

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paul Detoma MacDonald (Applicant)
AND Q-Med (Sweden) Australia Pty Limited (Respondent)
REPRESENTATIVES Patricia Mills, Counsel for Applicant
Anna Fitzgibbon, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 19 April 2005
DATE OF DETERMINATION 20 April 2005

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Paul MacDonald (“Mr MacDonald”) applies for an order for interim reinstatement to his former employment as Business Development Director with Q-Med (Sweden) Australia Pty Limited (“Q-Med”) an overseas company registered in New Zealand. He was dismissed from that position following a meeting on Friday 11 March 2005. The reasons for dismissal were later explained in advice dated 17 March 2005:-

...

We confirm that your employment with Q-Med was terminated at that meeting for serious misconduct arising out of your unauthorised use of Q-Med’s funds and your continued failure, despite repeated requests not to use Q-Med’s funds or incur expenses on its behalf without prior authority in April 2004. Despite this instruction you have continued to do so and you have ignored requests to explain why. A significant amount of this spending has been personal and with regard to alleged business related spending, you have failed to provide any receipts or substantiation for such spending.

Your actions have destroyed the trust and confidence in our employment relationship. We have no trust you.

...

[2] Mr MacDonald lodged an application in the Authority on 15 March 2005 claiming he was unjustifiably dismissed seeking remedies including interim reinstatement. As required, he has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained by Q-Med through the granting of an order for interim reinstatement.

[3] The parties were unable to resolve the differences between them by the use of mediation. There is to be an investigation meeting of the substantive claim from 5-7 July 2005.

[4] I have met with Counsel and considered affidavit evidence from Mr MacDonald, and Q-Med's Mr Bengt Agerup and Ms Camilla Lohrum. Ms Mills objected to Mr Agerup's affidavit being read because the overseas notary omitted to note the jurat with an endorsement that statement was either affirmed or sworn. That is a technicality that I am prepared to excuse and because I have no doubt about the principal item of evidence arising from that statement, that Q-Med no longer trusts Mr MacDonald. That aspect of the evidence is corroborated by Ms Lohrum. In the interests of justice, I also heard additional evidence from Mr MacDonald as to his financial situation, that evidence material in applications of this kind being absent from his affidavit.

Interim reinstatement

[5] Applications for interim reinstatement are considered under Section 127 of the Employment Relations Act 2000 ("the Act"). That section requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence and, recognising the importance of reinstatement as a primary remedy.

[6] The Authority provides, wherever practicable, for reinstatement where this is claimed and a personal grievance is established. The Authority acts to provide a just solution to the parties' problems in the particular circumstances of each individual case. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit - empowering the Authority to craft pragmatic solutions to do justice in each particular case.

[7] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and it is a discretionary remedy. The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

An arguable case

[8] Ms Fitzgibbon would not concede that Mr MacDonald had an arguable case. Indeed, she submitted there is not an arguable case. She submits that Mr MacDonald has failed to set out sufficient grounds which show that the dismissal was unjustifiable or that it was a decision that no reasonable employer could have reached in the circumstances.

[9] At this interim phase, I refer only to basic facts as is sufficient to place the ultimate order in context because there are disputed facts which are yet to be tested. Where there is dispute, Mr MacDonald is entitled to the benefit of an assumption that he will be able to prove his case when the substantive matter is investigated¹. In an application for interim reinstatement it is neither possible nor appropriate to reach a conclusion on any contested facts. My views hereafter are

¹ *NZ Stevedoring Co Ltd & Ors -v- NZ Waterfront Workers Union* [1990] 3 NZILR 308.

provisional only in order to decide if Mr MacDonald should be reinstated pending the substantive investigation.

[10] Mr MacDonald's claim that his dismissal was unjustifiable will be determined according to the statutory test of justification set out in section 103A of the Act.

[11] The grounds on which Mr MacDonald claims his dismissal was unjustifiable are helpfully summarised in his statement of problem at paragraph 2.42.

[12] Q-Med says Mr MacDonald took it upon himself to use Q-Med's credit cards for his personal spending and to have his salary credited against that spending. It expected that where he exceeded his salary he would reimburse it. It says it became aware in January 2004 that he had loaned himself \$AUD269,897 and that he had no authority to do so ("Directors Loan Account"). The amount of unauthorised funds is now said to be the sum of \$AUD411,291.33. It says that despite numerous requests over a period extending over many months, he has been unable to provide receipts or reports to justify any business related expenses.

[13] Mr MacDonald was formerly the General Manager of Q-Med's New Zealand and Australian operation. Following a settlement of a contended personal grievance recorded by a *Deed of Release* in September 2003 ("the settlement"), Mr MacDonald entered into a new employment with Q-Med as Business Development Director the terms of which were recorded in a contract of employment entitled a *Services Agreement*. Ms Mills says that the Deed of Release correctly interpreted according to Australian law, is capable of a conclusion that the settlement included the forgiveness of the balance of the Directors Loan Account up until October 2003 being a portion of the sum ultimately pursued against Mr MacDonald. Ms Fitzgibbon says the Deed of Release is clear on its face and does not deal with any issue relating to the Directors Loan Account. I find that is arguable for Mr MacDonald and there is a serious issue to be tried in relation to it.

[14] Mr MacDonald says that all charges to the Directors Loan Account were off-set against his salary which at the accountants' suggestion was not paid in cash and that as a consequence, at the end of each financial year the Financial Controller with Mr MacDonald's assistance, would complete a reconciliation of all his expenditure and allocate any personal items against his salary. Any sum in excess of his remuneration would then be repaid by him. He says he was unable to attend to this reconciliation in respect of the 2003 financial year and therefore any disciplinary action taken by Q-Med was premature because the balance could not be properly ascertained. He says too that because he has not been provided with full disclosure by Q-Med he has not been able to attend to a reconciliation and further, that he has been unable to attempt to remedy any alleged breach being an express term of his employment. I find these are tenable arguable grounds for Mr MacDonald and there are serious issues to be tried in relation to them.

[15] Mr MacDonald further argues that he was entitled to be heard by the Board of Directors of Q-Med as a term of his employment prior to any decision to summarily dismiss him. I find that is arguable for him and there is a serious issue to be tried in relation to it.

[16] I consider that the last cited matters are the most salient arguable grounds for Mr MacDonald and accordingly I find there are serious questions to be tried. Having read the affidavit evidence I am satisfied that there is a tenable arguable case and I find accordingly.

Balance of convenience

[17] In the exercise of the Authority's discretion I weigh up the inconvenience to the employer of having to bear the burden of interim relief before the substantive case is dealt with at investigation

meeting against the inconvenience to Mr MacDonald who may have a just case of having to bear the detriment of wrongful or unjustifiable action until the case has been heard. In this context inconvenience means detriment or injury. In most cases the relative hardship will ordinarily favour the applicant employee.

[18] Mr MacDonald has not secured alternative employment since his dismissal. He supports his five year old daughter who requires special needs care. He pays \$150.00 to his sister to supplement her income. He receives rental from his sister of \$220.00 per week and \$250.00 from Q-Med in respect of Q-Med's business premises which he owns.

[19] Mr MacDonald does not depose to any particular material detriment or hardship. In recognition of this and out of a concern that Mr MacDonald be heard fully, I took further *viva voce* evidence from him and invited both Counsel to put questions to him in elucidation of the issue.

[20] Having heard further from him, at best, all that I am able to discern by way of hardship to him is the obvious loss of the income stream of his salary. That is to be contrasted with Q-Med's clearly stated unequivocal position that it now no longer trusts Mr MacDonald. It considers Mr MacDonald has abused his senior position and that he has destroyed the confidence and trust that it once had in him.

[21] Q-Med conducted an investigation that extended over many months. At this interim stage, I am satisfied that it is reasonable for Q-Med and it is entitled to have serious concerns about Mr MacDonald's performance and conduct and to doubt whether or not it could continue to repose the degree of trust required in him.

