

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 266  
3032278/3042012

BETWEEN GARETH SMITH/HALCYON  
KNIGHTS NEW ZEALAND  
LIMITED

AND HALCYON KNIGHTS NEW  
ZEALAND LIMITED/GARETH  
SMITH

Member of Authority: Eleanor Robinson

Representatives: Gareth Smith in person  
Andrew Schirnack and Simon Schofield, Counsel for Halcyon  
Knights New Zealand Limited

Investigation Meeting: 3 May 2019

Determination: 3 May 2019

---

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The Respondent, Mr Gareth Smith, claims that he was unjustifiably dismissed from his employment with the Applicant, Halcyon Knights New Zealand Limited (Halcyon Knights)

[2] Halcyon Knights denies that Mr Smith was unjustifiably dismissed and claims that Mr Smith was dismissed in accordance with a valid trial period provision pursuant to s. 67A of the Employment Relations Act 2000 (the Act).

[3] Halcyon Knights by way of counterclaim claims that Mr Smith breached the employment obligations he owed to Halcyon Knights during his employment.

[4] Mr Smith denies that he has breached the employment obligations he owes to Halcyon Knights.

## **The issues**

[5] This determination addresses as a preliminary issue is whether or not Mr Smith was unjustifiably dismissed by Halcyon Knights in reliance on a valid trial period provision pursuant to s 67A of the Employment Relations Act 2000.

## **Background**

[6] Halcyon Knights is a specialist recruitment search and IT recruitment agency co-founded by Mr Lincoln Benbow, co-founder and joint shareholder in March 2007. Halcyon Knights grew significantly over a period of 10 years and currently has 5 offices and 40 technology recruiters based across the Asia-Pacific region.

[7] Mr Smith was interviewed 19 and 21 March 2018 by Ms Aksana Rusakova, Director NZ, following a recommendation by another employee.

[8] Mr Smith said that during the interviews Ms Rusakova had given him positive assurances about Halcyon Knights' operation and that it had the full support of the Australian part of the business.

[9] Ms Rusakova said that she had explained to Mr Smith that Halcyon Knights was looking to develop in New Zealand and that it was supported by Australia, but had not discussed with him the finances of Halcyon Knights.

[10] Following the interview on 21 March 2018 Ms Rusakova had emailed Mr Benbow and arranged a Skype call between him and Mr Smith for the following day.

[11] Mr Smith said that during the Skype interview Mr Benbow had also been very positive about given him positive assurances about Halcyon Knights' operation.

[12] Mr Benbow said that during the Skype discussion Mr Smith had told him he had 17 years' experience in the IT recruitment industry and could immediately introduce clients and opportunities to Halcyon Knights.

[13] Mr Lincoln said he had believed Mr Smith could introduce clients to Halcyon Knights and he had explained to Mr Smith that Halcyon Knights was excited about building the business in New Zealand based on the Australian model.

[14] Mr Smith confirmed that neither Ms Rusakova nor Mr Benbow had given him financial information about Halcyon Knights during the interviews.

[15] Following Mr Lincoln's interview with Mr Smith, and after initial confusion on Ms Rusakova's part about the salary level to be offered and confirmed to Mr Smith, Mr Smith was sent an offer letter and provided with an individual employment agreement by email dated 29 March 2018 which he signed on 4 April 2018 (the Employment Agreement).

[16] The Employment Agreement contained a Trial Period provision at clause 6 which stated:

**6. Trial period**

- (a) As you are a new employee your employment will be on a trial period basis for the first 90 days of your employment.
- (b) If, during the trial period, Halcyon Knights decides to terminate your employment, we will (subject to our ability to summarily terminate your employment under the terms of this letter) give you at least one week's notice of termination before the end of the trial period. Clauses 20(d) and 20€ in this letter may be applied to the notice period.
- (c) If Halcyon Knights notifies you before the end of trial period that your employment will be terminated, you will not be entitled to bring a personal grievance (or other legal proceedings) in respect of the dismissal.
- (d) ..

[17] The Employment Agreement also stated at clause 27:

**27 General**

...

- (e) This letter contains the entire agreement between you and Halcyon Knights about the subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this letter and has no further effect.

[18] Mr Smith signed the Employment Agreement below the section headed 'ACKNOWLEDGEMENT AND ACCEPTANCE' which stated:

I, Gareth Smith, acknowledge that I have read, considered and agreed to the terms and conditions of employment in this letter. I also acknowledge that I have been given a reasonable opportunity to take independent advice, and accept employment on the above basis. ...

I confirm that in accepting this offer I have not relied on the advice of the company or any of its representatives about what these terms mean.

[19] In the email which accompanied the Employment Agreement and which was also dated 29 March 2018 Ms Rusakova had written: "I'm pleased to be able to send you an offer with us, attached for you to review ... let me know if you have any questions".

[20] During April Mr Benbow had visited New Zealand on 9 and 10 April 2018 to induct Mr Smith. Mr Benbow said that during the induction process he had set out his expectations

as to what Mr Smith would be expected to achieve in the first three months of his employment.

[21] Mr Smith confirmed that during his period of employment with Halcyon Knights there had been transparency about the company performance against budget and financial expectations and that he had been aware that the New Zealand business was underperforming.

[22] Ms Rusakova said that by June 2018 Halcyon Knights had not secured sufficient clients to sustain the business and was operating at a loss.

[23] Mr Benbow said that a decision had been by Halcyon Knights to terminate Mr Smith's employment and that of two other employees, leaving Ms Rusakova as the sole employee.

[24] Mr Smith said that he and two colleagues had been summoned to a meeting with Ms Rusakova who facilitated a Skype call from Mr Benbow. In a short conversation Mr Smith said that Mr Benbow had informed them that their positions were redundant with immediate effect. They had then returned company property and left the building.

[25] Mr Smith said that he had not been informed at the meeting that his employment was being terminated in accordance with the trial period provision in his employment agreement.

[26] Mr Benbow confirmed that he had not referred to the trial period during the termination call.

**Was Mr Smith was unjustifiably dismissed by Halcyon Knights in reliance on a valid trial period provision?**

[27] 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.
- (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a person grievance in respect of the dismissal.

[28] 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.

#### *Misleading representation and/or unfair bargaining*

[29] Mr Smith considers that he was induced to enter into the Employment Agreement after Halcyon Knights erroneously represented the situation to him as regards the stability of the New Zealand operation.

[30] The duty of good faith contained in s 4 of the Act applies only to persons: "to an employment relationship".<sup>1</sup> The duty of good faith does not apply to any representations made prior to the employment relationship being entered into by the parties.

[31] Section 63 A of the Act applies to bargaining obligations and states at s 63A(2):

#### **63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement**

...

- (2) The Employer must do at least the following things:
  - (a) provide to the employee a copy of the intended agreement under discussion;
  - and
  - (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
  - (c) give the employee a reasonable opportunity to seek that advice; and
  - (d) consider any issues that the employee raises and respond to them.

[32] I find that Halcyon Knights complied with this section of the Act: Mr Smith was provided with an employment agreement, was advised that he had the right to seek

---

<sup>1</sup> The Employment Relations Act 2000 s4(1)

independent advice on it, provided with a reasonable opportunity to do and given the opportunity to raise any concerns he had.

[33] Section 68(2) of the Act sets out the criteria constituting unfair bargaining for individual employment agreements:

**Unfair bargaining for individual employment agreements**

- ..
- (1) The circumstances are that person A, at the time of bargaining for or entering into the agreement,—
    - (a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—
      - (i) age; or
      - (ii) sickness; or
      - (iii) mental or educational disability; or
      - (iv) a disability relating to communication; or
    - (b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf; or
    - (c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or
    - (d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.

[34] I do not find that there was unfair bargaining for the Employment Agreement signed between Knights and Mr Smith.

[35] Moreover in the Employment Agreement section headed 'Acknowledgment And Acceptance' Mr Smith had signed to confirm that he had not relied upon the advice of the company or its representatives about the terms.

[36] The trial period provision was set out in clause 6 of the Employment Agreement emailed to Mr Smith on 29 March 2018. I find that Mr Smith had ample opportunity to read the Employment Agreement and seek independent advice before he signed it on 4 April 2018.

*No reference to trial period provision on 22 June 2018*

[37] Mr Smith is concerned that during the notice of termination call Mr Benbow did not refer to the trial period provision.

[38] I find that there is no requirement to explicitly state that notice is being given in accordance with the trial period provision. Section 67B requires that notice of termination must be given before the end of the trial period in order to qualify for protection and I find this occurred.

[39] I determine that the trial period provision in Mr Smith's employment agreement was a valid trial period provision in accordance with s 67A of the Act.

**Costs**

[40] Halcyon Knights is the successful party in this matter and costs are awarded at the usual daily tariff rate applying in the Authority.

[41] As this matter occupied half a day of hearing time, Mr Smith is ordered to pay Halcyon Knights \$2250.00 pursuant to clause 15 of Schedule 2 of the Act.

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