Employment Court of New Zealand

Farmer Motor Group Limited v McKenzie [2017] NZEmpC 98 (15 August 2017)

Last Updated: 18 August 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 98

EMPC 344/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FARMER MOTOR GROUP LIMITED Plaintiff
AND	ADAM MCKENZIE Defendant

Hearing:	11 April 2017 (Heard at Tauranga)
Appearances:	P Crombie and K Hymers, counsel for plaintiff W Reid, advocate for defendant
Judgment:	15 August 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 6 December 2016.1 In that determination the Authority held that it had jurisdiction to investigate the claim of the defendant, Adam McKenzie, to have been unjustifiably dismissed. The investigation meeting in the Authority was dealt with on the papers filed. The preliminary issue, which the Authority decided in Mr McKenzie's favour, was whether the plaintiff, Farmer Motor Group Ltd (FMG) had a defence based on the fact that the employment agreement contained a 90-day trial period under s 67A of the Employment Relations Act 2000 (the Act). The Authority determined that while such a trial period was

contained in the agreement, the notice provisions contained in the agreement were

1 *McKenzie v Farmer Motor Group Ltd t/a Farmer Autovillage* [2016] NZERA Auckland 398.

not complied with. Accordingly, the employer could not rely upon the trial period provisions in the Act.

[2] Following the determination, the parties were recommended to attempt to resolve their dispute between themselves or attempt mediation by agreement or direction. The Authority would continue with the investigation meeting if such methods were unsuccessful. Costs were reserved.

[3] On 22 December 2016, the plaintiff filed a challenge to the determination. Mr McKenzie has filed a defence to the challenge.

[4] The parties have agreed that the challenge will be determinative of whether Mr McKenzie can proceed further with his personal grievance claim. If the Court upholds the challenge, that will be an end of the matter. If the challenge is unsuccessful, the matter will

proceed further in the Authority as a personal grievance claim.

[5] It was further agreed that the challenge would proceed solely on the basis of legal argument. No evidence would be presented. The facts as set out in the determination are therefore not in dispute.

Brief factual outline

[6] As the parties are not presenting evidence at the challenge and the factual findings of the Authority are not in dispute, the facts as found by the Authority in its determination can be set out. In the determination the Authority Member found the following:

[8] The facts of how FMG dismissed Mr McKenzie were not disputed. After he arrived late for work on 11 March, his supervisor Blair Woolford talked with him about why he was late. Mr Woolford also mentioned some other concerns he had about how Mr McKenzie had carried out his work during the previous three days. As a result of those concerns and Mr McKenzie's lateness on 11 March, Mr Woolford concluded Mr McKenzie was unsuitable for permanent employment by FMG and told him so. He then told Mr McKenzie his employment was terminated under the trial period provision, his dismissal was effective immediately, and Mr McKenzie would be paid his salary entitlement for the notice period in his employment agreement, in lieu of him working out those four weeks. Mr McKenzie left

the workplace soon afterwards that day and did not return to work again. On

16 March, which would have been the usual payday if Mr McKenzie was

still at work, FMG paid him four weeks' salary and his holiday pay

entitlement.

[9] On 8 April Mr McKenzie, through his representative, raised the disadvantage grievance with FMG. On 3 May, after communication with FMG's counsel, Mr McKenzie's representative raised the dismissal grievance. The latter grievance was founded on two claims – firstly, that Mr McKenzie was "sent home" without being given the notice of termination required by the Act and the terms of his employment agreement and, secondly, payment of four weeks' salary in lieu of notice did not constitute the notice required by the Act.

Relevant statutory and contractual provisions

[7] Again it is not in dispute that the determination appropriately set out the statutory provisions and provisions contained in Mr McKenzie's employment agreement which are relevant to this dispute. The paragraphs of the determination dealing with these provisions are set out as follows:

[5] Sections 67A and 67B of the Act set certain criteria for an employment agreement to include a trial period, that if met, then prevent a worker bringing a personal grievance or legal proceedings in the event she or he is given notice of dismissal before the end of the trial period:

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.

...

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 (h).

(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.

[6] Mr McKenzie signed his employment agreement before starting work with FMG. There was no doubt the following clause in FMG's agreement with him met the requirements of s 67A:

Trial period

5.1 The Employee is to serve a trial period for 90 days from the beginning of the Employee's employment. During that trial period the Employer may dismiss the Employee and, if the Employer does so, the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[7] Three other clauses set out how Mr McKenzie could be given notice of dismissal before the end of that 90 days and allowed for payment in lieu for all or some of the notice period (bold emphasis added):

Termination of Employment

35.1 ... [T]his agreement may be terminated by either party on not less

than **four weeks' notice in writing** to the other party.

35.2 The Employer must have grounds for termination of employment in accordance with New Zealand law. This does not alter the effect of, and is subject to, any trial provision in this agreement.

35.3 **If the Employer is terminating on notice under** this or **any other clause**, the Employer is **entitled to pay the Employee in lieu of all or part of the required period of notice** or to at any time require the Employee not attend work for all or any part of the notice period.

The Authority's finding

[8] In reliance upon a previous decision of the Employment Court, *Smith v Stokes Valley Pharmacy (2009) Ltd*,2 the Authority held that the notice given to Mr McKenzie by the plaintiff did not comply with the notice requirements in the employment agreement. As it did not comply with its own terms, the employer could not then rely upon the 90-day trial period clause to trigger the bar contained in s 67B(2) of the Act against pursuing the grievance for the dismissal. The member of the Authority followed a reasoned analysis of the matter in reaching that decision.

[9] It is that decision which is the subject of the challenge. The challenge was filed before the matter could proceed further to mediation and then if necessary to an investigation meeting into the grievance.

[10] While the challenge is a non-de novo challenge it is, in effect, an application to the Court to reverse the decision of the Authority on this preliminary point. If the challenge is upheld, then that will be finally determinative because it will mean that the Authority has no jurisdiction to consider Mr McKenzie's grievance claim. Mr Reid, who is acting for Mr McKenzie, concedes that point. If the challenge fails,

the Authority will resume its investigation into the grievance claim.

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

The respective arguments

[11] The legal question at issue is whether the employee is prevented from pursuing a personal grievance for unjustified dismissal under s 67B(2) of the Act; or whether, because of failure to give written notice, the dismissal pursuant to the trial period provisions was not valid and therefore s 67B(2) provides no protection to the employer.

[12] Both parties accept that the employment agreement between them contains a valid 90-day trial clause. The terms of the clause are not in dispute.

[13] Given the reliance placed by the plaintiff upon the wording in cls 35.1 and

35.3 of the agreement, it clearly accepts that the dismissal was an "on notice" dismissal. This is an important point because the alternative would be a summary dismissal, which did not require notice in writing. Termination of employment under s 67B is required to be on notice. If a summary dismissal is effected, the employer cannot rely upon the 90-day trial period to restrict a claim for unjustifiable dismissal

but must instead defend any such claim by proving the dismissal is justifiable.3 The

provisions of s 103 and 103A would then come in for consideration.

[14] A number of arguments were advanced by Mr Crombie on behalf of the plaintiff to resist the claim that it is not entitled, in the circumstances of this case, to rely upon the 90-day trial period rules. These arguments were as follows.

[15] First the plaintiff argues that the word "notice" in the relevant section does

not refer to the means of communication of the notice and that:

Where there is a contractual right to provide payment in lieu of an employee working out the notice period, then provided the employer informs the employee that his employment agreement is being terminated under a trial period clause, when termination takes effect, that he will be paid in lieu of working out the notice period, this constitutes "notice" pursuant to s 67B(1).

3 The statute says "if" the employer terminates the contract on notice, which leaves it open, technically, to dismiss without notice. *Smith* says at [107]: "Although there may be instances of misconduct or serious misconduct during a trial period for which an employer may dismiss an employee summarily and justifiably, that is a long established feature of employment law and is not addressed by this legislation. Rather, trial provisions or trial periods conclude for reasons of unsatisfactory work performance or incompatibility or reasons of that sort."

[16] However, in *Smith v Stokes Valley Pharmacy (2009) Ltd*, the Court determined that:4

... it would be irrational to interpret the statutory reference to notice as being other than the contractual notice in any particular case. Nor can the statutory requirement for notice be interpreted as its antithesis, no notice, which is the essence of summary dismissal.

[17] Therefore, where, as here, contractual notice exists in the employment agreement, that is the "notice" referred to in the statute. The plaintiff in this case argues that the court in *Smith* was not referring to a requirement for notice to be in writing, and therefore can be distinguished. However, the plaintiff cannot escape the fact that in this case the agreement does call for notice to be in writing.

[18] The plaintiff's second argument, which has similarities to the first argument, was that because Parliament chose not to accept a recommendation of the wording in the section be written notice, it was choosing to leave the means of communication to the parties. This argument seems to miss the point about the specific wording of the contract. Even if Parliament did choose to leave the means of communication to the parties, in this case the parties have chosen to adopt a written notice. It is the wording in the written contract that specifies and clarifies the obligations of the parties in this case, not the broad wording of the statute.

[19] The plaintiff also argues in this case that the common law concept of "reasonable notice" does not apply as that only refers to the length of the period of notice and not means of communicating the notice. The plaintiff is correct that "reasonable notice" applies to a period of time. Two points can be made about that. First, it does not relieve the employer of the requirement to give notice; and

secondly, "reasonable notice" applies only where the contract is silent.5 On the facts

in this case the employment agreement is clear on both the period of notice and the means of communicating the notice.

[20] The plaintiff also relied on a technicality argument in reliance upon *Modern*

Transport Engineers (2002) Ltd v Phillips where it was argued that a failure by the

4 At [107].

5 *Smith*, above n 2, at [106].

employer to comply with s 64 of the Act (which imposes requirements on the employer to retain a copy of the employment agreement) did not render a trial-period provision invalid.6 Judge Inglis in *Modern Transport* said that failure to provide a copy of the employment agreement does not automatically invalidate the agreement. In that case there was independent evidence, which the Court accepted, that the mysteriously absent employment agreement did in fact contain a 90-day trial period clause. The facts in that case are distinguishable from the present and a different issue was to the fore. I do not accept the plaintiff's argument in reliance on *Phillips*

that failure in the present case to give written notice was a technicality not leading to unenforceability of the 90-day trial period clause but perhaps giving rise to the other remedies such as a penalty.

[21] The plaintiff further argues that "strict observance of the agreed means of communicating notice" was not necessary for a notice to be effective. It relied upon an Employment Relations Authority determination, *Henderson v The Flooring Centre Ltd* to support this argument.7 In fact in that case there was an unequivocal oral resignation (not a dismissal) followed by an email confirmation of the conversation by the employer which was not denied; and agreement by both parties that resignation was a good way forward. The Authority found that in the circumstances there was no possibility of a misunderstanding.

[22] The plaintiff also claims that "payment in lieu constitutes notice". This is a misunderstanding of the words in the contract, which refers to payment in lieu of working out all or part of the required period of notice. At common law, according to Kiely's *Best Practice Guide*, payment in lieu of notice has been accepted as sometimes constituting notice, but not if the employee is engaged under a trial period.8 Kiely refers to *Coca Cola Amatil v Kaczorowski*, but while the Court of

Appeal in that case recognised that an employer might have a customary practice in

6 *Modern Transport Engineers (2002) Ltd v Phillips* [2016] NZEmpC 68.

7. *Henderson v The Flooring Centre Ltd t/a The Flooring Centre South Ltd* [2015] NZERA Christchurch 41.
8. P Kiely *Termination of Employment: A Best Practice Guide* (2nd ed, CCH New Zealand Ltd, Auckland, 2015) at 94.

lieu of notice, the Court reinforced that usually it will be expected that an employee will work out the period of notice.9

[23] The plaintiff also refers to an Authority determination where it claims there existed a contractual right for the employer to pay the employee in lieu of notice.10

In fact in that case the contract required that notice be in writing and this was done. The wording of the "payment instead of ..." clause was "the right to pay in lieu of working out the period of notice". That is what *Dblshot* did. There is no question of payment being in lieu of giving notice. The payment is in lieu of *working out* the notice which is required to be given.

[24] Mr Reid, on behalf of the defendant, relied upon the decision of *Smith v Stokes Valley Pharmacy.*11 As he pointed out, in that decision Chief Judge Colgan stated:12

... "notice" must be more than simply advice of dismissal. Rather, [s 67B] contemplates that it will be advice of when, in the future, the dismissal will take effect.

[25] Mr Reid disputed the plaintiff's attempt to argue that *Smith* could be distinguished on the basis that that decision in respect of notice is confined to a situation where inadequate payment was made in respect of the notice period. As he submitted, what was said in the decision in relation to payment in lieu of notice was:13

Even if this is correct (and for reasons I set out subsequently, I do not consider that it is), there is the inescapable fact in this case that Ms Smith was given no notice of the termination of her employment. The statute does not provide an alternative in the form of payment of a sum of money instead of notice ...

[26] Mr Reid also referred to a further statement in *Smith* that s 67B of the Act requires compliance both with the terms of the statute and the terms of the written

employment agreement. As stated in the judgment:14

9 *Coca Cola Amatil v Kaczorowski* [1998] 1 ERNZ 264 (CA at 280.

10 *Heeley v Dblshot Ltd* [2013] NZERA Auckland 101.

11 *Smith,* above n 2.

12 At [61].

13 At [105] and see *Hutchison v Canon New Zealand Ltd* [2014] NZERA Wellington 72.

14 At [107].

The sections are intended to complement parties' agreements and indeed, require, for their effective operation, those agreements to address certain issues. I conclude that one of those issues is the requirement of notice ...

[27] Mr Reid pointed to these statements from *Smith* to answer the submission of the plaintiff that as Parliament did not dictate the manner in which the parties could agree the form of notice, then written notice was not required. However, as Chief Judge Colgan said in *Smith*, the Act "complement[s the] parties' agreements".

Conclusion

[28] I do not accept the submissions made on behalf of the plaintiff in this case. Payment in lieu of notice cannot be regarded as a substitute for the requirement to give written notice.

[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.

[30] I agree with the analysis made by the member of the Authority in this case in reliance on both *Smith* and *Modern Transport Engineers*15 that the 90-day trial period provisions removed a fundamental right to bring proceedings for an unjustifiable dismissal and accordingly must be given strict interpretation both in respect of the statutory provisions applying and the contractual provisions. That was the primary principle enunciated by Chief Judge Colgan in *Smith* and it prevails in

this case.

[31] In the present case it is clear that the parties have established the method of giving notice which must be in writing. There is nothing in the statute which entitles the parties to abrogate that requirement. In this case the facts may amount to a position where Mr McKenzie was summarily dismissed. However, it was accepted by the Authority Member the parties have accepted that the dismissal was an on-

notice dismissal. That finding is not in dispute.

15 *Modern Transport Engineers*, above n 6.

[32] In view of my findings the challenge is dismissed. As indicated earlier, the Authority was preparing to embark on its investigation meeting when the challenge was lodged. The matter has not been finally determined in the Authority; it will now recommence its investigation meeting and continue with the claims made by Mr McKenzie.

[33] Mr Reid and Mr Crombie indicated in their submissions that the determination of the Court on the point which has been argued may result in a resolution of the matter. The Authority Member did indicate that the parties may wish to proceed to mediation before recommencing the investigation meeting. That may still be a possibility which the parties should continue, but otherwise the Authority should take steps to recommence the matter.

[34] In respect of the present proceedings before the Court, costs are reserved. If costs cannot be resolved, then the parties have 14 days in which to make submissions on costs which should include appropriate calculations under the Guideline Scale of Costs now applying in the Court.

M E Perkins

Judge

Judgment signed at 9 am on 15 August 2017
