

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 148  
3029432

BETWEEN                      MICHAELA CRADOCK  
Applicant

AND                              ALLIED INVESTMENTS  
LIMITED t/a ALLIED  
SECURITY  
Respondent

Member of Authority:        Trish MacKinnon

Representatives:              Simon Meikle, counsel for Applicant  
Alistair Hall and Joelle Avery, counsel for Respondent

Investigation Meeting:        3 October 2018 and 24 January 2019 at Palmerston  
North

Submissions and Further      Orally and in writing from both parties on 24 January  
Information Received:        2019

Date of Determination:        12 March 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Michaela Cradock was employed as a security guard by Allied Investments Limited trading as Allied Security (Allied Security) from 3 July 2017 to 14 September 2017. On the latter date she was informed by telephone and letter that her employment was terminated effective that day in accordance with the trial period clause of her individual employment agreement (IEA).

[2]     Ms Cradock claims the termination of her employment constituted an unjustifiable dismissal. She says the way her notice of termination of employment was delivered to her

breached her IEA. Also, she was provided with no notice period. Ms Cradock claims lost wages, compensation and costs as remedies for her personal grievance.

[3] Allied Security denies unjustifiably dismissing Ms Cradock. It says it relied on a valid trial period to bring her employment to an end. Accordingly, it says Ms Cradock is barred from bringing her claim.

### **Issues**

[4] The main issue for determination is whether Ms Cradock's employment was terminated under valid contractual trial period provisions that meet the requirements of the Employment Relations Act 2000 (the Act).

[5] Matters to be considered include:

- (a) Whether the manner of delivery to Ms Cradock of notice of the termination of her employment under the trial period provisions of her IEA was in breach of clause 16.7 of her IEA;
- (b) Whether the respondent had confirmed Ms Cradock as a permanent employee during the trial period; and
- (c) The validity of the "notice" provided to Ms Cradock.

[6] If Ms Cradock's employment is found not to have been validly terminated, the issue of whether she was unjustifiably dismissed will arise.

[7] Depending on the determination of the above issues, matters of remedies and contribution may need to be considered.

### **Ms Cradock's IEA**

[8] The following clauses from the IEA are relevant to this matter:

1. **Terms of agreement**

1.0 This agreement shall come into effect on 3rd July 2017 ... and shall remain in force until renegotiated or terminated pursuant to any provision of this agreement including any probationary period.

...

5 **90 day trial period**

5.1 As you are a new employee your employment will be on a trial period basis for the first 90 days of your employment.

5.2 If, during the trial period, we decide to terminate your employment, we will give you notice of termination before the end of the trial period. If we decide to terminate based on the 90-day trial any notice period will not apply and termination may be immediate.

5.3 If we notify you before the end of the 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.

...

## 16. Employee obligations

...

16.7 Any notices to be given by either party to the other shall be deemed to have been brought to a party's attention if it is delivered or posted to that party's last known residential address or, in the case of the Employer, to its registered office.

...

## 36. Termination and suspension of employment

36.1 Resignation:

- (a) If the Employee wishes to resign from their employment with the Employer, the Employee must give the Employer two weeks notice in writing. The Employer may elect to pay the Employee in lieu of working the notice period.

...

36.2 Summary dismissal: the Employer may dismiss the Employee without notice in the case of serious misconduct.

36.3 Redundancy: if the Employer terminates the Employee's employment for redundancy, it will give the Employee two weeks notice or pay in lieu of notice, and the Employee will not be entitled to redundancy compensation.

...

### Relevant law

[9] Sections 67A and 67B of the Act provide as follows:

#### **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 been previously employed by the employer.
- (4) *[Repealed]*
- (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).

**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 (j).
- (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.

**Was Ms Cradock's employment terminated validly under the trial period provisions?**

*(a) Validity of manner of giving notice*

[10] Through counsel, Simon Meikle, Ms Cradock submits the notice requirements of her IEA were not complied with when she was informed of the termination of her employment. The statutory trial period provisions, in Mr Meikle's submission, complement the parties' employment agreement terms and do not override them. He cites the Employment Court judgment in *Smith v Stokes Valley Pharmacy (2009) Limited* in support of this submission.<sup>1</sup>

[11] Mr Meikle refers to clause 16.7 of Ms Cradock's IEA and submits the word "deemed" is a command and/or a mandatory requirement. In his interpretation, notice of termination was required to be brought to Ms Cradock's attention by being posted or delivered to her last known residential address. He notes Allied Security was aware of Ms Cradock's residential address.

[12] In Mr Meikle's submission Allied Security's failure to provide notice in accordance with the IEA renders Ms Cradock's dismissal to be of no effect. He submits the employer cannot rely on immunity from a personal grievance claim by her.

[13] Allied Security rejects that view. In its submission, through counsel Alastair Hall, clause 16.7 of the IEA does not make it mandatory for any or all notices given by either party to the other to be delivered or posted to that party's last known residential address, for an employee, or to the registered office of the employer.

[14] I accept that submission. I reject the interpretation of "deemed" given to it by Ms Cradock and find it ascribes an unnaturally restricted definition of the word in the context of the IEA clause. In my view the clause allows a party certainty where, for example, there has been no acknowledgement of receipt of a notice it sent to the other party by other means. Posting or delivery to the other party's last known residential address or, in the case of the employer, its registered office, gives the sending party the assurance that the recipient party has been deemed to have had the notice brought to their attention.

[15] The clause does not, however, state or imply that posting or delivery in the manner referred to is the only method by which notices can be served. If the clause had been intended to have the meaning attributed to it by Ms Cradock, that could have been better achieved by requiring that any notices to be given by one party to the other "shall be delivered or posted ..."

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<sup>1</sup> [2010] NZEmpC 111 at [106] and [107].

[16] I also accept Mr Hall's further submissions on this matter that, where actual notice has been received, notice deeming provisions in contracts are not intended to displace proof of the actual receipt of written notice.

[17] In this instance Ms Cradock was notified by telephone by her manager, Chris Vaughan, that he had just sent her an email she should read. There is no dispute that Ms Cradock read Mr Vaughan's email and the letter he had attached to it informing her that her employment would come to an end that day. I find the emailing of notice to Ms Cradock, and Mr Vaughan's telephone call to alert her to the presence of that email, were not in breach of clause 16.7 of her employment agreement and did not render the notice invalid.

***(b) Did the employer effectively confirm Ms Cradock as a permanent employee?***

[18] Ms Cradock asserts that Mr Vaughan had confirmed verbally to her during the trial period that her employment would continue beyond 90 days. She provided evidence of a letter written by Mr Vaughan during her trial period which, in her view, confirmed her status as a permanent employee whose employment would continue after the expiry of the trial period. The letter was written at Ms Cradock's behest and addressed "To whom this may concern". It was written approximately two weeks before her employment was terminated on 14 September 2017.

[19] Mr Vaughan denied confirming to Ms Cradock that her employment would continue beyond the trial period. He acknowledged writing the letter, which he understood was required by a loan company in relation to a vehicle Ms Cradock was seeking to purchase. It was his recollection that Ms Cradock had drafted the letter and he had signed it.

[20] That was partially correct. The evidence showed Ms Cradock had drafted the initial letter in which she was described as a "current employee of Allied Security". Mr Vaughan had changed that description to "a current full-time permanent employee of Allied Security". Although he could not be certain why he had inserted the words "full-time permanent", Mr Vaughan believed it was because Ms Cradock had informed him the loan company would not give her the loan she required because her IEA did not convey that she had permanent employee status.

[21] In Mr Vaughan's view, he had changed the wording in the letter to help Ms Cradock, and he had no intention of providing any assurance to her about her employment status. His

evidence was that he was not a member of Allied Security's senior management team and was not authorised to provide such an assurance.

[22] Under questioning Mr Vaughan acknowledged he had, around mid-August 2017, and before Ms Cradock asked him for the "To whom it may concern" letter, a conversation with her about her employment. She had asked him whether her job was "sweet" to which he replied that it was. Mr Vaughan said this had occurred shortly after he had discussed with Ms Cradock the complaints some clients had made about her. At the time he did not think the complaints would be a problem as there were other clients and sites to which she could be sent.

[23] Ms Cradock may have interpreted the letter, and her earlier conversation with Mr Vaughan about her job being "sweet", as evidence that she had nothing to be concerned about in terms of the trial period. In my view, however, the evidence is not sufficiently strong to support a finding that Mr Vaughan's actions or words either waived the remainder of Ms Cradock's trial period or provided assurance her employment would continue beyond the expiry of that period.

**(c) Was the notice valid and/or reasonable?**

[24] Mr Meikle refers to the requirement to give notice in s 67B(1) and cites *Smith* where former Chief Judge Colgan said that ss 67A and 67B were:

...intended to complement parties' agreements and, indeed, require, for their effective operation, those agreements to address certain issues. I conclude that one of those issues is the requirement of notice and it would be irrational to interpret the statutory reference to notice as being other than the contractual notice in any particular case. **Nor can the statutory requirement for notice be interpreted as its antithesis, no notice, which is the essence of summary dismissal.** That, too, is consistent with the general nature of the trial provision sections. Although there may be instances of misconduct or serious misconduct during a trial period for which an employer may dismiss an employee summarily and justifiably, that is a long established feature of employment law and is not addressed by this legislation. Rather, trial provisions or trial periods conclude for reasons of unsatisfactory work performance or incompatibility or reasons of that sort. These are ones that the law has traditionally treated as giving grounds for dismissal on notice and not summarily.<sup>2</sup>(bolding added)

[25] In Mr Meikle's submission, Ms Cradock was not provided with reasonable notice which, in the context of her IEA, would be two weeks. That is the period of notice she was

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<sup>2</sup> n1 above at [107].

required to give on resignation. It is also the period Allied Security was required to give her in the event of termination for redundancy and the minimum period required if the employer terminated her employment on medical grounds.

[26] I agree that Ms Cradock was not provided with reasonable notice but the more relevant factor is that the contractual notice period is invalid under s 67B. As observed by Perkins J in *Farmer Motor Group v McKenzie*, "reasonable notice" applies only where the contract is silent.<sup>3</sup> In this instance, the contract was not silent: it contained a notice period, but one that I find to be invalid.

[27] Allied Security takes a different view of its obligations regarding notice to be given during a trial period. In Mr Hall's submission Allied Security complied with both the statutory provisions of s 67B and the contractual provisions of clause 5 of Ms Cradock's IEA. He notes that the Act contains no definition of "notice" and that *Smith* held that the reference to "notice" in s 67B(1) was, in its application to any particular case, a reference to the terms of notice in the particular employment agreement.

[28] While part of that submission is correct, it does not address the former Chief Judge's finding that the statutory requirement for "notice" cannot be interpreted as "no notice". Under clause 5.2 of Ms Cradock's IEA, that is precisely how "notice" is interpreted:

If, during the trial period, we decide to terminate your employment, we will give you notice of termination before the end of the trial period. If we decide to terminate based on the 90-day trial any notice period will not apply and termination may be immediate.

[29] In this situation, Ms Cradock's employer chose to terminate her employment with immediate effect. Her "notice" was "immediate termination", otherwise known as dismissal without notice or summary dismissal. I find that to be contrary to the statutory requirement for notice to be given. As the former Chief Judge stated in *Smith*:

..."notice" must be more than simply advice of dismissal. Rather, the subsection [67B] contemplates that it will be advice of when, in future, the dismissal will take effect.<sup>4</sup>

[30] Having concluded the trial period notice provision of Ms Cradock's IEA does not meet the requirements of s 67B and is invalid, I further conclude the s 67B(2) bar

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<sup>3</sup> [2017] NZEmpC98 at [19].

<sup>4</sup> n1 at [61].

against bringing a personal grievance for unjustifiable dismissal does not apply to Ms Cradock's situation.

**Was the dismissal justifiable?**

[31] Absent a valid termination under trial period provisions, Ms Cradock's dismissal cannot be justifiable. Mr Vaughan's evidence was that there had been a number of complaints about her performance and the decision to terminate her employment under the trial period provisions was taken after one "particularly bad" complaint from a client.

[32] Mr Vaughan contacted his manager, Chris McDowall, General Manager of Operations for Allied Security. After discussion they decided it would be best to end Ms Cradock's employment in reliance on the 90 day trial period provisions of her IEA. According to Mr Vaughan, Mr McDowall drafted the letter of termination for Mr Vaughan to send on to Ms Cradock. He did so and, under Mr McDowall's direction, telephoned Ms Cradock to tell her to check her emails and read the letter he had just sent her.

[33] Ms Cradock was not afforded any opportunity to answer allegations put to her for explanation before her dismissal was effected. Allied Security relied upon the trial period provisions of Ms Cradock's IEA and has advanced no alternative justification for her dismissal without process or notice. Mr Vaughan said he did not believe Ms Cradock would have been surprised to receive his letter of termination of her employment because of countless text messages and phone calls he had had with her as well as meetings.

[34] Ms Cradock's recollection differed from that of Mr Vaughan. She said, under cross examination, she had kept all her texts and emails and could not recall any concerning complaints about her performance. She recalled two meetings with Mr Vaughan, one initiated by her regarding an aspect of work, the other initiated by him. Neither meeting gave her cause to believe her employment was in jeopardy. To the contrary, she believed from Mr Vaughan's words and actions that her employment would continue on beyond the expiry of the trial period.

[35] I find the termination of Ms Cradock's employment and the manner in which it was effected was not the action a fair and reasonable employer could take in all the circumstances at the time. In short, her dismissal was unjustifiable.

### **Remedies and contribution**

[36] Section 128 of the Act provides that, where the Authority finds an employee has a personal grievance and has lost remuneration as a result, it must, subject to any issues as to contribution by the employee<sup>5</sup>, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. The Authority may, in its discretion, order the employer to pay a greater sum than that.

[37] Ms Cradock's evidence is that she was unable to find alternative full time employment until 1 June 2018, although she had various part time jobs from the time of her dismissal from Allied Security. I accept her evidence of having made many attempts to obtain employment following her dismissal.

[38] She calculates that in the period from her dismissal until 1 June 2018 she lost wages of \$17,819.71. She arrived at this amount by calculating her average weekly earnings during this time, basing her calculation on 9.6 weeks' employment with Allied Security. This resulted in average weekly earnings of \$650.83. From that, she deducted her earnings in the 37 weeks between dismissal and the commencement of full time employment.

[39] Ms Cradock miscalculated the length of her employment with Allied Security. She worked 74 days, or 10.6 weeks. This results in average weekly earnings of \$589.43. I am not persuaded to exercise my discretion to award more than three months' remuneration under s 128 as I find it unlikely Allied Security would have continued to employ Ms Cradock beyond that timeframe and accordingly find an appropriate award of wages to be \$7,662.59 gross, subject to any findings as to contribution.

[40] Ms Cradock seeks an award of \$20,000 as compensation under s 123(1)(c)(i) of the Act. She gave evidence, which I accept, of the effect her dismissal had on her. As well as being very upset by it, she had to sleep for six or seven weeks in the back of her vehicle as she could no longer afford rental accommodation. She had gone into debt to purchase the vehicle and feared not being able to keep up with the payments she was committed to making

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<sup>5</sup> In accordance with s 124.

for it. Ms Cradock's evidence was that she also had to drop out of her university veterinary studies at Massey University as it was too difficult and expensive to continue.

[41] I find compensation of \$15,000 to be appropriate in the circumstances. I have considered whether Ms Cradock's actions contributed towards the situation that led to her personal grievance as I am obliged to under s 124 of the Act.

[42] While Mr Vaughan gave evidence of meetings and many telephone discussions with Ms Cradock I prefer her evidence on this matter. There clearly were a number of telephone discussions between them but many appeared to be initiated by Ms Cradock when providing verbal reports of various work matters. I find there is insufficient evidence that her actions contributed to the situation that gave rise to her personal grievance for unjustifiable dismissal. Accordingly there will be no reduction under s 124 to the remedies I have awarded Ms Cradock.

### **Summary of findings and orders**

[43] The trial period of Ms Cradock's IEA was invalid, and she is able to access the personal grievance provisions of the Act. Her personal grievance for unjustifiable dismissal is upheld. Ms Cradock did not contribute to the situation that gave rise to her personal grievance.

[44] Allied Investments Limited trading as Allied Security is ordered to pay the following sums to Ms Cradock:

- (a) Reimbursement of lost wages under s 128 of the Act of \$7,662.59 gross; and
- (b) Compensation of \$15,000 for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act.

### **Costs**

[45] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**