RE THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION;

EX PARTE NORTH BROKEN HILL LIMITED

JUDGMENT
(oral)
6 April 1993

DAWSON J.

RE THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION; EX PARTE NORTH BROKEN HILL LIMITED

The applicant, trading as Associated Pulp and Paper Mills ("APPM"), operates a paper mill at Burnie. It appears that in 1992 a dispute arose between APPM and its employees to which it is unnecessary to refer more specifically. Against the background of that dispute, APPM decided to train staff personnel in all aspects of boiler operations. The training was to commence on 8 April 1992. On that day eleven boiler operators refused to operate the boilers while staff operators were being trained. The boiler operators were dismissed. On 8 April 1992 the union, which was then called and which I shall continue to call the Federated Engine Drivers' and Firemen's Association ("the FEDFA"), notified the Industrial Relations Commission of a dispute arising out of the dismissals.

On 13 April 1992 Senior Deputy President Munro made an interim award requiring APPM to re-employ the boiler operators upon their giving a written undertaking to work as directed, including co-operation with the training of staff personnel as boiler operators. Some boiler operators requested training before assisting in

the training of staff. APPM organized a "train-the-trainer" course to commence on 11 May 1992. It proposed to operate the boilers with qualified staff during the absence of boiler operators taking the course.

On 27 April 1992 the FEDFA faxed an application to Senior Deputy President Munro pursuant to s.87 and s.111(1)(n) of the *Industrial Relations Act* 1988 (Cth) requesting that the Commission seek expert advice from Government sources concerning safety and training procedures. APPM was not notified of this application then, nor provided with a copy of the faxed letter. On 5 May 1992 the parties were notified by the Commission that the application would be listed for hearing before Commissioner Merriman on 14 May 1992.

On 8 May 1992 the FEDFA faxed a letter to Commissioner Merriman requesting that the hearing of the application be brought forward to 12 May 1992 and that the Commission contact APPM and request that it withdraw its request for FEDFA members to attend the training course on 11 and 12 May 1992. APPM was not notified of this correspondence. On 8 May 1992 Commissioner Merriman advised the parties by fax that

the hearing would be brought forward to 12 May 1992. He also gave a direction that the training course be cancelled.

On 12 May 1992 at the hearing before Commissioner Merriman, APPM applied for a revocation of the direction and requested that the Commissioner disqualify himself from further hearing the application of the FEDFA. The Commissioner withdrew his direction of 8 May 1992 but refused to disqualify himself. On the same day, 12 May 1992, APPM lodged notice of appeal against Commissioner Merriman's refusal to disqualify himself and applied for a stay of proceedings.

The application for a stay of proceedings was heard before Deputy President Harrison on 13 May 1992. She refused the application, saying that she was "not persuaded that there is an arguable case that in relation to the FEDFA application the Commissioner has acted in such a way as to lead to a reasonable apprehension that he will not approach that matter with impartiality and with a fair and open mind." In reaching that conclusion, Deputy President Harrison considered it relevant that the application before Commissioner Merriman was one made under ss.87 and

111(a)(n) of the Act. It is plain that she considered that the nature of the application was such that neither the decision itself, nor the circumstances in which it was made, displayed any bias on Commissioner Merriman's part. She did not in her reasons condone communications between the Commissioner and one party to the exclusion of another party. However she said that in the circumstances she was not persuaded that APPM had an arguable case of bias or ostensible bias on the part of the Commissioner.

The appeal against Commissioner Merriman's refusal to disqualify himself came on for hearing before a Full Bench of the Commission comprising Vice-President Moore, Deputy President Harrison and Commissioner Oldmeadow. An application was made on behalf of APPM that Deputy President Harrison disqualify herself upon the basis that the comments made by her in refusing the stay application and her decision to refuse the application constituted a prejudgment of the very issue which was the subject of the appeal before the Full Bench. On 27 January 1993 she delivered a decision refusing to disqualify herself as a member of the Full Bench. The hearing before the Full Bench has been adjourned to 20 April 1993.

Before me APPM now seeks orders nisi for writs of prohibition and certiorari prohibiting Deputy President Harrison from proceeding further in the matter and quashing her decision to refuse to disqualify herself. It is not, I think, unfair to the applicant to say that the application is based upon the proposition that bias or apparent bias on the part of Commissioner Merriman was so plain by reason of his participation in communications with the FEDFA to the exclusion of APPM and his actions based upon those communications, that Deputy President Harrison herself demonstrated bias by rejecting the submissions put by APPM and by finding that no arguable case had been made out.

In argument I indicated that I was prepared to assume without, of course, deciding, that Deputy President Harrison was wrong in her conclusion that the circumstances did not disclose a case of bias or ostensible bias upon the part of Commissioner Merriman. But even upon that assumption, I do not think that the applicant can make out any case for the granting of the orders nisi which it seeks. Even if Deputy President Harrison was wrong in refusing the application for the stay upon the basis that the applicant did not have an arguable case, that does not of itself indicate any

partiality or prejudice on her part against the applicant. Nor does it indicate that in the resolution of the issue before the Full Bench she will be unable to bring to the proceedings an impartial and unprejudiced mind. No doubt there will be full argument before the Full Bench involving the participation not only of Deputy President Harrison, but the other members of the bench. There is nothing which I can discern in the interlocutory decision made by the Deputy President or in any comments made by her that her mind will be closed to the arguments which will be put or the discussion which may take place. Furthermore, I do not read the Deputy President's reasons for refusing the stay as a rejection of the proposition that communications between the Commission and a party to a dispute to the exclusion of another party may not be improper or may not amount to a denial of natural justice. Rather she appears to have concluded that in the circumstances of the particular application no bias or ostensible bias was disclosed. Whether that conclusion is correct is not really to the

point. As Mason J. said in *Re J.R.L.; Ex parte C.J.L.*[1]:

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than 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 he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that 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."

Nor does it matter that the previous decision is given in the very proceedings in which the ultimate issue falls for determination or in related proceedings[2].

At the most the applicant can, in my view, demonstrate that Deputy President Harrison reached a

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(1) (1986) 161 C.L.R. 342, at p.352.
(2) See *Finance Sector Union of Australia; Ex parte Illaton Pty. Ltd.* (1992) 66 A.L.J.R. 583; 107 A.L.R. 581; see also *Re Morling; Ex parte A.M.I.E.U.* (1985) 66 A.L.R. 608.

wrong conclusion for wrong reasons, something which I was prepared to assume for the purpose of argument. That falls short of establishing any arguable ground that she has displayed bias against the applicant such that she will not be able to participate impartially in the proceedings when they are resumed before the Full Bench. For these reasons I would refuse the orders nisi.