

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 246
3047472

BETWEEN STEVEN JOBBITT
 Applicant

AND 4 SEASONS INDOOR
 OUTDOOR LIVING (2014)
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, counsel for the Applicant
 Anjela Sharma, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 14 March 2019 from the Applicant
 5 April 2019 from the Respondent

Date of Determination: 29 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Jobbitt filed a statement of problem alleging that 4 Seasons Indoor Outdoor Living (2014) Limited (4 Seasons) unjustifiably dismissed him.

[2] 4 Seasons disputed that the Authority has jurisdiction to investigate Mr Jobbitt's unjustified dismissal claim because he was dismissed in accordance with a valid trial period provision.

[3] Mr Jobbitt claimed that his dismissal grievance was not barred by s 67B(2) of the Employment Relations Act 2000 (the Act). He claimed that 4 Seasons failed to meet the

notice provisions in s 67B(1) of the Act because it did not tell him, when he was given notice that his employment would end, that his last day of work would be 17 August 2018.

[4] This determination deals with the preliminary jurisdiction issue only.

Agreed facts

[5] The parties entered into a written individual employment agreement on 16 April 2018. Clause 11 of the individual employment agreement contained a 90 day trial period provision.

[6] The trial period provision stated:

- 11.1 The trial period will apply for 90 calendar days from the employee's first day of work to assess and confirm suitability for the position.
- 11.2 Parties may only agree to a trial period if the employee has not previously been employed by the employer.
- 11.2 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 on grounds as specified in sections 103(1)(b)-(g) of the Employment Relations Act 2000 (such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).
- 11.4 Within the 90 day trial period, either party may terminate the employee's employment by providing one week's notice of termination. This notice must be given within the trial period even if the employee's last day of work is after the trial period ends.
- 11.5 This trial period does not limit the legal rights and obligations of the employer and the employee (including access to Mediation Services), except as specified in section 67A(5) of the Employment Relations Act 2000.

[7] Mr Jobbitt started work with 4 Seasons on 14 May 2018 so his 90 day trial period started from that date. The last day of his trial period was therefore 11 August 2018.

[8] On 10 August 2018 4 Seasons advised Mr Jobbitt by telephone that his employment was terminated under the 90 day trial period clause in his employment agreement. Written confirmation of termination was also emailed to him on 13 August 2018.

Other material facts

[9] On 16 July 2018 Mr Jobbitt emailed 4 Seasons to say that he intended to move on from the business in the short term and would be looking for another position elsewhere.

[10] Mr Jobbitt stated that he didn't think the position was the right fit for him long term, but that he wasn't giving a formal resignation at that point because he didn't want to leave the branch in the lurch and he was happy to have a conversation around an exit date that worked for the parties.

[11] On 8 August 2018 4 Seasons' CEO, Mr Jonathan Cameron, met with Mr Jobbitt to discuss performance concerns and issues 4 Seasons had regarding Mr Jobbitt's commitment and attitude as store manager of the 4 Seasons' Tauranga store.

[12] Mr Cameron's view of that meeting was that Mr Jobbitt attempted to dictate terms that were unsatisfactory to 4 Seasons regarding Mr Jobbitt's continued employment while he looked for another job. Mr Cameron believed that the new terms Mr Jobbitt sought from 4 Seasons in order to continue his employment while he was job hunting were operationally impractical for 4 Seasons.

[13] At that point the parties could not agree on new terms and conditions of employment for Mr Jobbitt, which involved him seeking new work elsewhere and 4 Seasons recruiting his replacement, despite having email communications and a face-to-face meeting to discuss that.

[14] As a result of their meeting on 8 August, Mr Cameron concluded that 4 Seasons should terminate Mr Jobbitt's employment under the 90 day trial period provision in his employment agreement so it could employ a new store manager who was committed to the business. Mr Cameron took advice from Human Resources about how to handle that.

[15] On 10 August 2018 Mr Cameron phoned Mr Jobbitt, with the primary purpose of the telephone call being to terminate Mr Jobbitt's employment under the 90 day trial period provision.

[16] Prior to this telephone call Mr Cameron had taken advice from Human Resources so he read from a script that had been prepared for him. Mr Cameron also made a handwritten note about his telephone conversation with Mr Jobbitt, which was provided to the Authority.

[17] Mr Cameron told Mr Jobbitt during the 10 August 2018 telephone call that “*his employment agreement would be terminated under the 90 day trial period clause in his employment agreement*”.

[18] Mr Cameron did not tell Mr Jobbitt that his last day of work would be 17 August 2018 because he believed that was clear because the trial period provision in Mr Jobbitt’s employment agreement specifically referred to one week’s notice of termination.

[19] 4 Season’s view was therefore that Mr Jobbitt must have known that one week’s notice in accordance with clause 11.4 of his employment agreement meant his last day at work would be 17 August 2018.

[20] Mr Jobbitt’s position is that because Mr Cameron did not tell him during their telephone conversation on 10 August 2018 that his last day of work would be 17 August 2018, that omission invalidated the trial period provision in his employment agreement.

[21] Mr Cameron agreed that during the telephone call on 10 August he had indicated to Mr Jobbitt that 4 Seasons would be open to a discussion about further employment for Mr Jobbitt while he was looking for a new job if that was an option he wanted to explore. That suggestion was left with Mr Jobbitt to consider over the weekend.

[22] Mr Cameron’s view was that suggestion of some work being given to Mr Jobbitt while he was job hunting was separate to the contractual notice of termination that had already been given under clause 11.4 of Mr Jobbitt’s employment agreement, because it occurred after notice of termination had already been given to him.

[23] Mr Cameron said he made that suggestion to address Mr Jobbitt’s concerns that he did not want to be out of work while he was looking for new employment.

[24] 4 Seasons said that offer was an attempt to accommodate Mr Jobbitt’s personal circumstances, given that the previous discussions about possible employment up until Mr Jobbitt finding a new job had not resulted in any agreement between the parties.

[25] However, on Monday 13 August 2018 Mr Jobbitt challenged the validity of the termination of his employment under his trial period provision and he sought to pursue further employment until 14 February 2019 on specified terms.

[26] All of Mr Jobbitt's proposed new terms of employment were unacceptable to 4 Seasons.

[27] Mr Cameron responded by email on 13 August confirming that Mr Jobbitt's last day of employment would be Friday 17 August 2018. 4 Seasons confirmed that it would be relying on the notice of termination it had given Mr Jobbitt by telephone on 10 August 2018 and that no further employment agreements would be entered into.

[28] Mr Jobbitt's employment ended on 17 August 2018 and he raised a personal grievance for unjustified dismissal on 21 August 2018.

Findings

[29] To be able to rely on s 67B of the Act, 4 Seasons had to give Mr Jobbitt contractual notice in accordance with a valid trial period provision that met the requirements of s 67A of the Act.

[30] The Authority is satisfied that:

- (a) Mr Jobbitt's trial period provision met the requirements of s67A of the Act;
- (b) 4 Seasons complied with the notice requirements of clause 11.4 of Mr Jobbitt's employment agreement by giving him one week's notice of termination of his employment during the 10 August telephone call;
- (c) That verbal notice of termination given on 10 August was given to Mr Jobbitt within the trial period because it occurred one day before the trial period expired.

[31] Although the parties were initially both open to negotiating a different end date, other than the one week provided for in the employment agreement, that possible option did not invalidate the contractual notice of termination that had already been given.

[32] As it turned out no agreement on a different end date was ever agreed to by the parties, meaning the contractual notice of termination that had been given to Mr Jobbitt on 10 August was never varied or extended. While it was open to the parties to have done so, that did not in fact ever occur.

[33] The fact that Mr Cameron did not tell Mr Jobbitt during their telephone conversation on 10 August that his last day of work would be 17 August did not invalidate the valid trial period provision.

[34] 4 Seasons put Mr Jobbitt on notice about how his employment was ending (under the trial period provision) and when it was sending (in one week). That was sufficient information to make it clear and unambiguous to Mr Jobbitt that his last day of work would be 17 August 2018, unless both parties agreed to vary the notice period.

[35] Mr Jobbitt also received an email dated 13 August 2018 that recorded that his last day of work would be Friday 17 August, as per the one week's verbal notice of termination he had been given on 10 August, unless the parties had agreed on some alternative date. No alternative end date was agreed so the verbal notice period that had been given to Mr Jobbitt applied.

[36] Sections 67A and 67B of the Act and Mr Jobbitt's employment agreement do not state that for notice of termination under the trial period provision to be valid it must include (at the time notice is first given) the date on which the employment would end.

[37] The obligation on 4 Seasons, in order to meet the s 67B requirements, was that notice was given in accordance with the specified contractual notice requirements in Mr Jobbitt's employment agreement. That did occur.

[38] The Authority was therefore satisfied, because 4 Seasons met the requirements of s 67B(1) and (2) of the Act, that it was entitled to rely on the trial period provision in Mr Jobbitt's employment agreement to preclude him from pursuing a dismissal grievance against it.

[39] Accordingly, the Authority finds that it does not have jurisdiction to investigate Mr Jobbitt's unjustified dismissal claim because his employment was terminated in accordance with a valid trial period provision which met the requirements of s 67A of the Act.

What, if any, costs should be awarded?

[40] 4 Seasons as the successful party is entitled to receive a contribution from Mr Jobbitt towards its actual legal costs.

[41] The parties are encouraged to resolve costs by agreement. However, if that is not possible then 4 Seasons has seven days within which to file a costs application and Mr Jobbitt has seven days within which to file his response and if 4 Seasons wants to file a reply then it has three working days to do that after receiving Mr Jobbitt's costs submissions.

[42] The Authority will adopt its usual notional daily tariff based approach to costs so the parties are invited to submit how the notional daily tariff should be pro-rated to reflect costs in this case and then to identify any factors they say should result in the notional starting tariff being adjusted to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority