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# Tribunal Case Update

In *Stradford v Judge Vasta* [2023] FCA 1020 the Federal Court held a judge of the Federal Circuit Court liable for false imprisonment of a litigant purportedly for contempt of court. The Court held that the judge was not entitled to common law immunity due to serious and fundamental errors on his part which caused his actions to be without or in excess of jurisdiction.

In *Afegogo v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1128, a member failed to have the interpreter interpret all evidence, submissions and the member's comments on the applicant's case. The failures contributed to a finding of apprehended bias.

Also in this issue are two cases on bias by association with a party. In *BVV v Commissioner of Police* [2023] NSWCATAP 6 the NCAT Appeal Panel found that a member was not required to disclose that she had previously represented one party as counsel in unrelated proceeding, as the association was not a potentially disqualifying one.

In *Goldsmith v Legal Services and Complaints Committee* [2023] WASCA 136 the partial and inadequate disclosure of a member's association with a party did not support a finding that the other party had waived objection.

In *Sage v Commissioner of Taxation* [2023] FCA 1247 the Federal Court reflected on the implications of de novo review in a specialised jurisdiction. The Court upheld the AAT's refusal to require the respondent to produce external legal advice that had been provided to the primary decision maker, holding that it was not relevant to the de novo review that the AAT was required to undertake.

In *Parry Field Lawyers Ltd v Disputes Tribunal at Christchurch & Ors* [2023] NZHC 1829 the High

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Court of New Zealand determined that a body was a 'tribunal' within the meaning of s17(2) of the *Disputes Tribunal Act 1988* (NZ).

In *Long v Secretary, Department of Education* [2023] NSWCATAP 14, in the context of a parental leave policy, the NCAT Appeal Panel considered the vexed question of identifying the appropriate comparator for a complaint of direct discrimination on the basis of sex.

## Scope of common law judicial immunity

The following case note deals with the argument relating to the scope of a Federal Circuit Court judge's common law immunity from civil liability. In contrast to judges of many other inferior courts, the Federal Circuit Court judge did not enjoy statutory immunity from civil suit. This deficiency has since been corrected by legislation so far as the Federal Circuit and Family Court judges are concerned (see comment below). The implications of the Federal Court's reasoning for the immunity of tribunal members is considered in a comment that follows the case note. The case note and comment are based on contributions by Mr Jeremy Bonisch, an associate with the AAT.

### *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020

**Federal Court of Australia (Wigney J), 30 August 2023**

**Factual Background**

The applicant's ordeal began on 10 August 2018 when he attended the Federal Circuit Court (as it then was) before Judge Vasta ('the Judge') for what was meant to be the final hearing of his application for property adjustment orders under s 79 of the *Family Law Act 1975* (Cth) ('the Act'). Both the applicant (under the pseudonym 'Mr Stradford') and his ex-wife ('Mrs Stradford') appeared unrepresented. Mrs Stradford raised criticisms about the adequacy of the applicant's disclosure of his financial position. The Judge accepted these criticisms and told Mr Stradford that he would not hesitate to send him to jail if he failed to comply with further disclosure orders which the Judge proceeded to make ('the Orders') ([22]). The Orders included a notation that should the Court on the adjourned date form the view that the applicant had not made full and frank disclosure in accordance with the Orders, Mr Stradford would be dealt with for contempt of the Orders ([24]).

The matter came before Judge Turner for directions on 26 November 2018. Mrs Stradford's evidence was that the applicant had again failed to disclose several categories of documents that he was required to disclose ([26]). Mr Stradford claimed that he had produced all that he could ([27]). Judge Turner adjourned the matter until 6 December 2018 'for hearing of the contempt application'. Importantly, Judge Turner did not make a finding that Mr Stradford was in contempt or that he was non-compliant with the Orders ([28]).

Mr and Mrs Stradford appeared before Judge Vasta on 6 December 2018. Judge Vasta mistakenly believed that Judge Turner had *already* made the finding that the applicant had not made full and frank disclosure, and accordingly that he was in contempt of the Orders ([30], [32]), [360]. Mr Stradford endeavoured to explain that he had made disclosure to the best of his abilities. Mrs Stradford maintained that the disclosure was deficient but made no application or submission that Mr Stradford should be found in contempt. At this point, the Judge indicated he was prepared to deal with the applicant for contempt. Prior to doing so he adjourned the matter briefly to allow the parties an opportunity to settle the matter.

The parties were unable to reach a settlement on disclosure. When the hearing resumed, the Judge said to Mr Stradford 'So I hope you brought your toothbrush' ([34]). The matter was then adjourned until later that day, when the Judge delivered an ex-tempore judgment finding Mr Stradford in contempt and sentencing him to 12 months imprisonment effective immediately.

Mr Stradford spent six days in custody before the sentencing order was stayed pending an appeal. The Full Court of the then Family Court of Australia, unanimously allowed the appeal, stating: 'to permit the declaration and order for imprisonment to stand would be an affront to justice' (*Stradford and Stradford* [2019] FamCAFC 25 [9]).

**Scope of judicial immunity**

Mr Stradford commenced proceedings in the Federal Court of Australia claiming

that Judge Vasta had committed the torts of false imprisonment and collateral abuse of process. After concluding that the tort of false imprisonment had been made out against the Judge ([197]), Wigney J proceeded to consider the Judge's submission that as a judge he was immune from civil suit at common law ([198]). His Honour rejected the Judge's submission that the distinction of common law judicial immunity between superior and inferior judges had been abolished ([330]; cf [318]-[332]). After considering a long line of authorities ([199]-[349]), Wigney J concluded that the common law immunity of an inferior court judge may be lost and the judge held civilly liable in each of the following circumstances:

- 'Where the judge makes an order … in which the judge does not have "subject-matter" jurisdiction' to hear or entertain the matter ([343]);
- in exceptional circumstances, where a judge has subject-matter jurisdiction but 'makes an order without, or outside, or in excess of the jurisdiction' ([344]);
- in exceptional circumstances, where a judge 'is guilty of some gross and obvious irregularity in procedure, or a breach of the rules of natural justice other than … merely narrow technical [breaches]' ([345]); and
- in exceptional circumstances, where a judge '[makes] an order, or [imposes] a sentence, for which there was no proper foundation in law, because a condition precedent for making that order or sentence has not been made out' ([346]).

**Circumstances that deprived the Judge of immunity**

In the present case, Wigney J found that four separate reasons 'considered either individually or cumulatively, deprived the Judge of common law judicial immunity' ([372]).

The first was the Judge's failure to make a finding that Mr Stradford was non-compliant with the Orders and that he was in fact in contempt ([359]). The Judge had proceeded on the basis that Judge Turner had made a finding of contempt at the directions hearing on 26 November 2018. Wigney J found that the Judge 'plainly should have been aware that [Judge Turner] had made no such findings' ([360]). The result of the Judge's failure to find that Mr Stradford was in fact in contempt meant there was no legal basis upon which an imprisonment order could be made ([361]). Accordingly, the Judge had acted without, or in excess of jurisdiction ([359], [361]).

The second reason for loss of immunity was the Judge's failure to satisfy himself of certain matters under either Pt XIIA or Pt XIIB of the Act ([362]). The making of the required findings under one of those provisions was a condition precedent to the exercise of the power to imprison for contempt.

Third, the Judge was 'guilty of a 'gross and obvious irregularity of procedure' due to his failure to comply with any of the procedures for contempt prescribed in r 19.02 of the *Federal Circuit Court Rules* ([366]).

Fourth, the Judge was guilty of 'a gross denial of procedural fairness and breach of the rules of natural justice … more generally' ([369]). Referring to the decision of the Full Court of Family Court, Whitney J said that Judge Vasta had pre-judged that the alleged contravention of the order would constitute a contempt within the meaning of the Family Law Act; pre-judged the penalty for the contravention without first knowing the particulars of the alleged contravention; performed the roles of prosecutor, witness and judge; and made findings concerning the alleged contravention without any evidentiary foundation. (at [57]).

On each ground, Wigney J held that Judge Vasta had acted without or in excess of jurisdiction. Mr Stradford had been imprisoned under an order and warrant that were invalid and of no legal effect from the outset ([197]).

**Conclusion and Orders**

Wigney J held that Judge Vasta was not protected by common law judicial immunity because he acted outside of or in excess of his jurisdiction in making the imprisonment order ([555]). Therefore, the Judge was liable to Mr Stradford for false imprisonment ([374]-[375].

Judgment was entered in favour of Mr Stradford against the Judge and other respondents for general and aggravated damages, and against the Judge for exemplary damages also, for false imprisonment and deprivation of liberty. Total damages awarded to the applicant under all heads and against all respondents amounted to $309,450.

### Comment on the immunity of Tribunal Members

It is well established that superior court judges have a wide-ranging immunity and are not liable for anything they do while acting judicially. 'Acting judicially' is generally defined as acting bona fide as a judge with the belief (or mistaken belief) that they have jurisdiction (*Sirros v Moore* [1975] QB 118). The immunity extends also to administrative acts.

The decision in *Stradford* concerns the immunity of an inferior court judge. Wigney J rejected the contention that the distinction of judicial immunity between superior and inferior judges had been abolished ([330]; cf [318]-[332]). Wigney J acknowledged there may be sound policy reasons why that distinction should be abolished but concluded that that was a matter for the legislature or the High Court, and not for a single judge of the Federal Court (at [332]).

Some jurisdictions have already extended the scope of judicial immunity to inferior court judges. For example, section 44B of the *Judicial Officers Act 1986* (NSW) gives all judicial officers the same protection as a judge of the NSW Supreme Court. In November 2023, the Commonwealth Parliament passed the *Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023* which extends to judges of the Federal Circuit and Family Court of Australia (Division 2) the same judicial immunity that applies to judges of Division 1 of the Court.

The tribunal Acts establishing the AAT (Cth) and each of the Civil and Administrative Tribunals (CATs) of the States (including WA's State Administrative Tribunal) grant members the immunity of a superior court judge. Some other tribunal Acts confer similar protection on members, such as the *Personal Injury Commission Act 2020* (NSW) sch 2 s 4, and the *Mental Health and Wellbeing Act 2022* (Vic) s 335(1) (Mental Health Tribunal of Victoria).

Many tribunal Acts confer protection from suit on members by specifying conditions under which members enjoy immunity. A common form of wording is contained in the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 147 which provides that a member is not liable for an act done or omitted to be done in good faith in the actual or purported exercise of a power or function as a member or under the Act. A similar formulation is found in the *Immigration Act 2009* (NZ) sch 2 cl 6 (Immigration and Protection Tribunal).

A further example is the *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 116, which protects ACAT members from personal liability for conduct done honestly and without recklessness in the exercise of a function under that Act or in the reasonable belief that the conduct was in exercise of a function under the Act.

Whether tribunal members exercising *persona designata* functions, such as individually nominated AAT members who issue warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) Part 2-5 enjoy immunity pursuant to the immunity provisions in AAT's legislation, or whether (and to what extent) they have immunity under the legislation which authorises the particular function, is arguably unclear.

## Apprehended bias - failure to translate

A decision by a tribunal member to dispense with a translation of key parts of a contested hearing for the benefit of a party may be a breach of procedural fairness. In some circumstances, it may also contribute to a reasonable apprehension of bias.

In the following case, the Federal Court (Colvin J) made a broad assessment of the conduct of a senior member as documented in the transcript of a hearing. His Honour found that the senior member's conduct was likely to create in the mind of a fair-minded observer the impression that he 'had made little to no effort to ascertain [the applicant's] position', and also had 'strong preconceived views in favour of the [respondent's] position' ([69]). One factor contributing to this impression was that the senior member dispensed with a full (or indeed any) translation for the applicant of key parts of the hearing including oral evidence, the respondent's closing submissions and the senior member's evaluative remarks about the applicant's case.

The following edited case note was contributed by Mr Aaron Wallender, an associate at the AAT.

## *Afegogo v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1128

**Federal Court of Australia (Jackman J), 21 Sept 2023**

The applicant is a citizen of Samoa and was in Australia on a Temporary Work visa when, in February 2022, he was convicted of an offence and given a custodial sentence. The AAT, constituted by a senior member, affirmed a decision of a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs not to revoke the cancellation of a visa held by the applicant (the Decision). The applicant applied to the Federal Court for judicial review of the Decision on the ground that the conduct of the senior member in the hearing gave rise to apprehended bias.

In the hearing before the Tribunal, the applicant was self-represented. He had no command of the English language and was entirely reliant on the interpreter to be able to follow the course of the hearing. ([18]).

### Consideration by the Court

Jackman J allowed the application for review for the reasons summarised below.

The Court evaluated specific instances of conduct by the senior member, within the broader context of the entire hearing, as they might appear to a fair-minded observer ([14], (11), (13)], [69]).

The Court observed that the applicant was not provided with an opportunity to give oral evidence-in-chief before he was cross-examined ([21]).

The senior member initially decided that there was no need for the cross-examination of the applicant's witness to be interpreted. When the applicant said that he wanted to know what the witness had said, the senior member allowed the cross-examination to be repeated in summary form and intepreted ([25]).

#### *Closing submissions*

The senior member did not see any need for the respondent's oral closing submissions to be interpreted except in 'precis' form. This deprived the applicant of the opportunity to appreciate the points made against his case ([55]).

His Honour found that the senior member 'took control' of the respondent's closing submissions. The Court remarked that such a 'highly interventionist approach' during submissions is often said to give rise to apprehended bias ([56]).

