IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA269/2021
[2021] NZCA 466

BETWEEN	SENATE INVESTMENT TRUST THROUGH CROWN LEASE TRUSTEES LIMITED Applicant
AND	MATTHEW COOPER Respondent

Court: Cooper and Brown JJ

Counsel: K F Radich for Applicant
R Morgan, advocate for Respondent

Judgment: (On the papers) 13 September 2021 at 10.30 am

JUDGMENT OF THE COURT

A Leave is granted for Mr Morgan to appear as advocate for the respondent for the purposes of the application for leave to appeal.

B The application for leave to appeal is declined.

C The applicant must pay to the respondent 50 per cent of the costs for an application for leave to appeal and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

[1] Senate Investment Trust, through its corporate trustee Crown Lease Trustees Ltd (Senate), applies for leave to appeal under s 214(1) of the Employment Relations

Act 2000 (the Act) against a decision of the Employment Court[1] upholding a decision of the Employment Relations Authority (the Authority)[2] finding Mr Cooper's claim for unjustified dismissal was established.

[2] Under s 214(3) of the Act, this Court may only grant leave to appeal if the question of law raised by the proposed appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision. Senate seeks leave to appeal on two issues concerning the prerequisites for individual employment agreements which include a trial period of employment.

Statutory context

[3] Part 6 of the Act addresses individual employees' terms and conditions of employment. The individual employment agreement of an employee must be in writing and may contain such terms and conditions as the employee and the employer think fit.[3]

[4] One of the objects of pt 6 is to require new employees, whose terms and conditions of employment are not determined with reference to a collective agreement, to be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement.[4]

[5] Where it is proposed that the terms and conditions of employment include a probationary or trial period of employment, s 63A(2) provides:

> (2) The employer must do at least the following things:
>
> (a) provide to the employee a copy of the intended agreement under discussion; and
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> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
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> (c) give the employee a reasonable opportunity to seek that advice; and

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1 *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45.
2 *Cooper v Senate Investment Trust Through Crown Lease Trustees Ltd* [2019] NZERA Wellington 614.
3 Employment Relations Act 2000, s 65(1).
4 Section 60(b).

(d) consider any issues that the employee raises and respond to them.

However the failure to comply with that provision does not affect the validity of the employment agreement between the employee and the employer.[5]

[6] Section 67A(1) provides that an employment agreement containing a trial provision (for a specified period not exceeding 90 days) may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by that employer. If the employer gives the employee notice of termination before the end of such a trial period, then s 67B(2) provides that the employee may not bring a personal grievance or legal proceeding in respect of that dismissal.

[7] Where s 63A applies an employer has an obligation to retain copies of individual employment agreements. Section 64 relevantly provides:

> (1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).
>
> (2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—
>
> (a) signed the intended agreement; or
>
> (b) agreed to any of the terms and conditions specified in the intended agreement.
>
> …
>
> (6) To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—
>
> (a) signed the intended agreement; or
>
> (b) agreed to any of the terms and conditions specified in the intended agreement.

[5] Section 63A(4).

Factual background

[8] Mr Cooper who lived in Greymouth responded to a TradeMe advertisement for a labourer position in Palmerston North and was interviewed for the role by Mr Sowry (the director of Crown Lease Trustees Ltd) by telephone on 30 May 2018. Mr Cooper requested a copy of the proposed employment agreement so that he could provide it to Work and Income in order to obtain assistance with moving costs to Palmerston North.

[9] Mr Sowry claimed to have sent to Mr Cooper by email on 31 May 2018 a signed copy of the employment agreement which contained a 90 day trial period clause and made reference to s 67A of the Act. It included a form of declaration in the following terms:

> I, Matt Cooper, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.
>
> Signed by: ……. Date: ……..

[10] Mr Cooper said he did not receive the agreement.

[11] Mr Cooper started work with Senate on 18 June 2018. Mr Sowry claimed that when Mr Cooper arrived at Senate's premises on that day, he gave Mr Cooper an envelope containing two copies of the employment agreement sent previously. His evidence was that Mr Cooper put the envelope in his car and started work. His recollection was that although at that time Mr Cooper said he would sign it and return it the following day, Mr Cooper did not do so. Mr Cooper's evidence was that he was never given an envelope containing the employment agreements.

[12] A short time after the employment commenced there was a parting of the ways. Mr Cooper lodged a claim for unjustified dismissal. Senate sought to invoke the trial period provision. The Authority considered that the offer of employment had been made and accepted before the agreement was provided and that there was no

discussion about a trial period before Mr Cooper commenced work.[6] The Authority ruled that the dismissal was unjustified and awarded Mr Cooper compensation for hurt, loss of dignity and injury to his feelings in the sum of $4,800 and lost wages for three months, less an amount Mr Cooper had earned during that period.

The Employment Court judgment

[13] On appeal Senate contended that, having provided the employment agreement to Mr Cooper who did not indicate that he did not accept its terms, it must be implied that he had accepted the terms. Senate further submitted that it had met its obligations under s 63A(2)(b) of the Act to advise Mr Cooper that he was entitled to seek independent advice about the intended agreement. Reliance was placed on the wording of the declaration.

[14] The Employment Court found that it was more likely than not that Mr Cooper received the proposed employment agreement via email. However it was common ground that he did not sign it, nor that he ever made any statement purporting to accept it. In those circumstances the Judge did not consider it necessary to determine whether or not Mr Cooper was given copies of an employment agreement in an envelope on the day he commenced work.[7]

[15] On the issue whether the required advice was given to Mr Cooper the Judge held:

> [37] I find that there was no advice to Mr Cooper that he was entitled to seek independent advice. A declaration at the end of an employment agreement, with no accompanying advice beforehand, does not meet the obligation under the Act. Specific advice is required. This argument is further undermined by the fact that this declaration was at no point signed by Mr Cooper; Senate cannot rely on a warranty it has not been given.
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> (Footnote omitted.)

[16] The Judge also rejected Senate's argument that it was entitled to rely upon the trial period clause, stating:

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6 *Cooper v Senate Investment Trust Through Crown Lease Trustees Ltd*, above n 2, at [17]–[19].
7 *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper*, above n 1, at [15].

> [43] Accordingly, taking into account the strict approach to compliance with which s 67A should be regarded, the failure to have Mr Cooper sign the agreement before he started employment is fatal. An agreement is only a draft or a proposed agreement until it is executed. This is consistent with Mr Sowry's email message accompanying the draft employment agreement that stated "I will need the original so I have printed one here for you when you arrive" and the wording of the proposed agreement itself which required his signature:
>
> > I, Matt Cooper, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.
> >
> > Signed by: …… Date: ……
>
> [44] As the drafter of the agreement, it fell on Senate to follow up the issue prior to allowing Mr Cooper to begin work. It was incumbent upon Senate to ensure that execution took place before his employment began. It did not do so and, therefore, cannot now rely on the trial period clause contained in it.

The application for leave to appeal

[17] In its application for leave to appeal Senate submits two proposed questions of law:

(a) whether s 63A(2)(b) of the Act requires the advice which is given to an employee recipient of an intended employment agreement about their entitlement to seek independent advice to be additional to, or separate from, wording to that end which is contained in the declarations section of that employment agreement; and

(b) whether an employment agreement needs to be executed by signature for a trial period clause to be valid.

Leave to appear

[18] Mr Morgan filed materials in this Court on behalf of Mr Cooper. Mr Morgan acts as an employment advocate but is not a lawyer. A party may be represented by an advocate in the Authority or the Employment Court without leave.[8] There is no

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[8] Employment Relations Act, s 236.

equivalent provision for an appeal to this Court.[9] Leave to appear must be sought.[10] Mr Morgan has done so. Given the employment context and interlocutory nature of the proceeding, we grant leave for Mr Morgan to appear as advocate for Mr Cooper for the purposes of this application for leave.

Discussion

Advice of entitlement to seek independent advice

[19] Ms Radich for the applicant submits that there are no requirements in s 63A(2)(b) as to a particular form or location of the advice which an employer is required to give concerning the entitlement to seek independent advice about the intended agreement. She observes that only "advice" is required. That need not be in writing.

[20] She contends that the Court erred in law at [37] in finding that, because the requisite advice to Mr Cooper was contained in the declaration section of the agreement, Senate did not discharge its obligation under s 63A(2)(b).

[21] Mr Morgan for Mr Cooper responds that s 63A relates to intended rather than concluded agreements. The declaration in the agreement was framed in the past tense, stating that advice had been received. While acknowledging there is no prescribed form, he submits that advice must in fact be given but there was no evidence it was given to Mr Cooper.

[22] In our view the issue in this case concerning the giving of the prescribed advice is not one of law but of fact: was the requisite advice given to Mr Cooper in relation to the intended agreement. As the Employment Court has previously recognised, the signing of a warranty to the effect that there has been compliance with s 63A(2)(b) is not conclusive that advice was in fact given.[11] Furthermore in the present case the declaration was not actually signed. Hence the warranty was not provided.

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9 *Commissioner of Police v Aarts* CA400/2013, 21 August 2015 at [22].
10 Lawyers and Conveyancers Act 2006, ss 24 and s7(1)(b)(ii).
11 *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, (2011) 9 NZELR 306 at [98].

[23] The Judge's analysis at [37] is fact specific. It does not incorporate a question of law the answer to which could, in the circumstances of this case, support a finding that there had been compliance by Senate with the s 63A(2)(b) obligation. Consequently we do not accept the first proposed question as supporting leave to appeal.

Signature of an employment agreement

[24] Ms Radich submits, correctly, that the Act does not require an employment agreement to be signed by the employee in order for a trial period clause to be applicable. The requirement is only that the agreement be in written form. She contends the Court erred in law at [43]–[44] in finding that a failure to have Mr Cooper sign the agreement which had been sent by email was fatal to Senate's reliance on the trial period clause.

[25] Read in isolation the third sentence at [43] of the judgment could be construed as having the meaning contended by Senate, namely that an employment agreement containing a trial period provision is not made and enforceable until it has been signed. However it is apparent from the totality of the Judge's reasons that that was not the ratio of her decision.

[26] The Judge had earlier cited a passage from *Smith v Stokes Valley Pharmacy (2009) Ltd*[12] concerning agreements which contemplated execution by signature.[13] She noted that in another earlier case, which she viewed as analogous on a number of levels,[14] the fact that the proposed employment agreement sent to the employee provided a space for both parties to sign indicated that the agreement contemplated execution by signature.[15] In our view what the Judge was intending to convey was that in light of the email and the terms of the agreement it was Senate's intention that the agreement was to be executed by signature. As the Judge explained at [44], that not having occurred, Senate could not rely on the trial period clause.

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12 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, (2010) 7 NZELR 444 at [100]–[101].
13 *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper,* above n 1, at [38].
14 *Smith Crane and Construction Ltd v Hall* [2015] NZEmpC 82.
15 *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper*, above n 1, at [42].

[27] It is apparent from s 64(6) of the Act that a draft written employment agreement containing a trial period clause can be agreed to otherwise than by signature by the employee. But the Judge concluded that did not occur on the facts. In our view no question of law arises in the terms proposed by Senate.

Result

[28] Leave is granted for Mr Morgan to appear as advocate for the Mr Cooper for the purposes of the application for leave to appeal

[29] The application for leave to appeal is declined.

[30] The applicant must pay to the respondent 50 per cent of the costs for an application for leave to appeal and usual disbursements.

Solicitors:
Innes Dean, Palmerston North for Applicant