

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKARAU ROHE**

[2021] NZERA 287
3107692

BETWEEN CRYSTAL MCCONCHIE
Applicant

AND PARKERS BEVERAGE
COMPANY LIMITED
Respondent

Member of Authority: Sarah Kennedy

Representatives: Robert Morgan, advocate for the Applicant
Doug Speedy, in person for the Respondent

Investigation Meeting: On the papers

Submissions received: 3 June 2021 from Applicant
11 June 2021 from Respondent

Determination: 6 July 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 22 June 2021 in a case management conference the following issue was identified for investigation and preliminary determination:

- (a) Given the Applicant accepts the termination of employment occurred during a valid 90 day period, is a personal grievance (for the dismissal) barred by s 67B(2) of the Employment Relations Act (“the Act”)? and/or can the exception in s 67B(3) of the Act apply in the overall circumstances of this matter meaning a personal grievance could proceed?

[2] By agreement with the parties, the Authority considered this preliminary issue on the papers ahead of the investigation meeting which is scheduled for 13 July 2021. The parties provided written submissions on the preliminary issue.

Background

Crystal McConchie

[3] Crystal McConchie commenced work as a sales representative for Parkers Beverage Company Limited (Parkers Beverage) on 28 January 2020 having signed an individual employment agreement (IEA) on 6 November 2019 that included a 90 day trial period provision.

[4] On 17 March 2020 there was a telephone conversation between Ms McConchie and Tom Heywood, National Sales Manager, Parker's Beverage. What is not in dispute is that Mr Heywood told Ms McConchie that the Covid-19 pandemic situation was causing Parkers Beverage to rethink its business and they were fearing the worst. As a result they were considering whether or not to keep Ms McConchie's role.

[5] Ms McConchie recalls during the conversation she was told by Mr Heywood that her employer was considering a restructure and dismissing her. She also recalls redundancy being mentioned and she was invited to provide submissions or options that would assist in building a case to justify why her position should be retained. Ms McConchie suggested two alternatives; that she work on commission until lockdown had finished and that she work without pay until the subsidy had finished. Parkers Beverage say it considered those options but, on advice, discounted both. It is not clear whether it communicated that decision or the reasons for it to Ms McConchie before or during the communications about dismissal between the parties from 17 March 2020 to 24 March 2020. However, those reasons are set out in the affidavits filed on behalf of by Parker's Beverage in the Authority.

[6] On 23 March 2020, New Zealand was at Alert Level 3 and about to go into Alert Level 4 lockdown when Ms McConchie received a phone call from Doug Speedy, Director, Parkers Beverage, advising that her employment and that of one other employee was being terminated.

[7] Ms McConchie received an email from Mr Heywood later the same day confirming the phone conversation with Mr Speedy as follows:

Hi Crystal

Thank you for your time on the phone today.

What happens next:

1. Your employment with Parkers Beverage Company will cease effective close of business **Tuesday 24 March 2020**. Holly will calculate your final pay and process this week for you.
2. We will co-ordinate your company vehicle, laptop, phone, printer and samples to be returned to Parkers head office if & when this is possible due to restrictions in place due to COVID-19.

We will be in touch.

Kind regards

[8] Ms McConchie says she struggled to find employment during lockdown and was unable to obtain a benefit because she was recorded by the Ministry of Social Development (“MSD”) as being employed by Parkers Beverage and receiving the wage subsidy. The impact of being terminated so abruptly, attempting to seek work during lockdown and finding herself unable to get a benefit while she was looking for new employment impacted on her significantly. Due to financial hardship she had to make an early withdrawal from her KiwiSaver and borrow money from family to cover basic living costs.

Parkers Beverage/Doug Speedy

[9] Mr Speedy on behalf of the Respondent says in March 2020 Parkers Beverage was forced to consider reducing employee numbers because of lost revenue and predictions of further financial decline triggered by the Covid-19 situation. Mr Speedy states in his affidavit:

“We sought advice from Grow HR and undertook a restructure consultation process with the other potentially affected employee, who was by that stage outside of their 90-day trial period. We understood that as Crystal was still employed under a 90-day trial period PARKERS was able to terminate her employment pursuant to that clause.”

[10] Evidence will be given that Parkers Beverage applied for the wage subsidy for all staff on 17 March 2020 because it was expected at that time there would be a significant decline in business of more than 30 per-cent. On 17 March 2020 the Directors had not made a final decision about Ms McConchie's position but Parkers Beverage was continuing to take advice and consider the options.

[11] Mr Speedy says that Parkers Beverage at that time could not see an end to the effect of Covid-19 but definitely had the view that it was going to have a long term impact on the business, and certainly an impact that would last longer than the 12-week wage subsidy. The decision making about Ms McConchie's role is set out as follows:

“[33] So, given the overall uncertainty of the situation that we were facing, the fact that the Company had no work for Crystal and that we simply had no idea how long we would be facing Lockdown or when the Company may ever hope to recover, including in respect of if or when we may need a role similar to Crystal's in the future, we decided that certainty was preferable for both the Company and Crystal.

[34] As a result, later that afternoon, we unfortunately had to advise Crystal that her employment would be coming to an end the following day, 24 March 2020, as PARKERS was terminating her employment per the terms of her employment agreement and the trial period clause. This was further reconfirmed to Crystal by way of email from Tom later that day.”

[12] Parkers Beverage accepts it received a wage subsidy payment for Ms McConchie, however, it says the circumstances were that on 23 March 2020 (having already applied on 17 March for all staff before any decisions were made about terminations or dismissals) Parkers Beverage made enquires with MSD about what to do with the wage subsidy for two employees (one of which was Ms McConchie) after making a final decision to terminate two positions. Mr Speedy's signed affidavit states that the advice from MSD was to use the money for other staff and it followed that advice.

[13] Parkers Beverage will also say it has responded to complaints made by Ms McConchie about its handling of the wage subsidy to the Ministry of Business, Innovation and Employment (“MBIE”) and allegations of fraud to MSD. Mr Speedy's affidavit records MBIE advised him that Parkers Beverage had done nothing wrong and had followed correct advice from MSD and in relation to the fraud allegation (to MSD)

that Parkers Beverage "... had done nothing wrong with regards to the Wage Subsidy payments."

[14] I note there is no direct evidence available from MBIE or MSD other than two administrative emails created or requested by Mr Speedy that are attached to Mr Speedy's signed affidavit.

Submissions

[15] Mr Morgan accepts on behalf of Ms McConchie there was a valid dismissal under the trial period provision, but submits that Ms McConchie's personal grievance is raised on the basis of disadvantage caused by the actions of Parkers Beverage in not passing on the wage subsidy or remunerating Ms McConchie after it purportedly reversed its termination decision.

[16] The statement of problem characterises the applicant's position regarding the wage subsidy and Ms McConchie's employment status in this way:

"The applicant believes that participating in the Wage Subsidy Scheme, the respondent had the opportunity to reverse the decision of 23 March 2020 and during the 12 (weeks) duration of the scheme allow the applicant to work as it had agreed to do when joining up to the scheme.

Finally the applicant questions whether the decision of 23 March 2020 stands. While there was a letter of termination issued, having received the subsidy and advising MSD that she was still an active employee, whether this would supersede the notice of termination, with the employment continuing for the duration of the subsidy received for her being a current employee."

[17] Mr Morgan further provided in submissions at [8]:

"Having applied for the subsidy after 23 March and received the subsidy, this would imply that Parkers was either ignorant of the terms and conditions in which the wages subsidy was provided and has not as at the date of this submission been able to seek any further advice around how the subsidy should have been used...or Parkers continued to employ Ms McConchie, but failed to inform her that her employment

had not been extended and the actions of 26 March 2020 reversed those of 23 March 2020.”

[18] In summary the submissions are that the termination decision was reversed by Parkers Beverage (whether they intended to reverse it or not), by applying for and/or receiving the wage subsidy using Ms McConchie’s IRD number. In addition, given the time available and the advice that Parkers Beverage retain Ms McConchie’s portion of the wage subsidy it would have been open to Parkers Beverage to change its mind and re employ Ms McConchie. Not doing so, it says, amounts to a breach of the employer’s good faith obligations in the overall and unique circumstances of this matter.

[19] Mr Morgan accepts the employer did not inform Ms McConchie it had reversed its termination decision and further submits that Ms McConchie’s employment should be recognised as ending at the end of any subsidy payment concluding rather than on 24 March 2020. The entitlements of a permanent employee would then become payable under the IEA after the wage subsidy finished.

[20] Mr Speedy says that Ms McConchie was one of a number of employees whose employment came to an end because of the financial challenges of running a viable business triggered by Covid-19 in New Zealand in 2020. Mr Speedy says Parkers Beverage took human resources and legal advice about what steps it needed to take and followed that advice. Mr Speedy’s understanding is that Ms McConchie’s employment came to an end under a valid 90 day trial period and these proceedings are therefore unnecessary.

[21] I asked Parkers Beverage to confirm the number of people the company employed at the time relevant to Ms McConchie’s 90 day trial. By way of statutory declaration dated 22 June 2021 I was informed 13 people were employed by Parkers Beverage on 6 November 2019.

Discussion

Disadvantage

[22] A claim of unjustified disadvantage requires that the employee’s employment was affected to the employee’s disadvantage by unjustifiable actions of the employer

during the employee's employment. In this case the claimed disadvantage relates to not reversing a 90 day trial period termination decision, not passing on the wage subsidy and various breaches of good faith.

[23] On its face while this is a claim for disadvantage it appears to be directed at the dismissal or to be based on a disadvantage that occurred after the employment relationship ended both of which are unlikely to succeed.

[24] If I am wrong about that, s 67B of the Act provides that while a personal grievance for unjustified dismissal in accordance with a valid trial period is not permitted, a personal grievance on the basis of disadvantage is, in which case Ms McConchie's claim could proceed.

[25] I will consider Ms McConchie's trial period first before returning to conclude the analysis on disadvantage. Whether Ms McConchie's dismissal was valid under a 90 day trial period is dependent on whether the statutory rules about trial periods were followed.

Trial periods

[26] Sections 67A and 67B of the Act set out when an employment agreement containing a trial period may be entered into by an employer and an employee and what the effect of a trial provision is.

[27] Section 67A of the Act provides that an employment agreement containing the trial provisions may be entered into between a small-to-medium sized employer and an employee under certain specified conditions. Small-to-medium sized employer is defined in the Act as being an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into (s67A(2)).

[28] Where the employer dismisses the employee within the specified trial period the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[29] Section 67B expands on the effect of a trial period provision. It states that the section applies if a small-to-medium sized employer terminates an employment agreement containing a trial period provision 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. Where the employee's employment is terminated in accordance with that provision the employee is barred from bringing a personal grievance or legal proceedings in respect of the dismissal.

[30] Ms McConchie's IEA contained a comprehensive trial period provision at clause 10:

90 Day Trial Period

The Employer and you agree that a 90 day trial period under the provisions 67A and 67B of the Employment Relations Act (and amendments) shall apply from the day you first start working for the Company.

[31] Clause 2 of the IEA stated the commencement date for employment to be 28 January 2020. Parkers Beverage has confirmed it had 13 employees at the time relevant to Ms McConchie's IEA meaning it qualifies as a small to medium employer and was therefore able to enter into 90 day trial periods with employees.

[32] While it is not necessary to replicate the full trial period provision, I will highlight two other relevant sub-clauses. The first specified that, if the employer dismissed the employee during the trial period, the employee was not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal. The second provided that, during the trial period, the employer could terminate the employment agreement by providing the employee with one day's notice of termination and that notice was not required to be in writing.

[33] I also note that the provision of one days' notice by Parkers Beverage is consistent with acting in accordance with the trial period clause in Ms McConchie's IEA. While there appears to have been some confusion about whether Ms McConchie was told her termination was under the 90 day trial period, there is no obligation on the employer to provide reasons.

[34] Given there is no dispute between the parties that Ms McConchie's termination dismissal was valid under the trial period clause in the IEA; that Parkers Beverage

qualified as a small-to-medium sized employer at the relevant time, and in all other respects the IEA provisions are compliant with the requirements specified in the Act; the employer has acted in accordance with those IEA provisions and the Act; it is my conclusion that Ms McConchie's employment with Parkers Beverage was terminated under a valid 90 day trial period clause on 24 March 2020.

Reversal of employer's decision to terminate

[35] The factual dispute in the information filed with the Authority is relevant. Mr Morgan's submission is that on or around 26 March 2020 Parkers Beverage applied for and/or received the wage subsidy and this would have been three days after Ms McConchie's employment was terminated. This is important because Mr Morgan's submission is that Parkers Beverage must have changed its mind if it applied for the wage subsidy in her name after it had terminated Ms McConchie's employment.

[36] Mr Speedy's affidavit records the decision making of the company as follows:

17 March	Wage subsidy was applied for in relation to all staff.
17 March	Ms McConchie informed that Parker's was considering reducing its employees and her position was under consideration.
23 March	Decision made by Parkers to terminate Ms McConchie's position.
23 March	Phone call advising Ms McConchie her position was being terminated and email confirming one day's notice being given so her final day of employment was 24 March.
23 March	Parkers enquired with MSD about what to do with the wage subsidy for the two employees (one of which was Ms McConchie) whose employment with the company was coming to an end and were advised to use it regardless.
24 March	Ms McConchie's final day of employment.

[37] Leaving aside for the time being whether re-establishing an employment relationship when one party appears not to have intended it or even been aware, the

time line above indicates that Parkers Beverage did not change its mind on or around 26 March 2020. Instead Parkers Beverage made a deliberate decision to terminate Ms McConchie's position on 23 March 2020. On the same day Parkers Beverage enquired with MSD about what to do about the wage subsidy for Ms McConchie.

[38] The facts set out above do not lend themselves to a conclusion that the employer reversed its termination decision but rather that it intended for there to be a termination dismissal under a 90 trial agreement. Notice was given by the employer in accordance with the terms of the 90 day trial clause and once notice is given, it is effective without the recipient's acceptance and can be withdrawn or varied only with the recipient's consent.¹ Had Parkers Beverage withdrawn or varied its decision and Ms McConchie had consented, then a new contract could have come into being.² However, from the information and submissions filed in the Authority from Parkers Beverage it never intended to withdraw or vary its termination decision and even if it had, Ms McConchie never agreed.

Good faith

[39] A breach of good faith by the employer was also raised so for completeness I will briefly cover that issue. When a valid 90 day trial provision is in place employers do not have to provide employees with access to the usual amount of information and opportunities to comment before making decisions about terminations or dismissals.

[40] The intervening advice from MSD is relevant to Parkers Beverage's decision making and in these circumstances its good faith obligations appear to have been met. Given the evidence is consistent about the communications between the parties from 17 March 2020 to 23 March 2020, including that Ms McConchie had an opportunity to provide alternatives, it would be difficult to establish a breach by the employer of its good faith obligations when acting under a valid 90 trial provision.

[41] While it is arguable Parkers Beverage had the opportunity to reverse its decision, it chose not to. The business reasons set out in Mr Speedy's affidavit provide a basis for its decision making and given the 90 trial agreement, there was no obligation

¹ *Malaysia Airline System BHD (New Zealand) Ltd v Malone* (2003)1 ERNZ 494 at [53].

² Gordon Anderson *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2021) 271.

on the employer to provide information to Ms McConchie about the reasons for termination.

[42] I note also there is agreement between the parties that Parkers Beverage did not apply for the second round of wage subsidy in Ms McConchie's name and that Parkers Beverage was unaware that Ms McConchie was having difficulty obtaining a benefit as the issues were not raised with it until after the wage subsidy period had expired.

Was there a disadvantage?

[43] Analysing and considering whether Ms McConchie was disadvantaged by unjustifiable actions of Parkers Beverage is problematic given the conclusions I have reached above. By accepting there is a valid termination and no re-employment, there must also be acceptance that the employment relationship ended and that the actions of the employer were justified.

[44] On this basis, it would not be necessary to consider further whether there was a disadvantage because the employment relationship had ended on 24 March 2020, any disadvantage (if it did occur) would have taken place after the employment relationship ended and under a valid 90 day trial provision the actions leading to the disadvantage claimed and the dismissal are justified.

Conclusion

[45] Ms McConchie's employment was terminated on 24 March 2020 by way of giving one day's notice of termination on 23 March 2020 under a valid 90 day trial clause in the IEA.

[46] A personal grievance based on disadvantage cannot succeed in the circumstances of this case because the employment relationship had ended at the time the claimed disadvantage occurred.

[47] At this preliminary stage, Parkers Beverage appears to have complied with its limited good faith obligations in the context of a 90 day trial period termination.

[48] I note for completeness that the wage subsidy issue may be more correctly an issue for a different jurisdiction. The issue crystallised when Ms McConchie found

herself unable to obtain a benefit because the wage subsidy was recorded by MSD against her IRD number. However, for the purposes of these proceedings under the Act, I find that Ms McConchie had her employment terminated on 24 March 2020 and that by applying for and/or receiving the wage subsidy the employer did not intentionally or by implication reverse that decision.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

Sarah Kennedy
Member of the Employment Relations Authority