IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 123
EMPC 12/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	STEPHEN ROACH Plaintiff
AND	NAZARETH CARE CHARITABLE TRUST BOARD Defendant

Hearing:	24 – 25 July 2018 and further submissions on 15 October 2018 (Heard at Christchurch)
Appearances:	J Goldstein and L Ryder, counsel for plaintiff D Beck, counsel for defendant
Judgment:	19 October 2018

JUDGMENT OF JUDGE K G SMITH

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[1] Stephen Roach was dismissed from his job as General Manager of Nazareth Care Charitable Trust Board when it gave him notice relying on a 90-day trial provision in his individual employment agreement. He claims he was unjustifiably dismissed for two reasons. The trial provision was invalid because he had previously been employed by Nazareth Care and the notice given to him did not comply with the employment agreement.

[2] Nazareth Care says he was not previously employed by it, the notice given complied with the agreement and its dismissal of him is beyond challenge.

The employment agreements

[3] The unusual feature of this case is that Mr Roach was offered and accepted a job with Nazareth Care but before he started work he was offered and accepted a replacement job. The employment agreements for both jobs contained trial provisions. The first job was as Nazareth Care's Business Manager and the second one was as its General Manager.

[4] Mr Roach applied for the Business Manager's job on 18 May 2016 and was offered it on 16 June 2016. Negotiations over the proposed salary followed before agreement was reached. The employment agreement they signed provided for a starting date of 10 October 2016 and contained a trial period of 90 days.

[5] At the end of August 2016, Mr Roach was asked by Nazareth Care about his interest in the position of General Manager, because he had just been appointed as the Business Manager and it had an appreciation of his suitability for the job. On 6 September 2016, Mr Roach signed an individual employment agreement for the General Manager's job. The agreement provided for work to start on 10 October 2016 and was also subject to a trial period of 90 days.

[6] There were two significant differences between these jobs. The first difference was salary. The Business Manager's salary was $98,500 per annum while the General Manager's salary was $115,000 per annum. The second difference was seniority, because the Business Manager's job reported to the General Manager.

[7] Mr Roach never started work as the Business Manager and did not perform its duties and responsibilities. His appointment to that job was overtaken in September 2016 by the offer and acceptance of the General Manager's job. That explains why the starting date for both jobs was the same; he had already resigned from his previous employment anticipating starting work for Nazareth Care on 10 October 2016.

Dismissal

[8] As planned, Mr Roach started work on 10 October 2016 and worked until late November 2016 when he was dismissed. From October to November he was responsible for making contractual arrangements with service providers for Nazareth Care and participated in the employment of staff for a new rest home being constructed following the Canterbury earthquakes. There was a lot of activity in completing the new building in anticipation of receiving staff and residents.

[9] Just before 4 pm on Monday 28 November 2016, Mr Roach was surprised by an unanticipated visit to the new facility by Nazareth Care's Regional Project Manager who was based in Melbourne. Without much preamble she gave him about ten minutes notice of a meeting with her, the Christchurch-based Sister Superior and Garry Donnithorne, Nazareth Care Charitable Trust's Chairman, who had accompanied her to the facility. She did not say what the meeting was about.

[10] The surprise visit gave Mr Roach an inkling that something was wrong but nothing more. During the meeting the Regional Project Manager told him she had been asked to terminate his employment under the 90-day trial provision in the employment agreement. The impression conveyed by the way in which this news was delivered was that she was passing on a decision made elsewhere. His requests for an explanation were declined and invitations to discuss the situation were not taken up.

[11] During this meeting Mr Roach was told he would be paid one week's pay in lieu of notice. He was handed an envelope containing a letter recording the decision given to him at the meeting. The letter had been prepared beforehand and was not accurate because it wrongly recorded his agreement to being paid in lieu of notice.

[12] He did not open the envelope during the meeting and read the letter when clearing his personal items from his office. Mr Roach was allowed very little time to collect his personal items, return Nazareth Care's property, and leave. He was escorted from the premises and was not given an opportunity to say goodbye to staff as he left.

[13] Mr Roach issued proceedings for unjustified dismissal arising from what happened on 28 November 2016.[1] As well as claiming his dismissal was unjustified, he sought reimbursement of lost wages, and Kiwi Saver contributions, under s 123(1)(b) of the Employment Relations Act 2000 (the Act) from the date of his dismissal until the date of the hearing, holiday pay and interest. He claimed an unspecified sum pursuant to s 123(1)(c)(i) of the Act for loss of dignity, humiliation and injury to his feelings and asked the Court to impose a penalty payable to him for an alleged breach of good faith.

[14] Nazareth Care's defence to this proceeding was that it complied with ss 67A and 67B of the Act so that no claim for a personal grievance for unjustified dismissal could succeed and a penalty was not appropriate.

The issues

[15] Five issues are raised by this proceeding:

(a) Does the trial provision in Mr Roach's employment agreement as General Manager with Nazareth Care preclude him from bringing a personal grievance for unjustified dismissal?

(b) Were s 67B of the Act and the employment agreement complied with by the payment in lieu?

(c) If Mr Roach was not precluded from bringing a personal grievance, was he unjustifiably dismissed by Nazareth Care?

(d) If he was unjustifiably dismissed what, if any, remedies are appropriate?

(e) Was the duty of good faith breached and, if so, should a penalty be imposed and made payable to him?

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[1] The proceeding was removed from the Employment Relations Authority to the Court without an investigation. See *Roach v Nazareth Care Charitable Trust Board* [2017] NZEmpC 165, (2018) 15 NZELR 614.

[16] Each issue is discussed below.

Trial provision

[17] Both employment agreements contained trial provisions designed to comply with s 67A of the Act. While the Court has previously considered cases involving trial provisions, and made extensive comments about them, this is the first time where two different agreements containing trial provisions have been entered into by the same parties before work began.

[18] Mr Roach's case can be summarised in the proposition that his employment agreement as General Manager could not lawfully contain a trial provision because, when it was signed, he fell within the exclusion created by the definition of "employee" in s 67A(3). That section, in conjunction with s 67A(1), precludes a trial provision where an employee has been "previously employed" by the employer. He contended that, having signed the Business Manager's employment agreement, he was someone who had been "previously employed" by Nazareth Care. If that analysis is correct, Nazareth Care could not have the benefit of relying on s 67A to immunise it from a personal grievance for an allegedly unjustified dismissal.

[19] Nazareth Care's case is that Mr Roach cannot take advantage of s 67A(3), merely because the Business Manager's agreement had been signed first. It contended that agreement had been overtaken by the General Manager's agreement before any work started and it would be inconsistent with a purposive interpretation of s 67A(3) to conclude he had been "previously employed", when that was plainly not what had happened.

[20] Section 67A reads:

> **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).

[21] The case turns on the meaning of s 67A(3) and, of necessity, requires considering the relationship between "employee" used in that section, and the stipulated meaning given to that word in s 6, which reads:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; …

[22] Section 6(1)(b)(ii) extends the definition of employee to include "a person intending to work", which is defined in s 5 as:

> **person intending to work** means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning

[23] Mr Roach's case is said to be supported by the extended definition because, as a person intending to work, he was Nazareth Care's employee from the moment he signed the Business Manager's agreement. However, a significant part of Nazareth Care's case seeks to exclude that extended definition because s 6 applies "unless the context otherwise requires". This qualification is discussed later.

[24] Three previous decisions were relied on by the parties to explain the meaning and application of s 67A although none of them were completely consistent with this case; *Smith v Stokes Valley Pharmacy (2009) Ltd*, *Blackmore v Honick Properties Ltd*

and *Kumara Hotel Ltd v McSherry*.[2] The first in time was *Smith v Stokes Valley Pharmacy*. Ms Smith worked for the pharmacy business that was sold. She was interviewed for a job by the business's new owners, told she had the job and was sent a draft employment agreement containing a trial provision which she had not signed before starting work. She worked for the new owners on the day they took over the business. The next day she discussed the draft agreement with the owners, queried the trial provision, but signed the agreement.

[25] Ms Smith was dismissed summarily relying on the trial provision. After a detailed analysis of s 67A (and s 67B dealing with notice) the Court concluded that the statutory intention was for trial periods to be agreed upon in a written agreement at the beginning of the employment relationship, not retrospectively or otherwise settled during employment.[3] The Court concluded ss 67A and 67B should be strictly interpreted because they are exceptions to the protective scheme of the Act, by removing an employee's access to dispute resolution.[4]

[26] The Court held that Ms Smith fell within s 67A(3) because, when she signed the agreement, she was an employee who had been "previously employed", having started work the previous day. The Court described s 67A(3) as building on the extended definition in s 5 by creating, for the purposes of ss 67A and 67B, "a narrower class of employee", for the restricted purpose of those sections.[5] The result was that s 67A did not apply and she was entitled to pursue a personal grievance claim.

[27] The subject was revisited in *Blackmore v Honick Properties Ltd*, when the opportunity was also taken to explain the meaning of the words "…starting at the beginning of the employee's employment…" in s 67A(2)(a).[6] Honick Properties operated a farm and had a vacancy for a manager. Mr Blackmore expressed interest in the job. On 5 October 2010, a letter was sent to him offering employment, without referring to a 90-day trial provision. The offer was accepted on 10 October 2010 and

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2 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253; *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445; *Kumara Hotel Ltd v McSherry* [2018] NZEmpC 19, (2018) 15 NZELR 413.

3 *Stokes Valley Pharmacy*, above n 2, at [49]-[51].

4 At [48].

5 At [54].

6 *Blackmore*, above n 2, at [52].

work began on 15 November 2010. About an hour after starting work Mr Blackmore was given an intended employment agreement to sign containing a 90-day trial. There was no negotiation and he was not advised of an entitlement to seek independent advice. Reluctantly, he signed it. The agreement specified it came into force that day. He was subsequently dismissed relying on the trial provision in the agreement.

[28] The decision turned on whether Mr Blackmore had been "previously employed" by Honick Properties when the agreement was signed.[7] The Court approached the decision in the same way it did in *Stokes Valley Pharmacy*, concluding he was already an employee when the agreement was signed.[8] A reason for that conclusion was that the word "previously" in s 67A(3) may mean someone who is currently employed.[9] Relying on the definition of "employee" in s 6, and the extended definition in s 5, the Court held Mr Blackmore became an employee on 10 October 2010 when he was offered and accepted employment. The Court was prepared to say as an alternative that, at the latest, employment started on the morning of 15 November 2010, before the employment agreement was signed.[10]

[29] Honick Properties' argument, that a trial period should be able to be agreed after the commencement of employment, was rejected.[11] In reaching its conclusions the Court explained the extended definition of "employee" in s 6 was a response to a decision of the Arbitration Court about the employment status of a person who had accepted an offer of employment to begin on a future date but who had not started work when the offer was withdrawn.[12] However, the Court said the extended definition, "person intending to work", did not carry with it all of the rights and obligations that arise in an employment relationship. For example, an employee in that situation continued to owe a duty of fidelity to an existing employer while working out any notice period. The extended definition meant a person who had accepted an

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7 At [35].
8 At [44].
9 At [47].
10 At [49].
11 At [50].
12 *Auckland Clerical and Office Staff Employees IUOW v Wilson* [1980] ACJ 357 (AC). The extended definition was introduced into the Labour Relations Act 1987 and was designed to provide redress in situations like *Wilson* but also enabled workers to join a union before work commenced.

offer of employment was an employee for limited purposes until work started, but avoided creating a situation where potentially competing duties could arise.[13]

[30] The most recent decision was *Kumara Hotel Ltd v McSherry*.[14] Kumara Hotel created a position as Operations Manager and the possibility of Mr McSherry applying for it was raised with him by email. He was sent an offer containing the basic terms on which he could be employed which did not include a trial provision. He accepted the offer by email. Subsequently an employment agreement containing a 90-day trial provision was signed. Shortly after Mr McSherry arrived to start work as Operations manager the chef left abruptly. The vacancy created by the chef's departure was temporarily filled by Mr McSherry. However, Mr McSherry was later advised he was unsuitable for the job of Operations Manager and that he would be dismissed under the trial provision in the agreement.[15] He was invited to stay on as a chef and did so temporarily before giving notice.

[31] In *McSherry* Chief Judge Inglis made two observations relevant to this case. The first of them was that it was well established that some, but not all, obligations and entitlements start on the offer and acceptance of employment being completed. The example in *McSherry* was that work can still be undertaken in competition with the new employer prior to starting work and a personal grievance can be pursued for unjustified dismissal even though work for the new employer had not been performed.[16] That observation was consistent with *Stokes Valley Pharmacy* and *Blackmore*.

[32] The second observation was:[17]

> Once the parties have entered into a binding employment agreement the employee is employed by the employer for the purposes of s 67A. The corollary of that is that the employer is then precluded from seeking to rely on a 90-day trial period provision contained in a subsequent agreement, whether entered into before or after work actually commences.

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13 *Blackmore*, above n 2, at [48].
14 *McSherry*, above, n 2.
15 At [16].
16 At [44]; note also the Court referred to the Fair Trading Act 1986, s 12.
17 At [45].

[33] That conclusion meant Mr McSherry became Kumara Hotel's employee when he accepted the offer of employment by email.[18] The trial provision in the agreement they subsequently signed could not apply and he was entitled to pursue a personal grievance for unjustified dismissal.

[34] In this case counsel did not argue that *Stokes Valley Pharmacy* or *Blackmore* were wrong or went too far in their analysis of s 67A(3). Mr Roach's case relied heavily on *McSherry* because of the passage at [32]. Mr Goldstein drew a comparison between *McSherry* and this case because Mr Roach became Nazareth Care's employee on signing the first agreement meaning nothing turns on when he actually started work. An employment relationship was created at that point and, it was said, the position was no different from what happened when Mr McSherry accepted the offer of a job by email. Mr Goldstein emphasised his point by a rhetorical question: on the day before Mr Roach signed the General Manager's employment agreement what was his status? Mr Goldstein's answer was that Mr Roach was not a candidate for employment or a prospective employee because he had been "employed".

[35] If accepted, this analysis means there is no need to consider whether the context in which "employee" is used in s 67A(3) requires a different interpretation than the one stipulated by s 6. It is also immaterial that Mr Roach never took up any of the duties or responsibilities of Business Manager, just as Mr McSherry never worked as the Operations Manager.

[36] For Nazareth Care, Mr Beck's submissions took a different approach by emphasising that Mr Roach never started work as Business Manager before relinquishing that job and accepting another one. The kernel of this argument was that s 67A was to enable an employer to assess an employee's suitability for the job without risking a personal grievance for unjustified dismissal, so it followed that the section could not have been intended to apply to a situation where work had never taken place.

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[18] At [46].

[37] This argument was said to be supported by the text and purpose of s 67A(1)-(3) inclusive, concentrating on subs (3).[19] The text was said to support this interpretation because the word "employ" contains a plain and ordinary meaning of having been given work in exchange for pay or having undertaken work, emphasising the point that what is intended is the performance of the task or tasks required.

[38] The second part of this argument was that the purpose of s 67A was to allow an employer the benefit of an opportunity to assess the capabilities of an employee which necessarily meant that the person engaged to work actually performed the work required. Otherwise there was no way to assess suitability for the job. This purposive interpretation was gleaned, most likely, from s 67A(2)(a) and its reference to starting at the beginning of the employee's employment, as discussed in *Blackmore*.

[39] Mr Roach's case was criticised as being reliant on an out-of-context reading of the definition of "employee" in s 67A(3). That was because, Mr Beck said, the context in which "employee" was used in that section required a narrower definition than the one stipulated by s 6 of the Act. That narrower interpretation necessarily excluded Mr Roach's situation as being a person intending to work.

[40] Mr Beck supported this contextual approach by relying on the Supreme Court's decision in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*.[20] Aside from referring to *AFFCO,* he did not examine the Supreme Court's discussion about how to interpret contextual qualifications to defined words in statutes. In any event, the Court made the following comment:[21]

> Summarising what we consider to be the correct approach, where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected

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19 Relying on the Interpretation Act 1999, s 5; and *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

20 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212.

21 At [65].

> in the legislation and against the legislative history, where they are capable of providing assistance.

[41] In *AFFCO* the Supreme Court had to consider whether the word "employee" used in s 82(1)(b)(i) of the Act had the same meaning as it did in the balance of that section which defines a lockout. The Court looked at the context in which "employee" was used in that section and concluded that linguistically it could not have the same meaning as was intended in the balance of s 82. In undertaking this analysis the Supreme Court affirmed that the context must relate to the statute rather than to something extraneous.[22]

[42] The context relied on by Nazareth Care in this case, to depart from the meaning of "employee" in s 6, was gleaned from the purpose of s 67A; to allow an employee to be assessed by undertaking actual work and, therefore, a different definition ought to apply to create that opportunity. While Mr Beck did not attempt any greater explanation than saying a narrower definition should be used, he appeared to have been inviting an interpretation of "employee" in s 67A(3) that is consistent with a person already having performed work for an employer.

[43] Section 67A is poorly drafted creating ambiguity and uncertainty over the circumstances in which an employment agreement can lawfully contain a trial provision that may subsequently be relied on. While the section may be easy to apply on the first occasion on which an employment relationship is created it is opaque in other circumstances, like those which emerged in the agreements between Mr Roach and Nazareth Care, where changes are made before work starts.

[44] I do not accept Mr Beck's submission that the text of s 67A(3) supports the position taken by Nazareth Care. There is nothing in the language used in that section which leads to a conclusion that Parliament intended to exclude the extended definition from the meaning of "employee". Just as easily, the section could be read as signalling that once an employment agreement has been entered into an employer cannot impose a trial provision.

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[22] At [65].

[45] However, the purpose of s 67A(3) can be ascertained from s 62A(2)(a). In *Blackmore* the Court explained that the words used in this subsection (starting at the beginning of the employee's employment) allow for the trial period to begin on the day work starts which may be some time after the employment agreement was entered into. The purpose is to allow the employee to be assessed while working. Neither party has suggested that *Blackmore* is wrong in that respect. An interpretation of s 67A(3) that is consistent with s 67A(2)(a), as explained in *Blackmore*, means that what is being referred to by an employee having been "previously employed" is where there has already been an opportunity to assess the employee's suitability for the work. Nothing in that approach would allow an employer to impose a trial on an existing employee who has started work or on those employees who have worked for that employer before.

[46] The answer to Mr Goldstein's question, about Mr Roach's employment status immediately before signing the General Manager's agreement, is that he was an employee for a limited purpose but not otherwise. He could pursue a personal grievance for unjustified dismissal if the offer of employment had been withdrawn but, once work started, could not do so during the trial period.

[47] It follows that I accept Nazareth Care's submissions that s 67A(3) does not apply because Mr Roach had not been previously employed. The result is that Mr Roach was not an employee who had been previously employed by Nazareth Care at the point in time when he signed the employment agreement as a General Manager and subsequently started work. Nazareth Care was, therefore, entitled to offer him an employment agreement as General Manager containing a trial provision which took effect from the beginning of his work on 10 October 2016.

[48] Earlier some similarities between this case and *McSherry* were mentioned. The point of difference between *McSherry* and this case is that Nazareth Care and Mr Roach always contemplated that his work would be subject to the satisfactory completion of a trial period.

[49] The General Manager's employment agreement contained a valid trial provision under s 67A of the Act.

Section 67B

[50] The second part of Mr Roach's claim was that he was unjustifiably dismissed because he was not given the notice of dismissal required by his employment agreement. He pleaded that the wording of the trial provision precluded payment in lieu of working out notice, making Nazareth Care's actions a breach of the employment agreement and s 67B.

[51] Section 67B(1) deals with termination of employment where the employee is given notice under s 67A and reads as follows:

> **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.

[52] Section 67B(2), provides that if employment is terminated under subs (1) the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[53] The employment agreement for the General Manager's job dealt with notice in three places, in a schedule at the beginning of the agreement summarising its terms and conditions and in cls 3.3 and 9.8. The schedule stated that the employment agreement was subject to a trial period during which either party may terminate it by giving one week's notice instead of what was stipulated by cl 3. The reference to cl 3 is a mistake, because that clause is the one providing for the trial period. The schedule was referring to cl 9 dealing with termination of employment outside of the trial period.

[54] The schedule summarised cl 3, the relevant parts of which are cls 3.2 and 3.3:

> 3.2 During the trial period, the Employer may dismiss the Employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.
>
> 3.3 During the trial period, the Employer's normal notice period does not apply. Instead, either the Employee or the Employer may end this agreement by giving 1 week [sic] notice before the trial period ends. The Employer might

> decide to pay the Employee not to work. For serious misconduct, the Employee may be dismissed without notice.

[55] Those clauses can be compared with termination of employment where the trial period no longer applied, in cl 9.8, which reads:

> In the event that the Employer terminates the employment agreement for a reason other than serious misconduct, the Employer reserves the right to:
> a. Require the Employee to cease working and make payment to the Employee in lieu of providing notice.
> b. Require the Employee to undertake alternate duties.

[56] Ms Ryder argued that, reading cls 3.2 and 3.3 together, there was no contractual right for Nazareth Care to dismiss Mr Roach in the way it did. She submitted the reference in cl 3.3, to the employee not working, meant the worst position Mr Roach might have been in was to be given notice and be on a period of paid leave (or garden leave) during it, but its language did not extend to allowing dismissal followed by payment. Her point was that Mr Roach did not receive his contractual notice. In that respect, deficient notice was not lawful notice at all.[23] She relied on *Farmer Motor Group Ltd v McKenzie* as authority for the proposition that the reference to notice in s 67B(1) means to the contractual notice in the employment agreement.[24] She also relied on that case to say that s 67B(1) was to be strictly complied with and that a failure to do so meant notice had not been given in accordance with both the agreement and the section.

[57] In *Farmer Motor Group Ltd* Judge Perkins held that payment in lieu is not an alternative to providing notice but is simply an alternative to the employer requiring the employee to work out the period of notice which is given. In that case the Court also reinforced the observations made previously, in *Stokes Valley Pharmacy*, that the 90-day trial period removed a fundamental right to bring proceedings for an unjustified dismissal and, accordingly, is to be strictly interpreted both in relation to the Act and the employment agreement.

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23 See *Stokes Valley Pharmacy*, above, n 2, at [97].
24 *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98.

[58] Mr Beck submitted that payment in lieu provisions are widespread and acknowledged that failure to give "temporal notice" invalidated a trial.[25] However, he suggested that there would be a floodgate response if the approach argued for Mr Roach applied. He preferred an approach he derived from *Ioan v Scott Technology Ltd*, that giving notice can co-exist with simultaneously paying in lieu of notice.[26] He submitted s 67B(1) might be ambiguous, because it may require simply that an employer communicate notice of an intention to terminate employment, prior to the trial period ending, because it does not elaborate on what he said were strict notice requirements such as that it be in writing.

[59] Rounding out these submissions, Mr Beck said that nothing turned on the arguments for Mr Roach that cl 3.3 was confined to garden leave rather than payment in lieu. That was because, he said, the expression "payment in lieu of notice" is not a term of art.[27] The expression is not a term of art, as is demonstrated by the examples in *Ogilvy & Mather (New Zealand) Ltd v Turner*, but that does not assist in explaining the meaning of cls 3.2 and 3.3 or what happened in this case.[28]

[60] Nazareth Care intended to immediately end the employment relationship and acted accordingly. Mr Roach was summarily dismissed and there is no suggestion that any grounds existed for doing so. Nothing in cl 3.2 or cl 3.3 allowed for this type of dismissal. Clause 3.3 comes the closest, where it refers to the employer deciding to pay the employee not to work. That phrase, however, is at best ambiguous. I consider the clause requires notice to be given and that it can be followed by garden leave but it does not authorise cessation of employment and payment in lieu. Had the parties intended for payment in lieu to be available during the trial the agreement could easily have said so. It did not do that in cl 3, which can be contrasted with cl 9.8 which does say that. I conclude that the wording in cl 3.3 is deliberately different.

[61] I do not share Mr Beck's view about *Scott Technology Ltd*, or accept there is any ambiguity in s 67B. *Scott Technology Ltd* recognised the necessity for compliance

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25 See also *Farmer Motor Group Ltd*, above n 24, at [28]-[30].

26 *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 4.

27 Relying on *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641, [1995] 2 ERNZ 398 (CA).

28 *Ogilvy & Mather v Turner* [1996] 1 NZLR 641, [1995] 2 ERNZ 398 (CA) drawn from *Delaney v Staples* [1992] 1 AC 687 (HL).

with the contractual notice if s 67B is to be successfully relied on. I agree with that conclusion which is consistent with *Farmer Motor Group Ltd* and *Stokes Valley Pharmacy.* There is also no basis for assuming a flood of cases will follow if the decision is that the notice given to Mr Roach was deficient.

[62] Ms Ryder's submissions properly captured what is required to comply with s 67B and the employment agreement. Nazareth Care did not comply with the employment agreement when it dismissed Mr Roach. The failure to comply means that Nazareth Care is unable to rely on s 67B(1) of the Act to justify its decision.

Was Mr Roach unjustifiably dismissed?

[63] Mr Roach's case is that Nazareth Care cannot satisfy s 103A of the Act and he was, therefore, unjustifiably dismissed. The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A(3), requires the Court to consider a number of things, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissing him or her.[29]

[64] The decision to dismiss Mr Roach was made by the acting Chief Executive of Nazareth Care Australasia, Anthony McPhillips. It was preceded by a conversation between Mr McPhillips, Mr Donnithorne, and the Regional Project Manager during which they discussed concerns about Mr Roach's performance. Those concerns had been drawn to Mr McPhillips' attention by the Regional Project Manager, and by the Christchurch Care Services Manager, in brief emails on 13 November 2016 and 18 November 2016. None of those concerns had previously been discussed with Mr Roach by anyone on behalf of Nazareth Care, and he had no knowledge that his work was being commented on adversely.

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[29] Employment Relations Act 2000, s 103A(3)(b)-(d).

[65] These deficiencies were significant and cannot be overcome by s 103A(5). They were not minor and resulted in Mr Roach being treated unfairly. When the decision to dismiss was made, the emails sent to Mr McPhillips were accepted without further inquiry about the substance of the concerns mentioned in them.

[66] In a general sense those concerns questioned Mr Roach's dedication to the job, his communication with other staff, and said he had left an orientation course in Melbourne before it finished. In his evidence Mr Roach attempted to reply to them by refuting what was said or trying to illustrate they were trivial at best. Nazareth Care did not call any evidence to attempt to substantiate the concerns. It confined its evidence to explaining how the decision was made, the circumstances of Mr Roach's employment, and describing what happened during the dismissal meeting. Nazareth Care's witnesses were not in a position to explain, or to support, the emails that prompted the decision to dismiss. There was then, and there is now, no evidence that the concerns were justified or might have ultimately led to his dismissal.

[67] Nazareth Care cannot satisfy the test of justification in s 103A of the Act. Relying on unsubstantiated concerns in emails without further inquiry, or attempting to discuss them with Mr Roach, was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. It follows that Mr Roach was unjustifiably dismissed.

If he was unjustifiably dismissed what remedies are appropriate?

[68] The next issue to consider is the remedies, if any, Mr Roach is entitled to have. He claimed lost remuneration from the date of his dismissal (after making an allowance for what he received in lieu of notice) until the date of hearing, and compensation under s 123(1)(c)(i) of the Act.

[69] In assessing remedies, it is necessary to consider ss 123(1)(b) and 128(2) and (3) of the Act. Those sections read:

> **123 Remedies**
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

…

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

128 Reimbursement

…

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[70] The approach to assessing claims for lost remuneration was dealt with by the Court of Appeal in *Telecom New Zealand Ltd v Nutter*.[30] Because of the indefinite duration of employment agreements there is legitimate scope to debate the period of time in respect of which compensation should be awarded in cases of unjustified dismissal.[31] The Court said:[32]

> The making of any compensation award involves the asking and answering of a hypothetical question as to how the plaintiff would have been placed in the absence of the legal wrong in issue – in other words, counterfactual analysis. The longer the period in respect of which compensation is sought, the more uncertain and speculative the assumptions underlying the eventual award become.

[71] The Court went on to describe Mr Nutter's claim that his compensation should be assessed on the hypothesis that he would have worked until retirement at 65. He was 61 at the time of his dismissal. That claim was not accepted. The Court referred to contingencies or vicissitudes of life which must be allowed for and said:[33]

> Notwithstanding the practice in other jurisdictions, it is now well-established in New Zealand that a "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to "full" compensation.

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30 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) beginning at [70]; confirmed in *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [22].

31 *Nutter*, above n 30, at [70].

32 At [73].

33 At [74].

[72] The Court in *Nutter* endorsed the approach in *Telecom South v Post Office Union (Inc)*; awards of compensation are discretionary and moderation in them is appropriate.[34] Amongst the reasons for moderation was that full compensation may be disproportionate to the nature of the wrong.[35]

[73] With that background the Court of Appeal provided guidance as to how the claims for this type of compensation should be assessed. The actual loss sets the upper ceiling of any award and was the logical starting point for an assessment.[36] Compensation must be assessed in light of all contingencies and should not exceed the properly assessed loss of the employee.[37] Allowances have to be made for all contingencies which might, but for the unjustified dismissal, have resulted in the employment ending.[38] In that respect, the Court said that where a dismissal might be regarded as unjustified on purely procedural grounds, an allowance should be made for the likelihood that, on a proper procedure being followed, the employee would have been dismissed.[39]

[74] Mr Nutter's actual loss was determined by the Court as "not exceeding approximately two years remuneration" but a starting point of the equivalent of 18 months' remuneration was appropriate, before considering a reduction for his contributory conduct.

[75] Mr Roach's actual loss has been substantial. After being dismissed he had difficulty obtaining another job. He was unemployed until May 2017 when he began working part-time for five hours a week. In September that year his hours increased to 14 per week. By June 2017, he had unsuccessfully sought 97 positions before finally gaining further part time work as a finance administrator. Combined, both jobs provide 34 hours of work per week, for a total income of approximately $53,000 per annum. Part of the difficulty Mr Roach faced in seeking a job was how to explain to prospective employers the loss of his job at Nazareth Care. He knew the trial provision

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34 At [78], citing *Telecom South v Post Office Union (Inc)* [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA).
35 At [79].
36 At [81].
37 At [81].
38 At [81].
39 At [81].

had been used, because he was considered to be not suitable for the job, but had nothing more he could add to explain his situation.

[76] By consent a schedule of his lost remuneration was provided to the Court showing the total income Mr Roach would have earned between 5 December 2016 and the beginning of the hearing, on 24 July 2018, had he remained employed by Nazareth Care. The parties agreed that this schedule is arithmetically correct but disagreed over the amount, if any, that should be awarded. Mr Roach would have earned $186,875 gross in those 19 months. His actual earnings in the same period totalled $24,219, so his loss was $162,656 and that sets the upper limit for this compensation. No claim was made for any further losses beyond the calculation provided. No separate calculation for KiwiSaver contributions was provided so I assume it is accounted for in this schedule. There was no evidence of any unpaid holiday pay and, therefore, I assume any entitlement to it was satisfied.

[77] Allowing only modestly for contingencies, Mr Goldstein submitted the loss to be compensated was for the equivalent of 18 months' lost remuneration, amounting to $150,144. There was no reason to discount that sum for contributory conduct, and indeed, Nazareth Care did not attempt to do that. Interest was claimed but no calculation of it was provided.

[78] Mr Beck's submissions on remedies were succinct. He concentrated on inviting the Court to confine any award to three months' remuneration under s 128(2), submitting that Mr Roach's employment was relatively short and there was little prospect of him continuing with his job. He said the employment may have ended in a performance-based dismissal, on notice, after a period of performance management.

[79] The problem with that submission is the lack of evidence from which it might be concluded that Mr Roach's ongoing employment was in jeopardy. The submission assumed Mr Roach's performance was substandard and, once it had been reviewed and managed, his dismissal was a real possibility. In the absence of any evidence that Mr Roach's performance was substandard, and given his assertion that the concerns raised about him were wrong or trivial, the conclusion argued for by Mr Beck is unsupportable. To accept that Mr Roach would have been dismissed reasonably soon

after he was employed would not be to allow for reasonable contingencies but to speculate.

[80] However, contingencies must be considered, especially where a substantial claim is made. The amount allowed for contingencies in Mr Goldstein's submissions is inadequate and is extremely close to the "full compensation" approach *Nutter* rejected. If Mr Roach had lost the confidence of Nazareth Care, the employment relationship may have eroded over time. The circumstances of Mr Roach's dismissal and the subsequent impact on his ability to find replacement employment make it appropriate to exercise the discretion in s 128(3) to extend the claim for lost salary beyond the three-month period. Allowing for contingencies the amount to award is 12 months' remuneration.

[81] The next claim is for compensation under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings. While the relief claimed in the statement of claim was not specified Mr Goldstein sought $30,000 in his submissions. The abrupt dismissal impacted severely on Mr Roach. He was escorted from the premises in a manner that was deeply upsetting and not explained by simply being considered unsuitable for the job. He described being bewildered, devastated and demeaned especially because he had not received any negative feedback about his work.

[82] He was unsure about how he managed to drive himself home and that he was shaking uncontrollably during the journey. As a result of this dismissal he was left with a sense that he had let down his family. He had to work up the courage to tell his family and friends about what had happened. His inability to explain what had happened left him experiencing frustration and anger. He had trouble concentrating, sleeping and had fluctuating weight and dizzy spells. That evidence was supported by Mrs Roach who described her husband as having been devastated by the decision.

[83] Mr Roach's claim for compensation under s 123(1)(c)(i) of the Act was said to fall within the "upper level of the middle band", referring to the bands developed in *Waikato District Health Board v Archibald*.[40] In that case the Court referred to the

[40] *Waikato District Health Board v Archibald* [2017] NZEmpC 132.

inexact science applied in fixing this type of compensation, but found it helpful to consider compensation by referring to three broad analytical bands:[41]

- Band one involving low level loss/damage;
- Band two involving mid-range loss/damage; and
- Band three involving high level loss/damage.

[84] *Archibald* did not attempt to assign values of each of those bands, using them instead as a guide to a principled outcome. In *Archibald* compensation falling "around the middle of Band two" resulted in an award of $20,000. An example of an assessment made in band two is *Marx v Southern Cross Campus Board of Trustees*, where an award of $25,000 was made.[42]

[85] Mr Beck invited the Court to consider that any compensation under s 123(1)(c)(i) ought to be tempered because Mr Roach was aware at all times that his employment, in either job, was subject to a trial provision. That meant when Mr Roach was employed he accepted the inevitability of a degree of stress or upset if the trial period was invoked and he lost his job.

[86] While Mr Roach understood trial provisions, Mr Beck's submission goes too far in seeking to reduce the compensation that might be awarded merely because of that knowledge. What is to be compensated under s 123(1)(c)(i) is the impact on the individual of the actions of an employer which have been found to be unjustified. The impact was not ameliorated merely because Mr Roach knew he was exposed to the possibility of dismissal within 90 days of starting work.

[87] Mr Beck's second point was an unsupported assertion that any distress suffered by Mr Roach may have been heightened after he took advice and perceived his dismissal to be unjustified. The submission is rejected because it has no foundation.

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41 At [62].
42 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76 at [54].

[88] Mr Roach is entitled to an award of compensation under s 123(1)(c)(i). The amount sought at $30,000 in the "middle band" overstates the impact on Mr Roach. The consequences of Nazareth Care's action are in the middle band in *Archibald*, but $25,000 better reflects an appropriate level of compensation.

[89] Mr Roach sought interest on his claim for lost remuneration but did not specify the rate claimed or the period for which it was claimed. It became apparent on reviewing the pleadings, and closing submissions, that the parties had not considered any implications arising from the coming into force of the Interest on Money Claims Act 2016 (IMCA). The IMCA came into force on 1 January 2018 and applies to every civil proceeding commenced after that date.[43] Section 10 of the IMCA makes it mandatory for a court to award interest as compensation for the delay in payment of money in every money judgment.[44] The mandatory nature of that section does not sit comfortably with the contemporaneous amendments made to cl 14 of the Act which reads as conferring a discretion as follows:[45]

> …the court may, if it thinks fit, order that the amount awarded include interest…

[90] There is a further complication because, if the IMCA applies, s 25 precludes an award of interest unless the party making that claim specifies the section of that legislation relied on and the period to which the interest claim relates. If the IMCA applies Mr Roach's statement of claim is deficient and cannot satisfy s 25.

[91] The parties were provided with an opportunity to make further submissions on the IMCA. Mr Goldstein submitted that the IMCA does not apply because this proceeding began in 2017 and was removed to the Court thereafter. While the statement of claim was filed in the Court after 1 January 2018 that was a procedural step but, in reality, the proceeding had commenced before then. He also submitted, as an alternative, that the transitional provisions of the IMCA applied so, regardless of any difficulties with the pleading, interest could be awarded. Mr Beck submitted that the IMCA applies, the pleading does not satisfy s 25, and no interest can be awarded.

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43 Interest on Money Claims Act 2016, ss 2 and 5.
44 Section 6, a judgment or order in a civil proceeding requiring the payment of money.
45 Employment Relations Act 2000, sch 3, cl 14.

[92] Plainly there is a difficulty with the IMCA applying to all courts and civil proceedings, and making an award of interest mandatory, but also amending the Act in a way conferring a discretion.

[93] There is a further problem. The transitional provisions of the IMCA preserve the repealed s 87 of the Judicature Act 1908,[46] so that it continues to apply to every civil proceeding in senior courts commenced before 1 January 2018. There is a similar saving for ss 62B and 65A of the District Courts Act 1947,[47] and for cl 11 of sch 2 to the Act relating to the Authority. There is no transitional provision dealing with proceedings before this Court.

[94] What is clear is that a uniform method of calculating and awarding interest was intended.[48] Excluding this Court may have been an oversight. The intention must have been to confer a general discretion on this Court to award interest on a monetary award, but to require that any calculation of interest must be undertaken in accordance with sch 2 to the IMCA. Clause 14 of sch 3 to the Act was amended from 1 January 2018 and, therefore, applies from that date.

[95] Mr Roach is entitled to an award of interest on the sum of $115,000 from the date of his dismissal on 28 November 2016 until the date of payment at the rate calculated in accordance with sch 2 to the IMCA until the date of payment. If there is any difficulty in calculating this sum, or there are any problems over the use of the internet calculator referred to in that schedule, leave to apply for further orders is granted.

Breach of good faith?

[96] The last issue to address is a claim for a penalty for an alleged breach of good faith. The pleading supporting this claim is linked to the cause of action for unjustified dismissal although there are no particulars explaining it beyond an assertion of a breach. A direction is sought that the penalty be paid to Mr Roach.

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46 Repealed by the Senior Courts Act 2016, s 182(4).
47 Repealed by the District Court Act 2016, s 240(2).
48 See the Interest on Money Claims Act 2016, s 28.

[97] The basis for this claim is dicta from *Stokes Valley Pharmacy* to the effect that s 4(1A)(b) imposes a duty to be constructive, responsive and communicative so Nazareth Care was required to provide an explanation for the dismissal when asked.[49]

[98] The claim for a penalty was not the main focus of the proceeding. Consequently, it did not receive the same detailed submissions as the balance of the claims did. While the claim for a penalty was maintained, there were no submissions explaining the relationship between the duty of good faith created by s 4, and ss 67B(5)(a) and (b) and s 120 of the Act. In combination those sections relieve an employer from the obligation to comply with a request for the reasons for dismissal where a trial provision has been used. If an employer is not required to provide reasons for the dismissal it is difficult to see how a breach of the duty of good faith could occur or, if it did, be so egregious as to warrant a penalty.

[99] In any event, the worst that might be said of Nazareth Care's conduct in dismissing Mr Roach is that it mistakenly thought the steps taken complied with s 67A, s 67B and the employment agreement, and that they were not, as a result, in a position to discuss the reasons for his dismissal. Even if I had been persuaded that the duty of good faith applied in the way pleaded by Mr Roach a penalty would not have been imposed.

Outcome

[100] Mr Roach was unjustifiably dismissed by Nazareth Care and he is entitled to the following remedies:

(a) Compensation of 12 months' remuneration in the sum of $115,000.

(b) Interest on the sum in [100](a) calculated in accordance with sch 2 to the Interest on Money Claims Act 2016 from 28 November 2016 until the date of payment.

(c) Compensation under s 123(1)(c)(i) of $25,000.

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[49] *Stokes Valley Pharmacy*, above n 2, at [78].

[101] Costs were provisionally assessed as Category 2 Band B scale of the Court's Guideline Scale. That classification is now confirmed. Having been successful Mr Roach is entitled to an award of costs. If the parties are unable to agree on costs Mr Roach may file a memorandum within 15 working days, and Nazareth Care may respond within a further 15 working days. Mr Roach may file a memorandum in reply with a further 7 working days.

K G Smith
Judge

Judgment signed at 3.25 pm on 19 October 2018