

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 28
5312186

BETWEEN

JAMES JOHN TERRIS
Applicant

AND

THE PARLIAMENTARY
SERVICE
Respondent

Member of Authority: G J Wood

Representatives: Barry Driver for the Applicant
Paul McBride for the Respondent

Investigation Meeting: 4 and 5 October 2011 at Wellington

Submissions Received: 5 October 2011

Determination: 29 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr John Terris, claims that the termination of his employment by the respondent, Parliamentary Service, constituted an unjustifiable dismissal, as there were no grounds for Parliamentary Service to invoke the *breakdown in relationship* clause in the parties' employment agreement.

[2] Parliamentary Service claim that the relationship between Mr Terris as the out of Parliament support staff for list MP Paul Quinn terminated by operation of contract, as a result of an irreconcilable breakdown in the relationship between Mr Terris and Mr Quinn.

[3] The issues for determination are whether or not Mr Terris was dismissed (or instead the relationship ended by operation of the contract); if so, whether the General

Manager, Parliamentary Service, Mr Geoff Thorn, was justified in his decision in terminating the employment of Mr Terris because of an irreconcilable breakdown in his relationship with Mr Quinn; and if not what remedies should flow to Mr Terris.

Factual discussion

[4] There are few relevant disputes in the evidence in this case. After his election as a list MP in 2008, Mr Quinn was given responsibility for representing the National Party as its MP designated to the Hutt Valley. Being based in Wellington City, Mr Quinn thought it prudent to engage staff with a great deal of local knowledge and contacts in the Hutt Valley. Mr Terris was one person who had offered Mr Quinn some assistance prior to the election, and he subsequently came to help Mr Quinn find premises for his office in the Hutt Valley. As a result of these positive exchanges Mr Quinn arranged for Parliamentary Service to offer Mr Terris a three month employment agreement to act as his out of Parliament support staff member. Parliamentary Service is the employer of support staff to MPs. In effect this is what is known as a triangular employment relationship, because in effect the staff members work directly to the MP, but are actually employed by Parliamentary Service.

[5] Because of other community commitments, Mr Terris, a former Lower Hutt MP and Mayor, who was still closely involved in local, community and Church activities, was only available to work between 20 – 25 hours per week. Mr Quinn accepted that, although he was entitled to get 40 hours of paid assistance from Parliamentary Service.

[6] There is a dispute between Mr Terris and Mr Quinn about whether Mr Terris informed him about all of his community activities, including his elected position as a trustee on the Hutt Mana Community Trust. That Trust is responsible for maintaining and distributing the income from monies received in the Hutt Mana area from the sale of certain power companies previously owned by the local bodies in the area. The trustees are elected at the same time as local body elections and by the same process as local body councillors and mayors are elected.

[7] I do not need to determine whether Mr Terris informed Mr Quinn of this matter and why Mr Terris did not declare this on the schedule to his employment agreement (such roles were required to be declared by staff) because within seven months of his engagement the issue came to Parliamentary Service's attention and

from that time both it and Mr Quinn were definitely aware of Mr Terris's role as a trustee.

[8] Mr Terris's three months employment agreement went well and his local contacts were able to assist Mr Quinn in developing and maintaining beneficial relationships with community leaders. Furthermore, due to his extensive parliamentary and local body experience, he was well able to assist members of the public who came to Mr Quinn's office in Lower Hutt seeking assistance in matters such as accommodation, immigration and social welfare concerns.

[9] As a result, on 11 July 2009 Mr Terris was offered an extension to a three year fixed term agreement, which he accepted. He was employed above the top of the pay scale, for 25 hours per week.

[10] A number of issues arose between Mr Terris and Parliamentary Service, however, over the next 12 months, due solely to Mr Terris's out of work activities as a public figure. I accept that Mr Terris always made it clear that he would be continuing with his community and political activities, Mr Quinn wanted him to tone them down and in many areas Mr Terris did so, such as in no longer being spokesperson for the group seeking Wellington to become another super city. Parliamentary Service was involved in several initiatives to try and resolve such matters. However Mr Quinn remained concerned, particularly about Mr Terris's involvement with the Hutt Mana Charitable Trust and a complaint Mr Terris had made as a trustee to the Crown Law Office about the actions of other trustees, all of whom Mr Quinn wanted to build good relationships with because of their other community activities. These concerns were highlighted by complaints made to Mr Quinn from people associated with the other trustees.

[11] Parliamentary Service made some preliminary inquiries and wrote to Mr Terris on 21 December 2009, stating amongst other things:

...I believe there is no direct conflict of interest between your role as a Trustee for the Hutt Mana Charitable Trust and your role as the out of Parliament support for Paul Quinn MP. However, I am of the view that there exists a potential for confusion that your actions may be linked to Paul Quinn, MP and therefore generate a perceived conflict of interest and potential embarrassment for the member. The combination of the Trustee membership, relationship difficulties with members of the trust board and the potential effect of the Crown Law investigation, provides for a potential perceived conflict of interest.

...

Specifically I request that you refrain from making media statements in relation to the Crown Law investigation into the Hutt Mana Charitable Trust, particularly when the final report becomes public. Should you wish to make a public statement I encourage you to first seek the advice of Parliamentary Service with regards to any potential conflict of interest.

...

I appreciate your openness in working towards a resolution to this matter. Should you have any further questions or require clarification regarding expectations of conduct and behaviour please contact me directly.

[12] Mr Terris responded through his lawyers on 15 January 2010. His lawyer stated, amongst other things:

...our client agrees not to initiate any public comment as a result of Crown Law investigations into Hutt Mana Charitable Trust...

[13] The letter went on to state:

Is your Service suggesting that if our client in any capacity wishes to make a public statement on any issue whatsoever, he is required to first seek advice from your Service regarding any potential conflict of interest?

If so, prior to the Annual General Meeting of the abovementioned Charitable Trust which is to take place on 4 February 2010, we can advise that our client will wish to issue a press statement which will record his criticisms of some activities of the abovementioned Charitable Trust ...Our client does not believe that the issuing of a press statement commenting on such issues creates any actual or potential conflict of interest.

[14] The Parliamentary Service response was to the effect:

The Parliamentary Service does not wish to unduly impede on John's participation on the Hutt Mana Charitable Trust and acknowledges John's entitlement as a trustee to make comments at the Annual General Meeting. ...The Parliamentary Service does not intend that John refrain from any comment. Consequently it would not be appropriate for John to refer any questions from the Annual General Meeting to either the Parliamentary Service or especially Paul Quinn MP. ...

I do not propose that John seek advice from the Parliamentary Service when he wishes to make any public statement. However in instances when a potential conflict of interest is not obvious I would encourage John to consider possible consequences of actions he may take and where appropriate seek the advice of the Parliamentary Service.

You have advised me in paragraph 8 that John wishes to issue a press statement prior to the Annual General Meeting. This appears to be in contradiction to paragraph 4 which states that John agrees 'not to initiate any public comment as a result of Crown Law investigations into Hutt Mana Charitable Trust'. As previous explained it is my view that there exists a potential for confusion that John's actions may be linked to Paul Quinn, MP and therefore generate a perceived conflict of interest and potential embarrassment for the Member. As such I request that John refrain from making media statements in relation to the Crown Law investigation into the Hutt Mana Charitable Trust.

[15] Unfortunately this letter, which was sent to Mr Terris's lawyer (as is entirely appropriate), was not received by Mr Terris until after he had already made public comments about the Hutt Mana Charitable Trust, although not about the Crown Law investigation. Some of those comments were duly published in the Hutt News in a letter from Mr Terris on 2 February. The Hutt News then published a report on the Annual General Meeting on 16 February, about the turbulent events at the meeting. At that meeting Mr Terris was quoted by the Hutt News as alleging distortions of the truth, that at non-public trust meetings he had been called a liar and that he had been *subject to threats of physical violence and legal retribution*. Finally, he was quoted as saying:

There have been attempts to gag me via pressure on my employer [Mr Terris now assist National list MP Paul Quinn].

[16] This publication upset Mr Quinn. He felt that he was being dragged into problems of the Hutt Mana Charitable Trust, which he did not want to be any part of, and that he was being associated with attempts to gag Mr Terris. Mr Terris made it clear that he had not named Mr Quinn, but accepted that he had referred to attempts to gag him via pressure from his employer, his employer being Parliamentary Service. In evidence, Mr Terris accepted that his comments were made publicly and that it was a reasonable inference for anyone at the meeting to draw that Mr Quinn would be associated with his comments about attempts to gag him via pressure from his employer. Furthermore, Mr Terris stated in evidence that he was being pressured by Paul Quinn and that he wanted that out in the public arena.

[17] Parliamentary Service arranged to meet with Messrs Quinn and Terris to discuss Mr Quinn's concerns. Mr Quinn raised his belief that Mr Terris had agreed to forgo his community activities and that he was astonished at the Hutt News report,

which nullified the otherwise excellent job Mr Terris was doing for Mr Quinn, because it negatively impacted on the confidence the community and its leaders had in Mr Quinn. That was disputed by Mr Terris, who wished matters to be put in writing.

[18] In a subsequent interview with Mr Quinn he stated that he believed that the relationship had broken down, and made it clear that the series of articles in the *Hutt News* were the *straw that broke the camel's back*.

[19] Parliamentary Service met with Mr Terris to advise him of this development and to follow its own procedures where there may be an irreconcilable breakdown in relationship between an MP and a staff member. The parties' employment contains a section on events determining notice for out of Parliament support office, A6.1. It states:

A6.1.1 The employee's employment under this agreement will terminate:

1. *At the next general election or*
2. *When the Member of Parliament for whom the employee is employed to provide support services:*
 - (a) *resigns or otherwise vacates his or her seat, or*
 - (b) *takes office as a Minister of the Crown; or*
 - (c) *makes a decision that invokes the provision of s.31 of the Human Rights Act 1993; or*
 - (d) *has switched political allegiance to another party and does not require the employee to work with him/her.*
3. *where the General Manager considers that an irreconcilable breakdown has occurred in the relationship between the Member of Parliament and the employee.*

[20] Section A6.1.4 "Breakdown in Relationship" states:

The employee's employment will terminate where the General Manager considers that an irreconcilable breakdown has occurred in the relationship between the employee and the Member of Parliament to whom the employee provides support services. ...

This is because there needs to be a high level of mutual trust and confidence between the MP and the executive assistant or out of Parliament support person employed to provide support services and the loss of this trust and confidence will seriously impair the ability of the employee to carry out the work for which they have been employed.

Where employment is terminated under this provision, the employee will be given four weeks salary in lieu of notice.

In addition, the employee will be entitled to receive a lump sum compensation payment equal to 12 weeks base salary.

[21] Parliamentary Service's code of conduct also applied to Mr Terris. One of the obligations contained in it was that his private activities must not interfere with the performance of his official duties, or reflect unfavourably on Parliamentary Service and its relationships with its clients or the public. In the code he was advised that:

When you intend to take part in political activities where any actual or potential conflict of interest arises with the proper performance of your official duties, you are to inform your General Manager in writing through your manager.

In the event of an issue arising your activities will be judged upon an objective basis by the Parliamentary Service. You are advised to consider possible consequences of any actions you may take and not engage in them, or first seek the advice and/or permissions of the Parliamentary Service.

[22] In relation to participation in public bodies, the Code states:

As a Parliamentary Service employee you are free to stand for, or be appointed to, any office or position on any public or voluntary body as long as it will not interfere or conflict with your relationship with the Parliamentary Service. The General Manager will be the arbitrator of this in the event of any dispute between you and the Parliamentary Service.

[23] Parliamentary Service also works under a breakdown in relationship employment procedure document. The principles underlying the process are:

1. *In the first instance, wherever possible, the Service will assist members and staff members to resolve the issue informally.*
2. *Every reasonable attempt will be made to resolve issues where it is alleged a breakdown in the employment relationship has occurred. The Parliamentary Service recognises some issues are impossible to resolve.*
3. *The threshold for a breakdown is high: irreconcilable means incapable of being reconciled, i.e. unable to be mended.*

[24] The final decision is to be made by the General Manager following discussions with the Member of Parliament and/or staff member involved.

[25] Mr Terris met with Parliamentary Service on 12 May. The breakdown in relationship process was discussed and Mr Terris was advised that Mr Quinn's view

was that informal attempts to resolve the issue had not succeeded and that any further attempts would be futile. Mr Terris noted that prior to his employment commencing he had never been told that he could not make public statements and that other than the Hutt Mana Charitable Trust issues, all other matters of concern to Mr Quinn had been resolved by him complying with Mr Quinn's requests.

[26] Mr Terris noted that it had been agreed that he had a right to express his views at the Annual General Meeting. Mr Terris explained that he had no alternative but to speak that way at the AGM, given that he was being criticised by his employer for simply making appropriate comments about a matter of interest to the community, and noted that the Hutt News editorial praised his actions on the Trust. He felt that he and Mr Quinn could continue to work together, and that his limited community activities should not reflect on Mr Quinn's community profile.

[27] A report was prepared for Mr Thorn as General Manager following the investigations by Parliamentary Service. The report noted that the primary concerns of Mr Quinn related to ongoing potential conflicts of interest, and that Mr Terris had allegedly continuously demonstrated a lack of awareness of how his publicly held views were impacting on Mr Quinn's role as local MP. The report also noted that Mr Quinn considered that there had been numerous attempts by him to resolve matters, but Mr Terris continued with his public activities and comments. The report particularly noted Mr Quinn's view that following the Hutt News article the public could view Mr Quinn as the employer of Mr Terris (and not Parliamentary Service) and that this was having a detrimental impact on his role as the local MP, and causing him stress.

[28] The report assessed whether the relationship breakdown was irreconcilable, which Mr Quinn believed it was, whereas Mr Terris disagreed. According to the report, given that Mr Quinn had considered the response of Mr Terris and had not changed his view, it appeared that the relationship breakdown was irreconcilable.

[29] I note that Mr Terris had the right to speak to Mr Thorn directly. I accept that while Mr Terris was not aware of this right he should have been, had he followed the information provided to him by Parliamentary Service. In particular, Mr Terris made it clear that he was not keen to study the process, because he could see the inevitable outcome of it, namely termination of employment.

[30] Mr Thorn agreed with the report. He wrote accordingly to Mr Terris on 31 May 2010, invoking the breakdown in relationship clause in the employment agreement. In evidence Mr Thorn made it clear that Parliament Service staff worked in a highly politicised environment. Parliamentary Service considered that this environment had to be taken into account and that if an MP believes their political career is being negatively affected by the actions of one of their staff and Parliamentary Service can not bring them together, then the relationship has broken down and become irreconcilable. He noted that members of Parliamentary Service had met with both parties several times to try and repair the relationship, but it was clear that both had completely different views about this issue. From Parliamentary Service's perspective there was an irreconcilable breakdown in the relationship in that both parties could not work together, because one (Mr Quinn) did not believe it was possible to do so.

[31] Mr Thorn noted that it was very difficult to tell a politician that they were wrong about something affecting their representation, and that staff of MPs are required to support them in their political activities. In essence this was a relationship which was not working, and it was clear that it could not continue to work, so therefore an irreconcilable breakdown had occurred.

[32] The matter has been unresolved despite mediation. It therefore falls to the Authority to make a determination.

The law

[33] Parliamentary Service claims that this was not a dismissal but rather termination of employment of a fixed term employment agreement. Section 66 – Fixed Term Employment, requires an employer and employee to agree that the employment will end, amongst other things, on the occurrence of a specified event; that the employer must have genuine reasons based on reasonable grounds for specifying that event; that the employer must advise the employee when or how the employment will end and the reason for this, and that this must be done in writing. Furthermore, to be enforceable, a reason must not be to exclude or limit the rights of an employee under this Act. The valid ending of employment under this section means that there is no dismissal. However, failure to comply with any of these provisions means that the employee is entitled to elect to treat such an agreement as ineffective to end the employment.

[34] There is a significant legal issue as to whether or not the provisions of the agreement covering Mr Terris constitute a breach of s.238 of the Act, and thus s.66, as a device to avoid the personal grievance provisions of the Act, because where irreconcilable relationship breakdowns between people associated with an employment agreement between an employer and an employee occur they are normally dealt with under case law applying to justification for dismissal for incompatibility. However, for reasons given below, I do not have to determine that question.

[35] Dismissals for incompatibility are often described as occurring as a result of *an irreconcilable breakdown of trust and confidence in the employment relationship*. It is usually necessary to determine that the employee was substantially responsible for this breakdown. As was held in *NZ Fire Service Commission v. Reid* [1998] 2 ERNZ 250 at 276:

...an employer may justifiably dismiss an employee other than by pointing to and establishing a breach or breaches of contract (serious misconduct)... irreconcilable conflicts between an employee and the employer in between an employee and other employees as adversely affect employment relationships may cause the employer to be in breach of obligations of trust and confidence and thereby justify dismissal.

[36] On the other hand, Mr Terris has rights to freedom of expression under s.14 of the New Zealand Bill of Rights Act 1990 (see for example *Lowe v. Tararua District Council* [1994] 1ERNZ 887).

[37] The legal test is to determine whether what the employer did, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[38] In *Arthur D Riley & Co Ltd v Wood* [2008] ERNZ 462 the Court held at para.54-55:

[54] The test is not that the dismissal is judged according to the standards of an impartial observer. Section 103A recognises that the circumstances of an employment environment are a factor to be considered. This means that the standards of what is fair and reasonable may be variable according to the circumstances and a fair and reasonable employer may not necessarily be totally impartial or neutral. Of necessity employers bring to their decisions the values, culture and expectations of their specific work place. They must weigh the impact of the behaviour of an employee under

investigation on other employees and the work environment generally.

[55] *This does not give employers unbridled licence to impose their personal prejudices or values on employees. The concept of fairness implies an open minded approach and reasonableness implies rationality.*

[39] In that case the reasonably conservative conduct expected in the workplace was a major factor in determining whether or not some of the images forwarded to Ms Wood to others were objectionable.

[40] Different standards do apply in different environments, such as behaviour expected of staff in prisons, see for example *Harris v. Chief Executive Department of Corrections* [2001] ERNZ 544 (CA) per Thomas J, and the levels of confidentiality to be followed by public servants - *Chief Executive Department of Inland Revenue v. Buchanan (No.2)* [2005] ERNZ 767 (CA).

Determination

[41] Taking all factors into consideration I conclude that what Parliamentary Service did, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time. In this case the General Manager of Parliamentary Service was working in the most politically oriented workplace environment in New Zealand, and therefore such issues must be held up as of particular importance. Mr Terris was aware throughout that he was working in a highly political environment, where he had to take into account the needs of his employer, Parliamentary Service, and those of its client, MP Paul Quinn, and that both had to be satisfied with all aspects of the out of Parliament support provided by him.

[42] In this context Mr Terris should have been aware (which I believe he was, but simply would not accept) that his own political activities had to be such as they would not impact negatively on MP Paul Quinn. However, by the time his employment ended that relationship had completely broken down and was irreconcilable, due primarily to Mr Terris's political activities and statements. While Mr Terris may not have believed that, the facts were demonstrably otherwise. In any event a relationship is irreconcilable if one party considers it so. It is not a matter for mutual agreement.

[43] The breakdown placed Parliamentary Service in an extremely difficult position, for which it had formulated written policies that Mr Terris was aware of

throughout. Parliamentary Service followed these policies. It made a number of attempts to remedy matters between Messrs Terris and Quinn. While Mr Terris was, with the exception of one area, amenable to curbing his activities, he was not prepared to do so concerning his elected position with the Hutt Mana Charitable Trust. Had Mr Terris limited himself to his activities on the Trust he would have been on much stronger ground in claiming that he was not a significant contributor to the relationship break down that occurred. However, Mr Terris's actions at the Hutt Mana Charitable Trust Annual General Meeting were clearly designed to embarrass Parliamentary Service and/or Mr Quinn. Mr Terris had concerns about attempts to gag him, but he did not have to pursue them through a public meeting, where he knew the news media was in attendance and (as he admitted) likely to pick up on the issue. If there had been a chance of repairing the relationship, which was already under strain, those comments had the effect, whatever Mr Terris's intention may have been, of ensuring that there was no prospect of repair. While thus there was no serious misconduct by him, he alone was responsible for the nature of those public comments, which could have been made in more temperate language and in private to his employer. Thus Parliamentary Service's decision was one that a fair and reasonable employer would make in these particular circumstances.

[44] Mr Terris makes little complaint about the process adopted by Parliamentary Service investigating and the determining the issues. No doubt that is because how Parliamentary Service acted was fair and reasonable. The fact that Mr Terris was not suspended, despite overtures and questions from Parliamentary Services to Mr Quinn about whether that was something that he wanted, is not relevant to the issues here of an irreconcilable breakdown. An employer should never be criticised for failing to suspend an employee in such circumstances.

[45] As there were no alternative opportunities within Parliamentary Service I conclude that this is one of those rare cases where dismissal was justified for reasons of incompatibility. That is not to say that Mr Terris's views on his rights to free speech and whether his free speech would impact negatively on an MP to whom an out of Parliament staffer like Mr Terris provides support is any less correct than the attitude of Mr Quinn as to its effect. Rather it was Parliamentary Service's job to ensure that Parliamentary support staff can support their MP effectively, and that means that the relationship must remain on good terms. In this environment (and as with any triangular employment situation) Parliamentary Service's options are

narrower with respect to its client, here an MP, than they are to one of its own employees such as Mr Terris, and its employees are made aware of that, as it is clearly covered in the employment agreement. Mr Terris was primarily responsible for the breakdown because of his *attempt to gag* comments. Parliamentary Service also had to treat Mr Terris fairly throughout and I have concluded that it has done so. I therefore dismiss all claims by Mr Terris.

Costs

[46] Costs are reserved.

G J Wood
Member of the Employment Relations Authority