IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 4
EMPC 98/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CALIN IOAN Plaintiff
AND	SCOTT TECHNOLOGY NZ LTD TRADING AS ROCKLABS Defendant

Hearing: 30, 31 October and 1 November 2017

Appearances: H Gilbert, counsel for plaintiff
G Bevan and R Brazil, counsel for defendant

Judgment: 15 February 2018

JUDGMENT OF JUDGE J C HOLDEN

Introduction, issues and outcome

[1] Mr Ioan, the plaintiff in these proceedings, was employed as a senior design engineer by Scott Technology NZ Ltd trading as Rocklabs (Rocklabs), the defendant, and started his employment there on 1 August 2016. His employment agreement included a 90-day trial period. It also provided for four weeks' notice of termination but that Rocklabs could elect to not require Mr Ioan to work out the required notice, in which case the remaining balance of the notice period had to be paid by Rocklabs. By letter dated 7 October 2016 Rocklabs terminated Mr Ioan's employment. He was advised that Rocklabs had decided he would be paid in lieu of working out his four-week notice period and shortly thereafter he was paid for that period.

[2] Mr Ioan's case is based on three key points.

[3] First, Mr Ioan says he had the right to specific weekly performance feedback, which Rocklabs failed to provide. He says this failure gave rise to an unjustifiable disadvantage.

[4] Second, he says he had the right to notice, which Rocklabs failed to provide. Mr Ioan says that this failure removed the bar to raising a grievance for unjustifiable dismissal.

[5] Third, Mr Ioan says Rocklabs failed to undertake any proper disclosure or consultation processes with him, and further there was no substantive basis for the decision to dismiss. Mr Ioan says these failures caused him to suffer an unjustifiable dismissal.

[6] The Employment Relations Authority (the Authority) found that Rocklabs could rely on the trial period in the employment agreement, meaning that the Authority did not have jurisdiction to consider Mr Ioan's personal grievance for unjustifiable dismissal.[1] The Authority says that was the only claim before it; Mr Ioan's statement of problem did not mention a disadvantage grievance or any other grievance. It says its determination therefore resolved all issues before the Authority and so the matter before it was at an end.

[7] Both counsel provided careful and thoughtful submissions. I found them very helpful and thank counsel for them.

[8] For the reasons set out in this judgment, Rocklabs validly terminated Mr Ioan's employment pursuant to s 67B of the Employment Relations Act 2000 (the Act) and therefore Mr Ioan cannot pursue his personal grievance for unjustifiable dismissal.

[9] His claim of unjustifiable disadvantage also fails.

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[1] *Ioan v Scott Technology NZ Limited t/a Rocklabs* [2017] NZERA Auckland 106.

Employment agreement included a trial period

[10] Mr Ioan is an experienced mechanical design engineer. He saw an advertisement for a senior design engineer position at Rocklabs and applied for that position in May 2016. After an initial interview process, Rocklabs' engineering manager advised Mr Ioan that he was not prepared to offer him the position. This took Mr Ioan by surprise. When he asked the reasons for this he was advised that there were concerns about how he would get along with other staff. Mr Ioan's recollection was that a specific staff member was mentioned. The engineering manager's recollection was that his statement was more general, but both are agreed that it was in relation to getting on with other people.

[11] Mr Ioan then endeavoured to persuade the engineering manager to change his mind. He offered to work for free for the first few weeks just to prove the engineering manager's concern about Mr Ioan not getting along with other people was unsubstantiated. Mr Ioan followed that conversation up with an email in which he advised that he was "more than happy to start on a 90 days trial, and if by any chance (that one in a million I was telling you on the phone), things won't work the way they were supposed to, you could terminate the trial period at any time".

[12] In the event, Rocklabs did offer Mr Ioan employment and before Mr Ioan started, he signed an employment agreement that included a trial period. The engineering manager noted the trial period in discussion with Mr Ioan.

Issues started to arise in Mr Ioan's employment

[13] Mr Ioan was given an induction checklist at the same time he received the employment agreement. That induction checklist included anticipated weekly meetings for the first six weeks. The parties agree that there were no formal weekly meetings but they also agree that there was ongoing communication between Mr Ioan, his "buddy" and his manager.

[14] Mr Ioan proved to be a competent mechanical design engineer who made some useful design modifications, which made sense and were accepted.

[15] However, issues started to arise around his compatibility and fit as part of the team. In particular, Rocklabs felt that Mr Ioan tended to stick to his views and not really hear what other people were telling him.

[16] Rocklabs says that issues really started to come out when Mr Ioan was working on a design for an overall machine frame, as part of what was known as the 9001 ABM 2.2 kW platform update project. A meeting on 14 September 2016 was a key turning point. The engineering manager considered that this meeting was to be the design release meeting, at which time the team would finalise the design and review the purchasing list to ensure the correct parts were ordered, so that the prototypes could be made. A number of people attended the meeting, including Rocklabs' lead fabricator. At the meeting Mr Ioan raised a different fabrication method for the platform that was not accepted by the other people working on the task, with the lead fabricator saying that the method Mr Ioan proposed was not feasible, given the welding set up. There was some discussion about this, with Mr Ioan persisting with his proposal. The engineering manager felt that Mr Ioan had gone off on a tangent and that he was not listening to the lead fabricator and other staff as well as he ought. Basically, in his view, if Rocklab's equipment could not make the platform in the way suggested by Mr Ioan, that should have been the end of the matter. The engineering manager was concerned that Mr Ioan had spent time on an alternative design without checking it with the lead fabricator, who was responsible for its construction. Another design engineer, who was at the meeting, felt that Mr Ioan's conduct had made the meeting awkward.

[17] The engineering manager spoke to Mr Ioan about the way he had approached the alternative design and about how the meeting had gone, but his comments were not received by Mr Ioan as criticisms and the latter continued in his views both that there was no difficulty between the lead fabricator and him, and that his fabrication method ought to have been pursued.

[18] The engineering manager also started having some concerns about the time Mr Ioan was taking on some work, and what he saw as shifting timeframes.

Rocklabs considers termination under the trial period

[19] It was around this time that the engineering manager started discussing with other management and with the company's human resources advisor the issues that were being seen with Mr Ioan. The engineering manager felt he was in a difficult position, but the view he reached, and supported by his colleagues, was that he should consider terminating Mr Ioan's employment relying on the 90-day trial period.

[20] There was a further meeting between Mr Ioan and the engineering manager on 23 September 2016 at which the engineering manager again tried to discuss his concerns with Mr Ioan. He says that Mr Ioan was generally dismissive of those concerns and minimised them. However, the engineering manager's recollection was that at the end of the meeting Mr Ioan said "if you have any concerns, come to me rather than going through HR". Mr Ioan disputes that he said that but the engineering manager was very clear in his recollection of that statement and I accept that it was said.

[21] The timeliness issues the engineering manager had been seeing continued. He also obtained feedback from some of Mr Ioan's colleagues. That feedback was consistent with the engineering manager's own view of Mr Ioan.

Termination proposed

[22] At 3 pm on 6 October 2016 the engineering manager met with Mr Ioan and advised him that the company was considering terminating his employment. A letter to that effect was given to Mr Ioan. Mr Ioan was very upset at the proposal and I have no doubt that it was a difficult meeting for both men. Overnight, Mr Ioan prepared a response to the proposal.

[23] The following day, 7 October 2016, the engineering manager met with Mr Ioan at 8 am. The general manager also connected by conference call. At that meeting Mr Ioan provided his response to the proposal and spoke to it. Also at the meeting the engineering manager raised the question of notice and whether, if his

employment was to be terminated, Mr Ioan wished to work it out. He did not seek and Mr Ioan did not provide any response on that issue.

[24] After the meeting Mr Ioan continued to be very upset and approached the engineering manager for a decision three times over the course of the morning. In one of those approaches Mr Ioan asked if he should shut down his computer. The engineering manager took that as an indication that, if his employment was terminated, Mr Ioan would not want to work out his notice period. The engineering manager appreciated that Mr Ioan was very stressed and wished to deal with the matter quickly. He spoke with an HR advisor (based in Dunedin) and she prepared a draft letter to Mr Ioan. That letter was drafted on the understanding that Mr Ioan likely would not wish to work out his notice. The plan was that at the resumed meeting, the engineering manager would discuss the possibility of Mr Ioan working out his notice or leaving immediately and if, as was assumed from Mr Ioan's conduct, he did wish to go immediately, the letter would be handed over and take effect. The engineering manager gave evidence that he was prepared to have Mr Ioan work out his notice if that had been his preference. This is consistent with the evidence from the HR advisor who discussed these issues with the engineering manager.

Mr Ioan's employment is terminated

[25] As it transpired, at the meeting early in the afternoon on 7 October 2016 Mr Ioan was handed the letter at the beginning of the meeting, before any discussion. Because of the importance of this letter I set out the text in full:

> ...
>
> Further to our conversations over the last two days, it is with great reluctance that I am writing to confirm that your employment with Scott Technology Ltd. will end in accordance with the 90-day trial period provisions in Clause 2 (c) of your employment agreement, effective immediately.
>
> Thank you for your feedback on the proposal to end our employment relationship. I can appreciate and acknowledge your comments, and am sympathetic to your personal situation; but we feel that there has been clarity around what is required and opportunities for you to seek further information. I also feel that my concerns have been made clear to you - in

> one more formal sit down review as well as informal meetings, and discussions on a daily basis. You will recall that we also had frank and honest discussions during the recruitment process regarding the areas that were of concern to us - specifically communication and delivering on what is expected.
>
> Unfortunately, in this instance we believe there has been a mismatch between what we require in this senior role and what you provide. I acknowledge that you are a capable experienced and practical engineer, and would be willing to provide a verbal reference to this effect.
>
> Your notice period, as outlined in your employment agreement, is four weeks however we have decided you will be paid in lieu of working out your notice period. Therefore, your effective last day of work is today.
>
> Any outstanding leave entitlements will be paid in your final pay.
>
> Please don't hesitate to speak with me if you have any question relating to the content of this letter. We do wish you all the best and would like to thank you for your service to date.
>
> Yours sincerely,
>
> ...

[26] The engineering manager says that he then again raised with Mr Ioan the options of working out his notice or leaving that day and advised him that either option was available to him. That is not Mr Ioan's recollection. His recollection is that his employment was being terminated that day but that if he wished he could leave immediately following the meeting rather than stay until the end of the day. After hearing from both men, both on this particular point and generally, I consider that at some point in the meeting, after the letter had been given, the engineering manager did tell Mr Ioan that he could work out his notice if he preferred but that this comment did not register with Mr Ioan. Given his general demeanour, the engineering manager's comment likely was quite lowkey, and Mr Ioan does not always pick up on what is said to him. The stress and the contents of the letter already given to Mr Ioan also would have contributed to the situation.

[27] In the event Mr Ioan said he wished to leave immediately and Rocklabs agreed to him doing so. Mr Ioan uplifted his personal effects, said goodbye to his colleagues, and left.

[28] On 19 October 2016 Mr Ioan was paid four weeks' salary in accordance with the letter.

Mr Ioan found fixed-term employment quite quickly but has had no success since the Authority issued its determination

[29] Shortly after his employment with Rocklabs terminated, Mr Ioan secured six months' fixed-term employment as a design engineer, starting work on 25 October 2016. While his rate of pay for the new role was $155.77 gross less per week than at Rocklabs, taking into account the payment Rocklabs made on termination Mr Ioan says that he did not suffer any loss until after 19 March 2017. From 20 March until the end of the fixed term on 21 April 2017 he received $778.75 gross less than he would have received had he stayed with Rocklabs.

[30] In April 2017 Mr Ioan began looking in earnest for new employment. On 10 April 2017 the Authority issued its determination and found that s 67B of the Act prevented Mr Ioan from pursuing a personal grievance for unjustifiable dismissal. Since that determination became public, all Mr Ioan's job applications have been unsuccessful; he has not even been interviewed for roles. His evidence was that he is aware and has been told that this is because of online profiling for job applicants by recruiters and HR personnel.

Valid trial period included in agreement

[31] The parties agree that the trial period in the employment agreement was valid as the requirements in s 67A of the Act were met. That section 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.

(4) ...

(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).

[32] The effect of a trial period under s 67A is provided for in s 67B of the Act:

67B Effect of trial provision under section 67A

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

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

(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 section 103(1)(b) to (j).

(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 section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(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 section 120 that relates to terminating an employment agreement under this section.

[33] The first, and key, issue for me to consider is whether Rocklabs complied with s 67B(1). That itself turns on whether Rocklabs gave Mr Ioan the required "notice of the termination".

Two key provisions of the employment agreement

[34] There are two key provisions in the employment agreement. Clause 2(c) provides:

This agreement includes a Trial Period

i) The employee agrees to serve a trial period for the first 90 days of employment commencing on the day the employee actually starts work.

ii) During the trial period the employer may terminate the employment relationship on notice, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on the grounds as specified in sections 103(1) b-g of the Employment Relations Act 2000.

iii) Any part of this agreement or the Employer's policies and procedures (and in particular any disciplinary process) that conflicts with this provision shall have no effect until after the expiry of the trial period.

[35] Clause 11 deals with termination generally. Rocklabs purported to terminate the employment agreement under cl 11(a):

a) Either party may terminate this agreement at any time, for any reason, by giving four weeks written notice to the other party. The Employer may elect to not require the employee to work out the required notice in which case the remaining balance of the notice period shall be paid by the Employer. If the employment is terminated by the Employee without the required notice, then the remaining balance of the notice period shall be forfeited by the Employee. By agreement between the parties that period of notice may be altered.

The purpose of s 67A and s 67B is to reduce the risk to employers of employing employees who might not work out

[36] The Employment Relations Amendment Act 2008 introduced ss 67A and 67B. Section 4 provides that the purpose of the new sections was:

...

(a) to provide when an employment agreement may specify a trial period of 90 days or less, during which an employee can be dismissed and cannot bring a personal grievance or other legal proceedings in respect of the dismissal, subject to certain exceptions...

[37] The then Chief Judge Colgan addressed the new provisions in *Smith v Stokes Valley Pharmacy (2009) Ltd.*[2]

[49] The new provisions in ss 67A and 67B were intended to address the circumstances of "new" employees, that is of people who had not previously

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2 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253.

> been employed or who had not been employed recently or for whom obtaining employment might have proved difficult for any other reason. The scheme of the provisions, as it was promoted, was to allow employers some latitude in engaging and dismissing new employees in respect of whom there might be some risk of compatibility or other work performance issue. Read together, ss 67A and 67B both provide for a new form of "trial period" (otherwise known under s 67 as a "type of probationary arrangement") and remove some existing employee entitlements to challenge at law a dismissal.

[38] The then Minister of Labour commented when the Employment Relations Employment Bill 2008 was first introduced that the Bill was to benefit workers, as it gives them:[3]

> The opportunity to get their feet in the employment door, to back themselves to say "give me a go and I will prove how good I am".

[39] She said that the purpose of the 90-day trial period was to:

> Enable employers[4] … to determine a prospective employee's suitability for permanent employment without the risk of legal proceedings for unjustified dismissal in the event that the employment relationship does not work out.

[40] She said:

> This Bill is not about taking away rights; it is about giving opportunities. It has safety mechanisms to ensure that it is fair and balanced and is win-win for both employee and employer.

[41] The Explanatory Note to the Bill made a similar point:[5]

> This will enable those employers to determine the employees' suitability for permanent employment, without the risk of legal proceedings for unjustified dismissal in the event the employment is terminated. ... This Bill will provide opportunities for those who might suffer disadvantage in the labour market, for example employees who are new to the workforce or returning to the workforce after some time away or specific groups at risk of negative employment outcomes.

[42] Nevertheless, and as noted in *Smith*, ss 67A and 67B remove long-standing employee protections and should be interpreted strictly.[6]

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3 (9 December 2008) 651 NZPD 318.
4 Hansard records it as "employees" but that must be an error.
5 Employment Relations Amendment Bill 2008 (8-1) (explanatory note).
6 *Smith*, above n 2, at [48].

"Notice" in s 67B means notice in accordance with employment agreement

[43] Both parties accepted that, in interpreting s 67B, "notice" means notice in accordance with the applicable employment agreement rather than a statutory requirement distinct from the contractual notice provision. That is consistent with the authorities.[7]

[44] I consider this includes that employers may give notice but at the same time pay employees in lieu of them working out their notice, where such payments in lieu are permitted by the employment agreement. While there are comments made by then Chief Judge Colgan in *Smith* that can be picked out as arguably indicating a different view,[8] his most relevant comments align with the view I have reached.

[45] In that case the then Chief Judge found that the employer could not rely on the 90-day provision in the employment agreement because the employee was not a new employee as required by s 67A.[9] He then considered an alternative argument made by the employee that the employer did not give her notice of dismissal and/or breached its obligation to pay four weeks' wages in lieu of notice, thus not complying with the requirements of s 67B of the Act. In that context, the then Chief Judge pointed out that there is no statutory indication how notice may or must be done, the length of notice or whether an employer may make a payment in lieu of notice. He noted that Ms Smith's employment agreement expressly permitted the employer to make a payment in place of some or all of the notice period not given, but also that the payment made by the employer was only half that required by the employment agreement. It was on that basis he accepted Ms Smith's argument as "Deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as s 67B requires.".[10]

[46] In *Societe Generale, London Branch v Geys* the UK Supreme Court was considering a scenario where an employment agreement provided for notice but also

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7 *Smith*, above n 2, at [104]–[107]; *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98 at [17].
8 *Smith*, above n 2, at [61].
9 At [88].
10 At [97].

provided that the employer was able to terminate the employee's employment with immediate effect by making a payment in lieu of notice (PILON).[11] The employment agreement in that case was differently worded to the one in the present case, but nevertheless, the case is instructive as the purpose of the clause is the same – that the employee is not to work out his or her notice, but will be paid for it.

[47] Lady Hale was considering whether, where such a clause is included in an employment agreement, it is enough that the payment in lieu is actually made, or whether something more is required.

[48] She held that the payment was separate from notice and that notice needed to be clear and ambiguous:

> [57] Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee.
>
> …

[49] Lady Hale goes on:

> [58] It is necessary, therefore, that the employee not only receive his payment in lieu of notice, but that he receive notification from the employer, in clear and unambiguous terms, that such a payment has been made and that it is made in the exercise of the contractual right to terminate the employment with immediate effect. …

[50] Very recently, in *Farmer Motor Group Ltd v McKenzie*, Judge Perkins held that:[12]

> [29] Payment in lieu is not an alternative to providing notice whether oral or written as the agreement provides, but simply an alternative to the employer requiring the employee to work out the period of notice which is given.

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11 *Societe Generale, London Branch v Geys* [2012] UKSC 63, [2013] 1 All ER 1061.

12 *Farmer Motor Group*, above n 5.

[51] The principles to be drawn from these cases are that:

- Notice must be given and must be in accordance with the employment agreement.

- It must be clear and unambiguous, and explain how and when employment is to be terminated.

- Making a payment in lieu of notice does not override the need to give notice.

[52] Also relevant in this matter is the distinction between the termination of the employment agreement and the termination of employment itself. This distinction was confirmed by former Chief Judge Colgan in *Smith*:[13]

> It is significant also, that the notice is of termination of the employment agreement (containing the trial provision) and not of employment although, in practice, the two will often be the same. It is possible, however, to contemplate that there may be matters in the employment agreement that would survive a termination of the employment. Section 67B(1), however, requires that it be the employment agreement that is terminated.

Application of the law to the facts in this case

[53] The employment of Mr Ioan on a trial period is consistent with the express purpose of ss 67A and 67B. Rocklabs had some doubts about Mr Ioan and he asked that he be "given a chance" which Rocklabs agreed to, knowing that it had the safety mechanism of the trial period.

[54] The issues that arose with Mr Ioan's employment also were ones recognised when the legislation was implemented – of compatibility and "fit" rather than significant performance or misconduct issues.[14]

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13 *Smith*, above at n 2, at [61].

14 Explanatory note, above n 5: "This will enable those employers to determine the employees' suitability for permanent employment …".

[55] The issue then is whether Rocklabs has complied with cl 11(a) of the employment agreement, which provided for four weeks' notice but also allowed Rocklabs to elect to not require Mr Ioan to work out the required notice, in which case the remaining balance of the notice period had to be paid by Rocklabs.

[56] In substance, what happened is what the paragraph envisaged. Mr Ioan was paid for his four weeks' notice, and not required to work it out.

[57] The question for the Court then is whether, notwithstanding this substantive adherence, there was a fatal flaw in Rocklab's process in effecting the termination so that cl 11(a) was not complied with and therefore that it cannot rely on s 67B (1) and (2) of the Act.

[58] Mr Ioan's principal submission is that Rocklabs did not give him notice of the termination of his employment because the termination took effect immediately. He accepts that cl 11(a) of the employment agreement permitted Rocklabs to pay him for any remaining balance of notice, instead of requiring him to attend at work but says that cl 11(a) is, in effect, a 'garden leave' provision, requiring the employment relationship to continue until the end of the notice period.

[59] The termination was effected by the letter dated 7 October 2016, which the engineering manager gave to Mr Ioan that afternoon. Despite the intention of Rocklabs to reach agreement on whether Mr Ioan would work out his notice, that is not what happened. While there may have been indicators that suggested that Mr Ioan would not wish to work out his notice, I accept that the decision that he would not do so was made by Rocklabs and communicated to Mr Ioan at the beginning of the afternoon meeting on 7 October 2016, as set out in the letter. That is permitted by cl 11(a), which allowed for Rocklabs to make this decision unilaterally.

[60] I repeat the two key paragraphs of the letter of 7 October 2016:

> Further to our conversations over the last two days, it is with great reluctance that I am writing to confirm that your employment with Scott Technology Ltd. will end in accordance with the 90-day trial period provisions in Clause 2 (c) of your employment agreement, effective immediately.
>
> ...

> Your notice period, as outlined in your employment agreement, is four weeks however we have decided you will be paid in lieu of working out your notice period. Therefore, your effective last day of work is today.
>
> ...

[61] When these paragraphs are read together the letter says:

(a) the employment agreement requires four weeks' notice;

(b) the employment itself, that is the attendance at work, ends immediately;

(c) four weeks' salary will be paid in lieu of Mr Ioan working out his notice.

[62] Even adopting a strict approach to interpretation, the letter does not assist Mr Ioan. The first paragraph is commenting on the fact that Mr Ioan will no longer be doing work for the company, with immediate effect. The fourth paragraph then makes clear that the employment agreement requires four weeks' notice but that Mr Ioan would be paid in lieu of working out his notice. The use of "effective" in the next sentence: "Therefore, your effective last day of work is today.", reinforces that, while technically the agreement may continue, Mr Ioan would no longer be carrying out any work.

[63] My conclusion on this issue therefore is that the employment agreement was validly terminated by the letter of 7 October 2016 pursuant to cl 11(a) of the employment agreement; Mr Ioan was given advice of the termination of the employment agreement on four weeks' notice but also advised that he was not required to work during the period of his notice and that he would be paid for that period.

[64] The engineering manager and Mr Ioan then agreed that he would leave immediately and they both treated the end of the employment as the end of their relationship. Of course, this allowed Mr Ioan to take up new employment.

If no bar, dismissal would have been unjustifiable

[65] If I had found that the bar in s 67B did not apply, Mr Ioan would have been able to pursue his claim for unjustifiable dismissal. Section 103A then would have required Rocklabs to demonstrate that its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I have considered the extent to which the fact that the parties were operating under a valid trial period would be relevant, as was argued by Mr Bevan, counsel for Rocklabs. I do not consider it can be. The test in s 67B is binary: that is, if it applies, it acts as a bar to pursuing a grievance for unjustifiable dismissal, but if it does not apply the case falls to be considered under s 103A in the usual way.

[66] Here Rocklabs acknowledged that it did not approach the situation as it would have had there not been an applicable trial period. The process was truncated and less robust than would have been the case for a permanent employee. Put simply, the requirements of s 103A (3) were not met – there was no real investigation and little time for Mr Ioan to respond. I would have found the dismissal to have been unjustifiable.

But remedies would have been limited

[67] I then would have needed to consider what remedies were recoverable.

[68] Section 123(1)(b) provides for reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Because Mr Ioan obtained full-time employment (on a fixed-term basis) almost straight away, and the lesser rate of pay was largely ameliorated by the notice payment, Mr Ioan's loss of earnings was $778.75 gross up to 21 April 2017.

[69] The evidence was that Mr Ioan's inability to obtain new employment after the fixed-term employment ended was attributable to the Authority determination becoming public, which, as noted, has had the effect of putting off recruiters, meaning Mr Ioan has been unable to find employment. This is in contrast to the situation immediately following the termination of Mr Ioan's employment with

Rocklabs when he found suitable employment almost immediately. The apparent reaction to the Authority's determination is very unfortunate but is not attributable to the actions of Rocklabs.

[70] Accordingly, loss of earnings would have been limited to $778.75.

[71] Mr Ioan also would have been entitled to compensation under s 123(1)(c)(i) for humiliation, loss of dignity, and injury to his feelings. Again, compensation would have reflected the extent to which that was attributable to the unjustifiable actions of Rocklabs. Here the suddenness of the termination, and the lack of process did result in humiliation and injured Mr Ioan's feelings. A modest amount of compensation would have been awarded.

Unjustifiable disadvantage grievance not made out

[72] As noted by the Authority, the statement of problem before it did not include a disadvantage claim. The Authority therefore considered that its determination resolved all issues before it. The omission of the unjustifiable disadvantage grievance from the statement of problem apparently was an inadvertent oversight. In the plaintiff's submissions to the Authority counsel argued that Mr Ioan was unjustifiably disadvantaged in his employment and Mr Ioan seeks to pursue that argument in the Court also. Rocklabs did not challenge Mr Ioan's right to argue the unjustifiable disadvantage claim in the Authority and now abides by the decision of the Court as to whether it will deal with it. In the circumstances, I am prepared to consider the unjustifiable disadvantage claim and now do so.

[73] Mr Ioan's claim for unjustifiable disadvantage is based on the induction checklist. Ms Gilbert, counsel for the plaintiff, submitted that the induction checklist, having been provided with the employment agreement, formed some of the conditions of Mr Ioan's employment. I do not accept that. It is commonplace to have checklists for new employees and while it may be desirable for the parties to work through checklists, they are simply guidance and generally do not create any legal obligations. Here the checklist was provided at the same time as the

employment agreement but I do not consider that this has the effect of incorporating the checklist into the employment agreement.

[74] While the phrase in s 103(1)(b) "conditions of the employment" denotes a broader concept than a simple breach of contract, an employee needs to point to legitimate expectation.

[75] Here the expectation Mr Ioan had was that he would be given a reasonable level of instruction and supported in his role, and these things happened. As noted, while there were no formal weekly meetings there was ongoing communication between Mr Ioan, his "buddy" and his manager. For somebody with Mr Ioan's level of seniority that ought to have been sufficient for the purposes of induction. It was open to Rocklabs to take the approach to induction that it did.

[76] Ms Gilbert also submitted that by not having the weekly meetings envisaged in the induction checklist, Mr Ioan was denied the opportunity to properly understand and to attempt to remedy any perceived shortcomings with his work. She says that this had the result of depriving Mr Ioan of the opportunity to avoid his dismissal.

[77] But it was only after about seven weeks of his employment (and therefore outside the six-week period referred to in the checklist) that concerns started to crystallise. I am not satisfied that had the six weekly meetings occurred, that would have avoided the situation that arose.

[78] For these reasons, I also do not accept that any disadvantage flowed from the lack of meetings.

Costs reserved

[79] Costs are reserved. If costs are sought and cannot be agreed, then Rocklabs may apply for costs within 20 working days from the date of this judgment. Mr Ioan has a further 20 working days within which to respond to that application and then any submissions in reply from Rocklabs are to be filed within a further five working days.

Final comments

[80] Rocklabs found Mr Ioan to be a capable, experienced and practical design engineer. He has worked in research and development for over 25 years, with significant stretches of employment with other employers. I have noted Mr Ioan's evidence as to the impact of the publication of the Authority determination on his ability to find new employment. I hope that this judgment does not exacerbate this difficulty for him.

J C Holden
Judge

Judgment signed at 10 am on 15 February 2018