IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 133/10
5287439

	BETWEEN	ROBERT HAIG Applicant
	AND	CARRINGTON FARMS LIMITED First Respondent
		EDGEWATER DEVELOPERS LIMITED Second Respondent
		PH II INCORPORATED Third Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	W. Peters for Applicant J. D. Mc Bride for Respondent
Submissions received:	12 March 2010 from Applicant 16 March 2010 from Respondent
Determination:	23 March 2010

DETERMINATION OF THE AUTHORITY ON APPLICATION FOR REMOVAL TO EMPLOYMENT COURT

Employment Relationship Problem

[1] This problem relates to alleged breaches of an employment agreement and of good faith. The employment relationship began in 1996 when Mr Haig moved here from the United States to manage the development of land the first and second respondents owned on Karikari Peninsula. The third respondent (a U.S. company incorporated in Connecticut) is the ultimate parent of those companies.

[2] In consideration for taking up the role of Manager of the development Mr Haig was to be provided with an annual salary of NZ$100,000.00, accommodation

and relocation costs, and a vehicle. In addition he was to receive an equity shareholding in the enterprise of 15%, of which 5% was to be by "sweat equity" (conditional on completion of three years service) and the balance an option to purchase a 10% holding at the original purchase price plus closing costs and interest.

[3] No shares had been transferred to Mr Haig by 2005, when his employment as manager of the development ceased. In June 2005 Mr Haig was informed by the authorised agent of the respondents that by operation of a 1999 agreement regarding the equity share, and subsequent corporate restructuring, his entitlements were now in relation to US based companies and had a negative value.

[4] Mr Haig denies having agreed to any variation with this effect, saying that no subsequent agreements superseded the 1996 agreement or if they did, the respondents' agent made "*false statements of fact to deceive* [him] *into foregoing his entitlement to equity interests in the New Zealand development … for valueless interests in …US based companies."*

[5] Mr Haig says that this has caused him loss, which he seeks to have remedied by:

i. a declaration that the respondents have breached his employment agreement;

ii. a declaration that he is entitled to a 15% equity interest in the first two respondents, such interest being held on trust by those companies for him;

iii. an order pursuant to s.162 of the Employment Relations Act 2000 requiring a 15% shareholding in the first and second respondents to be either issued or transferred to him on the terms originally agreed in 1996;

iv. an inquiry as to damages;

v. a declaration that the respondents have not acted in good faith;

vi. an order that the respondents are liable for a penalty, and

vii. costs.

The Court of Appeal decision

[6] It is relevant background that the issues in dispute between the parties went before the Court of Appeal in May 2009. The issues in the appeal (which came about after the respondents had sought and obtained summary judgement against Mr Haig) were:

i. whether the New Zealand courts had jurisdiction to hear Mr Haig's claim;

ii. if so, whether they should do so or whether the United States was the appropriate forum, and

iii. whether summary judgement should have been entered.

[7] In a judgement issued on 7 September 2009 *(Unreported, CA 525/2008, [2009] NZCA 390)* with reasons given by Justice Glazebrook, the Court allowed the appeal, concluding that the New Zealand Courts (more particularly, the Employment Relations Authority and/or Court) had exclusive jurisdiction to interpret the employment agreement and that New Zealand was the appropriate forum for the dispute. The order for summary judgement was set aside.

The limitation issues

[8] In their common Statement in Reply, the respondents say that:

i. The applicant cannot commence an action in the Authority for breach of the employment agreement because more than six years have passed since that employment relationship problem arose (s 142, Employment Relations Act;)

ii. The applicant cannot recover any penalty in relation to the allegations of breach of good faith because he has not commenced his action within the 12-month limitation period prescribed in s 135 (5) of the Employment Relations Act, and

iii. The Authority should determine the issues arising out of limitation periods as a preliminary matter.

[9] The effect on the claim of the limitation periods in the Employment Relations Act (or indeed any limitation periods) does not appear to have been an issue before the Court of Appeal.

[10] For Mr Haig, Mr Peters opposed the suggestion that the Authority should commence with a separate determination of what he said amounted to a positive defence rather than a preliminary issue. He argued that it would be more economical for all aspects of the employment relationship problem to be investigated and determined together.

[11] The parties have tabled memoranda in support of their respective positions as to how the Authority investigation should be conducted. The respondent argued that the question of whether the 1999 agreement superseded previous agreements would dispose of all issues and could readily be confined to a two day investigation meeting. The applicant argued that in order to determine whether and when any breach arose it would be necessary for the Authority to hear most of the evidence on the substantive matters, in particular about the background to the purported 1999 agreement, and subsequent restructuring.

[12] After consideration of the memoranda regarding the process to be followed in the Authority's investigation I advised the parties by conference call that I proposed to split the process into two parts as suggested by the respondent. However I also accepted Mr Peters' submission that the evidence relating to the limitation issue was not clearly distinct from that which related to the substantive issues. The first part of the investigation was therefore proposed to address issues going to liability. Then, if any of those issues were determined in the applicant's favour, the Authority would

proceed in a second stage to investigate the issues of remedies including quantum of loss.

The application for removal

[13] During the same conference call at which I outlined to the representatives the process for the investigation Mr Peters advised that he had been instructed to lodge an application for the matter to be removed to the Employment Court. The application was duly received on 12 March. A statement in reply (opposing the application) followed shortly afterwards and both parties lodged memoranda in support of their respective positions. I now proceed to determine the application for removal on the basis of those submissions.

Issues

[14] The applicant requests that the Authority exercise its discretion to remove the matter pursuant to s. 178 (2) (d) of the Employment Relations Act which provides:

"(2) The Authority may order the removal of the matter, or any part of it, to the Court if-

…

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

[15] The relevant circumstances in this case are said to be:

i. *"The complex nature of the employee/employment relationship and the potential limits on remedies sought should the matter remain with the Authority;*

ii. *The requirement for evidence from overseas witnesses who are not parties to the proceedings; and*

iii. *The complexity of the legal and factual arguments requiring address…"*

[16] In the memorandum of support for the application, it is further argued that:

i. the Authority is "*limited in the orders it has the power to make*" whereas the Court had the jurisdiction to make any orders it sees fit, including "*orders against other entities which may not necessarily come within the employee/employer relationship";*

ii. the Authority "*does not have the jurisdiction to issue inter-jurisdictional Letters of Request*" to witnesses resident in the United States, and

iii. "*the circumstances of the matter give rise to complex legal and factual arguments more appropriately determined in the Court context."*

[17] In relation to the last point it is noted that the issues include matters relating to various allegedly binding agreements, companies' structuring, US tax law, retrospective valuation of share options (in terms of quantum.) All of these issues, it is said, are compounded by the overseas location of witnesses and relevant documentation.

[18] The respondent opposes removal on the grounds that the applicant has not shown good reason "*for displacing the presumption that the Authority should investigate employment problems in the first instance*" especially given that the Authority has fixed a hearing for 27 April for "*preliminary liability issues.*" The respondent relies on *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey [2002] 1 ERNZ 74,* as authority for the principle that Parliament has intended disputes of fact to be dealt with in the first instance by the Authority.

[19] The respondent goes on to argue that the Authority routinely grapples with unclear employer/employee relationships and asserts that neither the Authority nor the Court can make orders that extend beyond a claim for breach of the employment agreement. In this way, it says, the applicant's reliance on the Court being able to

make "*any other orders it sees fit*" is misplaced and this ground cannot form a basis for removal to the Court.

[20] As for the submission regarding Letters of Request, the respondents note that no information has been provided about the proposed witnesses or the evidence they are expected to give, or about whether it will be necessary to compel them to give evidence. It is also noted that neither the High Court nor the Employment Court can compel overseas witnesses to attend; all the High Court Rules provide for is a request for assistance from a foreign Court to enable the taking of evidence in that jurisdiction.

[21] The respondents also say that the complexity of the case is not a basis for removal, and assert that any difficulty traversing the issues in the case:

"has been addressed by the decision to conduct a preliminary hearing into liability… if the preliminary determination goes against the respondents… the parties will inevitably consider whether it would be appropriate to remove the matter to the Court."

[22] The respondents' submission concludes:

"…while there are a range of factual and legal issues in this case, the Authority has already determined that it should consider the employment relationship first before going on to consider whether there has been a breach of any employment agreement and the consequences of any such breach. Given the close proximity of the preliminary hearing date, the respondents respectfully ask that the Authority decline to order removal and instead proceed on the basis of the timetabling orders already made."

Determination

[23] References in the respondent's submissions on the removal application indicate that I may not have made myself entirely clear on what would be covered in the first part of the investigation. To clarify therefore I confirm that it was not to be

confined to a determination of the terms of employment between the parties, but was to include all of the following issues:

i. what were the terms of the employment agreement, and the parties to the agreement, at the outset of the employment;

ii. were these varied and if so what were the timing and effect of any such variations;

iii. whether and when any terms were breached, and

iv. whether the parties conducted themselves in good faith at each stage of the employment relationship.

[24] These questions are relatively complex, both legally and factually. Both parties have acknowledged as much, albeit that the one did so in arguing the case for dividing the investigation into two parts while the other did so in arguing the case for removal. The Court of Appeal also confirmed the range of legal and factual issues which will need to be resolved in order to establish whether Mr Haig has made out his claim (for which it said he had a good arguable case.)

[25] Some of the legal and factual issues which will arise in determining the questions in the first part of the investigation include:

i. whether the 1999 agreement (if such it was) amounted to a novation;

ii. the effect of terms being expressed to be subject to Connecticut law;

iii. what taxation arrangements were most beneficial to each of the parties, and how the taxation regime of Connecticut differed from that of New Zealand;

iv. questions as to whether terms were entered into on the basis of deceit, or of mistake, and

v. questions about the extent to which one of the respondents could bind the others.

[26] As the respondent has correctly pointed out, the existence of complex factual issues is unlikely, by itself, to provide sufficient reason for an employment relationship problem to be removed to the Employment Court. However numerous questions of law also arise in this case. Questions (iv) and (v) above, for example, will require consideration of how the Contractual Mistakes Act 1977, Contractual Remedies Act 1979 and Contracts (Privity) Act 1982 might apply to the facts of this case; matters which are not well covered in existing case law. Indeed, although it was not argued on that basis by the applicant, it seems likely that some of those questions of law will be sufficiently important that it can be said that the ground set out in s.178 (2) (a) has been met.

[27] As well, I accept that the case is likely to give rise to practical and case management issues which will not be resolved simply by the division of the investigation into two parts. Notwithstanding its submission regarding overseas witnesses, the respondent is already recorded[1] as having expressed concerns that with key witnesses and documents in the United States, issues arise about the ability of the New Zealand courts to compel production of documents and the appearance of witnesses. It is accepted that placing the matter before a Court of Record will provide greater options for dealing with such problems.

[28] I am satisfied that this is an appropriate case for the exercise of the discretion in s.178 (2) (d). In all the circumstances the Court should determine this matter. **I order that the whole employment relationship problem be removed to the Employment Court.**

Yvonne Oldfield
Member of the Employment Relations Authority

[1] Noted in the Court of Appeal decision, *ibid*, paragraph [44].