IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 198
EMPC 147/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out proceedings
BETWEEN	STEVEN JOBBITT Plaintiff
AND	4 SEASONS INDOOR OUTDOOR LIVING (2014) LIMITED Defendant

Hearing: 7 October 2019
(Heard at Christchurch via Audio Visual Link)

Appearances: W Reid, advocate for plaintiff
A Sharma, counsel for defendant

Judgment: 20 December 2019

JUDGMENT OF JUDGE K G SMITH
(Application to strike out proceedings)

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[1] On 29 April 2019, the Employment Relations Authority determined that it did not have jurisdiction to investigate Steven Jobbitt's claim that he had been unjustifiably dismissed by 4 Seasons Indoor Outdoor Living (2014) Ltd.[1]

[1] *Jobbitt v 4 Seasons Indoor Outdoor Living (2014) Ltd* [2019] NZERA 246.

[2] The Authority was satisfied that Mr Jobbitt had received notice terminating his employment that complied with a valid 90-day trial period provided for in the employment agreement he had with 4 Seasons.

[3] Mr Jobbitt does not agree and has challenged the determination.

The determination

[4] Mr Jobbitt and 4 Seasons entered into an employment agreement on 16 April 2018. Clause 11 of the agreement contained a trial provision pursuant to ss 67A and 67B of the Employment Relations Act 2000 (the Act).[2] The parties accept that clause 11 complied with the Act so the trial provision was lawful and enforceable. The only issue between them is the adequacy of the notice Mr Jobbitt was given to end his employment.

[5] Clause 11.4 reads:

> Within the 90 day trial period, either party may terminate the employee's employment by providing one week's notice of termination. This notice must be given within the trial period even if the employee's last day of work is after the trial period ends.

[6] Mr Jobbitt started work for 4 Seasons on 14 May 2018. The last day of the trial period was therefore 11 August 2018. The Authority held that, in a telephone call on 10 August 2018, Mr Jobbitt was told by 4 Seasons' Chief Executive, Jonathan Cameron, that:

> … his employment agreement would be terminated under the 90 day trial period clause in his employment agreement.

[7] Written confirmation of that termination was emailed to Mr Jobbitt a few days later, on 13 August 2018. The Authority held that the primary purpose of the telephone call was to terminate Mr Jobbitt's employment. Before that decision was made Mr Jobbitt had advised the company, as early as mid-July 2018, that he was looking for work elsewhere but he had not resigned. An unsuccessful attempt was made to

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[2] Prior to those sections being replaced on 6 May 2019 by s 36 of the Employment Relations Amendment Act 2018.

negotiate an arrangement for him to continue work for a period of time while looking for a new job. These negotiations occurred before the telephone call.

[8] The pleadings, application to strike out, and submissions, concentrated on whether what Mr Cameron said in the telephone call was sufficient to be notice of termination under clause 11.4 of the agreement. Mr Jobbitt's case was that the notice was deficient, because he was entitled to be told when his employment would end which Mr Cameron did not do. If that was correct 4 Seasons could not rely on s 67B(2) of the Act, which would otherwise prevent him from pursuing a claim for unjustified dismissal.

[9] The Authority was satisfied that the notice complied with clause 11.4 and that s 67B of the Act applied. Consequently, the Authority held that it had no jurisdiction to hear Mr Jobbitt's personal grievance for an alleged unjustified dismissal.

[10] Ms Sharma and Mr Reid accepted that the Authority's finding about the conversation was accurate and that Mr Cameron intended to end the employment agreement. That is an important concession by Mr Reid because, on one reading of the Authority's findings, the conversation may have been interpreted as ambiguous, perhaps meaning formal notice was to follow the conversation. When this possibility was raised with Mr Reid he accepted that Mr Jobbitt's case was that he was given notice in the telephone call but it was inadequate.

[11] Mr Jobbitt challenged the determination but confined the dispute to the conclusions at paragraphs [36], [37] and [38] of the determination, discussed below.

The Act

[12] Before considering the present application, it is useful to set out ss 67A and 67B as they were before recent amendments.[3] Those sections read:

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[3] On 6 May 2019 s 67A by s 36 of the Employment Relations Amendment Act 2018 and s 67B by s 37 of the Employment Relations Amendment Act 2018.

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) [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).

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.

[13] The amendments to these sections introduced a restriction, so that an employment agreement containing a trial provision may be entered into only by a small to medium-sized employer with employees who have not previously been employed by that employer. Those changes are not relevant to this proceeding because the employment agreement was entered into in July 2018, and the new provisions are not retrospective.

The challenge

[14] Mr Jobbitt's statement of claim challenged paragraphs [36], [37] and [38] of the determination. Paragraph [36] reads:

> [36] Sections 67A and 67B of the Act and Mr Jobbitt's employment agreement do not state that for notice of termination under the trial period provision to be valid it must include (at the time notice is first given) the date on which the employment would end.

[15] Paragraph [37] reads:

> [37] The obligation on 4 Seasons, in order to meet the s 67B requirements, was that notice was given in accordance with the specified contractual notice requirements in Mr Jobbitt's employment agreement. That did occur.

[16] Finally, paragraph [38] reads:

> [38] The Authority was therefore satisfied, because 4 Seasons met the requirements of s 67B(1) and (2) of the Act, that it was entitled to rely on the trial period provision in Mr Jobbitt's employment agreement to preclude him from pursuing a dismissal grievance against it.

[17] A statement of defence was not filed by 4 Seasons. Instead, after the time to file one had elapsed, it belatedly applied to strike out the statement of claim.

Strike out application

[18] The grounds of the application seeking to strike out the proceeding were that it:

(a) had incorrectly named the defendant;

(b) disclosed "no reasonably arguable cause of action, defence or case appropriate to the pleadings made";

(c) was frivolous and vexatious;

(d) was likely to cause prejudice to 4 Seasons; and

(e) was "otherwise an abuse of process of the Court".

[19] The application was supported by an affidavit from Mr Cameron, providing background about Mr Jobbitt's employment. Exhibited to his affidavit was a copy of Mr Jobbitt's witness statement for the Authority investigation without any apparent reason for doing so beyond an attempt to be complete.

[20] The first ground of the application is no longer relevant. The statement of claim had misstated the employers name by omitting the word "Indoor". That obvious but inconsequential mistake was corrected during a telephone directions conference.

[21] The company's application was opposed. The grounds of opposition insisted that the issue was not frivolous, vexatious or an abuse of the Court's process. The grounds relied on *Smith v Stokes Valley Pharmacy (2009) Ltd* to support the contention that the notice of termination was deficient.[4]

Jurisdiction to strike out

[22] The Court has jurisdiction to strike out all or part of a pleading.[5] The criteria to apply are well known:[6]

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

5 Employment Court Regulations 2000, reg 6(2)(a)(ii), High Court Rules 2016, r 15.1; and see *New Zealand Fire Service Commission v New Zealand Professional Fire Fighters Union Inc* [2005] ERNZ 1053 (CA) at [13].

6 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267-268; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152, [2017] ERNZ 858 at [20].

(a) Pleaded facts, whether or not they are admitted, are assumed to be true. That does not extend to pleaded allegations which are speculative and without foundation.

(b) The cause of action or defence must be clearly untenable, sometimes expressed as striking out a claim being inappropriate unless the Court can be certain it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases, reflecting a reluctance to terminate a claim, or defence, short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be particularly slow to strike out a claim in a developing area of law.

[23] For completeness, it is necessary to add that evidence may also be considered in a strike out application in an appropriate case.[7] However, that evidence is generally limited to what is undisputed. Where evidence is considered, that will not normally occur if it is inconsistent with the pleadings. That is because a strike out application is dealt with on the basis that the plaintiff is able to prove the pleaded facts. However, the Court of Appeal has acknowledged that there may be cases where a factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

The submissions

[24] In summary, Ms Sharma's submissions were that:

(a) Mr Jobbitt did not dispute when he was given contractual notice that his employment would terminate under the trial agreement.

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7 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566. Confirmed in *Pharmacy Care Systems Ltd v Attorney-General* (2001) 15 PRNZ 465 (CA) at [19].

(b) The law does not "mandate" an employer to specify the precise date when employment would terminate under a trial agreement, but rather the agreed contractual notice must be given in accordance with a valid trial provision.[8]

(c) Parties to an employment agreement are familiar with the contractual agreements themselves, and it follows that an employee has prior knowledge of the agreed notice period.

(d) The Authority's decision was consistent with previous cases, referring particularly to *Smith v Stokes Valley*.

(e) The statement of claim is frivolous and cannot succeed.

[25] In summary, Mr Reid's submissions for Mr Jobbitt were that:

(a) There is no dispute about the facts as stated in the determination.

(b) It is significant that the only communication Mr Jobbitt had about notice terminating his employment during the 90-day trial period was in the telephone call of 10 August 2018.

(c) The communication to Mr Jobbitt was "…wholly unclear in terms of when employment was to end". There was no reference to any notice period, and that communication may be interpreted as meaning termination was immediate or it could mean that it would be at a later time.

(d) The company had the right to terminate Mr Jobbitt's employment under clause 11, on one weeks' notice, but that is a minimum period. A longer notice period could have been given.

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[8] Relying on s 67A and 67B and *Smith v Stokes Valley*, above n 4.

(e) The problem with the determination is that it assumes Mr Cameron meant that he was intending to end the employment seven days later and Mr Jobbitt understood that. The determination assumes Mr Jobbitt was aware and understood the notice provisions in his employment agreement.

(f) A judgment in this case has a potentially wider consequence other than the litigants themselves.

(g) Drawing on *Smith v Stokes Valley*, *Farmer Motor Group Ltd v McKenzie*, and *Ioan v Scott Technology*, notice must be more than simple advice of the dismissal; it must be in accordance with the employment agreement, be clear and unambiguous, and explain how and when the employment is to be terminated.[9]

Analysis

[26] I am mindful that the criteria to consider requires accepting pleaded facts are assumed to be true and that the jurisdiction is exercised sparingly. Ms Sharma concentrated on arguing that, once the Authority's finding of fact about what was said in the telephone call was accepted, it must follow that lawful and complete notice was given terminating Mr Jobbitt's employment. It follows that the notice satisfied the employment agreement and, therefore, meant that s 67B(2) precluded any personal grievance for unjustified dismissal. She did not analyse the notice beyond submitting that it complied with the employment agreement.

[27] Mr Reid submitted it would not be appropriate to assume that the notice given to Mr Jobbitt was of the one week required by the employment agreement.

[28] He also raised a possibility that notice longer than the contractual notice may have been given. A potential lack of clarity over the notice was raised because some

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9 *Smith v Stokes Valley*, above n 4; *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98; *Ioan v Scott Technology NZ Ltd (t/as Rocklabs)* [2018] NZEmpC 4, (2018) 15 NZELR 723; *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386.

uncertainty may have existed, arising from the negotiations Mr Jobbitt and Mr Cameron had about work being extended beyond the trial period.

[29] As to the adequacy of notice, Mr Reid relied on comments from *Smith v Stokes Valley*, to argue that not enough had been done. In that case the plaintiff had been summarily dismissed relying on a trial provision. In obiter remarks the Court referred to the need for notice to be more than simple advice of dismissal.[10] The Court commented that s 67B contemplated notice to be advice of when, in future, the dismissal will take effect. Observations about the adequacy of notice, to the same effect as the obiter comments in *Smiths v Stokes Valley,* were made in *Farmer Motor Ltd v McKenzie* and *Ioan v Scott*.[11] Mr Reid submitted the same situation applied here. That was because Mr Jobbitt had not been told when, in future, the dismissal would take effect.

[30] I do not accept Mr Reid's submissions. I agree with the propositions that can be derived from *Smiths v Stokes Valley, Farmer Motor Ltd v McKenzie* and *Ioan v Scott*, that notice must be more than simple advice of dismissal and that it must comply with the employment agreement.

[31] That assessment does not assist Mr Jobbitt. He was entitled to receive notice complying with clause 11.4, and that is what he received when Mr Cameron stated in their telephone call that notice under the clause in the employment agreement was being given.

[32] Mr Cameron went further than just giving Mr Jobbitt advice that his employment would end. The complete statement included a clear reference to the trial period clause in the employment agreement and, therefore, to the one weeks' notice that was part of it. The conversation served two functions, telling Mr Jobbitt his employment was to end under the employment agreement, and that it would end in a week. Mr Cameron did not use a calendar day, which is what Mr Reid's submissions

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10 At [61].

11 As to observations to similar effect see *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523 at [57] per Lady Hale SCJ; "… it seems to me 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".

seem to suggest was required, but Mr Jobbitt knew from this conversation precisely when his employment was to end. The words used were enough satisfy the contractual notice.

[33] Once the Authority held that the notice given complied with the employment agreement its conclusion that s 67B(2) precluded a personal grievance for unjustified dismissal was inevitable.

Outcome

[34] Mr Jobbitt's proceeding against 4 Seasons is untenable because it cannot succeed. The proceeding is struck out.

[35] Costs are reserved. If they cannot be agreed then 4 Seasons may file a memorandum within 30 working days, Mr Jobbitt may reply within a further 20 working days and 4 Seasons can have a final response within a further 5 working days.

K G Smith
Judge

Judgment signed at 12.20 pm on 20 December 2019