State of Victoria has confidence in the President of the Board. The plaintiff, of course, has demonstrated and conceded before the Board that she has confidence in her. It is said that members of the public might consider that the President would not bring the required degree of impartiality to her task.

I accept that there has been and probably will be some degree of public interest in the outcome of the complaint. This has been brought about by newspaper and television publicity given to the hearing and matters raised by it. Whether the President, as the Liberal Party candidate for election, would be likely to create suspicion of her bias ought to be assessed by what fair-minded persons might think. No doubt some with strong political conviction might suspect she might not bring to her task that degree of impartiality that is required. But the criterion to be applied is not the suspicions of those with strong political convictions.

In my opinion the test is what fair-minded members of the public would consider, and they are persons not primarily with an interest in the outcome of the hearing of the complaint. I am satisfied that fair-minded persons could not reasonably suspect that any decision by the President would be **[12]** likely to be influenced by her political aspirations or ambitions. Further, in disqualifying herself the President acted prudently and fairly. Indeed she manifested a desire to be fair and place herself beyond suspicion. A member of the public, with knowledge of the self-disqualification, could not reasonably suspect or fear the President might determine the complaint with political bias and otherwise than upon the material properly before the Board.

I therefore consider that the disqualification of the President of herself, on the ground of bias, was not justified. In so judging, however, I am not to be understood in any way as criticising her. Indeed, notwithstanding what was said in the passage of the judgment of Mason J *In re JRL; Ex Parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, cited by Miles CJ in *R v Dainer; Ex parte Cooke* (1986) 84 FLR 305, I consider she acted prudently.

The other matter which arises in this case is the question of time. It is said that if the hearing were continued it would take some six days to complete the hearing on the issues of discrimination, and perhaps a further day or so would be required in the event of the issue of discrimination being found in favour of the complainant. Thus perhaps the further hearing would occupy ten days. Those are matters which are not relevant to the question of bias and whether or not the Board ought to continue to hear the complaint. They are matters for the Board itself to determine, and they are not matters upon which the jurisdiction of this court can be invoked. No doubt the Board will be able to set a time table of its own which would **[13]** enable it to complete the hearing before the commission of the President will expire in the event of her being successful in the by-election. It is declared that the First-named defendant, the Equal Opportunity Board, is not disqualified to continue to hear and determine the complaint No. 23/2186 between the plaintiff as complainant and the Second-named defendant as respondent.

It is ordered that the First-named defendant do continue to hear and determine forthwith the said complaint according to law. **[14]** I think costs should follow the event. The plaintiff ought not to bear the costs which have been, at least in part, incurred by the State of Victoria. It is ordered that the second named defendant pay the plaintiff's costs of and incidental to these proceedings. There will be leave to the plaintiff to amend the originating motion by adding the grounds set out in the notice. Beryl Joyce Power is appointed litigation guardian for the purpose of these proceedings.
