

IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH

[2014] NZERA Christchurch 134  
5437219

BETWEEN MARK THOMSON  
Applicant  
AND TRATHEN BUILDT LIMITED  
Respondent

Member of Authority: Christine Hickey  
Representatives: Chrissy Gordon, Advocate for Applicant  
Andrew Riches, Counsel for Respondent  
Investigation Meeting: On the papers  
Submissions received: 25 July 2014 from Applicant  
1 August 2014 from Respondent  
Determination: 4 September 2014

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**INTERLOCUTRY DETERMINATION OF THE AUTHORITY**

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- A. The Authority has jurisdiction to determine the applicant's claims for unjustified disadvantage and a penalty for a breach of good faith.**
- B. The parties are directed to mediation.**

**Employment Relationship Problem**

[1] Mark Thomson was employed as a Supervisor by Trathen Buildt Limited (Trathen Buildt) under a written individual employment agreement (IEA). He was offered the role on 13 July 2013 and advised there would be a trial period. He began work on 22 July 2013. Mr Thomson's IEA, which was entered into before commencing employment, contained a trial period of 60 days and a probation period of 90 days. He was dismissed in reliance on the trial period on 12 August 2013.

[2] Mr Thomson claims that he was unjustifiably disadvantaged and that Trathen Buildt breached its duty of good faith to him. He seeks a penalty to be imposed for breach of the duty of good faith and compensation for unjustified disadvantage as well as legal costs.

[3] Trathen Buildt says that because Mr Thomson was employed under a written trial period provision of 60 days and was dismissed within that period he is not entitled to bring a personal grievance for unjustified dismissal. Trathen Buildt submits that the claims made are an attempt to circumvent the legislative provision allowing an employer to dismiss an employee within a trial period without facing a claim of unjustified dismissal.<sup>1</sup> Trathen Buildt submits that the Authority does not have jurisdiction to investigate and determine Mr Thomson's claims. Because the respondent claims the Authority lacks jurisdiction it has refused to attend mediation.

### **Issues**

[4] In this preliminary determination the issues I need to determine are:

1. Whether the probation period provision and the trial period provision are both valid; and
2. Whether Mr Thomson is precluded from bringing a claim for unjustified disadvantage.

### **Facts**

[5] The parties have submitted a statement of agreed facts which I have relied on and both parties also made brief written submissions. The IEA contained the following relevant clauses:

#### **3.2 Probation**

*A probation period will apply for the first 90 days of employment to assess and confirm suitability for the position. The employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise, and the employer will appropriately warn the employee if he or she is contemplating termination. Any termination must comply with the termination clause in this agreement. This probation period does*

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<sup>1</sup> Sections 67A and 67B of the Employment Relations Act 2000.

*not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.*

### **3.3 Trial Periods**

*A trial period will apply for a period of **60 CALENDAR DAYS** employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.*

*During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance as specified in sections 103(1)b-g of the Employment Relations Act 2000 such as: unjustified disadvantage, discrimination, ...*

*Any notice as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services) except as specified in section 67A(5) of the Employment Relations Act 2000.*

[6] The IEA was created by the respondent using the Ministry of Business, Innovation and Employment's website Employment Agreement Builder. Under the heading 3.2 *Probation* the site states:

*Probation or trial periods can be included in agreements with the agreement of both parties.*

[7] Somewhat confusingly both probation and trial period provisions are included in the IEA, when it appears through the use of the word *or* on the Employment Agreement Builder site that they are proposed to be alternatives to one another and not additional to one another.

[8] Mr Riches submits on behalf of the respondent that I should rely on the Authority case of *Healy v Dblshot Limited*<sup>2</sup> to give full weight to the s 67A provision in the IEA. I do follow the approach in *Healy*. Mr Healy claimed that he had been unjustifiably dismissed.

[9] Despite the different time frames in clauses 3.2 and 3.3 and the different terms of each of them I consider that they were both effective in Mr Thomson's IEA. The trial period complies with the requirements of s 67A of the Act and so is effective to prevent Mr Thomson from being able to bring a claim of personal grievance of unjustified dismissal:

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<sup>2</sup> [2013] NZERA Auckland 101

- Mr Thomson was not previously employed by Trathen Buildt;
- The provision is in writing;
- The trial period does not exceed 90 days;
- Mr Thomson was given notice and dismissed during the trial period.

[10] However, that does not mean that Mr Thomson's claims are dismissed. Sections 67A and 67B of the Act do not operate to deprive Mr Thomson of his ability to bring a personal grievance for unjustified disadvantage or for a breach of good faith under s 4 of the Act, so long as the breach of good faith pleaded is not a breach of s 4(1A)(c) of the Act.<sup>3</sup>

[11] From the Statement of Problem and submissions made by Ms Gordon on Mr Thomson's behalf the claims appear to focus on whether or not the process set out in clause 3.2 was complied with.

[12] The point Mr Riches makes about Mr Thomson's claims being designed to subvert the ss 67A and 67B provisions is one that I will need to consider when determining whether facts relied upon by Mr Thomson to establish unjustified disadvantage and breaches of good faith are actually severable from the process by which the dismissal might have been considered unjustified under s 103A(3) of the Act.

## **Orders**

[13] For the reasons given the following orders are made:

- (i) The parties are directed to mediation; and
- (ii) The Authority has jurisdiction to investigate and determine Mr Thomson's claims of unjustified disadvantage and breach of good faith;
- (iii) The Authority's support officer will be in touch with the parties to organise a telephone directions conference if the matter is not settled by mediation.

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<sup>3</sup> Section 67B(5) of the Act says that in making a decision to terminate an employment agreement under a trial period provision an employer is not required to comply with s 4(1A)(c).

**Costs**

[14] I reserve the issue of costs until after the substantive claims have been determined.

Christine Hickey  
Member of the Employment Relations Authority