

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 46
5518221

BETWEEN AMELI ANTON
Applicant

A N D BROWNS LIMITED &
STABLE YARD LIMITED
Respondents

Member of Authority: Rachel Larmer

Representatives: Allen Goldstone Advocate for Applicant
Kirsten Bilkey for Respondents

Investigation Meeting: On the papers

Date of Determination: 13 February 2015

DETERMINATION OF THE AUTHORITY

- A. Ms Anton was not subject to a valid trial period provision so she is not precluded from pursuing her unjustified dismissal claim against the Respondents.**

Employment relationship problem

[1] Ms Anton was employed by “Stable and Yard Ltd and Browns Ltd” trading as “Stable and Yard and Browns Espresso Bar” (the Respondents).

[2] On 25 June 2014 Ms Anton was provided with a draft written individual employment agreement but she did not sign it because she believed that the rate of pay recorded in the employment agreement was less than what had been discussed and agreed during her interview on 23 June 2014.

[3] Ms Anton says she contacted Ms Kirsten Lloyd, one of the Respondents’ directors, to say she would not be signing the agreement due to the issue over the rate of pay.

[4] The draft employment agreement contained a trial period provision. The parties agree that Ms Anton never signed the employment agreement.

[5] Notwithstanding that advice on 26 June the Respondents asked Ms Anton to start work the following day (27 June), which she did. No employment agreement had been signed before Ms Anton started work and Ms Anton also says she had advised Ms Lloyd that she did not agree to the terms in the draft employment agreement she had been given.

[6] On 09 July Ms Anton emailed Ms Lloyd asking about her employment agreement and non-payment of wages but did not receive any reply.

[7] The Respondents say they were unhappy with Ms Anton's performance so decided to summarily dismiss her. On 18 July Ms Lloyd saw Ms Anton in the café and handed over a letter which stated she was dismissed on one week's notice and that her employment would end six days later.

[8] Ms Anton claims her dismissal was unjustified. The respondents say Ms Anton cannot bring a personal grievance for unjustified dismissal because she was dismissed in accordance with the trial period provision in the unsigned draft employment agreement she was given before she started work.

[9] Ms Anton says the trial period provision is not valid so cannot be relied on to preclude her from pursuing her unjustified dismissal claim. She submits that the trial period the Respondents seek to rely on does not meet the requirements of s67A of the Employment Relations Act 2000 (the Act) because the employment agreement was not signed before she started work or at any time thereafter.

[10] Ms Bilkey says that the Respondents believe Ms Anton deliberately did not sign the draft employment agreement which she received prior to accepting employment. Ms Bilkey submits that Ms Anton had a duty to complete all contractual requirements and should not have started work if she was not prepared to accept the pay rate that was offered in the employment agreement.

[11] Ms Bilkey submits that in these circumstances the Respondents should still be able to rely on the trial period provision in the unsigned employment agreement.

Issue

[12] The sole issue for the Authority to determine is whether or not Ms Anton was subject to a valid trial period provision. If so, then she is precluded from pursuing her dismissal grievance. If not, then Ms Anton may proceed with her substantive claims.

Is Ms Anton subject to a valid trial period provision?

[13] Section 67A of the Act is very prescriptive. If each of the elements of that section are not complied with then the purported trial period will not be valid and cannot be relied on by an employer to exclude an employee from the personal grievance provisions under the Act.

[14] The Employment Court in *Smith v Stokes Valley Pharmacy*¹ and *Blackmore v Honick Properties Ltd*² makes it clear that an employment agreement containing a trial period provision must be signed before the employee starts work in order for s67B(2) (which disqualifies an employee from bringing “*a personal grievance or legal proceedings in respect of the dismissal*”) to apply.

[15] There is no signed employment agreement in this case so the Respondents cannot fulfil the essential requirement of s.67A (1) that the trial period provision is recorded in an employment agreement. The mere fact that a trial period provision is contained in a draft unsigned employment agreement will not meet the requirements of s.67A in the Act.

[16] If an employer wants to rely on the trial period provision in the Act then it must ensure it fully complies with the requirements of s.67A of the Act. It is up to the employer to get this right. Failure to do so means they will not be able to subsequently rely on a trial period provision that does not meet all of the statutory requirements of s.67A of the Act.

[17] I find that Ms Anton was not subject to a valid trial period provision so she may pursue her unjustified dismissal claim.

¹ [2010] NZEmpC 111.

² [2011] NZEmpC 152.

Mediation

[18] Now that the preliminary jurisdiction issue has been resolved in Ms Anton's favour the parties are directed back to mediation to occur on the substantive claims.

Costs

[19] Ms Anton as the successful party is entitled to a contribution towards her actual costs. The parties are encouraged to discuss costs at mediation together with the substantive issues.

[20] If this matter is not resolved at mediation then costs are reserved to be dealt with at the conclusion of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority