

**CASENOTE: *Tucker v State of Victoria* [2020] VSC 121 (19 March 2020)**

Mr Tucker (**'Employee'**) was employed by the State of Victoria as a senior solicitor in the State Revenue Office, or SRO. Prior to 2 March 2018, the SRO conducted two investigations into the conduct of the Employee. The Employee, as Plaintiff, brought an injunction to prevent his termination of employment by the State, and consent orders were entered into, in these terms:

- a. Upon the Plaintiff by his solicitor undertaking to the Court to abide by any order that the Court may make as to damages in the event the Court is hereafter of the view that the Defendants suffered any [loss] by reason of giving the undertaking referred to herein that the Plaintiff ought pay.
- b. And upon the Defendants by their counsel undertaking to the Court that the Defendants will not, until the determination of this proceeding, or as otherwise agreed between the parties or by further order of the Court, finalise the proposed discipline outcomes set out in the letters of 25 October 2017 and 7 February 2018 to the Plaintiff.

**('Undertakings')**.

The effect of the Undertakings was that the State, in its capacity as employer, undertook not to finalise the disciplinary investigations. After hearing, the Employee was unsuccessful in his claim for liability. The employer then sought to call on the Employee's undertaking, in (a) of the Undertakings. Whilst there was another Defendant at times during the proceeding,<sup>1</sup> only the State sought to rely on the Undertakings.

Hearing

Associate Justice Ierodiaconou heard the State's application for relief based upon the Employee's undertaking as to damages.

Her Honour adopted principles set out in in the High Court decision of *Air Express Limited v Ansett Transport Industries*,<sup>2</sup> (**'Air Express'**) per the then Gibbs J, and a Victorian decision adopting *Air Express, Love v Thwaites & anor* per John Dixon J. In both of these decisions, their Honours emphasised the policy purpose of the requirement of the undertaking, as a means of ensuring that a defendant will receive compensation for losses suffered, if it appears that the injunction should not have been granted.

A. Liability

Her Honour turned *first* to liability. The first Defendant, the State of Victoria, sought damages on the basis that if not for the orders entered and the Undertakings, it would have dismissed Mr Tucker from his employment in February 2018. The State sought compensation comprised of salary, superannuation, payment in lieu of annual leave, and long service leave.

The Employee resisted the submission of the State by submitting that the State was seeking to 'double dip' by claiming from the Employee amounts that the Employee did not receive, (such as withholding tax and superannuation) which were in fact remitted elsewhere. In the first case,

<sup>1</sup> Mr Paul Broderick, in his capacity as authorised delegate of the State Revenue Office.

<sup>2</sup> [1981] HCA 75; (1981) 146 CLR 249, 323, 311–12 (Gibbs J).

withholding tax was paid to Commonwealth revenue authorities; and in the case of superannuation, to the Employee's complying superannuation fund.

Her Honour rejected the Employee's submission. The focus of the Undertakings was the amount of damages suffered by the State, and not the question of whether the Employee had received those monies in part or in full. Ierodiconou AsJ found that monies were paid in respect of his remuneration and so constitute part of the loss sustained by the first defendant in maintaining the plaintiff in employment pursuant to the SRO undertaking.

### B. Quantum

The Defendants gave evidence as to the amount of remuneration paid to or on behalf of the Employee, during the period when the Employee's employment was preserved by the injunction and the Undertakings. This amounted to \$199,681.46.

Ierodiconou AsJ found for the Defendants and entered judgment against the Plaintiff in the amount of wages sought.

### **Rationale of the decision**

This case is, as the Associate Justice pointed out, of those cautioning practitioners against treating an interlocutory injunction as a mere ritual or formality. The consequences when substantial loss accrues to a party *and then* that party seeks to recover, are dire for applicant for that injunction.

As other cases have pointed out, the interim or interlocutory injunction are a time for examining with sufficient clarity the nature of the case, and the applicant for relief's true prospects, based upon available evidence. It is likely that if this step had been taken, the Employee in this case would have.

**TIM DONAGHEY**  
**AICKIN CHAMBERS**  
**LATHAM CHAMBERS**  
15 April 2020