

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 72
5431070

BETWEEN BRENT HUTCHISON
 Applicant

AND CANON NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Geoff O’Sullivan, Counsel for the Applicant
 Christine Meechan QC, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received 30 January 2014 for the Applicant
 30 January 2014 for the Respondent
 24 February 2014 Applicant declined to provide
 submissions in reply

Determination: 10 July 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment relationship problem

[1] The respondent, Canon New Zealand Ltd (Canon), sells office products and services to retail and local businesses.

[2] On 1 February 2013 the applicant, Mr Brent Hutchison, received and signed a written employment agreement with Canon. Amongst other things the employment agreement provided Mr Hutchinson would commence employment on 4 March 2013 and that his employment was “*subject to a trial period of up to 90 days from the commencement of [his] employment*”.

[3] Mr Hutchison began working at Canon according to the date stipulated in the employment agreement. On 30 May 2013 (day 88 of the trial period) Mr Hutchison received a letter setting out concerns Canon held about his performance. He was requested to attend a meeting scheduled for the following day and advised he was entitled to a representative or support person. The letter concluded with the following statement:

You should be aware that this meeting may result in termination of your employment.

[4] On 31 May 2013, Mr Hutchison met with Canon and was given an opportunity to respond to the matters contained in the letter. After a brief adjournment, Mr Hutchison says he was advised his employment was being terminated under “*the 90 day rule*”.

[5] Payment of one week’s notice and holiday pay was placed into Mr Hutchison’s bank account that evening. Termination of his employment was later confirmed in writing on 4 June 2013, three days after the trial period had concluded.

The claims

[6] Mr Hutchison challenges the validity of the trial period provisions in a variety of ways and alleges he has a valid claim that he was unjustifiably dismissed. He says Canon failed to comply with several of the minimum statutory requirements set out at ss.67A and 67B Employment Relations Act (the Act) and in these circumstances he says he is not precluded from bringing a claim of unjustified dismissal to the Authority.

[7] Canon refutes Mr Hutchison’s claims in their totality and says he was dismissed in accordance with a valid 90 day trial period provision contained within the employment agreement.

[8] The preliminary matter before the Authority is whether or not Mr Hutchison is entitled to peruse a personal grievance for unjustifiable dismissal.

[9] The parties agreed to the Authority determining this issue ‘on the papers’ according to the information contained in the statement of problem and in reply and submissions from the parties.

[10] Mr Hutchison has made additional claims that he was unjustifiably disadvantaged by a number of Canon's actions. Those matters will be dealt with in a separate determination.

Was Mr Hutchison already an employee when he signed his employment agreement?

[11] Mr Hutchison first questions whether he met the extended definition of "employee" (pursuant to s.6 of the Act) prior to execution of the employment agreement and was therefore an "existing employee" at the time the employment agreement was presented to him.

[12] Counsel refers to s.6(1)(b)(ii) of the Act which extends the definition of 'employee' to include: "*A person intending to work*". Section 5 of the Act defines the phrase "*A person intending to work*" as meaning "*A person who has been offered, and accepted, work as an employee.*"

[13] The judgments of *Smith v Stokes Valley Pharmacy*¹ and *Blackmore v Honick Properties*² each make it clear that agreement to trial period provisions between an employer and employee will only be valid if the prospective employee is not a previous or current employee of the employer.

[14] Counsel for Mr Hutchison points to an opening statement contained in a cover letter dated 1 February 2013 that accompanied a copy of the employment agreement proposed by Canon for Mr Hutchison. The letter opens with the following statement:

"Congratulations Brent on your success in joining Canon NZ Limited"

[15] The letter goes on to say (amongst other things) that CNZ is:

"...delighted to send this offer of permanent full time [sic] at Canon NZ Limited which highlights the verbal offer made by [a Recruitment Specialist]"

[16] Counsel submits the wording of that document suggests that at the time Mr Hutchison received the employment agreement he may have already been an "employee" within the definition of that term set out at s.5. of the Act.

[17] I note there is no reference made in the cover letter of Mr Hutchison having already accepted its offer of employment at some earlier juncture. Additionally,

¹ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111

² *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

nowhere in the documentation furnished to the Authority does Mr Hutchison assert that he had accepted an offer of employment or that he regarded terms and conditions of employment had been finalised prior to 1 February 2013.

[18] I am unwilling to accept that Mr Hutchison may have been a *'person intending to work'* and therefore an *'employee'*, as defined by the Act solely on the basis of an opening sentence in a cover letter. I view the opening sentence in Canon's letter of offer as an enthusiastic overstatement made in the context of a recruitment process. I am not persuaded the words used, in and of themselves, are sufficient to establish that a process of offer and acceptance had concluded as is required to satisfy the definition at s5 of a "person intending to work".

[19] My view is reinforced by the remaining content of the letter which advises that the offer of employment is *"subject to successful criminal, credit and vehicle testing"* and would expire if not accepted within 7 days. The correspondence further asks Mr Hutchison to consider the agreement, obtain independent advice if required, and if acceptable sign the agreement and return. In these circumstances I am not satisfied that Mr Hutchison has established on the balance of probabilities that he was an employee of Canon before he executed the employment agreement. I do not accept this aspect of his claims.

Does the employment agreement between the parties contain a valid trial provision, that complies with.67A?

[20] Mr Hutchison claims that his employment agreement insufficiently specified the term of the trial period as is required by s.67A. He says the employment agreement merely stated that the trial period would end *"at some point"* within the 90 day period.

[21] Clause 6(a) of the employment agreement sets out the length of that period in the following way:

You agree that your employment is subject to a trial period of up to 90 days from the commencement of your employment under s.67A of the Employment Relations Act.

[22] Section 67A provides:

67A When employment agreement may contain provision for trial period for 90 days or less

(1) *An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*

(2) *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.

[23] I am unable to accept an argument that the employment agreement insufficiently specified the duration of the trial period. I consider the wording of the employment agreement is clear and complies with the statutory requirement to specify the period of the trial period. Mr Hutchison cannot reasonably have been confused or unsure as to the length his trial period.

Does the employment agreement between the parties contain a valid trial provision, that complies with 67B of the Act;

[24] Mr Hutchison next claims that s.67B of the Act requires an employer to give an employee notice of termination of employment before the end of the trial period.

[25] I regard his argument as regards notice requirements is more persuasive. He says Canon dismissed him without giving notice as required by the legislation and that his employment agreement avoids, in part, that obligation.

[26] Clause 6(b) of the employment agreement states:

*[Canon] may terminate your employment at any time during the trial period by giving you one week's written notice or **payment instead of notice**. You must give CNZ two weeks' written notice should you wish to leave your employment during the trial period. [emphasis is mine]*

[27] Counsel submits s.67B of the Act does not provide for payment instead of notice. Further, that written notice was not given to Mr Hutchison until after the 90 day trial period had concluded. In these circumstances he says the termination of his employment was not lawful.

[28] Section 67B materially states:

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee

notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period. terminated in terms of s.67B of the Act;

(2) *An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance of legal proceedings in respect of the dismissal.*

...

[29] In essence, disqualification from bringing a personal grievance is dependent upon lawful termination of the employment agreement under subsection (1). If there is not a lawful termination under that subsection, then the personal grievance barrier provided by subsection (2) does not apply.³

[30] In the lead case; *Smith v Stokes Valley Pharmacy (2009) Ltd*, Chief Judge Colgan examined what constitutes “*giving the employee notice of termination*” pursuant to s.67B. He observed, in the context of trial periods, that where termination of employment may occur over a span of time, notice of termination must be more than simply advice of dismissal and should advise when, in future, the dismissal takes effect⁴. He rejected an argument that “*notice*” under s67B should be interpreted as a discrete requirement separate to any relevant contractual provisions or implied terms of reasonable notice⁵ and concluded that the statutory reference to “*notice*” must be the contractual notice in any particular case.

[31] The starting point in this matter then is to examine whether clause 6(b) of the employment agreement and how Canon terminated Mr Hutchison’s employment agreement complied with the requirements of s.67(B).

[32] Firstly, there is no suggestion that the letter of 30 May 2013 advising Mr Hutchison of Canon’s desire to meet and discuss performance concerns and that termination of employment may occur as a result, constitutes notice of termination under the Act.

[33] Clause 6(b) sets out the parties’ agreement as to how Canon may terminate Mr Hutchison’s employment during the trial period. It provides two separate methods; the first is by providing “*one week’s written notice*” during the trial period. I find this portion of the contractual provision complies with s. 67B, but note in the circumstances of this matter one week’s written notice was given three days after the 90 day trial period had concluded. In these circumstances I am unable to conclude

³ Above at n 1 at [62]

⁴ Ibid at [61]

⁵ Ibid at [104]

Canon satisfied its contractual or statutory obligation to provide notice “*before the end of the trial period*”⁶.

[34] The alternative method, and the one by which Canon terminated Mr Hutchison employment agreement, provides for payment instead of notice.

[35] Canon submits that the parties bargained to allow for termination of employment during a trial period by means of payment.

[36] There is no dispute that an employment agreement may lawfully provide for payment in lieu of notice as a mechanism to conclude an employment agreement. In *GFW Agri-Products v Gibson*⁷ the Court of Appeal observed however that determination of when an employment contract comes to an end is a mixed question of fact and law and it affirmed that “*payment in lieu of notice is equivocal*” in this respect⁸.

[37] Turning then to the express words agreed between the parties at clause 6(b), I am unable to find that “*payment instead of notice*” is able to be objectively construed as “*notice*” as described by the Court in *Smith*⁹ when the words agreed specifically identify payment as an alternative to notice. I am further persuaded by the observation made by the Court in that case that “*The statute does not provide an alternative in the form of payment of money instead of notice...*”¹⁰

[38] The Court has made it clear that the obligations set out at ss. 67A and 67B are to be interpreted strictly in circumstances where removal of a right of access to justice is involved.¹¹ In *Smith*¹² the Court described the statutory trial provisions as:

...neither simple nor the broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with¹³.

⁶ S.67(B(1))

⁷ *Goodman Fielder Watties Agri-Products v Gibson* [1995] 2 ERNZ 323

⁸ *Ibid* at p329

⁹ Above at n 1

¹⁰ Above at n 1 at [105]

¹¹ Above at n 1 at [82]

¹² Above at n 1

¹³ Above at n 1 at [83]

[39] An employer's ability to lawfully terminate employment during a trial period is dependent, amongst other things, on the employer giving notice to the employee before the end of the trial period. I am unable to conclude Canon complied with this obligation by providing payment instead of notice nor was the obligation fulfilled when it provided Mr Hutchinson with written notice outside the duration of the trial period time frame.

[40] I accept counsel's submission that the notice mechanisms contained within the trial period provisions of the employment agreement are defective, and the manner by which Mr Hutchinson was terminated from Canon did not comply with the legislation. It follows that the ostensible contractual barrier to bringing a personal grievance for an unjustified dismissal does not apply. Mr Hutchinson is able, should he choose, to have this claim heard by the Authority.

[41] Canon might regard my approach as overly pedantic and regard the payment of a week's notice placed Mr Hutchinson arguable in a better position than if he had received one week's written notice within the trial period. That argument is speculative and cannot ameliorate a finding that it failed to comply with its agreed contractual provisions and the legislation.

[42] Counsel for Mr Hutchinson raised additional concerns about the validity of Mr Hutchinson's trial period provisions. Having found that Canon did not comply with the notice requirements of s.67(B) and that Mr Hutchinson is therefore not precluded from bringing a claim of unjustified dismissal I do not consider it necessary to consider any additional arguments presented by counsel in the alternative.

[43] The parties are directed to attend mediation. If matters remain unresolved following that event a conference call will be convened to arrange scheduling to investigate Mr Hutchinson's claims.

Costs

[44] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority