HIGH COURT OF AUSTRALIA

STEWARD J

HEATH MAXWELL RYAN FULTON PLAINTIFF

AND

CHIEF OF THE DEFENCE FORCE & ORS DEFENDANTS

[2025] HCASJ 20
Date of Hearing: 27 May 2025
Date of Judgment: 31 July 2025
C17 of 2024

ORDERS

1. *The plaintiff's application for an extension of time pursuant to r 4.02 of the High Court Rules 2004 (Cth) ("Rules") is refused.*
2. *The balance of the plaintiff's application for a constitutional or other writ is summarily dismissed pursuant to rr 25.09.3(b) and 28.01.2(c) of the Rules.*
3. *The plaintiff is to pay the first defendant's costs of and incidental to the application.*

Representation

D D Keane KC with Y Araki for the plaintiff (instructed by Operational Legal Australia)

Z C Heger SC with C M R Ernst for the first defendant (instructed by Australian Government Solicitor)

Submitting appearances for the second and third defendants

1 STEWARD J. The plaintiff is a former Reserve officer in the Royal Australian Air Force ("RAAF"). In January 2021 his service was terminated pursuant to reg 24(1)(c) of the *Defence Regulation 2016* (Cth). He sought judicial review of that decision in the Federal Court of Australia. The defendant to that action was the Chief of the Defence Force ("the CDF"), who is the first defendant in this proceeding. The plaintiff's application for review was dismissed by Perry J (the trial judge) on 22 December 2022.[1] His appeal from that decision was dismissed by a majority of the Full Court of the Federal Court of Australia (SC Derrington and Stewart JJ; Logan J dissenting) on 18 August 2023.[2] An application for special leave to appeal from that decision was unanimously dismissed by this Court on 8 February 2024.[3]

2 On 18 December 2024, some 314 days later, the plaintiff filed an application for a constitutional or other writ in the original jurisdiction of this Court, initially seeking – pursuant to s 75(v) of the *Constitution* – a writ of certiorari to quash the orders of both Perry J and of the Full Court. By leave, the plaintiff was permitted to add to his prayer for relief: (i) a writ of mandamus directing the Federal Court to hear his application for judicial review; and (ii) a writ of prohibition prohibiting the CDF from enforcing two cost orders made in the judicial review proceedings by Perry J and by the Full Court respectively.

3 By the present application, the plaintiff now complains that the decision of Perry J was infected with jurisdictional error, and that the decision of the Full Court was therefore also necessarily flawed. The alleged error was not raised before Perry J, was not raised before the Full Court, and was not disclosed in the plaintiff's application for special leave to this Court. The alleged error is that there was a reasonable apprehension that Perry J was biased against the plaintiff.

4 At the time of the trial, Perry J served as a Squadron Leader in the RAAF Reserve. However, this was not said to be the basis for the apprehension of bias; this fact was known to the plaintiff, and it caused no concern, even though the CDF was the respondent in his judicial review application. Rather, the basis for the contention is that at the time of the trial Perry J was under consideration for appointment as Deputy Judge Advocate General ("Deputy JAG") along with promotion to the rank of Air Commodore *and* that this required the CDF to be consulted and to provide his recommendation to the Minister for Defence. The plaintiff, it was said, had no knowledge of this at the time of the trial. As it happens,

---

1 *Fulton v Chief of the Defence Force* (2022) 178 ALD 185.

2 *Fulton v Chief of the Defence Force* (2023) 300 FCR 623.

3 *Fulton v Chief of Defence Force* [2024] HCASL 11.

following the dismissal of the plaintiff's judicial review proceedings, Perry J was appointed and sworn in as Deputy JAG.

5 The plaintiff requires a considerable extension of time within which to file his application seeking a writ of certiorari. For the reasons given below, that extension of time should be refused, and the balance of the application should be summarily dismissed as an abuse of process. The chronology of events compels this conclusion.

Chronology of events

6 The chronology of events in this matter, insofar as it is relevant for present purposes, may be broadly summarised as follows:

Date	Event
3 December 2020	The plaintiff was issued with a "Termination Decision", which specified that a delegate of the CDF had decided that the plaintiff's retention in the RAAF was not in the interests of the Defence Force and, as such, the plaintiff's service would be terminated with effect from 20 January 2021.
20 January 2021	The plaintiff's service in the RAAF was terminated pursuant to reg 24(1)(c) of the *Defence Regulation 2016* (Cth).
25 January 2021	The plaintiff applied to the Federal Court for an extension of time within which to seek leave to apply for judicial review of the termination decision.
23 August 2021	Perry J granted an extension of time within which to seek leave to apply for judicial review by the Federal Court of the termination decision.
26 August 2021	The plaintiff applied to the Federal Court for judicial review of the termination decision.
11 February 2022	Perry J applied to the Deputy Director of Senior Officer Management for appointment as Deputy JAG.
13-14 September 2022	The trial in the judicial review application took place over two days before Perry J.

22 December 2022	Perry J delivered primary judgment on the judicial review application (in *Fulton v Chief of the Defence Force* (2022) 178 ALD 185). Her Honour dismissed the application.
11 January 2023	The plaintiff commenced an appeal to the Full Court from the judgment of Perry J.
10 February 2023	Perry J was appointed as Deputy JAG.
21 March 2023	Perry J was sworn in as Deputy JAG.
22 May 2023	The Full Court (Logan, SC Derrington and Stewart JJ) heard the plaintiff's appeal from the judgment of Perry J.
9 June 2023	The plaintiff lodged a Freedom of Information ("FOI") request with the Department of Defence which sought documents and communications regarding the statutory position of Deputy JAG relating in the selection and appointment process resulting in the appointment of Perry J.
6 July 2023	The plaintiff sent an email to FOI Case Management, seeking to narrow the scope of his FOI request.
7 July 2023	A FOI Case Management officer sent the plaintiff an email, suggesting that the plaintiff further re-cast the scope of his FOI request.
10 July 2023	The plaintiff sent an email to the FOI officer, adopting the suggested re-cast of the FOI request.
18 August 2023	The Full Court delivered judgment on the plaintiff's appeal (in *Fulton v Chief of the Defence Force* (2023) 300 FCR 623). The Full Court dismissed the appeal by majority (SC Derrington and Stewart JJ; Logan J dissenting).
28 August 2023	The plaintiff received documents in response to his re-cast FOI request.
15 September 2023	The plaintiff applied to this Court for special leave to appeal from the judgment of the Full Court.

8 February 2024	This Court unanimously refused the plaintiff's application for special leave to appeal (in *Fulton v Chief of Defence Force* [2024] HCASL 11).
18 December 2024	The plaintiff filed an application for a constitutional or other writ in this Court.

The writ of certiorari: application for an extension of time

7 Pursuant to r 25.02.2(a) of the *High Court Rules 2004* (Cth) ("the Rules"), the plaintiff was obliged to file his application for a writ of certiorari "within 6 months after the day the decision sought to be quashed was made". The plaintiff did not file his application until 18 December 2024. Accordingly:

(a) in respect of the decision of Perry J (on 22 December 2022), the time for filing the application expired on 22 June 2023, and the plaintiff's application is 546 days (or approximately 18 months) out of time; and

(b) in respect of the decision of the Full Court (on 18 August 2023), the time for filing the application expired on 18 February 2024, and the plaintiff's application is 304 days (or approximately 10 months) out of time.

8 Pursuant to r 4.02 of the Rules, I have a general power to enlarge the period within which to file the plaintiff's application.

9 In *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* – albeit in the context of the power given to the Federal Court by s 477A(2) of the *Migration Act 1958* (Cth) to extend the time for the making of an application to that Court in relation to a migration decision – Gordon and Edelman JJ and I said:[4]

> "The text of the provision – the broad terms in which the discretion is conferred – recognises that there will be a range of potentially 'permissible' considerations, depending on the case. It is, in each case, for the judge hearing the extension of time application to determine which of a range of potentially relevant factors are to be taken into account in evaluating whether the interests of the administration of justice make it necessary for an extension of time to be granted in that particular case. Factors that are commonly regarded as relevant to the exercise of the Court's discretion to grant an extension of time include: the length of the delay; the explanation for the delay; any prejudice to the administration of justice as a

---

4 (2022) 276 CLR 579 at 599-600 [40] (footnotes omitted).

> result of the delay; and the prospects of the applicant succeeding in the application or the 'strength or weakness of the case ... sought to be advanced and the utility of advancing that case'."

10 The factors described in the foregoing passage are equally applicable to the power to enlarge time conferred by r 4.02. As McHugh J said in *Re Commonwealth; Ex parte Marks*, the grant of an extension of time to apply for constitutional relief under s 75(v) of the *Constitution* is certainly "not automatic".[5] His Honour also went on relevantly to observe that:[6]

> "An extension of time for seeking relief against a decision or judgment can only be granted if it is necessary to do justice between the parties. That means that it is necessary to have regard to the history of the matter, the conduct of both parties, the nature of the litigation and the consequences for the parties of a grant or refusal of the extension. Where an applicant seeks the issue of the constitutional or prerogative writs, a further factor must be considered. Those writs are directed at the acts or decisions of public bodies or officials, and the public interest requires that there be an end to litigation about the efficacy of such acts or decisions."

11 I decline to exercise the power in r 4.02 in favour of the plaintiff. His application for a writ of certiorari must therefore be dismissed.

12 The plaintiff's submissions in respect of the extension of time sought may broadly be dealt with as follows:

(a) First, the plaintiff did not raise his concern about apprehended bias before Perry J or before the Full Court published its reasons because – although he knew (at least prior to the Full Court's decision) of Perry J's position in the RAAF and application and appointment as Deputy JAG – he did not know about the involvement of the CDF in Perry J's appointment as Deputy JAG until he received certain documents in response to a FOI request. Those documents were received on 28 August 2023, shortly after the Full Court had published its reasons.

(b) Second, the plaintiff did not raise his concern in his application for special leave to this Court – which notably postdated the receipt of his FOI materials – because it "was not a suitable vehicle for determination of [the apprehended bias] issue". This was said to be because "it would require the

---

5 (2000) 75 ALJR 470 at 473 [13]; 177 ALR 491 at 495.

6 (2000) 75 ALJR 470 at 474 [15]; 177 ALR 491 at 495 (footnote omitted).

introduction and receipt of evidence that had not been received at first instance or on appeal".

(c) Third, the plaintiff proffered no explanation for why the application in this Court could not have been commenced in parallel with the application for special leave. Nor was any reason proffered for why the plaintiff delayed, after this Court refused special leave on 8 February 2024, an additional 314 days (almost 10 months) to commence the present application on 18 December 2024. There is no dispute that by that time, the plaintiff had long since received the FOI documents and knew all that was required to bring the application.

13 Based upon the above third proposition alone, I would refuse the enlargement of time sought. The plaintiff's delay in parallel with, and following refusal of, the special leave application is very great and is not excused or explained in any way. Moreover, the plaintiff has been legally represented at each stage of the proceeding – and in particular, was represented by senior and junior counsel before Perry J, before the Full Court and before me. Whilst it must be accepted that the CDF would suffer no great prejudice if the time was enlarged, the underlying claim for apprehended bias also lacks merit (see below), and there is a need to preserve the finality of litigation. As Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ observed in *Burrell v The Queen,* the principle of finality:[7]

> "[S]erves not only to protect parties to litigation from attempts to re-agitate what has been decided, but also has wider purposes. In particular, the principle of finality serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time."

14 In any event, I also do not accept the first and second propositions set out above. The matter of Perry J's promotion and the involvement of the CDF should have been raised before the Full Court before its reasons were published. Perry J's promotion and appointment as Deputy JAG took place on 10 February 2023, well before the hearing in the Full Court on 22 May 2023.

15 The fact of Perry J's appointment as Deputy JAG was known to the plaintiff by at least May 2023, and thus before the handing down of the Full Court's reasons.[8] The evidence before me is that on 9 June 2023 the plaintiff made the FOI

---

7 (2008) 238 CLR 218 at 223 [16]. See also *Navazi v New South Wales Land and Housing Corporation* [2015] NSWCA 308 at [106].

8 No direct evidence was adduced in this proceeding as to when the plaintiff became aware of the fact of Perry J's appointment as Deputy JAG. However, during the

application requesting documents "regarding the statutory position of Deputy JAG Air Force relating to: ... the latest selection and appointment process resulting in the appointment of Dr Melissa Perry". That request also relevantly asked, inter alia, for the following additional categories of documents "relating to":

> "- the number of: Expressions of Interests received, candidates shortlisted, candidates interviewed, candidates put forward to the decision maker (names not required),
>
> - the Names/position titles of selection panel members and decision makers involved in the process,
>
> - any declared or known conflicts of interest of the successful candidate".

16 The foregoing plainly evidences a train of inquiry, as at 9 June 2023, into the appointment of Perry J and to the possibility of the presence of conflicts of interest.

17 Subsequently, on 6 July 2023 (in response to an email from a FOI officer on 30 June 2023 concerning the FOI request) the plaintiff sent an email to a FOI officer seeking to narrow the scope of his FOI request. In doing so, the plaintiff made the following remarks, which at minimum demonstrate awareness of the possibility that the CDF was involved in Perry J's appointment:

> "I would be after the correspondence from the key selection and authorising staff involved in the process. I would guess this would be a selection coordinator, panel chair, endorsing/authorising members within the department for the appointment to be confirmed by the Governor General. I could only guess the authorising members to be the senior JAG and/or Defence Secretary/Defence Force Chief."

18 In any event, I infer that at least by 7 July 2023, and again before the publication by the Full Court of its reasons for judgment, the plaintiff knew, or had reason to believe, not only that Perry J had been appointed – but also that the CDF had been involved in the appointment process. That is because on that date the plaintiff received an email response from a FOI officer, suggesting that the plaintiff further re-cast the scope of his request for documents, and in doing so confirmed the involvement of the CDF in the appointment process. That suggested re-cast was in the following terms (and was adopted by the plaintiff in an email reply to the FOI officer on 10 July 2023):

---

hearing before me, senior counsel for the plaintiff conceded that he was instructed that the plaintiff became aware of this fact in May 2023.

"1. A copy of the Report to the Chief of the Defence Force: Recommendations for appointment of the Deputy Judge Advocate General — Air Force;

2. A copy of the Decision Brief for CDF: Recommendations for appointment of the Deputy Judge Advocate General — Air Force;

3. A copy of the Deputy Judge Advocate General — Air Force: Selection Advisory Panel Information Pack; and

4. A copy of the Ministerial letter from the Defence Secretary to the Chief Justice of the Federal Court of Australia."

19 It was incumbent upon the plaintiff to raise in some way, from this point at the latest, and before the Full Court delivered judgment on 18 August 2023, the claim he now seeks to propound. He was by that time sufficiently armed with the factual material to make his claim of apprehended bias; or at least he was sufficiently armed to warn the Court that the point might need to be raised shortly. It was not open to him to sit on his hands. More emphatically, it was not open to him to sit on his hands until well after the rejection of his application in this Court for special leave. I reject the suggestion that it was not appropriate for it to have been raised in some way in the plaintiff's application for special leave. By then, even the plaintiff accepted that he then knew all that he needed to know.

20 The plaintiff submitted that he could not have re-opened his case based only on the email exchange with the FOI officer – and accordingly, he was unable to raise the present claim until after the receipt of documents from his FOI request (which occurred on 28 August 2023, being shortly after the Full Court delivered judgment). The email of 7 July 2023 was said to contain inadmissible hearsay evidence, and did not otherwise meet the requisite probative standard to justify a re-opening of the appeal before the Full Court. In particular, it was said, the email was not in terms that confirmed that the documents existed, and did not disclose the timing of the CDF's involvement with the appointment process. In such circumstances, it was submitted, all the plaintiff could do was speculate about what had happened. The plaintiff further submitted that, given the seriousness of apprehended bias allegations, it was appropriate to wait to review the FOI documents prior to raising the matter.

21 With great respect, there are three answers to the foregoing contentions. First, the content of the email from the FOI officer afforded the plaintiff with a clear statement of the CDF's actual involvement in the appointment process. It expressly referred to two documents evidencing that involvement: the first was the "Report" to the CDF containing recommendations for the appointment; and the second was the "Decision Brief for CDF" which again was about the appointment.

22 Second, no attempt was made to ask counsel for the CDF, or the CDF's solicitors (the Australian Government Solicitor) in the appeal, for a copy of these documents, or for information about the involvement of the CDF in Perry J's appointment. As a model litigant, one can infer that, if asked, the CDF would have promptly produced the documents, and that there would otherwise have been full disclosure of the appointment procedure. Those admissions could have been a sound basis for an application to re-open the Full Court appeal.[9] Even if, contrary to best practice, CDF's counsel and solicitors were to refuse to co-operate, the plaintiff could have used the coercive procedures of the Court, such as a subpoena, to obtain what was needed. There was no need to wait for the FOI response.

23 Third, in any event, and at the very least, the Full Court should have been informed of the plaintiff's concerns prior to receipt of the FOI documents, and the potential application to re-open should have been foreshadowed to prevent the publication of reasons, and to enable all issues to be placed before the Court for determination.

24 By way of analogy, in *Vella v Minister for Immigration and Border Protection*[10] the plaintiff's visa had been cancelled. He sought revocation of that decision,[11] and then sought judicial review in the Federal Court of the Minister's subsequent decision not to revoke the cancellation decision.[12] His application was rejected by the Full Court.[13] An application for special leave to this Court was also subsequently refused.[14] A month later, the plaintiff commenced proceedings in the

---

9 The principles for re-opening an appeal in the Federal Court were recently summarised in *Roberts-Smith v Fairfax Publications Pty Limited* [2025] FCAFC 66 at [38].

10 (2015) 90 ALJR 89; 326 ALR 391 ("*Vella*").

11 *Vella* (2015) 90 ALJR 89 at 90 [7]; 326 ALR 391 at 392.

12 *Vella* (2015) 90 ALJR 89 at 90-91 [8]-[9]; 326 ALR 391 at 393.

13 *Vella* (2015) 90 ALJR 89 at 91 [10]; 326 ALR 391 at 393, citing *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61.

14 *Vella* (2015) 90 ALJR 89 at 91 [10]; 326 ALR 391 at 393, citing *Vella v Minister for Immigration and Border Protection* [2015] HCATrans 263.

original jurisdiction of this Court based on three new grounds of challenge.[15] He needed an extension of time to do so.[16]

25 Gageler J (as his Honour then was) refused the extension sought, in circumstances where "[e]ach of those ground for challenging the decision made by the Minister ... could have been pursued in the [now concluded] Federal Court proceeding".[17] In doing so, his Honour referred[18] to *Metwally (No 2) v University of Wollongong*,[19] where a new argument of constitutional invalidity was sought to be raised after the hearing of a special case in this Court in which validity had been assumed. The Full Court of this Court unanimously said in *Metwally (No 2)*:[20]

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

26 Gageler J observed in *Vella* that the foregoing principle was relevant to whether it would be in the interests of justice to extend time. His Honour reasoned:[21]

> "The principle to which reference was made in *Metwally (No 2)* is reflected in the overlapping doctrines of issue estoppel and abuse of process recently considered in *Tomlinson v Ramsey Food Processing Pty Ltd*. It is not necessary or appropriate to bring either of those specific doctrines to bear in the present case. It is sufficient that the principle tells strongly against the conclusion that the interests of the administration of justice

---

15 *Vella* (2015) 90 ALJR 89 at 90 [1], 91 [13]; 326 ALR 391 at 392, 393.

16 *Vella* (2015) 90 ALJR 89 at 90 [1]; 326 ALR 391 at 392. Section 486A(2) of the *Migration Act 1958* (Cth) relevantly conferred on a Justice of this Court a power to extend time if it was necessary in the interests of the administration of justice to make such an order.

17 *Vella* (2015) 90 ALJR 89 at 92 [15]; 326 ALR 391 at 394.

18 *Vella* (2015) 90 ALJR 89 at 92 [18]; 326 ALR 391 at 395.

19 (1985) 59 ALJR 481; 60 ALR 68 ("*Metwally (No 2)*").

