

**Attention is drawn to the order in this
determination prohibiting publication
of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 6
5602356

BETWEEN COLIN ROSS HUTCHINS
Applicant

AND CHIEF EXECUTIVE INLAND
REVENUE DEPARTMENT
Respondent

Member of Authority: Trish MacKinnon

Representatives: Fred Hills, Counsel for Applicant
Blair Scotland, Counsel for Respondent

Investigation Meeting: 15 January 2016 at Wellington

Submissions Received: In writing on 14 January 2016 and orally on 15 January
2016 from counsel for the Applicant
In writing on 14 January 2016 and orally on 15 January
2016 from counsel for the Respondent

Determination: 18 January 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Colin Hutchins has applied for interim orders requiring his employer, the Chief Executive of Inland Revenue Department (IR), to give, or not unreasonably withhold, consent to his working for the Myanmar Internal Revenue Department as a trainer for auditors while on a period of approved leave without pay. Alternatively, Mr Hutchins seeks an interim order that IR is estopped from unreasonably withholding consent.

[2] Mr Hutchins has provided an affidavit in support of his application for interim orders and an undertaking as to damages. Urgency was sought on the basis of Mr

Hutchins' imminent planned departure for Myanmar on the evening of 15 January 2016 and his acceptance of a contract with the Myanmar Tax Authority with a start date of 18 January 2016. His application for urgency was accepted in a telephone conference with the Authority and the respondent on 7 January 2016.

[3] IR resists the application for interim orders. It says Mr Hutchins has no contractual entitlement to be permitted to take up secondary employment while employed by it and that such decisions are the subject of managerial discretion. IR says it exercised its discretion fairly and reasonably in accordance with its contractual and statutory obligations.

[4] Mr Hutchins' personal grievance for unjustified disadvantage and his claims of breach of contract, breach of good faith, breach of the State Sector Act 1988 and of the implied duty not to act in a way that undermines the employment relationship of trust and confidence will be the subject of a substantive investigation in July 2016.

[5] The parties attended mediation on an urgent basis but were unable to resolve the matter.

The Authority's investigation

[6] The investigation into Mr Hutchins' application for interim relief was conducted by way of affidavit evidence and oral and written submissions.

[7] Two affidavits were received from the applicant on his own behalf. For IR, affidavits were received from Arlene Wright, a Deputy Commissioner, and Tony Morris, an Acting Group Manager. Ms White approved Mr Hutchins' application for special leave without pay. Mr Morris declined Mr Hutchins' subsequent application for consent to work for the Myanmar Revenue Authority during his period of leave.

[8] At the conclusion of submissions on Friday 15 January 2016 I adjourned the investigation meeting and reconvened later in the afternoon. As the intervening time had been insufficient to complete the written determination, I relayed my decision orally, together with a brief summary of my findings in respect of each of the tests applicable where interim relief has been sought. I informed the parties the completed written determination would be available on Monday 18 January 2016.

[9] Interim orders for prohibition on publication have been put in place regarding certain information of a sensitive nature, and information protected by the Tax Administration Act 1994. That information is contained in documents prepared for the Authority's investigation. The orders will be reviewed at the substantive investigation in July into Mr Hutchins' claims.

Relevant facts

[10] Mr Hutchins is the Manager of Legal and Technical Services (LTS) in IR's Wellington office. He is a longstanding employee who has undertaken overseas contracts on two occasions during recent years. Those engagements were, respectively, in Vietnam and the Maldives. On both occasions IR approved leave without pay for Mr Hutchins for the purpose of taking up the overseas work.

[11] On 12 November 2015, Mr Hutchins made an application for a combination of annual leave and leave without pay for up to nine months commencing in January 2016. His application cited, as reasons for the request, a number of personal and work-related matters which had been stressful and distressing for him over the past three years. Mr Hutchins stated that the accumulation of these issues had impacted on his health and he needed a break to recharge his batteries, look after his health and work on his marriage.

[12] He noted that, with an extended period of unpaid leave such as this, he would need to support himself and would be looking for casual work overseas. Mr Hutchins noted that, if this did eventuate, he would ensure there was no conflict with his obligations to his employer.

[13] Mr Hutchins' application was made to Graham Tubb, Group Tax Counsel. He is one of two managers to whom Mr Hutchins reports, the other being Cheryl Craig, Operational Manager of LTS. Mr Tubb wrote a memorandum addressed to Ms Wright and Mr Morris supporting the application. The memorandum noted that Mr Hutchins' reasons for wanting the leave were of a personal nature which overlapped with pressures originating at work. Mr Tubb's memorandum did not refer to Mr Hutchins' intention to seek casual work.

[14] The application was endorsed by Ms White and notification of this was conveyed in writing to Mr Hutchins on 20 November 2015 by Ms Craig. The letter noted the dates from which his annual leave and his leave without pay would apply.

He was informed his position would be held open for him until his return date of 10 October 2016.

[15] On 17 December 2015, following discussions with Mr Hutchins, Mr Tubb emailed Ms White advising her of his recent concerns over Mr Hutchins who had experienced "*considerable personal upheaval*". He said that the issue was some "*additional information he has provided to me about the period he will be away, and he has asked us to consider whether this would have affected our decision to grant the leave. Tony¹ and I think you need to be aware of this and perhaps redo the decision*".

[16] Mr Tubb explained in his email that the information related to an offer Mr Hutchins had received of an IMF contract in Myanmar that involved training audit techniques to tax staff. He relayed Mr Hutchins' concern that, if he undertook the work, his employer might perceive it badly or, if it had known about it at the time, might not have agreed to the leave "*even though the reason for the leave was the very high stress he has been under and his desire to save his marriage*". Mr Tubb said he and Mr Morris thought this potentially changed things and noted that he, personally, would probably still support the leave.

[17] On 21 December 2015, Mr Hutchins was informed in writing by Mr Morris that IR would not agree to him working for "*IMF*" while he was on leave. Reasons were not provided. Mr Hutchins was informed that the option of taking the period of leave remained open to him. He was asked to advise if he intended to do so by 24 December 2015.

[18] Some further correspondence ensued and a meeting between the parties took place by way of a telephone conference on 23 December. Notes of that meeting were attached to Mr Morris' affidavit. These record that Mr Hutchins and his legal representative, Fred Hills, were in attendance for the applicant. Attending for Inland Revenue were Mr Morris (the decision maker in the consent matter), Jason Cooper (a solicitor) and Tracey Burgess (a senior advisor).

[19] In the course of the discussion Mr Morris noted Mr Hutchins' request had been granted on compassionate grounds relating to his wellbeing. The work opportunity/request, which had come later, was a different consideration. The department did not support every such opportunity.

¹ Mr Morris.

[20] Mr Morris asked Mr Hutchins for the reasons he was seeking the Myanmar opportunity. It became clear in their following discussion that Mr Morris had not seen Mr Hutchins' original application for leave which had been addressed to Mr Tubb who was currently on leave overseas. Specifically he had not been aware that Mr Tubb had referred to Mr Hutchins seeking work to support himself while travelling. It also seemed that Mr Hutchins had not received a copy of Mr Tubb's memorandum to Ms White and Mr Morris in support of that application. Mr Morris noted that IR was concerned with parity across the organisation and that was a factor in their decision making. He conveyed that IR was open to Mr Hutchins providing more information on why he should be granted what appeared to be a career advancement opportunity.

[21] On 24 December 2015 Mr Cooper wrote to Mr Hill setting out IR's reasons for declining consent to his working in Myanmar during his leave. The letter noted that IR's decision to grant leave without pay to Mr Hutchins had been made on the understanding that Mr Hutchins was taking the leave for the personal reasons he had communicated to Mr Tubb.

[22] Mr Cooper's letter stated that when Inland Revenue exercised its discretion to provide Mr Hutchins with the benefit of nine months' leave without pay, it had in mind the objectives he had stated. Those were to recharge his batteries, look after his health and work on his marriage. The letter noted that Mr Hutchins had referred in his application for unpaid leave to needing to *“support ourselves and we will be looking for casual work overseas. If this does eventuate I will ensure there is no conflict with my obligations to IR”*.

[23] Mr Cooper noted this was not a specific request from Mr Hutchins for IR to consider an option for overseas work that was under consideration. It simply alerted IR to the possibility of paid work and made clear Mr Hutchins' commitment to uphold his obligations to IR. He said IR required Mr Hutchins to adhere to the process in the department's code of conduct for any paid or unpaid work he was looking to undertake during his unpaid leave.

[24] Mr Cooper pointed out there was a potential conflict with Mr Hutchins working for another tax authority. On the information available, he said it appeared the work Mr Hutchins would undertake in the role would draw heavily on his knowledge and experience gained through his career at Inland Revenue. That meant, whether intentionally or not, he would be viewed as a representative of IR in

Myanmar. He also noted that, as the Myanmar role had not come through Inland Revenue, there had been no opportunity to assess whether it was in IR's best interests and it was up to the employer, not Mr Hutchins, to determine that.

[25] He referred to the two previous opportunities Mr Hutchins had been provided in 2008 and 2012/2013 in respectively Vietnam and the Maldives. He referred to the significant impact on parts of Inland Revenue's business by Mr Hutchins' absences in those instances. These included finding internal resources to cover the period of Mr Hutchins' absences, which placed pressure on parts of the business that had been directly or indirectly affected as a consequence.

[26] Mr Cooper explained that Inland Revenue was not prepared to manage the impact of the approved leave to allow Mr Hutchins to take another work opportunity. However, it remained willing to provide him with leave without pay for his "*personal rehabilitation*". He noted that IR believed his request to work at the Myanmar Tax Authority was inconsistent with this purpose of personal rehabilitation.

[27] Mr Cooper's letter noted that IR would consider any alternative proposals put forward by Mr Hutchins over his approved period of leave without pay, taking into account the purpose and context in which the leave had been approved. He noted for the avoidance of doubt, such work would not include working for another tax authority. The letter ended by reaffirming Inland Revenue's awareness of the serious personal issues Mr Hutchins had raised and his status as a valued employee.

The key legal principles

[28] Interim relief is a discretionary remedy. The applicable tests in determining this application for interim orders are:

- i. Whether there is an arguable case;
- ii. Where the balance of convenience lies between the parties in the period until the substantive application has been determined;
- iii. Whether there are other adequate remedies; and
- iii. Where the overall justice lies.

[29] The four essential constituents of an estoppel are:²

- "a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
- the party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppel;
- detriment will be suffered if the belief or expectation is departed from; and
- it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation."

Is there an arguable case?

[30] The threshold for this test is relatively low and requires some "*serious or arguable, but not necessarily certain, prospects of success.*"³

[31] Counsel for the applicant submits that once the respondent approved his period of leave without pay, that became a term of his employment. Mr Hutchins had made it clear in his application that he would need to work to support himself while on leave. This meant that IR's approval of nine months' leave included the condition that he would be working, in Mr Hills' submission. That being so, the employer's discretion to decline his request to work for the Myanmar Tax Authority was very limited and could not be unreasonably withheld.

[32] Mr Hills submits IR's grounds for declining consent for Mr Hutchins to undertake that work were unreasonable. Mr Cooper's letter of 24 December 2015 included as reasons the employer's doubts that working for the Myanmar Tax Authority would provide the relief from personal issues cited as reasons for Mr Hutchins' request for leave without pay. That, in Mr Hills' submission was not a relevant consideration for declining consent.

[33] Nor in his view was the issue of parity a valid consideration, particularly as IR was not in a situation to exercise parity. It could not control to whom the Myanmar Tax Authority might offer work. The respondent had not elaborated where a potential conflict of interest could arise and had not asked for information about the work Mr

² As cited by Chief Judge Colgan in *Harris v TSNZ Pulp and Paper Maintenance Limited* [2015] NZEmpC 43 at [76].

³ *X v Y and the NZ Stock Exchange Ltd* [1992] 1 ERNZ 863

Hutchins would be undertaking in Myanmar. It could not reasonably decline consent on that ground in Mr Hills' submission. He also submits Mr Hutchins has an arguable case that IR is estopped from withholding consent to his working for the Myanmar Tax Authority during his period of unpaid leave.

[34] Counsel for IR denies an arguable case exists, while accepting the low threshold that applies to this test. Mr Scotland submits the Authority has no jurisdiction to grant an interim compliance order pursuant to s.137 of the Employment Relations Act 2000 (the Act) in respect of the respondent's exercise of a discretion regarding Mr Hutchins' request to undertake secondary employment.

[35] He also submits there is no requirement in Mr Hutchins' terms and conditions of employment that IR consent to his undertaking such secondary employment. In the absence of a breach of the applicant's employment agreement, there can be no compliance order awarded⁴.

[36] In any event, in Mr Scotland's submission, IR had the discretion to consider whether to consent to Mr Hutchins' undertaking secondary employment, and it had exercised that discretion fairly and reasonably. It would be contrary to public policy to make an interim compliance order in those circumstances. It would also set a dangerous precedent by imposing a fetter on an employer's ability to exercise a discretion in decision-making without fear of becoming the subject of compliance proceedings.

[37] On the evidence before me I have reservations about Mr Hills' submissions regarding Mr Hutchins' approved leave without pay (including the condition that he could work during that time) becoming a term of his employment. I also have reservations about the strict limitation which, in his submission, fetters any discretion IR may have over declining Mr Hutchins' request for consent to any work during his period of leave. These are not matters, however, that can be finally determined until full evidence has been heard and tested in the substantive investigation.

[38] After considering the views of the parties I have concluded Mr Hutchins has an arguable case although, on the evidence currently before me, I consider it to be at the weaker end of the scale.

⁴ *Bracewell v Richmond Services Limited* [2013] NZEmpC 245 at [7].

Where does the balance of convenience lie between now and the determination of Mr Hutchins' personal grievance?

[39] This requires considering the detriment that Mr Hutchins and IR respectively may incur as a result of orders being granted or not. It entails balancing the potential injustice that will be caused to Mr Hutchins if the relief is not granted, against the potential injustice to IR if it is granted. This test is closely related to that of whether adequate alternative remedies exist.

[40] Mr Hills submits that, if not granted relief, Mr Hutchins would receive no income while on unpaid leave. Without income he could not meet mortgage and billing commitments. Mr Hutchins had indicated in his affidavit that, if he were unable to earn during his unpaid leave, he would not take the leave and would be unable to remove himself from the Wellington-based stresses.

[41] Counsel submits IR would incur no detriment as a result of Mr Hutchins working while on leave. He refers to Mr Tubb's memorandum of 13 November 2015 recommending Ms White approve the applicant's leave in which Mr Tubb identifies a talent management opportunity arising from Mr Hutchins' absence. Mr Hills submits that, as Mr Hutchins' leave would be unpaid, there would be no financial disadvantage to IR and, potentially, a benefit as the temporary appointee to his position was likely to be on a lesser salary.

[42] Mr Scotland submits that, if Mr Hutchins were successful in obtaining interim relief, but unsuccessful in the substantive hearing, the exercise of IR's discretion would be rendered nugatory by virtue of timing. As the substantive hearing will not take place for some months, Mr Hutchins would have already have undertaken the Myanmar work during those months. He submits Mr Hutchins would also be placed in a difficult position in that event as he would not be permitted to continue his work for the Myanmar Tax Authority if IR did not agree to his doing so.

[43] As IR had not appointed anyone to Mr Hutchins' role, his position remained open to him, potentially as early as next week should he wish to return to work at that time. Mr Scotland submits that, although Mr Hutchins may have incurred the expense of airfares to Myanmar, he did so in the knowledge that the respondent had already declined consent for him to work for the Myanmar Tax Authority. In effect, in counsel's submission, Mr Hutchins had gambled on the success of his application for interim relief.

[44] I am persuaded by counsel for the respondent's arguments, particularly in relation to the timing issues and their effect on the respondent in the event that Mr Hutchins is unsuccessful in the substantive investigation of his claims. I find, on consideration of all the factors, the balance of convenience favours IR.

Is there an adequate alternative remedy?

[45] Mr Hutchins has available to him a period of unpaid leave. That remains in place and Mr Hutchins is, as noted in Mr Scotland's submissions, free to use that leave as he sees fit. He is not precluded from seeking other employment opportunities, provided he obtains consent from IR as required by its code of conduct provisions relating to secondary employment, and provided those opportunities do not entail working for a foreign tax authority.

[46] In the event that Mr Hutchins is successful in the substantive investigation financial remedies will be available to him at that time. For this reason I find the application of this test favours IR.

Overall justice

[47] I am required, having considered the other tests, to stand back and consider where the overall justice lies until such time as the substantive investigation of the matter takes place. This includes reflecting on the strengths of the respective parties' cases, bearing in mind there has not yet been an opportunity for testing of the evidence.

[48] I have found Mr Hutchins to have an arguable case, although I put it at the weaker end of the scale. I have found the balance of convenience favours IR and I have also found that Mr Hutchins has an adequate financial remedy available to him if he is successful in the substantive hearing of this matter.

[49] Taking these matters into account I find Mr Hutchins has not reached the threshold for being granted interim relief and that overall justice favours IR.

Estoppel

[50] Mr Hills submits that Mr Hutchins intended the conditions of his leave to be on the basis that he could seek work and he reasonably believed that IR accepted this

meaning. He submits that Mr Hutchins relied on this and acted to his detriment by preparing to leave New Zealand and incurring costs.

[51] I am not persuaded by this submission. Even if Mr Hutchins believed IR understood he intended to seek work, and granted the leave knowing he would seek work, it does not necessarily follow that IR understood he would be seeking anything other than the "*casual*" work he had referred to in his 12 November 2013 letter to Mr Tubb.

[52] It certainly does not follow that IR would understand that the work he was seeking was with a foreign tax authority. While Mr Hutchins' evidence is that he regarded the eight month contract with the Myanmar Tax Authority, training the Authority's staff in audit techniques, as casual work because it was temporary in nature, I do not believe that to be a reasonable view. I find he could not reasonably believe his employer accepted that he intended the conditions of his leave to be on the basis that he would seek work of that nature. The first essential constituent of an estoppel has not been met.

[53] While it is not necessary to go further, I note that counsel for Mr Hutchins disclosed in an email, copied to the Authority, in response to a request for information made in the telephone conference with the parties that Mr Hutchins had accepted the Myanmar offer and booked his flights to that country after IR had rejected his request for consent to undertake that work.

[54] I find none of the essential constituents of an estoppel have been met on the evidence currently before me.

Determination

[55] I decline to make the interim orders sought by Mr Hutchins.

[56] I also find the respondent is not estopped from withholding consent from Mr Hutchins to work for the Myanmar Tax Authority during his approved period of unpaid leave.

Costs

[57] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority