

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Adrian James Sprott (Applicant)
AND Centre For Advanced Medicine Ltd (Respondent)
REPRESENTATIVES Paul Tremewan, Counsel for Applicant
Gerard Curry, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 21 February 2005
DATE OF DETERMINATION 25 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent, Centre For Advanced Medicine Ltd (“CAM”), has applied for the removal of this matter to the Employment Court. The applicant, Adrian Sprott, opposes this application.

[2] Mr Sprott was dismissed from his position as Chief Executive Officer of CAM on 20 February 2004. Mr Sprott’s employment relationship problem was lodged with the Authority on 5 May 2004. CAM lodged a statement in reply with the Authority on 1 June 2004 which characterises the dismissal as a summary dismissal for serious misconduct. The parties attended mediation in November 2004. On 22 November 2004 CAM lodged an application for removal in the Authority, the covering letter to which advised the parties had been unable to resolve the substantive matter at mediation. On 3 December 2004 a notice of opposition to the removal application was lodged on behalf of Mr Sprott.

[3] The parties have filed detailed submissions in support of their respective positions. In addition I have had the benefit of meeting with the parties to hear their submissions.

Removal application

[4] The application for removal is made on the following grounds:

- “6. The important question of law for determination is whether the employee/employer relationship is at an end when the Chief Executive Officer and Director of a company has lost the confidence of the Chairman of the Board, the Board of Directors and the shareholders of the company.
7. This question must be considered in light of the relevant circumstances. These include the Applicant’s failure to:
 - (a) perform the duties and responsibilities set out in his employment agreement, specifically to:

- (i) provide commercial leadership;
 - (ii) follow the policies, rules and directions of the Respondent;
 - (iii) implement the development strategies of the Board of Directors of the respondent;
 - (iv) prepare a prospectus for an initial public offering of shares in the respondent;
 - (v) implement a staff shareholding scheme;
 - (vi) substantially advance ISO accreditation;
 - (vii) devote the whole of his efforts exclusively to carrying out his duties and responsibilities (instead carrying out tasks such as bookkeeping, plumbing, wiring and packing);
 - (viii) keep company information confidential;
 - (ix) follow the company policy that all professional advice, including legal advice, was only to be obtained through or with the approval of the Chairman of the Board;
 - (x) promote and protect the best interests of the company; and
- (b) respond to legitimate concerns raised by the Chairman of the Board and by members of the Board at a Board meeting.

8. This question is likely to be decisive. It has not yet been determined by the Courts.”

[5] Mr Sprott opposes removal essentially on the grounds that there is no important question of law to be determined.

Submissions

[6] Mr Curry submits the important question of law yet to be determined is that given Mr Sprott’s seniority and responsibility as CEO of CAM, once the Chairman of the Board had lost confidence in him could the employment relationship end justifiably by way of dismissal. Mr Curry submits this point of law could well be determinative of the substantive issue between the parties and is a question which goes to the very merits of the applicant’s claim and therefore arises other than incidentally. He also submits this point of law does not concern standards of procedural fairness but rather a consideration of the subjective assessment of the Board which lead to the decision to dismiss. He submits this question has consequences which reach beyond this case and has important implications for employers and CEOs generally.

[7] In terms of the discretionary issues to be considered by the Authority in its determination of this application for removal Mr Curry made the following submissions; the Authority’s discretion to order removal is a broad one and is not “closely fettered” notwithstanding, the real issue between the parties concerns a question of law, not disputed facts, challenge is practically inevitable and removal to the Court does not preclude the parties pursuing settlement discussions.

[8] Mr Tremewan submits the substantive issue before the Authority is whether Mr Sprott’s dismissal was unjustified and that this in itself does not raise a question of law sufficient to justify removal to the Court. Mr Tremewan submits the Authority is the appropriate forum in which to resolve disputed facts.

Determination

[9] The respondent seeks to rely on section 178 (2) (a) and/or (d) of the Act which provides:

- “(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.”

[10] In *Hanlon v International Educational Foundation (NZ) Ltd* [1995] 1 ERNZ 1, 7 Goddard CJ said:

“I conclude without difficulty that questions of law are likely to arise in this case otherwise than incidentally, and I turn my attention to the real issue which is whether the questions of law are important questions of law. It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s 94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter 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 it or a material part of it.”

[11] The circumstances of Mr Sprott’s dismissal as presented in the originating documents, application and opposition to removal and supporting submissions do not strike me as different from those routinely dealt with by the Authority. The role of the Authority is to investigate and resolve employment relationship problems (section 157 (1) Employment Relations Act 2000). The Act makes no distinction between employees seeking resolution of their employment relationship problems on the basis of position, responsibility or level of remuneration. The principles to be applied to a claim of unjustified dismissal by an employee who holds the position of CEO are the same as for any employee. Those principles, at least in relation to a dismissal which occurred prior to 1 December 2005, as in the present case, are well established.

[12] In considering an application for removal the Authority must also apply appropriate discretionary considerations (*NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* 1 ERNZ [2002] 74); this matter is likely to concern disputed questions of fact which the Authority is intended to deal with in the first instance, I am not persuaded as to the inevitability of challenge, the parties cannot make a decision as to challenge until such time as they have considered the determination in question and I am able to offer the parties dates for an investigation meeting on the originating application in May or June 2005.

[13] I am not satisfied an important question of law may arise from these proceedings or any that do arise would warrant removal to the Court. The discretionary considerations do not favour removal. The application for removal is declined.

Marija Urlich
Member of Employment Relations Authority