

his employment would end “effective today, and you will be paid in lieu of your one week notice period”.

[2] Mr Appleyard accepts that his employment agreement contained a valid 90-day trial period and that s 67B of the Act applied to his employment. However, Mr Appleyard says that proper notice was not given of his termination. Therefore, he says Corelogic was not entitled to rely on the trial provision within his employment agreement, to terminate his employment.

Issue

[3] The issue for determination by the Authority is whether Corelogic gave notice of termination of employment to Mr Appleyard, during the trial period in the employment agreement, in compliance with s 67B of the Act.

Individual Employment Agreement

[4] Mr Appleyard was employed by Corelogic pursuant to an individual employment agreement dated 1 May 2019. Clause 3 of the employment agreement contained a trial period as follows:

- 3.1 This Agreement is subject to a trial period. The Employee will serve a trial period of 90 days, starting on the Employee’s first day of employment.
- 3.2 If the Employer dismisses the Employee during the trial period, the Employee is not entitled to bring a personal grievance, or other legal proceedings, in respect of that dismissal.
- 3.3 During the trial period, any obligations that the Employer would otherwise owe to the Employee – by virtue of this agreement or any workplace policy – in respect of performance, training, conduct and other matters related to the employment, do not apply.
- 3.4 During the trial period, the Employer may terminate this agreement by providing the Employee with one week’s notice of termination, in writing.
- 3.5 If the Employee decides to end the employment relationship during the trial period, the Employee must give two weeks’ notice of termination, in writing.
- 3.6 The Employer may, at its discretion, pay the Employee in lieu of working some or all of this notice period. In addition to, or as an alternative to, paying the Employee in lieu of working some or all of the Employee’s notice period, the Employer may require the Employee to not attend the workplace during some or all of the notice period, but to continue to be employed by the Employer.

- 3.7 The Employer may also terminate the employment without notice for serious misconduct during the trial period.

Performance issues

[5] During May and June 2019, issues arose in respect of Mr Appleyard's performance. A meeting was held on 24 June 2019 in respect of one incident and on 28 June 2019 another meeting was held with Mr Appleyard. At the meeting on 29 June 2019, Ms Theresa Wells, GM Corporate Sales, and Mr Ben Speedy, Head of Country – New Zealand, both attended on behalf of Corelogic. Ms Vicki Kontelli from Human Resources attended via Skype for Corelogic. Mr Appleyard and his support person also attended.

[6] Mr Ben Speedy had prepared a letter for the meeting which Ms Wells read to Mr Appleyard. The letter stated:

Dear David,

Re: Termination of Employment (within Trial period)

As detailed in your Individual Employment Agreement, dated 1 May 2019, your employment is subject to a 90 day trial period, outlined in clause 3, "Trial Period" of that agreement.

Corelogic has made the decision to terminate your employment within your trial period.

This letter serves as notice of termination of your employment, effective today, and you will be paid in lieu of your one week notice period. We wish you all the best for your future endeavours.

Yours sincerely,

Ben Speedy

Head of Country – New Zealand

[7] Mr Appleyard's last day of employment was 28 June 2019 when he received the letter. Counsel for Mr Appleyard submits that Mr Appleyard's employment did not continue after 28 June 2019 because termination was "effective today". He further submits that notice was also on 28 June 2019 and therefore there was no intention by Corelogic that Mr Appleyard would continue in employment during the notice period.

[8] Counsel for Corelogic submits that the 28 June 2019 letter was written notice of termination as required by the trial period in the employment agreement. Mr Appleyard's

employment ended with effect from 28 June 2019 but Corelogic paid him in lieu of notice rather than requiring him to work during the notice period.

[9] The Employment Court in *Ioan v Scott Technology NZ Limited* has recently considered the meaning of “notice” in s 67B of the Act.¹ The Court held that for the purposes of s 67B “notice” means “notice in accordance with the applicable employment agreement rather than a statutory requirement distinct from the contractual notice provision”.²

[10] The Employment Court went on to cite *Societe Generale London Branch v Geys*³, a decision of the UK Supreme Court. Judge Holden states :

[46] In *Societe Generale London Branch v Geys* the UK Supreme Court was considering a scenario where an employment agreement provided for notice but also provided that the employer was able to terminate the employee’s employment with immediate effect by making a payment in lieu of notice (PILON). The employment agreement in that case was differently worded to the one in the present case, but nevertheless, the case is instructive as the purpose of the clause is the same – that the employee is not to work out his or her notice, but will be paid for it.

[47] Lady Hale was considering whether, where such a clause is included in an employment agreement, it is enough that the payment in lieu is actually made, or whether something more is required.

[48] She held that the payment was separate from notice and that notice needed to be clear and unambiguous:

[57] Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee.

[49] Lady Hale goes on:

[58] It is necessary, therefore, that the employee not only receive his payment in lieu of notice, but that he receive notification from the employer, in clear and unambiguous terms, that such a payment has been made and that it is made in the exercise of the contractual right to terminate the employment with immediate effect ...

¹ *Ioan v Scott Technology NZ Limited* [2018] NZEmpC 4

² *Ibid* at [43]

³ [2013] 1 ALLER 1061 at [58]

[11] Judge Holden then referred to *Farmer Motor Group Limited v McKenzie*, a Judgment of Judge Perkins in which he held that:

[29] Payment in lieu is not an alternative to providing notice whether oral or written as the agreement provides, but simply an alternative to the employer requiring the employee to work out the period of notice which is given.

[12] Judge Holden distils the following principles from the above:

- (a) Notice must be given and must be in accordance with the employment agreement.
- (b) It must be clear and unambiguous, and explain how and when employment is to be terminated.
- (c) Making a payment in lieu of notice does not override the need to give notice.

[13] In submissions filed in the Authority, counsel for Mr Appleyard submits that Mr Appleyard was:

... not terminated following a correct period of notice, but simply paid in lieu of a need to work. In order for the payments to be in place of working the correct period of notice, the letter from [Corelogic] would have needed to give notice not effective that day, but effective at the end of a notice period in the Agreement. That is, one week. This is the requirement of clause 3.4 of the employment agreement.

[14] Counsel for Mr Appleyard submits that notice was not given in accordance with the agreement as it was given “effective today”, not one week later.

[15] Counsel for the respondent submits that Corelogic did give Mr Appleyard:

“notice” of the termination of his employment, in accordance with terms of his employment agreement, which included the right to make a payment in lieu of notice, and that the notice given was a valid notice for the purposes of s 67B of the Act.

[16] It is my view that the submission made by counsel for Mr Appleyard ignores clause 3.5 of the employment agreement which gives Corelogic the discretion to pay an employee in lieu of working some or all of the notice period. Clause 3.5 also affords Corelogic the discretion to not require an employee to attend the workplace but remain employed.

[17] The letter given to Mr Appleyard on 28 June 2019 was, in my view, notice to Mr Appleyard in writing of termination of his employment as required by the employment agreement. Mr Appleyard was paid one week's notice and was not required to work during that notice period.

[18] I accept the submission made by counsel for Corelogic that the material facts of this case are almost identical to that contained in *Ioan*. *Ioan* is therefore directly applicable.

[19] In confirming the Employment Court's decision in *Ioan*, the Court of Appeal stated that:

Notice of termination in s 67B includes a situation where the employer gives the requisite period of notice but does not require the employer to work out the notice, instead making a payment for the period of notice.⁴

[20] "Notice" in s 67B means notice in accordance with the employment agreement. The employment agreement required notice to be in writing, which it was (clause 3.4) and that Corelogic could pay Mr Appleyard in lieu of his working out the notice period.

[21] It is my finding that Corelogic gave notice of termination of employment to Mr Appleyard, during the trial period in the employment agreement, in accordance with the employment agreement and in compliance with s 67B of the Act. Accordingly, Mr Appleyard's employment relationship problem is barred from proceeding under the Act.

Costs

[22] Costs are reserved. Corelogic has 14 days within which to file a memorandum as to costs. Mr Appleyard has 14 days from receipt of the memorandum of costs to file a memorandum in response.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁴ [2019] NZCA 386 at [30]