

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 337
3057274

BETWEEN SHAUN EVANS
 Applicant

AND JNJ MANAGEMENT LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Adam Mapu, advocate for the Applicant
 Julia Leenoh, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further 27 May 2019 from the Applicant
Information Received: 27 May 2019 from the Respondent
 28 May 2019 from the Respondent
 6 June 2019 from Respondent

Date of Determination: 6 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Evans claimed JNJ Management Limited (JNJ) unjustifiably disadvantaged and unjustifiably dismissed him.

[2] JNJ disputed the Authority's jurisdiction to investigate Mr Evans' personal grievance claims. JNJ said that 67B(2) of the Employment Relations Act 2000 (the Act) prevented Mr Evans from bringing personal grievances or legal proceedings in respect of his dismissal.

[3] JNJ offered Mr Evans employment as Head of Security on 4 December 2018. He was provided with a written proposed employment agreement that contained a trial period provision. JNJ also verbally informed Mr Evans that a trial period would be applicable. Mr

Evans was also advised of his right to seek legal advice before he signed the employment agreement.

[4] Mr Evans accepted the offer of employment and signed the proposed employment agreement.

[5] Mr Evans' employment agreement contained a 90 day trial period provision.

[6] The material clauses in Mr Evans' employment agreement, that related to his trial period, stated:

- *Appendix 1: Start date: 10 December 2018;*
- *Appendix 1: Length of trial period: 90 days;*
- *Appendix 1: Notice of termination during trial period: 1 week;*
- *Clause 2.1: The parties agree that employment is subject to a trial period for the duration specified in Appendix 1 and the trial period will commence on the day you start work;*
- *Clause 2.2: During the trial period the employer may dismiss you or give you notice of dismissal and, if the employer does so, you are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal;*
- *Clause 2.5: The parties expressly agree that, during the trial period, the employer is not required to follow any particular process relating to managing your performance, conduct, training or other matter relating to your employment, whether set out in this employment agreement, in any employer policies, or in any other document;*
- *Clause 2.6: You agree that you have been given the opportunity to discuss this provision and you have been advised of your right to seek independent legal advice about it.*

[7] In accordance with the date recorded in Appendix 1, Mr Evans started work for JNJ on 10 December 2018.

[8] The trial period provisions in Mr Evans' employment agreement were specific and unambiguous. The 90 day trial period ran from 10 December 2018 to 10 March 2019.

[9] On 1 March 2019 JNJ advised Mr Evans in writing that it was giving him one week's notice of termination in accordance with the notice period specified in appendix 1. JNJ's notice of termination advised Mr Evans that his last day of work would be 8 March 2019.

[10] The Authority finds that:

- (a) The trial period provision in Mr Evans' employment agreement met all of the requirements of s 67A(2) of the Act; and
- (b) JNJ terminated Mr Evans' employment in accordance with its contractual notice obligations.

[11] Mr Evans is therefore statute barred pursuant to section 67A(2)(c) and 67B(2) of the Act from bringing personal grievance claims.

[12] Mr Evans' disadvantage grievance claim was so intrinsically linked to his dismissal grievance that it could not succeed because the Authority could not investigate his dismissal grievance.

[13] Mr Evans has not raised any claims in his Statement of Problem that the Authority has jurisdiction to investigate. Accordingly JNJ's claim that the Authority does not have jurisdiction succeeds.

[14] JNJ as the successful party sought indemnity costs of \$15,887.15, or such other amount as the Authority considers appropriate.

[15] Indemnity costs are not appropriate for this matter. Costs are to be assessed in accordance with the Authority's usual 'notional daily tariff based approach' to costs.

[16] The current notional daily tariff is \$4,500 for the first day of an investigation meeting.

[17] This matter was dealt with on the papers, so it will be treated for the purposes of assessing costs as a half day matter. The notional starting tariff for assessing costs is therefore \$2,250 (being half of the daily tariff).

[18] The Authority is not aware of any matters that should result in the notional starting tariff being reduced.

[19] On 1 April 2019 JNJ made Mr Evans a “*without prejudice except as to costs*” settlement offer of a positive written reference if he withdrew his claims against it. If Mr Evans had accepted that offer the parties would not have had to file additional information or submissions on the jurisdiction issue. They would both have therefore been better off than they are now.

[20] JNJ pointed out to Mr Evans in letters to him dated 22 March and 1 April 2019 why his personal grievance claims could not succeed and why his trial period provision prevented the Authority from investigating his claims.

[21] The law relating to the validity and enforceability of trial period provisions is well known and settled. Mr Evans was represented by an employment advocate Mr Adam Mapu, so he should have known he had no reasonable prospect of successfully pursuing his claims against JNJ.

[22] The Authority considers that the way in which Mr Evans conducted his matter unnecessarily increased JNJ’s legal costs, so the notional starting tariff should be increased by \$1,000 to reflect that.

[23] Mr Evans is ordered to pay JNJ \$3,250 towards its actual legal costs within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority