Determination Number: AA 497/05
File Number: AEA 1166/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Karen Hormann (Applicant)
AND	Virtual Warehouse Limited (Respondent)
REPRESENTATIVES	Lewis Turner, Counsel for the Applicant Peter Davey, Counsel for the Respondent
MEMBER OF AUTHORITY	Robin Arthur
SUBMISSIONS RECEIVED	15 December 2005 (Respondent) and 19 December 2005 (Applicant)
CONSIDERATION OF PAPERS	20 & 21 December 2005
DATE OF DETERMINATION	22 December 2005

DETERMINATION OF THE AUTHORITY

[1] The respondent seeks removal of this matter to the Employment Court under s178 of the Employment Relations Act 2000 ("the ERA") on the grounds that important questions of law are likely to arise in the matter.

[2] The applicant opposes removal on the grounds that the respondent's application is an attempt at delay and that the questions of law raised by the respondent are not relevant.

Background

- **Procedural steps**

[3] Before this matter was lodged with the Authority the parties had met in mediation on 13 October 2005 and reached a conditional agreement on issues between them. However the condition was not met and the applicant lodged an urgent application with the Authority on 17 November 2005. She sought urgent compliance orders on the grounds that there was an existing employment relationship although she was absent from work on unpaid leave, allegedly because of "inappropriate treatment" by the respondent. That application sought, among other things, an order requiring the parties to agree, within three days, a protocol governing the applicant's immediate return to work. Urgency was not granted but the parties were directed to further mediation as this was the more appropriate forum to consider the protocol sought by the applicant. A provisional date for an investigation meeting, should the matter not be resolved in mediation, was set for 23 January 2006.

[4] On 5 December the respondent lodged its statement in reply and the application for removal to the Employment Court.

[5] Parties attended further mediation on 6 December but did not resolve issues between them.

[6] Member's minutes dated 22 November and 8 December 2005 set out the procedural steps and conferences with counsel on this matter to date. A conference on 8 December confirmed an investigation meeting for 23 January 2006 and a timetable for the exchange of witness statements and relevant documents if the application for removal to the Employment Court was not granted. Counsel also agreed an abridged timetable for filing submissions on the removal application to be decided on the papers. These submissions have been received and are considered below. On 21 December 2005 the applicant filed a brief of evidence repeating and updating her affidavit filed on 17 November 2005.

- **Background to the issues**

[7] Although this matter has not yet been investigated, the following background information can be identified from statements of problem and reply, the applicant's affidavit and the Authority's dealings with counsel on preliminary procedural aspects.

[8] The applicant's statement of problem raises two issues – firstly, her treatment on return to work in August this year after a period of parental leave, and secondly, a claim for unpaid salary of $183,404. Of this amount, $106,442 of outstanding salary and $11,596 of holiday pay was written off the respondent's books as part of arrangements made in June 2003 which included the applicant taking shares in the respondent company. The company had cash flow difficulties at the time.

[9] The applicant presently owns 25 per cent of the shares of the respondent which were transferred to her in December 2003. The sole director and majority shareholder is Joanne Holley. According to the statement of problem, Ms Holley holds 60 per cent of the shares and the remaining 15 per cent of the respondent is held by a 'silent' shareholder. Ms Holley has an irrevocable option to purchase that 15 per cent shareholding.

[10] The applicant is the financial controller of the respondent. Ms Holley is the general manager. There are two other employees. The company operates in the IT sector, co-ordinating projects and selling software and hardware.

[11] As financial controller the applicant did the paperwork in writing off salary owed to both her and Ms Holley in 2003. The applicant says she did not agree or understand that the salary "was lost to us forever" but "fully expected that this debt would be made good to me in due course if the business recovered sufficiently to do so".

[12] The statement in reply says that:

(i) the applicant agreed to write off her outstanding salary and holiday pay at a meeting in June 2003 which also agreed the assignment of shareholder advances, and

(ii) the applicant prepared the respondent's financial statements for the year ended 31 March 2003 which wrote off salaries due to Ms Holley and herself at that date.

[13] From 14 February to 16 May 2005 the applicant was on maternity leave. During April and May she began a gradual return to work, working on Tuesdays and Fridays. At Ms Holley's suggestion, the applicant took extended leave from 20 May and through June and July, using accrued annual leave. In July and August disagreements developed between the applicant and Ms Holley about future plans for the business and previous arrangements regarding salaries and shares. The parties have different accounts regarding the behaviour and relationship between Ms Holley, the applicant and the respondent's other staff in August.

[14] On 25 August 2005 the applicant advised by letter that she would be away from work for two weeks on "stress leave". She set out concerns regarding unpaid salaries and sought "immediate payment of short paid gross salary over the period 1 April 2001 to 31 March 2005 totalling $183,404". She also complained that Ms Holley had undermined her position in the company with the other staff and made remarks she regarded as "personal attacks".

[15] On 8 September 2005 the applicant, through her solicitors, raised a personal grievance with the respondent "arising out of the manner in which you have treated her and failed to address her subsequent work related stress". The grievance letter also stated "that there are shareholding issues which need to be addressed".

[16] The applicant provided a certificate from her doctor stating she was unfit for work from 8 September 2005 "as a result of work related stress" and would be reassessed in one month. The respondent asked the applicant to undergo a medical examination by a company-appointed psychiatrist. The applicant did not comply with the request.

[17] There was no current medical certificate at the time of the applicant's application in November 2005 for her grievance to be dealt with urgently.

[18] The applicant provided a further medical certificate from her general practitioner dated 1 December 2005 stating she was "generally in good health" and that provided she was "treated appropriately" the doctor had no concerns with her working.

[19] Mediation on 6 December did not resolve matters between the parties, including terms for the applicant to return to work from her extended leave. The respondent indicated on 8 December that it was willing to attend further mediation and asked the applicant's solicitors to provide details on a proposed protocol for her return to work. This was noted in a teleconference with counsel on 8 December with the parties left to arrange further voluntary mediation and advised that either party could seek a further direction to further mediation if that were required to progress discussions.

Legal principles on removal

[20] On the application of a party, the Authority may order removal of a matter for the Employment Court to hear and determine if:

> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
> *(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*
> *(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
> *(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[21] Where the Authority declines removal, the party seeking removal may apply to the Court for an order to have the matter removed for its decision. Where the Authority orders removal, the Court may order the Authority to investigate the matter if it considers the matter should not have been removed to it.

[22] Removal of this matter is sought under s178(2)(a) – the "important question of law" test. Case law provides the following propositions to guide exercise of the discretion to order removal on that basis:

- A question of law arising in the case other than incidentally must be identified;
- The importance of the question must be decided.

- The question need not be difficult or novel.
- The importance of a question of law can be gauged by factors such as whether its resolution affects large number of employers or employees or both, or the answer to the question has significant consequences for employment law generally. Importance is relative however and must be measured in relation to the case in which it arises.
- A question of law 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 a material part of it": *McAlister v Air New Zealand* (unreported, EC Auckland, AC22/05, 11 May 2005, Shaw J) citing *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EC, Goddard CJ).

[23] The application is considered is three steps: firstly, whether there is a question or questions of law arising other than incidentally; secondly, whether the answer to the question is likely to be decisive or strongly influential in deciding the case or an important aspect of it; and thirdly (where the statutory test for removal is satisfied), whether there are nevertheless any relevant factors in the particular case that are good and sufficient reasons for the Authority, in the exercise of its discretion, not to order removal.[1]

[24] Relevant factors to weigh in considering the discretion to refuse removal include (but are not limited to):

- The likelihood of resolution of the matter between the parties themselves, in mediation or before the Authority, based on "a realistic prediction of the future based on the past".[2]
- Whether there is "an existing but arguably dysfunctional employment relationship" which needs to be "repaired and supported" by the Authority.[3] More generally, this factor is an assessment of the state of, and prospects for, the on-going relationship between the parties.
- The prospect of a longer delay before a decision is made at first instance if the case is removed, weighing both any urgency in the matter such that it should be dealt with by the Authority and the probability of a challenge to any determination of the Authority resulting in a hearing in the Employment Court in any event .[4]
- Whether the case turns on disputed facts which are better dealt with in the Authority.[5]
- The strength of the case for removal under the statutory tests – which in the case of an application under s178(2)(a), considers whether the question of law is clearly "very important" or is barely established or falls elsewhere in that range.[6]
- Prudent deployment of the resources of the Authority and the Court (including the costs to the parties of long hearings), subject to the interests of justice.[7]
- Removal of a right to general challenge by any party (that is loss of a level of appeal), balanced against the knowledge that Parliament must have known this would be a consequence in all cases of allowing such removals.[8]

Respondent's submissions

[25] The respondent submits two important questions of law arise in relation to the applicant's claim for unpaid salary. The first is whether the journal entries writing off the unpaid salary are

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[1] *Auckland District Health Board v X* (unreported, EC Auckland, AC33/05, 29 June 2005) at [30] and *Andrew v Commissioner of Police* (unreported, EC Christchurch, CC21A/03, 31 July 2003) at [5]
[2] *ADHB* at [38]
[3] *Andrew* at [30]
[4] *ADHB* at [48]; *Andrew* at [23] and *McAlister v Air New Zealand Ltd* (unreported, EC Auckland, AC 22/05, 11 May 2005) at [10]
[5] *McAlister* at [10]
[6] *ADHB* at [63]
[7] *Andrew* at [28]
[8] *Andrew* at [28]

deductions under the Wages Protection Act 1983. The second is whether the agreement to write off unpaid salary is a matter "related to an employment agreement" so as to give the Authority jurisdiction to make an order granting relief to the respondent under the Illegal Contracts Act 1970.

- Wages Protection Act 1983 ("the WPA")

[26] The WPA allows an employer, with the written consent of a worker, to make deductions from wages payable. The applicant made journal entries in the respondent's ledgers in 2003 writing off wages owed to her and Ms Holley. The respondent argues these entries were made by the applicant in two roles – as the financial controller responsible for the respondent's accounting records and as the employee owed the salary being written off. WPA s5(1) requires that deductions from wages payable be by written consent or request of the worker. The respondent argues that whether the journal entries made by the applicant were written requests of the applicant, so as to come within the meaning of the word "deductions" in WPA s5(1), is a question of law.

- Illegal Contracts Act 1970 ("the ICA")

[27] Alternatively the respondent submits that it will rely on the ICA if the journal entries are not within the scope of deductions under the WPA. As best I can ascertain from the submissions, the argument seems to be that if the writing off of the applicant's wages without her agreement was an illegal provision, the respondent will seek relief because that money was part of a deal to transfer shares to the applicant.

[28] The Authority's power to order relief under the ICA is limited by ERA s162 to "any matter related to an employment agreement". The question of law is whether the agreement to write off unpaid salary is such a matter so as to allow the Authority to make an order under the ICA if that were warranted in the particular circumstances of this case.

- Importance of the questions of law

[29] The respondent says these two questions of law "are likely to have implications over the exact nature of the jurisdiction of the Authority under s162 and between the [WPA] and the [ICA]". However it does not explain how the answers to these questions will be decisive or strongly influential in deciding the case.

[30] It does claim that if the applicant were successful in her claim for unpaid salary then Ms Holley's unpaid salary would also have to be recorded as a liability, resulting in the company becoming insolvent on a balance sheet basis, which in turn may result in it ceasing to trade and laying off its other two employees. While that is important to the company, it is not a factor relevant to the statutory test on the importance of the questions of law.

- Reasons against removal

[31] The respondent anticipated the applicant would argue that delay in having the matter heard in the Employment Court was a factor for refusing removal. It submits that its willingness to attend further mediation to work through any issues relating to the applicant's request for a protocol to facilitate her return to work mitigates against any delay.

[32] It says that the applicant's claim for unpaid salary is not urgent as it was raised in mid 2005 after having been written off two years previously.

[33] It also suggests that the importance of the proceeding to the parties means "there is a real possibility that there will be an appeal to the Employment Court" resulting in further delays for both sides. It submits that removing the matter to the Court will avoid the costs of two hearings.

Applicant's submissions

[34] The applicant submits that her personal grievance and her claim for unpaid salary are both straightforward factual enquiries, readily able to be investigated and determined by the Authority.

- Neither questions of law nor important ones

[35] She denies her claim for unpaid salary raises questions of law at all, far less important ones.

[36] She says whether the journal entries writing off the unpaid salary were deductions under the WPA is a factual matter only.

[37] She says whether the agreement to write-off unpaid salary is a matter "related to an employment agreement" is, again, a factual enquiry as to whether or not the discussions between the parties in mid-2003 could somehow be said to be "related to an employment agreement".

[38] Alternatively she says that if the issues raised by the respondent were questions of law, they are "peripheral" and "narrow issues which would be relevant but not determinative of a part of one of the two issues before the Authority". She does not say why they are not important.

- Reasons against removal

[39] The applicant doubts it will be possible to arrange an interim return to work, although she says she will "engage with the respondent" to see if arrangements can be made.

[40] The Authority has set dates to investigate this matter in late January or early March. Inquiries by the applicant's solicitor of the Court's registry suggest that this matter, if removed, would be unlikely to be heard in the first half of next year.

[41] The applicant doubts a challenge is inevitable from any Authority determination as the matter has already settled once, albeit on the basis of conditions which failed.

Discussion

The WPA

[42] Whether journal entries writing off the unpaid salary can amount to deductions under the WPA is clearly a question of law. The term "deductions" is not defined in the WPA and whether the meaning of the word extends to the journal entries is a matter of the proper construction of the statute which is, as described in *CIR v Walker* [1963] NZLR 339, 353 (CA), "necessarily a matter of law". Adapting the form of words used by Gresson P in that case (at 354), although the question sought to be answered in the present matter depends, as the solution of every problem must depend, on the facts found, it is ultimately a question of law as to what the word "deductions" comprehends in the relevant section of the WPA.

[43] However being a question of law is not enough. It must be a question that "is likely to arise in the matter other than incidentally" and an "important" question. I am not satisfied that the issue of

whether writing off unpaid salary is a deduction for the purposes of the WPA arises at all in this case.

[44] There is no factual issue, as best I can tell from the parties' statements and the applicant's affidavit, that the applicant consented at the time of the writing off of her unpaid salary. In fact it is the respondent's case that, as its financial controller, the applicant herself made the journal entries which effected the write off. The issue at the heart of this matter is what arrangement or agreement, if any, was made by the parties about the *terms* on which that salary was written off. The respondent's argument is that there was an agreement made on 20 June 2003 for the applicant and Ms Holley to forgo payment of accrued salary and holiday pay entitlements in return for the allocation of shares and shareholder advances. The applicant's argument is that she agreed to the pay entitlements being written off the company books at the time but the terms of any agreement or arrangement were that the pay entitlements remained a debt to her which "would be made good if the business recovered sufficiently to do so". In her brief of evidence filed on 21 December 2005 she states that "[a]t no stage was it suggested … that salary and annual leave was being used to pay for shares".

[45] The journal entries made by the applicant may or may not be conduct consistent with the respondent's account of events. However, even if the journal entries raised the question of whether they amounted to written consent to deductions for the purposes of the WPA, I am not satisfied that the question is of anything other than incidental concern. The material issue is the terms of any agreement or arrangement, not the means of achieving it.

[46] If I were wrong on that point, I am also not satisfied that the proposed question of law meets the requirements of being an important question. Because it relates to the means of effecting the writing off of the salary rather than the terms of any arrangements made for that write off, the answer to the question of law would not be decisive or strongly influential in deciding a material part of the case.

[47] For these reasons I find that the question of law proposed by the respondent on this point does not meet the statutory test for removal of the matter set by s178(2)(a) of the ERA.

The ICA

[48] The respondent's argument is that it will seek relief under s7 of the ICA for validation of the write offs, if it were not entitled to extinguish those pay entitlements. To seek that relief it must establish that an arrangement for an allocation of shares in return for the salary write off was a matter relating to an employment agreement. It needs that link to such a "matter" for the Authority, in turn, to have the statutory power under s162 of the ERA to provide relief under the ICA.

[49] I accept the applicant's submissions that the respondent's proposed question on this point is not a question of law "but rather a factual enquiry as to whether or not the discussions between the parties in mid-2003 could somehow be said to be 'related to an employment agreement' ".

[50] The issue, again, is what terms, if any, were arranged or agreed for the salary write off. There is no written agreement on the terms of the salary allocation although, attached to the statement of reply, there are documents relating to an assignment of shares by the 'silent' shareholder, notes of a meeting on 20 June 2003, and a spreadsheet showing assignment of advances and wages and entitlements foregone. These will, no doubt, be the subject of further evidence by the applicant and Ms Holley on what was said and done around that time.

[51] The construction of documents where the parties have intended all the terms of their contract (apart from any implied by law) to be contained in those documents is a question of law: *Carmichael v National Power plc* [1999] 4 All ER 897; [1999] 1 WLR 204 (HL). However, as Lord Hoffman explained in his speech in that case, the terms of the contract are a question of fact where "the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct". And whether the parties intended documents to be the exclusive record of the terms of their agreement is also a question of fact.

[52] For these reasons I am not satisfied that whether the agreement to write off unpaid salary is a "matter related to an employment agreement" is a question of law. Rather it is a question of fact and does not meet the statutory test for removal of the matter set by s178(2)(a) of the ERA.

Other points

[53] There is a preliminary factual question which will need to be resolved. It is whether whatever arrangements were made in June 2003 were related to an employment agreement at all or were arrangements about shares between business partners. Neither party has supplied a copy of any employment agreement signed by the applicant but nor has her status as an employee been questioned. The respondent has provided a copy of standard terms and conditions said to have been prepared by the applicant for the respondent's employees. It makes no reference to any provisions for shareholding as part of the conditions or benefits of employment. If there is an argument that the arrangements on salary write offs and share advances were outside the employment relationship, and were rather part of a commercial arrangement between share purchaser and share seller, there may be a jurisdictional issue for the Authority and the parties will need to address it. However, at this stage, it does not change the position in respect of the respondent's removal application.

[54] For the reasons given earlier in this determination I have not had to consider whether, if there were important questions of law arising other than incidentially, nevertheless there were good and sufficient reasons not to order removal. If I were wrong on my earlier findings, and the statutory test at s178(2)(a) were met, I do not consider there are relevant factors that would prevent removal in this particular case. Delay would be inevitable and the prospect of a challenge to any Authority determination is high given the value or importance of the issues to the parties, whichever were successful at this level. However because the statutory test has not, in my view, been met, the matter may not be removed.

Determination

[55] **The questions of law proposed by the respondent do not meet the requirements of s178(2)(a) of the ERA. I decline the respondent's application for an order removing this matter to the Employment Court under s178 of the ERA for the reasons given in this determination.**

[56] Although the respondent's application and the parties's submissions did not address whether there were any grounds for removal of this matter under s178(2)(b),(c) or (d), I nevertheless did consider whether there might be such grounds but am satisfied there are not.

Next steps

[57] I urge the parties to continue efforts to resolve this matter, including any discussions on the applicant's return to work. As noted earlier in this determination, the respondent has indicated it is prepared to attend further mediation and wanted details of a proposed protocol for that to occur. There are good reasons for both parties to arrange an interim return to work of the applicant, if

possible, and risks if they do not. If the applicant's personal grievance application is upheld, the respondent risks an order for lost wages, subject to any necessary mitigation, for the entire period that the applicant is away from work. If the respondent has taken reasonable steps to facilitate the applicant's return but she does not take it up, the applicant risks losing at least part of the prospective remedy of lost wages.

[58] There is a timetable in place for the lodging of evidence. The respondent's witness statements and any additional relevant documents are due to be lodged by 16 January 2006. An investigation meeting is scheduled for 23 January 2006. An alternative meeting date of 9 March 2006 is provisionally scheduled in the event that the expected arrival in late January of counsel for the applicant's new baby disrupts the arrangements for the 23 January meeting.

[59] There is the prospect that the respondent may exercise its right under s178(3) to seek special leave of the Court for an order removing this matter to the Court. If the respondent does make such a leave application, counsel is asked to advise the Authority as soon as possible so that arrangements can be made to stay its investigation timetable pending the Court's decision.

Robin Arthur
Member of Employment Relations Authority