New Zealand Employment Relations Authority Decisions

Roach v Nazareth Care Charitable Trust Board (Christchurch) [2017] NZERA 1118; [2017] NZERA Christchurch 118 (6 July 2017)

Last Updated: 14 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 118
3002571

BETWEEN STEPHEN ROACH Applicant

A N D NAZARETH CARE CHARITABLE TRUST BOARD Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein, Counsel for Applicant

David Beck, Counsel for Respondent

Investigation Meeting: Determined on the papers by consent

Submissions Received: 10 May and 13 June 2017, from the Applicant

18 May 2017, from the Respondent

Date of Determination: 6 July 2017

DETERMINATION OF THE AUTHORITY

A. I decline to remove this matter to the Employment Court.

B. Costs are reserved.

Employment relationship problem

[1] The applicant applies for the removal of the entire matter to the Employment Court to hear and determine it without the Authority investigating it pursuant to s 178 of the Employment Relations Act 2000 (the Act).

[2] The respondent opposes removal of the matter to the Court.

Background

[3] Mr Roach complains that he was unjustifiably summarily dismissed on

28 November 2016. The respondent relies upon a statutory trial period provision in Mr Roach's employment agreement to assert that the dismissal was justified pursuant to s.67B of the Act. Mr Roach, however, contends that the trial period was ineffective in preventing him from bringing a personal grievance in respect of his dismissal as he had already been employed by the respondent in the position of Business Manager at the time that he was offered employment as the General Manager.

[4] On 16 June 2016, the respondent offered Mr Roach employment in the position of Business Manager and sent to Mr Roach an individual employment agreement which contained the following term:

3. **Trial Period**

1. The first 90 days of employment shall be a trial period, starting from the first day of work.

2. During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.

3. During the trial period, the employer's normal notice period does not apply. Instead, either the employee or the employer may end this agreement by giving 1 week notice before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.

4. If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.

5. During the trial period, the employer and the employee must treat other in good faith.

[5] Under the terms of this individual employment agreement, Mr Roach was to commence work on 10 October 2016. Mr Roach signed the agreement on 21 June

2016, as did the CEO on behalf of the respondent.

[6] In August 2016, before Mr Roach had commenced working for the respondent, the respondent offered him a more senior position of General Manager. The respondent sent Mr Roach an individual employment agreement for the General Manager position which also included a trial period. The terms of the trial period clause in the second employment agreement are identical to those of the trial period clause in the first agreement, cited above, save that the numbering of the clauses is slightly different and the terms "employee" and "employer" start with a capital letter instead of a lower case letter.

[7] Mr Roach accepted the terms of this second employment agreement, which maintained the commencement date as 10 October 2016, by signing it on 6 September

2016.

[8] Mr Roach commenced employment on 10 October 2016 as agreed but on

28 November 2016 was handed a letter which advised him that he was currently in his

90 day trial period and that the respondent confirmed the decision had been made not to continue his employment. He was given one week's notice, which was to be paid in lieu of notice.

The relevant legislation

[9] Section 6 of the Act provides as follows:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

....

(ii) a person intending to work;

[10] "A person intending to work" is defined in s.5 as:

A person who has been offered, and accepted, work as an employee;

and **intended work** has a corresponding meaning.

[11] Sections 67A and 67B provide:

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.

(4) [Repealed]

(5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to

section 61(1)(b).

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 (j).

(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.

[12] Section 178 of the Act provides as follows:

178 Removal to court

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it,

to the court to hear and determine the matter without the Authority investigating it.

(2) The Authority may order the removal of the matter, or any part

of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or

related

issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the

party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set

out in paragraphs (a) to (c) of subsection (2).

(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the

case may be, thinks fit.

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

(6) This section does not apply—

(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and (b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

The parties' submissions

[13] Mr Goldstein on behalf of Mr Roach submits that the matter before the Authority involves an important question of law, and that removal of the matter is in the "urgent public interest". Mr Goldstein submits that the question of law is whether an employee as defined in s.6(1)(b)(ii) of the Act is an "employee" for the purposes of s.67A(3) of the Act. Mr Goldstein argues that this question of law is critical to the investigation of the whole matter and is therefore not incidental to the case but decisive.

[14] Mr Goldstein argues that the answer to the question is significant to both employers and employees as it would determine whether or not an employee who has signed an employment agreement with an employer, and then accepts a different offer from that same employer, can be justifiably dismissed pursuant to s.67A of the Act.

[15] Mr Goldstein also argues that any matter that affects the interpretation and application of s.67A of the Act, including the one currently before the Authority, has the potential to significantly affect, directly or indirectly, the employees and employers of New Zealand.

[16] Mr Goldstein argues that, although the matter may appear to be simple, its determination involves a pivotal interpretation of the statutory definition of *"employee"* and the application of this definition to the trial period section. He says that the point of law currently before the Authority has not yet been considered and determined and so it is appropriate for that consideration and determination to occur in the Court. He also argues that, in circumstances where it is likely that either party may challenge any determination of the Authority to the Court, it is timelier and more cost-effective that the matter be heard and determined at first instance by the Court.

[17] Mr Beck in his submissions opposing the application for removal, whilst accepting that Mr Roach has advanced a novel argument, does not agree that that founds a question of law. Mr Beck argues that the matter involves a relatively straightforward statutory interpretation issue and refers to the preamble to s.6 of the Act which states:

In this Act, unless the context otherwise requires, ...

[18] Mr Beck asserts that, on the facts, the context here is *"otherwise"*. He suggests that the question to be determined is framed as follows:

Whether or not an employee who signed an employment agreement containing a 90 day trial period and then accepted a different position and signed another employment agreement with the same 90 day trial provision and same employer, prior to commencing employment, can be deemed to be someone who was ... previously employed by that employer and thus, once employment (in the trial period) commenced, able to access an exemption from the strictures of an agreed 90 day trial period?

[19] Mr Beck argues that the matter has already been extensively traversed in the Employment Court case of *Blackmore v Honick Properties Ltd*1. He argues that, if the period of employment included the period during the time the individual was a "person intending to work", then any clause in an employment agreement commencing a trial period on a certain date would be inoperative as the trial would commence from the date all employment terms were agreed and an absurdity would

result as the 90 day period would be potentially reduced.

[20] Mr Beck refers to *Blackmore* in which His Honour Chief Judge Colgan clarified that a clearly and properly agreed trial period can take effect at a future date

1 [2011] NZEmpC 152

when the job starts, given the provision of section 67A(2)(a), starting at the beginning

of the employee's employment.

[21] Mr Beck also refers to Colgan CJ's finding at paragraph [55] that Parliament:

... cannot have intended the extended meaning of "employee" to have meant there would also come into existence the range of obligations of an employment relationship from the point of acceptance of an offer of employment.

[22] Mr Beck argues that no important question of law arises because the Authority can determine easily whether any unique contextual factors place Mr Roach in a position of being considered a previous employee for the purposes of exempting him from a trial period, and this is a factual inquiry and not one involving a key legal issue.

[23] Mr Beck also disputes that a public interest arises where parties agree to abandon an agreement and substitute a new agreement prior to commencement of employment. He says that there is an extensive body of settled law around the 90 day issue which can be applied to the question in dispute.

[24] Mr Beck also disputes that there is any urgency in the matter and argues that proceeding to have the matter determined by the Authority is more likely to resolve matters in a timely matter whilst preserving the applicant's right to have the matter heard *de novo* by the Court.

[25] Finally, Mr Beck, referring to the preamble in s.6(1) above, states that the reference in s.67A(3) of an employee who has not "been previously employed by the employer", refers clearly to a situation that prevents an employer imposing a trial period on someone they have already had the opportunity to assess in an employment relationship rather than in the context of the person merely *"intending to work"*.

Discussion

[26] The leading case in relation to removal to the Court is *Hanlon v International*

*Educational Foundation (NZ) Inc*2. In this judgment, His Honour Chief Judge

Goddard said the following:

2 [1995] NZEmpC 2; [1995] 1 ERNZ 1

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s943. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. ... It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it was strongly influential in bringing about a decision of it or a material part of it.

[27] In *McAlister v Air New Zealand Ltd4* the Employment Court summarised the

Hanlon principles5 and then stated at paragraph [10]:

[10] Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[28] It is now well established that a trial period contained in an employment agreement that is entered into after the employee commences work for the employer does not satisfy the requirements of s.67A as the employee will have been previously employed by the employer, therefore taking him or her outside of the scope of the definition of "employee" in s.67A(3).

[29] Mr Roach contends that, as he was already employed by the respondent in the position of Business Manager, he was not a "new employee" at the time that he was offered and accepted the position of General Manager. It is this proposition that underpins the question that the Authority needs to determine. In other words, I agree

with Mr Goldstein that the appropriate question to be determined is whether an

3. Section 94 of the Employment Contracts Act 1991 which gave the Employment Tribunal power to remove a matter to the Court.

4 AC 22/5, 11 May 2005 (EmpC)

5 At paragraph [9]

employee as defined in s.6(1)(b)(ii) of the Act is an "employee" for the purposes of s.67A(3) of the Act.

[30] However, I agree with Mr Beck that the answer to this question is already available in the *Blackmore* judgement. I refer to the following passages of *Blackmore6.* I cite from them extensively because of the need to see Chief Judge Colgan's conclusions in their entirety (emphasis added).

[50] The principal argument for the defendant that a trial period should be able to be agreed after the commencement of employment, as occurred in this case, relied on a submission about the potential consequences of finding that employment commenced immediately upon acceptance of the offer of it. In the context of this case, Ms Burke accepted that offer and acceptance of employment was concluded between the parties on about 10 October 2010. However, Mr Blackmore did not begin work for HPL until more than a month later, on 15 November 2010. Counsel's submission was that if Mr Blackmore's employment and, therefore, the 90-day trial, were deemed to have begun more than a month before work actually started, more than a third of the trial period would have been ineffectual. Ms Burke submitted that an even more extended timeframe between acceptance of an offer of employment and its commencement might, theoretically in these circumstances, mean that the entire 90-day period for assessing the employee's performance would expire before work even began, thus negating entirely the purpose of the trial.

[51] There are, however, two answers to those concerns.

[52] The first is that a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work. The phrase in s 67A(2) (a) "st ar ti ng at t he

begi nni ng of t he empl oyee ' s empl oyment ..." means when t he

employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer

as from a future date.

[53] So the trial period agreed in these terms simply becomes one of a number of terms and conditions of employment that will take effect at a future date when the job starts.

[54] The second is, for reasons upon which I will elaborate, that the

ext ended def init i on of "e mpl oyee " i n s 6 of the Act appl ies onl y t o

deeming a person to be an employee before the commencement of work for the purpose of being able to bring a personal grievance for unjustified dismissal during that period.

[55] Parliament cannot have intended the extended meaning of "employee" set out above to have meant that there would thereby also come into existence the range of obligations of an employment

6 Paragraphs [50] to [59]. References omitted.

relationship from the point of acceptance of an offer of employment. One need only contemplate the hypothetical case of a sales employee for Pepsi Cola who applies for, is offered, and accepts a sales role with Coca Cola. The employee is obliged to give Pepsi a month's notice so that the work for Coca Cola will not commence for a month after the offer and acceptance. The employee continues to be employed by Pepsi for that period of a month. The usual obligations of an employment relationship, such as not working in competition with one's employer and the incidence in practice of trust and confidence, could not be performed with both "employers" contemporaneously.

[56] The extended definition of "employee" as a person intending to work and meaning someone who has been offered and accepted employment, was enacted as a legislative response to the judgment of the Arbitration Court in *Auckland Clerical and Office Staff Employees IUOW v Wilson*. There, an employee was offered and accepted employment to begin on a specified future date and relinquished her existing position in reliance upon this. Before work actually started, the employer advised the employee that she would not be engaged after all. The Court determined that because employment had not begun, the employee could not claim by personal grievance that she had been dismissed unjustifiably and compensated for the wrong suffered by her. The extended definition of "employee" was subsequently included in the legislation in precisely the same terms

as it now appears.

[57] It is significant that Parliament addressed the consequence of the judgment in *Wilson* by deeming that a person in those circumstances is to be regarded as an employee for the purposes of enabling a grievance for unjustified dismissal to be brought, even if the work with the new employer has not yet commenced.

