IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 167/09
5277404

	BETWEEN	JAMES & WELLS PATENT AND TRADE MARK ATTORNEYS Applicant
	AND	ROBERT SNOEP Respondent
Member of Authority:	James Crichton	
Representatives:	Gretchen Stone, Counsel for Applicant Andrew Shaw and Amy Shakespeare, Counsel for Respondent	
Investigation Meeting:	1 October 2009 at Christchurch	
Determination:	5 October 2009	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent in this proceeding (Mr Snoep) was until 20 July 2009 a salaried partner in the applicant (James & Wells) firm. Mr Snoep had previously been an employed solicitor in that firm and in that regard had executed an employment agreement which contained restraint of trade provisions.

[2] On 21 August 2009, James & Wells filed an application in the Authority seeking interim injunctive relief and alleging that Mr Snoep had breached express and implied terms of his original employment agreement. Mr Snoep resisted that application. Part of Mr Snoep's defence of James & Wells' application is Mr Snoep's contention that as a partner in James & Wells, he cannot be an employee as well and that whatever his former status as an employee of James & Wells he is certainly not bound by any provisions of the former employment agreement now.

[3] In the first telephone conference I convened to deal with James & Wells' application for injunctive relief against Mr Snoep, Mr Snoep's counsel foreshadowed

the intention of filing an application for removal to the Employment Court, principally on the ground that an important question of law was involved. That application was filed on 4 September 2009, duly opposed by James & Wells and set down for the hearing of oral argument on 1 October 2009. The parties indicated they were still in discussion with a view to exploring resolution, but in the result those efforts were not successful and the 1 October fixture went ahead as planned.

Removal

[4] Section 178 of the Employment Relations Act 2000 sets out the grounds on which the Authority may remove a matter to the Employment Court. As I indicated above, the grounds on which this particular removal application is promoted are mostly to do with the contention that an important question of law is likely to arise in the matter *other than incidentally,* although the public interest ground is also in issue.

[5] The application for removal is framed in the following terms:

> *This application is made on the following grounds:*
>
> *(a) An important question of law is likely to arise other than incidentally, in that the matter can only be resolved by determining if a person who is held out to be a "partner" can in fact be an employee of that partnership;*
>
> *(b) The case is of such a nature that it is in the public interest for it to be removed immediately to the Court, as the decision on the question of law above could have an immediate and significant impact on numerous professional partnerships;*
>
> *(c) There are no significant differences of fact to be resolved so the resolution of this matter does not rely heavily on an investigatory approach;*
>
> *(d) In all the circumstances it is appropriate for the Authority to exercise its discretion in favour of removal to the Employment Court.*

[6] The essence of Mr Snoep's argument is that there are two separate bases on which it can be contended that an important question of law is involved. The first of these relates to the question of whether a person can be a partner and an employee of the same firm at one and the same time and thus whether an employment agreement entered into when the individual was only an employee might continue to apply after the person becomes a partner of the firm.

[7] The second important question of law, it is contended, is the enforceability of the restraint of trade. Here the uniqueness is said to be the question of the

enforceability of a restraint where the party restrained is labouring under a false belief as to the efficacy of that restraint.

[8] James & Wells say that the issue before the Authority is simply whether Mr Snoep has breached the restraint or not and that Mr Snoep was simply a non-equity partner and thus continued to be covered by the restraint in his employment.

The law

[9] The legal position is clear. Even if the grounds, or one of the grounds under which removal may be contemplated, is made out, the Authority still has a discretion not to order removal: *NZAEPMU Inc v. Carter Holt Harvey Ltd* [2002] 1 ERNZ at 74.

[10] Second, an important question of law will either have major significance for employment law generally or will affect a large number of employers or employees or both: *Hanlan v. International Education Foundation (New Zealand) Inc* [1995] 1 ERNZ 1.

Conclusions

[11] James & Wells say that this is essentially a standard restraint of trade argument which the Authority deals with regularly. They say that the Authority must apply the test in s.6 of the Employment Relations Act 2000 to determine whether or not Mr Snoep is in truth an employee and, if he is, whether the restraint can apply and whether the restraint has been breached.

[12] If this were all that the Authority were charged with considering, I would accept James & Wells' argument at face value, but I do not think the matter is as simple as they portray it to be. I think that counsel for Mr Snoep is right when they make the submission:

> *Central to this case is the issue of the type of relationship that existed between the parties at the time of Mr Snoep's termination. There is a secondary issue about the enforceability of a restraint of trade.*

[13] The factual position is that Mr Snoep was employed by James & Wells in early 2001 pursuant to an employment agreement, which employment agreement contained a restraint of trade provision. Then, on 1 April 2008, Mr Snoep became a partner in James & Wells. Like many professional firms, James & Wells have a two

tier partnership with some partners being equity partners and some partners being salaried partners. Mr Snoep was one of the latter.

[14] James & Wells say that Mr Snoep was, to all intents and purposes, an employee even after he became a member of the partnership. They say that he was paid on a PAYE basis, that the work was provided for him as were all the tools of his trade and, of course, he had no share in the profit of the enterprise. They say, in effect, that Mr Snoep's reliance on the significance of the partnership is misplaced. I do not agree.

[15] In my opinion, that analysis does violence to the common law on partnership and to certain relevant provisions of the Partnership Act 1908. If Mr Snoep can be both a partner and an employee at one and the same time, then that resolves the issue once and for all. But the old common law position as I understand it is that a person cannot be both a partner and an employee in a firm. Such a view is, of course, consistent with the law relating to *holding out*. It is not for outsiders to inquire into the structure and nature of the relationships between partners. If a firm holds an individual out as being a partner, then it matters not at all that that partner might be of a different class or type from the individual in the next office.

[16] The discretion that rests with the Authority to remove the matter to the Court or not must, of course, be exercised in accordance with principle. As I have already made clear, I consider that there is an important legal question in relation to the juxtaposition between the roles of partnership and employment and it seems to me in principle that that question passes the test which the Act requires. I think the position is otherwise in relation to the other matter on which Mr Snoep relies upon, namely the restraint of trade itself. That aspect, taken without the context of the fundamental legal issue I have just referred to, is not in any way unique or unfamiliar. However, it would be unhelpful to the parties and not a sensible use of the time of the employment institutions if only a portion of the matter was to be removed to the Court. It seems to me that if there is to be a removal, then it should be a removal of the whole matter.

[17] Having already made the point that the Authority has a discretion to exercise in respect of removal, I need to briefly refer now to the basis on which that discretion ought to be exercised. Primarily in the present case, I consider that the Authority should look at the different decision-making processes and reflect on their suitability for the task at hand. In the present case, I am not persuaded there are any serious

question of disputed fact and the task is primarily one of determining the law. Given that that task seems to me in principle to be both unique and challenging, it is difficult not to conclude that the matter should not be dealt with by a Judge. There is nothing in the factual matrix of the present case which makes the Authority's inquisitorial process particularly appropriate; essentially the challenge is a legal argument and it should be dealt with in a courtroom.

Determination

[18] I hold that the question of law involved, namely the question whether an employee may also be a partner and the consequences of that juxtaposition for restraints of trade executed when the employee was just an employee, is an important question of law because of its uniqueness and its potential to affect large numbers of professional firms and practitioners in a number of professions in this country.

[19] As I have noted, while the Authority is not obliged to remove a matter even if grounds are made out, there is an ample basis in my judgment for removal of the present case and I order that the whole of the matter be removed to the Court in the interests of administrative convenience.

[20] Accordingly I order the whole of the matter to be removed to the Court for the Court to hear and determine, without the Authority investigating the matter.

Costs

[21] Costs are reserved.

James Crichton
Member of the Employment Relations Authority