

ISBESTER v KNOX CITY COUNCIL (M19/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2014] VSCA 214

Date of judgment: 10 September 2014

Date special leave granted: 13 February 2015

The appellant pleaded guilty to a charge, pursuant to s 29(4) of the *Domestic Animals Act 1994 (Vic)* ('the Act'), that her dog had bitten a person causing serious injury. Following her conviction, the respondent ('the Council') wrote to the appellant to inform her that it intended to consider whether to exercise a power under s 84P of the Act to have the dog destroyed, and invited her to attend a 'panel hearing'. The appellant attended the hearing and made submissions. After this process, the Council officer delegated to make a decision on behalf of the Council pursuant to s 84P, determined that the dog should be destroyed and gave written reasons for that decision.

The appellant instituted proceedings in the Supreme Court of Victoria challenging the validity of the Council's determination. She submitted, inter alia, that the delegate's decision was affected by apprehended bias because one of the members of the panel, Kirsten Hughes, had been involved in the investigation of the matter and the formulation of the prosecution case, and was therefore neither impartial nor disinterested in the outcome of the hearing. Emerton J dismissed the proceeding.

The appellant's appeal to the Court of Appeal (Hansen, Osborn JJA and Garde AJA) was unsuccessful. The Court noted that it followed from the nature of the statutory scheme that: (a) the council's power to destroy the dog had already been determined at the time it considered whether it should, as a matter of discretion, be destroyed; (b) the Act expressly contemplated a hearing in the Magistrates' Court culminating in conviction as conditioning the establishment of that power but did not expressly contemplate a hearing as a precondition to the exercise of the relevant discretion; (c) there was nothing in the Act to suggest that the decision as to the exercise of the discretion was to be made other than administratively; (d) there was nothing in the Act to suggest that prior involvement with the history of the dog automatically disqualified members of the council or its officers from participating in the discretionary decision concerning the dog's destruction; and (e) the relevant discretion was reposed in a democratically elected local government body in unqualified terms.

The Court considered that the appellant had not demonstrated a real possibility of prejudgment in this case, for a number of reasons. First, it was significant that the prosecution culminated in the appellant's plea of guilty and it was upon this plea that the conviction founding the Council's jurisdiction under s 84P rested and not upon contested evidence. Secondly, the fact of participation in the prosecution by Ms Hughes did not of itself demonstrate a predisposition to a particular exercise of the discretion under s 84P. Thirdly, the fact Ms Hughes had obtained information from the Ministry of Housing as to the future possible accommodation of the dog prior to the panel hearing did not demonstrate

relevant prejudgment. Fourthly, the fact that Ms Hughes undertook procedural tasks associated with the panel hearing could not be said to demonstrate any prejudgment of the merits. Fifthly, there was no evidence demonstrating that Ms Hughes had expressed any prior opinion or concluded judgment with respect to the real issues before the panel. Sixthly, the legislative scheme did not require a panel hearing before persons who had had no involvement in the prosecution process which preceded it. Seventhly, prior to the panel hearing, the appellant and her solicitor were advised by letter that Ms Hughes would participate in the hearing. No objection was made to her participation. The obvious inference is that no apprehension of existing prejudgment was drawn by them at that time. Eighthly, the evidence as to the course of the panel hearing did not provide any basis for the conclusion Ms Hughes had prejudged the matter. The whole impression given by the evidence was that Ms Hughes participated actively in a hearing which examined the issues afresh. Lastly, the Court observed that Ms Hughes was not in fact the decision-maker. The reasonable observer would not regard any pre-existing views of Ms Hughes as demonstrating that the decision-maker was not 'open to persuasion' at the hearing.

The grounds of appeal include:

- Having accepted that the rules of procedural fairness applied to the panel hearing convened by the respondent to determine the fate of the dog "Izzy" the Court of Appeal:
 - (i) erred in law holding that because the Magistrates' Court hearing in which the appellant pleaded guilty to a charge made under s 29(4) of the *Domestic Animals Act* 1994 (Vic) had concluded, Ms Hughes was not an accuser before the panel; and
 - (ii) erred in holding that Ms Hughes' role as a decision maker on the panel did not constitute apprehended bias by way of a conflict of interest.