IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 165
EMPC 169/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	STEPHEN ROACH Plaintiff
AND	NAZARETH CARE CHARITABLE TRUST BOARD Defendant

Hearing: 13 November 2017

Appearances: J Goldstein, counsel for the plaintiff
D Beck, counsel for the defendant

Judgment: 21 December 2017

JUDGMENT OF JUDGE K G SMITH

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[1] On 28 November 2016 Stephen Roach was dismissed from his employment as General Manager of Nazareth Care Charitable Trust Board. In dismissing him Nazareth Care relied on a trial provision in the employment agreement between them.

[2] Mr Roach contends that the trial provision is invalid. After raising a personal grievance with Nazareth Care he issued proceedings in the Employment Relations Authority for unjustified dismissal and sought an order pursuant to s 178(2) of the Employment Relations Act 2000 (the Act) that this matter be removed to the Court. His application was unsuccessful and he has now applied to the Court.[1]

[1] *Roach v Nazareth Care Charitable Trust Board* [2017] NZERA Christchurch 118.

Preliminary Issue

[3] This application began as a challenge to the Authority's determination as if s 179(1) of the Act applied. After discussion with counsel they accepted, in reality, it was an application for special leave pursuant to s 178(3) and should be decided on that basis. The hearing was conducted accordingly.

Agreed statement of facts

[4] There is no material dispute about what happened and an agreed statement of facts was filed for the purposes of this application.

[5] Between 2008 and May 2016 Mr Roach was employed as a Business Manager by the Cancer Society in Christchurch. On 17 March 2017, Nazareth Care advertised a vacancy for a full-time Business Manager. Mr Roach applied for that job on 18 May 2016.

[6] The job was offered to him by email on 16 June 2016 and he was sent a draft individual employment agreement. He responded by requesting an increase in the proposed salary, after the expiry of a 90-day trial period which was part of the draft agreement. On 21 June 2016 he was provided with an amended draft individual employment agreement. He signed the agreement and returned it to Nazareth Care by email on 21 June 2016. The starting date for this job was 10 October 2016.

[7] On 31 August 2016, Nazareth Care asked Mr Roach if he was interested in applying for a newly available position of General Manager. He was and an interview was conducted the next day.

[8] At the end of the interview the new job was offered to him. He accepted it subject to receiving a satisfactory written offer. The following day a draft individual employment agreement for the General Manager's job was sent to him with the same starting date, that is 10 October 2016.

[9] Negotiations for an increase in salary followed and an amended draft individual employment agreement was provided to Mr Roach by email on 5 September 2016. The next day he signed that agreement and returned it by email.

[10] Mr Roach began work as Nazareth Care's General Manager on 10 October 2016. His employment was terminated with one week's notice on 28 November 2016. Notice was paid in lieu and his employment ended that day. Nazareth Care relied on a 90-day trial provision in the employment agreement for the dismissal.

[11] On 9 December 2016, a personal grievance was raised on Mr Roach's behalf with Nazareth Care. Issue was taken with the validity of the trial provision because, among other things, he was already employed when it was included in the General Manager's employment agreement. His dismissal was said to be unjustified and remedies were sought. A few days later, on 15 December 2016, Nazareth Care responded disputing Mr Roach's right to raise a grievance of unjustified dismissal relying on the trial provision.

[12] Both employment agreements contained materially indistinguishable trial provisions. A schedule at the front of the General Manager's agreement summarised the provision as:

> Employment is subject to a trial period of 90-days, during which either party may terminate this contract by giving one week [sic] notice instead of that stipulated by clause 3.

[13] In cl 3, under the heading "Trial Period", the following is provided for:

> 3.1 The first 90-days of employment will be a trial period, starting from the first day of work.

[14] Clause 3.4 informed Mr Roach about his inability to bring a personal grievance for unjustified dismissal if he was dismissed during the trial period.

The determination

[15] As a preliminary step in the Authority Mr Roach applied for an order that the entire matter be removed to the Court to hear and determine. He made that application because, he contended, the proceeding raised an important question about whether an employee, as defined in s 6(1)(b)(ii) of the Act, is an employee for the purposes of s 67A(3). The application was based on the outcome of the legal debate being determinative of the whole employment relationship problem. Nazareth Care opposed the application.

[16] What motivated this application was the unusual situation where Mr Roach had entered into two employment agreements before starting actual work. If Mr Roach was already an employee when he accepted the General Mangers job, s 67A(3) was said to preclude a trial provision from being included in the employment agreement.

[17] The case presented to the Authority was supported by a submission that the interpretation and application of s 67A has the potential to directly, or indirectly, significantly affect a wider group of employers and employees.

Power to remove

[18] The Authority can order the removal of a matter to the Court for hearing in the first instance if it is satisfied that s 178 of the Act is met. That section provides:

> **178 Removal to court**
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> (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
>
> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
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> (a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

…

[19] The Authority rejected the application. It did not accept it satisfied s 178(2)(a)-(c) and held there was no basis to exercise the discretion in s 178(2)(d) in favour of removal. The reason for rejecting the application was that trial provisions were extensively, and authoritatively, traversed in *Blackmore v Honick Properties Ltd*, *w*hich completely addressed the legal propositions advanced for Mr Roach.[2]

[20] Extensive passages from *Blackmore* were quoted.[3] The Authority's purpose in referring to those passages was to set out the Court's analysis of s 67A. In that case Mr Blackmore had accepted an offer of employment and started actual work before signing the employment agreement containing a trial provision which the employer was seeking to rely on.

[21] The analysis in the paragraphs quoted by the Authority was to deal with, at least partly, a submission for the employer that a trial period should be able to be agreed on after the commencement of employment. In *Blackmore* concerns had been

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2 *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.
3 At [50]-[59].

raised by the employer about the practical implications if it was not possible to include a trial period in this way.

[22] The Court provided what was said to be two answers to the employer's concerns. The first answer was derived from interpreting s 67A(2)(a), and the phrase "…starting at the beginning of the employee's employment…" as meaning when the employee begins actual work not when agreement was reached, meaning the exchange of an offer and acceptance of work. That analysis anticipated an agreement having a lawful trial period starting from a future date when actual work began.[4]

[23] The second answer to the employer's concern was in the extended definition of "employee" in s 6. The Court concluded the extended definition, of "a person intending to work", was provided for the limited purpose of allowing an employee to bring a claim for unjustified dismissal during the period before actual work begins.

[24] This answer relied on explaining the extended definition was enacted to overrule the effect of a decision of the Arbitration Court in *Auckland Clerical and Office Staff Employees IUOW v Wilson*.[5] In that case an employee who had been offered and accepted employment to begin on a future date was not able to bring a personal grievance for unjustified dismissal, under the legislation as it then stood, when employment was withdrawn.[6]

[25] The Authority summed up those passages it quoted from *Blackmore* by saying they created a principle:[7]

> So, *Blackmore* establishes that an employee entering into an employment agreement with a valid trial period prior to the commencement of work does not result in the employee having been "previously employed by the employer", even though he is a "person intending to work" (the *Blackmore* principle).

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4 At [52].
5 *Auckland Clerical and Office Staff Employees IUOW v Wilson* [1980] ACJ 357 (AC).
6 *Blackmore v Honick Properties Ltd*, above n 3, at [56].
7 *Roach v Nazareth*, above n 1, at [32].

[26] The Authority concluded that applying these "principles" and "the principles of contract law" meant that when Mr Roach signed the employment agreement as a General Manager, to replace the job of Business Manager, he remained a "person intending to work". All that happened was a variation to an existing agreement. That conclusion meant for the whole time before he started actual work for Nazareth Care his status did not change. He was still only an employee within the limited compass, and for the limited purpose, of being "a person intending to work". The Authority held he was not a person who had been previously employed within the meaning of s 67A(3).

[27] *Blackmore* therefore answered both the application to remove and the substantive employment relationship problem. Removal was declined because there was no question of law to be removed. The Authority declined to exercise its discretion to grant the application because no useful purpose would be served in doing so.[8]

[28] One paragraph of the determination needs to be mentioned because it summed up the position reached by the Authority:[9]

> In reaching this conclusion I have made known the Authority's current view of the substantive matter before it; namely, that Mr Roach was not previously employed by the respondent when he commenced work. However, this determination does not determine the matter of whether Mr Roach's dismissal was justified or not as I have not been addressed on the full facts of the matter, including whether the trial period is otherwise valid and is otherwise been validly implemented.

[29] Despite the qualification in the last sentence of that paragraph it is apparent the Authority was also satisfied that *Blackmore* provided an answer to the substantive proceeding.

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8 At [35].
9 At [36].

Grounds of this application

[30] The Authority was said to have made errors of law because it:

(a) failed to apply the relevant legal principles when determining the application to remove;

(b) elevated obiter comments, in *Blackmore*, to the status of "principles";

(c) misunderstood the basis for the removal application; and

(d) indicated its likely decision on the substantive matter.

[31] Mr Goldstein summarised the important questions of law said to arise as:

a) How do the [trial] period provisions set out in s 67A and 67B apply to the plaintiff being an employee intending to work as defined in S6(1)(b)(ii)

b) Did the plaintiff become an employee of the defendant within the meaning of S6(1)(b)(ii) and if so when

c) If the plaintiff was an employee within the meaning of s6(1)(b)(ii) does that mean that for the purposes of S67A(3) that the plaintiff had been previously employed by the defendant

d) Was the plaintiff an employee of the defendant within the meaning of s67A … prior to commencing work for the defendant on 10 October 2016

e) What was the plaintiff's "employment status" after the parties signed the first individual employment agreement on 21 June 2016 and what effect, if any, did the signing of the second individual employment agreement have on that status

f) Was the plaintiff an employee (as defined by S67A) immediately prior to entering into the second individual employment agreement, if he was an employee, did that mean the defendant could not rely on the trial period clause in the second [independent employment agreement]

[32] These questions overlap but can be summarised in these propositions:

(a) the *Blackmore* passages relied on were obiter and should not be read as binding or creating principles to apply;

(b) *Blackmore* does not properly interpret s 67A and is either wrong, and should not be followed, or does not apply to Mr Roach's situation;

(c) the Authority has declared the outcome of the employment relationship problem at this preliminary stage without a full consideration of the case; and

(d) it is in the interests of justice to remove the matter to the Court.

Trial provisions

[33] Trial provisions are provided for in s 67A which reads:

> **67A When employment agreement may contain provision for trial period for 90-days or less**
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> (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—
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> (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
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> (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.

(4) *[Repealed]*

(5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).

[34] Mr Roach's case is that s 67A(1) does not apply because he was, at the time he accepted the second job as General Manager, already an "employee" within the meaning of s 67A(3). That is because there is no qualification to being an "employee" within s 67A(3) restricting its operation to exclude a person who is "intending to work".

[35] The intended argument is that s 67A(3) operates to Mr Roach's advantage. While he falls within the definition of s 6(1)(b)(ii) as being a "person intending to work", there is nothing in s 67A(3) to indicate the reference to having been previously employed is limited, or restricted, to exclude a person benefiting from the extended definition of "employee".

[36] It follows, Mr Goldstein intends to argue, that *Blackmore's* analysis of s 67A(2)(a), that it means the beginning of actual work, is wrong or does not apply. He intends to argue that the reference is to the formation of the employment agreement and that the approach in *Blackmore* went further than was necessary to decide the case. If that argument fails, he intends to say this situation is not covered by *Blackmore* because one employment agreement ended by being replaced with another one.

[37] Mr Goldstein also intends to argue that *Blackmore* contains an internal inconsistency between [58] and earlier passages discussing the meaning of s 67A.[10]

[38] If one or more of these arguments succeeds there are obvious consequences for Mr Roach's dismissal relying on the trial provision.

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[10] Mr Beck conceded there may be an inconsistency but the point was not fully argued.

[39] For Nazareth Care Mr Beck's position was two-fold. First, *Blackmore* was properly decided and its comments about s 67A are a purposive interpretation of that section as required by s 5 of the Interpretation Act 1999. That is because Parliament intended to recognise the opportunity for an employer to be able to test an employee and the only sensible meaning for the section was by being able to assess his or her ability by actual work. That intention is captured by words "…starting at the beginning of the employee's employment…" in s 67A(2) meaning the beginning of actual work. Otherwise the purpose of s 67A, to establish a trial provision, would be defeated.

[40] Second, Mr Beck submitted that there was a significant qualification to the definition of "employee" in s 6 because it only applied "unless the context otherwise requires". The context here, of being able to test an employee's ability in a trial, means that the extended definition does not apply when considering the meaning of "employee" in s 67A(3).

[41] These submissions can be summarised as *Blackmore* is correct because it is a workable, purposive, interpretation of s 67A consistent with Parliament's intention, which would be frustrated, and rendered nonsensical, if an alternative was adopted.

Test for removal

[42] The criteria applying to removal on an application for special leave are those in s 178(2)(a)-(c). Section 178(2)(a) necessitates an important question of law that is likely to arise other than incidentally. That test was first addressed in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* in the following way: [11]

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[11] *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 (EmpC).

> The statutory test is not whether there is an unsettled, controversial, or novel point of law. Rather, an important question of law must be shown to be likely to arise in the proceeding other than incidentally.[12]

[43] Although stated differently in the submissions for the parties, the important question of law likely to arise in this proceeding is whether or not Mr Roach is entitled to bring a claim for unjustified dismissal, and if so whether he was unjustifiably dismissed, arising from the proper interpretation of s 67A(1)-(3) inclusive.

[44] While the purposive interpretation of s 67A has an attractiveness, at this stage it would not be appropriate to say the decision in *Blackmore* provides a full answer to the propositions likely to be put in issue by the proceeding.

[45] It was common ground between Mr Goldstein and Mr Beck that properly interpreting s 67A, in the context of this case, will decide the entire proceeding. No findings of fact are required and the outcome will be completely dictated by whether or not *Blackmore,* and the remarks referred to by the Authority from that case, apply to Mr Roach's circumstances. That is probably what the Authority was intending to mean at [36] of the determination.

[46] I consider that the test referred to in *Carter Holt Harvey* is satisfied. That is because the question of law will be decisive of the case.

[47] It is important to stress no concluded view has been reached about the strength of Mr Goldstein's submissions over s 67A or, for that matter, his argument that *Blackmore* is either wrong or contains an internal inconsistency. All that can be said, at this stage, is that the circumstances facing Mr Roach have not arisen previously. It is at least arguable that the extended definition of employee, to include a person intending to work, is not confined to the ability to pursue a personal grievance for unjustified dismissal if an offer of employment is withdrawn before work starts. It might apply in this case.

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[12] Mr Goldstein relied on *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) to say that a question of law arising in the matter will be important if it is decisive of the case, some important aspect of the case, or strongly influential in dealing with the material part of it.

[48] Section 178(2)(a) is satisfied.

178(2)(b): Nature, urgency and public interest

[49] The nature, urgency and public interest criteria in s 178(2)(b) were addressed only briefly. The wide use of trial provisions is said to create public interest. In contrast, Mr Beck said that, while trial provisions are common there is no weighty question arising from this case justifying removal to the Court. That is because there is a body of settled case law about them that can be applied by the Authority.

[50] I agree there is public interest in trial periods given the wide use of them. I accept that there is a matter of public interest in considering s 67A.

Discretion

[51] Mr Goldstein and Mr Beck agreed the Court has a discretion to grant or refuse the application. I consider the discretion should be exercised in favour of granting the application. There is an obvious convenience to the parties of removing the matter to the Court, because the Authority has firmly stated its view about the proceeding before it. While the Authority left open the possibility that there might be other matters to consider, it clearly stated *Blackmore* provides an answer to the employment relationship problem. It would not be in the interests of either party to require them to expend time, and money, in concluding the investigation before the Authority, where the outcome and a subsequent challenge are an inevitability.

Outcome

[52] Mr Roach's application to remove the matter to the Court is successful. A statement of claim is required to be filed within 20 working days of the date of this judgment.

[53] A statement of defence is to be filed as required by the Employment Court Regulations 2000.

[54] Costs are reserved.

K G Smith
Judge

Judgment signed at 1:40 pm on 21 December 2017