

[3] There is dispute between the parties about the extent of the negotiations around the terms of the employment agreement, with Mr Newbold saying in his evidence that he understood that he was continuously employed and the evidence from Interlink firmly advancing the contrary view. It is common ground, however, that the employment agreement between the parties which was presented by Interlink on 1 April 2009 and signed by Mr Newbold on 3 April 2009, contain provisions in reliance on the *trial period* provided for in ss.67A and 67B of the Act. It is also clear that although Mr Newbold had the opportunity to take advice before he signed the employment agreement, he chose not to do so.

[4] On 26 June 2009, Interlink invited Mr Newbold to a meeting, the terms of which are in dispute. However, it is common ground that Mr Newbold was asked to return his company car and to consider a commission-only selling arrangement. Interlink says that in addition to those agreed matters, it made clear its intention to terminate Mr Newbold's employment in reliance on the *trial period*.

[5] In a practical sense, by close of business on Tuesday, 30 June 2009, the employment agreement had come to an end, Mr Newbold having previously rejected Interlink's suggestion that he work on a commission-only basis.

[6] The essence of Mr Newbold's complaint is that Interlink is not able to rely on the *trial period* provisions enacted in ss.67A and 67B and that accordingly s.103A applies; in relation to the disadvantage claim, Mr Newbold's contention is that in recruiting another individual to fulfil Mr Newbold's role, Mr Newbold was disadvantaged by an unjustified action of Interlink.

Issues

[7] The Authority will need to decide from its investigation:

- (a) If Mr Newbold has any justiciable claim to have been unjustifiably dismissed; and
- (b) If Mr Newbold has been disadvantaged by unjustified acts of Interlink.

Was Mr Newbold unjustifiably dismissed?

[8] I am satisfied Mr Newbold was not unjustifiably dismissed from his employment by Interlink. There is no dispute between the parties that the written

employment agreement contains provisions drafted in reliance on the new statutory provisions enacted by the Employment Relations Amendment Act 2008. However, Mr Newbold contends that he was subject to an employment agreement which provided for continuous employment. Mr Bathurst of Interlink is very clear about the nature of the employment offered and his evidence is that at both the interviews between himself and Mr Newbold, the fact of a *trial period* was referred to by him. Indeed, Mr Bathurst goes further and contends that Mr Newbold agreed to the trial period.

[9] Whatever the standard of the oral communication between the parties, the written communications are very clear indeed. Mr Bathurst, in confirming Mr Newbold's employment in an email dated 26 February 2009 (contemporaneously with the initial interviews between the principal protagonists), refers specifically to a trial period and, more importantly, in the subsequent employment agreement the matter is clearly disposed of. Clause 1 of the employment agreement is in the following terms:

This agreement shall come into effect on 01/04/2009 and shall remain in force until renegotiated after your three month trial period on June 30th or terminated pursuant to any provision of this agreement."

[10] Clause 5 of the employment agreement, after referring broadly to the probationary or trial period, concludes with this sentence:

The employee may not take a personal grievance for dismissal during the trial period.

[11] Mr Newbold says that he trusted Mr Bathurst and did not think he needed to seek advice about the meaning of these provisions or indeed the employment agreement generally. Mr Bathurst of course maintained throughout the investigation meeting and in the previous exchanges between the parties that he had been clear about the nature of the engagement and that Mr Newbold knew or ought to have known what was involved. I am satisfied that the inclusion of those provisions just referred to quite clearly identified the nature and extent of the kind of employment being offered. It may be that it is not elegantly expressed, but I am satisfied that any reasonable person, reviewing the document, would understand the meaning to be derived from the material I have quoted in full above. Mr Newbold could have sought legal advice and indeed there is no suggestion that he was discouraged from doing so; actually, the evidence discloses quite the reverse. Mr Newbold made a conscious

decision to rely on his own skill and judgment. In that regard, I note that Mr Newbold is a mature man with significant experience in sales at a senior level and it is not unreasonable to expect that, if he chose to rely on his own skill and judgment, then that was a decision freely and properly made.

[12] In his complaint about the nature of the subject employment agreement, Mr Newbold particularly identifies the fact that whereas the statutory provision refers to 90 days the employment agreement provision refers to three months. Of course, although broadly the same, there is a small difference in the provisions. Interlink counters that submission by pointing out that Mr Newbold was employed on 1 April 2009 and given notice of termination on 26 June 2009, an elapsed time of 87 days. However, there is dispute about whether there was indeed a termination in the discussion on 26 June; Mr Newbold contended that he was not properly notified of the termination of the employment agreement at that discussion. However, even Mr Newbold's evidence recalls Mr Bathurst saying:

*Its coming up to your 90 days; we need to talk about your review.
Your position is costing too much; ... I want the vehicle back in the
factory by Tuesday night*

[13] Then at 3pm on 30 June, Mr Newbold's evidence is that he was told to hand over all company property including the keys to his company vehicle and that Mr Newbold himself regarded his employment from that moment as at an end.

[14] Of course, if Mr Newbold is able to satisfy the Authority that the provision in dispute is not a *trial period* within the meaning of s.67A but simply a probationary period in terms of s.67, then the ordinary rules relating to personal grievance would apply. It is suggested that Interlink failed to specify a period of 90 days or less in the employment agreement and failed to give proper notice to Mr Newbold. As to the second allegation, I am satisfied it cannot be sustained on the evidence. Even on Mr Newbold's recollection of the 26 June 2009 meeting, it seems to me that any reasonable person would assess the words Mr Newbold remembers being spoken by Mr Bathurst as plain evidence of a trial period and the conclusion of the trial period and the employer's unwillingness to contemplate a continuation of the employment arrangement in its present form.

[15] Of course, Mr Bathurst's evidence goes further; Mr Bathurst is adamant that Interlink could not afford the position and would not be able to extend Mr Newbold's

employment beyond the end of the trial period and that Mr Newbold was told this. Mr Bathurst went on to depose that he gave Mr Newbold the opportunity to accept the commission-only selling basis as an alternative to the job previously provided on the trial period, and that if Mr Newbold did not want the commission-only selling position, then the employment relationship would end effective 30 June 2009.

[16] I am satisfied on the evidence before me that even on Mr Newbold's evidence, it is plain that the meeting of 26 June 2009 resulted in the termination of the employment agreement on that date, thus complying with the terms of s.67B. However, for the avoidance of doubt, I make clear my considered view that Mr Bathurst's evidence of the discussion is to be preferred over Mr Newbold's. Certainly, Mr Bathurst's recollection of the meeting is absolutely consistent with Mr Newbold's and the only difference between the two men is Mr Bathurst's recollection that he was more specific about termination than Mr Newbold remembers.

[17] As to the other matter raised by Mr Newbold, the question of whether the provision itself is consistent with the statutory enactment, the issue here is whether a provision which talks of three months trial is consistent with a statutory provision which refers to:

a written provision that states, or is to the effect, that for a specified period (not exceeding 90 days)

[18] The factual position in the present case is that the trial period commenced on 1 April 2009 and given that two of the three months in which the trial period was to run were 30 day months, the total elapsed time for the three month trial period, as a matter of fact, would have been 91 days. Interlink clearly intended that its provision conform with the law. It took advice. It changed the terms of its standard in-house employment agreement to meet the new circumstances. I have already noted that the drafting is not elegant. Plainly, the provision ought to have referred to 90 days rather than three months, but the intention is plain enough if only from the final sentence of clause 5 of the agreement which makes clear that a personal grievance may not be taken during the trial period. That view is supported by clause 1 of the agreement which contemplates renegotiation **after** the trial period **or** termination.

[19] I feel able to conclude that the provision in the employment agreement is in substantial compliance with the statutory enactment whose protection it sought. The

first reason for this conclusion is that the statute contemplates a written provision that *states, or is to the effect, that ...* a trial period not exceeding 90 days may be created with special consequences. The provision I have just quoted is disjunctive, that is, it offers the option of a stated 90 days trial period **or** a provision **to that effect**. I hold that the provision in the Interlink agreement had the same effect as a 90 day trial period.

[20] I make this deduction because, as I have noted above, the maximum extent of the *non compliance* was one day over the three month period in question. Further, the evidence before the Authority is plain that Interlink amended its standard employment agreement to take advantage of the new statutory enactment. Mr Bathurst satisfied me that he had only agreed to employ Mr Newbold as a sales manager precisely because this was a trial period within the meaning of the new statutory enactment. Mr Bathurst also satisfied me that he sought the protection of the new provision and that Mr Newbold knew what he was being offered, and agreed to it.

[21] In that last regard, I am clear that I prefer the evidence of Mr Bathurst to that of Mr Newbold who maintained throughout that he thought he had continuous employment. But that claim flies in the face of the clear words in the agreement, especially clauses 1 and 5, and the fact that Mr Newbold, a senior and experienced commercial man, considered the agreement for 48 hours and then signed it.

Was Mr Newbold unjustifiably disadvantaged?

[22] Mr Newbold's argument about disadvantage revolved exclusively around his contention that a young Brazilian woman had been hired by Interlink in replacement of himself after his position had been brought to an end by Interlink. I am satisfied on the evidence before the Authority that Mr Newbold is mistaken about the factual position. I am satisfied with Mr Bathurst's evidence that the new employee was recruited as a consequence of a long term strategy which Interlink had been pursuing and which had its genesis before Mr Newbold was even hired.

[23] In any event, given that the effect of the earlier decision I have made is to bring Mr Newbold's employment to an end by a reliance on the new statutory enactment, it is difficult to see how he could suffer disadvantage in Interlink subsequently employing another individual. On the facts before the Authority, the new staff member is not employed in the same capacity as Mr Newbold was and had

been pursued actively by Interlink since before Mr Newbold's appointment was even made.

Determination

[24] For the reasons advanced earlier in this determination, Mr Newbold's claims fail.

Costs

[25] Costs are reserved.

James Crichton
Member of the Employment Relations Authority