IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 159
EMPC 105/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALLIED INVESTMENTS LIMITED T/A ALLIED SECURITY Plaintiff
AND	MICHAELA CRADOCK Defendant

Hearing:	11 September 2019 (heard at Wellington)
Appearances:	A Hall and J Avery, counsel for plaintiff S Meikle, counsel for defendant
Judgment:	11 November 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Michaela Cradock and Allied Investments Ltd t/a Allied Security (Allied) were parties to an individual employment agreement (IEA) containing a 90-day trial clause. Part way through the trial period, Allied gave Ms Cradock notice of termination with immediate effect.

[2] Ms Cradock raised a personal grievance alleging that she had been unjustifiably dismissed. She contended she was provided with no notice, so that the provisions of s 67B of the Employment Relations Act 2000 (the Act) could not apply; and that she was unjustifiably dismissed entitling her to remedies.

[3] Allied contended it had relied on a valid trial period provision to bring Ms Cradock's employment to an end. Consequently, it argued the statutory bar in s 67B(2) prevented her from raising a dismissal grievance.

[4] The Employment Relations Authority disagreed.[1] It held that the trial period notice provision of Ms Cradock's IEA did not meet the requirements of s 67B, so that the statutory bar did not apply.[2] The Authority went on to conclude that the dismissal was unjustifiable; and that Allied should pay Ms Cradock lost wages of $7,662.59 gross, and $15,000 compensation for humiliation, loss of dignity and injury to feelings.[3]

[5] Allied brought a non-de novo challenge, asserting that the Authority erred in three respects. First, it had wrongly concluded the trial period notice provision was invalid. Second, and alternatively, it miscalculated the length of Ms Cradock's employment with Allied when assessing her lost wages claim. Third, the amount awarded for compensation was excessive.

[6] In this judgment I will outline the findings of the Authority which provide the necessary description of background circumstances, and then analyse each of the three issues in light of the evidence and submissions presented by each party.

The determination

[7] After describing introductory matters, the Authority set out the material provisions of the IEA. For present purposes they are:

> **Terms of agreement**
>
> **1.0** This agreement shall come into effect on 3rd July 2017 ... and shall remain in force until renegotiated or terminated pursuant to any provision of this agreement including any probationary period.
>
> ...
>
> **5. 90 Day Trial Period**
>
> 5.1 As you are a new Employee your employment will be on a trial period basis for the first 90 days of your employment.

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1 *Cradock v Allied Investments Ltd t/a Allied Security* [2019] NZERA 148.
2 At [24]-[30].
3 At [44].

> 5.2 If, during the trial period, we decide to terminate your employment, we will give you notice of termination before the end of the trial period. If we decide to terminate based on the 90-day trial any notice period will not apply and termination may be immediate.
>
> 5.3 If we notify you before the end of the trial period that your employment will be terminated, you will not be entitled to bring a personal grievance (or other legal proceedings) in respect of the dismissal.
>
> ...
>
> **36. Termination and Suspension of Employment**
>
> **36.1 Resignation:**
> (a) If the Employee wishes to resign from their employment with the Employer, the Employee must give the Employer two weeks' notice in writing. The Employer may elect to pay the Employee in lieu of working the notice period.
>
> ...
>
> **36.2 Summary dismissal:**
> The Employer may dismiss the Employee without notice in the case of serious misconduct.
>
> **36.3 Redundancy:**
> If the Employer terminates the Employee's employment for redundancy, it will give the Employee 2 weeks' notice or pay in lieu of notice, and the Employee will not be entitled to redundancy compensation.
>
> ...

[8] The Authority then dealt with two issues as to Allied's notice of termination, which are no longer relevant and do not require further consideration now.

[9] Having done so, it turned to consider the question of whether the notice was valid and/or reasonable under s 67B(1). The Authority referred to dicta of former Chief Judge Colgan in *Smith v Stokes Valley Pharmacy (2009) Ltd*, to the effect that a notice under the 90-day trial provisions had to be more than simply advice of dismissal; rather the section contemplated that the notice would contain advice as to when, in future, the dismissal would take effect.[4]

[10] Relying on this dicta, the Authority held the notice did not give advice of a future termination, and was accordingly invalid; consequently, the statutory bar against personal grievances could not apply.

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4 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [61].

[11] The Authority then considered whether the dismissal was justifiable. It summarised evidence from the company that there had been a number of complaints about Ms Cradock's performance, and that the decision to terminate her employment under the trial period provisions was taken after a "particularly bad" complaint from a client. The Authority noted, however, that Ms Cradock had not been offered any opportunity to answer these allegations before she was dismissed. It recorded that Ms Cradock said she had kept all her texts and emails and could not recall any concerning complaints about her performance. In two meetings she had with her manager, she had been given no cause to believe her employment was in jeopardy. To the contrary, she believed from what she was told that her employment would continue beyond the expiry of the trial period.[5]

[12] The Authority concluded that in these circumstances the dismissal was unjustifiable; it accordingly went on to consider remedies.[6]

[13] The dismissal had occurred on 14 September 2017. Ms Cradock was unable to find alternative full-time employment until 1 June 2018, although she had various part-time jobs in the interim. The Authority accepted her evidence of having made many attempts to obtain employment following her dismissal.

[14] The Authority noted that Ms Cradock had calculated that from 14 September 2017 to 1 June 2018, her lost wages were $17,819.71. This figure was derived by calculating Ms Cradock's average weekly earnings during this period using a devisor based on 9.6 weeks' employment with Allied; that is, from 3 July 2017 to 14 September 2017. This resulted in average weekly earnings of $650.83. From the resultant sum she deducted her earnings in the 37 weeks which passed between her dismissal and the commencement of her full-time employment.[7]

[15] The Authority found she had miscalculated the length of her employment with Allied, which was 74 days, or 10.6 weeks. Use of this devisor resulted in average

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5 *Cradock v Allied Investments Ltd t/a Allied Security,* above n 1, at [34].
6 At [35].
7 At [38].

weekly earnings of $589.43, which the Authority used to calculate lost earnings for the three-month period following termination.

[16] The Authority was not persuaded to exercise its discretion to award more than three months' remuneration under s 128 of the Act, concluding it was unlikely Allied would have continued to employ Ms Cradock beyond that timeframe. Accordingly, the appropriate award of wages was $7,662.59, subject to any findings as to contribution.

[17] Then the Authority considered Ms Cradock's claim for an award of compensation for humiliation, loss of dignity and injury to feelings of $20,000. The Authority accepted Ms Cradock's evidence as to the effect of the dismissal on her. It recorded that as well as being very upset by it, she had to sleep for six or seven weeks in the back of her vehicle as she had no longer been able to afford rental accommodation. She had gone into debt to purchase the vehicle and feared not being able to keep up with the payments she was committed to making. She had also told the Authority she had to drop out of her university veterinary studies at Massey University, as it was too difficult and expensive to continue. The Authority concluded that $15,000 was an appropriate award.[8]

[18] The Authority found that Ms Cradock's actions did not contribute to the situation that gave rise to the dismissal grievance.[9] This finding is not contested.

First issue: validity of notice

[19] Before summarising counsel's submissions with regard to the validity of the notice which was served on Ms Cradock by Allied, it is appropriate to set out the statutory provisions relating to trial periods which applied at the time.[10] They read:

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

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8 At [41].
9 At [42].
10 These provisions were amended with effect from 5 May 2019 by the Employment Relations Amendment Act 2018, ss 36 and 37.

(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.

...

(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).

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.

Submissions

[20] For Allied, Mr Hall submitted, in summary:

a) It was accepted that the requirements of s 67A of the Act are to be interpreted strictly. The necessary requirements of that section were all met in the agreed trial provisions incorporated in the IEA between Allied and Ms Cradock.

b) Turning to s 67B(1), the key issue was whether immediate notice qualified as "notice of the termination". The Authority held that it did not, relying on dicta in *Smith*.[11]

c) However, there was no previous case where it had been decided parties could not agree a trial period could be terminated with immediate effect.

d) The concepts of "notice" and "notice period", as used in cl 5.3 of the IEA, were distinct. The provision of a notice of termination, and the length of any notice period, were a matter to be agreed between the parties.

e) The explanatory note for the Employment Relations Amendment Bill 2008, when the concept of a trial period was originally introduced, stated that "... the employer must comply with any agreed notice period, or give a period of notice of termination of the employment". By inference, "notice" in s 67B meant express contractual notice, and if no such notice, then common law principles would result in a term of reasonable notice being implied.

f) Cases which had discussed the concept of notice for the purposes of s 67B(1), such as *Smith* and *Ioan v Scott Technology NZ Ltd t/a Rocklabs,*[12] were not on point, because these judgments did not deal with the question of whether an immediate notice was valid. They are accordingly distinguishable.

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11 *Smith v Stokes Valley Pharmacy (2009) Ltd,* above n 4, at [106]-[107].

12 *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 4; *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386 at [26]-[28].

g) The notice given in the present case was clear and unambiguous. It was given under a contractual provision that made it clear termination could be immediate.

h) If immediate notice is not possible under s 67B(1), then the question arises as to what period is appropriate, since no minimum period is specified in the section. Could the parties agree that one hour is sufficient, or one day? Where should the line be drawn? Parliament could not have intended such an arbitrary result.

i) If Parliament intended that immediate notice was not valid, and that there should be a minimum period of notice, it would have said so.

j) The position in overseas jurisdictions where minimum periods of notice are proscribed, were referred to and contrasted with the New Zealand position where no minimum legislative notice period is provided for.

[21] For Ms Cradock, Mr Meikle submitted, in summary:

a) The language used in cl 5.2 of Ms Cradock's IEA was ambiguous. The first sentence requires notice; the second sentence does not.

b) Section 67B(1) of the Act is clear. A notice of termination is to be given, which is an obligation that cannot be contracted away.

c) The Court of Appeal stated in *Ioan*[13] that ss 67A and 67B do not remove longstanding employee protections and must therefore be interpreted strictly. This meant that s 67B required the termination of a trial period to be on notice, and that a summary dismissal would fall outside the section.

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13 *Ioan v Scott Technology NZ Ltd*, above n 12.

d) In *Smith*,[14] it was observed that the statutory requirement for notice could not be interpreted as its antithesis, no notice, which is the essence of summary dismissal.

e) In *Farmer Motor Group Ltd v McKenzie*, the Court again held that because the 90-day trial period provisions removed a fundamental right to bring proceedings for an unjustifiable dismissal, those provisions, and the contractual provisions, must be interpreted strictly.[15]

f) In light of these matters, the notice served on Ms Cradock in the present case was invalid.

Analysis as to notice of termination in s 67B(1)

[22] The starting point must be s 5 of the Interpretation Act 1999. Text and purpose are the key drivers of statutory interpretation. The position is summarised in the following well-known observations of Tipping J in *Commerce Commission v Fonterra*:[16]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

Text

[23] Dictionaries confirm that a notice is the provision of information or notification about something. Formal notice may be given about a fact or event that has occurred, is occurring, or will occur. The word is potentially one of broad effect.

[24] A preliminary point is that no one is suggesting that the words used allow for notice to be given about an event that has already occurred. The word "notice" has a more restricted meaning when used in s 67B(1).

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14 *Smith v Stokes Valley Pharmacy (2009) Ltd*, above n 4.
15 *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98 at [30].
16 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

[25] The word must be construed in the phrase in which it appears. That is, the employer must give 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."

[26] The final words of the subsection have two potential consequences. First, although a notice of termination for the purposes of s 67B(1) must be given before the end of the trial period, it is permitted to take effect either before, at, or after the end of the trial period.

[27] Second, the effect of giving such a notice prior to the end of the trial period means it will relate to a future event if the termination is to take effect at or after the end of the trial period. It follows that in two of the three situations referred to in the subsection, advance notice will be given.

[28] But what of the third situation, where the notice must be given before the end of the trial period, to take effect before the end of the trial period, as occurred in the present case? Did Parliament in that one situation allow for the possibility of immediate notice?

[29] On the face of it, no distinction is suggested by the words used, whether by implication, or by the use of express language. Arguably all three situations require the same type of notice since no distinction is stipulated.

[30] Whether this is the case must be cross-checked by considering the various factors that indicate the intended purpose of the subsection.

Purpose

[31] The statement contained in the explanatory note of the Bill which introduced the proposed trial provisions referred to a new s 67B(1) in a form which was ultimately enacted. The proponents of the Bill said:

> ... The employer must comply with any agreed notice period, or give a period of notice of termination of employment.

[32] As already mentioned, Mr Hall submitted that from this statement it could be inferred "notice" in the subsection meant express contractual notice, or if there was no such express provision, the reasonable notice which would be implied at common law.

[33] His point, in effect, was that "any agreed notice period" as referred to in the explanatory note could include instant notice, even although the alternative referred to would require a period of reasonable notice of termination to be given. But the explanation contains no reference to the giving of immediate notice. Common-sense suggests that the explanation should be understood to mean that a period of notice was required, as was in fact stated.

[34] I turn next to the intended scheme of the trial provisions, as indicated in relevant statements made when the provisions were introduced. These were reviewed in some detail by former Chief Judge Colgan in *Smith*. I need not repeat the passages he cited. He went on to make these findings:

> [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*.
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> [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.*
>
> (Emphasis added)

[35] The requirements for strict interpretation in such circumstances have long been endorsed by the courts. In *Queenstown Lakes District Council v Palmer*, a full Bench of the Court of Appeal referred to what was described as a traditional principle which enjoys fundamental constitutional status in our free and democratic society, "… that

citizens are not to be denied access to the courts, save in rare and appropriate circumstances, and then only pursuant to explicit statutory language."[17]

[36] The point was reaffirmed with regard to the trial provisions, by the Court of Appeal in *Ioan*.[18]

[37] I respectfully agree with these conclusions. The normal protections of the Act should be precluded only where, on a strict interpretation, it is clear that Parliament intended they would not be available.

[38] A further contextual matter which is relevant to purpose concerns the role of a notice of termination of an employment relationship. Under the general law, such a notice:[19]

> … turns what otherwise would have been an open-ended employment relationship, by agreed variation, to a fixed term employment arrangement. In the absence of consent from the other side or good cause, neither party is entitled to change his mind and to terminate the employment relationship earlier than the notice period.

[39] The nature of a notice of termination given in an employment context was considered by the Supreme Court in *Geys v Société Générale, London Branch.*[20] Lady Hale, after discussing the special nature of such contracts which she said may well contain implied terms as a necessary ingredient of the relationship, said:

> 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. In a lucrative contract such as this one, a good deal of money may depend upon it. But even without that, there may be rights such as life and permanent health insurance, which depend upon continuing to be in employment. In some contracts there may also be private health insurance. A person such as [Mr Geys], going on holiday over Christmas and the New Year, needs to know whether he should be arranging these for himself. At the other end of the scale,

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17 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 at 555 (CA).
18 *Ioan v Scott Technology NZ Ltd,* above n 12, at [26].
19 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [154] (EmpC) (footnotes omitted).
20 *Geys* v *Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523, [2013] 1 All ER 1061.

> an employee who has been sacked needs to know when he will become eligible for state benefits.

[40] Those observations were made in the UK context. However, it is equally true that in New Zealand the employment relationship is special, and not necessarily analogous to a commercial contract given the subject matter. Such an agreement may contain a mix of agreed terms, as well as those imposed by the Act. These include the important obligations of good faith, as described in s 4. That section is of course to be construed in light of the objects of the statute as described in s 3; particularly important for present purposes is the reference to the inherent inequality of power in employment relationships.[21]

[41] An example of the application of good faith principles with regard to trial provisions was discussed by former Chief Judge Colgan in *Smith*. He noted that the good faith duty tends to favour a requirement on employers to give an explanation for dismissal at the time of giving a notice to conclude a trial period.[22] I will return to this point shortly.

[42] It is next necessary to consider established principles relating to the period of notice to be included in a notice of termination. Under the general law, it is well accepted that the period of notice is either that which is specified in the employment agreement or, where that is not stated, an implied period of reasonable notice.[23]

[43] There is a significant body of case law relating to such an implication. Each case turns on its own facts, but what is incontrovertible is that the Court will fix the period of notice if necessary.[24] The requirement to provide reasonable notice is a well-enshrined common law obligation if the parties have otherwise not referred to a period of notice in their agreement.

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21 Employment Relations Act 2000, s 3(a)(ii).

22 *Smith v Stokes Valley Pharmacy (2009) Ltd*, above n 4, at [75]-[78].

23 Gordon Anderson, *Employment Law in New Zealand* (2nd ed, LexisNexis NZ Ltd, Wellington, 2017) at 8.20, Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford, 2016) at 521.

24 See, for example, the collection of cases contained in *Hamer v Transport Commercial (Auckland) Ltd* [1998] 1 ERNZ 509 (EmpC) and, more generally, Anderson, above n 23, at para 8.22.

[44] When construing s 67B(1), the Court is entitled to proceed on the basis that Parliament was well aware of these principles.

[45] Parliament would also have been well aware of the fact that, where justified, an employer can terminate an employment agreement with immediate effect, but only on the grounds of misconduct or serious misconduct. Summary dismissal is obviously the antithesis of dismissal with notice.

[46] The Court of Appeal addressed this topic in *Ioan* in these terms:[25]

> [28] We also accept a strict interpretation of s 67B is required. However, we do not consider this means Parliament intended "notice of the termination" to have a different, more restrictive meaning than at general law. That is to say, we do not accept that Parliament intended terminations of employment agreements that would at general law constitute terminations on notice to be classified as summary dismissals for the purposes of s 67B and so outside its scope. There is no reason of principle or policy why that should be so. …

[47] Mr Hall submitted this dicta was made in a case having a different focus than arises here; he said it related only to the situation where an employer advises an employee of termination within the trial period but does not require that person to work out the notice, instead making a payment in lieu.

[48] Whilst *Ioan* did concern payment in lieu of notice, I consider the observation as to Parliament's purpose was not intended to be confined; the Court was plainly addressing the scope of the phrase "notice of termination" for all purposes.

[49] There are two points which arise from the passage. The first, which I have already discussed, is that "notice of the termination" has a particular meaning for the purposes of employment agreements; such a notice relates to a future event so that the employee can order his or her affairs. There is no evidence to suggest that Parliament did not intend the established concept to apply to the language it adopted in s 67B(1). The second point is that summary dismissals are an exception to the general law as to termination on notice.

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[25] *Ioan v Scott Technology NZ Ltd*, above n 12.

[50] Given these factors, it is inherently unlikely that Parliament would have intended that trial provisions would be terminable immediately, contrary to the general law, without saying so expressly.

[51] Mr Hall's key point was that Parliament has left it to the parties to conclude their own bargain, on this and other points relating to trial arrangements. In my view, such freedom is constrained by ss 67A and 67B. These sections allow certain provisions to be included in employment agreements, but only within the "specified parameters" of the statutory regime.[26]

[52] Mr Hall also referred to examples of overseas legislative provisions where minimum periods of notice are provided by statute.[27] He contrasted those regimes with the New Zealand position. He submitted that had Parliament intended there to be a minimum period of notice, either as part of a trial period or more generally, this would have been expressly provided for as in some overseas jurisdictions.

[53] There is no indication in the extrinsic materials provided to the Court that these were referred to, or considered by, Parliament. Moreover, those regimes are not so dissimilar as to assist in interpreting the trial provisions.

[54] In New Zealand, obligations of good faith apply to bargaining;[28] and as already discussed, such duties continue during the employment relationship including one created under s 67A.[29] Such a context suggests the giving of a period of notice is necessary when terminating the trial of a vulnerable employee.

[55] Could these obligations support an implied term of minimum notice, one that could not be confined to one hour or one day?[30] The present case does not require resolution of such an issue, and it is preferable that the question be left for an instance

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26 *Smith v Stokes Valley Pharmacy (2009) Ltd,* above n 4, at [106].

27 For example, Employment Rights Act 1996 (UK), s 86; Canada Labour Code RSC 1895 c L-2, s 230, and Employment Standards Act 2000 SO c 41, ss 54–58.

28 Employment Relations Act 2000, s 32 ("Good faith in bargaining for collective agreement"), s 60A ("Good faith in bargaining for individual employment agreement").

29 See above at [41].

30 See *Smith v Stokes Valley Pharmacy (2009) Ltd,* above n 4, at [69].

where the question is directly in point; consideration of hypothetical minimum periods referred to by Mr Hall are not a helpful aid to the present interpretation issue.

[56] I do not consider that Parliament intended that vulnerable employees working subject to a trial provision would not have the same entitlements as to notice as would apply to other employees, except those summarily dismissed in cases of serious misconduct. As the Court of Appeal observed, there is no reason of principle or policy why that should be the case.[31]

Conclusion as to meaning of "notice of termination"

[57] Drawing these threads together, I am satisfied that "notice of the termination" in s 67B(1) means the giving of advance notice, or a notice period, for a range of reasons.

[58] It is clearly the case that advance notice is to be given where this occurs prior at the end of the trial period to take effect at or after the end of that period. There is no indication that the same requirement does not arise where the notice is given prior to the end of the trial period to take effect before that period concludes.

[59] By way of cross-check, a range of factors confirm this intention.

[60] First, the explanatory note of the Bill introducing the trial provisions referred to the obligation to give a period of notice of termination of employment.

[61] This reflects the general law with regard to the giving of notices of termination.

[62] If Parliament had intended to override the longstanding requirements which apply, unless there is an instance of serious misconduct justifying summary dismissal, it would have said so. The word "notice" thus has the usual meaning given in employment law.

[63] This strict interpretation is confirmed having regard to the purposes of the Act, including obligations of good faith, and the requirement to acknowledge the inherent

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31 *Ioan v Scott Technology NZ Ltd*, above n 12, at [28].

inequality of power between employer and employee when bargaining for, and working under, a trial provision.

[64] It follows that Ms Cradock's trial provision did not meet the requirements of s 67B(1) because the relevant provision did not provide for advance notice, and was accordingly invalid.

[65] It follows that the Authority did not err in its finding on this point. The challenge on the first issue is accordingly dismissed.

Second issue: quantum of compensation

[66] Having found that the company was not entitled to rely on the trial provision protections, the Authority determined that Ms Cradock had been unjustifiably dismissed. That aspect of the determination has not been challenged. What has been challenged is the quantum awarded.

[67] On this issue, Mr Hall submitted in summary:

a) It is well established on the authorities that when assessing the quantum of compensation under s 123(1)(c)(i) of the Act, the employer is not to be punished. Rather, the amount awarded must relate to the suffering felt by the employee as derived from the established personal grievance.[32]

b) Allied had dismissed Ms Cradock pursuant to a trial period that it genuinely believed was valid; it had acted responsibly and could not have known that in doing so it was acting in breach of s 67B(1). The breach was technical only, and this should be reflected in the compensatory award.

c) Three months' lost wages and a compensation award of $15,000 was punitive, because had notice been given in the terms in which it was agreed for other types of termination in the IEA, Ms Cradock would have

[32] *Tawhiwhirangi v Attorney-General in respect of the Chief Executive, Department of Justice* [1994] 1 ERNZ 459.

been given two weeks' notice, and would have received wages for that period.

d) The sum of $15,000 was excessive. That sum was outside the range which was fair in the circumstances.

[68] Mr Meikle submitted in summary:

a) Ms Cradock was held to have been unjustifiably dismissed, and that is the grievance from which the distressed flowed; and

b) the amount awarded was not inappropriate.

Analysis: compensation

[69] In *Richora Group Ltd v Wai Ying Cheng*, Chief Judge Inglis adopted a five-step approach under s 123(1)(c)(i) of the Act:[33]

a) What is the nature of the harm that has been suffered?[34]

b) What is the extent of the loss or harm which has been suffered?[35]

c) Where on the spectrum of cases does the particular case sit in terms of harm suffered, which may be assessed with regard to the bands identified in *Waikato District Health Board v Archibald*.[36]

d) Where on the spectrum of cases does the particular case sit in terms of quantum?[37]

e) What is a fair and just award in the particular case?[38]

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33 *Richora Group Ltd v Wai Ying (Melody) Cheng* [2018] NZEmpC 113.
34 At [41].
35 At [42].
36 At [52]; *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].
37 At [55].
38 At [69].

[70] It will be evident from the foregoing that the assessment of compensation is for the humiliation, loss of dignity and injury to the feelings of the employee, arising from the personal grievance which has been established. Section 123(1)(c)(i) of the Act is to compensate for harm suffered; the culpability – or lack of it – does not feature in the assessment.

[71] The Authority did not choose to make reference to the banding system, but it is useful to do so now in order to assess whether the Authority erred; the question for the Court is whether its finding was within the range of appropriate outcomes.

[72] Mr Meikle made a brief submission with reference to *Archibald*, where the Court concluded in a redundancy case that the injury suffered by the employee as a consequence of the employer's unjustified actions fell around the middle of band 2, which led to a conclusion that an appropriate award was $20,000.[39]

[73] Subsequently, in *Richora*, the Court found, for the purposes of that case, that the bands should be nought to $10,000 (band 1), $10,000 to $40,000 (band 2) and above $40,000 (band 3).[40]

[74] I respectfully adopt those bands for the purposes of this case.

[75] I agree that the compensatory award of $20,000 in *Archibald* provides a useful basis for considering a range for present purposes. In my assessment, the consequences for the plaintiff in that case were more serious than those which arose here.

[76] Accordingly, I consider the award of $15,000 to be within range. The challenge with regard to this point is accordingly dismissed.

Issue three: exercise of discretion under s 128(3)

[77] For Allied it was submitted in summary:

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39 *Waikato District Health Board v Archibald*, above n 36, at [66].
40 *Richora Group Ltd v Wai Ying (Melody) Cheng*, above n 33, at [67].

a) The Authority erred by adopting an averaging calculation to determine the quantum of three months' lost wages.

b) In particular, the calculation undertaken by the Authority did not factor in:

- If the dismissal had not occurred, Ms Cradock would have been working minimal hours until 6 November 2017 at her own request.

- Then she would likely have worked only her guaranteed hours of 12 hours per week, from 6 November 2017 to 15 December 2017, because the extra work she had undertaken previously would no longer have been available.

- She did in fact obtain work elsewhere at Sky TV, which was not reflected in the Authority's calculation.

- Accordingly, the correct calculation should have proceeded on the basis of 12 guaranteed hours per week, at $16 per hour, for 13 weeks, a total of $2,496. Her earnings throughout that period should then be subtracted to give the final lost wages amount.

[78] For Ms Cradock, Mr Meikle submitted in summary:

a) The calculation undertaken by the Authority, which produced a figure of $7,662.59 gross, was not incorrect.

b) Although the Authority undertook its calculation by utilising average weekly earnings prior to her dismissal, it was not unreasonable to do so. Even if Ms Cradock would not have been available for extra work due to university commitments from mid-September to early November 2017 there were limited prospects of obtaining extra work thereafter. It was likely her employment would have continued with Allied beyond the three months following termination, contrary to the Authority's finding

on that point. Balancing these factors, the amount awarded was reasonable.

Analysis: s 128 considerations

[79] Over the relatively short period of her employment with Allied, some 10 weeks, Ms Cradock was offered significant hours of work over and above the minimum described in her IEA of 12 hours per week.

[80] Christopher McDowell, General Manager (Operations), stated in his evidence that work opportunities over and above 12 hours per week would not have been available for the period following Ms Cradock's dismissal, because the demand for the particular additional work she had been undertaking diminished.

[81] A second issue arose from the fact that not long before her employment was terminated, Ms Cradock emailed Allied indicating that she was only available for limited hours to 6 November 2017 due to university requirements.

[82] Although Ms Cradock told the Court that the requests she had made in her email restricted the days of the week on which she would be available for extra work, in fact she could have worked up to 53 hours per week for the period 18 September to 22 October 2017, and 36 hours per week for the period 23 October to 6 November 2017. She had asked for as much work as possible thereafter.

[83] A further factor was raised by Ms Cradock. She said that two staff members ceased working for Allied in early September 2017, and their roles were advertised. She raised the question of whether that would have provided her with additional opportunities. However, I accept the company's evidence that such opportunities may well have been constrained by the fact that it was looking for full-time replacement employees; Ms Cradock had university obligations and would not have been available for such a role. This possibility must be put to one side.

[84] Another factor was raised, which in my view, is also not relevant. Ms Cradock had sought annual leave from 21 – 30 December 2017. Under her IEA, this would

have been a paid entitlement. Her non-availability in the period does not therefore fall for consideration in the assessment of post-termination earnings.

[85] In his closing submissions, Mr Hall accepted that Ms Cradock may have been offered some extra work from mid-September to early November, over and above her minimum contracted hours of 12 per week; he assessed this at say one day per month, say two hours per week.

[86] Even allowing for modest additional work on the basis of this concession, the Authority's calculation of lost wages for the post-termination period appears to have proceeded on a more favourable basis than the evidence, at least that which was placed before the Court, would have justified.

[87] A further consideration arises from the Authority's analysis. It was not persuaded that more than three months' remuneration under s 128 of the Act, because on its assessment of the evidence it was unlikely Allied would have continued to employ Ms Cradock beyond that timeframe in any event.

[88] The necessary counter-factual analysis does not lead to a conclusion that Allied would have ceased employing Ms Cradock beyond the three-month timeframe following her actual termination. The evidence does not establish that her employment would have ended because of performance issues. Nor was there any evidence of possible redundancy or other potential reasons for termination. I do not therefore agree that there was a prospect of Ms Cradock's employment not continuing after the three months following her termination.

[89] In an unchallenged finding, the Authority said Ms Cradock had been unable to find alternative full-time employment until 1 June 2018, although she had various part-time jobs. The Authority accepted her evidence of having made many attempts to obtain employment following her dismissal.[41]

[90] On the basis of the evidence heard by the Court, I would have considered it appropriate to award lost wages for the period through to the date on which

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[41] *Cradock v Allied Investments Ltd t/a Allied Security*, above n 1, at [37].

Ms Cradock obtained alternative employment, 1 June 2018, and would have assumed that there would have been limited opportunities for additional hours. Allowance would then need to have been made for earnings actually obtained across the period.

[91] However, the result would have been approximately similar to that obtained by the Authority if assessed on the basis of an average of 14 hours per week across the period to 1 June 2018. In short, I am not persuaded the Authority erred in fixing the lost wages figure of $7,662.59, although there will need to be a minor adjustment for SKY TV earnings obtained in the three-month period.

Disposition

[92] Allied has not succeeded on two of its three points of challenge; and on the third has succeeded to a minor extent only.

[93] This judgment replaces the Authority's determination. I confirm the awards which it made, but there will need to be an adjustment for wages earned by Ms Cradock from SKY TV, in the three months following the termination of her employment. I anticipate the parties can resolve this modest arithmetical issue.

[94] Ms Cradock is entitled to costs. My provisional view is that these should be determined on the basis of a Category 2, Band B of the Court's Guidelines Scale as to costs. Counsel should discuss the issue directly. If not agreed, Ms Cradock may make an application to the Court within 21 days. Allied may respond within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 2.45 pm on 11 November 2019