[58] In this case the extended definition of "employee" is engaged because the dispute turns on whether Mr Blackmore is entitled to have access to a personal grievance for unjustified dismissal. Therefore, as from the completion of the process of offer and acceptance of employment, Mr Blackmore became an employee of HPL to the extent that he was entitled to bring a grievance against it as from 10 October 2010 when he accepted its offer of employment.

[59] In practice, an employer cannot require lawfully an existing employee to enter into a trial period in the course of current employment. The legislative emphasis is upon new employment relationships that have not already begun. That is consistent with the parliamentary rhetoric that trial periods would allow employers to take on staff that they would not otherwise engage and would allow persons who would not otherwise be taken on by reason of their inexperience or past history or other disadvantageous circumstances to get a job and prove themselves worthy of it.

[31] Applying these principles, and principles of contract law generally, to the current situation, the position is as follows:

a. On 21 June 2016 Mr Roach became an employee of the respondent under the extended definition of "employee" in s 6 of the Act; that is, for the purpose only of being able to bring a personal grievance for unjustified dismissal during the period from 21 June to 10 October (the pre-commencement period);

b. Mr Roach was not an employee of the respondent in any other sense during the pre-commencement period, as he owed no duties to the respondent and it owed no other duties to him, save arguably in respect of terminating the agreement by notice;

c. On 6 September 2016, the terms of the offer signed on 21 June were varied by agreement in respect of the remuneration and position. The new agreement was formatted differently and contained additional clauses defining full time, part time and fixed term employment, a clause about police checks and a clause about the right to work in New Zealand but the trial period clause was materially identical.

d. This agreed variation of terms did not operate to terminate the employment of Mr Roach. This finding derives from a general principle of contract law and is demonstrated each time that an employee gets a pay rise or a promotion; such a change does not terminate the employment relationship.

e. In addition, clause 2.4 of both agreements reinforces this general principle, when it states:

This contract entirely replaces any previous contract of employment with Nazareth Care Charitable Trust, save that any previous contract of employment with Nazareth care Charitable Trust shall be counted towards the employee's service with the employer.

[32] So, *Blackmore* establishes that an employee entering into an employment agreement with a valid trial period prior to the commencement of work does not result in the employee having been "previously employed by the employer", even though he is a "person intending to work" (the Blackmore principle).[7]

7 The opposite conclusion would create a practical absurdity in any event, because, otherwise, such a principle coupled with the established principle that an agreement entered into after the commencement

[33] Coupling the Blackmore principle with the principle of contract law that an agreed variation of terms does not terminate the employment, means that Mr Roach remained "a person intending to work" during the entirety of the pre-commencement period despite the variation of terms. His status as such did not change. Therefore, when the trial period was triggered at the commencement of work, he cannot have been "previously employed by the respondent" because of the operation of the Blackmore principle.

Conclusion

[34] My conclusion is that removal to the Court of this question is not necessary or warranted because there is no question of law to be removed. The question has already been substantially answered in *Blackmore* and the application of general principles of contract law and contract interpretation, with which the Authority is well accustomed, provides the remaining elements.

[35] Alternatively, as removal is discretionary, I decline to remove this question as no useful purpose would be served in so doing. I also find that it is not in the "urgent public interest" to remove the matter as its resolution is capable of being established by the Authority expeditiously.

[36] In reaching this conclusion I have made known the Authority's current view of the substantive matter before it; namely, that Mr Roach was not previously employed by the respondent when he commenced work. However, this determination does

not determine the matter of whether Mr Roach's dismissal was justified or not as I have not been addressed on the full facts of the matter, including whether the trial period is otherwise valid and has otherwise been validly implemented.

Determination

[37] For the reasons set out in this determination, I decline to remove this matter to the Court.

[38] A case management conference call shall be arranged in due course to discuss the further progress of the matter.

of work renders the trial period ineffective would require the agreement to be entered into at the precise moment the work commenced for any trial period to be effective. Such a conclusion would also place employees in a very difficult position of having to resign from their existing employment without having first entered into a binding agreement with the new employer.

Costs

[39] Costs are reserved until this matter has been substantively disposed of.

David Appleton

Member of the Employment Relations Authority
