

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 389
3049612

BETWEEN JOSEPH LANZ
 Applicant

AND MCINDOE LOGGING
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: David Ure, counsel for the Applicant
 Mark Nutsford, advocate for the Respondent

Investigation Meeting: On the papers

Determination: 1 July 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. The Authority has jurisdiction to investigate the personal grievance application of Joseph Lanz.

B. Costs are reserved.

[1] McIndoe Logging Limited (MLL) dismissed Joseph Lanz on 28 April 2018. MLL had employed Mr Lanz to work as a Mechanised Faller in its logging business in East Coast forests. Its employment agreement with him, signed on 22 January 2018, included a 90 day trial period.

[2] MLL relied on that trial period term to dismiss Mr Lanz with immediate effect. Its letter of dismissal to him said Mr Lanz's employment started on 12 February 2018, so the 90 day trial period expired on 12 May 2018.

[3] If the dismissal did occur before the end of a valid and effective trial period, Mr Lanz was barred by s 67B(2) of the Employment Relations Act 2000 (the Act)

from bringing a personal grievance or other legal proceedings over his dismissal. However Mr Lanz did seek to raise such a grievance . He did so on the basis that the written terms of his agreement said his employment started on 22 January 2018 and that the trial period applied from that specified start date. Ninety days from the January date was 21 April 2019. On that basis Mr Lanz said the trial period had expired by the date of his dismissal on 28 April and he was entitled to pursue his grievance.

[4] M Lanz is a Canadian citizen. At the time he signed the employment agreement with MLL he was in New Zealand on a work visa for employment with another company. He was not issued a work visa allowing him to work for MLL until 12 February 2018. MLL said he was not legally able to start work for it before that date. It said, as a consequence of that situation, the trial started from the February date, not the January start date recorded in his employment agreement.

The Authority’s investigation

[5] The parties agreed the preliminary jurisdictional issue of whether or not Mr Lanz was entitled to pursue his grievance should be determined on the papers. For that purpose they lodged submissions and relevant documents on an agreed timetable. Those documents included affidavits from Mr Lanz and MLL director Rodney McIndoe setting out key facts.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[7] The issues for determination were

- (i) For the purposes of determining if Mr Lanz was dismissed before the end of a valid trial period, when did his employment begin – 22 January or 12 February 2018?
- (ii) Did notice of the termination of his employment under a trial period comply with the requirements for “notice” under s 67B(1) of the Act?

[8] The first issue involved construction of the relevant sections of the Act and its application to the particular terms of MLL’s employment agreement with Mr Lanz.

[9] The second issue concerned compliance with the terms of that agreement and whether, if not complied with, the statutory bar to grievances under the Act's trial period provisions could be relied on.

The employment agreement

[10] The relevant terms of MLL's employment agreement with Mr Lanz were:

3. Start date

This agreement shall come into effect on January 22nd 2018.

...

10. Trial period

- a) A trial period will apply for 90 days from the start date specified in Clause 3 of this agreement, during which time suitability for and of the position will be assessed and reviewed by the Employer.
- b) During the trial period the employer may terminate the employment agreement and the employee may not pursue a personal grievance on the basis of unfair dismissal except as specified under the Employment Relations Act.
- c) One week's notice of termination may be given by either party within the duration of the trial period, even if that notice extends beyond the end of the trial period.

...

The law

[11] At the time Mr Lanz and MLL entered their employment agreement the relevant provisions in the Act regarding trial periods were:

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.

- (3) **Employee** means an employee who has not been previously employed by the employer.

...

67B Effect of trial provision under section 67A

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

...

[12] Also relevant were the Act's definitions of "employee" and "a person intending to work":

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, employee—
- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes—
 - (i) ...
 - (ii) a person intending to work;

5 Interpretation

In this Act, unless the context otherwise requires,—

...

person intending to work means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning

When did Mr Lanz's employment begin?

[13] MLL's argument for imposition of the statutory bar to Mr Lanz pursuing his grievance concerned, in essence, the meaning of the phrase in s 67A that a trial period is for a specified period "starting at the beginning of the employee's employment". It submitted that his employment began on 12 February, as MLL intended, once Mr Lanz was granted the work visa and attended the workplace for the purpose of working and being paid for that work. It said the 22 January date stated in the employment agreement as the "start date", and referred to in the trial period clause as the date from which the 90 day trial period would apply, was "clearly erroneous".

[14] MLL also relied on some of the analysis in the Employment Court's decision in *Blackmore v Honick Properties Limited* for the proposition that the trial period

applying to Mr Lanz was a term that would take effect from a future date when he started work.¹

[15] It submitted this interpretation of the arrangement was to be favoured because it would have been illegal for MLL to “employ” Mr Lanz before his work visa was issued on 12 February.

[16] Each argument failed for reasons that follow. Ultimately this is because, as clear from the case law, the statutory trial period provisions must be interpreted strictly and that interpretation closely considers the particular factual situation and the contractual terms agreed by the parties in each case.

[17] As the Employment Court explained in its decision in *Smith v Stokes Valley Pharmacy (2009) Limited*:²

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

[18] However the Court also emphasised that the statutory provisions were intended to complement the terms of the parties’ employment agreement. As long as permitted terms about trial periods were within specified parameters, the relevant sections “did not purport to override the parties’ entitlement otherwise in law to conclude the terms of their own bargain”.³ The case law on aspects such as the provisions for notice of termination demonstrates that the sections must be interpreted and applied in light of the particular contractual terms agreed by the parties.⁴ In one example the Court explained that it was the wording in the written agreement that specified and clarified the obligations of the parties in each particular case, not the broad wording of the statute.⁵

[19] It is this emphasis on analysing and applying the particular contractual terms, to the extent they are within the permitted statutory parameters, that ultimately meant

¹ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152.

² *Smith v Stokes Valley Pharmacy (2009)* [2010] NZEmpC 111 at [48].

³ *Smith*, above n 2, at [106] and [107].

⁴ *Smith*, above n 2, at [106] and [107].

⁵ *Farmer Motor Group Limited v McKenzie* [2017] NZEmpC 98 at [18].

the Court's analysis in the *Blackmore* decision did not support MLL's submissions about its position. The following extended extract from that decision directly addressed the issue of whether a person who has accepted an employment agreement is an employee for the purpose of a 90-day trial beginning to run (some bold emphasis added):

[50] The principal argument for the defendant that a trial period should be able to be agreed after the commencement of employment, as occurred in this case, relied on a submission about the potential consequences of finding that employment commenced immediately upon acceptance of the offer of it. In the context of this case, Ms Burke accepted that offer and acceptance of employment was concluded between the parties on about 10 October 2010. However, Mr Blackmore did not begin work for HPL until more than a month later, on 15 November 2010. Counsel's submission was that if Mr Blackmore's employment and, therefore, the 90 day trial, were deemed to have begun more than a month before work actually started, more than a third of the trial period would have been ineffectual. Ms Burke submitted that an even more extended timeframe between acceptance of an offer of employment and its commencement might, theoretically in these circumstances, mean that the entire 90 day period for assessing the employee's performance would expire before work even began, thus negating entirely the purpose of the trial.

[51] There are, however, two answers to those concerns.

[52] The first is that **a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work.** The phrase in s 67A(2)(a) ... starting at the beginning of the employee's employment ... means when the employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date.

[53] So **the trial period agreed in these terms** simply becomes one of a number of terms and conditions of employment that will take effect at a future date when the job starts.

[54] The second is, for reasons upon which I will elaborate, that the extended definition of employee in s 6 of the Act applies only to deeming a person to be an employee before the commencement of work for the purpose of being able to bring a personal grievance for unjustified dismissal during that period.

[55] Parliament cannot have intended the extended meaning of employee set out above to have meant that there would thereby also come into existence the range of obligations of an employment relationship from the point of acceptance of an offer of employment. One need only contemplate the hypothetical case of a sales employee for Pepsi Cola who applies for, is offered, and accepts a sales role with Coca Cola. The employee is obliged to give Pepsi a month's notice so that the work for Coca Cola will not commence for a month after the offer and acceptance. The employee continues to be employed by Pepsi for that period of a month. The usual obligations of an employment relationship, such as not working in

competition with one's employer and the incidence in practice of trust and confidence, could not be performed with both employers contemporaneously.

[56] The extended definition of employee as a person intending to work and meaning someone who has been offered and accepted employment, was enacted as a legislative response to the judgment of the Arbitration Court in *Auckland Clerical and Office Staff Employees IUOW v Wilson*. There, an employee was offered and accepted employment to begin on a specified future date and relinquished her existing position in reliance upon this. Before work actually started, the employer advised the employee that she would not be engaged after all. The Court determined that because employment had not begun, the employee could not claim by personal grievance that she had been dismissed unjustifiably and compensated for the wrong suffered by her. The extended definition of employee was subsequently included in the legislation in precisely the same terms as it now appears.

[57] It is significant that Parliament addressed the consequence of the judgment in *Wilson* by deeming that a person in those circumstances is to be regarded as an employee for the purposes of enabling a grievance for unjustified dismissal to be brought, even if the work with the new employer has not yet commenced.

[58] In this case the extended definition of employee is engaged because the dispute turns on whether Mr Blackmore is entitled to have access to a personal grievance for unjustified dismissal. Therefore, as from the completion of the process of offer and acceptance of employment, Mr Blackmore became an employee of HPL to the extent that he was entitled to bring a grievance against it as from 10 October 2010 when he accepted its offer of employment.

[20] At first blush the Court's analysis might be read as supporting MLL's position. It refers to circumstances where an agreement for a trial period becomes a term that will take effect at a future date when the job starts. It also records counsel's submission in that case that, if a trial period was taken to run from the date of agreement rather than starting work, some of the trial period would become ineffectual. In Mr Lanz's case, the effect would be that the trial period had already run for 21 days before he actually started work and how he carried out that work could be observed for the purposes of that trial period.

[21] However a closer reading of the analysis in *Blackmore* suggests that it did not override regard for the actual contractual terms agreed by the party or the statutory definition of an employee as including a person intending to work, that is where the person has accepted the offer to work but had not yet started doing it.⁶ As highlighted in bold type in paragraph [52] of the extract above from *Blackmore*, the Court referred to the prospect that a contractual term could be agreed, before the work started, that a

⁶ See also *Kumara Hotel Limited v McSherry* [2017] NZEmpC 19 at [45] and [46].

trial period was to “begin on the day of commencement of work”. It then said, at [53] as also highlighted in bold, that such an “agreed” term would then take effect at a future date when the job started. Actual and written agreement on such a term is needed for that effect rather than being something that automatically arises as an outcome of the wording of s 67A. Accordingly, *Blackmore* is not authority for disregarding the actual words used in MLL’s written agreement with Mr Lanz stating a “start date” and using that phrase in the subsequent clause about when the trial period was to commence.

[22] In his affidavit Mr McIndoe said he had talked with Mr Lanz in December 2017 about a position MLL had advertised for a feller. Mr McIndoe said they verbally agreed that MLL would employ Mr Lanz once his work visa was approved. At that time Mr Lanz had a work visa that only allowed him to work for a different New Zealand logging business. Mr Lanz asked Mr McIndoe for a signed employment agreement to support his visa application to work for MLL. Mr McIndoe said the date of 22 January in the agreement provided by MLL was when Mr Lanz had asked for the agreement and they had signed it.

[23] However, and consistent with the Court’s emphasis in *Smith* on a strict interpretation and giving effect to the parties’ contractual bargain, Mr McIndoe’s explanation did not override or replace the written record of the bargain made at the time that MLL provided Mr Lanz with the employment agreement. There was nothing to suggest that Mr Lanz did anything other than agree to and sign the terms of employment that MLL set out in the agreement, including the provision for a trial period running from the start date.

[24] MLL could have avoided the situation by having a term that said the trial period started from the date Mr Lanz was granted a work visa or, once getting one, actually started work. Such a term is a common practice. In *Talbot Agriculture Limited v Wate*, for example, the employment agreement included this term: “The employment commences on approval of a work visa by Immigration New Zealand ...”.⁷ In that case the Court, looking at the particular written terms of the agreement, held that the employment relationship was not intended to start until or unless a visa was obtained. On the same approach of determining the matter according to the intention disclosed by an objective reading of the words of the written employment

⁷ [2019] NZEmpC 31.

agreement in Mr Lanz's case, the start date of 22 January was not an "error" but an agreed term. Use of the defined term "start date" in the trial period clause meant the 90 days ran from that date, not the later date on which Mr Lanz actually started work.

[25] While that might sound a 'tough' outcome for MLL in this situation, it follows the emphasis in the case law on the obligation of the employer to get its "paperwork" correct and for the Act to be interpreted in a way that acknowledges and addresses the inherent inequality of power in employment relationships.⁸

[26] It would have been unlawful for Mr Lanz to start work for MLL on 22 January, because he did not yet have a visa allowing him to do so. However, it was not unlawful for him simply to have an employment agreement stating that start date, provided he did not actually engage in any work for it. But, even if he had illegally started work before the necessary visa was granted, the terms of the employment agreement regarding the trial period would be interpreted and applied to the same effect and outcome. In making that last point I note that there was no suggestion whatsoever MLL that would have either asked or allowed him to start work without that visa.

Did notice given to Mr Lanz comply with the requirements of s 67B(1)?

[27] By letter dated 28 April 2018 Mr McIndoe advised Mr Lanz his employment was terminated "effective immediately in accordance with clause 10 of your individual employment agreement". The letter also said that "in accordance with clause 10(c)" he would "be paid one week's wages in lieu of notice".

[28] The difficulty for MLL was that the employment did not provide for payment of wages in lieu of notice. Clause 10(c) said one week's notice of termination would be given. Mr Lanz did not get a week's notice. He was dismissed with immediate effect.

[29] Section 67B of the Act sets the statutory bar to bringing a personal grievance for unjustified dismissal, if an effective trial period is in place. However, the section does not apply unless the employer gives "notice" of the termination. As confirmed in the *Smith* decision, the statutory reference to notice is to be interpreted as referring to the notice provisions set by the employment agreement in any particular case. In

⁸ *Blackmore*, above n 1, at [66] and Employment Relations Act 2000 s 3(a)(ii).

short, the statutory notice required is the contractual notice. Failure to comply with the contractual terms for notice is deficient notice. Deficient notice does not satisfy the s 67B requirement for notice.⁹

[30] As a result of MLL's failure to give the notice required by its employment agreement with Mr Lanz, it lost the immunity to a personal grievance proceeding that s 67B would otherwise have given it.

Outcome on jurisdiction to consider the grievance

[31] For the reasons given, the trial period under which Mr Lanz was employed had expired before he was given a letter of dismissal. Even if that conclusion were wrong, MLL had not complied with the requirements for giving him notice under a statutory trial period. As a result the statutory bar to Mr Lanz pursuing a grievance could not be imposed. The Authority has jurisdiction to investigate and determine his application, along with the counterclaim made MLL in its reply to his application.

Next steps

[32] The conclusion reached concerns application of legal principles regarding access to the statutory grievance procedures, not the merits of Mr Lanz' application or its eventual prospect for success. However, following this determination, the situation is now different from when the parties first attended mediation in September 2018. If the representatives cannot now promptly resolve this matter by discussion, further mediation on a voluntary or directed basis may assist. Either party may request a direction, if needed. If mediation does not resolve the matter, and Mr Lanz wishes the Authority to then proceed with an investigation, he should promptly advise the Authority so the necessary arrangements can be made.

Costs

[33] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority

⁹ *Smith*, above n 2, at [61], [97] and [107] and *Farmer Motor Group*, above n 5, at [17] and [18] and *Ioan v Scott Technology NZ Limited t/a Rocklabs* [2018] NZEmpC 4 at [51].