

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 198
3063273

BETWEEN DAVID MARCHANT
 Applicant

AND ACCORD PLASTICS LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Greg Lloyd, counsel for the Applicant
 Alan G Stewart, advocate for the Respondent

Investigation Meeting: On the papers

Affidavits, Submissions
and further Information 18 October and 5 November 2019 from the Applicant
Received: 1 November 2019 from the Respondent

Date of Determination: 14 May 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Marchant claims he was unjustifiably dismissed from his employment with Accord Plastics Limited (Accord). He seeks reimbursement of lost wages, compensation and costs.

[2] Accord says it employed Mr Marchant on a trial basis and terminated his employment within the trial period based on unsatisfactory performance.

[3] In the course of a case management conference with the parties it was agreed the Authority would determine as a preliminary matter whether Accord could rely on the trial

period provisions of Mr Marchant's individual employment agreement (IEA) to terminate his employment.

[4] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

The Employment Agreement

[5] Mr Marchant's IEA contains the following provisions relevant to his claim:

3 Nature & Term of Agreement

3.1 You are employed as a full-time employee.

3.2 This agreement shall come into force on 15 October 2018, and will continue in force until terminated in accordance with the provisions of either clause 4 or 21 below.

Probationary Period

3.3 Upon commencing employment, you shall undergo a three-month probationary period. During the probationary period, the Company shall monitor and periodically review your performance in terms of the skills and attributes required for this position and shall take all reasonable steps to provide you with any necessary assistance and suspension (sic) to achieve a satisfactory level of performance.¹

If, by the end of the probationary period you have failed to achieve the standard required, the Company may give two weeks' notice of termination or at the Company's discretion offer an extension to the term of the probationary period. As an alternative to termination, the Company may reassign you to other duties to which you appear better suited.

Probationary arrangement

1 The Employee must complete a satisfactory 90-day arrangement before the Employee's employment pursuant to this Agreement is confirmed.

2 Thirty days and 60 days respectively after the Employee's commencement date, the Employer will review the Employee's work performance:

2.1 When a review is carried out, any deficiencies will be advised to the Employee orally, and may at the discretion of the Employer, be recorded in writing; and

¹ "Suspension" is incongruous in this context where "supervision" is more likely to have been intended.

- 2.2 The Employee will be advised by the Employer of the steps required to achieve satisfactory work performance and the Employer will assist the Employee in achieving such work performance where practicable.
- 3 At the end of the 90-day probationary arrangement, the Employer will again review the Employee's work performance, including efforts made by the Employee to remedy any deficiencies previously identified (either orally or in writing) by the Employer.
- 4 After discussing the Employee's work performance, and listening to any reasons that the Employee may have for poor work performance, the Employer may:
- 4.1 confirm the Employee's employment pursuant to this Agreement;
- 4.2 extend the probationary arrangement for a further period of up to 90 days, whereupon the provisions of this clause will apply as if there had not been a previous arrangement; or
- 4.3 terminate the Employee's employment on one week's notice or payment in lieu thereof if dissatisfied with the Employee's work performance. Termination of the Employee's employment may take place up to one week after the expiry of the first or second probationary arrangement.
- 5 The Employee will not have a legitimate expectation that he/she is to be offered employment pursuant to this Agreement unless the Employee has satisfactorily completed the probationary arrangement to the approval of the Employer.
- 2 (sic) This provision is made pursuant to section 67A and 67B of the Act.

[6] Clause 21 of the IEA provides that employment relationship problems between the employee and the employer are to be settled in accordance with the procedure set out in the fourth schedule to the IEA.

Relevant law

[7] At the time of Mr Marchant's employment the following statutory provisions applied to probationary and trial periods:

67 Probationary arrangements

- (1) Where the parties to an employment agreement agree as part of the agreement

that an employee will serve a period of probation after the commencement of the employment,—

- (a) the fact of the probation period must be specified in writing in the employment agreement; and
 - (b) neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.
- (2) Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.
- (3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.

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.

Valid trial period?

[8] Mr Marchant has provided the background to his employment in an affidavit in which he says he applied for the position at Accord on 28 September 2018 after seeing it advertised on Trade Me. He was interviewed by Accord's sole director and shareholder, Paul Stiles, on 2 October and says there was no mention of a trial period during that process.

[9] Mr Marchant deposed that he was offered the position on 11 October 2018 and he accepted it the same day. He said there was no mention of a trial period when Mr Stiles offered the position to him and he was not offered an employment agreement at that time.

[10] His first day of employment was Friday 12 October 2018. He was given an IEA on Monday 15 October, which both he and Mr Stiles signed that day.

[11] On 30 November, seven weeks into the employment, Mr Marchant says Mr Stiles called him into his office and dismissed him without discussion and without any reference to a 90 day trial period. The first time Mr Marchant became aware Accord was relying on the trial period to justify his dismissal was in the statement in reply it filed in the Authority.

[12] Mr Marchant has deposed that his understanding of the probationary clauses of his IEA was that his employer would monitor and supervise his performance for the first three

months of his employment and, if there were any problems with his work, he would be provided with training and support to improve. He did not understand the clauses to mean that he could be dismissed for poor performance without a fair process involving monitoring, reviewing and supervising his performance and discussing any perceived problems with him.

[13] Mr Lloyd submitted, on behalf of Mr Marchant, that the IEA contains no enforceable trial period clause. In his view, the relevant clause in Mr Marchant's IEA is a probationary arrangement clause as provided for by s 67 of the Act and does not prevent Mr Marchant from pursuing a personal grievance for unjustifiable dismissal. He submits the clause is inconsistent with the trial period provisions of the Act in a number of important respects.

[14] He cited the requirements of the Act for a trial period provision to be effective, as set out in s 67A of the Act above.² In Mr Lloyd's submission, the relevant provisions in Mr Marchant's IEA fails to meet any of the statutory elements in that it is not called a trial period; it purports to allow the employer to dismiss Mr Marchant at the end of the probationary arrangement, not during it; and there is no reference to the employee's inability to pursue a grievance in respect of a dismissal.

[15] Mr Lloyd observed there is only one reference to ss 67A and 67B in the Probationary Period clause of Mr Marchant's IEA: this is in the last sentence where it states that the provision was made pursuant to those sections of the Act. He submitted that simply referring to those sections of the Act fell well short of the requirements contained in ss 67A & 67B, particularly as the contractual words were wholly inconsistent with the statutory provisions to which they purportedly gave effect.

[16] Mr Stewart provided a response to Mr Marchant's affidavit by way of a signed statement. Mr Stiles, who made the offer of employment to Mr Marchant and also dismissed him, did not provide any information directly to the Authority by way of a statement or an affidavit. Mr Stewart, a Chartered Accountant, did not claim to have been present at any of the events he referred to in his response/submissions and his statement was mostly written in the passive voice. Mr Marchant's account of events in his sworn affidavit did not refer to Mr Stewart and I conclude it is unlikely he was present when Mr Marchant was interviewed, offered the position, or dismissed.

² As they applied during the period of the applicant's employment.

[17] I have, therefore, accorded little weight to those parts of Mr Stewart's signed statement/submissions where he has reported events as if he had knowledge of them despite not being present. This included matters that had not been raised in the statement in reply. Mr Stewart stated that, at Mr Marchant's interview for the position, he was informed there would be a 90 day trial period. Mr Marchant's evidence, which I prefer, is that there was no mention of a trial period at the interview or when he was offered the position.

[18] Mr Stewart accepted Accord did not provide any counselling about his performance to Mr Marchant during his employment. He said that, when the extent of the faulty products Mr Marchant had made was made known by customers, the employer had no option but to take immediate action.

[19] Accord's statement in reply also referred to the probationary clauses in Mr Marchant's IEA having been prepared by a professional, and claimed the employer considered the clauses should be able to be relied on to terminate an unsatisfactory employee during the first three month period.

[20] Mr Stewart acknowledged in his statement/submissions that Mr Marchant commenced work on Friday 12 October 2018 and was given an IEA on Monday 15 October, which both he and the employer signed the same day.

Discussion

[21] Mr Stewart's statement/submission did not revisit the matter of Accord's reliance on the probationary clause and nor did it provide any information about the "professional" who drafted the clauses. Nonetheless, I will briefly address that issue as it is raised in the statement in reply. In short, I find no merit in the claim. The responsibility for the IEA, whether prepared for, or by, the employer rests with the employer. Any dissatisfaction the employer may have with, or redress it may wish to seek from, the professional who drafted the IEA clauses is a matter for the employer to raise with the professional and/or the professional's regulatory body, if any. If the employer acted unlawfully in reliance on the clauses, its actions are neither excused nor mitigate by that reliance.

[22] There is no dispute between the parties that Mr Marchant had worked for one day before being given, and signing, an IEA. That is significant as it means Mr Marchant was an existing employee of Accord by the time he signed the IEA. As such, Accord could not agree

a trial period with him under s 67A (3) of the Act. Mr Lloyd submitted, based on the principles of *Smith v Stokes Valley Pharmacy*, that even if the probationary provisions of the IEA were trial period provisions under ss 67A and 67B of the Act, and were lawful in all other respects, they could not be relied on by Accord because Mr Marchant was an existing employee.³

[23] I accept that submission. As former Chief Judge Colgan made clear in *Smith*, the trial period provisions of the Act are to 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 dismissal from, employment*”.⁴ The effect of ss 67A and 67B is to remove an employee’s right to bring personal grievance or legal proceedings in respect of a dismissal.⁵

[24] In accepting the submission, I find that Accord could not rely on the purported trial period provisions of Mr Marchant’s IEA to dismiss him. The provisions are not trial period provisions, for the reasons identified by Mr Lloyd that I have referred to in paragraph 14 of this determination, although they purport to be made under ss 67A and 67B. They are probationary arrangements as provided in s 67 of the Act and, as provided for at s 67(1)(b), do not affect the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during, or at the end of, the probation period.

[25] The emphasis in those provisions is on supervision, monitoring, review and assisting an employee who is not meeting performance expectations to raise their performance to the required standard. They indicate that the employer will not dismiss an employee during the probationary period and, if dismissal is decided upon at that stage, it will follow a process of reviews at 30, 60 and 90 days with, potentially, further reviews at those stages of the following 90 days if the probation is extended.

[26] To be clear, there is no issue with Accord retaining the probationary provisions in its employment agreements, with the exception of the final sentence of the probationary arrangement clause. That sentence, stating that the provision is pursuant to ss 67A and 67B, is incorrect: the provision is not in accordance with those sections of the Act.

³ [2010] NZEmpC 111.

⁴ N 3 at [48].

Summary

[27] The Probationary Period and Probationary Arrangement provisions of Mr Marchant's employment agreement are not valid trial period provisions under ss 67A and 67B of the Act. Accord could not rely on those provisions to dismiss Mr Marchant and Mr Marchant is not prevented by any term of his employment agreement from pursuing a personal grievance for unjustifiable dismissal.

[28] The Authority will shortly be in contact with the parties to progress the hearing of Mr Marchant's personal grievance.

Costs

[29] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority