

AUSTRALIAN LABOR PARTY (NSW BRANCH)

REVIEW TRIBUNAL

ALEXANDER V BARCHA

1. On 3 July 2015, the Administrative Committee referred the following matters to the Review Tribunal:
 - i. Correspondence from Mr Nathan Alexander, appealing the decision of the Internal Appeals Tribunal dated 17 June 2015; and
 - ii. Correspondence from Mr Nathan Alexander appealing the decision of the Internal Appeals Tribunal dated 19 May 2015.

Review Tribunal Directions prior to Hearing

2. The Review Tribunal hearing of these referrals was conducted on 29 October 2015. In prosecuting the appeals Mr Michael Lee SC with Mr James Mack & Mr Jason Donnelly, both of Counsel, appeared for Mr Nathan Alexander instructed by William Roberts Lawyers. Mr Shane Prince, of Counsel, appeared for Mr George Barcha assisted by Dr Hugh McDermott MP.
3. The two appeals were against Decisions of the Internal Appeals Tribunal ("IAT") each dealing with the conduct of the then Secretary of the Smithfield Branch of the NSW ALP. The first Decision examined the procedures followed by the Branch Secretary, Mr George Barcha, in his renewal of Branch members' ALP memberships for 2015. The second Decision, the first dispute in time, considered a challenge to the legitimacy of a number of Branch meetings and asserted irregularities in the Branch attendance book.
4. The Review Tribunal's hearing was conducted in accordance with Directions given by the Tribunal. In submissions Mr Barcha challenged the Review Tribunal's Directions. On 12 August 2015 as the Tribunal had over 430 pages of correspondence and submissions, solicitors for Mr Alexander were asked for a single document outlining the full nature of the appeal/s and an identification of the issues the Review Tribunal was being asked to consider.
5. On 19 August 2015 solicitors for Mr Alexander filed submissions and some 40 pages of attachments relating to the appeal from the IAT decision of 17 June 2015. The submissions did not canvas any matters related to the appeal referred to the Review Tribunal by the Administrative Committee of the IAT Decision of 19 May 2015. In the

submissions it was stated that Mr Alexander wished to “retain his rights”. A Statutory Declaration of Mr Embada Qutami dated 22 May 2015 in the possession of the Review Tribunal was also not relied upon. This Embada Qutami Statutory Declaration attests to a number of matters central to this dispute.

6. In a further Directions hearing, when questioned as to the relevance of the Embada Statutory Declaration, Counsel for Mr Alexander stated the Embada Quatami Statutory Declaration was the basis for a “new charge” and would not be pursued in the appeal. However correspondence before the Review Tribunal revealed Mr Alexander sent the Embada Quatami Statutory Declaration to the ALP Office on 24 May 2015. A copy was sent to both Mr Barcha and his representative, Dr McDermott, on the same date. Correspondence also revealed the Embada Quatami Statutory Declaration was before the IAT. An examination of the IAT Decision did not reveal a consideration of the Embada Quatami Statutory Declaration.
7. Questions were also raised as to the status of the membership renewal of Mrs Shafiqah Qutami as Mr Barcha stated in his submissions before the IAT she had authorised him to renew her membership. There are three statutory declarations from Mrs Qutami in relation to these matters. These three statutory declarations were not considered to be new evidence but evidence before the Review Tribunal on appeal. Further the Review Tribunal held, notwithstanding submissions to the contrary, Mr Alexander should not be permitted to “reserve” his rights to later press a new charge or another appeal on matters already before the Review Tribunal. The just and speedy administration of Party matters under the Party Rules is paramount for the Review Tribunal.
8. The Review Tribunal therefore directed the parties as follows:

The Review Tribunal has consolidated the appeals referred to it by the July meeting of the Administrative Committee.

The Review Tribunal accepts all the documents before it, including the Embada Statutory Declaration and membership renewal form, the correspondence related to each appeal from both parties and each of the IAT Decisions.

The Review Tribunal will hear final, oral submissions, including as to the evidence considered collectively, with a view to the Tribunal deciding the two appeals thereafter. In so directing we hold the appeal competent.

9. It is noted that there was difficulty faced by both the IAT and the Review Tribunal due to Mr Alexander selectively pressing, then withdrawing, then re-submitting various documents during the course of the hearings relating to what was ultimately his complaint.

Notice of Contention

10. On 28 October 2015 the Review Tribunal received a “Notice of Contention” filed on behalf of Mr Barcha challenging the Formal Reprimand ordered by the IAT in their Decision of 17 June 2015. Mr Barcha contended the penalty was excessive as he had successfully defended a substantial number of allegations pressed by Mr Alexander (who sought a finding of unworthy conduct) but he was found by the IAT only to have had “poor practice” in submitting the membership renewal forms for 2015. The Review Tribunal determined to consider this submission if it had to reconsider sanction.
11. Mr Barcha further pressed a new charge against Mr Alexander alleging Mr Alexander, in making false and unsubstantiated complaints against him, was himself guilty of unworthy conduct. The Review Tribunal considered the content and submissions in the Notice. The Review Tribunal determined that it would not consider the charges brought in the Notice of Contention by Mr Barcha against Mr Alexander arising from findings by the IAT. It held these were new charges and had not been referred to the Tribunal under the Rules
12. The Review Tribunal determined to consolidate the appeals.

Powers of the Review Tribunal

13. In submissions both parties canvassed the nature of an appeal before the Review Tribunal.
14. An appeal before the Review Tribunal is subject to Section J of the NSW Labor 2015 Rules. The Review Tribunal is a creature of the ALP Rules and its decisions are final (subject to an overrule by the party’s NSW Annual Conference [J.10(a)&(b)] and appeal rights to the ALP National Executive). The Section defines who holds rights to appeal [J.1]; the form and manner in which appeals must be made [J.1]; the Review Tribunal’s jurisdiction [J.2]; and its powers to obtain information [J.7]. Review Tribunal proceedings are not bound by the rules of evidence [J.12(c)] and parties have the right to procedural fairness and a hearing under the direction of the Tribunal Chair [J.13(b)]. It must act in accordance with the merits of the case without regard to technicalities or legal forms [J.8(d)]. Orders made by the Review Tribunal are to be, within its discretion, “appropriate in the circumstances” [J.8(b)].
15. Mr Barcha submitted that an appeal to the Review Tribunal requires an allegation that error exists in a decision of the IAT. It was asserted:

(the) Review Tribunal is not a mere continuation of the first instance hearing before the (IAT) and does not permit the laying of fresh charges in the Review

Tribunal – even if those fresh charges arise out of and are not derivative of conduct in the (IAT).

16. Mr Alexander submits the jurisdiction of the Review Tribunal is limited to hearing an appeal as formulated and then to arrive at its decision.

17. As was held in *Perry v Zraika* at [10]:

The appeal before the Review Tribunal is a rehearing where the Review Tribunal has the ability to receive new or fresh evidence (for instance, Rule J.7 allows the Review Tribunal to require party members to provide statements and to produce documents). The Review Tribunal must conduct proceedings “according to the substantial merits of the case without regard to technicalities or legal forms” (Rule J.8(d)).

18. In accordance with the powers vested in the Review Tribunal under Section J of the Rules, as particularised above, the Review Tribunal’s powers are very broad and include powers to obtain information from Party units [J.7]. The Review Tribunal reiterates the ruling made in *Perry v Zraika* that the nature of a hearing before the Review Tribunal is that of a rehearing.

Issue

19. The focus of this appeal is therefore whether, on all the evidence relied upon in both appeals, Mr Barcha’s conduct, as Secretary of the Smithfield Branch, was unworthy conduct under the rules such as to bring the Party into disrepute and, if so found, what should be the appropriate sanction?

The Appeal: Evidence as to the renewal of Party memberships

20. It is necessary to consider the charges and the evidence that led to both decisions of the IAT. Mr Alexander contended Mr Barcha’s conduct in the procedures he followed in his bulk renewal of Smithfield Branch memberships for 2015 breached Rule A.35(a). As was held in *Zraika v Perry* at [45]:

The Tribunal accepts ... the current (Party) rules permit bulk renewals. They also permit Branch officials to present bulk renewals on behalf of multiple members.

21. The IAT examined the circumstance surrounding the renewal of the party memberships for 2015 of Mr Joseph Farrugia and Mrs Lena Farrugia. Mr & Mrs Farrugia attested in statutory declarations that Mr Barcha had renewed their membership in a circumstance where they did not complete the renewal forms; they did not sign the forms; the signatures on the forms were not theirs; they did not pay anyone for their

membership fees; they did not know the forms had been submitted; they had no knowledge of, nor give consent to anyone to renew their membership.

22. Mr Barcha in reply stated:

These allegations are completely false. I did not fund the membership renewal, nor did I sign the membership renewal form, of Joe Farrugia or Lena Qutami Farrugia.

...

As is supported by the statutory declaration of Mrs Shafiqqa Qutami, the mother of Lena Qutami Farrugia, I was given the completed and signed renewal forms of Mr Joseph Farrugia and Mrs Lena Qutami by Mrs Shafiqqa Qutami with the associated fees (\$40 = 2 X \$20 Concession) on 29 January 2015. Mrs Shafiqqa Qutami also gave me her own signed renewal form and renewal fees (\$20 Concession).

Mrs Shafiqqa Qutami requested that I submit the 3 renewal forms on behalf of herself and her daughter and son-in-law to head office for renewal.

Mr Barcha relied upon the first statutory declaration of Mrs Qutami dated 15 May 2015 confirming this.

23. Mrs Qutami initially did support this version of events but in a second statutory declaration dated 18 May 2015 she recanted. She stated:

I did not give George Barcha any labour [sic] membership form or money. Over the past couple of years I have not attended a meeting at the Smithfield branch and have not signed the attendants [sic] book.

24. In a third statutory declaration Mrs Qutami dated 24 May 2015 gave details of pressure brought upon her to assist Mr Barcha in the renewals process. She again directly denied giving Mr Barcha the signed forms from herself or from Mr and Mrs Farrugia or any monies for the renewals.

25. Mr Barcha gave evidence before the IAT. He also tendered a statutory declaration denying the details contained in the second Mrs Qutami statutory declaration which denial she reiterated in her oral evidence before the IAT.

26. The IAT found the following facts:

13. Having regard to the whole of the evidence, the Tribunal is unable to accept the evidence of Mr Barcha that he obtained completed and signed Renewal Forms for Mr Farrugia and Ms Qutami from Mrs Qutami upon visiting her house. In making this finding, the Tribunal has had regard to the following matters:

(a) Firstly, Mrs Qutami denied having completed or prepared Renewal Forms in the names of her daughter and son-in-law. Whilst the Tribunal does not necessarily accept all of Mrs Qutami's evidence given the

changes in her statements between her three Statutory Declarations, Mrs Qutami was emphatic that she did not complete the Renewal Forms.

(b) Second, the Renewal Forms do not appear, on their face, to have been completed by Mrs Qutami. Mr Barcha's account only makes sense if Mrs Qutami completed the Renewal Forms to give to Mr Barcha on 29 January 2015. Yet, the handwriting on the forms is not that of Mrs Qutami and it is inherently unlikely that Mrs Qutami completed the forms herself.

(c) Thirdly, it appears to the Tribunal that it would be unlikely that Mrs Qutami would take the initiative to complete and pay for membership renewals for her daughter and son-in-law. Mrs Qutami does not appear to speak or read English with a high level of proficiency and was going through difficult personal circumstances at the time. The Tribunal believes it is unlikely that Mrs Qutami would have completed the forms, particularly without the knowledge of her daughter and son-in-law.

(d) Fourthly, Mr Barcha's evidence was unsatisfactory or incomplete in a number of respects. Mr Barcha was unable to say who had asked him to collect Renewal Forms from Mrs Qutami, why he was involved in submitting those forms or whether he had collected other forms from Mrs Qutami. Whilst the Tribunal understands that memory is fallible, these events took place only a few months ago and it might be expected that Mr Barcha could recall at least some of these details.

...

15. The difficulty for the Tribunal is that there is no evidence to affirmatively establish that Mr Barcha prepared and falsely signed the Renewal Forms himself and used his own funds to pay the membership fees. To make such a finding on the material before the Tribunal would be to engaged [sic] in speculation. Given the seriousness of the allegation and the consequences for Mr Barcha, the Tribunal is not able to make such finding based on speculation. Furthermore, there simply does not seem to be any reason for Mr Barcha to take it upon himself to falsify membership Renewal Forms for Mr Farrugia and Ms Qutami. He had nothing to gain

27. Counsel for Mr Barcha, submitted that the findings of the IAT at [13] above related only to the two renewal forms of Mr and Mrs Farrugia and in that context the IAT found the appropriate sanction was a Formal Reprimand. He submitted there was no error in the reasoning of the IAT. Therefore, it was contended, for Mr Alexander to press before the Review Tribunal submissions addressed to Mr Barcha's conduct and credit before the IAT is to mount a new allegation and as such it would not be within the jurisdiction of the Review Tribunal. The Review Tribunal rejects this submission. The Review Tribunal has before it the evidence considered by the IAT and two further statutory declarations similarly challenging their renewal of Party membership in 2015: that of Mr Embama Qutami and Mrs Qutami.

28. The IAT rejected Mr Barcha's evidence he had collected Mr and Mrs Farrugia's completed membership forms from Mrs Qutami's home. Mr Barcha directly challenged the credit of Mrs Qutami. The Review Tribunal rejects Mr Barcha's allegation that Mrs Qutami's third statutory declaration was inaccurate, untrue and false. The inference cast by Mr Barcha that Mrs Qutami was intimidated into recanting her first statutory declaration is also rejected. This is an assertion but no evidence was offered in support of this proposition. The Review Tribunal acknowledges, as did the IAT, that Mrs Qutami changed her evidence between the first and second statutory declaration and she has explained at length how this came about in her third statutory declaration.
29. In an examination of the evidence the Review Tribunal further accepts:
- Mrs Qutami's first statutory declaration was hand written by Mr Barcha's sister Lillian and was then signed by Mrs Qutami;
 - The similar handwriting on Mrs Qutami's first statutory declaration and on the renewal forms of Mr Joseph Farrugia and Mrs Lena Farrugia is convincing enough for the Review Tribunal to find they were likely completed by the same person but it is not necessary ultimately to decide that issue; and
 - The signatures on the renewal forms of Mr & Mrs Farrugia and those on their respective statutory declarations are not the same. The signatures on the renewal forms of Mrs Qutami and Mr Qutami and those on their respective statutory declarations also do not appear to be the same.
30. The Review Tribunal is satisfied, having sighted Mr Barcha's handwriting and signature, it was not Mr Barcha who filled in the membership forms and signed them. However Mr Barcha had carriage of those forms, was their custodian, and paid the membership fees. He renewed 57 memberships of the branch.
31. The Party requires a person renewing memberships to authenticate each membership renewal. In renewing the memberships for the Smithfield Branch in 2015 Mr Barcha signed a Declaration as required under the Rules:
- I, George Barcha, declare that all members I am renewing ... are aware that their membership is being renewed by myself and are willing to have that membership renewed.*
32. Mr Barcha contended that this statement of belief was made honestly and was not deliberately false. It was submitted on behalf of Mr Barcha that the finding by the IAT that it did not agree with Mr Barcha's belief that another person's statement was incorrect cannot be a finding that Mr Barcha gave false evidence. Mr Barcha is a 30-

year member of the Party. He is a Party unit Secretary. He holds office for the Party having been elected as a Labor Councillor on Fairfield Council. He knows or should know the relevant Rules of the Party. His declaration (not a statutory declaration) to the Party on renewing the memberships of branch members was not the truth. The Party must be able to trust its members who hold positions as Branch Officials and be able to rely on the word of persons holding Party and public office under its auspices.

33. On our examination of the evidence before us the Review Tribunal does not accept the IAT finding that the procedure followed by Mr Barcha in the renewal of memberships for 2015 should be termed “poor practice” Rather the Review Tribunal finds Mr Barcha wilfully renewed four Party membership for 2015 without authority. Mr Barcha’s actions were in breach of Party Rules in paying for membership renewals without authority. Further, when challenged, he wilfully attempted to discredit Mrs Qutami. This conduct along with his giving a false declaration to the Party Office is viewed most seriously by the Review Tribunal.

Evidence as to the Irregularities in Smithfield Attendance Book Charge and the IAT Decision of 19 May 2015

34. The first appeal in time is the Decision of the IAT of 19 May 2015. The IAT in this earlier Decision considered the status of Smithfield Branch activities on 24 November 2014 and 31 January 2015. The IAT held the activities on both dates were not branch meetings for the purpose of official party business. The IAT therefore held the signatories in the branch attendance books on those dates of persons in attendance at those activities were not to be counted as the signatories of members attending at a branch meeting.
35. Allegations of unworthy conduct were also pressed as to the activities of Mr Barcha, as Branch Secretary before and at the February and March 2015 meetings of the Smithfield branch. The IAT found no unworthy conduct though concern is expressed as to the reason a text notice of the meeting was sent which included the following:

If visitors like to attend the chair has requested written notice with the name of the attendee and request for approval...

Such a request, demand or instruction is outside the Rules of the Party. Mr Barcha says he was concerned at possible unruly behaviour at the meeting but a Branch Secretary must comply with party rules and under the new rules transparency in party affairs is paramount.

36. As the Review Tribunal had evidence on oath from Mr Qutami and Mrs Qutami that they had not attended Smithfield Branch meetings for a number of years, the Review Tribunal called in the 2014 Smithfield attendance book for examination. A cursory examination reveals both had allegedly attended at a number of branch meetings and had allegedly signed the attendance book.
37. As was said in *Zraika v Perry* at [62]:
- This is the primary record that determines Branch members' eligibility to vote in rank and file pre-selections. The history of the Party is replete with examples of forged attendance books. The Branch Secretary is the custodian of the attendance book.*
38. No diligent Branch Secretary would allow the name of a person not in attendance at a Branch meeting to be entered or thereafter maintained in the attendance book. Mr Barcha is the custodian of the Smithfield Branch attendance book. The Smithfield Branch attendance book must be called in to the ALP head office and the applications of the 57 members, who through Mr Barcha have had their Party membership renewed in 2015, must be verified.
39. The Review Tribunal finds the evidence as to Mr Barcha's performance as Branch Secretary to demonstrate a serious disregard for the rules of the Party.

Sanction

40. As has been acknowledged Mr Barcha has been an active member of the Smithfield Branch for over twenty years. He has been Secretary of the Smithfield branch and the Smithfield/Prospect State Electorate Council and the McMahon Federal Electorate Council. In 2011, he was elected by the rank-and-file membership as a representative to the Labor Policy Forum. In 2012 he was elected as a Labor Councillor on Fairfield City Council. He has been an active campaigner for the Party. He must be given credit for his long service to the Party.
41. The Review Tribunal must weigh this service against the successful challenge made against the four unauthorised membership renewals submitted by Mr Barcha as Branch Secretary in 2015. Our examination of the procedures he followed revealed serious misconduct by a senior party member. Further we are persuaded Mr Barcha made a Party declaration to the Party Office he must have known was untrue. The Branch attendance book of which he is the custodian reveal irregularities at least in relation to two branch members, Mr Qutami and Mrs Qutami.

42. Mr Barcha submitted the findings in his favour by the IAT especially in its May Decision are a foundation for his submission that a sanction in the form of a Formal Reprimand was excessive. He submitted his long-term conduct in managing the affairs of the Smithfield Branch has been without challenge and the circumstances surrounding the renewal 57 memberships, few of which were challenged, collectively establishes that the sanction for his “poor practice” was too severe. Alternatively, he contended the Sanction was appropriate in all the circumstances revealed on appeal.
43. Counsel for Mr Alexander asserted before the Review Tribunal that the IAT reprimand was an insufficient penalty given the weight of the evidence of the breach of Party Rules and an expulsion was appropriate.
44. The Review Tribunal has reached the conclusion that the conduct of Mr Barcha in his renewal of Branch Party memberships in 2015; in persisting to defend his actions before the Tribunals of the Party against the weight of the evidence; in giving to the Party office a false declaration; in the irregularities in the Branch attendance book held in his custody; was all conduct when viewed collectively which must be found to be unworthy conduct and a breach of Rule A.35(a).
45. While taking into account Mr Barcha’s long service to the Party, the Review Tribunal is nonetheless of the view his unworthy conduct was most serious and should attract a similar order to that considered appropriate in *Zraika v Perry*. Mr Barcha’s membership of the ALP and his continuity is suspended for a period of six (6) months from today’s date. The Tribunal notes his Counsel’s submission that such a sanction will likely prevent him from being an endorsed Party candidate at the next local government elections.

FURTHER COMMENTS ARISING FROM THIS MATTER

Use of Statutory Declarations in Proceedings

46. Both parties to these proceedings have chosen to support their positions in relation to the conduct of Smithfield Branch by obtaining numerous statutory declarations from Branch Members. Of the numerous statutory declarations filed in these proceedings only seven directly addressed the relevant issues namely the renewal of membership and the attendance book irregularities.
47. The Review Tribunal notes that Party Members who swear a knowingly false statutory declaration, a declaration on their oath, could attract a significant court penalty. The

Review Tribunal warns against any such practice. For the avoidance of doubt, the Review Tribunal makes no such finding in this matter but notes that many Party members were unnecessarily involved in these proceedings.

The Political Circumstance

48. It is unfortunately necessary to comment that both litigants work for local members of Parliament. They press charges about the activities of a branch located in an electorate where there have been electorate boundary changes proposed. The Review Tribunal is concerned that these matters are symptomatic of a larger dispute. Staffers are often branch members and they retain the rights of every party member under the rules but staffers should not be used as the voice for disputes with wider implications. The integrity of the party in the wider community is challenged by such action.

Legal Representation

49. The Review Tribunal adopts the view expressed by the IAT in its June Decision at [19]:

... in the circumstances of this matter, both parties were granted leave to be (rep)resented by legal practitioners. The Tribunal does not consider this will be the usual course in Tribunal hearings. Whilst the Tribunal will, of course, consider any application by a party to be represented by a lawyer, parties appearing before the Tribunal should not expect that leave will be granted in all cases.

The Review Tribunal expresses its concern with overrepresentation by parties in internal Party Tribunal proceedings and believes that the number of appearances in this matter bears out these concerns.

Party Membership Renewal Procedures

50. This matter involved familiar disputation in relation to the renewal of Party memberships. The Review Tribunal urges the Party to adopt the recommendations that were made in *In Zraika v Perry* in relation to Party membership renewals.

END