The concerns expressed by the senior member about the applicant's case as documented in the transcript of the hearing were not interpreted ([57]). They were made before the applicant had an opportunity to make his closing submissions ([58], [62]). The statements included the senior member's evaluation of the seriousness of the applicant's offending; the factors that might be said to weigh in his favour; the factors relating to the applicant's connection to minor children in Australia; and the expectations of the Australian community. His Honour noted that '[t]here was nothing provisional about the way in which most of the [senior member's] interventions were put' ([72]).

Jackman J determined the senior member did not at any point make clear to the applicant the extensive concerns he held regarding the application for review. His Honour concluded that such a consistent failure 'might be taken by a fair-minded observer to indicate that [the senior member] had no interest in what [the applicant] had to say about those concerns' ([64]).

Looking at the senior member's conduct throughout the hearing, His Honour found that the hypothetical observer might well have concluded that the senior member had made up his mind and was not open to being persuaded by the applicant's submissions ([72]).

### Order

The Court set aside the Tribunal's decision and directed that the review be conducted afresh by a differently constituted Tribunal.

# Relevance of legal advice in de novo review

The following case considers the scope of the AAT's power under s 37(2) of the AAT Act to order the production of a document to the Tribunal. The Tribunal refused an application for an order requiring the Commissioner of Taxation to produce external legal advice provided to the primary decision maker. The Federal Court (Colvin J) agreed with the Tribunal that the legal advice was not 'relevant' to the Tribunal's review for purposes of s 37(2).

The Court's reasoning reflects on the role of a tribunal undertaking de novo review. After examining sections 7, 17A(f) and 17H of the AAT Act, the Court commented that members exercising the AAT's review jurisdiction may be expected to possess the competence to ascertain and apply the relevant law. While the AAT may consider submissions on legal issues, it does not rely on external legal advice to understand its powers and the law which it is to apply ([14]).

## *Sage v Commissioner of Taxation* [2023] FCA 1247

**Federal Court of Australia (Colvin J), 19 Oct 2023**

The applicant Mr Sage applied to the Administrative Appeals Tribunal ('the Tribunal') for review of a decision by the respondent dismissing his objection to assessments of his income tax liabilities and penalties. Before the Tribunal, Mr Sage sought production by the respondent of external legal advice that had been provided to the person who made the decision under review. The Tribunal declined to require the production of the advice under s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the Act') as it was not satisfied that that advice might be relevant to the de novo review that it was required to undertake.

Mr Sage applied to the Federal Court for judicial review of that decision, arguing that the Tribunal had made a jurisdictional error of law by taking a legally erroneous view as to what was relevant for the purposes of s 37(2). He argued that the legal advice to the Commission was 'relevant' for the purposes of the Tribunal's power under s 37(2) because it concerned legal matters that the Tribunal was required to decide, namely, whether Mr Sage was liable to pay income tax and penalties.

Mr Sage also relied on the Tribunal's power in AAT Act s 40A(1)(b) to summons a person to produce a document. It was accepted by the parties that if the case failed under s 37(2) it would also fail under s 40A(1)(b) ([33]).

**The Court's consideration**

The Court found that the Tribunal was correct in its understanding of the nature and extent of its power under s 37(2) and had correctly identified the question for decision as being 'whether the Tribunal was satisfied that the documents *may be* relevant to the review by the Tribunal' ([39]) (emphasis in original).

His Honour noted that the test of relevance in 37 of the Act is that the documents to be produced are those which may be relevant to the review of the decision to be undertaken by the Tribunal ([16], [71]). His Honour observed that the Tribunal's jurisdiction 'is to determine *for itself, on the material before it*, the decision which can, and which it considers should, be made' ([12] (his Honour's emphasis)), quoting *Frugtneit v Australian Securities and Investments Commission* [2019] HCA 16, [51]). The Tribunal considers the same question as was addressed by the Commissioner, but 'is not concerned with identifying whether there was error in any aspect of the way the original decision was made' ([12]). As a specialist and independent tribunal determining the issues afresh, the Tribunal must form its own view on the law ([14], [71]).

The Court accepted the correctness of the Tribunal's view that to be 'relevant' for the purposes of s 37(2), 'the documents must contain material which bears upon the material findings to be made by the Tribunal as to the foundation for its decision' ([68], [69], [72]). In reaching this conclusion, the Court relied upon the ruling of Bromwich J in *Commissioner of Taxation v ACN154 520 199 Pty Ltd (in liq)* [2018] FCA 1140.

**Orders**

The application for review was dismissed.

## Disclosure of association with a party

The following two cases apply principles from *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 [69]-[70] relating to a member's disclosure to the parties of a potentially disqualifying association with a party to the proceedings.

In *BVV v Commissioner of Police*, the NCAT Appeal Panel found that the mere fact that a tribunal member had previously represented one party as counsel in unrelated proceedings did not disqualify her from the proceedings. The member was not required to disclose the association, and no reasonable apprehension of bias arose from her non-disclosure.

In *Goldsmith v Legal Services and Complaints Committee*, a tribunal member disclosed the existence of an association with the respondent but did not disclose the details which might have led a fair-minded observer to reasonably apprehend bias. In these circumstances the appellant could not be said to have waived objection to the constitution of the tribunal.

### *BVV v Commissioner of Police* [2023] NSWCATAP 6

**Civil and Administrative Tribunal NSW Appeal Panel (I Coleman SC ADCJ and T Simon, Principal Members), 11 Jan 2023**

In an appeal to the Civil and Administrative Tribunal NSW Appeal Panel ('Appeal Panel'), the appellant, BVV contended that a Senior Member constituting the Tribunal made an error of law in declining his application to disqualify herself from the proceedings. The basis for that claim was that prior to her appointment to the Tribunal, the Senior Member had appeared as counsel for the respondent in three matters.

The Appeal Panel found that the Senior Member was correct in her finding that BVV had failed to demonstrate how her previous appearances as counsel for the respondent might impact her decision making in relation to the issues in the privacy proceedings commenced by BVV ([35]).

In relation to BVV's argument that the Senior Member had an obligation to disclose to the parties that she had previously acted as counsel for the respondent, the Appeal Panel cited the joint reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 [69] ('*Ebner*') where their Honours stated:

> As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying.'

Their Honours added that a failure to disclose does not of itself give a party a right to have the judge withdraw from hearing the matter, nor does it provide a ground in procedural fairness to set aside the ultimate decision. At most the non-disclosure is relevant only to the extent that it might 'cast some evidentiary light on the ultimate question of reasonable apprehension of bias' (*Ebner* [70]).

Applying these principles, the Appeal Panel found that the Senior Member had no obligation to raise the matter with the parties nor to disqualify herself. The mere fact that the Senior Member had represented the respondent was not potentially disqualifying, so there was no need for her to disclose it ([31]).

The Appeal Panel dismissed the appeal.

## Partial disclosure – no waiver

In the following case a superior court declared that if a tribunal member discloses an association, the member should not withhold facts which affect the parties' assessment of whether the member is affected by a reasonable apprehension of bias.

An argument of waiver in these circumstances is unlikely to succeed. A litigant cannot be said to waive the right to object to a particular member sitting in the case if the member has withheld the essential facts on which a successful objection might be based.

Vaughan JA, who agreed with Buss P and Hall JA on the outcome, analysed the waiver issue differently. His Honour applied the principle in *Charisteas v Charisteas* [2021] HCA 29 [23] that there can be no waiver without informed consent ([67]). The non-disclosure of facts material to forming a reasonable apprehension of bias negates the implication of waiver from the absence of an objection.

## *Goldsmith v Legal Services and Complaints Committee* [2023] WASCA 136

**Supreme Court of Western Australia Court of Appeal (Buss P, Vaughan JA and Hall JA), 7 Aug 2023**

The State Administrative Tribunal ('the Tribunal') found that the appellant solicitor, Mr Goldsmith had engaged in professional misconduct and unsatisfactory professional misconduct and made an order recommending his suspension from the practice of law for 12 months.

A crucial issue in the case was whether Mr Goldsmith and the complainant barrister had agreed in a phone conversation to defer payment of the complainant's fees. The parties gave conflicting evidence about that conversation. In giving its reasons for preferring the complainant's account, the Tribunal made adverse findings about Mr Goldsmith's credibility.

Mr Goldsmith appealed to the Court against the Tribunal's orders on the ground (Ground 1) that the prior relationship between the complainant and a Deputy President, being one of three members that constituted the Tribunal, gave rise to a reasonable apprehension of bias.

The Deputy President had made a disclosure of the relationship to the parties at a directions hearing prior to the hearing. No application was made for the Deputy President to disqualify himself. The respondent argued that Mr Goldsmith had waived his right to object to the constitution of the Tribunal by allowing the hearing to proceed.

### The Court's consideration

The Court unanimously found Ground 1 of the appeal to be established. Vaughan JA delivered a separate judgment agreeing with Mazzo and Mitchell JJA but with a different theoretical analysis on the waiver question.

### Was the relationship disqualifying?

The Court held that the existence of the prior relationship in the terms disclosed by the Deputy President was held to be insufficient by itself to give rise to apprehended bias ([25]. The Deputy President had disclosed that he and Mr Goldsmith had both served on the board of a barristers' chambers. However, the Deputy President failed to disclose that he and the complainant had served concurrently for over eight years, and that the relationship had continued until around two years prior to the Tribunal hearing. These undisclosed facts, the Court said, go to the 'nature, duration, intensity and proximity' of the relationship that are weighed in determining whether a prior association is disqualifying ([25], [27], [84]).

Mazza and Mitchell JJA (Vaughan JA agreeing) said that the 'logical connection' between these undisclosed facts and a reasonable apprehension of bias 'arises from a combination of:

1. the likelihood that the Deputy President would have formed a view of the honesty and reliability of the complainant while they were directors; and
2. the impact of that view on the assessment of the credibility and reliability of the complainant's evidence on a critical issue in the disciplinary proceedings ([26]).

A fair-minded observer informed of those circumstances might reasonably apprehend that the Deputy President's preconceived views might operate consciously or unconsciously to deflect him from assessing the credibility and reliability of the complainant's evidence solely on the basis of his evidence given before the Tribunal ([8], [20], [21], [30], [31], [33]]).

In those circumstances a reasonable apprehension of bias arose. In the absence of waiver, the Court held that the Deputy President should not have sat on the Tribunal.

Applying the High Court decision in *QYFM v Minister for Immigration* [2023] HCA 15, the Court held that the Deputy President's participation in the proceedings deprived the Tribunal as constituted of jurisdiction ([9]. No inquiry was required into the actual effect the Deputy President's participation may have had on the outcome of the case ([10], [24]).

### The waiver argument

A party to proceedings may waive their right to object to a tribunal member hearing and determining the case. However, the Deputy President failed to disclose facts which were essential to a finding that a reasonable apprehension of bias arose ([46]). Mr Goldsmith was under no duty to make inquiries to ascertain further details ([10], [90]). The result was that Mr Goldsmith lacked knowledge of the circumstances which would

give rise to a reasonable apprehension of bias on the part of the Deputy President ([47]). He could not be said to have waived his right to object to the Deputy President's participation in the hearing ([10], [67], [82]) (Mazza and Mitchell JJA)).

While agreeing with the finding of Mazza and Mitchell JJA that there was no waiver, Vaughan JA analysed the issue in terms of informed consent. He noted that the High Court in *Charisteas v Charisteas* [2021] HCA 29 [23] stated that there could be no waiver without informed consent ([67]). While the authorities had not always expressed the requirement in terms that the informed party must be 'fully aware' of the circumstances from which a reasonable apprehension of bias might arise, he took this to be the requirement for a finding of waiver ([71]). His Honour found that, given the inadequacy of the Deputy President's disclosure, Mr Goldsmith was in no position to make an informed decision whether to object to the constitution of the Tribunal or to continue with the hearing ([86]. Therefore, Mr Goldsmith could not be said to have waived his right to object to the Deputy President sitting on the Tribunal ([80]).

**Orders**

Leave to appeal was granted, the appeal was allowed and specified orders of the Tribunal set aside. The matter was sent back for reconsideration by a differently constituted Tribunal, with the hearing of further evidence. (The latter order was made because all members had made findings as to credibility in the earlier proceedings ([11])).

## What is a tribunal?

In Issue 1 of 2023 we reported a decision in which the District Court of New Zealand held that a Standards Committee administered by the New Zealand Law Society was not a 'tribunal' within the meaning of s 17(2) of the *Disputes Tribunal Act 1988* (NZ). The Court examined the Standards Committee's institutional features and the scope of its powers, laying particular weight on the breadth of its ancillary powers and functions and the extent of its institutional independence from the Law Society.

In this issue we report the subsequent decision of the High Court of New Zealand (Gendall J), granting the law firm's application for judicial review of the District Court's decision. The High Court declared that the Standards Committee is a 'tribunal' within the meaning of s 17(2) when exercising its function under the *Lawyers and Conveyancers Act 2006* ('LAC Act') to determine a dispute as to the quantum of a lawyer's fee.

The Court focussed on the particular statutory powers and functions that the Standards Committee exercises when making a fee determination, and the clear statement in s 161 of the LAC Act that its determination is final and conclusive as to the quantum. The Court also noted that its interpretation was consistent with the clear legislative policy in s 17 to stop claims already determined elsewhere from being re-litigated before the Disputes Tribunal.

### *Parry Field Lawyers Ltd v Disputes Tribunal at Christchurch & Ors* [2023] NZHC 1829

**High Court of New Zealand (Gendall J), 13 July 2023**

Ms Neilsen filed a claim against Parry Field Lawyers ('PFL') in the Disputes Tribunal alleging that the law firm had charged her incorrectly. PFL submitted that s 17(2) of the *Disputes Tribunal Act 1988* (NZ) ('the DT Act') precluded the Disputes Tribunal from considering the claim relating to fees which had already been determined by the Standards Committee. The Disputes Tribunal determined that it had jurisdiction and proceeded to dismiss Ms Nielsen's claim on the merits.

On appeal, the District Court held that a Standards Committee was not a 'tribunal' within the meaning of s 17(2). Accordingly, the Disputes Tribunal did not act outside its jurisdiction in determining Ms Nielsen's claim.

PFL applied to the High Court for judicial review of the District Court's decision.

**Legislative framework**

The Disputes Tribunal is established by the DT Act and its general powers are defined by the Act. The key issue in the case concerned the scope of the limiting provision in section 17(1)(b) of the Act. The effect of the provisions was that where 'proceedings before [an] other court or tribunal were commenced before the claim

was lodged with … the Tribunal' (s 17(1)(b)) then s 17(2) applies. It provides:

> the issues in dispute to which those proceedings relate … shall not be the subject of proceedings between the same parties in the Tribunal unless the proceedings are transferred to the Tribunal from a court, or the claim before the other court or tribunal is withdrawn, abandoned or struck out.

The question for determination was whether the Standards Committee in determining the fee dispute is a 'tribunal' for the purposes of s 17 of the DT Act.

**The Court's consideration**

Gendall J noted that a Standards Committee is empowered by s 161 of the *Lawyers and Conveyancers Act 2006* (NZ) ('LAC Act') to determine the quantum of a disputed fee for legal services, and its certificate on a review of the determination is expressed to be 'final and conclusive as to the amount due' ([44], citing s 161(3), (4) of the LAC Act). While a court proceeding can challenge a client's liability to pay a lawyer's fee, his Honour took it to be 'well-settled' that the quantum is finally determined by the Standards Committee ([55]).

The Court held that the Standards Committee, when performing its function of determining a legal fees complaint, is a 'tribunal' within the meaning of s 17 of the Act ([55]). His Honour found that 'as a specialist tribunal it is clearly acting in a quasi-judicial manner in that determination' ([51]). In making its determination it is empowered by the LAC Act to enquire into disputed questions and adjudicate matters, give decisions and 'to administer justice with requirements in many ways similar to a court'. His Honour J found that the circumstances in the present case fell within section 161(4) of the LAC Act which provides that a costs quantum complaint is to be regarded as 'finally disposed of' ([51]).

His Honour noted that s 17 of the Act was 'entirely consistent with the important principle of finality in litigation' and was designed to prevent the re-litigation of matters finally determined elsewhere ([53]).

**Order**

The judicial review application succeeded. His Honour granted declarations that:

a. the Tribunal's decision of the Tribunal was ultra vires;

b. the Tribunal erred in failing to find that it lacked jurisdiction to hear Ms Nielsen's claim; and

c. section 17(2) of the Act excludes the Tribunal from seizing jurisdiction over a fee complaint which had been determined by the Standards Committee.

## The comparator in direct discrimination

Discrimination Acts commonly distinguish between direct discrimination on the ground of a characteristic such as sex or disability, and indirect discrimination on the same ground. Direct discrimination comprises treating the aggrieved person who possesses a specified characteristic less favourably than the discriminator would treat a person without that characteristic 'in circumstances that are the same or not materially different'. This test requires a comparison to be made between the treatment afforded to the aggrieved person and a person, real or hypothetical without the aggrieved person's characteristic.

In *Purvis v New South Wales* (2003) 217 CLR 92 [224] ('*Purvis*') the High Court considered a claim of direct discrimination in education by a school on the ground of disability. Daniel Hoggan had an acquired brain injury which caused him to exhibit violent behaviour, leading the school to suspend and eventually expel him. The appellant argued that as Daniel's behaviour was part of his brain disorder, an appropriate comparator was a student without his disorder *and* without the violent behaviour that results from it.

The High Court majority considered that the words 'in circumstances that are the same or are not materially different' in s 5 of the *Disability Discrimination Act 1992* (Cth) ('DDA') allows the Court to impute Daniel's violent behaviour to the hypothetical comparator. Accordingly, the comparison is with the manner in which the school has treated or would treat a student who exhibited similar behaviour but did not have the disability.

Although *Purvis* was decided in the context of the DDA, the High Court's narrow approach to defining the comparator has made it more difficult for complainants to demonstrate direct discrimination under other Acts. In the following case, the principles in *Purvis* were applied in a complaint of direct discrimination on the ground of sex.

## *Long v Secretary, Department of Education* [2023] NSWCATAP 14

**Civil and Administrative Tribunal of NSW Appeal Panel (Senior Members R Dubler and E Bishop), 27 Jan 2023**

The appellant, Mr Long, appealed against a decision of the NSW Civil and Administrative Tribunal ('the Tribunal') with respect to the dismissal of his complaint of direct and indirect discrimination on the ground of sex.

### The complaint

Mr Long was the biological father and primary caregiver of twins who were born through a surrogacy arrangement. His employer, the NSW Department of Education ('the Department') granted him 14 weeks paid leave under the Department's Altruistic Surrogacy Leave Policy ('the ASL Policy') conditional upon him producing a parentage order under the *Surrogacy Act 2010* (NSW).

Mr Long identified the Department's discriminatory conduct as requiring him to get a parentage order or repay the leave payments received. That conduct was said to comprise discrimination in employment under the *Anti-Discrimination Act 1977* (NSW) ('ADA') s 25; direct discrimination under s 24(1)(a) and indirect discrimination under s 24(1)(b).

As to indirect discrimination, Mr Long contended that the Department had imposed an unreasonable requirement that he be female in order to receive 14 weeks paid leave to be the main caregiver for his biological children.

### The Tribunal's conclusions

#### *Direct discrimination*

To succeed in his claim of direct discrimination on the ground of sex under ADA s 24(1)(a), Mr Long needed to demonstrate that, the Department had treated him 'less favourably than in the same circumstances, or in circumstances which are not materially different' it had treated or would treat a woman, and that one of the reasons for that less favourable treatment was his sex.. The comparator relied upon by Mr Long was a female teacher employed by the Department who had access to 14 weeks paid leave after giving birth to a child.

Applying the principles in *Purvis v New South Wales* (2003) 217 CLR 92 [224] ('*Purvis*'), the Tribunal held that the circumstances of a surrogacy arrangement were 'materially different', even where a woman is the biological parent. It found that an appropriate comparator was a female teacher who is the biological parent and who will be the primary caregiver of a child born as a result of a surrogacy arrangement ([33]). The Tribunal found that such a comparator would have been treated no differently from Mr Long and would have been required to produce a parentage order to obtain leave under the Policy. The Tribunal rejected Mr Long's claim that he was unable to obtain a parentage order under the Surrogacy Act because he was the biological father.

#### *Indirect discrimination*

The Tribunal found that the Department's ASL Policy applied to all applications irrespective of gender, and that Mr Long had failed to demonstrate under s 24(1)(b) that a substantially higher proportion of men are unable to comply with the requirement of the Policy to produce a parentage order.

### Consideration by the Appeal Panel

#### *Direct discrimination*

The Appeal Panel found that the Tribunal had:

- correctly applied the principles in *Purvis* to determine to determine that the objective circumstances of the Treatment included that Mr Long was a biological father through a surrogacy arrangement ([53]), and
- correctly decided that the Policy treated a biological father by way of surrogacy in the same way as a biological mother by way of surrogacy ([69]).

The Appeal Panel held that an appropriate comparator 'was a female teacher who is the primary caregiver of the child born through surrogacy' ([69]).

Mr Long's contention was that as primary caregiver he should have the same access to 14 weeks paid leave that a female teacher can

access under the Department's maternity leave provisions. The Department's maternity leave provisions were available only to a female employee who was pregnant or had given birth to a child. The Appeal Panel did not accept Mr Long's contention that the Department's maternity leave provisions were discriminatory ([93]). It found that the Tribunal had correctly concluded that the maternity leave entitlements were rights or privileges in connection with pregnancy, childbirth or breastfeeding, falling within the exception to s 24 provided by ADA s 35. The provisions did not provide entitlement based on a care-giving role after a child was born ([92]).

***Indirect discrimination***

The Appeal Panel found no error in the Tribunal's reasoning on indirect discrimination. There was no error in the Tribunal's finding that a grant of leave under the Policy was conditional on the provision of a parentage order irrespective of the applicant's sex ([75]). Mr Long had failed to provide evidence that a substantially higher number of men are unable to comply with the condition on access to surrogacy leave ([77]).

**Order**

The Appeal Panel refused leave to appeal and dismissed the appeal.