

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 128  
5560444

BETWEEN RAYMOND KENNETH HILL  
Applicant

A N D ARDEX NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Peter Cahill, Advocate for the Applicant  
Karyn Kajan, Advocate for the Respondent

Investigation Meeting: 2 September 2015 at Christchurch

Date of Determination: 8 September 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant (Mr Hill) alleges that he has suffered a personal grievance by way of an unjustified disadvantage and a breach of good faith as well. The respondent (Ardex) resists both of those contentions.

[2] This case is interesting because it involves a claim for a personal grievance by way of unjustified disadvantage where the employment agreement contained a trial period in terms of s.67A of the Employment Relations Act 2000 (the Act). Mr Hill was dismissed in reliance on that trial period and despite his evidence to the contrary, it is difficult not to see his claim as being an attempt to raise a personal grievance because of the dismissal.

[3] When the matter first came onto my list, I convened a telephone conference with the parties' representatives and as a consequence agreed with the representatives

that I would deal with the jurisdictional issue first. By the “*jurisdictional issue*” I meant the issue whether it was available to Mr Hill to bring a personal grievance in these circumstances or not.

[4] While I heard a certain amount of evidence about what happened during the employment, I indicated at the beginning of the hearing that my focus was on the jurisdictional question and that is the only matter of substance that I need to deal with in the present determination.

### **The issues**

[5] I will need to respond to the following questions:

- (a) Did the trial period provision in the employment agreement conform with the law;
- (b) Is this claim an attempt to circumvent s.67A;
- (c) Does Mr Hill have a personal grievance anyway?

### **Does the trial period provision conform with the law?**

[6] I am satisfied the trial period provision does conform with the law. It is common ground that Mr Hill was presented with the proposed employment agreement prior to the employment commencing and that he signed the agreement well before he commenced his duties. He was given an opportunity to seek legal advice on the employment agreement and he told me that he chose not to.

[7] The relevant provision in the agreement is straightforward, simple and in my view conforms with the statutory requirements. The provision is in the following terms:

4.1 ***Trial period:*** *There will be a trial period of 90 calendar days from date of commencement of employment. During the trial period the employer may dismiss you, and you will not be able to take a personal grievance on the ground of unjustified dismissal.*

*You may still pursue a personal grievance on other grounds in the Employment Relations Act, such as sexual or racial harassment, or if the employer does something that unjustifiably disadvantages you.*

[8] It is common cause that Mr Hill was dismissed within 90 days of his starting his duties and it is also common ground that in effecting the dismissal, Ardex made it clear it was relying on the trial period provision.

[9] It follows from the foregoing analysis that I am satisfied this provision is an operative trial period provision and therefore may be relied upon to protect Ardex from claims of personal grievance in reliance on the fact of the dismissal, provided, as happened in this case, that Ardex complied strictly with the elements of the provision.

**Is Mr Hill's claim an attempt to circumvent s.67A?**

[10] I consider that Mr Hill is seeking to circumvent the effect of s.67A because, contrary to Mr Hill's submission that he was reliant upon s.103(1)(b) of the Act, I consider a proper analysis of Mr Hill's claim is that his claim is in fact "*in respect of the dismissal*" and not a personal grievance for unjustified disadvantage at all.

[11] Mr Hill tries to deal with the matter by complaining about the process that the employer used (according to him) in bringing the employment to an end but the difficulty with that treatment of the matter is that it is predicated on the fact of the dismissal and therefore seems to me to be "*in respect of the dismissal*" to use the expression adopted in the statute.

[12] Put another way, were it not for the dismissal, Mr Hill would have no reason to complain about the way that Ardex effected the dismissal and it is difficult to divorce the manner in which the dismissal was undertaken from the dismissal itself.

[13] I listened carefully to Mr Hill's evidence and his various complaints about Ardex but I was inclined to agree with Ardex' view that those complaints were not germane to the issue of whether Mr Hill had a legal basis on which he could bring his claim for personal grievance, or not.

[14] Moreover, it is only proper that I point out that Ardex did not accept the burden of Mr Hill's allegations. First, it did not accept the description Mr Hill gave of the manner of the dismissal and on the basis of the evidence that I heard, I prefer its evidence to the evidence from Mr Hill.

[15] Second, Ardex maintains that in the wider context of the reason that the employment relationship irretrievably broke down, while Mr Hill was adamant that he

had no idea that his services were not meeting Ardex' expectations, Ardex was adamant in its evidence that it had spoken at length with Mr Hill and regularly about his various failings but that he was effectively guilty of "*selective hearing*".

[16] Put simply, Mr Hill's allegation that he has suffered a disadvantage by reason of the unjustified actions of the employer in the way in which the employer brought the employment to an end is rejected by me because I have not been persuaded that the method by which a dismissal is effected can be divorced from the substance of the dismissal itself and given the legal position that an employee may not bring a personal grievance "*in respect of the dismissal*", I conclude that Mr Hill's claim must fail.

[17] That is the way in which Mr Hill's advocate presented the matter and that is the way in which the Statement of Problem is drafted as well.

[18] But for the avoidance of doubt, I comment in the succeeding section about whether a wider interpretation of the subject matter of the unjustified disadvantage might assist Mr Hill's claim.

#### **Does Mr Hill have a personal grievance anyway?**

[19] While I have thought it appropriate to consider if a wider treatment of Mr Hill's grievance would avail him, I still conclude that he has not satisfied me that he has a viable personal grievance.

[20] If, rather than the way the matter was presented to the Authority, Mr Hill's claim were for disadvantage because of the totality of his treatment while in the employ of Ardex, I am still not persuaded that there is a basis for Mr Hill to be successful.

[21] It is a truism that in order for an employee to be successful in an unjustified disadvantage grievance there must be both disadvantage to the grievant and an unjustified action or series of actions from the employer to causatively produce the disadvantage.

[22] Looking at the factual matrix in the present case and excluding completely the dismissal which brought the employment relationship to an end, it is difficult to identify either element as being present. While the employment continued, Mr Hill was not disadvantaged in any way so far as I could tell from the evidence by any

action of the employer. Of course, I must exclude the dismissal which brought the employment to an end because, as a matter of law, in terms of s.67A of the Act, a personal grievance cannot be raised by an employee in respect of a dismissal made in reliance on a trial provision.

[23] Moreover, while it is evident that there was no disadvantage to Mr Hill during the employment, I have also not been persuaded there was any unjustified action or indeed series of such actions by Ardex. Ardex raised with Mr Hill various difficulties it had with his performance; Mr Hill denies that that happened but I am satisfied that it did. It sought to have Mr Hill lift his performance and nothing Mr Hill told me convinced me that he was treated badly or unfairly during that process.

[24] An employer is entitled to seek better performance from an employee and that is all that Ardex did. I accept its evidence that it found it difficult to recruit staff in Christchurch (the evidence was to the effect that within Australasia Christchurch was one of two locations, the other being in Australia, where it had particular difficulty in recruiting). Given that situation, its point (again accepted by me) is that it went out of its way to try to get Mr Hill up to an acceptable standard but it felt that he was literally not listening to it and not taking the opportunities it gave him to improve himself.

[25] While, as I say, I am not satisfied that I need to address the question in this section of the determination because of the answer that I have reached in the earlier section of the determination, I have dealt with it for the sake of completeness because Mr Hill was anxious to give me a deal of evidence about the way that he felt he was treated and of course I had to get Ardex to respond to that in order to be fair and even-handed.

### **Determination**

[26] I have not been persuaded that Mr Hill has a viable personal grievance for unjustified disadvantage. I have concluded that properly analysed, his attempt to claim a personal grievance for unjustified disadvantage is in fact an attempt to pursue a personal grievance for unjustified dismissal and he is precluded from doing that by the effect of s.67A of the Act.

**Costs**

[27] I reserve the question of costs but observe that as Ardex has been entirely successful and dealt with this matter using in-house personnel (as it is perfectly entitled to do), I would expect that no issue of costs should arise.

James Crichton  
Member of the Employment Relations Authority