

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Adrian James Sprott, Applicant

AND Centre For Advanced Medicine Ltd, Respondent

REPRESENTATIVES Timothy Allan, Counsel for Applicant
Gerard Curry, Counsel for Respondent

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 10 August 2005
11 August 2005

SUBMISSIONS RECEIVED 22 August 2005

DATE OF DETERMINATION 4 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dr Adrian Sprott was employed as the chief executive officer of Centre for Advanced Medicine Ltd (“CAM”) in January 2002. CAM is a wholly owned subsidiary of a Singapore registered company, Master Projects Limited (“MPL”). The boards of directors of CAM and MPL are chaired by David Perry who also holds majority shareholding in both companies. Dr Sprott reported directly to Mr Perry.

[2] CAM operates a clinic in Auckland offering intravenous chelation therapy and associated treatments to the public. Intravenous chelation therapy is not publicly funded. As CEO Dr Sprott’s duties included the management of this clinic, as well as an on site laboratory and associated administrative functions and the business development of chelation therapy and associated products.

[3] Dr Sprott’s terms of employment were set out in a written employment agreement which was augmented by detailed strategic goals agreed by the parties. He has a Phd in chemistry and qualifications and experience in finance and capital investments. There is no dispute between the parties that Dr Sprott’s combination of skills and experience were highly relevant to the role of CEO at CAM. Dr Sprott’s father, Dr Jim Sprott, was a consultant to MPL during his (Dr Sprott’s) employment with CAM. Dr Jim Sprott is a long time advocate of the health benefits of intravenous chelation therapy and he and Mr Perry have a long professional association and friendship.

[4] Dr Sprott was dismissed from this position as CEO with CAM on 20 February 2004. He says his dismissal was unjustified because; he was dismissed without due regard to the accepted standards of procedural fairness and he had received no warning that his employment was in

jeopardy. He seeks remedies of reimbursement of lost wages and compensation for hurt and humiliation consequent to his dismissal.

[5] CAM says Dr Sprott's conduct amounted to serious misconduct and the process for implementing his dismissal was fair and reasonable in the circumstances.

[6] To resolve this employment relationship problem the Authority must determine whether Dr Sprott's dismissal was justified in all the circumstances. This requires an inquiry into whether CAM could reasonably conclude Dr Sprott's conduct amounted to serious misconduct warranting dismissal having completed a fair and reasonable investigation into the allegations.

The circumstances of Dr Sprott's dismissal

[7] At about 4.30pm on Friday, 20 February 2004 Mr Perry attended the offices of CAM having flown into Auckland from Singapore, where he resides, the day before. On his arrival at the CAM offices Mr Perry invited Dr Sprott into the lunchroom with the advice that he wished to speak with him privately. He then placed a letter on the table at which they were sitting and advised Dr Sprott it was a termination letter and these were his last minutes at CAM. Dr Sprott said nothing, got up and left the room.

[8] Dr Sprott went down to the building's carpark and telephoned Dr Jim Sprott to advise of his dismissal. On his way out of the building Dr Sprott met the medical officer, Dr Jon Richardson, and the chief scientific officer, Dr Fitzpatrick. He advised them he had been dismissed. Dr Sprott then returned to CAM's reception area accompanied by Dr Jim Sprott, his sister, Alison Sprott, Dr Richardson and Dr Fitzgerald. Dr Jim Sprott and Ms Sprott expressed their shock at Dr Sprott's dismissal. Ms Sprott requested an employment meeting on behalf of Dr Sprott. Dr Jim Sprott resigned as a consultant to CAM on the spot. Dr Richardson tendered his resignation. Dr Sprott repeatedly asked Mr Perry for the reasons for his dismissal. Mr Perry made no comment. This encounter ended when it became evident Mr Perry would not respond and the members of the Sprott family left the offices of CAM.

The reasons for dismissal

[9] The letter tabled at the dismissal does not state the reasons for dismissal. It advises Dr Sprott he was dismissed with immediate effect and sets out details of final pay and return of company property. The final paragraph of the letter includes:

“Your representative has indicated in writing that termination of your contract will lead to legal action against the company.”

[10] The representative Mr Perry is referring to is Dr Jim Sprott. The reference to legal action in the event of dismissal is contained in a letter Dr Jim Sprott wrote to Mr Perry dated 17 February 2004. This letter was written in reply to a letter from Mr Perry to Dr Jim Sprott dated 12 February 2004 requesting his assistance to negotiate Dr Sprott's exit from CAM.

[11] Mr Perry wrote to Dr Sprott on 25 February 2004 setting out two main reasons for his dismissal; non-performance of duties and serious misconduct:

Non-performance of duties

- (i) the Chairman, Board of directors and shareholders of CAM had lost trust and confidence in Dr Sprott as the CEO;
- (ii) Dr Sprott had failed to implement CAM's development strategies;
- (iii) the financial performance of CAM had deteriorated under Dr Sprott's leadership.

Serious misconduct

- (iv) Dr Sprott failed to respond to the Board's concerns raised at the 28 January meeting regarding the distribution of the November memorandum and the commissioning of an opinion from Ms Sprott; and
- (v) Dr Jim Sprott's response of 17 February to Mr Perry's letter of 12 February contained threats of legal action, adverse publicity and the resignation of Dr Jim Sprott if Dr Sprott was dismissed which indicated the employment relationship had irrevocably broken down.

Non-performance of duties

[12] CAM says Dr Sprott failed to perform his duties as the CEO and this amounted to serious misconduct warranting dismissal. The tests for justifiability of a dismissal for non-performance are well established¹ Was CAM's conclusion that Dr Sprott had failed to perform his duties fair and reasonable in all the circumstances?

[13] Though there were no formal performance reporting processes in place for Dr Sprott and Mr Perry spent most of his time in Singapore he was in close and regular contact with Dr Sprott. They were in regular email and telephone contact and Mr Perry met with Dr Sprott during his two or three annual visits to New Zealand. Mrs Choo Archer, the executive director of CAM, also attended these meetings. When I asked Mrs Archer if Mr Perry had raised performance issues with Dr Sprott during these meetings Mrs Archer was able to recall Mr Perry raising the non-appointment of a receptionist.

[14] Dr Sprott's diaries have been provided to me. They contain the only record of his meetings with Mr Perry. The diary entry for 11 November 2003 is the first record of Mr Perry raising the strategic direction of CAM with Dr Sprott. The entry records:

“David [Perry] at 110 [clinic location 110 Remuera Rd] long term picture.
Singapore not happy with speed of progress at CAM.
A CAM often makes claims but cannot back up with science.
Give views to Megan [Mr Perry's daughter-in-law].
DaP [Mr Perry] wants more formal structure which also means more meetings.”

[15] The next relevant diary entry concerns a meeting with Mr Perry and Dr Sprott on 18 December 2003. The relevant extract provides:

“Singapore wants to formalise functions at the director level. Want each project to have priorities. 28 Jan 04 Choo and Adrian go to Singapore. Report in advance with headings. Review employee contracts for some projects.
Include cost benefit numbers (preliminary
DaP prefers Singapore meeting before 110 asbestos meeting. Meetings then to be held quarterly subsequently.
Subsequent Choo does last quarter report and Adrian does forward looking report including targets.”

[16] On 23 January 2004 Mr Perry emailed Dr Sprott:

“Dear Adrian

At the directors meeting next week, we will review progress on implementing the development strategies of the company.

The objective will be to establish priorities for uncompleted projects, and to allocate 2004 funding.

¹ *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711

1. Projects as per your contract

Gaining positive acceptance by the medical establishment and public of New Zealand
 The Prospectus
 Staff motivated and staff shareholding scheme
 Staff Training
 ISO Accreditation
 High standard of client service

2. Other existing projects confirmed

South Auckland funding authorities
 Mercury (MOH)
 AA/O
 AA/I (BioMed)
 EE/O (TJS)
 EMF data (Dr Terry)

3. New projects

Diabetes
 Blood serum vitamin C testing
 Research and marketing
 Property

Please report on these items and any other projects you consider may require significant funding.

Thanks and Regards
 David A Perry
 Chariman”

[17] Dr Sprott provided his report prior to the Board meeting. The report was used as the agenda for the Board meeting on 28 January. Dr Sprott spoke to his report and the minutes record that he answered questions put to him by the Board members.

[18] Mr Perry opened the meeting. The following extracts of this opening from the minutes are relevant:

“Centre for Advanced Medicine Limited (CAM) is now much more complicated and expensive to operate, and it is necessary to hold regular Board of Directors meetings to consider options for the future. Items discussed at these meetings must not be shared outside the board without authority from the Chairman. Directors can therefore speak frankly and with confidence.

...

2003 Net Loss will be similar to last year, but considerably higher in Singapore dollars due to the adverse exchange rate. 2002 SG \$360,000; Estimated 2003 SG \$550,000.

This meeting will make recommendations to MPs [MPL] about the level of funding required for 2004. MPs will consider the overall situation, including more viable Singapore projects and, as soon as possible, will advise NZ management what 2004 funding is available, and therefore what project priorities will apply.

Adrian Sprott (AJS) has provided a report on company projects and progress to date which will take as read. This report will serve as the agenda for the meeting.

Dr Jim Sprott (TJS) is scientific consultant and adviser to the Chariman. Over the years he has recommended a strategic plan which we consider impossible to implement, and therefore have consistently rejected. This strategic disagreement has in no way undermined the scientific advice provided by TJS to the Chairman, who considers it to be of the utmost importance to our understanding of the medical issues involved.

The Chariman asked whether AJS has any conflicts of purpose or tensions arising from this strategic disagreement with his father.

AJS confirmed his strong support for the official policy of the CAM directors, and made no recommendations for any change to that policy.”

[19] CAM says Dr Sprott had an opportunity to respond to the concerns about his non-performance through his report to the Board and at the Directors meeting and that he failed to or inadequately responded to these concerns.

[20] I do not accept this. There is no evidence Dr Sprott was advised his performance did not meet accepted standards prior to dismissal. He was not told how he could improve his performance or told a timeframe within which his performance must improve. It may have been Mr Perry’s intention at the meetings on 11 November, 18 November and 28 January to put performance concerns to Dr Sprott about the progress of CAM’s strategic goals but this is not what the contemporaneous record of those meeting show. What they show is Mr Perry taking decisive steps to implement reporting processes to assess Dr Sprott’s performance in implementing the strategic goals of the organisation.

[21] While I accept an employee in a senior role such as Dr Sprott’s is expected to perform to a high standard and to complete the duties assigned to them any review of that performance must be transparent and the employee must be given a fair opportunity to respond to those concerns and, if upheld, a fair opportunity to address those concerns. There is no evidence Dr Sprott was afforded such an opportunity. For these reason I find there was no reasonable basis upon which CAM could conclude Dr Sprott had failed to perform his duties under his employment agreement.

Further incidents of serious misconduct

[22] In addition to the non-performance issue the 25 February reasons for dismissal letter state two further instances of Dr Sprott’s conduct amount to serious misconduct:

- (i) Dr Sprott’s failure to respond to the Board’s concerns about the commissioning of a legal opinion from Ms Sprott and the distribution of the November 2003 memorandum as raised at the 28 January Board meeting; and
- (ii) Dr Jim Sprott’s letter of 17 February 2004.

[23] A justified dismissal for serious misconduct requires an employer to show it has conducted a fair investigation into the allegations and that the conclusions reached are reasonable in the circumstances. A fair investigation requires that an employee is given a fair opportunity to respond to allegations under investigation. To assess the justifiability of a dismissal the Authority must scrutinise the employer’s actions but not to a pedantic degree.

[24] Were the allegations of serious misconduct concerning Dr Sprott’s failure to respond to the Board’s concerns at the January Board meeting and Dr Jim Sprott’s letter of 17 February 2004 put to Dr Sprott in such a way that he had a fair opportunity to respond?

(i) failure to respond to the Board’s concerns

[25] The witnesses confirmed the minutes of the January Board meeting in relation to the November memorandum (“paragraph 8 Research and Marketing”) are accurate. The minutes record Mr Perry raised the November memorandum, explained his reasons for directing Dr Sprott to withdraw the memorandum, apologised for expressing his annoyance at the memorandum so forcefully and advised in clear terms of a process in future for seeking professional advice outside the organisation. The minutes then note “No response was presented.”

[26] The minutes do not record that any questions or specific allegations were put to Dr Sprott regarding his distribution of the November memorandum and the commissioning of an opinion from Ms Sprott. The minutes do not record that Dr Sprott could face disciplinary action as a consequence of an investigation into the November memorandum. It was not put to Dr Sprott that if he did not provide a response then that could amount to serious misconduct. I accept the minutes record Mr Perry's displeasure at the distribution of the memorandum and the commissioning of an opinion from Ms Sprott. However, they go no further than that and an expression of displeasure does not amount to the putting of allegations of serious misconduct to Dr Sprott with a fair opportunity to respond.

[27] Dr Sprott replied to the minutes by way of memorandum emailed to Mr Perry on 16 February 2004. This response specifically addresses Mr Perry's criticism regarding the November memorandum and provides an explanation as to why no response was provided at the meeting. Mr Perry said he saw this response as an attempt by Dr Sprott to cast himself in a better light following the January Board meeting. This conclusion was not put to Dr Sprott to comment on and the response is not referred to in Mr Perry's letter of 25 January 2004.

(ii) Dr Jim Sprott's letter 17 February 2004

[28] CAM says it was necessary to take immediate and decisive steps to remove Dr Sprott from his position with CAM because the 17 February letter amounts to serious misconduct; it was written on Dr Sprott's behalf and contains serious threats against CAM.

[29] The first paragraph of the 17 February letter states it is written in response to Mr Perry's letter of 12 February inviting Dr Jim Sprott to act as a go-between to negotiate an exit strategy for Dr Sprott from CAM.

[30] The second and third paragraphs of Dr Jim Sprott's letter provide:

“At the outset I would point out that since you have now made matters relating to the Singapore board meeting held on 28 January 2004 pertinent to Adrian's employment at CAM, Adrian is now entitled to disclose those matters in full to a legal adviser and/or employment advocate and/or authorised negotiator under the protection of legal qualified privilege.

Accordingly, your previous stipulation to all Directors of CAM that no matters discussed at the Board meeting held on 28 January 2004 are to be canvassed with persons who are not Directors of the company no longer applies. Adrian is entitled to discuss those matters with a restricted class of persons, of whom I am one.”

[31] The letter goes on to:

- (i) rebut in detail Mr Perry's criticism of Dr Sprott's performance as CEO of CAM as set out in his letter of 12 February;
- (ii) criticise Mr Perry's conduct towards Dr Sprott at the January Board meeting;
- (iii) set out a justification for Dr Sprott's actions with regard to the November memorandum;
- (iv) expressly refuse to negotiate an exit strategy for Dr Sprott;
- (v) detail why a dismissal of Dr Sprott would be unjustified;
- (vi) detail the consequences for CAM if Dr Sprott was dismissed, which include, Dr Jim Sprott's resignation as a consultant to MPL, a claim of unjustified dismissal by Dr Sprott, the coordination of media interest in such a claim and the issues raised in the November memorandum and that Dr Jim Sprott would advise Dr Fitzgerald to resign from CAM;
- (vii) advise Mr Perry to put on-hold all matters relating to Dr Sprott's employment until Mr Perry is in New Zealand and a “full-scale, frank and open discussion” can be held.

[32] Mr Perry's letter of 25 February setting out the reasons for dismissal states with regard to Dr Jim Sprott's letter of 17 February:

"I attempted to address the situation which had arisen [referring to the January Board meeting] by writing to your father on 12 February to seek his assistance to negotiate a dignified exit. My aim was to avoid a dismissal and to reach an agreement with you that would result in you leaving the company on agreed terms, in a way that would safeguard your reputation as much as possible.

The response from your father on 17 February rejected any prospect of reaching agreement on severance terms. That letter contained threats of legal action. It contained threats of adverse publicity both to the media in general and to medical professionals in the event that you were dismissed. The letter also contained a threat that your father would approach the company's Chief Scientific Officer, Dr Michael Fitzgerald, and advise him to look for alternative employment. Your father threatened to resign as a consultant to Master Projects Pte Limited. The 17 February letter demonstrated both by its tone and its content that the company's employment relationship with you had broken down irretrievably. The situation was clearly not salvageable.

[33] Mr Perry's decision to dismiss Dr Sprott was in reaction to Dr Jim Sprott's letter of 17 February. This is clear from the letter of 25 February; Mr Perry had sought Dr Jim Sprott's assistance to negotiate an exit package for Dr Sprott, Dr Jim Sprott rejected that suggestion and threatened to launch a counteroffensive in the event of Dr Sprott's dismissal. In the face of these threats Mr Perry felt he had no option but to dismiss Dr Sprott.

[34] Mr Perry says the threats of legal action, adverse publicity and Dr Jim Sprott approaching the chief scientific officer were serious threats to CAM and he understood these threats were made on Dr Sprott's behalf because statements as to agency are contained in the second and third paragraphs of Dr Jim Sprott's letter and knowledge of aspects of the contents of the letter Dr Jim Sprott could only have been gained from Dr Sprott.

[35] Did the letter of 17 February amount to serious misconduct on the part of Dr Sprott so serious as to warrant summary dismissal executed in the manner described?

[36] This is not a situation where the employer was unsettled into acting precipitately by the employee's conduct² Upon receiving Dr Jim Sprott's letter Mr Perry flew into Auckland on 19 February, took legal advice that evening and waited until the end of the business day on 20 February to dismiss Dr Sprott.

[37] Dr Jim Sprott told me he did not show Mr Perry's 12 February letter to Dr Sprott but told him the import of it and asked him questions about the issues raised in the letter in order to prepare a response. He said Dr Sprott did not see his letter of 17 February before it was sent. I accept this.

[38] The genesis of the letter of 17 February is Mr Perry's letter of 12 February. Mr Perry acknowledges this in his letter of 25 February. Mr Perry wrote to Dr Jim Sprott in his capacity both as consultant to MPL and Dr Sprott's father. His proposal to Dr Jim Sprott presents an obvious conflict in his role as Dr Sprott's father and consultant to CAM. Mr Perry's letter must also be seen in the context of his recent strategic conflict with Dr Jim Sprott.

[39] Mr Perry has taken from Dr Jim Sprott's letter that he has discussed the letter of 12 February and 17 February with Dr Sprott and that the letter is written on Dr Sprott's behalf. Given the context in which the letter of 17 February was written and the contents of the 17 February letter - that Mr Perry's proposal presented Dr Jim Sprott with an obvious conflict, that Dr Jim Sprott responded in kind wearing two potentially conflicting hats ie, consultant to CAM and Dr Sprott's father, that Dr Jim Sprott's statement as to agency is specific to Dr Sprott's disclosure to him of the

² *Macadam v Port Nelson Ltd (No 2)* [1993] 1 ERNZ 300

contents of the January Board meeting and minutes, that Dr Sprott had very recently sent Mr Perry a memorandum dated 16 February responding to the minutes of the January Board meeting and covering some of the same issues as Dr Jim Sprott's letter covers - an obvious question would present itself to Mr Perry as to what capacity Dr Jim Sprott's statements were made.

[40] Mr Perry should have clarified these issues with Dr Sprott before he made the decision to dismiss. Mr Perry's proposal to Dr Jim Sprott presented an obvious conflict between his role as a consultant to MPL and his loyalty to his son. It was foreseeable that Dr Jim Sprott would respond in a forthright manner. To then use that response to justify Dr Sprott's dismissal without first clarifying his authorisation of that response was unreasonable and unfair.

Determination

[41] For the reasons set out above I find Dr Adrian Sprott's dismissal was unjustified. CAM did not have a reasonable basis upon which to conclude Dr Sprott had failed to performance his duties or that his conduct at the Board meeting and in relation to the letter of 17 January so impaired the relationship of trust and confidence that it amounted to serious misconduct warranting dismissal.

Remedies

[42] Having established his dismissal was unjustified Dr Sprott is entitled to a consideration of remedies.

[43] Dr Sprott seeks compensation for hurt and humiliation caused as a consequence of his dismissal to the sum of \$50,000 under section 123(1)(c)(i). He said that in some circles a summary dismissal may be viewed as having a criminal connotation. I asked Dr Sprott if that was his view and he said it was. Dr Sprott said his dismissal came as a complete shock and the evidence of his conduct on the day of his dismissal supports this.

[44] CAM is ordered to pay Dr Adrian Sprott the sum of \$10,000 pursuant to section 123(1)(c)(i) of the Act.

[45] Dr Sprott also seeks reimbursement of wages lost as a consequence of his dismissal from date of dismissal until resolution of his personal grievance. He has provided evidence of earnings he has received since his dismissal from CAM which are limited to some consultancy work he has undertaken and amount to \$5000. Dr Sprott has not applied for a new position and has not enrolled with any recruitment agencies. He said he cannot begin the process of finding another position until the issues around his dismissal are resolved. He also told me he had been contacted shortly after his dismissal by a contact in Canada with a preliminary offer to find him employment, but did not pursue that opportunity because his employment issues remain unresolved, he had made the decision to return to New Zealand he does not wish to relocate to Canada.

[46] The evidence I received as to why Dr Sprott has not made more extensive efforts to find another position was very limited. I do not accept that preparing for these proceedings or any other, however related, alleviates the obligation to mitigate loss which is said to be consequent to this dismissal. I do accept that someone looking for a position in Dr Sprott's field, due to the specialisation of that role, would not be able to immediately find another position. Given this I set the sum of lost wages Dr Sprott is entitled to be reimbursed at three months.

[47] CAM is ordered to reimburse Dr Adrian Sprott the sum equivalent to three months salary, paid at the rate applicable at the time of dismissal, pursuant to section 123(1)(b) of the Act.

Contribution

[48] Section 124 of the Act requires me to consider what, if any, contribution Dr Sprott may have made to the circumstances which resulted in his dismissal.

[49] On the evidence received by the Authority I am not satisfied that it has been established that Dr Sprott's conduct, in relation to the performance of his duties, his conduct at the January Board meeting or Dr Jim Sprott's letter of 17 February were sufficiently blameworthy to justify a reduction in the remedies. If these matters had been properly drawn to his attention and a fair opportunity to explain provided then the situation may have been different. There will be no reduction for contribution.

Costs

[50] The issue of costs is reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to and wish the Authority to determine this issue than application to do so should be made.

Marija Urlich
Member of Employment Relations Authority