

TOPICS:

- Federal law – Worker’s compensation claims – pre-requisite “material contribution”;
- Employment Law – summary dismissal;
- Judicial disqualification for perceived bias.

1. EMPLOYEES MUST ESTABLISH ‘SIGNIFICANT’ CONTRIBUTION TO DISEASE - SAFETY REHABILITATION AND COMPENSATION ACT 1988

On 19 January 2007 the Federal Court handed down the decision of *Comcare v Sahu Khan* (2007) FCA 15. This changed the law relating to material contribution. As a result of this decision employees suffering from a disease now have to prove that, having regard to all relevant contributing factors, their employment significantly contributed to the disease.

2. WHEN CAN AN EMPLOYEE BE SUMARILY DISMISSED?

Given the many areas of liability with which employers can be burdened for wrongfully dismissing an employee, good knowledge of what constitutes justifiable grounds for dismissing an employee is necessary.

Determining whether particular misconduct is sufficiently serious to justify the termination of an employment contract is a question of fact. This could mean that what might justify dismissal by an employer in one case may not justify it in another case. This complicates the giving of appropriate legal advice. The Victorian Supreme Court in *Sent v PrimeLife Corp Ltd* [2006] VSC 445 illustrates the circumstances in which dismissal of two employees was held to be justified. Mandie J described serious misconduct in the common law context of “to include conduct, in relation to important matters, that constitutes a repudiation of or is incompatible with or repugnant to the essential obligations of an employee or is destructive of the relationship of good faith and confidence between employer and employee.” He held that the proved conduct of the employees compromised the security and confidentiality of the Board’s deliberations. As such their loyalty and cooperation could not longer be relied on; their actions were subversive and destructive of the necessary trust that must exist between a company and its executive officers for the relationship to function.

3. WHEN SHOULD A JUDGE DISQUALIFY HIMSELF ON THE APPLICATION OF A PARTY?



In *Prendergast v Parsons (No. 3)*, [2007] FamCA 445, Guest J gave judgement on the husband's application that he disqualifies himself for perceived bias.

His Honour dismissed the application and set out the relevant law –

For the benefit of the parties, in particular to assist the husband in better understanding my determination of his application, I refer to what Mason J, as he then was, said in *Re JRL; Ex parte CJL* (1986) [161 CLR 342](#) at 351, namely:

"It needs to be said loudly and clearly that the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice; rather, that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that is likely to decide issues in a particular case adversely to one of the parties. This does not mean either he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudice, and this must be firmly established."

[His Honour then referred to a number of authorities and went on to say]:

"Although it is important that justice must be seen to be done, **it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias**, encourage parties to believe that by seeking a disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour." [My emphasis]

26. In *Johnson v Johnson* (supra) Kirby J had occasion to refer to *re JRL; ex parte CJL* (supra) and had this to say at page 504:

"Such considerations lie behind the salutary warning given in *Re JRL; ex parte CJL* that judicial officers in Australia were obliged to discharge their professional duties unless disqualified by law. They were told not to accede too readily to suggestions of an appearance of bias lest parties be encouraged to seek such disqualification without justification. Applications of that kind might sometimes be made in the hope of securing an adjudicator more sympathetic to a party's cause. Or they might be made because of the strategic advantage that may thereby be secured, especially the interruption of lengthy proceedings and the delays consequent upon obtaining a fresh start in a busy court or tribunal."

I have given my earnest consideration to the husband's application and it is important for all parties to understand that my judgment is directed to the legal and factual issues arising from an application of this nature. I have yet to hear the contested applications and it is only then that I shall make my final determination.



28. The competing applications have now been before the court for a number of years and in the fullness of time found their way into the Standard Track List of Defended cases. It falls to me to conduct the final hearing, to which I shall attend in an independent and impartial way. In *Ebner v Official Trustee in Bankruptcy* (2000) [205 CLR 337](#) at 348 Gleeson CJ, McHugh, Gummow and Hayne JJ, when considering the principles to be applied, also had this to say:

"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear and they are not at liberty to decline to hear cases without good cause. Judges do not chose their cases; and litigants do not chose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.

The particular principle or principles which determine the grounds upon which a judge will be disqualified from hearing a case follow from a consideration of the fundamental principle that court cases, civil or criminal, must be decided by an independent and impartial tribunal."

29. In my view, the basis for disqualification raised by the husband is entirely without merit and I do not propose to accede to his application. He was ably represented at the hearing before me on 3 January 2007 and not one scintilla of a suggestion was raised by his then counsel on that day suggesting that I had in any way treated the husband unfairly. I decided the contest on the material before me and there was the usual dialogue between myself and all counsel identifying the issues. Further, the husband raised no such objection when before me on 13 February 2007, it being then known that I was to be the trial judge.



30. It seems to me that the husband has in some way perceived me to be a judicial officer not compliant to his interests in court, which is plainly wrong. He has, in pursuit of his misplaced ideation, written to the Attorney-General for the Commonwealth of Australia, the Prime Minister, the Chief Justice of the Family Court of Australia and the Registry Manager of the Melbourne Registry of the Family Court of Australia. His complaints, when distilled, are mere broad, sweeping assertions without the identification of particulars.

31. I heard the contested applications on 3 January 2007 and delivered judgment, which appears on the court file. That judgment by no measure, or at all, supports the husband's extravagant assertions. I have accorded him every reasonable opportunity to identify the material relied upon by him. This he has, somewhat painstakingly, now done. I have read that material. It does not, in my view, identify issues that would support his application.