

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 197/08
5107560

BETWEEN MICHAEL REX SHERIDAN
Applicant

AND HIREQUIP LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Tony Drake, for Applicant
Aaron Lloyd, for Respondent

Investigation Meeting: 9 May 2008

Determination: 28 May 2008

DETERMINATION OF THE AUTHORITY

[1] Michael Sheridan seeks removal of his employment relationship problem to the Employment Court on the grounds that it raises important questions of law and/or in all the circumstances the matter should be removed. He has filed an affidavit in support of his application.

[2] The respondent does not oppose the application. However, the respondent does not agree that all the questions raised on behalf of Mr Sheridan do raise important questions of law.

Employment Relationship Problem

[3] Mr Sheridan says a core term and or benefit of his employment with the respondent was a management equity scheme. He says his \$350,000 investment in that scheme and the potential value to him of the scheme on maturity (between \$2.6 and \$4 million) are compromised by his unjustified dismissal. He alleges breaches of

his employment agreement, concomitant claims for general and special damages and penalties, breach of the Fair Trading Act 1986 and damages.

[4] The respondent denies the management equity scheme forms part of Mr Sheridan's terms of employment. It denies Mr Sheridan has any basis for the asserted breaches.

The application for removal

[5] The relevant statutory provisions provide:

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

...

(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[6] In *McAlister v Air New Zealand*¹ Judge Shaw set out the following propositions to apply to an assessment of section 178(2)(a):

- *It is necessary to identify a question of law arising in the case other than incidentally*
- *It is necessary to decide the importance of the question*
- *It is not necessary that the question should be difficult or novel*
- *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 material part of it.*

¹ [1995] 1 ERNZ 1

[7] Mr Drake submits that Mr Sheridan's employment relationship problem raises a number of important questions of law:

- Whether the management equity scheme was a term of the employment agreement between the parties and whether, even if it was not a term of the employment agreement, compensation can nevertheless be awarded for loss of a benefit;
- Whether "off the record" and "without prejudice" are interchangeable terms and whether such statements are admissible in the context of a constructive dismissal;
- Whether it is an implied term of the parties' employment agreement that the respondent could not repudiate the agreement prior to the expected sale of the business;
- How to calculate any compensation or damage for loss of the profit from the management equity scheme.

[8] Mr Lloyd submits there is no doubt that this is an important case but that the respondent does not agree that all the issues raised by the respondent amount to important questions of law. He submits:

- The management equity scheme is excluded from Mr Sheridan's terms of employment by effect of the completeness clause contained in the written employment agreement. He submits the law on completeness clauses appears to be settled but the application of that law by the institutions may mean an important question of law arises;
- The law on employment benefits (does the equity scheme amount to one?) is well settled and no important question of law may arise;
- The nexus between estoppel and implied terms may give rise to an important question of law; is the respondent estopped from denying a benefit given its alleged conduct in inducing Mr Sheridan to leave secure employment and arranging that Mr Sheridan take advice on the management scheme from the respondent's external legal advisors?
- The law regarding without prejudice communications is well settled;
- The law regarding repudiation of employment agreements is well settled;

- Any assessment of compensation is an important question of fact not law.

Determination

[9] The statute provides that the Authority is to determine matters at first instance and should generally do so unless it is satisfied that one of the removal criteria is met and that it is appropriate given the Authority's residual discretion for it to remove the matter.

[10] I consider that the applicant's claim that an important question of law is likely to arise other than incidentally is strong. I have measured the importance of the questions of law in relation to the statement of problem in which they arise.

[11] The applicant says:

- (i) the management equity scheme he entered is either a term of his employment or a benefit of that employment;
- (ii) that he was allegedly improperly induced to enter the scheme within the context of his employment discussions with the respondent;
- (iii) that he now finds himself cut off from the benefits of that scheme as a consequence of the respondent's allegedly unlawful actions under the employment agreement; and
- (iv) seeks damages to remedy alleged breaches.

[12] The resolution of these issues involves mixed questions of fact and law. The nature of the questions of law concern the status of the management equity scheme within the context of the parties' rights and obligations under their employment agreement and the exercise of those rights and obligations. There are important questions of law.

[13] The answer to the question may be of wider significance and interest to employment law in general. The resolution of the posed question of law is central to this employment relationship problem. The questions of law are important to the parties.

[14] There are no factors which would make it undesirable to remove this matter to the Court².

[15] It is appropriate that I should exercise my discretion and remove this matter to the Employment Court. Accordingly I order the removal of this matter to be heard and determined by the Court.

Marija Urlich

Member of the Employment Relations Authority

² *Auckland DHB v X (No 2)* [2005] ERNZ 551, 561