IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 331
3304200

	BETWEEN	ALICE BRANDON-WARREN Applicant
	AND	MAKA8KA LIMITED Respondent

Member of Authority:	Helen van Druten
Representatives:	Hayley Johnson, Advocate for the Applicant Alex Liu as the Respondent
Investigation Meeting:	27 March 2025 at Auckland
Submissions received:	27 November 2024 and 26 March 2025 from the Applicant 5 December 2024 from the Respondent
Determination:	13 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alice Brandon-Warren was employed from 16 July 2023 to 1 August 2023 by Maka8ka Limited (trading as Filly Café). Ms Brandon-Warren lodged a statement of problem claiming unjustified dismissal under an invalid trial period clause. She had started work at the café a day earlier than her employment contract start date.

[2] Ms Brandon-Warren also stated that as required by the Employment Relations Act 2000 (the Act), Maka8ka Limited did not specifically advise her to seek independent legal advice before she signed her employment agreement and therefore her employment was unfairly bargained for.[1]

[1] Reference was made to the Employment Relations Act 2000 (the Act), s 63A(2).

[3] Maka8ka Limited says that it followed the Ministry of Business, Innovation and Employment (MBIE) guidelines for employment and ended her employment in compliance with the 90-day trial period clause in her employment agreement.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Brandon-Warren and Mr Alex Liu (as Maka8ka Limited's director). Both witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

(a) Did Maka8ka Limited's actions invalidate the trial period clause in the employment agreement? Specifically, did Maka8ka Limited fail its obligations under s 63A(2) of the Act and did the change in Ms Brandon-Warren's start date invalidate the clause under s 67A(2) of the Act?

(b) If so, was Ms Brandon-Warren unjustifiably dismissed from her employment with Maka8ka Limited and is she entitled to a consideration of remedies sought, including:
   (i) reimbursement for lost wages; and
   (ii) compensation under s 123(1)(c)(i) of the Act.

(c) Should the Authority order a penalty against Maka8ka Limited for any established breaches of s 4 or s 63A(2)(b) of the Act?

(d) Should either party contribute to the costs of the other party?

[7] Ms Brandon-Warren alleged Maka8ka Limited had failed to provide her with time and wage records when she requested these after her employment was terminated. This claim was withdrawn at the investigation meeting.

Background information

[8] Maka8ka Limited was registered in January 2023 with Alex Liu and Huang Dong as directors. According to Mr Liu it was his first time running a business and entering the hospitality industry. The café was opened in Mt Wellington, Auckland in March 2023.

[9] Ms Brandon-Warren interviewed and was employed by Maka8ka Limited to work as a Front of House (FOH)/Barista. On 24 June 2023, she signed an employment agreement to start work on 17 July 2023. The employment agreement had a 90-day trial period clause which said:

> 90 DAY TRIAL PERIOD
> 2.1 You are being employed on a 90 trial period pursuant to section 67A of the Act. The object of the trial period is to enable Filly Cafe to assess your performance of your duties under this Agreement and to enable Filly Cafe to assess your suitability to the position. The 90 day trial period commences on the Commencement Date in the Second Schedule.
>
> 2.2 At any time during, or at the end of the 90 day trial period Filly Cafe may either:
> (a) Confirm your appointment to the permanent staff; or
> (b) Terminate your employment by providing you with 1 week's notice if you are dismissed during or on the expiry of the 90 day trial period.
>
> 2.3 It is recorded that in the event of a dismissal pursuant to this clause you are not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal.

[10] The date in the Second Schedule read:

> COMMENCEMENT DATE: 17th JULY 2023

[11] On 21 and 23 July 2023, Maka8ka Limited said that the café manager, Lexi, spoke to Ms Brandon-Warren raising concerns about her work performance as the café had received some poor feedback. On 24 July 2023 Lexi gave her a new contract at a reduced hourly rate with front of house duties only so she could have further barista training.

[12] The following day on 25 July 2023 Maka8ka Limited gave Ms Brandon-Warren notice of termination of her employment under the 90-day trial period clause. They provided one week's notice and Ms Brandon-Warren's employment ended on 1 August 2023.

[13] This case has impacted both parties. Mr Liu said that he has since sold the business after considerable personal cost and loss of courage running a business. Ms

Brandon-Warren's confidence was also impacted and it also impacted her financial stability.

Trial period

[14] Before determining if Ms Brandon-Warren was unjustifiably dismissed I must consider if the trial period in her employment agreement was valid under the Act.

[15] Section 67A of the Act provides that an agreement may contain provisions for a trial period for 90 days or less with an employee "who has not previously been employed by that employer". There are also other requirements in the Act for that trial period to be valid.

[16] Section 67A(2)(a) of the Act states that:

> For the purposes of this section and section 67B**, 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….

[17] Ms Brandon-Warren says that the trial period clause is invalid and unenforceable because:

(a) according to her employment agreement the trial period did not commence at the beginning of her employment, it commenced on 17 July 2023, a day after she started work; and

(b) Maka8ka Limited also failed to advise her that she was entitled to seek independent advice before signing the agreement as required by s 63A(2) of the Act.

[18] As trial periods remove longstanding employee protection and an employee's right to challenge their dismissal as unjustifiable, a strict approach to compliance with s 67A should be taken.[2]

[19] In *Blackmore v Honick Properties*[3], the Court emphasised:

> It is not too onerous an expectation that employers will get the correct paperwork and do things in a correct sequence. The benefits of ss 67A and 67B… are the quid pro

[2] *Smith v Stokes Valley Pharmacy (2009) Ltd*, [2010] NZEmpC 111 at [48].
[3] *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152 at [66].

> quo for the significant advantages to the employer of removing longstanding rights of challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee.

Did Maka8ka meet s 63A(2) requirements relating to independent advice?

[20] One of the requirements under s 63A(2) of the Act is that the employer must advise the employee that he or she is entitled to seek independent advice about the intended agreement and give a reasonable opportunity for that to happen.[4]

[21] Ms Brandon-Warren says that Maka8ka Limited did not specifically inform her of her right to seek independent legal advice before signing the contract so "this contract was unfairly bargained for" and breached s 63A(2) of the Act.

[22] This assertion is based on several key decisions of the Employment Court, not least the finding in *Blackmore v Honick Properties Ltd* that "a declaration at the end of an employment agreement, with no accompanying advice, does not meet the requirement of s 63A(2)(b) of the Act – specific advice is required".[5]

[23] In the facts of that case, Mr Blackmore had no time to consider, take advice on or negotiate the draft agreement with the trial period. It was presented to him after he started employment and he had no opportunity to seek advice or raise any issues for Honick Properties Ltd to consider. Mr Blackmore felt he had no alternative but to sign the agreement.[6]

[24] That decision also referred to the decision in *Smith v Stokes Valley Pharmacy*. Like Mr Blackmore, Ms Smith was already working in the business when the new owners inserted a trial period clause. Similarly in *Lenoel v Waikato Windoware Ltd* Ms Lenoel was given one working day to seek independent advice.[7] In all three cases, the Authority and the Court established that the opportunity to seek independent legal advice was not a genuine opportunity to do so:

> The law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend on the circumstances of the case.[8]

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[4] The Act, s 63A(2)(b).
[5] Above n 3 at [98] and referenced in *Senate Investment Trust Through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45 at [37].
[6] Above n 3 at [42-43] and [98].
[7] *Lenoel v Waikato Windoware Ltd* [2023] NZERA 481 at [19].
[8] *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152 at [64].

[25] While the principles and application requirements of the Court are clear in those cases, I distinguish the independent legal advice requirement in those decisions from Ms Brandon-Warren's specific circumstances including:

(a) Ms Brandon-Warren was given the contract on 21 June 2023 - four weeks before she commenced employment;

(b) She was not given any timeframe for acceptance only an email with the agreement and a message for Ms Brandon-Warren to "return when you can". No pressure was applied by the employer to sign the agreement;

(c) The 90-day trial period was clause 2 and on the first page of the agreement. It was not buried within the document but clear to see;

(d) The employee certificate was attached to the employment agreement that Ms Brandon-Warren had to sign. She separately signed both the employment agreement and the employee certificate;

(e) Ms Brandon-Warren evidenced that she considered the agreement and was afforded the opportunity to negotiate its terms and conditions. She did not sign it immediately. She texted Maka8ka Limited on 22 June 2023 asking to have a minimum hours clause included. Maka8ka Limited included that clause and sent a new version which Ms Brandon-Warren then signed and returned on 24 June 2023;

(f) Unlike Mr Blackmore in that decision, Maka8ka Limited gave Ms Brandon-Warren a real opportunity for consideration, advice and negotiation as opposed to a nominal or minimal opportunity; [9]

(g) Emails, text and employment documentation indicated that the employment process was conducted in good faith by Maka8ka Limited. It was a small business. It was responsive and communicative in the recruitment process.

[26] For the reasons above, I do not agree with the submission that there was a breach of s 63A(2)(b) of the Act. Ms Brandon-Warren's employment agreement was not unfairly bargained for.

[9] Above at n [83].

Was Ms Brandon-Warren a "new employee" under s 67A(1)?

[27] Having signed the agreement, on Sunday 25 June 2023, Ms Brandon-Warren then messaged Maka8ka Limited and offered her availability for 29 June 2023 "if you need me to come in to work". While initially not needing her help, Ms Brandon-Warren messaged again on 8 July 2023 with "please let me know if you need a hand…before the 21st a week in advance so I can get that day off". On 9 July 2023 Lexi messaged and "wondered if" Ms Brandon-Warren could work on Sunday 16 July 2023 for 4 hours. She agreed and was paid for those hours on 17 July 2023.

[28] Based on the analysis in the *Smith v Stokes Valley Pharmacy* decision, section 67A is not designed to 'catch out' the small employer. Section 67A(1) prevents an employer lawfully requiring an existing employee to enter into a trial period in the course of current employment or more than once. "An employer and employee may agree to a trial period only once. If an employer decides to re-employ the employee, the option to agree to another trial period will not be available".[10]

[29] Ms Brandon-Warren offered to start her employment a day earlier and Mr Liu agreed. The wording and potential impact of the trial period clause was clear. In reality, the offer by Ms Brandon-Warren to start work earlier and the acceptance by the employer was effectively a mutually agreed revision of the start date in her employment agreement. It would be technical and narrow to claim this was new employment when the parties mutual intent was clear.

New employment agreement

[30] In the conversation on 21 July 2023 about her work performance, the café manager, Lexi, proposed a new job offer. This offer was for a FOH role instead of barista and paid at $2 less per hour. Lexi then confirmed this offer in writing on 24 July 2023.

[31] Ms Brandon-Warren did not agree to the new terms. There was no evidence to support Maka8ka Limited's claim that she had agreed to the new conditions and there is evidence that she had questioned the new agreement. A day later her employment with Maka8ka Limited was terminated.

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[10] Explanatory notes to the Employment Relations Amendment Bill 2008 referenced in *Smith v Stokes Valley Pharmacy* [2010] NZEmpC 111 at [41].

[32] The offer of new terms is not relevant to Ms Brandon-Warren's termination of employment as the 25 July 2023 email advising termination of employment relies on the trial period provision. Recognising the exception under s 67B(5)(a) of the Act, Mr Liu was able to terminate Ms Brandon-Warren's employment under a valid trial period clause.

[33] The attempt to unilaterally change the terms of employment is relevant to the alleged breach of good faith during her employment.

[34] Ms Brandon-Warren claims that she received no feedback about her coffee or customer complaints. Mr Liu disputes this and claims that:

(a) The café received several refund requests and complaints on 16 July 2023 which raised concerns.
(b) The manager spoke to Ms Brandon-Warren on 21 July 2023 about her speed, latte art and suggested further training. Ms Brandon-Warren said she would demonstrate her skills on Sunday "and we agreed to give her another chance".
(c) Further training was provided by the manager on 23 July 2023 but according to Mr Liu the café still received returned beverages and negative feedback.

[35] I prefer Mr Liu's account of these events as this would explain why he gave Ms Brandon-Warren a new employment agreement on 24 July 2023 with a new role as front of house.

[36] I accept that Mr Liu did not intend to undermine the employment relationship by offering a revised employment agreement and it was never implemented. Regardless, it was a breach of good faith under s 4(1) of the Act to attempt to unilaterally change the terms of employment without communicating effectively with Ms Brandon-Warren and with the intent to dismiss if she did not accept those revised terms.

[37] After consideration of s 133A of the Act which sets a non-exhaustive list of matters I must have regard to, no penalty is awarded under s 4A of the Act as the breach did not meet the thresholds for a penalty to be awarded.

Conclusion

[38] Respecting the Court's approach that the rights removed by a trial period necessitate a strict application of section 67A requirements, I consider that in these circumstances:

(a) there was a documented mutual intent by the parties to start employment one day earlier and this change was initiated by Ms Brandon-Warren. To look only at the employment agreement and seek to now redefine what was intended by both parties would be against the objects of the Act; and

(b) there was good faith on the part of both parties when this offer was made and accepted. In the circumstances, Maka8ka Limited met the requirements of s 63A(2) of the Act.

(c) At the time of her termination of employment, Ms Brandon-Warren was employed under the employment agreement agreed between the parties dated 23 June 2023 and this met the s 67A requirements of the Act.

[39] On this basis and considering the facts and circumstances of specific cases determined on their own merits, I conclude that in Ms Brandon-Warren's employment, the trial period clause is valid and it was a validly implemented termination of employment under that clause. Ms Brandon-Warren is not able to pursue her personal grievance claim for unjustified dismissal.

Costs

[40] As Maka8ka Limited was self-represented, costs lie where they fall.

Helen van Druten
Member of the Employment Relations Authority