IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA142/2018
[2019] NZCA 386

BETWEEN	CALIN IOAN Appellant
AND	SCOTT TECHNOLOGY NZ LIMITED Respondent

Hearing:	20 June 2019 (further material received 5 July 2019)
Court:	French, Brown and Collins JJ
Counsel:	S R Mitchell and J P Lynch for Appellant G D Bevan for Respondent
Judgment:	27 August 2019 at 10 am

JUDGMENT OF THE COURT

A We answer the question of law submitted for determination by this Court:

Whether s 67B(1) of the Employment Relations Act 2000 applied to the termination of the appellant, in circumstances where that termination was advised to him within the trial period, but the employer paid the employee in lieu of work for the notice period, in a manner permitted by his employment agreement?

Answer: Yes.

B The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by French J)

[1] Mr Ioan was employed by Scott Technology NZ Ltd (Scott Technology) under an employment agreement which provided for a 90-day trial period. His employment was terminated during the trial period and he sought to bring a claim of unjustifiable dismissal in the Employment Court.[1]

[2] Judge Holden held that Mr Ioan was prevented from bringing the claim because s 67B of the Employment Relations Act 2000 (the Act) applied.[2] Section 67B states that if an employer terminates an employment agreement containing a trial provision by giving the employee notice of the termination before the end of the trial period, the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[3] Dissatisfied with that outcome, Mr Ioan sought and obtained leave to appeal to this Court on the following question of law:[3]

> Whether s 67B(1) of the Act applied to the termination of the appellant, in circumstances where that termination was advised to him within the trial period but the employer paid the employee in lieu of work for the notice period, in a manner permitted by his employment agreement?

Background

[4] It was common ground that the clause in the employment agreement providing for a 90-day trial period complied with the requirements of s 67A of the Act and was therefore valid.[4]

[5] In addition to the clause providing for a trial period, the agreement also contained a general notice provision, cl 11. It relevantly stated:

---

1 Mr Ioan also sought to bring a claim of unjustifiable disadvantage but the Employment Court held that claim was not made out on the facts. It is not part of the appeal.

2 *Ioan v Scott Technology NZ Ltd (t/as Rocklabs)* [2018] NZEmpC 4, (2018) 15 NZELR 723 [EC decision] at [63].

3 *Ioan v Scott Technology NZ Ltd* CA142/2018, 3 August 2018 (Minute of Brown J) at [5].

4 Since the Employment Court decision was issued, the Employment Relations Act 2000 has been amended to limit the use of 90-day trials to employers with less than 20 employees. The amendment has no bearing on the appeal.

(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.

[6] Mr Ioan commenced his employment with Scott Technology on 1 August 2016.

[7] Unfortunately, things did not work out. There were various meetings which culminated on 7 October 2016 when management handed Mr Ioan a letter. The letter read:

> ...
>
> 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,
>
> ...

[8] Although the letter advised that the company would pay Mr Ioan in lieu of working out his notice period, the Judge accepted the company's evidence that it would have been willing for Mr Ioan to work out his notice if that was his preference. She also accepted the company had asked him whether that was his preference but also found the question had not registered with Mr Ioan.

[9] Mr Ioan said he wanted to leave immediately and that was agreed.

[10] On 19 October 2016, Mr Ioan was paid four weeks' salary together with holiday pay. The date of 19 October was the usual pay day. Mr Ioan commenced employment with another company on 25 October 2016.

The reasoning of the Employment Court

[11] Judge Holden recorded that both parties accepted that for the purposes of s 67B the requisite "notice" of termination meant the period of notice under the relevant employment agreement.[5] The Judge said she considered this "included" 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 contract.[6]

[12] The Judge went on to identify the key question as being whether Scott Technology failed to comply with the notice provision in the employment agreement and as a result was unable to rely on s 67B.[7]

[13] She then analysed the wording of the letter, construing it to say:[8]

(a) The employment agreement required four weeks' notice.

(b) The employment itself, that is the attendance at work, ended immediately.

---

5 EC decision, above n 2, at [43].
6 At [44].
7 At [57].
8 At [58]–[62].

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

(d) His effective last day of work was the date of the letter, reinforcing that while technically the agreement may continue, Mr Ioan would no longer be required to carry out any work.

[14] The Judge concluded that the employment agreement was validly terminated by the letter pursuant to cl 11(a) of the 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.[9]

[15] The manager and Mr Ioan then agreed he would leave immediately and they both treated the end of the employment as the end of their relationship which allowed Mr Ioan to take up new employment.[10]

[16] It followed the bar on issuing proceedings regarding the termination in s 67B applied.

The scope of the question for determination

[17] Under the Act, the right of appeal to this Court is by leave and it is confined to questions of law which raise questions of general importance.[11] Two things follow from those limitations. The first is that the question for determination must be formulated with precision. The second is the Court will not countenance arguments at the hearing that stray outside the proper scope of the question in respect of which leave has been granted.

[18] The question of law for determination in this case was, as already mentioned:

> Whether s 67B(1) of the Employment Relations Act 2000 applied to the termination of the appellant, in circumstances where that termination was advised to him within the trial period, but the employer paid the employee in

---

9 At [63].
10 At [63].
11 Employment Relations Act, s 214(3).

> lieu of work for the notice period, in a manner permitted by his employment agreement?

[19] On behalf of Mr Ioan, Mr Mitchell raised several arguments which in our view were outside the proper scope of the question. In particular, he sought to challenge the Judge's construction of the letter and her finding that Scott Technology had complied with the notice provisions of the employment agreement.

[20] When we put to Mr Mitchell that these issues were outside the scope of the question, he disputed this and said the wording of the question left the issue of compliance with the employment agreement open. That interpretation of the question is however untenable. The question is unequivocally predicated on the existence of specified circumstances, namely termination being advised within the trial period and a payment in lieu of work for the notice period being made in accordance with the employment agreement.

[21] To put it another way, the question for determination is *not* whether Scott Technology is precluded from relying on s 67B because the termination was effected in breach of the employment agreement.

[22] Rather, the issue of general importance which the question was plainly intended to raise is the more fundamental one of whether the Judge correctly interpreted the phrase "notice of the termination" as it appears in s 67B when she held the phrase included the contemporaneous giving of notice and payment in lieu of notice in accordance with the employment contract.

[23] We turn now to the arguments advanced in relation to that issue and our analysis.

Analysis

Argument on appeal

[24] Mr Mitchell submitted that, correctly interpreted, "notice" under s 67B meant more than just advice of dismissal. It meant advice of when in the future the termination will take effect. It required a specific date. He also submitted — at

least at one point of his submissions — that it meant the employee needed to work during the notice period. Otherwise, it was a summary dismissal and so outside s 67B.

[25] In support of those submissions, Mr Mitchell referred us to the decisions of *GFW Agri-Products Ltd v Gibson*, *Smith v Stokes Valley Pharmacy (2009) Ltd*, *Geys v Société Générale, London Branch* and *Farmer Motor Group Ltd v McKenzie*.[12]

Our view

[26] As Judge Holden noted, the purpose of ss 67A and 67B is to enable employers to assess an employee's suitability for permanent employment without the risk of legal proceedings in the event the employment is terminated, a risk which might otherwise deter the employer from engaging the employee at all.[13] As also noted by the Judge, and emphasised by Mr Mitchell, s 67B does, however, remove longstanding employee protections and must therefore be interpreted strictly.[14]

[27] We accept that s 67B requires the termination to be on notice and that a summary dismissal therefore falls outside the section.

[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. Yet, that would be the consequence of accepting Mr Mitchell's submissions.

---

12 *GFW Agri-Products v Gibson Ltd* (1995) 1 NZELR 394 (CA) at [9]; *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, (2010) 7 NZELR 444; *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523; and *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98.

13 In this case, that is what in fact happened. Scott Technology had declined to offer Mr Ioan a position because of concerns about his ability to get on with others and it was him who had suggested a trial period so he could demonstrate those concerns were unfounded.

14 EC decision, above n 2, at [42].

[29] The general law regarding the effect of a payment in lieu of notice is well established. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal.[15] It is not an alternative to providing notice as required by the agreement. Nor will the fact of a payment cure a defective notice, including a notice that is defective because it is ambiguous or not in accordance with the contract because, for example, the period of notice is too short. If, however, the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice which has been conveyed in clear and unambiguous terms, then that is a termination on notice.[16]

[30] It follows we agree with the Judge that "notice of the termination" in s 67B includes a situation where the employer gives the requisite period of notice but does not require the employer to work out the notice, instead making a payment for the period of the notice. It further follows that our answer to the question of law submitted for our determination is "Yes".

Outcome

[31] We answer the question of law submitted for determination by this Court:

> Whether s 67B(1) of the Employment Relations Act 2000 applied to the termination of the appellant, in circumstances where that termination was advised to him within the trial period, but the employer paid the employee in lieu of work for the notice period, in a manner permitted by his employment agreement?
>
> Answer: Yes.

[32] As regards costs, there is no reason why these should not follow the event. The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Garry Pollak & Co, Auckland for Appellant
Gallaway Cook Allan, Dunedin for Respondent

---

15 *GFW Agri-Products Ltd v Gibson*, above n 12, at [9].
16 *Farmer Motor Group Ltd v McKenzie*, above n 12, at [29].