

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2011-409-001493

BETWEEN

TIMOTHY PETER SIMS HOWE
Plaintiff

AND

AARON VERNON LEE KEOWN
Defendant

Hearing: 30 August 2011

Counsel: A J Forbes QC and JWA Johnson for Plaintiff
N Till QC and J Cowan for Defendant

Judgment: 2 September 2011

JUDGMENT OF FOGARTY J

Introduction

[1] In May 2012 the first term of appointment of the CEO of the Christchurch City Council expires. The defendant is a councillor of the Christchurch City Council. The Council has advertised the position of Chief Executive. The incumbent Chief Executive is applying. The defendant supports the retention of the incumbent. He has said so publicly. The plaintiff, a concerned ratepayer, seeks an injunction to prevent the defendant participating in the deliberations over the appointment, on the grounds that he is not impartial. The defendant has not challenged his standing to do this, as he wants a decision on the merits.

[2] The application asks this Court to exercise its inherent power to maintain the rule of law by judicial review of the exercise of government powers. The common law requires that all public law powers should be exercised for their proper purpose and fairly. If public powers are being breached, or used unfairly, the High Court may intervene with the remedy of injunction. A public power cannot be exercised by any person for private advantage, including to favour or disfavour any person with whom

the decision-maker has a personal relationship, or financial interest. Where a person has such a connection, the law assumes, reliably, that there is a material risk that the decision-maker will exercise the public power for the wrong reason, consciously or unconsciously, because the decision will be tainted with improper partiality for a person. If such a decision-maker actually so favours another, she or he is said to be biased, and if there is a real danger that she or he may so favour another, consciously or unconsciously, there is a risk of apparent bias. Either way the Court will intervene.

[3] The plaintiff relies on three separate actions of the defendant, which counsel say, taken cumulatively, demonstrate that he has pre-determined the appointment, which is the first ground of argument; demonstrated apparent bias, which is the second ground; and breached the statutory code of conduct in that he is not objective and has demonstrated a real danger of bias in that he might unfairly regard with favour the application of the incumbent, and with disfavour the application of other applicants.

[4] A person can be predetermined upon an outcome without being biased in favour of any particular person. A person can be biased without being predetermined as to an outcome. It is dangerous to think of bias and predetermination as synonyms. My reasoning will distinguish between these two concepts.

[5] The ultimate issue in this case is whether the defendant so favours the retention of the Chief Executive that he should either stand aside, or be excluded by injunction from participating in the Council's deliberations.

[6] I analyse this issue in three parts. First, I will make findings of fact as to the conduct of the defendant, and the inferences that can be drawn as to the nature of the favouritism, and whether there are any qualifications to it.

[7] Second, I will examine the process that Parliament requires the Council to follow. I will include in that analysis, an examination of the extent to which the law allows councillors to form a policy favouring the retention of the incumbent Chief Executive Officer, and when the law requires the Council to advertise the position,

whether or not the Council is dissatisfied with the performance of the CEO, and whether or not the CEO wants to continue.

[8] Third, I will take these findings of fact and statute law, and then apply the common law against predetermination and the common law against bias, to see if the remedy of injunction should issue.

[9] I turn to the first part of my analysis examining the conduct of the defendant.

The conduct of the defendant

[10] The first act relied upon by the plaintiff is a letter that the defendant wrote to *The Press* on 18 April 2011. In part of that letter he said:

I would like to make it publicly known that I have become very impressed with the way our CEO has run this organisation.

Sometimes you have to give credit where credit is due.

Tony Marryatt now has my respect.

Mr Marryatt is the incumbent CEO.

[11] The second conduct relied upon by the plaintiff took place at a meeting held by the councillors to which the Council staff and the public were excluded. It is said to have been around about 25 May. At this meeting the defendant asked each of the other councillors if he or she supported the incumbent Chief Executive.

[12] The third conduct of the defendant relied upon by the plaintiff is an interview that he had with Ms Susi McLean on Newstalk ZB on 10 June 2011. This was the day that the Council decided to commence the process of advertising for a new Chief Executive. Ms Susi McLean is the interviewer. The defendant's first name is Aaron.

Susi McLean Aaron, good morning

Aaron Yes, good morning Susie, how are you?

Susi McLean I am very well thank you. How are things in your world?

Aaron Pretty good, pretty exciting of course, we are going to annual plan again today, had a big meeting yesterday, but that wasn't the reason why I was calling you.

I had had some feedback, I had heard the start of your show yesterday, and then had feedback from some people during the day on what might have been on there, and I was quite upset about it, and I really needed to give you a ring.

Susi McLean Go for it.

Aaron And get a couple of things straight. Our Mayor has been accused of some stuff that he hadn't done. Um, in the so called leaks. So I think there is a reference in there that the Mayor had gone around and asked, been a bully and asked all the Councillors if they had supported Tony Marryatt, and that wasn't actually the case.

So I'm going to put my hand up here and say that it was actually me that asked at that meeting that we had a couple of weeks ago.

I can put it in context for you why I asked, but before I would do that I would probably ask you – do you support the boss at your place?

Susi McLean Aaron, can I just ask the question though, yes, I support my boss, however I'm just trying to think of the difference here, however are you involved in the selection process?

Aaron The entire Council is, yes.

Susi McLean Yes, so I guess the difference is this – I do support my boss, but then I'm not involved in hiring him. So, for me to publicly support my boss, well for starters, I get my pay cheque and it's politics, and it's a good thing to do as an employee but I'm not involved in the selection process.

I think the difference with you guys is – you are – you're part of the recruitment panel. So to openly support one candidate when you are opening the net up wider to hopefully attract more, doesn't just seem like a great process to me.

Aaron True, it could be seen like that, but that wasn't the context of the question.

It was around – I was asking the question based around legal process, because the only reason that we – well in my mind – that we are going out to consult – because Tony's contract runs until next year, its May next year – so there is not going to be a big change in the near future.

His contract runs until then, and legally you have to advertise it.

The question I posed was, if you owned a company, your company through no fault of your own, ie an earthquake was in the worst situation it had ever been in its entire history, and you had a CEO at that company that had the full support of all his staff, not necessarily just the elected members, I know the senior management staff and the staff at the Council really support their boss.

Why would you go changing the captain of the ship? That was the question I was asking.

And I was told it was a legal one, and it was in that, that I asked whether people supported Tony, so that was the context there.

Susi McLean And I guess for the people of Christchurch we need to then understand – this is – either one of two things is going on, either council is just going through a process and just going through the motions in advertising the city manager’s job because it has to and it’s not desiring change and therefore the question is raised how seriously are you going to take this process with any other candidate that turns up.

Or there’s a genuine process designed to open the net wider to ensure that we get the very, very best city manager that we can get. So which of those two things is it?

Aaron It is the latter because probably, I’m not saying definitely, but probably given Tony Marryatt’s track record and the local government, he will most likely be the best candidate there is but that is not guaranteed because Rob Fyfe might throw his hat in the ring.

Now Rob doesn’t have a history in local government or understand the CERA Act. But he might be the best candidate on the day and therefore he would win. So it is genuinely open. It’s been pretty well advertised as in the front page of the paper, so everyone knows it’s coming up. I think it officially opens as of this weekend and then the ads will start next week in the paper. So it’s ...

Susi McLean [interrupts] ... Do you know, Aaron, I think the muddle that you guys have got yourselves in and you are in a muddle with this one and it’s even sounding muddily as we’re talking you know, I think the muddle has happened that somehow there has been the aspersion or the inference that the reason this job is being advertised is that councillors and/or other influential people are unhappy with the performance of the city manager.

Yeah?

Aaron No. No, not at all. His contract runs out in May next year, so that’s why his contract has to be advertised. We are allowed to roll over for two more years ...

Susi McLean Right.

Aaron ... but Tony's more committed to the city than that. And he wants to see it through for five because that's what he just did, he again wants to do another five. For that to happen – so for him – so basically he's putting his job on the line. This isn't the other way around. He can, by rights, just get a two year rollover and he's back for three years from now. So ...

Susi McLean [Interrupts] Right. What you're saying is that the job is not up for grabs because you're unhappy with Tony's performance; it's up for grabs because it's a legal requirement.

Aaron Exactly.

Susi McLean I guess what I would say to take it one step further, Aaron, is that's all well and good, but for the people of Christchurch you guys may not see a need to look for skills beyond the city manager you have, but for the rest of us, we see this as an opportunity to cast the net and see who is out there and what's going on.

And I guess that as a city, as a rate payer, I would hope that you are going to take that opportunity really seriously and not just have a tick box process around the selection.

Aaron No. No, we definitely will, but here's the bonus for the city is that you already have within – because I mean there's over 2000 staff in the Council and imagine how much of an upset in the ship if a third disappeared in a year because they didn't like the new CEO.

Under the old CEO that won't happen so – and it is not the time for sweeping change but it is the time to have the door open and if there's someone better there, they will get the job, there's no doubt there at all.

Our luck for the city is that the old CEO is not saying I am leaving town, I am moving on, this is it for me. He is saying I am putting my name forward – so you have got a really strong benchmark to judge the others against.

If he was not there, then you really have to take what comes along – you actually have to or otherwise you won't have a CEO.

Susi McLean Sure.

Aaron ... Whereas at this point we have got a really good one, we might get a better one, if we don't get a better one, we have still got a really good one – so for the city's sake, it is a really good thing.

Susi McLean Hey Aaron, have you guys had legal advice on the situation you are in now, particularly with some of the comments that the Mayor is alleged to have made in support of the current city manager.

Aaron Umm. Yeah, yeah we have, and as far as we have been told, the Mayor hasn't breached anything because he has just said

that of all the CEOs he has worked with, he has found Tony to be one of the best.

There is nothing wrong with that – I don't see – you must support, just like Mark Christianson is the head of our drainage, our water and waste. He is one of the best in the country – we have got no problems saying that. We have really good people in the city – we should support that and support them when that question is asked.

It would be nothing worse, imagine the turmoil our city would be in if the Mayor has said, oh gee, the CEO is pretty average I think, crikey, that wouldn't be very good for our city.

Susi McLean Yeah, but I do think that the prudent thing to do would actually not to be commenting on the performance of any of the applicants for this job.

Hey look we have got to run Aaron. Thank you very much for your call ...

Aaron [Interrupts] One more thing Susie, so it was me who said that, not Bob, and Bob did say yesterday that if someone better does come along, they will be the CEO – so he said that in his own words as well.

Susi McLean Good stuff, thanks for clarifying that Aaron and we will let you get back to your city planning debate.

[13] Mr Keown, in an affidavit, explained the context of these three different incidents: his letter to *The Press*, his asking councillors whether they supported the CEO, and the reason for the Newstalk interview. His evidence is that:

3. Prior to being elected as a Councillor I had limited knowledge of the incumbent Chief Executive Mr Tony Marryatt. I had never met Mr Marryatt. My knowledge of him was restricted to such information as was available to me as a member of the public from the media. I had formed some adverse views of Mr Marryatt's performance, which I expressed on a number of occasions and in a number of different venues, including:
 - (a) I had been a member of a group known as City Vision which was critical of the Council and Tony Marryatt as its CEO;
 - (b) In public election debates I had criticised Mr Marryatt's value;
 - (c) On radio I had challenged the level of salary paid to Mr Marryatt.
4. Following my election I had some, but limited, dealings with and opportunity to assess Mr Marryatt prior to the earthquake of 22 February 2011. Following that earthquake I had direct experience of Mr Marryatt's leadership as Chief Executive. I was impressed with the manner in which he dealt with that emergency

and the manner in which he communicated with and led the employees of the Council during particularly stressful and trying times.

5. As a result of that experience I gained confidence in Mr Marryatt's ability. I wrote a letter to the Press conveying that confidence in him. I wrote the letter solely/primarily to redress my prior criticism of him. ...
6. My letter was written prior to my having knowledge of the forthcoming expiry of the Chief Executive's appointment and therefore had no bearing whatsoever on the appointment process which is now impending.
7. I subsequently became aware that the Chief Executive's contract expired in May 2012. There was consideration by Council of what would happen including the following:
 - (a) About a couple of weeks before 10 June 2011 the Council had an informal confidential 'PX' (ie public and Council staff excluded meeting) about the CEO's position. It was in the early stages discussion about the position. It was before I was aware of the requirements of the Local Government Act regarding the appointment of the CEO. The discussion clarified what was legally required ie reappointment for no more than 2 years or advertising for a term of not more than 5 years. The context of my question was during discussion about whether to roll over the appointment for two years or advertise for a five year appointment. I questioned what the view to a roll-over of 2 years was by asking the meeting whether they support Mr Marryatt. That would not have been an option if there had been widespread opposition to that course.
 - (b) Subsequently on 25 May 2011 the Council resolved not to re-appoint Mr Marryatt but to advertise the position and appoint a Chief Executive for a five year term....
8. Despite the confidentiality of the meeting ... someone leaked the fact of the question re support for Mr Marryatt to the media which asserted that it was the Mayor who had asked it. On 10 June 2011, I heard discussion on Newstalk ZB which also asserted that the Mayor had asked the question of Councillors. I telephoned Susi McLean of Newstalk ZB to set the record straight as I did not think it fair for my question to be wrongly attributed to the Mayor.

[14] Mr Forbes, counsel for the plaintiff, has invited the Court to interpret the defendant's readiness to consider an outstanding other candidate for appointment over the incumbent as mere words – not to be relied upon. He invites the Court to

make a finding that taken together, this course of conduct demonstrates that the defendant has predetermined the outcome.

[15] I find that taken together, the actions and words of the defendant show a strong support for the retention of the CEO. But it is very important to record why and why not.

1. There is no suggestion that he is an old friend, a business partner, a creditor or a debtor of the CEO. He does not, on that basis, fear or favour the CEO for reasons other than his capability as a Chief Executive Officer.
2. Second, rather the Chief Executive Officer has impressed the defendant by his performance in his office.
3. The defendant believes strongly that the Council should not change its CEO in the middle of this crisis unless a very outstanding candidate comes forward.

[16] This last point of view is what is called in public law, and elsewhere, as a policy. The defendant's policy position is formed independently from the personality of the incumbent.

The statutory criteria and process

[17] I will now turn to the second part of my analysis which is to examine the statute law and the statutory process governing the appointment process.

[18] The Council does not have the power to delegate the appointment of its Chief Executive. This is important. The Council can delegate all of its decisions except making rates, making bylaws, borrowing money, selling assets, and adopting long term and annual plans, and appointing its CEO.¹

¹ Local Government Act 2002 Schedule 7 Clause 32(1) (LGA, Sch 7, cl 32(1))

[19] What does this mean? It means that Parliament intends full political accountability by the councillors to the ratepayers for the appointment of the Chief Executive Officer.

[20] The law requires the Council to review the employment of the Chief Executive Officer at least six months before the end of his term.² It is not clear on the record of this case whether this was done, or was being done in May, in the course of a public-excluded meeting. I have been told from the bar that such reviews are regarded as confidential, being employment related. What is clear, however, is that the Council was discussing, before making a decision as to two years or five years, the position of the Chief Executive Officer.³ It is more probable than not that the councillors would have individual views in any event prior to that meeting, as to the performance of the CEO, that is natural. In that discussion in the public-excluded meeting, it is likely, and so probable, that any divisions in judgment will have been identified among the councillors as to the quality of the performance of Mr Marryatt as Chief Executive Officer.

[21] As a matter of law, after the first term of the Chief Executive Officer, the Council has a discretion to either reappoint the Chief Executive Officer for two years or to advertise the position as vacant and open up another five year term.⁴ In this case it would appear from the radio interview that Mr Marryatt has indicated that he does not want another two year term. He wants to go into a competition for a five year second term.

[22] When the position was advertised by the Council, I am told from the Bar, that the advertisement told potential applicants that the incumbent was applying. Such applicants can be relied upon to do their homework and to appreciate that the councillors will have likely established individual views, and possibly joint views, one way or the other as to the merit of the incumbent.

² LGA, Sch 7, cl 35(1)

³ LGA, Sch 7, cl 34(1), (4), (5)

⁴ LGA, Sch 7, cl 34(4)

[23] The Council has seven special criteria when considering the appointment of a Chief Executive Officer.⁵ The law is that:

The local authority must, in making an appointment under section 42, have regard to the need to appoint a person who will –

- (a) discharge the specific responsibilities placed on the appointee; and
- (b) imbue the employees of the local authority with a spirit of service to the community; and
- (c) promote efficiency in the local authority; and
- (d) be a responsible manager; and
- (e) maintain appropriate standards of integrity and conduct among the employees of the local authority; and
- (f) ensure that the local authority is a good employer; and
- (g) promote equal employment opportunities.

These are minimum criteria.

[24] As a good employer, the law requires the Council to have a personnel policy requiring “the impartial selection of suitably qualified persons for appointment”.⁶ And, in addition, “when making an appointment, must give preference to the person best suited to the position”.⁷

[25] Taken together, this means the law requires councillors to impartially select the suitably qualified person best suited for the position of Chief Executive Officer of the Council.

[26] This means that the councillors must consider, in advance of their decision, the demands and challenges to be faced by the CEO of the City of Christchurch in the five years from 2012, and then from the available candidates, select the person best suited to those demands and challenges.

⁵ LGA, Sch 7, cl 33

⁶ LGA, Sch 7, cl 36(2)(c)

⁷ LGA, Sch 7, cl 36(3)(a)

[27] In turn this means that the councillors can add to the basic criteria set out in the statute, applicable to all local authorities across the country, additional criteria, so long as those additional criteria are not inconsistent with the mandatory criteria.

[28] This task can be described as developing a policy, individually or as a group, as to how the candidates are being to be selected. It is as practical as giving some thought beforehand as to the experience that will be looked for, as to the questions that will be put to the candidates.

[29] Public law is very familiar with the important difference between developing a policy before a decision is made, and pre-determining a decision.

[30] There are many cases which raise questions of an overly strong policy. These cases are usually⁸ analysed in terms of the language of predetermination or closed mind, rather than in the language of bias.

[31] Where decision-makers have the ability to develop a policy the public law analysis is best confined to the issue of “closed mind” or “predetermination”.

[32] This is particularly apt in this case. No one is suggesting the defendant favours or fears the Chief Executive Officer because of family, social or financial considerations.

[33] To complete this analysis of the statutory process, I would add that where a decision-maker has developed a policy, on top of the basic criteria, it is best practice to actually disclose that policy before the hearing. This is not possible if the individual decision-makers have different additional criteria, as is quite likely in this case, given that the whole Council are the decision-makers.

⁸ For example, *CreedNZ v Governor-General* [1981] 1 NZLR 172 CA; *Devonport BC v Local Government Commission* [1989] 2 NZLR 203 CA

Applying the common law

[34] I now turn to the third part of my analysis which is to apply the common law to the facts and to the statute law. The law against predetermination and bias has its origins in the law developed by Judges, not Parliament. Where we find it in statutes, such as here in the Code of Conduct in the Local Government Act, it is clearly a codification of the common law.

[35] The common law requires public powers to be exercised fairly. Even if a statute does not expressly say that, a Judge will insist on it. But what the common law does not do is question who Parliament selects to make a decision, or the process it imposes. Often, as here, the person appointed, and the process they follow, virtually guarantees that the decision-makers will have formed strong views before the hearing starts.

[36] There was a suggestion in the plaintiff's legal argument that Mr Keown's wrong was to air his views before the hearing. Contrary to that submission there is no duty to appear impartial. The duty is to be impartial. But partiality should not be confused with holding a strong and legitimate policy in favour of stability in a crisis, unless an outstanding candidate trumps that value. "Impartiality" is the word used in the Local Government Act and is clearly directed to preventing persons being favoured or disfavoured for inappropriate reasons. And, as I have previously noted, where a policy in addition to the statutory criteria is adopted, it is better that it be aired before the meeting, not kept hidden.

[37] The defendant's preference for stability is a legitimate policy that he can have consistent with assessing the merit of the candidates. Given the crisis, it is legitimate for him to take the view that a competing candidate will have to have outstanding qualities justifying a loss of continuity of leadership at this time.

[38] I consider next whether the plaintiff has proved that the defendant's policy goes beyond favouring retaining the incumbent CEO to closing his mind to the possibility of him being replaced.

[39] Mr Forbes urged me to place no weight on this answer to Ms McLean's question. You will recall I have read this out before, but I repeat it again, to focus on Mr Forbes' argument:

Susi McLean And I guess for the people of Christchurch we need to then understand – this is – either one of two things is going on, either council is just going through a process and just going through the motions in advertising the city manager's job because it has to and it's not desiring change and therefore the question is raised how seriously are you going to take this process with any other candidate that turns up.

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Now Rob doesn't have a history in local government or understand the CERA Act. But he might be the best candidate on the day and therefore he would win. So it is genuinely open. It's been pretty well advertised as in the front page of the paper, so everyone knows it's coming up. I think it officially opens as of this weekend and then the ads will start next week in the paper. So it's ...

And then he was interrupted. Now we all know that Mr Rob Fyfe is the Chief Executive of Air New Zealand and we all know that he has done an outstanding job for that company. Plainly, the defendant was using Mr Fyfe to illustrate his point, apparently because he, Mr Fyfe, had been the subject of discussion on Newstalk earlier.

[40] Mr Forbes said that his answer was just words as to the possibility of a better candidate succeeding. That is a judgment I have to make. I do not agree. It needs to be kept in mind that the interview was relatively informal, by telephone. My judgment is that Mr Keown, the defendant, was answering honestly the questions. I have already noted the suggestion in the argument that his fault may have been candour. This appears to me to be a candid interview. I find that the plaintiff has not proved that the defendant has a closed mind.

[41] In his closing address Mr Forbes urged on me to apply a standard of reasonable possibility of danger of bias, following the Supreme Court in *Saxmere*.⁹ That decision is not directly on point. It is setting the test for apparent bias by reason of personal favouritism. No case was cited to me where such a test has been applied to a process such as going on the City Council. On the contrary, there are numerous cases of decision-making by elected persons, where Judges caution against applying rigorously the law of bias developed to prevent corrupt decisions, influenced by fear or favour on the part of the decision-maker. Professor Joseph discusses this and collects a number of cases.¹⁰

[42] It suffices to quote from Professor Joseph a couple of his summaries of the law. He says:

(4) *Utility of a single, universal standard*

The vast range of decision-making authorities throws in question the utility of a unitary standard of bias. ...

... A decision-maker may be expected to hold preconceived views or to develop and apply policy in the exercise of discretion. Where bias is alleged against local authorities or planning bodies, the evidence must tend to establish actual predetermination of issue. ...

(at 999)

[43] I cannot rule out as a reasonable possibility that the defendant may have a closed mind, subconsciously. I should explain. My previous finding was that it has not been proved on the probabilities that he has a closed mind. But I will not order an injunction on the basis that there is a possibility that he may have a closed mind in a case such as this, where Parliament has deliberately required the decision to be taken by all the elected councillors. He is going to be one of 12 or 13 councillors who will consider and debate the merits of the competing applicants. I decide the case for the defendant.

⁹ *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35

¹⁰ *'Constitutional & Administrative Law In New Zealand'* 3rd ed Phillip A Joseph, Thomson Brookers 25.5.4 (4) and (6); *CreedNZ v Governor-General* [1981] 1 NZLR 172 CA; *Devonport BC v Local Government Commission* [1989] 2 NZLR 203 CA

[44] I end this judgment with some brief comments on material I have not taken into account at all, or only in the most limited way. First, I did not read affidavits filed by prominent citizens in support of the plaintiff or any of the newspaper articles – except the article summarising and quoting from the opinion of the solicitors, Chen and Palmer. I read that article for a special reason. I had taken note that a majority of councillors on 1 July had resolved that the defendant stand aside, or invite him to stand aside. (There is some debate as to the wording of the motion). I had observed to the defendant’s counsel, Mr Till, that the motion in any event may indicate a loss of confidence by his fellow councillors that the defendant could keep an open mind. Taking me through the article, Mr Till persuaded me that that was far from clear; as Chen and Palmer’s advice to the Council was cautious, and suggesting that the defendant ought to stand aside as a precaution.

[45] The defendant is entitled to costs. Costs are reserved.

Solicitors:
Wynn Williams & Co, Christchurch, for Plaintiff
Shirley Law, Christchurch, for Defendant