

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 398
5628909

BETWEEN ADAM MCKENZIE
 Applicant

AND FARMER MOTOR GROUP
 LIMITED T/A FARMER
 AUTOVILLAGE
 Respondent

Member of Authority: Robin Arthur

Representatives: Warwick Reid, Advocate for the Applicant
 Peter Crombie and Kelly Hymers, Counsel for the
 Respondent

Investigation Meeting: On the papers

Determination: 6 December 2016

DETERMINATION OF THE AUTHORITY

A. The Authority has jurisdiction to investigate Adam McKenzie's application.

B. Costs are reserved.

Employment Relationship Problem

[1] Adam McKenzie began work as a sales consultant for Farmer Motor Group Limited (FMG) on 7 March 2016. Five days later he was dismissed after arriving at work around 40 minutes later than his scheduled start time. Mr McKenzie applied to the Authority for an investigation of FMG's actions, claiming he was unjustifiably disadvantaged during the trial period and then unjustifiably dismissed.

[2] FMG's reply to his application raised a jurisdictional issue. It said the provisions of s 67B of the Employment Relations Act 2000 (the Act) barred Mr

McKenzie from pursuing personal grievances he had raised for unjustified disadvantage and unjustified dismissal. FMG said its employment agreement with Mr McKenzie included a valid and binding term that provided for a 90-day trial so he had no right to bring a grievance about a dismissal during that trial period. Further, FMG said the statutory bar also applied to his disadvantage grievance, which concerned events directly related to his dismissal during the trial period.

[3] The parties sought determination of the jurisdictional issue ‘on the papers’.¹ As part of that arrangement Mr McKenzie advised he would not pursue his disadvantage grievance if the trial period were found to be effective in barring his dismissal grievance. The parties then each lodged written submissions, firstly FMG, then Mr McKenzie and finally, in reply, FMG.

[4] As permitted by 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter but has not recorded all evidence and submissions received.

Mr McKenzie’s employment agreement and his dismissal

[5] Sections 67A and 67B of the Act set certain criteria for an employment agreement to include a trial period, that if met, then prevent a worker bringing a personal grievance or legal proceedings in the event she or he is given notice of dismissal before the end of the trial period:

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

¹ Employment Relations Act 2000, s 174D.

(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.

...

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 (h).

(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.

[6] Mr McKenzie signed his employment agreement before starting work with FMG. There was no doubt the following clause in FMG's agreement with him met the requirements of s 67A:

Trial period

5.1 The Employee is to serve a trial period for 90 days from the beginning of the Employee's employment. During that trial period the Employer may dismiss the Employee and, if the Employer does so, the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[7] Three other clauses set out how Mr McKenzie could be given notice of dismissal before the end of that 90 days and allowed for payment in lieu for all or some of the notice period (bold emphasis added):

Termination of Employment

35.1 ... [T]his agreement may be terminated by either party on not less than **four weeks' notice in writing** to the other party.

35.2 The Employer must have grounds for termination of employment in accordance with New Zealand law. This does not alter the effect of, and is subject to, any trial provision in this agreement.

35.3 **If the Employer is terminating on notice under this or any other clause**, the Employer is **entitled to pay the Employee in lieu of all or part of the required period of notice** or to at any time require the Employee not attend work for all or any part of the notice period.

[8] The facts of how FMG dismissed Mr McKenzie were not disputed. After he arrived late for work on 11 March, his supervisor Blair Woolford talked with him about why he was late. Mr Woolford also mentioned some other concerns he had about how Mr McKenzie had carried out his work during the previous three days. As a result of those concerns and Mr McKenzie's lateness on 11 March, Mr Woolford concluded Mr McKenzie was unsuitable for permanent employment by FMG and told him so. He then told Mr McKenzie his employment was terminated under the trial period provision, his dismissal was effective immediately, and Mr McKenzie would be paid his salary entitlement for the notice period in his employment agreement, in lieu of him working out those four weeks. Mr McKenzie left the workplace soon afterwards that day and did not return to work again. On 16 March, which would have been the usual payday if Mr McKenzie was still at work, FMG paid him four weeks' salary and his holiday pay entitlement.

[9] On 8 April Mr McKenzie, through his representative, raised the disadvantage grievance with FMG. On 3 May, after communication with FMG's counsel, Mr McKenzie's representative raised the dismissal grievance. The latter grievance was founded on two claims – firstly, that Mr McKenzie was “sent home” without being given the notice of termination required by the Act and the terms of his employment agreement and, secondly, payment of four weeks' salary in lieu of notice did not constitute the notice required by the Act.

The issues

[10] Mr McKenzie’s argument that the notice given to him was inadequate for the purposes of s 67B of the Act relied on two propositions. Firstly, the requirement for notice was not satisfied by telling a worker that his employment was terminated with immediate effect. Secondly, his employment agreement required notice be given in writing, which he did not get, so there was no notice sufficient to comply with s 67B.

[11] FMG’s responses to Mr McKenzie’s argument suggested the notice clauses were structured in such a way that payment in lieu of notice was “clearly intended to constitute notice”. Accordingly the payment made to Mr McKenzie needed to be considered in relation to his proposition that a dismissal made with immediate effect could not be said to have been made on “notice”.

Was immediate termination, with pay in lieu of notice, adequate notice?

[12] Because of findings made later in this determination about the requirement for notice in writing, it was not necessary to resolve the parties’ competing contentions about notice with immediate effect or whether payment made in lieu was adequate notice. While I carefully considered their thorough and concise submissions, only the following aspects regarding interpretation of s 67A and s 67B were relevant for the purposes of this determination.

[13] Section 67B(2) includes a particular requirement before the statutory bar against pursuing a grievance is triggered. The trigger is that the employee’s employment agreement must have been terminated in accordance with subsection (1). As explained by the Employment Court in its decision in *Smith v Stokes Valley Pharmacy (2009) Limited*:²

... [D]isqualification from bringing a personal grievance is dependent upon lawful termination of the employment agreement under subs (1). If there is no lawful termination in subs (1), then the personal grievance barrier under subs (2) does not apply.

[14] At issue in Mr McKenzie’s case was whether FMG had met the subsection (1) requirement to give him “notice of termination”.

² [2010] NZEmpC 111 at [62]

[15] The Act has no definition of notice. In the *Smith* case the Court held the reference to notice in subsection (1) to mean more than the worker being told of the fact of dismissal. The Court considered the subsection also contemplated advice about the timing of when the dismissal would take effect.³

Because a termination of which notice must be given may lawfully occur at any point over a span of time including during, at the moment of conclusion and after the end of a trial provision, “notice” must be more than simply advice of dismissal. Rather, the subsection contemplates that it will be advice of when, in future, the dismissal will take effect. ... It is significant, also, that the notice is of termination of the employment agreement (containing the trial provision) and not of employment although, in practice, the two will often be the same.

[16] The Court also held the subsection (1) reference to “notice” was, in its application to any particular case, a reference to the “contractual notice”, that is whatever terms of notice were in the particular employment agreement.⁴ The “notice” required in subsection (1) could not be inconsistent with the contractual notice agreed between the parties.⁵

[17] In reaching those conclusions the Court emphasised sections 67A and 67B did not override the parties’ legal right to “conclude the terms of their own bargain”. For Mr McKenzie and FMG this meant the terms regarding notice, to which they were to be held in the application of those sections to their circumstances, were the terms that they themselves had agreed. Those were not terms imposed externally.

[18] FMG’s argument (much simplified in this description of it) was that its actions of telling Mr McKenzie of his dismissal during the trial period and paying him four weeks’ salary complied with the requirements of s 67B(1) because its own agreement with him allowed it to do so. Compliance with its own contractual terms was its defence.

[19] Accepting that argument, however, then put FMG in considerable difficulty because it had not complied with its contractual obligation to give Mr McKenzie notice in writing of his dismissal.

³ *Smith*, above n 2, at [61].

⁴ *Smith*, above n2, at [107].

⁵ *Smith*, above n2, at [106].

Was oral notice sufficient when the agreement required written notice?

[20] FMG accepted it failed to give Mr McKenzie written notice of the termination of his employment. It submitted the failure “may” have amounted to a breach of the employment agreement but did “not invalidate the 90 day trial period clause in the agreement”.

[21] In itself the submission was correct. The clause was not ‘invalidated’ by the failure. The issue was whether, having not met an express and specific requirement of its contractual term for providing notice, FMG could have then met the s 67B(1) requirement to give “notice”. The Court’s interpretation in *Smith* established that statutory reference to notice was to whatever “contractual notice in any particular case” the parties had agreed.⁶ FMG’s failure to give notice in writing did not ‘invalidate’ its trial period clause. The clause was valid in circumstances where FMG followed its own terms of notice. However, if it did not comply with its own terms, FMG could not then rely on the clause to trigger the s 67B(2) bar against pursuing a grievance for the dismissal.

[22] FMG, nevertheless, submitted a number of arguments as to why “merely failing” to confirm the termination in writing did not really matter or should not be held to make the bar ineffective in this particular case. Those arguments included:

- (i) The Employment Court had, in a case subsequent to *Smith*, agreed the statutory provisions should be read strictly but held that it did not follow every failure would automatically lead to the same result.⁷
- (ii) Section 67B(1) did not require notice to be in writing and this was “a contractual obligation only”.
- (iii) *Smith* could be distinguished from Mr McKenzie’s case because FMG had a clause expressly allowing for payment in lieu of notice and, unlike in *Smith*, FMG had paid for the full notice period.
- (iv) The proper remedy for FMG’s breach of the employment agreement, in not giving Mr McKenzie written notice, would be to seek a penalty under s 134 of the Act, not a finding that the statutory bar was ineffective.

⁶ *Smith*, above n 2, at [107].

⁷ *Modern Transport Engineers (2002) Limited v Phillips* [2016] NZEmpC 68 at [20].

- (v) Both parties relied on the oral termination and, because FMG paid him four weeks' salary in lieu of working the notice period, Mr McKenzie suffered no prejudice from the failure to give him notice in writing. If FMG breached the agreement by not providing written notice, Mr McKenzie had later affirmed the breach by accepting the payment and not protesting or paying it back after getting the money.

(i) Does every failure have the same result?

[23] In *Modern Transport Engineers (2002) Limited v Phillips* the Court dismissed a narrow, technical argument that a trial period provision could not be relied on because the employer could not produce a copy of the employment agreement in which the provision was written.⁸ Section 64 of the Act required the employer to keep a copy of the signed agreement but the copy could not be found. The employer suggested Mr Phillips had taken it. Mr Phillips disputed the allegation. As a factual finding the Court accepted that, before he started work, Mr Phillips was given and both parties had signed a copy of a standard form employment agreement for new employees that included a trial period provision. It was in that context that the judge stated:⁹

I agree with the observation in *Smith* that s 67A carves out an exception to the established entitlement to pursue personal grievances for unjustified dismissals and that it ought to be read strictly. It does not however follow that every failure will automatically lead to the same result.

[24] However, as the judge then also noted, the ultimate issue in *Modern Transport* was whether the employment agreement contained the relevant provision, not whether the employer had kept a copy of it. The failure there was not in respect of the application and operation of sections 67A and 67B. The case is not authority for a proposition that failure to meet the requirements of those two sections is to be considered any less strictly than suggested in the *Smith* decision.

(ii) Why was notice in writing required since s 67B(1) only refers to "notice"?

[25] FMG pointed to the parliamentary history of s 67B(1) because, in 2008, Parliament rejected a proposed amendment to insert the word "written" before the

⁸ *Modern Transport*, above n 7.

⁹ *Modern Transport*, above n 7, at [20].

word “notice” in the subsection.¹⁰ As Parliament had decided s 67B should not state notice was to be written, FMG submitted that “also suggest[ed] a failure to comply with a contractual requirement to give written notice should not deny an employer the protections intended by s 67B”.

[26] Its submission could not survive the interpretation of s 67B given by the Court in *Smith* two years later. As already canvassed in this determination, the Court has made it clear the section is to be interpreted strictly and that the use of the word “notice” in it refers to the contractual terms for notice.¹¹ The word “notice” in s 67B(1) had no separate or different meaning for the purposes of the operation or application of the subsection.

[27] Since the Court’s decision in *Smith* in 2010 and a similar decision in 2011 both held sections 67A and 67B must be interpreted strictly, Parliament has had several opportunities, while making other amendments to the Act, to amend the wording of those two sections if the Court’s analysis was overly prescriptive or otherwise inconsistent with parliamentary intention.¹² The legislature has not elected to do so. In those circumstances, it is the Court’s later interpretation, rather than earlier parliamentary history, that must guide the Authority’s determination.

[28] From reading *Smith*, and a range of Authority determinations applying its interpretation, it is clear that close attention must be made in each case to the actual wording of the notice provisions.¹³ Differences in wording in the particular employment agreement are be ‘carried forward’ into what the word ‘notice’ then means in s 67B as that section is applied in each particular case. Different outcomes may also result from whether the employer has or has not complied with its own, particular agreed notice terms.

[29] Consequently FMG’s submission that its own agreed clause requiring notice in writing was “only” a contractual obligation could not be accepted. Its own wording gives the meaning that must be applied to the use of the word “notice” in s 67B.

¹⁰ Employment Relations Amendment Bill, second reading, in committee: 9 December 2008.

¹¹ *Smith*, above n 2, at [48] and [106].

¹² See *Smith*, above n 2, and *Blackmore v Honick Properties Limited* [2011] NZEmpC 152.

¹³ See, for example, *Hutchison v Canon New Zealand Limited* [2014] NZERA Wellington 72 and *Healy v Dblshot Limited* [2013] NZERA Auckland 101.

(iii) *Can the relevant principles in Smith be distinguished?*

[30] In *Smith* the employment agreement required Ms Smith to be given “4 weeks written notice”. The Court said another term in that agreement also expressly permitted her employer to make a payment in place of some or all of the notice period, although the exact wording of that term was not given in the judgment.¹⁴ Following her immediate dismissal during a supposed trial period, Ms Smith was paid only two weeks’ wages in lieu of notice, not four weeks. Describing the employer’s observance of those notice provisions as “deficient”, the Court reached the following conclusion:¹⁵

Deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as s 67B requires. A termination of employment on short notice is, unless accepted, ineffective notice: *Brown v New Zealand Tourism Board*. Ms Smith did not accept the termination of her employment so that the employment agreement was not terminated on notice as the law required. For this reason, also, she is not precluded from challenging her dismissal by personal grievance.

[31] FMG sought to distinguish *Smith* on the factual grounds that it had paid the full four weeks salary provided in its clause allowing for payment in lieu of notice. It submitted that the Court in *Smith* had accepted payment in lieu of notice was ‘notice’ for the purposes of s 67B, effective provided the full amount due in the term was paid.

[32] Even if that factual distinction were accepted as relevant, FMG’s submission did not displace the full effect of the principle regarding “deficient notice” expressed by the Court in *Smith*. In the particular circumstances of that case, the Court was addressing a short payment. The point was that the employer had not complied with an express term of its agreement with the worker. In Mr McKenzie’s case the deficiency was failure to observe a different requirement of the agreed terms. However the same principle about the effect of the deficiency applied despite the factual difference in the particular kind of term to which it applied. The failure or shortcoming in not observing the express contractual term for notice in writing meant the notice given to Mr McKenzie was “not lawful notice” so that he was not dismissed on the “notice” required in s 67B(1).

(iv) *Should a penalty be the only consequence for breaching the notice clause?*

¹⁴ *Smith*, above n 2, at [97].

¹⁵ *Smith*, above n 2, at [97]. Footnote omitted.

[33] FMG submitted its breach of the notice clause was capable of being remedied by a penalty under s 134 of the Act, rather than by a finding that Mr McKenzie was not barred from pursuing his grievances.

[34] Although the breach did make FMG liable to a penalty, there was no basis for holding that was the only possible consequence for the breach. The breach meant FMG did not satisfy the requirements of s 67B(1) to have given “notice” of the termination of Mr McKenzie’s employment agreement in accordance with the terms FMG had earlier agreed with him. As stated in *Smith* the section complemented the parties’ agreement and did not override the terms of its own bargain. Failure to keep that bargain, however, could have consequences for the immunities provided by s 67B:¹⁶

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

...

The new sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with.

[35] One of those ‘specific steps’, in Mr McKenzie’s case, was for FMG to follow the agreed terms about notice. While not stated in the statement of problem, statement in reply or the parties’ submissions on the jurisdictional issue, it could reasonably be inferred that the employment agreement was really FMG’s document from the outset. There was no suggestion Mr McKenzie had negotiated a specific requirement for notice in writing in the event of a dismissal during his trial period. FMG most likely had the term crafted as part of a standard form employment agreement. It was its term to keep.

[36] It was not an onerous term. It could have been satisfied with a few moments effort on 11 March. Observations made by the Court in *Blackmore v Honick*

¹⁶ *Smith*, above n2, at [48] and [83].

Properties Limited, albeit about the requirements for setting up a trial period rather than ending one, applied equally to FMG’s failure to follow its own agreed term:¹⁷

It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. The benefits of ss 67A and 67B, as the Court emphasised in [*Smith*], are the *quid pro quo* for the significant advantages to the employer of removing longstanding rights of challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee.

For these reasons, I do not think it could be said that the requirements on an employer seeking to have those advantages are either impractical or onerous.

Ultimately, of course, it is not a question of whether this Court considers those advantages too onerous in any event. Rather, Parliament has legislated these constraints and requirements, and it is not for this Court to say whether employers should be required to comply with the legislation or be relieved of its obligations. Statutory requirements must be complied with and, for the reasons set out by the Court in [*Smith*], strictly.

[37] FMG’s shortcoming in not giving the promised written notice may appear minor and of no real or practical difference. To accept that view however would be to ignore the major consequence for Mr McKenzie of overlooking FMG’s breach, that he would thereby be denied access to “the general employee protective scheme of the Act”. It would be inconsistent with the Act’s object of addressing the inherent inequality of power in employment relationships and the Court’s direction that the s 67B(2) bar to grievances should only apply where an employer has strictly complied with the Act’s trial period provisions.¹⁸

(v) *Had Mr McKenzie accepted oral notice by not returning the money?*

[38] FMG submitted Mr McKenzie had accepted his immediate dismissal because he had not protested about getting paid four weeks’ salary in lieu of notice and had not returned the money. It relied on *Painter v Epic Hair Designs NZ Limited*, an Authority determination said to be about factually similar circumstances, for the notion that Mr McKenzie’s conduct affirmed FMG breach in not giving him written notice, with the result that the trial period was not invalidated.¹⁹

[39] I do not accept there were materially similar circumstances. Ms Painter’s agreement provided for seven days’ notice but no payment in lieu of notice if she was

¹⁷ [2011] NZEmpC 152 at [66]-[68].

¹⁸ Employment Relations Act 2000, s 3(a)(ii).

¹⁹ [2016] NZERA Christchurch 112.

dismissed during her trial period. Another clause provided for payment in lieu under a different notice provision that would apply after the end of her trial period. She was dismissed during the trial period, told she was not required to return to work and told she would be 'paid out' for the seven days. However, because Ms Painter said she was "not bothered" by being paid in lieu, the Authority found she had affirmed the apparent breach caused by not having to work during the notice period.

[40] Mr McKenzie left work soon after he was told of his dismissal and did not return the money paid to him five days later. In leaving work he did what he was told. He did not request payment of the money to him. There was no evidence of any express agreement or positive act of acceptance by him of those unilateral actions of his employer.

[41] A further formal difference was apparent in the respective employment agreements of Ms Painter and Mr McKenzie. Hers allowed variations in terms at any time but with no requirement they be in writing. Her agreement could be inferred by conduct. His provided for variations to be recorded in writing. No such variations were recorded.

[42] Mr McKenzie has not affirmed the breach to his contract by choosing to keep the employment agreement "on foot". It was not a choice he was able to make because his employer had terminated the agreement.

Outcome

[43] For the reasons given, FMG's action in breaching the terms of Mr McKenzie's employment agreement, by not giving him notice in writing, meant that the statutory bar at s 67B(2) of the Act was not effective.

[44] The rationale for that conclusion can be summarised in this way. FMG and Mr McKenzie had an employment agreement that set the terms on how each would act. Each was bound to keep the promises made in that agreement.²⁰ One such promise said any termination of Mr McKenzie's employment would be by "notice in writing" to him. The statutory bar against a grievance requires the employer to have given "notice" of the termination of the employment agreement. The Employment

²⁰ *Fuel Espresso Limited v Hsieh* [2007] NZCA 58 at [21]: "Agreements are made to be kept."

Court has said what “notice” means in that statutory context is whatever the terms of the particular employment agreement says is to be notice. Mr McKenzie did not get the written notice promised in his agreement. FMG accepted its notice to him was, in that sense, deficient. The Court has said deficient notice is no notice. The result is that FMG did not give “notice” of the sort required by s 67B(1). Due to that failure, the statutory bar in s 67B(2) is not effective. The bar only operates when an employee’s agreement is terminated in accordance with subsection (1). As a result the statutory bar could not then be lowered to prevent Mr McKenzie pursuing his grievances. He must be allowed to proceed.

Next steps

[45] The conclusion reached concerns application of legal principles regarding access to the statutory grievance procedures, not the merits of Mr McKenzie’s grievances or their eventual prospect for success. However, following this determination, the situation is now different from when the parties first attended mediation on 30 August. If the representatives cannot now promptly resolve this matter by discussion, further mediation on a voluntary or directed basis may assist. Either party may request a direction, if needed. If mediation does not resolve the matter, and Mr McKenzie wishes the Authority to then proceed with an investigation, he should promptly advise the Authority so the necessary arrangements can be made.

Costs

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr McKenzie may request timetable directions for the lodging of memoranda on costs.

Robin Arthur
Member of the Employment Relations Authority