20 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

21 *Vella* (2015) 90 ALJR 89 at 92 [19]; 326 ALR 391 at 395 (footnote omitted).

make it necessary to extend time for a party to litigate issues which that party has already had an opportunity to raise in earlier litigation."

27 Analogous considerations are engaged here. The plaintiff here sought judicial review in the Federal Court and was obliged to raise all of the issues upon which he sought to rely. Perry J's service in the RAAF Reserve was a matter of public record at the time of his trial, and the plaintiff became aware of her Honour's appointment as Deputy JAG before the Full Court handed down its decision. And for the reasons given above, I would also infer that he knew, or should have known, of the CDF's involvement in Perry J's appointment by July 2023 at the latest, or at least by that time he had good reason to believe that the CDF had played some part in that appointment process, and had ample means of confirming this in a timely manner. Thereafter, if something was to be made of the point, it should then have been raised in a timely fashion; the plaintiff should not have waited an additional nearly one and a half years to make it.

28 It follows that it is not in the interests of justice to extend the time within which to make the plaintiff's application for a writ of certiorari.

The writs of mandamus and prohibition: abuse of process

29 By the leave of the Court and with the consent of the CDF, the plaintiff amended his present application to also seek the issue of writs of mandamus and prohibition pursuant to s 75(v) of the *Constitution*. These additional prayers for relief were added at the invitation of the CDF, who earlier contended that without a claim for a writ of mandamus and/or prohibition, this Court did not have original jurisdiction to grant the proposed writ of certiorari (in circumstances where the jurisdiction to grant certiorari under s 75(v) of the *Constitution* is ancillary to the remedies specified in s 75(v)). Both forms of relief sit at odds with the plaintiff's substantive complaint.

30 The proposed writ of mandamus seeks to direct the Federal Court and its judges to hear and determine the plaintiff's application for judicial review. Pursuant to r 25.02.1 of the Rules, such an application for a writ of mandamus must be filed within two months after the day of the refusal to hear. This reflects the well-established principle that "[a] writ of mandamus does not issue except to command the fulfilment of some duty of a public nature *which remains unperformed*".[22] There are, with respect to mandamus, "two species of failure to act or to decide: actual failure and constructive failure".[23] However, there has here been no such

---

22 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 (emphasis added).

23 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 481 [41].

actual or constructive failure (in fact the plaintiff's judicial review application was heard and determined promptly by Perry J) – and if the plaintiff's claim for apprehended bias were made out, there is nothing to suggest the application would not be re-heard by the Federal Court.

31 The application for a writ of prohibition seeks an order prohibiting the CDF from enforcing order 2 of 18 August 2023 (being the Full Court's order that the plaintiff pay the CDF's costs in the appeal proceeding) and order 1 of 27 February 2023 (being Perry J's order that the plaintiff pay the CDF's costs in the primary proceeding). There is no evidence before this Court that the CDF has enforced, or is seeking to enforce, either of these orders for costs.

32 In any event, both proposed remedies of mandamus and prohibition are also premised on the same ground of jurisdictional error as the proposed writ of certiorari addressed above. In my view, the plaintiff's failure to raise the ground of apprehended bias before the Full Court, and the very significant delay in commencing this application following the conclusion of both the Full Court proceeding and his special leave application in this Court, renders the prayers for mandamus and prohibition an abuse of process. Given the history of this proceeding and the need for finality in litigation, it would be unjustifiably oppressive to the defendants for this proceeding to continue when the plaintiff had earlier exhausted his rights of appeal.[24]

33 The claims for writs of mandamus and prohibition should be summarily dismissed as an abuse of process pursuant to rr 25.09.3(b) and 28.01.2(c) of the Rules.

The central contention of apprehended bias

34 Whilst I need not consider the plaintiff's substantive contention about apprehended bias, something nonetheless should be said about it. Perry J serves this nation as a judge of the Federal Court. Her Honour also serves her nation as an officer in the RAAF Reserve. This was a matter of public record at the time of trial, and no complaint was made about it at that time.

35 A claim of apprehended bias is to be assessed by consideration of 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

---

24 *Vella* (2015) 90 ALJR 89 at 92 [18]-[19]; 326 ALR 391 at 395, quoting *Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71. See also *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25]; *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267 [15].

decide".[25] In *CNY17 v Minister for Immigration and Border Protection*, Nettle and Gordon JJ observed that the fair-minded lay observer has "a broad knowledge of the material objective facts ... as distinct from a detailed knowledge of the law or knowledge of the character or ability of the [decision-maker]".[26] Here those objective facts include the following:

(a) First, her Honour was not merely promoted to Air Commodore. Her Honour was appointed a Deputy JAG for the RAAF. This is a position reserved for a serving or retired judge or to a person who has been a lawyer for at least five years.[27] The role requires Perry J to act in an analogous judicial capacity by assisting the Judge Advocate General to oversee the Australian Defence Force's military justice system. As such, her Honour was required to swear or affirm an oath that she would "do right to all manner of people according to law, without fear or favour, affection or ill-will".[28] Perry J gave the same oath when her Honour was appointed to be a judge of the Federal Court.[29]

(b) Second, whilst her Honour was promoted to the rank of Air Commodore, she received no pay increase. Perry J is not entitled to any salary as a member of the RAAF Reserves whilst her Honour is paid a salary as a Federal Court judge.[30]

(c) Third, as a serving officer, Perry J was always subject to the possibility of promotion as her Honour grew in seniority. As it happens, her Honour was promoted, when made Deputy JAG, to the rank of Air Commodore. Much was made by the plaintiff of the status of this rank and the fact that Perry J effectively skipped over two ranks, namely those of Wing Commander and Group Captain, upon becoming Deputy JAG. With respect, the plaintiff misconceives what a fair-minded lay observer would infer about Perry J's

---

25 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6] (footnote omitted).

26 (2019) 268 CLR 76 at 99 [58], quoting *Webb v The Queen* (1994) 181 CLR 41 at 73.

27 *Defence Force Discipline Act 1982* (Cth), s 180.

28 *Defence Force Discipline Act* 1982 (Cth), s 184, Sch 4.

29 *Federal Court of Australia Act 1976* (Cth), s 11, Sch.

30 *Defence Force Remuneration Tribunal Determination No. 2 of 2017, Salaries* (Cth), cl A.1.4(e); *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2022* (Cth), s 10; *Remuneration Tribunal Act 1973* (Cth), s 7(3).

> motives in seeking the appointment as Deputy JAG. In all of the foregoing circumstances, a fair-minded lay observer would have inferred that the appointment was sought in the discharge of Perry J's duty of service to her country.

36 In these circumstances, it is very difficult, if not impossible, to see how a fair-minded lay observer might conclude that there was a reasonable apprehension of bias when Perry J decided to serve her country in this additional way, with the same standards of impartiality, independence, and integrity.

37 The CDF also relevantly submitted that – even if Perry J's judgment was infected by apprehended bias – the subsequent appeal to the Full Court was an adequate remedy to "cure" that defect (the plaintiff made no claim of apprehended bias against any member of the Full Court). That submission was founded on the well-established principle that procedural unfairness at first instance may be "cured" by a fair hearing on appeal.[31] However, there remains some uncertainty in the jurisprudence as to whether that principle also extends to the "curing" of apprehended bias, particularly in light of certain remarks of Kirby and Crennan JJ in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*.[32] Indeed, in the hearing before me, senior counsel for the CDF conceded that she had been unable to identify any authority in which the principle had been applied to the "curing" of apprehended bias. In light of my foregoing reasons, it is unnecessary to here determine this issue.

Disposition

38 The application for a writ of certiorari in the original jurisdiction of this Court requires an extension of time pursuant to r 4.02 of the Rules. That request is refused. The application for other relief is summarily dismissed as an abuse of process pursuant to rr 25.09.3(b) and 28.01.2(c) of the Rules. The plaintiff must pay the costs of the CDF.

---

31 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116; *Hill v Green* (1999) 48 NSWLR 161 at 172 [55] per Spigelman CJ, 193-194 [151], 195 [156]-[157], 197 [164] per Fitzgerald JA.

32 (2006) 229 CLR 577 at 611-612 [117] per Kirby and Crennan JJ; contra at 634 [172] per Callinan J.