Determination Number: AA 141A/05
File Number: AEA 241/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Paul Detoma MacDonald (Applicant) **AND** Q-Med (Sweden) Australia Pty Limited (Respondent)
AND	Q-Med (Sweden) Australia Pty Limited (Counter-Problem Applicant) **AND** Paul Detoma MacDonald (Counter-Problem Respondent)
REPRESENTATIVES	Patricia Mills, Counsel for Applicant/Counter-Problem Respondent Anna Fitzgibbon, Counsel for Respondent/Counter-Problem Applicant
MEMBER OF AUTHORITY	Leon Robinson
INVESTIGATION MEETING	11 November 2005
DATE OF DETERMINATION	23 November 2005

DETERMINATION OF THE AUTHORITY

The Authority orders that, pursuant to section 178 of the Employment Relations Act 2000, the whole of this matter is to be removed to the Employment Court for hearing and determination without investigation by the Authority.

Application to remove proceedings

[1] Q-Med (Sweden) Australia Pty Limited ("Q-Med") asks the Authority to remove the matters the subject of this investigation to the Employment Court for hearing and determination without investigation by the Authority. Mr Paul MacDonald ("Mr MacDonald") opposes the application.

[2] Mr MacDonald was formerly employed by Q-Med as its Business Development Director. He was dismissed from that position following a meeting on Friday 11 March 2005. The reasons for dismissal were later explained in advice dated 17 March 2005:-

> ...
>
> *We confirm that your employment with Q-Med was terminated at that meeting for serious misconduct arising out of your unauthorised use of Q-Med's funds and your continued failure, despite repeated requests not to use Q-Med's funds or incur expenses on its behalf without prior authority in April 2004. Despite this instruction you have continued to do so and you have ignored requests to explain why. A significant amount of this spending has been personal and with regard to alleged business related spending, you have failed to provide any receipts or substantiation for such spending.*
>
> *Your actions have destroyed the trust and confidence in our employment relationship. We have no trust you.*
>
> ...

[3] Mr MacDonald lodged an application in the Authority on 15 March 2005 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. The Authority declined the application for interim reinstatement by a Determination dated 15 March 2005.

[4] Since that time the parties have been engaged in continuing mediation but the problem has not proved capable of resolution and Mr MacDonald says mediation is yet to be finally concluded.

[5] Q-Med has now lodged a counter-problem against Mr MacDonald. It says Mr MacDonald took it upon himself to use Q-Med's credit cards for his personal spending and to have his salary credited against that spending. It says that it expected that where he exceeded his salary he would reimburse it. It says it became aware in January 2004 that Mr MacDonald had loaned himself $AUD269,897 and that he had no authority to do so ("Directors Loan Account"). The amount of unauthorised funds is now said to be the sum of $AUD411,291.33. It says that despite numerous requests over a period extending over many months, Mr MacDonald has been unable to provide receipts or reports to justify any business related expenses. By an amended statement in reply and counterclaim dated 16 May 2005 Q-Med seeks to recover from Mr MacDonald the sum of NZ$440,205.11 (AUD$411,291.33), together with interest and costs.

[6] Mr MacDonald was previously employed as the General Manager of Q-Med's New Zealand and Australian operation. Following settlement in September 2003 of a contended personal grievance recorded by a Deed of Release ("the settlement"), Mr MacDonald entered into a new employment with Q-Med as Business Development Director the terms of which were recorded in a contract of employment entitled a *Services Agreement*. Mr MacDonald by his counsel, says that the Deed of Release correctly interpreted according to Australian law, is capable of a conclusion that the settlement included the forgiveness of the balance of the Directors Loan Account up until October 2003, being about roughly half of the sum now pursued against him. Q-Med by its counsel says the Deed of Release is clear on its face and does not deal with any issue relating to the Directors Loan Account.

[7] Mr MacDonald says that all charges to the Directors Loan Account were off-set against his salary which at the accountants' suggestion was not paid in cash and that as a consequence, at the end of each financial year the Financial Controller with Mr MacDonald's assistance, would complete a reconciliation of all his expenditure and allocate any personal items against his salary. Any sum in excess of his remuneration would then be repaid by him. He says he was unable to attend to this reconciliation in respect of the 2003 financial year and therefore any disciplinary action taken by Q-Med that led to his dismissal, was premature because the balance could not be properly ascertained. He says too that because he has not been provided with full disclosure by Q-Med he has not been able to attend to a reconciliation and further, that he has been unable to attempt to remedy any alleged breach, being an express term of his employment. Mr MacDonald further says that he was entitled to be heard by the Board of Directors of Q-Med personally as a term of his employment prior to any decision to summarily dismiss him.

[8] Q-Med by application lodged on 4 October 2005, now asks the Authority to remove these proceedings to the Employment Court.

[9] Mr MacDonald opposes that application and his response is essentially that it is premature, as mediation has not been finally concluded. He says too, that he intends to protest the Authority's jurisdiction to determine Q-Med's claim for repayment of monies allegedly owed up to 1 October 2003.

The legal principles

[10] Parliament has provided that some cases may be removed to the Employment Court for hearing and determination at first instance rather than being investigated conclusively by the Authority. Such cases are those which meet the criteria set out under section 178 of the *Employment Relations Act 2000* ("the Act"). That section is as follows:-

> *178. Removal to Court*
>
> *(1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*
>
> *(2) The Authority may order the removal of the matter, or any part of it, to the Court if—*
> - *(a) an important question of law is likely to arise in the matter other than incidentally; or*
> - *(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*
> - *(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
> - *(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.*
>
> *(3) Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*
>
> *(4) An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*
>
> *(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*

(6)[1] This section does not apply—

(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

[11] Two recent decisions of the Employment Court assist the Authority as to the relevant principles to be applied - *Auckland District Health Board -v- X*[2], and *McAlister -v- Air New Zealand Limited*[3].

The grounds for removal

[12] Q-Med relies on two grounds in seeking to have this matter removed to the Employment Court:-

> *Pursuant to section 178(2)(a) of the Act, important questions of law will arise in relation to the Applicant's claim for unjustified dismissal, and the Respondent's counterclaim for sums due because of "the loan".*
>
> *Pursuant to section 178(2)(d) that in all the circumstances, including the complexity of the case, the jurisdictional issues, and the quantum of the sums claimed by the Respondent, the Employment Court is best placed to consider and determine the matter.*

An important question of law?

[13] It is not always easy to discern the distinction between a question of law and a question of fact. It is generally true that while questions of fact are concerned with the factual basis on which law is applied, whether a set of facts satisfies a certain legal definition or requirement is a question of law. Every point of legal interpretation that arises after primary facts have been established is a question of law. Similarly, the application of the law to a set of facts is a question of law. A mixed question of fact and law arises where both questions of fact and law are in dispute.

[14] Q-Med says that the application of section 103A of the Act (as amended) in respect of the justification for Q-Med's termination of Mr MacDonald's employment constitutes an important question of law. That test is said to be new and untested at Employment Court level and no authoritative guidance is presently available. I agree that the new statutory test and its correct application is an important question of law. However, the Court is likely to provide definitive guidance very shortly having now heard a matter applying the new test. Accordingly, I do not consider that this question is decisive of this application.

[15] It is then said that the factual background to the case is complicated and that considerations of whether Mr MacDonald's conduct constitutes serious misconduct or were such as to fundamentally undermine the trust and confidence of the relationship arise. It is conceded that whilst largely a factual enquiry, careful analysis is required of the terms of Mr MacDonald's contract and the New Zealand law with respect to personal grievances as it applies to his case. It is submitted that these issues are important issues of law, central to and decisive of the case.

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[1] Subsection (6) was inserted, as from 1 December 2004, by s 58 *Employment Relations Amendment Act (No 2) 2004.*

[2] unreported, AC33/05, 29 June 2005, Colgan CJ

[3] unreported, AC22/05, 11 May 2005, Shaw J

[16] With respect, those are enquiries the Authority undertakes daily and there is nothing complicated about that enquiry. I reject the submission in the same way the Court did in *Centre for Advanced Medicine Limited -v- Adrian James Sprott*[4]. The question of the justifiability of Mr MacDonald's termination is an enquiry which is quite properly the domain of the authority by investigation at first instance consistent with the objects and intent of the Act.

[17] Mr MacDonald says in his reply that he will protest the Authority's jurisdiction in respect of Q-Med's counter-problem for a portion of debt it pursues against him arising prior to 1 October 2003. It is not disputed that the said portion is roughly half the debt now sought. On 1 October 2003, the parties entered into a Deed of Release which is expressed to be governed by the laws of New South Wales, Australia. Mr MacDonald says that the said Deed of Release disentitles Q-Med from seeking to recover from him any quantum accruing prior to 1 October 2003.

[18] Q-Med resists that argument and says that important questions of law arise as to whether the Authority has jurisdiction to consider foreign law and whether it is the *forum conviens* to determine issues arising under the said Deed of Release. Its Counsel submits that issues of jurisdiction and what lawyers call *forum conviens* are important questions of law central to its counter-problem and *"as such should be dealt with by the Court"*. The submission is eventually distilled to this:-

> *The case involves considerable documentary evidence spanning a number of years. Assuming jurisdiction, the Employment Relations Authority or Court is likely to have to apply New South Wales law and take expert evidence. It is submitted that some cases are more appropriate for judicial intervention at a higher level. The Employment Relations Authority operates in a special investigative manner, and is likely to operate differently from the relevant Employment Tribunal in New South Wales. The Employment Court operates by traditional means and remains the more appropriate forum to consider foreign law given that it is the Court of record. It is submitted that these issues will be difficult and require a greater deal of expertise than in the ordinary course of events.*

[19] I do not agree that the enquiry is one of comparing methodologies with a view to ascribing one as more superior or appropriate over the other. There is no place for those considerations in the clearly expressed statutory criteria.

[20] I note too that the Authority has earlier considered the very same issues in *Clinton Moore & Musashi Pty Limited*[5] and without any question of its expertise or the appropriateness or otherwise of its power to embark on the same. These present alleged important questions of law were not regarded as such by the Authority and thereby worthy of removal.

[21] On a question of whether it would be inappropriate for the Authority to consider and apply Victorian law, the Employment Court articulated no difficulty in principle with respect to the Authority's mode of operation in undertaking such an exercise. In *Musashi* where a similar submission was made, the Court said:-

> *[21] I do not agree. Although the Employment Relations Authority may employ investigative techniques to resolve employment problems, it is nevertheless a judicial body required to comply with the principles of natural justice: see David v Tilley. It determines cases and is obliged to give reasons for its determinations. These are able to be challenged in the Employment Court and, if the hearing of the challenge is a hearing de novo (see s179) conventional adversarial litigation techniques apply. It is also open to the Authority, on statutory grounds, to either state a question of law for determination by the Employment Court or to remove the hearing of a matter at first instance to this Court on grounds including that important questions of law are for decision.*

[4] unreported, AC20/05, 10 May 2005, Shaw J, para 17
[5] unreported, AA17A/01, 17 May 2001, Yvonne Oldfield.

[22] The latter part of that statement suggests however, methodologies aside, the question in contention is one capable of being regarded as an important question of law. Is the question required to be important only to the parties, or have more wider importance for employment law generally?

[23] It is now clear (if it were ever in doubt) following the Court's citation of approval of the *McAlister* decision in *Auckland District Health Board -v- X*[6] that section 178 does not require an important point of law to be novel and thereby having importance generally. It is the latter part of the fifth proposition stated in *Hanlon -v- International Education Foundation (NZ) Inc*[7] and relied on in *McAlister* that appears to continue to state the position definitively:-

> *5. The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally.* ***But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.***
>
> The emphasis is mine.

[24] The importance of the question of law specifically to the case in which it arises is to be contrasted with the question's importance to employment law generally. Section 178 makes no distinction. I note that a question of law for appellate purposes must be one where it ought to be submitted to the appellate court *"by reason of its general or public importance or for any other reason"*. The point I make is that the legislature clearly spells out how the question of law is to be "important" for appellate purposes. It makes no such distinction for removal purposes.

[25] I am persuaded then, that the enquiry relating to the operation and interpretation of the Deed of Release according to the application of New South Wales law and whether Mr MacDonald is consequently partially relieved of liability and wrongdoing by virtue of it, is an important question of law for the purposes of section 178(2)(a) of the Act. That question is important because it will be decisive of matters now in dispute between these parties in a material way.

The residual discretion

[26] In the event that I have misinterpreted the correct principles to be applied with respect to important questions of law, it is also my opinion that in all the circumstances the Court should determine matters. There is a residual discretion reserved to the Authority on that basis at section 178(2)(d) of the Act.

[27] The relevant circumstances are these. Central to both the claim for unjustifiable dismissal and the counter-problem is the Director's Loan Account. Issues arise as to the authorisation surrounding its establishment and its continued operation. There will be a need to conduct a scrupulous enquiry of substantial documentation over many years in the form of a quantitative analysis. The application of New South Wales law to the Deed of Settlement is also required. All those matters are intrinsically linked to questions relating to the justifiability of Q-Med's actions.

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[6] unreported, AC33/05, 29 June 2005, Colgan CJ at paragraph [36].
[7] [1995] 1 ERNZ 1

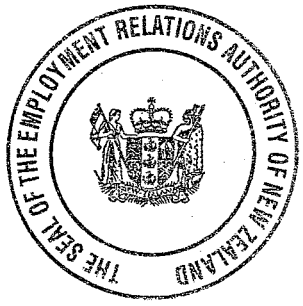
[28] Relevant too in my assessment is the likelihood of challenge. As far as I am able to assess from what is apparent on the papers at this point in time, it seems to me there is a certain inevitability about the prospect of either or both parties ultimately seeking a *de novo* challenge in the Court given the high stakes involved for both parties. The quantum sought against Mr MacDonald is substantial.

Determination

[29] For all the foregoing reasons, **I order that the whole of this matter be removed to the Court to hear and determine without the Authority investigating the matter.**

[30] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Fitzgibbon is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Mills is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

L. Robinson



Leon Robinson
Member of Employment Relations Authority