



Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
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90 Days Notice

We have repeatedly looked at the issues that have arisen with 90 day trial periods. From the first significant decision; **Smith v. Stokes Valley Pharmacy** (2009) it was apparent that because trial periods 'removed longstanding employee protections' the Court would interpret the provisions of the Act strictly. A recent decision **loan v. Scott Technology NZ Ltd t/a Rocklabs** (February 2018) looked, from this standpoint, at the issue of the provision of notice in the trial period termination. S.67B states:

"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.*

...

We have frequently been asked about the effect of notice on 90 day trial terminations. While it is accepted that notice must be provided, employers are commonly keen to pay in lieu of notice and have the employee exited as soon as possible. Our advice on this issue has been tempered with caution as a result of the requirements in **Smith** to interpret the provision strictly. While the issues of fact in **Smith** were unusual (in that the employer paid out part of the notice), and the case itself turned on existing employment, the Court in that case considered the meaning of termination 'on notice' in s.67B and determined that:

"... "notice" must be more than simply advice of dismissal. Rather, the subsection contemplates that it will be advice of when, in future, the dismissal will take effect."

Our advice has therefore tended towards either allowing the employee, or even requiring the employee to work out the notice period.

The **Rocklabs** decision has clearly addressed this specific issue. Mr loan's employment agreement included a 90 day trial:

"This agreement includes a Trial Period

- i) *The employee agrees to serve a trial period for the first 90 days of employment commencing on the day the employee actually starts work.*
- ii) *During the trial period the employer may terminate the employment relationship on notice, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on the grounds as specified in sections 103(1) b-g of the Employment Relations Act 2000.*
- iii) *Any part of this agreement or the Employer's policies and procedures (and in particular any disciplinary process) that conflicts with this provision shall have no effect until after the expiry of the trial period."*

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson,** or **Peter Zwart.**

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And in clause 11 the agreement dealt with termination generally:

“a) Either party may terminate this agreement at any time, for any reason, by giving four weeks written notice to the other party. The Employer may elect to not require the employee to work out the required notice in which case the remaining balance of the notice period shall be paid by the Employer. If the employment is terminated by the Employee without the required notice, then the remaining balance of the notice period shall be forfeited by the Employee. By agreement between the parties that period of notice may be altered.”

There were some factual discrepancies between the parties surrounding the termination itself. The Court however held that within the 90 days Mr loan was called to a meeting and advised that the company was considering terminating his employment. The following day the parties met again. Mr loan responded in detail to the proposal to terminate and proposed alternatives. The meeting concluded. During the day Mr loan repeatedly asked when or if the matter would be concluded. A subsequent meeting was called and a pre-prepared letter was provided to Mr loan, which stated in part:

“... Further to our conversations over the last two days, it is with great reluctance that I am writing to confirm that your employment with Scott Technology Ltd will end in accordance with the 90-day trial period provisions in Clause 2 (c) of your employment agreement, effective immediately.

...

Your notice period, as outlined in your employment agreement, is four weeks however we have decided you will be paid in lieu of working out your notice period. Therefore, your effective last day of work is today.

Any outstanding leave entitlements will be paid in your final pay.”

The employer went on to state that having issued the letter, the parties discussed the options of working out notice or being paid in lieu. The employee challenged this and the Court found that dismissal was effected by the issuing of the letter. The employee was therefore notified that employment would terminate immediately and the employee would be paid in lieu of notice.

The Court considered a recent Employment Court decision on notice **Farmer Motor Group Ltd v. McKenzie:**

“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.”

Concluding that the principles relating to the provision of notice are:

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

The issue in this case was *“whether Rocklabs has complied with cl 11(a) of the employment agreement, which provided for four weeks' notice but also allowed Rocklabs to elect to not require Mr loan to work out the required notice, in which case the remaining balance of the notice period had to be paid by Rocklabs.*

In substance, what happened is what the paragraph envisaged. Mr loan was paid for his four weeks' notice, and not required to work it out.”

Mr loan argued that *“Rocklabs did not give him notice of the termination of his employment because the termination took effect immediately. He accepts that cl 11(a) of the employment agreement permitted Rocklabs to pay him for any remaining balance of notice, instead of requiring him to attend at work but says that cl 11(a) is, in effect, a “garden leave” provision, requiring the employment relationship to continue until the end of the notice period.”*

The Court ultimately determined that if the employer adhered to the termination requirements within the agreement then it could rely on the 90 day trial period.

Therefore in this case, because the agreement provided for payment in lieu, the employer was able to do so without breaching the trial period provisions.

While each case will depend on the actual words of the agreement, this case seems to set a clear precedent; employers may terminate in 90 day trials and pay in lieu of notice where the agreement allows for payment in lieu.