

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 281
5612726

BETWEEN REBECCA CLARK
 Applicant

A N D LIGHTHOUSE ECE LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Prisk, Advocate for Applicant
 Mere King, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 20 June 2016 from Applicant
 28 June 2016 from Respondent
 04 July 2016 from Applicant
 10 August 2016 from Respondent
 10 August 2016 from Applicant

Date of Determination: 23 August 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Clark was employed as an Early Childcare Teacher by Lighthouse ECE Limited (Lighthouse) on 23 November 2015.

[2] Clause 15 of Ms Clark's individual employment agreement contained a 90 day trial provision which allowed Lighthouse to terminate her employment on one week's notice. Clause 7.1 of the employment agreement required Ms Clark to give four weeks' notice.

[3] On 18 December 2015 Ms Clark gave Lighthouse written notice of her resignation.

[4] On 22 December 2015 Lighthouse dismissed Ms Clark on one week's notice under the 90 day trial period provision. Ms Clark's last day of employment was 30 December 2015.

[5] Ms Clark claims that the 90 day trial period provision in her employment agreement does not meet the requirements of s.67A of the Employment Relations Act 2000 (the Act) because it did not specify the starting date of her 90 day trial, contrary to the requirement of s.67A(2)(a) of the Act.

[6] Ms Clark says that the failure by Lighthouse to meet the requirements of s.67A(2)(a) of the Act means it cannot rely on the trial period provision to prevent her from pursuing a dismissal grievance.

[7] Ms Clark further says that even if the trial period provision is held by the Authority to be valid, Lighthouse still breached the terms of her employment agreement because it failed to give her the full one week's contractual notice which Ms Clark submits made her dismissal under the 90 day trial period provision invalid.

Material contractual terms

[8] The trial period provision in clause 9 of Ms Clark's employment agreement states:

15.0 Trial period

15.1 A trial period will apply for a period of ninety (90) days ("the Trial Period") under s.67A Employment Relations Act 2000, to assess and confirm the suitability of the Employee for the position.

15.2 During the Trial Period, the Employee and Employer will deal with the other in the good faith. However, the Employer may terminate the employment relationship on one (1) week's notice and the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of a dismissal.

[9] Item 6 on p.17 of the employment agreement states:

"The commencement date of employment is: 22 November 2015."

[10] Lighthouse says that the trial period provision met the requirements in s.67A of the Act because the commencement period was set out in a schedule to the employment agreement so it was clear the parties intended for the trial period to begin at the commencement of Ms Clark's employment.

Relevant legislation

[11] Section 67A(2) of the Act states:

Trial provision means a written provision in an employment agreement that states, or is to the effect, that –

- (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- (b) during that period the employer may dismiss the employee; and
- (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

Issues

[12] The Authority is required to determine (as a preliminary issue) whether clause 15 of Ms Clark's employment agreement can be relied on by Lighthouse to deprive Ms Clark of the right to bring a dismissal grievance against it.

Does the trial period provision meet the requirements of s.67A(2)(a) of the Act?

[13] The material dispute in this case is whether clause 15 of Ms Clark's employment agreement states or "*is to the effect*" (as per s.67A(2)(a) of the Act) that the trial period provision starts at the beginning of her employment.

[14] Lighthouse says that on a plain and ordinary reading of clause 15 it is clear that the parties intended the trial period would begin at the commencement of employment. Lighthouse submits that there is no other date on which the trial would reasonably begin.

[15] I do not accept that submission. Clause 15 does not make any reference to the date on which the 90 day trial period commences. It does not cross reference to the commencement date recorded on p.17 of the employment agreement, although it was open to it to have done so.

[16] Clause 15.1 does not expressly state that the trial period starts at the beginning of Ms Clark's employment. It is therefore necessary to decide whether or not the reference in clause 15.1 to the fact that the trial period "*will apply for a period of 90 calendar days*" meets the requirement in s.67A(2) that the clause is "*to the effect*" that it starts on Ms Clark's first day of employment.

[17] I find that it does not reasonably imply that the 90 days starts on the first day Ms Clark starts work for Lighthouse.

[18] There are a number of circumstances in which the parties may agree that the 90 day trial period does not start on the commencement date of employment but rather when the employee actually starts undertaking the work she or he has been employed to do.

[19] For example, an employee may be undergoing a lengthy induction or an overseas temporary placement, or may be undertaking offsite training or secondment work for an external entity until the work that they have actually been employed to do is available to commence.

[20] In such circumstances, it is foreseeable that the parties may have decided to agree that the trial period provision would start from the date on which the employee actually starts undertaking the work they are required to do in the position they have been employed for. That makes sense if the purpose of the trial period is to give reasonable time to assess an employee's suitability for employment.

[21] I do not accept Ms King's submission that the fact a trial period may not start to run on the first day of employment as *an overly technical interpretation*. Nor do I accept that it goes against the plain reading of clause 15 of the employment agreement or would strain the meaning of that clause, creating uncertainty and ambiguity.

[22] The Employment Court in *Smith v. Stokes Valley Pharmacy*¹ made it clear that a strict interpretation should be given to s.67A because it deprives an employee of the right to invoke the personal grievance provisions in the Act in certain specified circumstances.

¹ [2010] NZEmpC 111.

[23] I consider that the failure of clause 15.1 to specify when (or include words to that effect) the trial period was to start means that Ms Clark was not effectively advised of the date on which the trial period would commence.

[24] I do accept Ms King's submission that the reference in clause 15.1 that the trial period will apply for a period of 90 days "*under s.67A*" by incorporation provides that the trial period starts on commencement of employment. I do not accept that Ms Clark could reasonably be expected to have known that.

[25] I consider that the prescriptive nature of s.67A of the Act means that an obligation is on an employer to ensure that it has clearly and specifically met all of the requirements of s.67A of the Act before it is permitted to rely on the validity of the trial period provision.

[26] I do not accept that the wording of clause 15 is "*to the same effect*" as if it had specified that the trial period started on "*the commencement date*".

[27] I do not accept Ms King's submission that clause 15.1 is to be read as having incorporated the requirement in s.67A of the Act for the trial period to have started at the beginning of Ms Clark's employment.

[28] I have preferred Mr Prisk's submission that the reference in clause 15.1 to the trial period being *under s.67A* only serves to establish the authority for Lighthouse to impose a trial period provision on Ms Clark and nothing more.

[29] Lighthouse is precluded from relying on the trial period provision in clause 15 of Ms Clark's employment agreement on the grounds that it does not meet the requirements of s.67A(2)(a) of the Act because it failed to state or contain words "*to the effect that*" the trial period commenced on the first day Ms Clark started work.

What, if any, costs should be awarded?

[30] Ms Clark as the successful party is entitled to a contribution towards her actual legal costs. However costs are reserved pending the resolution of Ms Clark's substantive claims.

Rachel Larmer
Member of the Employment Relations Authority