

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 107  
EMPC 89/2020**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID APPELYARD Plaintiff
AND	CORELOGIC NZ LIMITED Defendant

Hearing: On the papers

Appearances: S R Mitchell, counsel for plaintiff  
J Lapthorne and N S Bartlett, counsel for defendant

Judgment: 23 July 2020

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**JUDGMENT OF JUDGE M E PERKINS**

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**Introduction**

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 26 February 2020.<sup>1</sup>

[2] The Authority held that notice of termination of employment of the plaintiff, David Appleyard, during a 90-day trial period was in accordance with s 67B of the Employment Relations Act 2000 (the Act). Accordingly, the employment relationship problem was banned from proceeding. Costs were reserved. There has been no subsequent determination on costs.

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<sup>1</sup> *Appleyard v Corelogic NZ Ltd* [2020] NZERA 92 (Member Fitzgibbon).

[3] Mr Appleyard has elected to challenge the determination by way of a hearing de novo. It has been agreed that the matter will be heard on the papers as it was before the Authority. An agreed statement of facts has been filed, together with attachment of agreed documents to be admitted. Counsel have provided submissions in support, answer and reply.

### **Agreed facts and documents submitted**

[4] The agreed facts are as follows:

1. The Plaintiff commenced employment with the Defendant on 13 May 2019.
2. The Plaintiff's employment with the Defendant was governed by an employment agreement dated 1 May 2019 (a copy of the employment agreement is **attached**).
3. The employment agreement was signed by the Defendant on 1 May 2019 and signed by the Plaintiff on 3 May 2019.
4. The Plaintiff was asked to attend a meeting with the Defendant on 28 June 2019.
5. During the meeting, the Plaintiff was given a letter. The contents of the letter was read to the Plaintiff during the meeting (a copy of the letter is **attached**).
6. Payment of the Plaintiff's final pay, including payment in lieu of his notice period was made on 19 July 2019 (a copy of the final payslip is **attached**).
7. The Plaintiff wrote to the Defendant by letter from counsel dated 23 July 2019 in relation to the termination of the Plaintiff's employment (a copy of the letter from counsel is **attached**).

[5] Copies of the documents stated to be attached have been provided to the Court. The letter terminating employment, dated 28 June 2019, reads as follows:

...

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.

...

[6] The letter written by Mr Mitchell, counsel for Mr Appleyard, dated 23 July 2019, reads as follows:

...

**DAVID APPLEYARD**

I act for David Appleyard.

My instructions relate to the termination of his employment.

I understand that CoreLogic rely on the trial period of the Employment Agreement. My instructions indicate that CoreLogic has not acted consistently with the provisions of Section 67B(1). In those circumstances, the company cannot rely on the trial period contained within the Individual Employment Agreement.

Section 67B(1) requires terminations to be on notice. This notice was not provided in this instance. While it is accepted that payment may have been made in lieu of notice, my instructions are that at the meeting on Friday 28 June 2019, my client was simply advised that his employment was terminated, and this took effect immediately.

I am instructed to raise a personal grievance on my client's behalf. I would be grateful for your advice as to whether CoreLogic would be willing to attend mediation to resolve this grievance. In the absence of such an agreement, I am instructed to refer the matter to the Employment Relations Authority for resolution. It would be my client's preference to resolve the matter without the need for proceedings.

I look forward to your advice.

...

[7] The agreed facts state that the letter of 28 June 2019 was read and given to Mr Appleyard during the meeting. Subsequent mediation did not resolve the dispute.

## **Plaintiff's submissions**

[8] The plaintiff accepts that the trial period provided for in the employment agreement was valid. Mr Mitchell, however, submitted that proper notice was not given. The provision in the individual employment agreement relating to the trial period reads as follows:

### **3. Trial Period**

- 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.

[9] Mr Mitchell submitted that using the words "effective today" meant that the period of notice of one week, required by the agreement, was not given. He also submitted the notice was immediate. Mr Appleyard did not continue in employment from that time. No later date for his employment to end was contained in the letter.

[10] Ms Laphorne, counsel for the defendant, in her submissions, relied upon the position which was taken by this Court, and subsequently the Court of Appeal, in *Ioan v Scott Technology NZ Ltd*.<sup>2</sup> These decisions were referred to and relied upon by the Member of the Authority in the present case.

[11] Mr Mitchell, in his submissions in reply, endeavoured to distinguish the facts of the present case from those which applied in *Ioan*. However, while the wording adopted by the employers in the present case is in a more abbreviated form, what it is intending to convey is almost identical. Mr Mitchell, in the present case, in my view, is trying to re-litigate the same argument as he had already run in the Court of Appeal in *Ioan* and which was rejected.

[12] In decisions such as *Smith v Stokes Valley Pharmacy (2009) Ltd*<sup>3</sup> and, indeed in the Court of Appeal's decision in the *Ioan*, the draconian effects of the provisions in the Act relating to 90-day trial periods are recognised. As was stated by this Court in *Smith* and the Court of Appeal in *Ioan*, strict interpretation of s 67B is required. The Court of Appeal, however, went on to state:<sup>4</sup>

[28] ... However, we do not consider this means Parliament intended "notice of the termination" to have a different, more restrictive meaning than at general law. That is to say, we do not accept that Parliament intended terminations of employment agreements that would at general law constitute terminations on notice to be classified as summary dismissals for the purposes of s 67B and so outside its scope. There is no reason of principle or policy why that should be so. Yet, that would be the consequence of accepting Mr Mitchell's submissions.

[13] In the present case, any objections as to the formation of the agreement, as discussed in *Smith*, are removed by the concession that the trial period provision in the agreement was valid.

[14] Clause 3 of the individual employment agreement in the present case, which contains the provisions incorporating the trial period, and different rules as to notice from the other notice provisions prescribed in the agreement, needs to be read in its

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<sup>2</sup> *Ioan v Scott Technology NZ Ltd, (T/A Rocklabs)* [2018] NZEmpC 4, [2018] ERNZ 1; *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386, (2019) 10 NZELC 79-108.

<sup>3</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48].

<sup>4</sup> *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386.

entirety. There is a close relationship between cl 3.4 and cl 3.6. The following passage in the Court of Appeal's decision in *Ioan* is relevant and reads as follows:<sup>5</sup>

[29] The general law regarding the effect of a payment in lieu of notice is well established. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal. It is not an alternative to providing notice as required by the agreement. Nor will the fact of a payment cure a defective notice, including a notice that is defective because it is ambiguous or not in accordance with the contract because, for example, the period of notice is too short. If, however, the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice which has been conveyed in clear and unambiguous terms, then that is a termination on notice.

[15] Continuing on from that statement, what were the words in the dismissal letter in this case conveying? The only conclusion I can reach as to the words used is that, as a matter of common sense, natural meaning and the purpose of the words, they were giving Mr Appleyard one week's notice of termination of his employment. The words "effective today" were to convey that he was not required to continue working for the period of notice and would receive payment in lieu. That is not payment in lieu of notice but payment in lieu of his being required to work out the period of notice of one week and earn wages.

[16] For these reasons, Mr Appleyard's challenge to the determination of the Authority fails and is dismissed.

[17] Insofar as costs are concerned, costs should follow the event. The defendant is entitled to a costs award against Mr Appleyard. At the directions conference in this matter, it was agreed by counsel that costs on the basis of Category 2B of the Court's Guideline Scale are appropriate.<sup>6</sup> Accordingly, costs are to be calculated on the basis of that category. In addition, the issue of costs in the Authority needs to be resolved. There should be no difficulty about the parties reaching agreement as to the usual costs which would have applied in the Authority. However, if there was any disagreement

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<sup>5</sup> Footnotes omitted.

<sup>6</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 16.

as to the calculation of costs to be paid by Mr Appleyard in respect of the challenge,  
then the matter can be referred back to the Court by appropriate memoranda.

M E Perkins  
Judge

Judgment signed at 3 pm on 23 July 2020