

NOTE: An order prohibiting the publication
of certain evidence appears on page 2

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Dr Tony Bierre (Applicant)
AND Diagnostic Medlab Services Limited (Respondent)
REPRESENTATIVES R McIlraith and L Turner, Counsel for Applicant
C Meechan and R Arthur, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 5, 6 and 12 December 2002
SUBMISSIONS RECEIVED 17 and 19 December 2002
DATE OF DETERMINATION 10 January 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Tony Bierre offered his resignation to Diagnostic Medlab Services Limited (“DMSL”) in August 2002. The resignation was accepted, but two days later Mr Bierre sought to withdraw it. DML did not agree to the withdrawal so Mr Bierre now says either it should have, or that the enforcement of a termination date of 31 January 2003 amounts to an unjustified constructive dismissal.

Also there is a restraint of trade provision in the parties’ written employment agreement. Mr Bierre seeks its deletion on the grounds that it is both void and unreasonable.

Background

By mid-late 1999 Mr Bierre was one of a group of medical specialists practising in a merged Diagnostic Medlab operation, having previously been a partner and then a shareholder in a practice known as Diagnostic Laboratory. He has been a Fellow of the Royal College of Pathologists of Australasia for some 19 years, has experience in general surgical pathology and particular expertise in gynaecological pathology and breast pathology. Diagnostic Medlab was in business as a community (or privately-owned) medical testing laboratory whose workflow came from medical practitioners’ private practices and from privately owned medical facilities. On 1 January 1990 Mr Bierre was brought into partnership at Diagnostic Laboratory as a histo-cytopathologist.

For present purposes I define histopathology as the study by microscopic examination of body tissues and the changes caused in them by disease, and cytopathology as the study by microscopic examination of cells and the changes caused in them by disease.

Towards the end of 1999 Sonic Healthcare Limited (“Sonic”) bid for and purchased the interests of the SGS Medical Group in Australia and New Zealand. SGS owned the shares in the Medlab company, and was the majority shareholder in the Diagnostic company. The minority shareholders in the Diagnostic company were Mr Bierre and other senior colleagues. Sonic purchased their shareholdings too. I was provided with commercially sensitive documentation regarding aspects of the Sonic purchase, including valuations, and except to the extent it is referred to in this determination I formally order that none of that evidence be published.

The present respondent, DMSL, employs the Diagnostic Medlab staff. DMSL is owned by another New Zealand registered company, Diagnostic Medlab Limited, which is in turn owned by Sonic.

The terms of sale included requirements that Mr Bierre, and the minority shareholders who did not retire, enter into employment contracts effective on the completion of the sale. The minority shareholders were also bound by commercial restraints of trade in respect of the sale of the business. Those restraints began on the third business day after various conditions precedent to the sale were met.

Mr Bierre’s employment contract was dated 1 December 1999. Clause 13 of the contract set out a restraint of trade, commencing from the date of termination of the contract, as follows:

“(a) For the purposes of this clause the following words shall have the following meanings:

...

Protected Business means a business or activity engaged in by the Company or any member of the Sonic Group at the date on which this agreement terminates;

...

Restrained Activities means each of the following:

- (i) a business or activity of a type the same or substantially the same in all material respects as the Protected Business (or any material part of it);
- (ii) a business or activity of a type which is competitive in any material respect with the Protected Business;
- (iii) an attempt to seek custom from any customer of the Protected Business or any provision of goods or services to any such customer of the Protected Business (being goods or services of the type provided by the Protected Business). For this purpose the customers are those as at the Completion Date [of the sale];
- (iv) solicit or entice away or endeavour to solicit or entice away any director, employee, consultant, officer, contractor or agent of the Protected Business [exceptions follow]; or
- (v) any interference with the Protected Business.”

The duration of and geographical limits on the restraint were contained in a table setting out various combinations of geographical and temporal limitations in order of preference. Clause 13 also explained how the combinations were to be applied. With reference to Mr Bierre’s circumstances the most preferred combination was a restraint of 2 years in the region controlled by the Auckland Regional Council. Provided this restraint was reasonable, then it would be applicable. If not, the next preferred restraint would be for the same period over the Auckland metropolitan area, and so on through the table until a combination was found to be reasonable.

Subclause (f) provided:

“The Employee ... shall not directly or indirectly ...

- (i) carry on, or be concerned or engaged in; or
- (ii) in any way be interested in ...; or
- (iii) provide services in relation to (whether as an employee, consultant, advisor or otherwise); a Restrained Activity or carry out any preparatory steps in relation to any of the above.”

Subclause (g) set out exceptions to the above restrictions, including the provision of pathology services in public hospitals subject to the agreement of the chief executive, as well as any other activity permitted by the chief executive. Agreement was not to be arbitrarily or capriciously withheld.

Mr Bierre received a very substantial sum of money in return for the agreements he made. In addition, by letter to his solicitors dated 3 November 1999, he confirmed he had read, sought advice on and understood the transaction documents to which he was a party. By letter to Sonic dated 4 November 1999 his solicitors confirmed they had given advice on the documents, including the employment contract.

I turn next to the circumstances leading to the termination of Mr Bierre's employment. Before doing so I set out some contractual provisions relating to the term of Mr Bierre's employment:

"1. Employment

...

1.2 This contract will continue in force for a minimum term of four years and nine months (the minimum term) subject to the company's right to terminate the employment pursuant to clauses 8.2 [termination without notice], 8.3 [redundancy] and 8.4 [on medical grounds] and thereafter shall continue in accordance with the terms of this agreement. The Restraint of Trade specified in clause 13 will continue to have effect after the contract ceases to be in force.

...

8. Termination

8.1 Expiry of contract term

8.1.1 Upon the expiry of the minimum term either party may terminate this contract by giving the other 6 months' written notice of termination.

...

8.2 Termination without notice

8.2.1 Notwithstanding clause 8.1, the company may either during, or following the expiry of the minimum term, terminate the employee's employment at any time without notice in cases of serious misconduct, disobedience, gross negligence or serious neglect of duty. Without limitation the following events shall be considered to constitute grounds for termination without notice:

· ...

· The employee committing any material breach to this contract (...) which in the view of the chief executive or the Sonic MD is considered to be a breach of a material provision of this contract and in respect of which notice of breach has been given by the company to the employee and, where capable of remedy, the employee has failed to remedy such breach within fourteen days of such notice:"

The merging of the Diagnostic and Medlab businesses and the purchase by Sonic, as it would have in any business in similar circumstances, created management challenges in terms of staffing and general operational procedures. The retirement or departure of five senior Medlab pathologists, when there is a shortage of skilled pathologists in New Zealand at the best of times, created further pressures for the new organisation.

Mr Bierre was in charge of the histology and cytology department. Mee Ling Yeong, another senior pathologist specialising in histology and cytology, was aware that problems were occurring as a result of the increased workload and offered to assist Mr Bierre. With the support of Mr John Matthews – a specialist haematologist and the director of Clinical Services until 31 October 2002 – Ms Yeong made her offer to Mr Bierre. In October or November 1999 all three entered into discussions about how the arrangement would work. All three were also members of the management board, and the minutes of a meeting dated 9 December 1999 recorded the arrangement that Ms Yeong would take responsibility for internal departmental management while Mr Bierre would cover external relationships with clinicians as well as competition issues.

In practice Ms Yeong took responsibility for recruiting staff, preparing rosters for the department, and other general administrative matters, while Mr Bierre continued as lead pathologist for the breast histology service provided to BreastScreen Auckland and North, and to the St Mark's Clinic.

Although all pathologists were expected to carry out both histology and cytology work, Mr Bierre's work was otherwise predominantly in cytology. He asserted it was unclear how this came about, but since he had been intensively involved in the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region ("the Gisborne Inquiry") I consider the assertion a little disingenuous. In any event it was Mr Matthews' evidence that Mr Bierre had agreed to take a leading role in cytology. Similarly it was Mr Bierre's preference to continue as lead pathologist in breast histology, and if his preference for gynaecological cytology and breast histology meant Ms Yeong was left with overall management of the rest I do not consider that to have been at her own initiative.

Mr Bierre and Ms Yeong had known each other for a number of years and were friends. However their management-sharing arrangement did not run smoothly during 2000 and following a serious disagreement between them over the purchase of frozen section machines communication tended to be conducted through Mr Matthews or Frank Tuck, the chief executive officer. On several occasions Ms Yeong indicated to Messrs Tuck and Matthews that she felt undermined by Mr Bierre and preferred not to continue with the additional responsibilities. Nevertheless she did continue.

Mr Bierre complained of poor communication and of being 'left out of the loop'. I was given a number of examples of incidents which illustrated the nature of the conflict, but do not consider it necessary to record them. I say instead that it was plain by the time of the investigation meeting that the relationship between Mr Bierre and Ms Yeong had deteriorated beyond the point of no return, and that Mr Bierre was far from blameless in that respect. There was no real 'leaving out of the loop' of Mr Bierre although there were certainly communication problems associated with the deterioration of the relationship. In the context of his personal grievance, Mr Bierre's argument is that DMSL did not do enough to address to conflict between he and Ms Yeong, and allowed the conflict to continue for too long.

In what appeared to me to be at least in part an attempt to explain how the discord came about, Mr Bierre alleged that, despite numerous requests, he never received clarification of his and Ms Yeong's roles and nor was there a clear definition of the boundaries between histology and cytology.

Regarding roles, on 14 September 2000 the board of management resolved that Mr Bierre would take the role of Clinical Director of Cytology and continue to handle national issues such as cervical and breast screening. Ms Yeong would take the role of Clinical Director of Histology and manage the pathologist pool in consultation with Mr Bierre to ensure there was a rotation of pathologists through cytology. The role of a clinical director was set out in a formal document. No doubt there were grey areas when it came to managing histology and cytology respectively, but I do not see how two very senior and experienced people could have problems identifying and negotiating appropriate boundaries.

In the second half of 2000 Mr Bierre also became concerned at what he perceived to be an increase in complaints and negative feedback about standards at Medlab. He raised these variously with Mr Tuck, Mr Matthews and Ms Yeong over the course of the next two years. In the context of his personal grievance, he says that inaction on these complaints left him feeling at personal risk of legal liability as well as to his reputation. He also felt his concerns were not heard.

There were mistakes, and complaints were received over that period. In general Diagnostic Medlab, and Diagnostic Laboratories before it, had made mistakes and received complaints in the course of business. It was common ground that from time to time mistakes happen. There is a series of quality standards applicable to minimise the occurrence of mistakes, and to identify and act on them promptly if they do occur. In the personal grievance context the question is whether the errors and complaints Mr Bierre reported meant additional action should be taken to the extent that the failure to do so amounted to a breach of the parties' employment contract. My comments on the matter of errors and complaints are not intended to cut across the matters canvassed at the Gisborne inquiry, rather they are made in the context of the present employment relationship problem.

Mr Bierre's assertion that there was a deterioration in standards was a perception he had because of the complaints and errors of which he was aware. He made no attempt to provide an objective measure of the deterioration, and indicated at the investigation meeting that it would be meaningless to do so because of the wide variation in the circumstances surrounding each patient and each sample provided for testing. That statement itself casts doubt on the basis for the assertion about a deterioration in standards, and other than to acknowledge that there were practical difficulties associated with the merger and the purchase by Sonic, I do not accept there was a reasonable foundation for the assertion.

One relatively frequent complaint concerned the length of time between the dispatch of a sample to Diagnostic Medlab for testing, and the provision of a report on the outcome. DMSL provided statistics that would not support an assertion that there was a trend towards an increase in the time taken to test and provide a report on a sample. They support the opposite. Figures from October 2000, 2001 and 2002 respectively show that as a rough average 60% of requests were completed within 2 days. This was well in excess of figures from the pre-Sonic period.

Of the complaints received, some were fair and some were not. Of the fairly based complaints, some were attributable at least in part to action (or inaction) of Mr Bierre himself. One relatively regular complainant was Mr John Harman, Surgical Director of BreastScreen Auckland and North and the founding Surgical Director of St Mark's. He put his complaints in writing, and worded them strongly. They amounted to general comments about a deterioration in service and specific complaints about turnaround times. However in his evidence at the investigation meeting he said his approach was to ride people hard - he wanted priority to be given to all samples received from his clinics - and I believe it was this approach as much as any feeling of frustration about the service he received which led him to word the complaints as he did.

Moreover Mr Bierre is not correct in asserting nothing was done about the concerns he passed on. Indeed when he said 'nothing was done' I understood that to mean he concluded nothing *effective* was done because Diagnostic Medlab continued to receive complaints. In fact Ms Yeong put a great deal of effort into meeting with clinicians such as Mr Harman to discuss any concerns about service and standards, and she constantly and conscientiously sought to ensure compliance with quality standards, improve efficiency and address clinicians' concerns. Mr Matthews and Mr Tuck also met with or spoke to the clinicians who indicated concerns, and generally sought to maintain positive business relationships. Mr Bierre himself was expected to attend regular meetings at the St Mark's clinic, but did not always do so.

Overall it may be that Mr Bierre was unaware of the full details of when other meetings were held and who conducted them, but he was aware that such meetings were held. He was also aware of Ms Yeong's attempts to improve service. If he believed she did nothing what he really meant was that he did not agree with her approach or did not consider it helpful. I conclude that Mr Bierre was entitled to raise concerns if he had them, but that some of them were unfounded and it was not reasonable to say that his concerns were not acted on to the extent he says occurred.

Issues involving a newly recruited pathologist from South Africa illustrate a number of aspects of the problems between the parties.

One of the issues concerned whether the pathologist was appropriately qualified to work on gynaecological histology or cytology in terms of Standard 501 of the relevant quality standards. Mr Bierre alleged that Ms Yeong nominated the pathologist to work in those areas despite knowing he did not meet Standard 501.

Ms Yeong took great exception to that allegation, which is a serious one. Ms Yeong was aware of the standard. Her view was that the position of South African pathologists was dealt with on a case by case basis, through recommendations made to the Medical Council by a panel of representatives of which Ms Yeong had in the past been a member. In other words, she knew what she was doing. Mr Bierre's approach to the interpretation of Standard 501 was to look at the list of required qualifications which it contained, and conclude that the pathologist concerned did not have any of those qualifications. Ms Yeong's view was that the formal entry into a probationary registration arrangement under the auspices of the Medical Council, which had happened in the case of the pathologist concerned, was sufficient to meet the standard provided the associated supervision was available as she planned for it to be.

Ultimately it is not for me to determine as a matter of law whose view was correct. I can, however, conclude that Mr Bierre's accusation was unreasonable. Such accusations against a colleague are destructive, and the accusation illustrates why Mr Tuck made that very criticism of Mr Bierre's overall approach to issues arising in the workplace.

Another of Mr Bierre's constant complaints was that he did not have the pathologist resources he required in his area of work. I have had difficulty in identifying precisely what he wanted when he made this complaint, and it appeared to be impossible to satisfy him. He, like everyone else, had to deal with the problem posed by the shortage of pathologists he was well aware existed in New Zealand. Nevertheless Ms Yeong was active in her efforts to recruit, even though those efforts were subsequently criticised by Mr Bierre. In addition there was no disagreement that it was preferable for all pathologists to be rostered over both histology and cytology duties, and Ms Yeong did that. When Mr Bierre continued to complain about resourcing Ms Yeong sought to identify someone whose duties would be principally in cytology, and the person eventually rostered in that way was the South African pathologist.

Yet by an email message dated 28 November 2001 Mr Bierre wrote to Mr Tuck referring to his opposition to the creation of a pathologist position dedicated to cytology, querying Mr Matthews' role, and stating "... I am not happy to be part of a mediocre service ... The experiment with Mee Ling has not worked in my opinion. In my opinion she is well intentioned but does not have the leadership to drive histology into a culture of excellence even with significant input from John." Messrs Tuck and Matthews did not agree with that opinion, and neither do I. I consider the comment a telling reflection of the state of the relationship between Mr Bierre and Ms Yeong at the time, and of Mr Bierre's attitude to Ms Yeong.

Mr Tuck replied to the 28 November message in a letter dated 21 December 2001, saying many of the points had already been discussed and perhaps it was time to take a different approach. He suggested the involvement of Colin Goldschmidt, the Australia-based managing director of Sonic, and proposed that the matter be taken up early in the new year. Mr Bierre responded by advising he would be on leave during January, before detailing his view that Ms Yeong was using unproved methods of management 'with little or no respect for what had been achieved in the years before.' He also expressed concerns about the approaches of Messrs Tuck and Matthews to the management of Diagnostic Medlab, which both men took as criticisms of them as well. Mr Bierre considered his message to have been constructive, but that view was not shared by anyone else.

The exact nature of Mr Goldschmidt's involvement was not decided on at the time. Mr Tuck had considered asking Mr Goldschmidt to mediate in the matter but decided not to proceed in that way. Mr Tuck did not discuss this with Mr Bierre at the time, and although it was open to him to do so I do not believe he was obliged to. Indeed Mr Goldschmidt told me that his preferred approach to management was to leave local issues to be resolved at local level. In February 2002 Mr Tuck forwarded to Mr Goldschmidt the correspondence of 21 and 24 December. He also made it clear to Mr Goldschmidt that he considered Mr Bierre was being destructive and overly critical, but since he was doing no more than brief Mr Goldschmidt in a management sense I see no reason why he should not have, and note Mr Bierre's view was also placed before Mr Goldschmidt.

For various reasons Mr Bierre was absent from the workplace for most of January and a little under half of February. On or about 15 March he had discussions with Mr Tuck about his wish to enrol in an MBA course at Otago University for reasons that appeared to be unrelated to the difficulties at Diagnostic Medlab. Soon after that, Messrs Tuck and Goldschmidt had a further discussion about how to resolve the difficulties involving Mr Bierre.

The proposed solution was to create a new Women's Health Division to be headed by Mr Bierre. Mr Goldschmidt saw this as a lateral-thinking attempt to fix the problem, as well as a useful marketing approach and a way of addressing competition from another private medical laboratory, Southern Community Laboratories. The initiative was his, it was based on initiatives in Sydney, and he believed it would be successful.

Mr Tuck discussed the idea with Mr Bierre and Ms Yeong during various meetings in April 2002, with a view to developing in detail how the Division would work. Over the next three months Mr Tuck worked on preparing a draft internal organisation document, a final form of which he forwarded to Mr Bierre for consideration on or about 21 June 2002. Mr Bierre provided comments on the draft which Mr Tuck regarded as relatively minor alterations with which he was happy. He thought the parties were on a path that could resolve the parties' problems. In his evidence on the matter, however, Mr Bierre said: "There have been quite a few discussions over the Women's Division but detail has been lacking and Mr Tuck has been very rigid in his approach – determined to have things done his way – yet he is not the one who assumes the clinical risk." This criticism was not made at the time, although overall it appeared to Mr Tuck and Mr Matthews that Mr Bierre was the one who wanted things done his way.

After a period of leave, in July 2002 Mr Tuck began to set up the regular meetings that were to form part of an attempt to address the communication problems between Mr Bierre and Ms Yeong. Mr Matthews was due to retire and was to be replaced by Paul Ockleford, who was also a haematologist and had joined Diagnostic Laboratories as a partner in 1987. The intention was that Messrs Tuck and Ockleford would meet separately with Ms Yeong and Mr Bierre before the meetings to iron out what would be on the agenda and how the agenda items would be approached. All four would then attend the full meeting.

The first 'pre meeting' meeting with Mr Bierre was held on 29 July 2002. Mr Bierre reiterated concerns about communication difficulties which he had raised with Mr Tuck a few days earlier. He also commented on the Women's Health Division proposal by referring to the importance of relationships with the pathologists who would be working in the division, as well as the need for the division to be properly resourced. He stressed the importance of good communication, of regular meetings and of the need to minute the meetings. There was an agreement that the meetings would be held weekly. Mr Bierre said he felt encouraged at the end of the meeting.

He started to raise these issues again at the full meeting on 31 July, and Mr Tuck moved to restrict the discussion on the ground that the issues had already been covered. Mr Bierre felt this was unfair and that he had been closed down. My view is that the matters he was raising had indeed been raised frequently and at length over the preceding two years. During that period the problems had escalated. It is plain to me that if Mr Tuck had allowed the discussion to focus on those matters again the parties would have been sucked into the downward spiral they had been on for two years, when the intention was that the Women's Health Division be part of a new approach. The earlier baggage was to be left behind and the parties needed to focus pro-actively on how the division would operate. This was the new approach. The old one had not worked.

The meeting continued in accordance with the agenda with no apparent disagreement, and Ms Yeong left a little early as she had another commitment. However Mr Bierre was angry that Mr Tuck had restricted the discussion, and after Ms Yeong left he took Mr Tuck to task about the matter. He also criticised Ms Yeong again and continued to question her ability. Mr Tuck mentioned his concerns about Mr Bierre's approach and suggested he be more positive and supportive towards his younger colleagues. He was concerned about Mr Bierre's approach of being constantly critical of others. In his evidence he described Mr Bierre's reaction after Ms Yeong's departure as "... yet another example of him undoing anything positive that we did and of him changing his mind in relation to issues which we honestly believed he had accepted."

Mr Bierre described himself as being distraught at the end of this meeting. He felt his future in the organisation was limited and that his issues were being ignored. However I also believe that, underlying at least some of his behaviour, was his fear of becoming 'another Dr Bottrill.' He was familiar with the Bottrill circumstances and that the Gisborne Inquiry had a concern that similar problems might be present in other laboratories. Indeed Diagnostic Laboratories had received some scrutiny in that respect, although Mr Matthews' evidence suggests this may have been because of the method of reporting rather than because of problems like those in Gisborne. In any event, there was no evidence that any formal adverse finding resulted. In insisting on his requirements the way he did Mr Bierre was seeking reassurance that he would not be another Dr Bottrill, in a form that could not be given, and to the detriment of workplace relationships.

That night Mr Bierre decided to tender his resignation. He said in evidence that he did so to "try to have DML take my concerns about quality, and the Women's Health Division, seriously and act upon them." He did not at any point say he had no real intention of resigning at all. He did say he wanted change, but there was never any suggestion that he would continue to work for DMSL if the change he sought was not secured.

There was no room for doubt in the letter of resignation dated 31 July 2002. In its closing paragraph the letter merely said, "It is therefore with great regret that I wish to submit my resignation from Diagnostic Medlab." There was nothing ambiguous or conditional about the resignation, and the letter was far more than merely a threat to resign. The reasons for the decision to resign were said to be the gulf between himself and Ms Yeong, the feeling that Mr Bierre did not have Mr Tuck's trust and support when it came to obtaining and managing the resources required to provide an excellent service, and Mr Tuck's unjustified and unwarranted comments on Mr Bierre's management of pathologists. Given the course of the parties' relationship these were consistent and plausible reasons for the submission of a genuine resignation.

Messrs Tuck and Bierre met to discuss the letter on Tuesday 6 August 2002. Mr Tuck had taken it seriously as a resignation and had no reason to believe it might be withdrawn if, for example, DMSL indicated it was now ready to address Mr Bierre's concerns in a way that was satisfactory to Mr Bierre. That is hardly surprising, since Mr Tuck reasonably and genuinely believed attempts had been made to address them over a long period and the attempts had been unsuccessful. Mr

Bierre did not raise the possibility that he might reconsider. He said nothing during the discussion to put DMSL on notice that the letter of resignation was intended to be taken at anything other than face value. DMSL was entitled to, and did, take the letter at face value.

On Thursday 8 August 2002 Mr Bierre sent an email message to Mr Tuck in the following terms:

“I thought it would be worthwhile to confirm some of the details of our meeting on Tuesday. Resigning from DML is not what I wish to do and is certainly not my preferred option to resolve the current situation. My resignation was forthcoming for the reasons I have explained. It is in everyone’s interest and benefit for us to endure there is good communication and that there are some ground rules established to ensure good communication and trust are re-established. All of us should be in agreement that we wish to move forward to ensure that DML is a pleasant place to work and that we provide to our customers a level of service they value and that we can be proud of.”

I do not read that message as indicating the resignation was not meant to be accepted. I read it as a confirmation of the resignation and a restating of the reasons for it. As far as interpretation of the message is concerned I place no great weight on the indication that resignation was not Mr Bierre’s preference, since that is frequently expressed to be the case in genuine resignations in similar circumstances. The same is true of the expressions of hope for the future. If the message was intended to convey that Mr Bierre would proceed with his resignation only if the current issues could not be resolved, I do not believe it was reasonably capable of being read that way.

Inevitably on his receipt of the resignation Mr Tuck began to consider how the organisation would accommodate it, as well as the implications of the lack of a proposed termination date and the existence of the restraint of trade. I see nothing inappropriate in his consulting about the matter. Eventually by letter dated 12 August 2002 Mr Tuck responded formally to Mr Bierre’s letter of resignation, ending by saying:

“Notwithstanding the fact that you have resigned during the minimum period specified in your employment agreement, we have decided to accept your resignation on 6 months’ notice. We need to talk through how things will be handled during that notice period ...”

Mr Bierre said the letter came out of the blue. He said that until then he had believed, and continued even afterwards to believe, that the issues between the parties could be resolved without the resignation being put into effect. He did not have any reasonable grounds for interpreting Mr Tuck’s responses in that way. Nor did he have any reasonable grounds for his assertion of confidence that, following a brief discussion with Ms Yeong on or about 13 August 2002, good progress could be made in their relationship. Finally, he was not entitled to assume that Mr Goldschmidt could or would do anything other than leave it to Mr Tuck to make appropriate decisions regarding the resignation.

Following a meeting on the same day, on 14 August 2002 Mr Bierre sent an email message to Mr Tuck which I consider to be a thin, unconvincing and extremely belated attempt to bring a positive attitude to the parties’ longstanding difficulties. It was in reality no more than an attempt to create grounds for suggesting that the parties’ difficulties might be resolved so that Mr Bierre could in turn say that his resignation need not proceed. Indeed it stated “I am now in a position to withdraw my resignation.” Mr Tuck replied by letter dated 15 August 2002 stating his position was that the resignation was tendered on 31 July and accepted on 12 August. He added that he did not share Mr Bierre’s confidence that there was a ‘way forward’.

Subject to the outcome of these proceedings, Mr Bierre has continued to work at Diagnostic Medlab for what has been regarded as a 6 month notice period expiring on 31 January 2003. Mediation has been attempted but was not successful.

Determination regarding the submission of the resignation

I have concluded on the facts, in effect, that Mr Bierre submitted a clear and unconditional resignation which was capable of being accepted. It was accepted two days before Mr Bierre purported to withdraw it. If there was any breach of good faith in respect of that set of circumstances, it was on the part of Mr Bierre and I do not accept the submission that DMSL failed to act in accordance with its obligations of good faith.

I now turn to address further legal argument about the contractual effect of the resignation. Counsel for DMSL submitted the matter is simply one of a resignation being tendered and accepted, thereby becoming binding.

Counsel for Mr Bierre has raised a number of further arguments based on the fact that the resignation was tendered before the end of the fixed term set out in the employment contract. They cover whether the contract was repudiated, whether DMSL was entitled then to cancel the contract under the Contractual Remedies Act 1979, and whether any purported cancellation was effective. They also cover the application of clause 8.2.1 in the employment contract, saying that if Mr Bierre tendered a resignation before the expiry of his employment contract then that was a material breach which should have brought into play the notice of breach provision in the clause.

I see all of these approaches as different possible ways of analysing the circumstances surrounding the tendering of the resignation at the time it was tendered, and deciding what the options were. One was to accept the resignation even though it was offered before the expiry of the fixed term of the contract. Another was to regard the contract as repudiated and cancel it. A third was to invoke clause 8.2.1 and issue a notice requiring the resignation to be withdrawn.

DMSL chose to accept the resignation and not to enforce any right to remedies it may have had in respect of the early termination. I see nothing in the law to prevent it from making that choice. There was no indication in the evidence that it took any steps to exercise either of the other options, or any other options that may have been available to it. Since the options were not exercised, it is not necessary to assess whether or not they were correctly exercised. Accordingly, and since there was no argument about the notice period, I treat this matter as one of the acceptance of a resignation.

Determination on existence of a dismissal

The next question is whether the resignation was in reality a constructive dismissal, effective on 31 January 2003. Counsel for Mr Bierre relied in general on an alleged breach of the parties' obligations of trust and fair dealing, and that DMSL had conducted itself in such a manner calculated or likely to destroy or seriously damage the parties' relationship of trust and confidence.

One of the primary issues in this respect concerned the working relationship between Mr Bierre and Ms Yeong. It was obvious that the relationship had deteriorated beyond the point of no return. It was equally obvious that Mr Bierre has no real insight into the role his own behaviour played in the deterioration. He attributed the problems to various forms of poor management and unwillingness to compromise on the part of others, seeing himself in the role of unappreciated advocate for improving quality standards and an unheard voice begging for improvement in communication within the organisation. However rather than agreeing that he was not heard, I would say that despite any protestations he might make to the contrary he was not prepared to listen to other points of view with any great degree of open mindedness.

That is not to say the fault was entirely that of Mr Bierre. It is simply a comment on his attitude made to emphasise that the fault was not entirely that of Ms Yeong either. In a constructive dismissal context the most relevant question is whether the approach DMSL took to the conflict amounted to a breach of any duty it owed to Mr Bierre. In that respect, and for the reasons indicated by the preceding findings of fact, I do not accept there was any breach of duty and I do not accept that DMSL failed to act on the discord.

A second principal argument in support of the constructive dismissal was that DMSL's inaction on Mr Bierre's concerns about quality standards in the organisation left him exposed to personal and professional risk. I have not recorded all of it, but have considered the evidence on the point and characterise the argument as the expression of a fear Mr Bierre had rather than one that accurately reflected a breach of duty on DMSL's part. Some of the concerns were unfounded or overstated. Many of them, such as the example of the qualifications of the South African pathologist, were closely intertwined with the difficulties in the relationship with Ms Yeong. Ms Yeong either did act, or had already acted on several of them, and again the real issue was one of whether Mr Bierre was satisfied with her actions rather than of whether action was taken at all.

Overall I conclude that there was no failure to act on Mr Bierre's concerns to the extent that DMSL was in breach of its duty to Mr Bierre as his employer.

As for Mr Tuck's role in the matter, he attempted to address Mr Bierre's concerns, but eventually he did express his frustration at the fruitless attempts to satisfy Mr Bierre. I do not accept that the Women's Health Division initiative was set up to ensure Mr Bierre failed, or that Mr Tuck did anything but the best he could to support and encourage its success.

For these reasons I do not believe Mr Bierre's resignation amounts to a constructive dismissal. The resignation was at his own initiative and the reasons for the resignation did not reflect any breach of duty by DMSL. Mr Bierre does not have a personal grievance.

Determination on restraint of trade

Counsel made submissions on the effect of a repudiation of the contract on the enforceability of the restraint provision. Because of the conclusion I have reached about the contractual effect of the resignation, there is no need to address those submissions other than to find that the resignation did not of itself render the restraint unenforceable.

Next, counsel for Mr Bierre submitted that there was no consideration for the restraint in the employment contract. He acknowledged that Mr Bierre received a very large sum of money in the course of the sale to Sonic, but said there was no link between the commercial documentation and the restraint provision. The consideration Mr Bierre received related only to the purchase of the business and to the commercial restraint.

Both counsel made reference to **Fletcher Aluminium Limited v O'Sullivan** [2001] 2 NZLR 731 (CA). In that case Mr O'Sullivan had designed a new range of aluminium joinery which Fletcher Aluminium agreed to buy. The agreement took the form of an agreement for the sale and purchase of intellectual property, and provided that in consideration of the company entering into the agreement Mr O'Sullivan would enter into an employment agreement in the form annexed. The employment agreement included a restraint of trade provision, which was expressed to be 'in consideration of the Company agreeing to pay you ... and agreeing to enter into the Agreement [for sale and purchase of the intellectual property] ...' The Court of Appeal commented in its judgment that it was plainly correct to say that the totality of the transaction must be taken into account (at [31]).

Counsel for Mr Bierre commented correctly that Mr Bierre's employment restraint did not include an 'in consideration' provision of the kind found in Mr O'Sullivan's employment restraint, and pointed out that no employment agreement was annexed to the terms of sale. The overall thrust of his submission was that, in the absence of any express reference to an employment restraint in the sale and purchase transaction, there was no link between the two and no consideration for the employment restraint.

However Schedule 1 of the terms of sale defines 'Transaction Documents' as including the employment contracts, which in turn are defined as the contracts in respect of Mr Bierre and his colleagues, dated on or before the completion date and providing for the employment of the person in question. Not only that, but the employment contract was one of the documents on which Mr Bierre obtained advice before the completion of the sale. Obviously the employment contract formed part of the totality of the transaction. There are no grounds for separating the employment restraint clause contained in it from the transaction and concluding there is no consideration for the restraint. The consideration for the overall transaction encompasses the entire contents of the employment contract.

Counsel for Mr Bierre also submitted that, as the commercial restraint has expired, DMSL no longer has a proprietary interest to protect. I believe the appropriate principle in this respect is set out in the **O'Sullivan** case as follows:

"[28] That the Courts have approached restraint covenants entered into at the time of the sale of the goodwill of a business differently from such covenants in employment contracts is clear enough. ... The difference derives from the fundamental proposition that a restraint of trade should be no wider than is required to protect the party in whose favour it is given. The purchaser of goodwill requires protection against the erosion of that goodwill. The employer requires protection against an employee taking advantage of the employer's trade and commercial information acquired by the employee in the course of employment." (p 739).

Thus any rights of DMSL as the employer continue to the extent that the restraint in the employment agreement is reasonable. As indicated in the above extract, this includes protection against Mr Bierre taking advantage of DMSL's trade and commercial information. I do not believe anything in the above quotation excludes the generally accepted propositions that an employer has a proprietary interest in protecting its client base (ref: **Herbert Morris Limited v Saxelby** [1916] 1 AC 688), which I would define in this case as the referring clinicians and other medical practitioners, and its business links with those clients (ref: **Cooney v Welsh** [1993] 1 ERNZ 407).

For these reasons I decline to treat the restraint as void.

This leads me to a consideration of whether the restraint was reasonable. In that respect the proprietary interest which DMSL seeks to protect is its business links with the referring clinicians and practitioners and I am satisfied on the evidence that the proprietary interest exists for the purposes of the employment restraint. I note in particular that it was clear from the evidence that Mr Bierre had 'influence or sway' over key referring clinicians. I turn instead to the contents of the restraint, in terms of the restrained activities and the geographical, temporal limits.

(a) Restrained activities. The restraint applies to private sector medical laboratory services and would not prevent Mr Bierre from working in public hospital laboratories providing services for the hospitals' own inpatient and outpatient care. Diagnostic Medlab pathologists had made that very move in their employment. Southern Community Laboratories is a direct competitor with Diagnostic Medlab in the private sector, and subject to the limits to which I will shortly turn the restraint would prevent Mr Bierre from having any interest of any kind in, or providing any services in respect of that business. He would also be prevented from carrying out any of the

activities set out in clause 13 (f) in respect of any new venture or other arrangement in respect of private sector medical laboratory services.

With reference to clause 13 (a)(i), Mr Bierre's activities would be restricted to a business or activity which was not the same or substantially the same 'in all material respects' to that of a private sector medical laboratory. On that basis work in public hospitals in the circumstances described above was not excluded. Similarly research and teaching positions do not appear to be excluded. Such activities were not Mr Bierre's preferred activities, but personal preference is not the test of reasonableness. As at the investigation meeting, there was no evidence to persuade me that the extent of the restrained activities was unreasonable.

- (b) Geographical limit. Diagnostic Medlab has laboratories, and presumably referrers, throughout the region controlled by the Auckland Regional Council. I do not consider it unreasonable for the restraint to be applicable over the same area.
- (c) Temporal limit. While DMSL's preferred restraint would operate for a period of two years, the terms of the employment contract provide alternatives of 18 months, 12 months, 6 months and three months in decreasing order of preference. The issue of reasonableness is complicated in this respect by the fact that the reasonableness of the two year restraint must be assessed with reference to decreasing geographical limits, which must in turn be found to be unreasonable before one turns to assessing the reasonableness of a shorter restraint period. At the time of the investigation meeting it did not appear necessary to explore those permutations so I assessed only the first preference.

DMSL's principal justification for the two year time limit rests on an assessment of the amount of time required to protect its relationships with referring clinicians and other medical practitioners. It also points out that, at the time the restraint was entered into, and with the benefit of legal advice, Mr Bierre agreed the restraint was reasonable. Mr Bierre said at the investigation meeting that he now believes a two-year (and for that matter any) restraint is unreasonable because it would prevent him from practising in his area of 'superspecialty', namely breast and cervical screening. Again, however, that amounts to an expression of personal preference. Nor is it quite true. Mr Bierre could still do this work in a public hospital laboratory, although he may not be able to do as much of it as he has done in recent years.

Assessing the length of time reasonably required to protect existing relationships is a far from exact science. I must give weight to the agreement the parties reached on the matter, although it is not determinative. In addition, although each case must be determined on its merits, a reading of cases involving medical practitioners and lawyers indicates that two-year restraints in the interests of protecting client connections have been considered reasonable. On the facts of this case, personal connections with referrers are regarded as very important, and I accept that it takes time to build up the trust in a pathologist's ability which is required to create and maintain these connections.

I therefore conclude that the two-year period of restraint is reasonable.

Some additional matters were argued in respect of the reasonableness of the restraint. In his evidence Mr Bierre urged me to take the view that such is his level of expertise in breast and cervical screening it would not be in the public interest to enforce a restraint of trade against him. Counsel for the respondent very helpfully provided a number of decisions on restraints of trade which comment on the public interest in the availability of specialist medical services, as against the public interest in upholding contracts such as Mr Bierre's. In **Dhanapala v Jackson** (1999) 9

TCLR 67 (HC), Penlington J approved the following comment by the Supreme Court (which was undisturbed on the subsequent appeal) from **De Lambert v Blakely and Anderson**:

“If there should be a dearth of radiologists in Christchurch, it does not follow that the defendant should be allowed to fill the gap; and if public interest is involved, it is very much in the public interest that contracts be honoured. Neither in this nor in any other respect do I find any ground for holding that this covenant is injurious to the public.” (**Dhanapala** p 95)

In **University of Auckland v Sewell** [2000] 1 ERNZ 781, Judge Travis considered the authorities on the point and, with reference to the facts of that case, concluded:

“I am not persuaded that the public interest in patients having their choice of doctors would prevent a restraint, if otherwise found to be reasonable, being enforced. Indeed ... there is a public interest in the sanctity of contract.” (p 801 ll 12 – 15).

I take the same approach to the argument regarding the availability to the public of Mr Bierre’s ‘superspecialist’ skills. In addition, I note Mr Bierre is not the only person in Auckland able to offer services in breast and cervical histocytology.

Finally it was submitted that, if the restraint were to be enforced, Mr Bierre would be unable to practise in his areas of expertise. The reality of that submission is that Mr Bierre will be forced to work in areas of pathology which are not his preferred areas. He will also not have the degree of seniority or additional expertise that he has now. However I am not satisfied that he will be unable to practise as a pathologist.

Costs

Costs are reserved.

The parties are invited to agree on the matter themselves. If they are unable to do so they shall have 21 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other they shall have a further three working days from the date of receipt of the relevant memorandum in order to file and serve such reply.

R A Monaghan
Member, Employment Relations Authority