

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 106
3000148

BETWEEN CALIN IOAN
 Applicant

A N D SCOTT TECHNOLOGY NZ
 LIMITED t/a ROCKLABS
 Respondent

Member of Authority: Rachel Larmer

Representatives: Helen Gilbert, Counsel for Applicant
 Rachel Brazil, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 08 March 2017 from Applicant
 24 March 2017 from Respondent
 31 March 2017

Date of Determination: 10 April 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Ioan's Statement of Problem claims that he was unjustifiably dismissed from his employment with Scott Technology NZ Limited t/a Rocklabs (Rocklabs) on 06 October 2016.

[2] Rocklabs disputes the Authority's jurisdiction to investigate Mr Ioan's dismissal grievance on the basis that he was dismissed under a valid trial period provision which met the requirements of s.67A of the Employment Relations Act 2000 (the Act).

[3] Rocklabs says that the effect of the valid trial period provision, which was included into Mr Ioan's employment agreement in accordance with s.67A of the Act, means that s.67B(2) of the Act prevents Mr Ioan from pursuing his dismissal grievance.

[4] Mr Ioan says that even though the trial period provision was valid, it is not enforceable, so Rocklabs cannot rely on it to prevent Mr Ioan from pursuing his dismissal grievance, because the provisions of s.67B of the Act do not apply.

[5] Mr Ioan put forward three arguments to support his submission that s.67B does not prevent him from pursuing his dismissal grievance because;

- a. Rocklabs told him it was proposing to terminate his employment under the trial period provision and gave him an opportunity to comment on that before it made a final decision to dismiss him. Mr Ioan says that amounts to a "*proposal*" to terminate his employment which means s.67B doesn't apply because s.4(1A)(c) of the Act does not apply to notice of termination under s.67B of the Act;
- b. Rocklabs ended his employment immediately by paying him in lieu of notice, which means Mr Ioan was not given advice of when in future his dismissal would take place contrary to s.67A(1) of the Act.
- c. He was unjustifiably disadvantaged in his employment.

[6] This determination addresses the preliminary jurisdiction issue only.

Employment Agreement

[7] The parties entered into an individual employment agreement dated 18 July 2016 which included at clause 2(c) a trial period provision. This states:

"This agreement includes a Trial Period

- i) The employee agrees to serve a trial period for the first 90 days of employment commencing on the day the employee actually starts work.*
- ii) During the trial period the employer may terminate the employment relationship on notice, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may*

pursue a grievance on the grounds specified in sections 103(1)b-g of the Employment Relations Act 2000.

iii) Any part of this agreement or of the Employer's policies and procedures (and in particular and disciplinary process) that conflicts with the provision shall have no effect until after the expiry of the trial period."

[8] I find that the requirements of s.67A of the Act were met so the trial period provision in Mr Ioan's employment was valid.

[9] Clause 11 of the employment agreement deals with termination. The material part of the termination clause at 11(a) states:

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 employer 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.

Leading case law

[10] The leading case is the Employment Court decision in *Smith v Stokes Valley Pharmacy (2009) Ltd*¹.

[11] The Employment Court held for an employee to be disqualified from bringing a dismissal grievance under s.67B(2) of the Act, there must have been lawful termination of the employment agreement containing a valid trial period provision, by the giving of notice of termination before the end of the trial period, regardless of whether the termination took effect before, at or after the end of the trial period.

[12] Failure by an employer to lawfully terminate the employment agreement means that s.67B(2) of the Act will not apply. That means that an employee whose employment agreement has not been terminated lawfully will not be precluded from pursuing a dismissal grievance.

[13] The reference to "*giving the employee notice of termination*" in s.67B(1) of the Act relates to contractual notice. Compliance by an employer with its contractual

¹ [2010] NZEmpC 111.

notice obligations must be interpreted strictly because s.67B removes longstanding employee protections. Therefore, whether or not Mr Ioan is precluded from bringing a dismissal grievance requires a close examination of the contractual notice provisions.

Relevant facts

[14] Rocklabs' letter dated 05 October 2016 to Mr Ioan set out its concerns regarding his performance and stated that it believed there was a mismatch between what Rocklabs required and Mr Ioan's skillset. The letter said Rocklabs was proposing to end the employment relationship under clause 2c of the employment agreement. Mr Ioan was invited to provide his feedback by 3pm 07 October 2016.

[15] Mr Ioan elected to give feedback in writing on 06 October 2016 and at a meeting held at 8am on 07 October 2016. Mr Ioan's position was that he wanted the employment relationship to continue.

[16] Mr Mowlem adjourned for a few hours after the 8am meeting on 07 October to consider Mr Ioan's feedback.

[17] Rocklabs claims that Mr Ioan approached Mr Mowlem a couple of times during the adjournment asking if a decision had been made. Mr Mowlem claims that around 12.20pm Mr Ioan approached him again and was shown a draft of the dismissal letter.

[18] Mr Mowlem says he told Mr Ioan he could work out his four weeks' notice or could finish that day, and that he (Mr Mowlem) asked Mr Ioan what he wanted to do. Mr Mowlem claims that Mr Ioan said he wanted to leave immediately as he hadn't slept.

[19] Mr Ioan disputes that evidence. Mr Ioan says he was never given the option of working out his notice and was only given the option of finishing off immediately or working out the rest of that day. Mr Ioan says a dismissal letter was handed to him so his termination date had already been predetermined.

[20] Mr Mowlem says he finalised the dismissal letter and gave it to Mr Ioan that afternoon. The dismissal letter dated 07 October 2016 said:

“[Mr Ioan’s] employment [with Rocklabs] will end in accordance with the 90-day trial period provisions in Clause 2(c) of your employment agreement, effective immediately.

[...]

“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.”

[21] Mr Mowlem also acknowledged in the dismissal letter that Mr Ioan was *“a capable experienced and practical engineer and [that Rocklabs] would be willing to provide a reference to this effect.”*

Did Rocklabs’ consultation letter of 05 October 2016 prevent it from relying on the trial period provision?

[22] I do not accept that by advising Mr Ioan of its intention to invoke the trial period provision to end his employment and inviting his feedback before it made a final decision Rocklabs invalidated the trial period provision.

[23] Section 67B does not prevent an employer from advising an employee of its view that they are not suitable for ongoing employment past the expiry of the trial period provision.

[24] Although s.4(1A) does not apply to a trial period dismissal, I do not consider that an employer who attempts to engage with an employee it is proposing to dismiss under a trial period invalidates its contractual right to rely on a trial period to end the employee’s employment. Mr Ioan’s submission under this heading does not succeed.

Did Rocklabs comply with s.67B(1) of the Act?

[25] Rocklabs letter of 07 October 2016 advised that Mr Ioan’s employment will end in accordance with clause 2(c) of his employment agreement, thereby invoking the 90 day trial period provision.

[26] Clause 2(c)(ii) of the employment agreement entitled Rocklabs to end the employment *“on notice”*.

[27] The length of the notice period is not stated in the trial period provision so we must look at clause 11 of the agreement to see what length of notice is required to end the employment.

[28] Clause 11 gives Rocklabs the option of terminating on four weeks' notice or four week's pay in lieu of notice. Rocklabs chose to pay four week's pay in lieu of notice, as it was permitted to do under clause 11(a).

[29] I do not accept Mr Ioan's submission that a payment in lieu of notice which is made in accordance with an express contractual term in the employment agreement voids the trial period provision.

[30] I do not accept Mr Ioan's submission that he was not told at what future date his employment would end because he was told in the dismissal letter that it would end that day.

[31] I do not accept Mr Ioan's submission that the payment in lieu provision did not apply to a dismissal in reliance on the trial period provision. Although it was open to the parties to have agreed to such a restriction on a payment in lieu I find that they did not in fact do so.

[32] I consider that adopting Mr Ioan's argument about the restriction on Rocklab's ability to make a payment in lieu of notice to him during the trial period would require the Authority to read words into the trial period clause that do not appear in the employment agreement.

[33] I find that the letter of 07 October gave Mr Ioan notice of termination of employment before the end of his 90 day trial period.

[34] If Rocklabs had stated that a particular or specific period of notice was to be given for a trial period dismissal then it would have been legally required to have adhered to that specific period of notice. However the parties did not set out a different specific notice requirement to apply during the trial period so the contractual notice agreed by the parties in clause 11 applies.

[35] I am satisfied that Rocklabs complied with Mr Ioan's contractual notice provisions by paying him four weeks' pay in lieu of notice which meant that his employment was terminated lawfully.

[36] Because Rocklabs ended the employment lawfully I find that it is able to comply with the requirements of s.67B(1) of the Act. Compliance with s.67B(1) of the Act means that Rocklabs is able to rely on s.67B(2) of the Act to prevent Mr Ioan from bringing a dismissal grievance in respect of his dismissal.

Does the Authority have jurisdiction to investigate a disadvantage grievance?

[37] Section 67A and s.67B of the Act do not prevent Mr Ioan from pursuing a grievance that is not a dismissal grievance. However there is no other grievance claim currently before the Authority.

[38] Mr Ioan's Statement of Problem identifies one grievance claim and that is his dismissal grievance. No mention is made of a disadvantage grievance or any other type of grievance.

[39] Because there is no disadvantage claim or for that matter any other legal claim currently before the Authority in respect of these parties there is nothing else for the Authority to investigate.

[40] I therefore consider that this determination resolves all issues which are currently before the Authority by way of a Statement of Problem involving these parties, so I consider this matter AEA 3000148 is at an end.

Outcome

[41] I find that Rocklabs succeeds in its challenge to the Authority's jurisdiction to investigate Mr Ioan's dismissal grievance. Section s.67B of the Act prevents Mr Ioan from pursuing his dismissal grievance.

Costs

[42] Rocklabs, as the successful party, is entitled to a contribution towards its actual legal costs.

[43] The parties have seven days within which to attempt to agree on costs. If agreement is not reached then Rocklabs has 14 days from the date of this determination within which to file costs submissions with Mr Ioan having seven days from the date that Rocklabs files any costs submissions to file his own submissions.

Rocklabs therefore has three further working days from receipt of Mr Ioan's costs submissions to file any reply submissions.

Rachel Larmer
Member of the Employment Relations Authority