

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 291  
5620448**

BETWEEN                      PHILLIP WILSON  
   Applicant  
  
AND                                SAFARI HOSPITALITY  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Applicant in Person  
   Fiona McMillan, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions received:        19 & 23 August 2016 from Applicant  
   19 August 2016 from Respondent  
  
Determination:                26 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Phillip Wilson, claims that he was entitled to three months' notice upon the termination of his employment with the Respondent, Safari Hospitality Limited, (SHL), and he was therefore unjustifiably disadvantaged by SHL providing him with only two weeks' notice of termination.

[2]     SHL denies that Mr Wilson was unjustifiably disadvantaged in his employment, and claims that he was provided with adequate notice.

**Issues**

[3]     The issue for determination is whether or not Mr Wilson was unjustifiably disadvantaged by SHL providing him with two weeks' notice rather than three months' notice upon the termination of his employment.

## **Background Facts**

[4] SHL owns two restaurants in Auckland, Harbourside Ocean Bar Grill and Botswana Butchery.

[5] Mr Wilson was offered employment as the full-time Executive Head Chef for the Harbourside Ocean Bar Grill and Botswana Butchery on 26 December 2014, and commenced employment on 2 March 2015. In that position he reported to the Group Executive Chef, Mr Stuart Rogan.

[6] Mr Wilson was provided with a written employment agreement (the Employment Agreement) which stated at clause 1.1:

*This agreement replaces all previous employment agreements, terms, conditions, agreements, understandings, between the Employer and the employee.*

[7] The Employment Agreement set out at clause 3 that Mr Wilson's employment was subject to a trial period which was outlined in Schedule 2 of the Employment Agreement.

[8] Mr Wilson had signed the Employment Agreement after clause 11 '**Declaration**' which stated:

*11.1 I declare I have read and understood the conditions of employment detailed above, and accept them fully. I further declare that I have read (or had explained to me to my satisfaction) the rules of the Employer.*

*11.2 I acknowledge I have been given the opportunity to seek independent advice regarding this Agreement.*

[9] Schedule 2 of the Employment Agreement contained details of the Trial Period, stating that it was made: "*pursuant to sections 67A of the Employment Relations Act 2000.*"

[10] The Employment Relations Act 2000 (the Act) makes provision for trial periods at ss. 67A and 67B. The Act states:

*S 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 previously been employed by an employer

**S 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.*
- ...
- (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.*

[11] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[12] Notice periods were detailed in Schedule 1 of the Employment Agreement as being:

- Resignation: 3 months
- Misconduct/substandard work 2 Weeks
- Performance: (no period specified)
- Redundancy: 2 Weeks
- Long-term Illness: 2 Weeks

[13] The Trial Period as set out in Schedule 2 did not specify a notice period.

[14] At a meeting held on 13 May 2015 Mr Wilson's employment with SHL was terminated in accordance with the Trial Period provisions set out in Schedule 2 of the Employment Agreement.

[15] The decision to terminate Mr Wilson's employment was later confirmed in a letter dated 13 May 2015 from Mr Stuart Rogan, Group Executive Chef. In the letter Mr Rogan referred to performance issues having been raised with Mr Wilson at a meeting held on 6 April 2015 attended by him, Mr Wilson and Mr Russell Gray, Director and Chief Executive, during which meeting he had been reminded that he was employed subject to a trial period, and his continued employment could be in jeopardy.

[16] The letter also confirmed that during the meeting held on 13 May 2015 Mr Wilson had been advised of the decision to terminate his employment on the basis that he was not suitable, and stated: "*You were offered the opportunity to work out your notice period but preferred to be paid out the 2 week notice and leave immediately. This is effective from 13 May 2015.*"

[17] Mr Wilson claims that it had been agreed by both parties during the recruitment negotiations that 3 months was an appropriate period of notice given the seniority of the position, the scarcity of Executive Chef level positions in the market and candidates with the experience and ability to perform at that level, industry norms, and in consideration of his leaving a fulfilling and well remunerated position in the UK.

[18] SHL claims that it relied upon the Misconduct/Substandard Work performance notice period of 2 weeks in the absence of a notice period for the 90 day trial being stipulated in the Employment Agreement.

### **Determination**

[19] Notice periods during a trial period are not specified in the Act. Section 67B of the Act states that an employer terminating an agreement containing a trial provision under 67A of the Act must give the employee notice of termination before the end of the trial period: "*whether the termination takes effect before, at, or after the end of the trial period*".

[20] The Employment Agreement is silent on the matter of a notice period during the trial period. The other notice periods specified in Schedule 1 refer only to notice due to termination as a result of resignation, misconduct or substandard work, redundancy and long-term illness.

[21] Reasonable notice<sup>1</sup> is inferred where an employment agreement does not expressly provide for a notice period: *Kitchen Pak Distribution Ltd v Stoks*<sup>2</sup>. In that case Judge Palmer held that it is largely a question of fact what constitutes reasonable notice and quoting the passage from *Whelan v Waitaki Meats Ltd*<sup>3</sup> which states per Gallen J:<sup>4</sup>

*What is an appropriate notice will depend on a consideration of all of the surrounding facts. There are a very large number of authorities which deal with cases of this kind and there is general agreement as to what factors are appropriate in considering what is an appropriate length of notice to be given. The emphasis which is placed on such factors will of course vary from case to case and the matter is so individual that it is difficult to arrive at any rule which on application will give a calculated figure.*

[22] Whilst noting in *Cain v HL Parker Trust*<sup>5</sup> that a rule of thumb denoting what constitutes reasonable notice is to reflect how often an employee is paid, the then Chief Judge Goddard stated:<sup>6</sup>

*There is, however, no legal basis for that supposition. It is no more than the application in the generality of cases of the rule that where the contract does not specify a period of notice, then that period must be a reasonable period having regard to the way in which the parties are circumstanced. The frequency of payment is an indicator but it is not a decisive one.*

[23] In the later case of *Rolls v Wellington Gas Co Ltd*<sup>7</sup> Chief Judge Goddard reiterated that a reasonable period of notice is required, noting that there is no mechanical yardstick as to what constitutes reasonable notice. His Honour stated:<sup>8</sup>

*A decision about what is a reasonable period of notice is a decision about questions of fact and degree in the light of circumstances that can properly be treated as relevant. The cases show that, although no comprehensive list of factors can be laid down, these may include such things as:*

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<sup>1</sup> Cf: *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [106].

<sup>2</sup> [1993] 2 ERNZ 401 (EmpC)

<sup>3</sup> [1991] 2 NZLR 74, (1990) ERNZ Sel Cas 960 (HC)

<sup>4</sup> *Ibid* at 966-967

<sup>5</sup> [1992] 3 ERNZ 777 (empC)

<sup>6</sup> *Ibid* at 783-7840

<sup>7</sup> [1998] 3 ERNZ 116 (EmpC)

<sup>8</sup> *Ibid* at pg 126

- *The nature of the employment;*
- *The character of the employment relationship;*
- *The seniority of the position;*
- *The length of service of the employee;*
- *The age of the employee;*
- *The availability of other employment for a person of the employee's experience and qualifications or training; and*
- *The individual circumstances of the particular employer and employee.*

[24] In this case the Employment Agreement is silent on what constitutes contractual notice upon termination of the 90 day trial period. Mr Wilson's dismissal was not a resignation or a dismissal for misconduct/substandard work, although by their nature, trial periods are usually terminated by reason of unsatisfactory work performance or incompatibility. Nor was Mr Wilson's dismissal a termination based upon redundancy or long-term illness.

[25] Although Mr Wilson was paid on a weekly basis, I have not taken this as a 'rule of thumb' but examine the issue of what constituted 'reasonable notice' during the trial period in light of the factors set out in *Rolls v Wellington Gas Co Ltd*.

[26] Examining the nature of the employment I observe that Mr Wilson was aware when he signed the Employment Agreement on 26 December 2014 that his employment was subject to the successful completion of a statutory 90 day trial period. He had expressly agreed by signing the Employment Agreement indicating that he had accepted the conditions of employment, including the trial period provision.

[27] Moreover, whatever was alleged to have been discussed during the interview process, clause 1.1 of the Employment Agreement makes it clear that it overrides any previous agreements or understandings.

[28] The Employment Agreement states at clause 11.1 that Mr Wilson had read and accepted fully the conditions of employment, and at clause 11.2 that he had had the opportunity to seek independent advice upon it. However there is no evidence that Mr Wilson sought to clarify the applicable notice period if termination occurred during the 90 day trial period prior to signing the Employment Agreement in December 2014 or commencing employment in March 2015.

[29] It is noted in Schedule 2 of the Employment Agreement which addressed the Trial Period provision that: *“The Employee will not have a legitimate expectation that he/she is to be offered part-time or full-time employment ..... unless the Employee has satisfactorily completed the trial period to the approval of the Employer.”*

[30] On that basis I find that Mr Wilson accepted the position as Executive Chef knowing that the ongoing nature of the employment was uncertain and not guaranteed as subsisting beyond the statutory 90 day trial period.

[31] Mr Wilson was employed as the Executive Head Chef for the Harbourside Ocean Bar Grill and Botswana Butchery restaurants. He reported to the Group Executive Chef who was responsible for the same two restaurants. In that sense, although the title is descriptive of a senior position, the reporting line infers that it was subject to the supervision of the Group Executive Chef.

[32] Mr Wilson was not a long-serving employee at the time of his dismissal. In addition he is well-qualified in his field and a recent survey of available positions in Auckland indicates a number of potentially suitable positions for Head Chefs and Executive Head Chefs.

[33] Having given the matter full consideration, I conclude that the nature of the employment, namely being subject to a statutory 90 day trial period, is most persuasive, and determine that a 2 week notice period was reasonable in the circumstances of a specific notice period not being stipulated in the event of an unsuccessful completion of the statutory 90 day trial period.

### **Costs**

[34] The matter was determined by the Authority on the papers by way of timetabled submissions. The parties were not put to the expense of attending at an investigation meeting. In all the circumstances, I am not persuaded that this is a matter in which costs should be awarded.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**