Employment Court of New Zealand

Smith Crane and Construction Limited v Hall [2015] NZEmpC 82 (4 June 2015)

Last Updated: 11 June 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 82

EMPC 263/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SMITH CRANE AND CONSTRUCTION LIMITED Plaintiff
AND	ANDREW HALL Defendant

Hearing:	2 May 2015 (heard at Christchurch)
Appearances:	T McGinn, counsel for the plaintiff P Brown, counsel for the defendant
Judgment:	4 June 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Andrew Hall is an experienced civil and structural engineer who specialises in piled foundations and the underpinning of properties which have subsided. In late 2013 he was recruited from England to a position in Christchurch with Smith Crane and Construction Limited (SCC) as a Senior Piling Project Manager. He commenced work in that role in January 2014.

[2] The first of two questions for resolution by the Court is whether there was a binding agreement between the parties that Mr Hall's employment was subject to a

90-day trial period provision (trial provision). If the Court finds there was no such agreement, the second question is whether Mr Hall represented he would accept a written trial provision with the consequence that he is now estopped from contending

otherwise.

SMITH CRANE AND CONSTRUCTION LIMITED v ANDREW HALL NZEmpC CHRISTCHURCH [2015] NZEmpC 82 [4 June 2015]

Background

[3] Mr Hall raised a personal grievance which was considered by the

Employment Relations Authority (the Authority).1

[4] The Authority began its determination by summarising the circumstances in this way:

1. ... A letter of offer emailed to [Mr Hall] referred to an attached individual employment contract ... which contained a 90-day trial period clause.

2. He accepted the offer of work by counter-signing the written letter of offer and returning it by email to SSC on about 17 September 2013. Mr Hall did not sign and return the [individual employment agreement] before he started work.

3. Mr Hall commenced work in Christchurch on 13 January 2014. On

11 February 2014 Mr Hall and Tim Smith, the managing director of SSC, signed the [individual employment agreement] after it was discovered that

Mr Hall had not already signed it. Mr Hall was dismissed by Mr Smith as at

8 April 2014 in reliance on the 90-day trial period provision in the

[individual employment agreement].

4. Mr Hall says that the 90-day trial period was not valid and he has the right to bring a personal grievance claim for unjustified dismissal. In the alternative, he says that the way in which he was dismissed was an unjustified disadvantage and demonstrated bad faith on SCC's part. ...

[5] After considering the relevant case law, the Authority determined that Mr Hall was an employee of SCC before he and the company signed the individual employment agreement (IEA) which contained the trial provision. At the time the trial provision was agreed in writing, Mr Hall was an employee who had been previously employed by SCC. Accordingly, the trial provision was not binding because s 67A(3) of the Employment Relations Act 2000 (the Act) provides that the section applies only where an employee has not been previously employed by the employer.

[6] Turning to the question of whether the way in which Mr Hall was dismissed was an unjustified disadvantage and demonstrated bad faith on the part of the

employer, the Authority concluded that in deciding to terminate Mr Hall's

1 *Hall v Smith Crane & Construction Ltd* [2014] NZERA Christchurch 146.

employment the Managing Director, Mr Smith, did not comply with any of the basic procedural requirements of s 103A of the Act.

[7] The Authority concluded that Mr Hall had not been informed of Mr Smith's concerns about his performance and had no opportunity to respond to those concerns or to improve his performance. The Authority concluded that Mr Smith could not have taken Mr Hall's explanations about his concerns into account when making the decision to dismiss, as he had not given Mr Hall any chance to respond. Those defects were not minor and they resulted in Mr Hall being treated unfairly. In the absence of a valid trial provision a fair and reasonable employer could not have acted in the way SCC did and could not have made the decision to dismiss Mr Hall on performance grounds. It was accordingly determined that the dismissal was

unjustified.2

[8] In its determination as to remedies, the Authority held that SCC must pay Mr Hall $31,326.91 gross in lost remuneration, $7,000 compensation for humiliation, loss of dignity and injury to feelings, and $766.75 reimbursement for variation of Work Visa costs. Costs relating to the investigation meeting were reserved.

[9] SCC's challenge is limited to the question of whether there was a binding

90-day trial arrangement – either in accordance with the provisions of s 67A of the Act, or by application of principles of estoppel. If the Court does not allow its challenge on either ground, SCC will accept the Authority's determination regarding the procedural irregularities of the dismissal and the remedies associated with it.

[10] At the hearing of the challenge, the Court received evidence from Mr Badderly, Civil Contracts Manager for SCC who was directly involved in recruiting Mr Hall; Mr Smith, Managing Director of the company who gave evidence as to his interactions with Mr Hall; and Ms Ward, Administration and Payroll Manager who had dealings with Mr Hall after he commenced his employment. Mr Hall also gave evidence, explaining his understanding of the

process which led to him accepting the offer which was made by SCC when he was

2 At [31]-[32].

living and working in the United Kingdom (UK), as well as the events following his relocation to New Zealand up until his dismissal. The relevant documents which were exchanged between the parties are important and these were introduced as evidence.

[11] In order to determine the issues raised in the challenge, I must first make findings as to relevant events, and set out the parties' evidence on key issues.

Chronology

[12] In 2013 Mr Hall made a decision to seek out employment in New Zealand with the intention of relocating his family and attaining a better quality of life and work balance. He contacted a recruitment company which specialised in recruiting civil engineering staff who put him in touch with SCC, who at the time were seeking a Piling Manager. SCC was advised that Mr Hall was intending to live and work in New Zealand.

[13] Mr Badderly met Mr Hall in the UK on 9 July 2013; he provided an overview of the proposed role as Piling Manager. It was his conclusion that Mr Hall was keen to relocate and work for the business in New Zealand. Matters were left on the basis that a possible offer would be discussed with the Managing Director and a formal offer could potentially follow.

[14] On 3 September 2013, Mr Badderly sent Mr Hall an email, annexed to which was a signed letter of offer. It referred to an "attached employment contract", though such a document was not in fact annexed. What was attached was technical information relating to a drilling rig relevant to a particular drilling contract in which SCC was engaged.

[15] Mr Hall and Mr Badderly then spoke by telephone to discuss the offered salary of $125,000 NZD. He wished the figure to be increased to $150,000 NZD. Mr Badderly suggested a salary of $145,000 NZD, but indicated that SCC would be in a position to meet the salary expectations at the time of an anticipated review in September 2014. This compromise was agreed to. Mr Badderly said he would send a revised offer together with the company's standard contract. He told Mr Hall that

all staff were hired according to the same agreement. The terms of the company's

standard agreement were not discussed at the time.

[16] On 6 September 2013, Mr Badderly sent an email to Mr Hall. The subject of the email was "Job Offer". In that email he said he hoped the attached offer was "more palatable", and that he wished to have confirmation by return. He then said that also attached was a copy of the "standard individual employment contracts (sic)".

[17] The amended letter of offer stated:

Re: Senior Piling Project Manager

Thank you for your interest and application for the above position.

As discussed with you during my recent visit to the UK and considering your experience, we would like to offer you the position of the Senior Piling Project Manager for our Piling Division with Smith Crane and Construction Ltd based in Christchurch, New Zealand.

Details of employment would be as follows:

• A commencement date of as soon as practicable to suit your personal circumstances and on presentation of your NZ Work Permit.

• Your usual hours of work would be 7.00am to 5.30pm, five days per week, Monday to Friday (50 hours per week) however you are expected to work hours required to manage the operation as described in the

attached job description.

• You would be required to fill in a weekly timesheet detailing hours worked and appropriated to relevant job / cost centres.

• You would be employed under the attached individual agreement of employment except where expressly modified by this letter.

• Remuneration: we offer you a commencing salary of $145,000 NZD, paid in weekly increments.

• Company vehicle and mobile provided for work purposes.

• Smith Crane & Construction will reimburse you for your NZ Immigration to a maximum of GDP 1,000.

• Smith Crane & Construction will pay for economy airfare to NZ, if you leave the employment of SCC within one year, this flight is to be

reimbursed to SCC.

This position is full time and will require 100% dedication to the tasks at hand.

You are not to have any other business or employment activities whilst employed by the company without my written approval.

Should you find the terms and conditions of the above letter and attached employment contract acceptable please sign one copy and return to our Johns Rd office and keep one copy for your own records.

Should you wish to discuss any of the above prior to signing the contract please call and arrange a time to discuss with myself, we are now seeing a significant increase in piling and foundation work taking off for the Christchurch rebuild.

We look forward to the opportunity to work with you in the Christchurch operation and hope that your time with us is long, enjoyable and mutually beneficial.

[18] The letter was signed by Mr Badderly. The attached IEA which was unsigned by SCC, included the following clause:

2. Commencement of Employment & Trial Period; Position

Description, Work Location.

a) Employment shall commence on except that if any reason you are not able to physically commence work on that day your employment shall commence on the first day you actually work.

b) Secondary employment – this is a full-time position. The employee is expected to devote his/her full energies to the position and for this reason together with a need to protect the [company's] commercial interest the employee is not permitted to engage in any business activity or secondary employment without the companies prior written consent during the term of this employment contract. Further the company shall have the right to require the employee to curtail or restrict any business activity or secondary employment outside work hours, which causes the impairment of, is in direct conflict with, or reduces available energy for the duties and responsibilities of the employee to this position.

c) Your employment is subject to a 90-day trial period. You agree that during this period we may decide to terminate your employment by giving you not less than one week's notice. If we do terminate your employment at this time you will not be entitled to bring a personal grievance or other legal proceeding in respect of the dismissal.

d) You are employed in the position of .

e) You will be required to work from our premises situated at

484 Johns Road, Christchurch. On occasion we may require you to work in other areas of the country.

[19] Schedule 1 of the contract was a position description which had not been completed. It did not give any particulars as to the role involved and did not contain the name of the person to whom the employee would report. It required the employee to acknowledge that he had read and understood the company's policies

and procedures. These documents had not been provided to Mr Hall to this point, and were not provided to him before he commenced employment in New Zealand.

[20] Schedule 2 of the contract required details of the employee, including an account number for the direct crediting of wages, an Inland Revenue Department number, tax code information and whether the employee was enrolled with KiwiSaver. This schedule had not been completed.

[21] Schedule 3 referred to company property. It stated that the employee had been advised that upon leaving SCC all personal protective equipment was to be returned before any final pay would be released, with the employee being required to indicate whether that advice had been given. Other information relating to the provision of property to the employee was also provided. This schedule had not been completed.

[22] At this stage, no advice was given by SCC to Mr Hall that he was entitled to seek independent advice about the intended agreement. The provision of such advice is a mandatory requirement falling on an employer under s 63A(2)(b) of the Act.

[23] On 10 September 2013, Mr Hall sent an email to Mr Badderly acknowledging the receipt of the revised offer, and stating that he needed to "look into the finer details"; he said he would revert shortly.

[24] On 12 September 2013, Mr Hall sent a further email to Mr Badderly stating that he had given the amended offer further consideration, and would be happy to accept the current proposal with the addition of a salary review following six months employment and the consideration of a performance-related bonus after 12 months.

[25] In response to this email, Mr Badderly telephoned Mr Hall on either 16 or

17 September 2013. He explained that the company did not provide performance bonuses but that they would agree to review Mr Hall's salary and performance in September 2014. Mr Hall said he would accept the offer on that basis. He indicated he would return it shortly.

[26] On 18 September 2013, Mr Hall returned the job offer letter, having signed it the previous day. In his covering email he referred to the fact that he was attaching a signed copy of the job offer letter, and that as had been discussed previously he hoped to be commencing employment in the New Year. He did not say he was attaching the signed IEA. In fact he had not signed it and did not return it with his email.

[27] Mr Badderly told the Court the letter of offer was the "overriding document that included the individual employment contract. Once the job offer was signed [he] accepted that everything else behind that document was also accepted and signed."

[28] Mr Hall explained that he initially thought the standard IEA was relevant to himself and so wrote his name on it. Upon reading it further he decided that it was a standard document that had yet to be completed by the employer. He did not consider it appropriate to sign the document, because there were aspects of it that he did not believe would apply to him, such as standard terms relating to the obtaining of a tea break if his supervisor approved this, and information which he could not give in the schedules to the standard agreement, including his commencement date. He also noted that there was a trail provision for 90-days which he doubted was applicable to him. In summary, he considered that parts of the IEA were relevant to him, and parts were not.

[29] On 25 September 2013, Mr Badderly completed an Immigration New Zealand (INZ) form, as employer, to support Mr Hall's Work Visa application. It referred to entries in the form regarding an "attached offer of employment and standard conditions", and that the duration of the job was "permanent". This paperwork was forwarded to Mr Hall who provided it, together with the information he was required to provide, to the office of INZ in London. Mr Hall confirmed in evidence that he provided a copy of the signed letter of offer as well as the unsigned standard IEA on the basis that he needed to send everything he had to INZ.

[30] He interpreted the information forwarded by SCC as confirming that the intended position would entail a permanent, full-time role in accordance with a

Central Skills Register operated by INZ. He said that the INZ form which SCC had completed assured him that he need have no further concerns regarding the trial provision, or indeed as to any other aspect of the standard IEA.

[31] Mr Hall advised Mr Badderly by email on 5 October 2013 that his Visa had been submitted to INZ; and on 2 November 2013 that it was completed and received by him that day.

[32] In November 2013, Mr Hall met Mr Smith who was in the UK purchasing new plant equipment. They discussed the introduction of a particular piling system to New Zealand, and Mr Hall's experience in that regard. Equipment was acquired with which he was familiar. There was no discussion as to terms and conditions of Mr Hall's employment.

[33] Mr Hall commenced work for SCC on 13 January 2014. Some four weeks later, he realised no salary payments had been made. He was concerned about this as he had financial responsibilities in the UK. He discussed this issue with Ms Ward. She advised him on 20 January 2014 that before his pay could be processed he would need to provide an IRD number. For his part, Mr Hall understood the problem was that there was no signed IEA, and that he should see Mr Smith's secretary about this. Mr Hall arranged for Mr Smith's secretary to finalise an IEA for him by entering his name and position in the text of the document; and he also completed schs 1 and 2 as best he could. He said this document was completed in a hurry. Although the IEA still contained a trial provision because it was part of the standard document used by SCC, Mr Hall did not consider it to be relevant. This was because he was comfortable in his job, he had been provided with a company car, and had now moved out of accommodation provided by the company to accommodation which he had apparently arranged. He felt he was fitting in well. His immediate concern was to have the agreement signed so that he would receive his salary payments.

[34] Clause 23(a) stated:

You agree that this agreement replaces any previous agreement, whether verbal or written, between both of us.

[35] He placed the document which he had prepared on Mr Smith's desk on

11 February 2014, so it could be signed. Because this had not occurred by

17 February 2014, he sent an email to Mr Smith asking him to sign it and then provide it to Ms Ward so that he could receive salary payments. He confirmed he was owed wages because he had commenced employment on 13 January 2014. As a result Mr Smith rang him and they both signed the document in his office. This dealt with the wages issue.

[36] On 31 March 2014, Mr Smith wrote to Mr Hall, stating that the company was invoking its right to terminate his employment under the trial provision. One month's notice was given. In the letter Mr Smith said that he had become increasingly concerned about Mr Hall's work performance, and this led him to conclude that Mr Hall was not suitable for a permanent role so that it was appropriate to exercise a right to terminate.

[37] As he did not have time to meet with Mr Hall to give him a letter of termination, he left it on Mr Hall's desk in a sealed envelope.

[38] Mr Hall then asked to meet Mr Smith to discuss the position and find out why he was being terminated. Such a meeting occurred on 2 April 2014. Performance issues were said to have precipitated the termination, but Mr Smith confirmed that he had relied on the trial provision to effect it.

The parties' submissions

[39] The essence of the plaintiff's submissions were as follows:

a) Although Mr Hall had not signed and returned the standard IEA with the signed offer, its terms were incorporated by the following express reference:

You will be employed under the attached individual employment agreement except where expressly modified by this letter.

Further evidence of acceptance of the terms of the standard IEA was provided by the statement in the letter of offer that if Mr Hall found the

terms and conditions of the "above letter and attached employment contract" acceptable, he was to sign one copy and return it, keeping a copy for himself.

It was submitted that his acceptance of the terms of the standard IEA were confirmed by him providing it along with the letter of the offer to INZ; then commencing employment without raising any further issue; and by generating a further version of the agreement containing reference to the trial period, which he had signed.

b) Mr Hall was familiar with legal contracts, their understanding and implementation, and claimed specialisation in contract law when promoting his skills as a Project Manager. Standard form contracts were common in the industry. In those circumstances there could be no room for misunderstanding. His indication that he needed to look into the finer details was a reference only to the financial aspects of the offer. His statement that he did not sign the standard IEA as it was incomplete and not tailored to his circumstances does not explain why many of the provisions which he thought were not acceptable, including the trial provision, were subsequently included in the document which was indeed signed in February 2014.

c) Counsel then referred to the decisions of this Court of *Smith v Stokes Valley Pharmacy (2009) Limited*3 and *Blackmore v Honick Properties Limited*,4 both being judgments of Chief Judge Colgan. Emphasis was placed on the finding in *Smith* where the parties did

not intend to be bound by the terms of a draft written agreement until they executed that

agreement by affixing their signatures, which occurred after employment commenced.5 Counsel submitted that the present case was different. Counsel further submitted there was an apparent acceptance

by the Court in *Blackmore* that an agreement could be concluded

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

4 *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

5 *Smith v Stokes Valley Pharmacy*, above n 3, at [101].

otherwise than by signing.6 Counsel said that whilst a signature on a contractual document provides irrefutable proof of acceptance in the absence of fraud and unfair bargaining type issues, whether an agreement has actually been concluded is a question of evidence. It was also submitted that *Blackmore* involved two findings that did not apply in the present case. The first finding was that the plaintiff was an existing employee when he signed the agreement. The second finding was that unfair bargaining had occurred because the employee was not advised of his right to seek independent advice about the intended agreement; the Court accordingly determined that the trial provision should be set aside under s 68 of the Act. It was again submitted that the present case was different.

d) In short, it was contended for the company that the language used in the letter of offer was such that it should be concluded that the terms of the IEA were incorporated; to determine otherwise would infringe basic contract law principles.

e) Alternatively, in the event that it was determined Mr Hall was an existing employee at the time he agreed to the trial provision so that the plaintiff was prevented from availing itself of the protections afforded by ss 67A and 67B, it was submitted Mr Hall should be estopped from denying his acceptance of the provision prior to commencement of employment. This is because representations were made as described above which SCC relied on and detriment would be suffered if the belief or expectation was departed from which would be unconscionable. Reliance was placed on dicta of Chief Judge Colgan in *Harris v TSNZ Pulp and Paper Maintenance Limited* which demonstrated the application of conventional principles of estoppel in

this jurisdiction.7

[40] Counsel for Mr Hall submitted:

6 *Blackmore v Honick Properties Ltd*, above n 4 at [70].

7 *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43 at [75]- [76].

a) Mr Hall did not sign an IEA prior to the commencement of his employment. An agreement containing a trial provision was signed, but that did not occur until approximately four weeks after the commencement of employment. It was also contested that the signed letter of offer should be construed as incorporating the terms of the standard IEA.

b) The letter of offer provided Mr Hall with a choice as to whether he would sign the standard IEA, because the instruction to return such was conditional on him determining whether the letter of offer or the attached employment contract were acceptable.

c) Mr Badderly had assumed that acceptance of the job offer amounted to acceptance of the IEA. But in the circumstances silence on the part of Mr Hall on the status of the IEA, could not amount to acceptance.

d) Counsel then referred to the authorities already mentioned, placing particular emphasis on the following dicta:

• The first was found in *Smith* where the Court said:8

[100] On the other hand, the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound by the obligations and benefits contained in the agreement. Conversely, until that symbolic but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.

[101] As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they would each be bound by the draft written agreement unless until that was executed by the writing of their signatures.

• The second was found in *Blackmore* where the Court said:9

8 *Smith v Stokes Valley Pharmacy Ltd*, above n 3.

9 *Blackmore v Honick Properties Ltd,* above n 4, at [71].

... Certainty and predictability for employers wishing to use trial periods are important. This will ensure if they are careful that such agreements are entered into before, and not after (even shortly after) work commences.

Counsel submitted that these conclusions were directly applicable in the present circumstances.

e) With regard to the claim in estoppel, an analysis of the facts suggested the statements made by Mr Hall were well short of amounting to a representation. Given the absence of signing on the standard IEA when the letter of offer was returned, it was not reasonable to conclude that the employer relied on any apparent representation in the counter-signed letter of offer. The short point was that SCC

knew it needed to obtain a signed document, as was evidenced by the fact that Mr Smith eventually did sign a copy of the document. However this did not occur prior to commencement of Mr Hall's employment.

Legal issues

[41] The first question for determination centres on the requirements of s 67A of the Act which relevantly 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.

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

...

[42] In *Smith*, the Court considered the legislative history, referred to statements made by the Minister of Labour during the second reading, and held:10

[47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing.

[48] 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.

[43] Later the Court observed:

[83] The new sections are neither simple nor the very 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 with. Significant obligations of good faith dealing remain upon employers.

[44] There is dicta to similar effect in *Blackmore*.11 I respectfully adopt the conclusions reached in both judgments.

[45] A key issue is whether the parties intended that they would be bound by the standard IEA only if it was executed by the writing of signatures. This is an orthodox contract interpretation point, in respect of which it is useful to set out the relevant principles as summarised by Tipping J in *Vector Gas Limited v Bay of Plenty Energy Limited:*12

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required

10 *Smith v Stokes Valley Pharmacy Ltd*, above n 3.

11 At [37]-[41].

12 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444 (SC) (citations omitted).

interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the Court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

...

[22] Nor does the objective approach require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean.

[23] ... Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose. ...

Was there a binding agreement as to a trial provision?

[46] I consider first the question of whether the parties intended that the standard IEA would be incorporated by the signing of the letter of offer. In doing so, it is necessary to begin by considering the context.

[47] The first letter of offer which was sent by Mr Badderly on 3 September 2013 did not attach the standard IEA, although that letter referred to it as being attached. It was obvious that the letter of offer was the primary document; it contained the essential terms for consideration.

[48] After the parties had negotiated the salary issue, Mr Badderly sent a further version of the letter of offer, and on this occasion he specifically stated that he was also attaching the "standard" IEA. It was not completed in the various respects already mentioned.

[49] The letter of offer stated that Mr Hall "would" be employed under the attached IEA except where expressly modified; it indicated a potential future

scenario. Later in the letter there was a conditional indication that made it clear that "if" Mr Hall found the terms and conditions of both the letter and the attached IEA acceptable, he was to sign "one copy". The next sentence referred to the possibility of discussing queries if any existed prior to the "signing of the contract".

[50] I find that when the letter is considered objectively, SCC intended that

Mr Hall would need to sign:

a) The letter of offer, which SCC had signed. It contained provision for Mr Hall's signature. That document was to be signed and returned immediately.

b) The IEA, which also contained provision for the signature of both parties; but it had yet to be completed. As Mr Badderley stated in his email, discussion as to its contents could occur, and I find, negotiation. Once that occurred, both parties would sign it.

[51] Context confirms that intention. Mr Hall, to the knowledge of Mr Badderly, was about to take a very significant step. He owned and operated a business which had a turnover of two million GBP. In order to take up a position in New Zealand following his relocation there, it was clear that operation would cease. The taking of the position offered to him by SCC was obviously significant. These circumstances reinforced the need to ensure that any terms and conditions of employment – particularly a provision that his employment could be terminated without cause after only 90 days – was specifically acknowledged by signing, as was anticipated by the form of agreement which contemplated execution by signature.

[52] I conclude that the letter of offer must be understood as meaning what Mr Hall thought it meant. That is that he would in the future be employed by SCC under an agreement, the form of which was attached, but which needed to be completed and then signed by both parties. If he found the terms and conditions of both the letter and the attached IEA acceptable, he should return a copy of each. That he did not return a copy of the signed IEA meant that the parties had not yet

agreed to the terms contained in it. They could be finalised once Mr Hall arrived in

New Zealand. Mr Badderly's conclusion to the contrary was incorrect.

[53] The circumstances of the provision of documents to INZ do not lead to a different conclusion. The employer attached a copy of the letter of offer and the unsigned IEA to the requisite form, indicating that Mr Hall was to be a permanent employee; that was consistent with Mr Hall's understanding of the situation, since he had not acknowledged a 90-day trial limitation. That he provided a copy of the letter of offer and unsigned IEA was not intended to indicate a position which was any different from that which had applied previously. He provided the two documents which had been given to him relating to his intended employment, although he had yet to sign the proposed IEA as the document itself anticipated.

[54] Since it was SCC which had the responsibility of drafting and finalising an employment agreement with Mr Hall, so also was it SCC's responsibility to follow-up that issue with Mr Hall. No concerns on this issue were raised with Mr Hall by Mr Smith when they met in the UK in November 2013. When Mr Hall arrived in New Zealand in January 2014, he commenced work without being asked to sign the IEA by any representative of the employer.

[55] As I determined earlier, the position was regularised by Mr Hall himself in early February 2014, when he found that he was not being paid. He understood this was because there was no IEA in place, and that was not an unreasonable conclusion. I accept that he completed the document in circumstances which he considered urgent so as to ensure he would receive his outstanding salary payments. In doing so he signed a document which was more complete than the standard IEA which had been provided to him previously, although it still contained a 90-day trial provision. The relevant context however related to the importance of having a signed document so that there was no focus on this particular provision.

[56] Significantly the document provided that it would replace any previous agreement between the parties, whether verbal or written. Counsel for the plaintiff argued that the document was of no force, since it was not a variation of anything that had already been agreed. I do not accept this submission. The document had

information in it over and above that which had been contained in the standard document submitted to Mr Hall previously. Furthermore, the terms of Mr Hall's employment agreement to that point were contained only in the letter of offer. The IEA now incorporated the key elements of the letter of offer. Mr Smith and Mr Hall met and signed it in Mr Smith's office, obviously intending that it would have legal consequences. I find that the document was fully effective.

[57] In summary I find that the counter-signing of the letter of offer by Mr Hall on

17 September 2013 did not incorporate the terms of the standard IEC. That document was replaced by the IEA which both parties executed on

11 February 2014.

[58] It is next necessary to consider the effect of s 67A(3) which provides that for the purposes of a trial provision, an employee must be one who has not been previously employed by the employer. Mr Hall commenced work with SCC on

13 January 2014 and became SCC's employee at that point. The document which he subsequently signed incorporating the trial provision was not signed until

17 February 2014, although it was dated seven days previously when Mr Hall had submitted it to Mr Smith for signing. At the time of signing Mr Hall was an existing employee. Consequently the trial provision was not signed in accordance with the mandatory requirements of s 67A. The trial provision was invalid. That conclusion deals with the first question raised by the challenge.

Was there an estoppel?

[59] It is well established in this Court that estoppel may operate as a cause of action in employment law, provided the employment relationship engages jurisdiction under s 161 of the Act.13 The elements of the doctrine were conveniently summarised in the recent decision of Chief Judge Colgan in *Harris* in these terms:14

[75] The equitable doctrine of estoppel applies where it would be unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to admit to act, in a matter which is now compromised. Estoppel can operate as a sword (cause of action) as well as a shield (a defence to a cause of action). An estoppel may provide a

13 *Newick v Working In Ltd* [2012] NZEmpC 156; [2012] ERNZ 510, at [28]-[59].

14 *Harris v TSNZ Pulp and Paper Maintenance Ltd*, above n 7.

remedy to prevent unconscionable conduct by another party including the

enforcement of that other party's representation made to the claimant.

[76] There are four essential constituents of estoppel:15

• a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;

• the party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppels;

• detriment will be suffered if the belief or expectation is departed from; and

• it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[60] Applying those principles to the present circumstances, the question is whether Mr Hall should be estopped from denying that he created a belief that he would be bound by the written trial provision which was contained in the standard IEA sent to him by SCC with its letter of offer.

[61] As observed by Chief Judge Colgan in *Smith* in the extract cited earlier, the introduction of ss 67A and 67B removed longstanding employee protections and access to dispute resolution and to justice.16 Any representation for estoppel purposes in the present circumstances would have to have created a clear and unequivocal acceptance of the provisions of the statute. Moreover, such a representation would have to meet all the requirements of s 67A, including the requirement that the representor had not previously been employed by the representee. The focus of analysis for estoppel purposes must be on pre-employment circumstances.

[62] It is contended for SCC that there was such a representation for several reasons. Mr Hall signed and returned the letter of offer. He provided the letter of offer and unsigned IEA to INZ as evidence of agreed terms and conditions. He

commenced employment without raising any further issues to the terms of

15 Footnotes omitted.

16 *Smith v Stokes Valley Pharmacy Ltd*, above n 4.

employment. And finally, he generated a further version of the agreement containing a trial period at his own initiative after which he signed it.

[63] My previous findings deal with these contentions. Mr Hall did not sign the standard IEA which had been given to him, and that was significant. I have held that SCC wished him to do so, but to the knowledge of managers of SCC this did not occur. Because the document was in a standard form and remained to be completed, it was a document which was in draft only, and amenable to discussion and if need be negotiation between the parties. The returning of the signed letter of offer had to be understood in that context. The sending of the documents to INZ could not and did not alter the position. Indeed, SCC were proceeding on the basis, as the company told INZ, that Mr Hall would assume a permanent position. He commenced his employment on the same basis. Finally, the signing of the IEA occurred in circumstances where there was no focus on the trial provision; the focus was on signing an agreement to facilitate outstanding salary payments. And in any event, it occurred after Mr Hall's employment had commenced; since a trial provision needed to be agreed prior to the commencement of the employment, any relevant representation needed to be made by that point.

[64] At no time was there a discussion on the issue of inclusion of a trial provision from which SCC could have concluded that Mr Hall agreed to such a provision. The circumstances of Mr Hall's recruitment were such that after due reflection he took the significant step of ceasing a business operation in the UK, left his family, and relocated to Christchurch – all to the knowledge of SCC. Those facts alone suggest it would be inherently unlikely that he would represent to his intended employer that he agreed to a 90-day trial provision – particularly when the company itself was portraying the intended arrangement as one which would be permanent.

[65] I conclude that Mr Hall did not create or encourage the asserted belief or expectation in any way.

[66] In the absence of a representation, there could be no reliance or detriment. Even were I to have concluded that the other elements of the cause of action in estoppel were made out, I would not have concluded that it would be unconscionable

to depart from the terms of the alleged representation. That is because SCC did not advise Mr Hall at any time that he was entitled to seek independent advice about the intended agreement, contrary to the mandatory obligation imposed on it by s 63A of the Act. He was an employee for the purposes of that section, and the obligation to provide that advice was in Mr Hall's circumstances a very significant one.17 It went

to the heart of a fair bargaining process.18 Consequently, it would not have been

appropriate to conclude that the company was entitled to equitable relief by way of estoppel.

Conclusion

[67] Neither of the grounds relied on by SCC have been made out. The challenge is accordingly dismissed, and the Authority's conclusions as to the way in which the dismissal was carried out, and the remedies which flow from it, stand.

[68] Mr Hall is entitled to apply for costs with regard to the challenge. Such an application should be filed with evidence within 14 days of the date of this decision. SCC may respond with submissions and evidence if any 14 days thereafter.

B A Corkill

Judge

Judgment signed at 2.20 pm on 4 June 2015

17 *The Salad Bowl Ltd v Amberleigh Howe-Thornley* [2013] NZEmpC 152, at [48].

18 *Blackmore v Honick Properties Ltd*, above n 5, at [48]. The possibility of relief under s 69 of the Act was not pleaded in this case obviating the need to make an alternative finding of the kind made in *Blackmore*.