[22] Q-Med resists interim reinstatement on the grounds that it no longer trusts Mr MacDonald. Mr MacDonald admits he is indebted to Q-Med. He takes issue with the quantum of his liability. I accept that Q-Med's view is honestly held and on the evidence before the Authority at this interim stage, I am satisfied that it is entitled to reasonably take that view. His acceptance of liability in principle but dispute as to quantum, is incompatible with the faithful discharge of his duties because whatever the correct quantum may be, it appears at this stage, he was not authorised to incur any such liability at all, nor to continue to incur any accumulating liability in whatever quantum as may eventually be ascertained.

[23] It seems to me that in the prevailing circumstances, it would bear more harshly on Q-Med to have to bear the burden of interim relief by being required to continue to employ him in his very senior position as Business Development Manager, a position which I accept requires a high degree of trust and instrumental role in Q-Med's New Zealand operation, when it does not trust him.

[24] In the result, I am unable to say that I appreciate any material detriment, injury or hardship for Mr MacDonald as is sufficient to require Q-Med to bear the exercise of the Authority's equity and good conscience jurisdiction in the form of the injunctive relief sought. In such circumstances, I find therefore that the balance of convenience favours Q-Med.

Overall justice

[25] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement.

[26] I am particularly mindful at this juncture, of the primacy now accorded by Parliament to the remedy of reinstatement as a relevant factor in considering interim reinstatement. Final reinstatement "must" be provided wherever practicable. I consider too, in the exercise of the

Authority's equity and good conscience jurisdiction and in determining a whether to grant a discretionary remedy, what options other than those advanced by the parties that the justice of the case requires.

[27] It is not disputed that Q-Med is presently taking steps to disestablish its New Zealand operations. That fact weighs significantly with me now.

[28] When he was dismissed Mr MacDonald was asked to return Q-Med's property. He maintained he had returned his cellphone but Q-Med did not accept he had because the cellphone was still incurring charges. It emerged at the investigation meeting that Mr MacDonald had retained the SIM card but said he had left the handset at Q-Med's office. He has not previously disclosed the fact he has retained the SIM card and he has continued to incur charges on that cellphone number until Q-Med implemented a hold on the account.

[29] He was also asked to make arrangements for the return of a Porsche motor vehicle on which Q-Med paid the monthly lease payments. While he continued to maintain Q-Med had no property in that leased vehicle he made no offer to take over the lease payments while he continued to use it after his employment had ended.

[30] Q-Med also says that Mr MacDonald never disclosed that he was the landlord of its rented premises in New Zealand - although explained by Mr MacDonald as commercially justified, the non-disclosure was not denied by him.

[31] For all of the above reasons Q-Med resists Mr MacDonald's reinstatement. I am satisfied that those matters are sufficient to disentitle Mr MacDonald from equitable relief and militate against the exercise of a discretion in his favour. The overall justice does not favour Mr MacDonald.

Determination

[32] For all the above reasons **I decline to grant an order for interim reinstatement.** Nor do I consider that crafting any other solution between the parties is warranted.

Costs

[33] If costs are sought they are reserved.

Investigation Meeting

[34] The substantive matter is to proceed to investigation meeting commencing on Tuesday 5 July 2005 and continuing until Thursday 7 July 2005.

[35] Both parties are to lodge and serve witness statements by 4.00 pm on Monday 13 June 2005. Any reply witness statements are to be lodged and served by 4.00 pm on Friday 24 June 2005.

[36] I particularly wish to interview Ms Janele Kekz and Mr Anders Blom.

[37] I call for the following documentation:-

- (i) Q-Med's audited accounts and the notes to those accounts from 1997 to present;
- (ii) The general ledger account for the director's loan account together with any adjusting general journal entries.

- (iii) All documentation probative of a reconciliation exercise between Mr MacDonald and the financial controller following financial year end.
- (iv) All email correspondence involving Ms Janelle Kekz in relation to the said directors' loan account.

[38] I shall discuss the procedure at the investigation meeting and other matters that may arise in a telephone conference with counsel in due course.

Leon Robinson
Member of Employment Relations Authority