



ISSUE

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a regular newsletter for clients of  
mcphail gibson & zwart ltd

## 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
- Training
- Monthly newsletter

In 1984 artificial intelligence ("AI") graced our screens in the Terminator with scenes of Arnold Schwarzenegger, a cyborg disguised as a human, sent back in time to assassinate the one person (Sarah Connor) that would eventually save humankind from extinction by robots.

Today, although not as dramatic as the apocalyptic scenes from the Terminator, artificial intelligence is no longer a fictional concept and is becoming more engrained in our lives. Obvious examples are Amazon's Alexa or Apple's Siri. However, recently there has been a lot of attention paid to ChatGPT. ChatGPT is an AI Chatbot which allows you to input a topic or question, and in accessing the significant amount of data available on the internet, it gives you an answer. It has widely been known to be used to write college essays, answer text questions, and even compose music.

For this newsletter, we thought we would give this a go, and asked for an analysis of an Employment Court case.

**Our question:** "Provide an analysis of *Best Health Foods Ltd v Berea* [2021] NZEmpC 155"

### ChatGPT's Answer:

"*Best Health Foods Ltd v Berea* [2021] NZEmpC 155 is a recent case that was heard before the New Zealand Employment Court. The case involved an employee, Mr. Berea, who had been working for Best Health Foods Ltd for a number of years. Mr. Berea's employment was terminated by the company, and he subsequently filed a claim for unjustified dismissal.

*The Employment Court heard the case and found in favor of Mr. Berea, ruling that his dismissal was unjustified. The Court found that the company had not followed proper procedures when terminating Mr. Berea's employment and that they had not provided him with a fair opportunity to respond to the allegations against him. Additionally, the Court found that the company had not adequately investigated the allegations against Mr. Berea before making the decision to terminate his employment.*

*The case is significant because it highlights the importance of following proper procedures when terminating an employee's employment. Employers must ensure that they follow a fair and reasonable process, including providing the employee with an opportunity to respond to any allegations, conducting a thorough investigation into the allegations, and considering the employee's response before making a decision to terminate their employment.*

*The case also highlights the importance of providing employees with clear and specific reasons for their dismissal. The Employment Relations Act 2000 requires that employers provide employees with a clear explanation of the reasons for their dismissal, and failure to do so can result in a finding of unjustified dismissal.*

*Overall, *Best Health Foods Ltd v Berea* [2021] NZEmpC 155 serves as a reminder to employers of the importance of following proper procedures when terminating an employee's employment. Employers who fail to follow the proper procedures may be found to have unjustifiably dismissed the employee and may be liable for remedies such as compensation, reinstatement, or other remedies ordered by the Employment Court."*

## 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 **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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## Our Analysis

While ChatGPT's analysis is correct to a point, the significant issue of the case was missed. The Court had to address whether the employer had properly terminated the employee's employment under a trial period provision and, if not, whether the termination amounted to an unjustified dismissal.

The key issues the Court was required to determine were:

1. Whether notice was properly given, as required by the Act; and
2. If not, the trial period could not be relied upon and the Court was required to consider whether the dismissal was justified.

## Facts

Ms Berea was employed by the company from 17 January 2020. Prior to commencing employment, Ms Berea was provided with and signed an individual employment agreement. The individual employment agreement contained a trial period provision, which was compliant with the requirements under the Act.

On 21 January 2020, the company asked Ms Berea to attend a meeting. In the meeting, Ms Berea was told that her work was "basic", and she was required to improve by the end of the day. At the end of day, the company called Ms Berea to a meeting where she was told that the company was unhappy with her work, and she was "not needed any further".

Following the meeting, the company emailed a letter purporting to give notice of the termination, and when Ms Berea's final pay was paid, it included three days' payment in lieu of notice.

## The Court's decision

The Employment Relations Act 2000 states:

### **67B Effect of trial provision under section 67A**

- (1) *This section applies if a small-to-medium-sized 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.*

The Court observed at [71] that:

*"The Court of Appeal held in Ioan v Scott Technology NZ Ltd that a strict approach to the construction of s 67B of the Act is required. The section requires termination to be on notice. Summary dismissal therefore falls outside the section."*

The Court agreed with the Authority and found that Ms Berea was verbally dismissed in the meeting of 21 January 2020 without notice. Because the company had not given notice, as required, the trial period could not be relied upon, and Ms Berea was summarily dismissed from her employment and was therefore entitled to bring a personal grievance in respect of the dismissal.

The company argued that Ms Berea's performance over the three days of her employment was so inadequate that summary dismissal was justified in the circumstances. Noting the lack of process that was followed, the Court did not accept the company's position and agreed with the Authority, finding that no fair and reasonable employer could have concluded that summary dismissal on the grounds of performance was warranted in the circumstances. Therefore, the dismissal was unjustifiable. The remedies awarded by the Authority of \$12,000 compensation, lost wages, and no reduction for contribution were confirmed by the Court.

## Summary

While ChatGPT did give an overview of the procedural requirements, it did not address the key issue. The takeaway from this case is that an employee's employment can be validly terminated under a trial period, where that trial period provision is compliant with the law and the employee is given notice of the termination correctly before the end of the trial period.

Further case law has also built upon this principle, finding that generally payment in lieu of notice is also not deemed "giving the employee notice" as required for termination under a trial period provision.

What this shows is ChatGPT can provide a basic level of analysis. However, humans will provide a more in-depth analysis that can pick up on technical and detailed aspects of a case, how that case relates to legislation and other case law, and how it could apply to a real-world situation.

Just like the Terminator had to go through all the "Sarah Conners" to find the right one, it seems we may not be at risk of being replaced by AI just yet.