

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 824
3352381

BETWEEN NOEL JR CAMACHO
Applicant
AND NORTH BEACH LIMITED
Respondent

Member of Authority: Matthew Piper
Representatives: Hayley Johnson, advocate for the Applicant
Emma Monsellier, advocate for the Respondent
Investigation: On the papers
Submissions received: 5 September 2025 from the Applicant
26 September 2025 from the Respondent
Determination: 18 December 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Noel Jr Camacho was briefly employed by North Beach Limited (North Beach) in late 2024 before his employment was summarily terminated. North Beach says Mr Camacho is prevented from bringing a personal grievance in respect of his dismissal because his employment agreement contained a trial period provision. Mr Camacho says the trial period provision is invalid.

[2] On 15 August 2025 the Authority directed that the validity of the trial period provision be dealt with as a preliminary matter. This determination resolves that preliminary issue.

The Authority's investigation

[3] For the Authority's investigation affidavit evidence was lodged from Mr Camacho and from Johnny Dee, a regional manager for North Beach.

[4] As permitted by s 174E of the Employment Relations Act 2000 (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

[5] The preliminary issues identified for investigation and determination were:

- (a) Having regard to ss 67A and 67B of the Act, does the trial period provision in the applicant's employment agreement with the respondent mean he is prevented from bringing a personal grievance in respect of his dismissal?
- (b) Should either party contribute to the costs of representation of the other?

Relevant factual background

[6] On 13 November 2024 North Beach responded to Mr Camacho's application for employment by seeking to interview him for an Assistant Store Manager role at its Lynn Mall store. Two interviews took place the following day on 14 November 2024 and referee contacts were provided by Mr Camacho.

[7] On 18 November 2024 an accounts and payroll administrator from North Beach emailed Mr Camacho a proposed employment agreement. The cover email contained details regarding KiwiSaver and access to North Beach's systems, but did not refer to the trial period or probationary period in the agreement.

[8] Separately, on 18 November 2024 North Beach's automated system sent Mr Camacho an email providing access to a portal in which he was to enter personal details and review policy documents. Among other things the email said "*We confirm that your employment is subject to a 90-day trial period, as outlined in your employment agreement. You are welcome to seek independent advice regarding the terms and conditions of your agreement before accepting.*"

[9] Mr Camacho said nothing in the employment agreement worried him and that although he noticed it contained a trial period and probationary provision, he was unconcerned by their presence. Mr Camacho did not seek independent advice regarding the employment agreement and regarded it as a formality before commencing work.

[10] Mr Camacho signed and returned the agreement unaltered to North Beach on 21 November 2024 prior to the commencement of his employment on 25 November 2024.

[11] On 2 December 2024, after meeting with Mr Camacho to discuss concerns regarding events of that morning, North Beach wrote to Mr Camacho terminating his employment. It said the termination of his employment was pursuant to the trial period provision in his employment agreement. Mr Camacho was given one day's notice of his dismissal, which was paid in lieu of him working it.

The relevant provisions of the employment agreement

[12] In order to determine the validity of the trial period provision, a number of clauses in the agreement must be considered. The relevant provisions are set out below:

1. TERMS AND CONDITIONS OF EMPLOYMENT

[...]

1.2 The conditions contained in this Agreement replace any terms and conditions, whether written, oral, expressed or implied applicable prior to the date of this Agreement.

3. TRIAL PERIOD

3.1 You will serve a trial period for 90 days commencing from the Commencement Date (the "**Trial Period**").

3.2 During the Trial Period the Employer may dismiss You by giving no less than the required notice period as set out in the First Schedule.

3.3 If the Employer does dismiss You in accordance with clause 3.2 of this Agreement, You shall not be entitled to bring a personal grievance or other legal proceedings against the Employer in respect of the dismissal.

3.4 The parties acknowledge and agree that the terms of this clause of the Agreement constitute a valid Trial Period provision within the meaning of section 67A(2) of the Employment Relations Act 2000.

3.5 No other term or condition of this Agreement shall derogate from this Trial Period provision.

4. PROBATIONARY PERIOD

4.1 The Employer may in its sole discretion employ You on a probationary basis for the period as set in the First Schedule (the “**Probationary Period**”).

4.2 The purpose of any Probationary Period shall be for the Employer to continue assessing and confirming Your suitability for the position.

4.3 During the Probationary Period, Your Supervisor will provide guidance, feedback and any necessary support to You as required. Both parties will be required to promptly discuss any difficulties that arise, and the Employer will appropriately warn You in advance if it is contemplating termination of this Agreement during the Probationary Period.

4.4 Notwithstanding any other provision in this Agreement, either party may terminate this Agreement by giving the required notice in accordance with the First Schedule during the Probationary Period. If the Employer does terminate Your employment during the Probationary Period, it reserves the right to make an appropriate payment of Salary and/or Wages to You in lieu of notice.

4.5 The parties acknowledge that the Probationary Period does not limit the legal right and obligations of the Employer or You, and that both parties must deal with each other in good faith.

4.6 You acknowledge that the Employer has explained the Probationary Period to You and that You have been advised that You can seek independent advice in relation to this clause (and this Agreement) and have been given a reasonable opportunity to seek such independent advice.

20 TERMINATION OF EMPLOYMENT

General Termination

20.1 This Agreement can be terminated by either party by giving the required period of notice set out in the First Schedule. The Employer is not obligated to accept any more or less notice than what is specified in the First Schedule.

[...]

28 MISCELLANEOUS

28.1 Each party acknowledges and agrees that this Agreement constitutes the entire agreement and understanding between the parties and supersedes any previous agreement between them.

[...]

FIRST SCHEDULE

COMMENCEMENT OF EMPLOYMENT: 25 November 2024

[...]

TRIAL PERIOD: 90 days

PROBATIONARY PERIOD: 3 months

NOTICE PERIOD: Trial Period: One (1) day
Probationary Period: One (1) calendar week
General Termination: Six (6) calendar weeks
Redundancy: One (1) calendar week
Incapacity/medical grounds: One (1) calendar week

Trial period provisions

[13] Section 65 of the Act prescribes the essential requirements for all individual employment agreements, including that they must be in writing and must contain particular terms.

[14] Sections 65A through 68 of the Act then deal with particular issues that may be dealt with by individual employment agreements and provides requirements for each. These issues include the use of probationary periods (s 67 of the Act) and the use of trial provisions (ss 67A and 67B of the Act). Each of these are relevant to the determination of this matter because both were referred to in Mr Camacho's employment agreement.

Probationary periods

[15] The parties to an employment agreement may agree that the employee will serve a period of probation. The fact of the probationary period must be specified in writing and the employee's right to bring a grievance for unjustified dismissal is not disturbed by the presence of a probationary period.¹

[16] Where an employee is employed pursuant to a probationary period, the employer is still obliged to comply with duties of fairness to the employee, such as indicating areas of concern, and must be able to justify the dismissal of that employee, albeit within the context of a probationary employment relationship.

¹ Section 67 of the Act.

Trial periods

[17] Section 67A of the Act provides that an employment agreement may contain a trial provision where the employee has not been previously employed by that employer. In order to be valid, the trial provision must be in writing and must state that:

- a. it is for a specified period not exceeding 90 days starting at the beginning of the employee's employment; and
- b. during that period the employer may dismiss the employee and if the employer does so the employee is not entitled to bring a personal grievance in respect of the dismissal.

[18] Section 67B of the Act then says that an employee who is given notice of the termination of their employment before the conclusion of the trial period is unable to bring a personal grievance or other legal proceedings in respect of the dismissal.

[19] In *Smith v Stokes Valley Pharmacy (2009) Limited*² the then Chief Judge made the following observation in relation to the interpretation of ss 67A and 67B of the Act:

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.³

[20] The above position was referred to in the Court's judgment in *Lewis v Immigration Guru Limited*⁴ with approval.⁵ In *Lewis* a trial period provision and a probationary provision were both included in the relevant individual employment agreement. The Court found there were inconsistencies between the two provisions, which created ambiguity rendering the trial period provision unable to be relied upon by the employer. This was said by the Court to be because there were unresolvable conflicts between the two provisions relating to differing notice periods and because by agreeing to also be bound by the probationary period clause the employer was

² [2010] NZEmpC 111

³ At para [48].

⁴ [2017] NZEmpC 141

⁵ At para [27].

required to show justifiable cause for dismissal and undertake a fair process in carrying out the dismissal.⁶

[21] This means that if Mr Camacho's employment was simultaneously subject to both a probation period and a trial period provision, any inconsistency between the two would likely create ambiguity rendering the trial period provision unenforceable.

[22] Mr Camacho has not claimed that there is any deficiency in the trial period provision itself, but said it cannot be relied upon because of the presence of an effective probationary period. North Beach's position was that the trial period provision was valid and effective.

Was the probationary in effect?

[23] In support of its submission that the trial period provision was valid and prevented Mr Camacho from being able to raise a personal grievance in respect of his dismissal, North Beach submitted that the probationary period in the employment agreement was not in effect.

[24] This submission was based on the fact the probationary period said at clause 4.1 "*The employer may in its sole discretion employ You on a probationary basis for the period set out in the First Schedule [...]*". North Beach said that it had never given notice to Mr Camacho of its intention to exercise the discretion to employ him pursuant to a probationary period. It said the automatically generated email accompanying the employment agreement referred to a trial period only, and not a probationary period.

[25] No evidence was provided to the Authority that North Beach had communicated to Mr Camacho that the probationary period was not intended to apply. Nor did it point to any other provisions of the employment agreement it said did not have any legal effect.

[26] As set out above, clauses 1.2 and 28 of the agreement said that the employment agreement constituted the entire agreement between the parties and that it superseded

⁶ At para [32]

any previous agreements or representations. The terms of the employment agreement were, by their own definition, contained solely within the agreement itself.

[27] This means the system generated email regarding the inclusion of a trial period provision should be given no weight in interpreting the employment agreement.

[28] As a general principle, parties to an agreement are entitled to presume that every clause in that agreement is intended to apply to the relationship, unless there is clear language in the agreement to the contrary. This logic applies to the probationary period, and I find there was no clear language excluding it from having effect.

[29] The reference in clause 4.1 of the probationary period clause to it being at the Employer's sole discretion does not displace the notion that it came into effect when the agreement was signed. Rather, the very presence of a probationary period provision in the employment means the words "*The employer may in its sole discretion employ You on a probationary basis for the period set out in the First Schedule [...]*" can be reasonably read as meaning the employer has exercised that discretion by including the clause.

[30] The probationary period in clause 4 was sufficiently certain so as to be binding on the parties upon the signing of the agreement. It was said to apply for the period "*as set out in the First Schedule*", which was recorded as being "*3 months*". The three months in question can be objectively understood to mean when Mr Camacho's employment commenced because that is when the terms of the agreement came into effect.

[31] I therefore find the probationary period was a valid part of the employment agreement between North Beach and Mr Camacho and that it applied from the commencement of his employment for a period of three months.

[32] North Beach also argued that the fact the provision in the agreement which said the employment relationship was to continue until terminated by either party in accordance with the agreement⁷ was subject only to the trial period clause and not the probationary clause showed the parties only intended for the trial period provision to apply. I consider this to be an unpersuasive argument because the clause in question did

⁷ Clause 2.3 of the agreement.

not exclude their being an effective probationary period, even if it only referred to the trial period provision.

[33] North Beach further argued that clause 3.5 of the agreement, which said “*No other term or condition of this Agreement shall derogate from this Trial Period provision*” means the trial period provision should be preserved. However this argument misses the point made by the Court in *Lewis*, which is that it is the inconsistency between the two provisions that renders reliance on the trial period untenable. Further, clause 4.4 of the probationary provision also states that it operates “*notwithstanding any other provision in this Agreement*” which means the purported primacy of the trial period provision claimed by North Beach is directly countered within the probationary period.

Is Mr Camacho prevented from bringing a personal grievance in respect of his dismissal?

[34] The presence of both a trial period provision and a probationary period, as drafted, created ambiguity within Mr Camacho’s employment agreement. Following the principles articulated by the Court in *Smith* and *Lewis*, the trial period provision must be interpreted strictly.

[35] The probationary period and the trial period created contemporaneously applicable but inconsistent rights and obligations for the parties. This includes both the differing notice periods and whether a fair process must be followed prior to summarily terminating employment.

[36] Applying *Lewis* I find that by agreeing to be bound by the probationary clause, the onus on North Beach to show justifiable cause for dismissal and undertake procedural requirements prior to and in carrying out the dismissal continued to exist.

[37] Accordingly, the trial period provision in Mr Camacho’s employment agreement is ineffective in that it does not prevent him from raising a personal grievance in respect of his dismissal.

Costs

[38] Costs are reserved.

Matthew Piper
Member of the Employment Relations Authority