Civil and Administrative Tribunal
New South Wales

Case Name:	**Zonnevylle v Department of Justice**
Medium Neutral Citation:	Not Published
Hearing Date(s):	21 May 2019
Date of Orders:	21 May 2019
Date of Decision:	21 May 2019
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	L Pearson, Principal Member
Decision:	(1) Mr Zonnevylle's application for leave to be assisted by a McKenzie friend for the hearing on 21 May 2019 is granted. (2) Mr Zonnevylle's application for me to disqualify myself from conducting the hearing on 21 May 2019 is refused.
Catchwords:	ADMINISTRATIVE REVIEW – access to information – application for summary dismissal – McKenzie friend – application for recusal
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Government Information (Public Access) Act 2009
Cases Cited:	Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46 McGuirk v Vice-Chancellor, University of New South Wales [2009] NSWADTAP 43 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507 Turner v Commissioner, Corrective Services NSW [2016] NSWCATAD 15 Vice-Chancellor, University of New South Wales v Curtin and McGuirk; Curtin v Vice-Chancellor, University of New South Wales (Interlocutory

	Applications) [2006] NSWADT 271 Zidar v NSW Department of Justice (Office of the General Counsel) [2019] NSWCATAD 38
Texts Cited:	NCAT Tribunal Policy 6 - Communicating with the Tribunal and Members
Category:	Procedural and other rulings
Parties:	Peter Zonnevylle (Applicant) Department of Justice (Respondent)
Representation:	Applicant in person Crown Solicitor's Office (Respondent)
File Number(s):	2019/00103283

REASONS FOR DECISION

1 The applicant, Mr Zonnevylle, seeks written reasons for certain interlocutory decisions made at a hearing on 21 May 2019.

Background

2 The present proceedings 2019/00103283 are an application lodged with the Tribunal on 3 April 2019 seeking review of a decision dated 10 January 2019 in which the Director, Open Government Information and Privacy, Office of the General Counsel, Department of Justice, notified the applicant that email correspondence received from him on 6 January 2019 seeking to lodge an amended access application under the *Government Information (Public Access) Act* 2009 (GIPA Act) had been filed and would not be actioned. The letter stated that as advised by email on 23 October 2018, correspondence from the applicant would not be considered received by the department unless received via Australia Post. The payment received by the department would be retained for a period of 20 working days in anticipation of an application via Australia Post.

3 The application to the Tribunal states as the Grounds for Application:

> BREACH OF REVIEWABLE DECISIONS INCLUDING SECT.51.2, SECT 57, SECT.60, SECT. 63; BREACH OF SECT.3; FAILURE TO PROMOTE THE ACT; QUESTIONS OF LAW RESULTING FROM BOTH THE RESPONDENT AND THE IPC REVIEW; ALLEGED SECT 112 & SECT 111 BREACHES Refer to the attached sheet for further details.

4 Attached to the application are two documents which appear to be records of email transmission and a document extracting provisions of the GIPA Act.

5 On 8 May 2019 the Tribunal received an application by the respondent for dismissal of the application pursuant to s 55(1)(b) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act) on the basis that the proceedings are frivolous, vexatious, misconceived or lacking in substance.

The respondent also seeks an order that the applicant pay the respondent's costs. The Grounds for Application are stated:

> 1. The Application filed 3 April 2019 seeks review of a purported decision made by the NSW Department of Justice on 10 January 2019 (the Decision) advising the Applicant of the manner in which the respondent would accept receipt of an access application under the *Government Information (Public Access) Act* 2009 (the GIPA Act).
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> 2. The Respondent will submit that the Tribunal has no jurisdiction to conduct a review of the Decision, as the Decision is not a "reviewable decision" for the purposes of s 100 of the GIPA Act.
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> 3. The Respondent will further submit that these proceedings have been instituted and are being maintained for the dominant purpose of seeking to establish breaches of the GIPA Act by a public servant.

6 There was no appearance by the applicant at the case conference listed for 9 May 2019. Directions were made on that occasion (by a different Tribunal member) for the proceeding to be listed for hearing of the application by the respondent for dismissal of the application pursuant to s 55(1)(b) of the NCAT Act at 12.00 noon on 21 May 2019 for 30 minutes. The Notice of Orders included a note:

> The Tribunal notes that the Respondent has indicated that if there is no appearance by the Applicant on the next occasion it will bring an application for dismissal pursuant to section 55(1)(c) of the Civil and Administrative Tribunal Act 2013.

7 At the commencement of the hearing on 21 May 2019 the applicant handed up an Application for Miscellaneous Matters seeking a number of orders. Some of those requested orders were the subject of rulings during the 30 minutes available. Other matters not reached relate to a complaint against the respondent's representative, copyright on hearing sound recordings, and the issue of summonses.

8 Directions were made for the parties to provide written submissions in relation to the application for summary dismissal. Those directions were confirmed in writing to the parties, on 21 May 2019, and are:

1. On or before 28 May 2019 NSW Department of Justice is to give to the Tribunal and all other parties evidence including statements, documents and submissions in support of its application made on 8 May 2019 for summary dismissal of the application filed by the applicant Peter Zonnevylle on 3 April 2019 (2019/103283).

2. On or before 2 July 2019 Peter Zonnevylle is to give to the Tribunal and all other parties evidence including submissions in response. The submissions may include any submissions in support of those matters raised in the Application for Miscellaneous Orders filed at the hearing which were not addressed at the hearing on 21 May 2019, and which require further consideration if the proceedings are not dismissed.

3. The parties' submissions are to include any submission as to whether a hearing is required or can be dispensed with and the application for summary dismissal determined on the papers.

4. Subject to consideration of the parties' submissions under s 50(3) of the Civil and Administrative Tribunal Act 2013, the Tribunal will advise the parties whether the application for summary dismissal is to be determined on the papers, or a date on which it is listed for hearing.

5. The Tribunal notes that the applicant Peter Zonnevylle has requested written reasons for the rulings made on 21 May 2019. Reasons will be provided.

9 At the hearing the applicant:

(1) sought leave to be assisted by a McKenzie friend;

(2) applied to have me recuse myself from the proceedings on the ground of actual and apprehended bias; and

(3) opposed the date set for him to make his submissions in response to the respondent's application for summary dismissal.

10 At the conclusion of the hearing the applicant requested written reasons for the directions and rulings made. The following are those reasons.

Application for leave for McKenzie friend

11 The applicant sought leave for Mr Joe Zidar to be a McKenzie friend, submitting that that had been allowed on previous occasions in Tribunal proceedings. The Application for Miscellaneous Matters annexed a list of four

Tribunal and one Supreme Court proceedings in which Mr Zidar has appeared as McKenzie friend.

12 The application was opposed by the respondent's representative on the ground that a McKenzie friend is required to have a detached attitude to the proceedings, relying on *McGuirk v Vice-Chancellor, University of New South Wales* [2009] NSWADTAP 43 and *Zidar v NSW Department of Justice (Office of the General Counsel)* [2019] NSWCATAD 38.

13 I granted leave for Mr Zidar to assist as a McKenzie friend for the purposes of the hearing on 21 May 2019 only, to assist the applicant but not to speak. That limited role is consistent with the authorities cited by the respondent's representative, which make it clear that a McKenzie friend can be permitted to assist a litigant in presenting his or her case, provided that that person does not disrupt the proper conduct of the proceedings and does not act as an advocate in the proceedings. In *Zidar v NSW Department of Justice (Office of the General Counsel)* [2019] NSWCATAD 38 Senior Member Montgomery permitted Mr Zonnevylle to provide assistance to Mr Zidar, without any right to speak. SM Montgomery stated:

> 15. Section 38 of the *Civil and Administrative Tribunal Act* 2013 ("the NCAT Act") provides:
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> > 38 Procedure of the Tribunal Generally
> >
> > (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
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> 16. In accordance with section 38 of the NCAT Act I formed the view that it would not assist the orderly conduct of proceedings if Mr Zonnevylle was permitted to sit at the Bar Table while offering Mr Zidar assistance. I indicated to Mr Zidar that Mr Zonnevylle could provide him assistance but that he could not sit at the Bar Table to do so and that Mr Zonnevylle did not have any right to speak. I anticipated that there was a high likelihood of disruption if Mr Zonnevylle interjected. This subsequently proved to be the case.
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> 17. The role of a McKenzie Friend was discussed by the Administrative Decisions Tribunal Appeal Panel in *McGuirk v Vice-Chancellor, University of New South Wales* [2009] NSWADTAP 43. The Appeal Panel noted that a McKenzie friend is a person who is of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the

proper conduct of the proceedings. A person appointed as a McKenzie friend may not act as an advocate in the proceedings.

18. The Appeal Panel also noted that there could be no objection to any litigant in person having the assistance of a person who conducted himself or herself in a quiet and unobtrusive way and had a detached relationship to the issues in controversy and to the other party to the proceedings.

19. Consistent with this approach I informed Mr Zidar that Mr Zonnevylle could provide him assistance of that kind. However, he could not appear as an advocate for Mr Zidar or address the Tribunal on behalf of Mr Zidar.

14 The reference to "a detached relationship" comes from the decision the subject of the appeal in *McGuirk v Vice-Chancellor, University of New South Wales* [2009] NSWADTAP 43. In *Vice-Chancellor, University of New South Wales v Curtin and McGuirk; Curtin v Vice-Chancellor, University of New South Wales (Interlocutory Applications)* [2006] NSWADT 271 President O'Connor DCJ commented:

55. In my view there is a danger in any class of litigation – not just criminal trials – that the proposed McKenzie friend may be an agitator or promoter of a cause whose interests go beyond the mere giving of assistance to a friend in need on a particular occasion. In the *Bow County Court* case the proposed friend was a man who regularly rendered assistance to fathers in the family law courts, derived remuneration from this activity, and was the president of a fathers' rights group. Lord Woolf MR referred at 758 to the danger that such a person:

> 'will cease to conduct himself as an assistant and will indirectly run the case, using the litigant in person in the manner in which a puppet master uses a puppet. Such behaviour could provide a firm foundation for a judge not wishing him to be present as a McKenzie friend'.

56. In my view, therefore, the proper practice is for a litigant in person in the Tribunal to advise the Tribunal at the outset of the proceedings if he or she wishes to be assisted by a friend in the way contemplated for a McKenzie friend. The other party should be invited to indicate its attitude. The Tribunal should allow such assistance unless it has a well-founded concern that the participation of the friend might interfere with its ability effectively to conduct the proceedings. In that regard the nature of the proceedings will be relevant (different considerations may apply as between, for example, preliminary proceedings in the nature of case conferences or planning meetings and the formal hearing itself).

57. In the present circumstances, there could, I feel, be no objection to Mr Curtin or any litigant in person having the assistance of a person who conducted himself or herself in a quiet and unobtrusive way and had a detached relationship to the issues in controversy and to the other party to the proceedings.

> 58. However here, Mr Curtin has proposed as the McKenzie friend a person who is an active litigant in the Tribunal against the same respondent and is regularly dealing as a party in other proceedings with the respondent's legal representatives and FOI officers. There is a real risk that an assistant of this kind will engage in conduct of the kind to which Street CJ and Lord Woolf MR alluded. The planning meeting process is one which seeks to see to what extent a matter can be resolved without going to formal hearing. The introduction into the process of a person who is involved in direct litigation of their own against the opposite party is not conducive, as I see it, to the effective use of the planning meeting procedure.

15 In the context of a hearing listed for a limited time for a limited purpose, and provided the restrictions on direct involvement of the McKenzie friend were understood and complied with in the interests of avoiding disruption to the proper conduct of the proceedings, I was satisfied that it was appropriate to permit the assistance of Mr Zidar as a McKenzie friend on 21 May 2019.

Application for recusal

16 The applicant requested that I recuse myself from the proceedings, alleging both actual and apprehended bias. The basis for that submission is my previous refusal in proceedings 2018/333885 of leave for the applicant to appear at a hearing by telephone; my inaction in responding to a request for reasons made by email; and my breach of the obligation under s 62 of the NCAT Act to provide written reasons on request, in those proceedings. The applicant submits that that prejudiced his procedural rights, and demonstrates that I am not open or accountable as required. A further basis for the application is that the respondent's representative was permitted to take time to make submissions in opposition to the request for a McKenzie friend.

17 The respondent's representative submitted that there was no suggestion of actual or apprehended bias.

18 Actual bias is present when a decision-maker's mind is so closed to persuasion that argument against that view is ineffectual: *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507. An apprehension of bias arises where "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": *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. The relevant principles are explained by Deputy President Hennessy in *Turner v Commissioner, Corrective Services NSW* [2016] NSWCATAD 15:

> 6. The general test for apprehended bias is whether 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: *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [11]. The two step process involved was explained by the High Court in *Ebner v Official Trustee in Bankruptcy* in the following way at [8]:
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> > First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. 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. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.
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> 7. For a decision-maker to disqualify himself or herself for apprehended bias, there must be an objective connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the decision-maker must not bring an impartial mind to bear on the issues that are to be decided: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [67] Gummow ACJ, Hayne, Crennan and Bell JJ.
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> 8. A decision maker has an obligation to hear and determine the matter unless reasonable apprehension of bias can be established: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [19]; *Bienstein v Bienstein* (2003) 195 ALR 225 at [35]-[36]
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> 9. An application for disqualification should be determined by the decision-maker whose disqualification is sought, and should not involve a contest on the facts: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 436; *Wentworth v Graham* [2003] NSWCA 240.

19 The fact that in a previous matter involving the applicant, subsequently heard by a different Tribunal Member, I had refused his application for leave to appear by telephone is not sufficient in my view to show that I could not bring an open mind to determination of the issues that required consideration in

these proceedings on 21 May 2019. Equally, I do not consider that the decision I made in that matter could indicate an abuse of power, or mean that a fair minded lay observer with knowledge of the material and facts in the proceedings might reasonably apprehend that I might not bring an impartial and unprejudiced mind to this matter. It is not necessary to traverse the reasons for the decision made in 2018/333885, which were provided to the applicant on 27 March 2019 in response to a formal request for those reasons. The NCAT *Tribunal Policy 6 - Communicating with the Tribunal and Members* makes it clear that parties or other people involved in proceedings should not contact, or attempt to contact, Members about proceedings, including by email. There was no appeal from my decision in 2018/333885.

20 Further, the fact that the respondent's representative was permitted on 21 May 2019 to make submissions in opposition to the request for a McKenzie friend, as required as a matter of procedural fairness to both parties, could not constitute actual bias, or lead a fair minded lay observer to reasonably apprehend that I might not bring an impartial and unprejudiced mind to the matter.

21 In my view, the issues raised by the applicant do not provide a ground for disqualification on the basis of either actual or apprehended bias, and there is no proper basis for disqualification.

Directions for written submissions on the summary dismissal application

22 The respondent's representative proposed that its evidence and submissions on the summary dismissal application could be provided to the Tribunal and to the applicant by 28 May 2019, a period of one week. The applicant stated that he required 7 weeks to provide his evidence and submissions in response.

23 The Tribunal is required by s 36(2) of the NCAT Act, in making any procedural determinations, to seek to give effect to the guiding principle as stated in s 36(1), namely "…to facilitate the just, quick and cheap resolution of the real issues in the proceedings". The parties are under a duty to co-operate with

the Tribunal to give effect to this principle "and, for that purpose, to participate in the processes of the Tribunal and comply with directions and orders of the Tribunal": s36(3). In doing so the "practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the costs to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings": s36(5). Further guidance is provided in the decision of the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46:

> Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.

24 The application for dismissal under s 55(1)(b) of the NCAT Act, which states the grounds on which it is made, was made on 8 May 2019. The central issue for determination will be whether there is a reviewable decision for the purposes of an application to the Tribunal under s 100 of the GIPA Act. The applicant is aware of the relevant provisions of the GIPA Act, having provided with his application to the Tribunal on 3 April 2019 a document listing sections 41 (How to make an access application) and 51 (initial decision as to validity of application), and sections 57, 58, 60 and 63 of the GIPA Act. While not a lawyer, the applicant has had experience in pursuing applications under the GIPA Act in this Tribunal: he listed three such applications in the annexure to the Application for Miscellaneous Matters, and there are 10 decisions published in Caselaw in which he is identified as applicant in proceedings under the GIPA Act.

25 Based on my understanding of the nature of the issues, and an assessment of the likelihood that the applicant could properly respond to those issues, my initial assessment of a reasonable period in which the applicant could prepare his evidence and submissions in response to the material provided by the respondent was a period of three weeks. On further discussion, and when it became apparent that there were matters raised in the Application for

Miscellaneous Matters that could not be addressed in the time available, that was extended for a further 2 weeks, to 2 July 2019. That provides the applicant with a total of 5 weeks to respond after receiving the respondent's evidence and submissions. In my opinion that is an appropriate period, consistent with the obligations imposed by s 36 and s 38 of the NCAT Act.

Orders

(1) Mr Zonnevylle's application for leave to be assisted by a McKenzie friend for the hearing on 21 May 2019 is granted.

(2) Mr Zonnevylle's application for me to disqualify myself from conducting the hearing on 21 May 2019 is refused.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar