

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 104
5622866

BETWEEN	KELLY MANN Applicant
AND	MAXAM CORPORATION LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: John Gwilliam, Counsel for Applicant
Graeme Ogilvie, Advocate for Respondent

Investigation Meeting: 13 July 2017 at Wellington

Submissions Received: 13 and 21 July from the Applicant
13 and 20 July from the Respondent

Determination: 11 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kelly Mann brings two personal grievances to the Authority for determination. The first is for disadvantage caused by an unjustifiable action of her employer and the second is for unjustifiable dismissal. Ms Mann was employed by Maxam Corporation Limited (Maxam) in an accounting position from November 2015 until February 2016. On 12 February 2016 Graeme Cromie, a director of Maxam, gave Ms Mann verbal and written notice that her employment was being terminated under the trial period provisions of her employment agreement.

[2] Maxam says Ms Mann's claim to have been disadvantaged by an unjustifiable action of her employer arises out of, or in respect of, the termination of her employment. As such it says the claim cannot be pursued under the 90 day trial

period provisions of the Employment Relations Act 2000 (the Act). It further says Ms Mann is precluded from bringing a claim for unjustifiable dismissal because her employment was subject to a valid trial period clause.

[3] Additionally, Maxam says Ms Mann did not raise that grievance within the statutory timeframe.¹ As Maxam did not consent to the grievance being raised out of time, the claim could proceed only by way of application to, and a decision from, the Authority under the "*exceptional circumstances*" provision of the Act.² Maxam notes no such application had been made.

[4] The parties attended mediation but were unable to resolve the matter.

Issues

[5] The issues for the Authority to determine are:

- (a) Whether the trial period provision of Ms Mann's employment agreement was valid;
- (b) Whether, if the trial period provision was valid, Ms Mann's employment was terminated within the trial period;
- (c) Whether the notice of termination of employment was valid;
- (d) Whether Ms Mann was disadvantaged by an unjustifiable action of her employer in the way it carried out the termination of her employment;
- (e) Whether Ms Mann is precluded from raising a personal grievance for unjustifiable dismissal by s.67B(2) of the Act;
- (f) If she is not precluded, whether she raised such a grievance within the statutory timeframe; and, if so
- (e) Whether her dismissal was justifiable.

Trial Periods

[6] The following provisions of the Act relating to trial periods are relevant:

¹ As specified in s.114 of the Act

² Sections 114 and 115 of the Act

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. Effective trial provision under section 67A

- (1) This section applies if an employer terminates an employment agreement containing a trial provision under s67A 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.
- (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in s103(1)(b)-(h).
- (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
- (5) Subsection (4) applies subject to the following provisions:
 - (a) In observing the obligation in s4 of dealing in good faith with the employee, the employer is not required to comply with s4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
 - (b) The employer is not required to comply with a request under s120 that relates to terminating an employment agreement under this section.

Personal Grievances

[7] The relevant part of the Act relating to personal grievances provides:

103 **Personal grievance**

- (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim –
- (a) That the employee has been unjustifiably dismissed; or
 - (b) That the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
 - (c) That the employee has been discriminated against in the employee's employment; or ...

Was the trial period provision valid?

[8] Ms Mann was interviewed for the position in October 2015. After being offered the position she was given an individual employment agreement (IEA) to take away and consider. She returned it, signed, on 5 November and commenced employment on 18 November 2015. The relevant portions of the Trial Period provisions of that IEA are replicated below:

- 3.1 The Employee's employment under this Agreement is subject to a Trial Period in accordance with sections 67A and 67B of the Employment Relations Act 2000. The Trial Period shall start on the Commencement Date and continue for up to 90 days.
- 3.2 Either party may terminate the employment relationship by giving one weeks' notice of termination before the end of the Trial Period. To avoid doubt, the Termination clause does not apply to termination in accordance with this clause.
- 3.3 If the Employee is given notice of the termination of their employment by the Employer in accordance with this Trial Period clause, whether the termination takes effect before, at, or after the end of the Trial Period the Employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[9] The First Schedule of the IEA contains details including Ms Mann's remuneration, location and hours of work, and the Commencement Date, which is noted as "*November 2015*".

[10] According to Mr Cromie no specific commencement date was inserted into the IEA because, when he offered Ms Mann the position, he did not know when she could start her employment. He said he was flexible as to when in November 2015 Ms Mann started work, and he left it up to her to advise a convenient date. She then advised she would start on 18 November.

[11] Mr Gwilliam, counsel for Ms Mann, submits the trial period clause of her employment agreement was invalid for lack of specificity as to its commencement date and was not compliant with s.67A of the Act for that reason. He refers to *Smith v Stokes Valley Pharmacy (2009) Ltd* as authority for a strict interpretation of trial period provisions being appropriate, given such provisions deprive an employee of right to bring a personal grievance for unjustifiable dismissal.³ Mr Gwilliam also submits the commencement date of the employment, and therefore that of the trial period, was the date on which she signed her employment agreement, being 5 November 2015.

[12] I have considered those submissions but do not accept them. Regarding the lack of specificity submission, there is no requirement in s.67A for a commencement date to be specified. It provides that the trial period will start at the beginning of the employee's employment. There was no disagreement between the parties that it was left up to Ms Mann to advise her employer of her starting date. Ms Mann confirmed in the course of the investigation meeting that she informed her employer when she wished to start her employment and that she was never in doubt that 18 November 2015 was her commencement date.

[13] I find there was no ambiguity or uncertainty in either party's mind as to the commencement date. That being so, I am unwilling to find the trial period to be invalid for lack of specificity in the IEA. Both parties were well aware at the date of Ms Mann returning her signed employment agreement that she would advise her employer of her commencement date and she duly did so.

³ [2010] ERNZ 253 at [48]

[14] Statements made by Ms Mann when she raised a personal grievance with her employer by letter dated 29 February 2016 also make it clear she was in no doubt about when the trial period commenced. She referred in that letter to the termination of her employment on 12 February as being "*right at the end of my 90 days*". That accords with the trial period commencing on the day she starting working for Maxam.

[15] If she had believed the trial period started on 5 November 2015 rather than on her first day on the job, Ms Mann would have informed her employer in her letter of 29 February 2016 that the trial period was already over by 12 February 2016. I find she did not do so because she was in no doubt that the trial period had commenced on 18 November 2015.

[16] I find this to be a situation similar to that in *Blackmore v Honick Properties Limited*⁴ where the Employment Court, in considering the matter of when employment commenced stated:

... 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.⁵

[17] I am satisfied both parties had certainty about the date the trial period commenced and I find the trial period provision in her IEA was valid.

Was Ms Mann's employment terminated within the trial period?

[18] I have found the trial period commenced when Ms Mann started her employment on 18 November 2015. She was notified both verbally and in writing of the termination of her employment on 12 February 2016 which, by my calculation, was day 87 of the trial period. That sits firmly within the specified timeframe for the trial period.

Was the notice of termination valid?

⁴ [2011] ERNZ 445

⁵ n4 at [52]

[19] Counsel for Ms Mann submits the notice of termination of her employment on 12 February was defective in that it did not contain advice of when the termination would take effect.

[20] I have considered that submission and reject it. The letter of termination from Mr Cromie referred to the trial period clause of Ms Mann's employment agreement. That clause includes, at 3.2, specific reference to a one week notice period applying to a termination effected before the end of the trial period, as distinct from the eight week notice period that applied under the general termination provisions of the IEA.

[21] While Mr Cromie's letter did not specify that one week's notice would apply, I find his reference to the trial period clause of Ms Mann's IEA was sufficient to provide certainty as to the effective date of the termination, absent any discussion she and Mr Cromie may have over accommodating her preferences.

[22] Mr Cromie's evidence, which I accept, is that he did not specify the one week's notice in the termination letter because he was prepared to offer Ms Mann a longer period of notice if she wished. He suggested to Ms Mann she might prefer to have a month's notice, which Ms Mann quickly rejected. Ms Mann acknowledges she scoffed at that suggestion and proposed a week to which Mr Cromie agreed.

[23] In the event, and in the face of the visible distress Ms Mann was exhibiting, Mr Cromie suggested she could leave immediately and be paid for the notice period if she wished. While the parties have conflicting evidence over this, I prefer Mr Cromie's version of events and accept he offered, rather than instructed, Ms Mann to leave that day. I accept Mr Cromie's evidence that he made the offer out of compassion for Ms Mann, despite it being inconvenient for the business to allow her to leave without working out her notice period.

Was Ms Mann unjustifiably disadvantaged by the way her employer carried out the termination of her employment?

[24] Ms Mann's evidence was that she asked Mr Cromie on 12 February 2016 why he was invoking the trial period provision to terminate her employment. He failed to give her reasons, saying that he had received advice he did not need to do so. She says she asked him numerous times and, through counsel, submits she was disadvantaged by his failure to supply the reasons.

[25] Mr Cromie acknowledges Ms Mann asked for reasons more than once and that he advised her he was not required to provide them. Through its advocate, Mr Ogilvie, Maxam submits Ms Mann's claim must fail firstly, because it relates to the dismissal, and s.67(2) prohibits a personal grievance being brought in respect of a dismissal that was effected during the trial period. Maxam submits that the second reason the claim must fail is that Ms Mann has not provided any evidence of the disadvantage she suffered from not being given reasons for the termination of her employment under the trial period provisions of her IEA.

[26] I do not accept the first part of Maxam's submissions on this point. Ms Mann's grievance for unjustifiable action relates to the lack of reasons being given by the employer, and is separate, and additional, to her claim to have been unjustifiably dismissed. The (then) Chief Judge observed in *Smith* that, while s.67B exempts an employer from certain requirements of the Act, the exemptions are restricted and are to be interpreted strictly. The good faith provisions of s.4 of the Act still apply to trial periods, unless specifically excluded. The Chief Judge referred to s.67B(5)(a), which exempts an employer who is considering the termination of an employee's employment under a trial period from the requirement at s.4(1A) to provide the employee with information relevant to the continuation of the employment.

[27] He also referred to s.67B(5)(b) which exempts the employer from the requirement at s.120 of the Act to provide a statement in writing of the reasons for the termination, when requested by the employee. The former Chief Judge made clear, however, that the exemption does not extend to other good faith obligations including those of being responsive and communicative and not doing anything, whether directly or indirectly, to mislead or deceive:

So whilst an employer is not obliged to notify an employee of the employer's proposal to end the employee's employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee seeking and being entitled to receive an explanation for the dismissal at the time when notice of it is given.

...I consider that an employer, upon giving notice of termination of an employment relationship in reliance on s 67B, is not entitled in law to refuse to give an explanation for such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead or deceive the employee.⁶

⁶ n3 at [81] and [82]

[28] Nor do I accept the second part of Maxam's submission with regard to Ms Mann's failure to provide evidence of disadvantage she suffered from her employer's failure to provide reasons for the termination of her employment upon her asking. Ms Mann had recently returned from a short period of sick leave and suspected her employer had decided to terminate her employment on health grounds. She was greatly upset by this and by not being made aware of the reasons for her termination. I accept her distress over the notification of the termination of her employment was in no small part due to not having her questions answered about the reasons for it. This led to Ms Mann accepting Mr Cromie's offer to leave the workplace immediately rather than having the opportunity to work out her period of notice and depart in a less agitated state of mind.

[29] I find Ms Mann does have a personal grievance based on her employer's failure to provide the information she requested on 12 February 2016.

Can Ms Mann raise a personal grievance for unjustifiable dismissal?

[30] Counsel for Ms Mann's submissions on this issue relate to the invalidity of the trial period provisions and the defective nature of the notice provided. I have already found the trial period provisions were valid and the notice of termination was effective. It follows therefore that Ms Mann is precluded from bringing a personal grievance for unjustifiable dismissal by the provisions of s.67B(2).

[31] Even if I were wrong about that, I would find Ms Mann had not raised a grievance for unjustifiable dismissal within the statutory timeframe as set out in s.114 of the Act. When raising her personal grievance by letter dated 29 February 2016, Ms Mann made it clear the grievance was for unjustified disadvantage. She reiterated that in an email of 18 March 2016 in response to Mr Cromie's written reply to her raising of a grievance stating her grievance was "*NOT Unjustified Dismissal...*".

[32] Ms Mann's first statement of problem, lodged on 28 April 2016 referred to her personal grievance for "*Unjustified Disadvantage*". She did not refer to a personal grievance for unjustifiable dismissal until she lodged an amended statement of problem on 19 June 2017. That was 16 months after her employment had been terminated. As noted earlier, Maxam made clear in its response that it did not consent to the raising of the personal grievance for unjustified dismissal, and noted Ms Mann

had not applied to the Authority for leave to raise the personal grievance outside the statutory period.

[33] Ms Mann, through counsel, made oral submissions that there were exceptional circumstances such that the Authority should allow the late raising of the unjustifiable dismissal grievance. These were that Ms Mann had taken no legal advice before raising her grievance, and had not been provided with reasons for the termination of her employment. I find neither of those factors constitutes exceptional circumstances.

Determination

[34] Ms Mann's employment agreement contained a valid trial period provision and her employment was terminated in accordance with that provision. She is accordingly not entitled to bring a personal grievance for unjustifiable dismissal.

[35] She has a personal grievance for unjustifiable action by her employer causing her disadvantage in her employment. That arose from the employer's refusal, when asked to provide reasons for the termination, on the day it gave Ms Mann notice under the trial period provision. I find Ms Mann did not contribute to the situation that led to her personal grievance.

Remedies

[36] Ms Mann seeks wages and compensation for hurt and humiliation in respect of her personal grievance. Given my finding that the termination of her employment was lawful under the terms of the trial period provisions of her employment agreement, I do not consider she has lost remuneration as a result of her personal grievance.⁷ I therefore decline to make an award of wages.

[37] I have accepted Ms Mann was distressed at her employer's refusal to give her reasons for the termination of her employment when she requested them on 12 February 2016. I find it likely that distress led to her not working out her notice period and to her leaving the workplace in an upset and agitated state. I find a modest award of compensation to be appropriate.

⁷ Section 128 of the Act

[38] Maxam Corporation Limited is ordered to pay Ms Mann the sum of \$1,500 as compensation under s.123(1)(c)(i) of the Act.

Costs

[39] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority