

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 187  
5577999

BETWEEN                      SELINA LUMB-VAIPAPA  
   Applicant  
  
A N D                              B & Y TRUST CO 2015  
   LIMITED  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Peter Cahill, Advocate for the Applicant  
   Yvonne Zhang, Advocate for the Respondent  
  
Investigation Meeting:        27 November 2015 at Christchurch  
  
Submissions Received:        27 November 2015 on behalf of the Applicant  
   27 November 2015 on behalf of the Respondent  
  
Date of Determination:        30 November 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.        Although Ms Lumb-Vaipapa's employment with the respondent did not start until after she signed the employment agreement, the contractual 90 day trial period was otherwise not compliant with statutory requirements.**
- B.        Ms Lumb-Vaipapa was unjustifiably dismissed and is awarded remedies as set out in this determination.**
- C.        Costs are reserved.**

**Employment relationship problem**

[1] Ms Lumb-Vaipapa claims that she was unjustifiably dismissed from her employment and subjected to an unjustified disadvantage in her employment in the manner of that dismissal.

[2] Although the respondent did not lodge a statement in reply, it resisted the claims on the basis that Ms Lumb-Vaipapa was dismissed pursuant to a valid 90 day trial period pursuant to s 67A of the Employment Relations Act 2000 (the Act).

### **Background facts**

[3] The respondent owned and operated a bakery and café called Dough Boys at the time of the dismissal. Ms Lumb-Vaipapa commenced employment as a cook at Dough Boys with the previous owners on 1 January 2015. Ms Lumb-Vaipapa entered into an individual employment agreement with the respondent company which was signed and dated by the parties on 25 February 2015. This employment agreement contained a trial period clause in the following terms:

3. ***TRIAL PERIOD***

- 3.1 *A trial period will apply for a period of up to 90 calendar day's [sic] employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the Employee has not previously been employed by the Employer.*
- 3.2 *The trial period will commence on the day the employment agreement is signed by the Employee.*
- 3.3 *During the trial period the Employer may terminate the employment relationship, and the Employee may not pursue a personal grievance on the grounds of unjustified dismissal.*
- 3.4 *Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67A(5) of the Employment Relations Act 2000.*

[4] The employment agreement also provided, at clauses 16.1.1 and 16.1.2, as follows:

- 16.1.1 *The period of notice of termination as outlined in Schedule A shall be given in writing by either party irrespective of the reason for termination. Where employment is terminated without the required notice, equivalent wages shall be paid or forfeited as the case may be.*
- 16.1.2 *The provisions in 16.1.1 shall not prevent the Employer from summarily terminating the employment in case of serious misconduct or absence without reasonable cause or any other justifiable cause.*

[5] Schedule A provided that the notice of termination due in the 90 day trial period would be one day, and that it would be one week after successful completion of the trial period.

[6] The employment agreement also stated at clause 1.1 that it would commence on the day it was signed and would remain in force until either party terminated it.

[7] The respondent company took over the lease of the premises of Dough Boys with effect from 1 March 2015. This is the date when they say they took over the running of the business and when they became Ms Lumb-Vaipapa's employer.

[8] On 22 May 2015, Ms Lumb-Vaipapa was given a letter by Mr Yu Xi Zhang, one of the shareholders of the respondent business, stating that she was dismissed. Ms Lumb-Vaipapa did not keep a copy of the letter but Ms Zhang showed a copy of it to the Authority at its investigation meeting. It stated:

*20 May 2015*

*Dear Selina*

*We are regretted to advise you that your employment is terminated because you didn't provide efficient and courteous service to your customers. You also broke things whenever you were angry. We wish you a bright future.*

*Best regards*

*Yours sincerely*

*Baozhe Xu*

*Director*

*B&Y Trust Co. 2015 Ltd*

[9] Ms Lumb-Vaipapa says that this was not the text of the letter she was given but she agreed that the gist was the same. Ms Lumb-Vaipapa says that there were no disciplinary processes followed and that she was unaware of any employment problems.

[10] The same day Ms Lumb-Vaipapa sent an email to the owner of the business, Mr Bob Xu, and his wife, Yvonne Zhang, in which she raised a personal grievance, set out what she required to resolve it, and offering to meet or go to mediation. Mr Xu and Ms Zhang sent Ms Lumb-Vaipapa an email on 25 May 2015, which stated as follows:

*Dear Selina,*

*Thank you for your letter. We didn't want to upset you. But you broke the blender for the iced coffee by putting a metal spoon into it then started. It couldn't be fixed then we bought a new one to replace it. We also heard that you bang anything whenever you were not*

*happy. We thought you would improve but recently you broke the icecream machine when you were not happy. We had to get it repaired. All tools and equipment have life as human do. We use them to create their value. They should be respected and taken care of as well.*

*We will pay off your holiday pay and the last shifts you worked.*

*For the mediation, we don't have to go because you hadn't passed the 90 day period with our company.*

*We wouldn't say anything about you to anyone else. Bygones are bygones. We wish you have a good future.*

*Best regards,*

*Bob & Yvonne*

[11] A personal grievance was also raised by Mr Cahill on behalf of Ms Lumb-Vaipapa by way of a letter on 1 June 2015, which included the following statement:

*Selina commenced work on 1st January 2015 with the previous owners of Dough Boys as a cook. On 2nd February you took over as the new owner of the business. Sometime between that date and 16 February 2015, you provided Selina with a new employment agreement.*

[12] Mr Xu responded to Mr Cahill on 2 June in which he explained the arrangements that had taken place between him and the previous owner and the respondent company's involvement in the Dough Boys business until the employment agreement was signed. His explanation included the following:

*From your letter, we think that the staff misunderstood what was happening in Feb 2015. The Vendor had a family problem and we were asked to run the business for the Vendor before we took over the shop. Even we were there, the business was not ours before we got the lease agreement and pay for the business. Do you agree???? Nobody can get a business without paying for it. Before we started, we handed out the employment agreement to staff. Normally, the staff have to sign the employment agreement before he/she starts to work for the employer. Selina signed the agreement and staff rules on the 25 Feb 2015. This means that she accepted the job we offered to her. Then she became our employee from 1st March 2015 on the settlement date. Therefore, she was in the 90 day period when the employment agreement was terminated.*

[13] On 26 June 2015, the employment law firm, Goldstein Ryder, wrote to Mr Cahill on behalf of the respondent referring to the 90 day trial period as justification for Ms Lumb-Vaipapa's dismissal. In the letter, Goldstein Ryder set out some further information as follows:

*On 23 February 2015 B&Y Trust Co Limited 2015 entered in to a sale and purchase agreement with Jiang Yan Limited for the purchase of the Dough Boys Bakery & Café. At the date of signing, only partial payment of the purchase price had been made for the Dough Boys Bakery & Café. To pay off some of the purchase price, the*

*purchaser (my client) agreed to pay the staff wages on behalf of the vendor until the settlement date. My client was not involved in any other aspects of running the business until the settlement date on 1 March 2015. My client took over the business and became the employer on 1 March 2015. All existing staff were aware of these arrangements.*

*In anticipation of the purchase of the business, my client offered Ms Lumb-Vaipapa employment in February 2015 and provided her with an individual employment agreement. Ms Lumb-Vaipapa signed and dated the agreement on 25 February 2015. Your client commenced employment with my client on 1 March 2015. Therefore the trial period was entered into well before employment commenced.*

*On 29 April 2015 B&Y Trust Co Limited 2015 formally entered into a Deed of Lease with DIA Properties Limited. The lease was for the premises of the landlord's (DIA Properties) building located at [address omitted] comprising shop and storage areas. The commencement date of the lease was 1 March 2015. This is further evidence of the date my client took over the business.*

[14] The Authority saw a copy of the deed of lease which, indeed, showed that the commencement date of the lease was 1 March 2015.

[15] The Authority also saw a copy of a one page agreement dated 30 January 2015 in the following terms:

*Additional conditions for the sales and purchase agreement between Jiang Yan Ltd (Vendor) and the B&Y Trust Co 2015 Ltd (Purchaser)*

*Because of the family problem, the vendor asked the purchaser to run the Dough Boys Bakery & Café on his/her behalf from the 2nd of February 2015 until the lawyers finish the paper work of the business transaction of the Bakery.*

*The Vendor agrees to leave all the stock to the purchaser and the purchaser agrees to pay staff wages on behalf of the vendor until the settlement date.*

*The settlement date will be negotiated between the two parties after the lawyers finish the paper work.*

*Signature (Vendor):  
Date: 30/1/2015*

*Signature (purchaser):  
Date: 30 Jan 2015.*

[16] The Authority saw another agreement between Jiang Yan Limited and B&Y Trust Co 2015 Limited which stated the following:

*Vendor has received the payment for the sales of the Dough Boys Bakery & Café. Because of the financial agreement between these*

*two parties, the Vendor pays the rent until the end of February and the Purchaser pays the staff wages on behalf of the vendor. The settlement date will be the 1st March 2015.*

[17] That agreement was signed by the vendor and the respondent on 23 February 2015.

[18] It is the evidence of Ms Lumb-Vaipapa that, on 2 February 2015, she was told by the manager of the time, Ross Baldwin, that that was his last day because his services were no longer required as the business was being sold. Mr Baldwin told her that the new owners were coming in that day to meet the staff at 4.30pm.

[19] Ms Lumb-Vaipapa says that, at 4.30pm that day, Mr Zhang and Ms Zhang from the respondent company, and the previous owner (known as Bob) met with the staff and Bob told them that Dough Boys had been sold to the respondent company. The previous owner informed them that he would continue to pay the wages until 15 February 2015, after which B&Y Trust would take over the wages. He also said that, from 2 February, the new owners would be in charge and a staff member (Liz Snook) would be the new manager. Ms Lumb-Vaipapa said that, after a short period, Ms Snook left, and Mr Zhang started to manage the business by telling the staff what to do and by preparing rosters.

[20] The respondent denies that they took over the business prior to the settlement date on 1 March. They say that, during the first two weeks of February, Mr Zhang attended the business every day to observe it, to decide whether he and his brother in law, Mr Xu, would buy it or not. The respondent company was not incorporated until 9 February 2015, and the lease not commenced until 1 March. Mr and Ms Zhang did not know what Mr Baldwin had told Ms Lumb-Vaipapa but he was wrong to say that the respondent had taken over the business from 2 February. They also deny that the previous owner, Bob, had announced that Mr Xu and Mr Zhang had purchased the business from that date.

[21] Ms Zhang said that the reason they started to pay the wages of the staff on 16 February was because they could not afford to pay the entirety of the purchase price. The payment for the wages was to reduce that price therefore. She said that the income from the business went to the old company up to 1 March, though.

[22] Mr Zhang admitted that he prepared the rosters after Ms Snook left, and that he made coffees and helped out.

## The issues

[23] The key issue to determine is whether the trial period clause of the individual employment agreement entered into by Ms Lumb-Vaipapa was valid and binding on her. This will require an analysis of two issues:

- a. Whether the trial period contained in the individual employment agreement was compliant with statutory requirements; and, if so,
- b. Whether Ms Lumb-Vaipapa's dismissal was compliant with the terms of the trial period, and the other terms of the individual employment agreement.

[24] The first issue requires an examination of two sub issues:

- a. Whether the trial period wording in the employment agreement was compliant with the requirements of s 67A; and
- b. Whether Ms Lumb-Vaipapa was employed by the respondent company prior to entering into the individual employment agreement.

[25] Having determined those issues, if the trial period was not valid, or if Ms Lumb-Vaipapa's dismissal was not in accordance with the trial period, the Authority must then go on to consider whether the dismissal was justified pursuant to s 103A of the Act. If it was not, it must then consider:

- a. What remedies may be due to Ms Lumb-Vaipapa; and
- b. Whether any reduction should be made to those remedies by way of her contribution to her personal grievance.

## The law

[26] Trial periods are governed by ss 67A and 67B of the Act. These sections provide as follows:

***67A When employment agreement may contain provision for trial period for 90 days or less***

*(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*

- (2) **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
- (b) during that period the employer may dismiss the employee; and
- (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) **Employee** means an employee who has not been previously employed by the employer.
- (4) [Repealed]
- (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).

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

- (1) This section applies if an 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.
- (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).
- (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
- (5) Subsection (4) applies subject to the following provisions:
- (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
- (b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

**Was the trial period wording in the employment agreement compliant with the requirements of s 67A?**

[27] His Honour Chief Judge Colgan stated, in *Smith v. Stokes Valley Pharmacy (2009) Ltd*<sup>1</sup>, the following, at [48]:

*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.*

[28] Section 157(1) of the Act provides that the Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. However, this general rule is tempered by the Employment Court's requirement of strict interpretation in respect of ss 67A and 67B.

[29] Whilst His Honour Chief Judge Colgan was expressing that view in relation to the interpretation of the statutory provisions in ss 67A and 67B, the corollary is that the same strict application of this legislation must apply in examining whether the contractual trial period relied upon by the respondent, and whether its actions in reliance upon the trial period, were compliant with the statutory requirements.

[30] Section 67A of the Act requires that the trial provision:

- (a) be in writing; and
- (b) be in an employment agreement; and
- (c) states, or is to the effect that:
  - i. it is for a specified period (not exceeding 90 days), starting from the beginning of the employee's employment; and
  - ii. the employee is to serve a trial period; and

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<sup>1</sup> [2010] NZEmpC 111

- iii. during that period the employer may dismiss the employee; and
- iv. If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[31] Applying the strict interpretation and application principle, it is my view that the trial period provision at clause 3.1 of the individual employment agreement does not satisfy s 67A(2)(a) of the Act. This is because this statutory provision makes clear that the period of the trial period must be **specified**. The verb *specify* is defined in the New Zealand Oxford Dictionary<sup>2</sup> inter alia as:

*To name or mention expressly*

[32] This means that the actual number of days of the trial period must be named expressly. Clause 3.1 of the individual employment agreement does not specify the period, but states that the trial period will apply for a period *of up to 90 calendar days employment*. In other words, the employee does not know what the actual period of the trial period is. All she knows is that it will not exceed 90 days. Therefore, the period of the trial period is not specified; only the maximum length of it is specified.

[33] Whilst Mr Cahill said in his submissions that he regarded the wording of the trial period as being compliant with the terms of the Act, that concession does not permit me to ignore the statutory requirement. For the reasons I have stated above, I must respectfully disagree with Mr Cahill.

[34] It is my finding that this clause does not comply with the requirements of s 67A(2)(a) of the Act, and so Ms Lumb-Vaipapa's dismissal in reliance upon it is not protected under s 67B of the Act.

[35] Having made that finding, I am not required to enquire further into the validity of the clause, and its operation. However, as the main focus of the investigation meeting was on whether Ms Lumb-Vaipapa was employed prior to the employment agreement being signed by her, I shall examine that question anyway. The facts of the case are unusual, and it is helpful for the Authority to analyse those facts against the requirements of the law.

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<sup>2</sup> Editors Tony Deverson and Graeme Kennedy, Oxford University Press, 2005

**Was Ms Lumb-Vaipapa employed by the respondent company prior to entering into the individual employment agreement?**

[36] This is an important question in relation to the validity of a trial period because it has been established by the Employment Court that an employment agreement containing a trial period must be entered into before, and not after, work commences. In the case of *Blackmore v. Honick Properties Ltd*<sup>3</sup>, the Employment Court stated, at [71], the following:

*It might be said that the parties' individual employment agreement was executed only about an hour or so after Mr Blackmore began work for HPL so that he could not really be said to have worked for the company previously when the agreement was entered into. However, certainty and predictability for employers wishing to use trial periods are important. This will ensue [sic] if they are careful that such agreements are entered into before, and not after (even shortly after), work commences.*

[37] A similar principle was expounded by the Employment Court in *Stokes Valley Pharmacy (2009) Ltd* where Ms Smith had started work for the new employer the day before she entered into the new employer's employment agreement.

[38] This enquiry as to whether Ms Lumb-Vaipapa was an employee of the respondent prior to her entering into the employment agreement can be assisted by reference to the definition of *employer* in s 5 of the Act and the definition of *employee* in s 6(1) to (3) of the Act.

[39] *Employer* is defined as follows:

*...a person employing any employee or employees; and includes a person engaging or employing a homemaker.*

[40] *Employee* is defined in s 6(1) to (3), as follows (omitting irrelevant provisions):

**6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, **employee**—
- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes—
    - (i) a homemaker; or
    - (ii) a person intending to work;

<sup>3</sup> [2011] NZEmpC 152, [2011] ERNZ 445

...

*(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2), the court or the Authority—*  
*(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*  
*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[41] In deciding whether Ms Lumb-Vaipapa was an employee of the respondent prior to 25 February 2015, it is helpful to apply broadly the same approach as the Employment Court and the Authority take when deciding whether a person is an employee or an independent contractor, modified to take into account these particular facts. This means in particular that it is useful to examine the issue of control of Ms Lumb-Vaipapa's daily activities by the respondent before 25 February.

[42] At first sight, it does appear that Ms Lumb-Vaipapa was subject to the control of Mr Zhang, at least after Ms Snook left. He certainly decided what hours she (and other staff) would work, and these hours were different to what she used to work under the previous owner. The respondent company also paid Ms Lumb-Vaipapa's wages from 16 February.

[43] In light of these factors, and the statements that Ms Lumb-Vaipapa says were made by Mr Baldwin and the previous owner about the respondent company taking over from 2 February, it is clear why Ms Lumb-Vaipapa believes that the respondent company was her employer from that date. However, the inquiry into whether the respondent was her employer prior to 25 February requires a broad examination of the situation, and is not determined solely on the basis of Ms Lumb-Vaipapa's subjective understanding.

[44] One issue to examine is how and when Ms Lumb-Vaipapa's employment with the previous owner of Dough Boys ended. It is possible for an employee to be employed by joint employers, but this situation requires that there be a sufficient degree of a relationship between the legal entities. In judging that relationship, the Court will look for the element of common control<sup>4</sup>. Applying this test, the previous owner of the business and the respondent were not joint employers of Ms Lumb-Vaipapa.

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<sup>4</sup> See paragraph [56] of *Orakei Group (2007) Ltd v Doherty (No 1)* [2008] ERNZ 345

[45] One can infer from Ms Lumb-Vaipapa's evidence that she understood her employment with the previous owner to have ended on 2 February. However, no evidence was heard from the previous owner, and in the absence of any written communication from them about the employment ceasing, one cannot take this line of inquiry any further.

[46] Persuasive evidence, however, relates to the following:

- a. The settlement date of the purchase of the business was 1 March 2015. This is evidenced by the short agreement dated 23 February 2015, and the commencement date stated on the deed of lease.
- b. Even though the respondent was paying the wages of the staff after 15 February, the previous owner of the business retained the profits until 1 March. This evidence from Ms Zhang was not challenged by Ms Lumb-Vaipapa.
- c. The previous owner paid the wages up to 15 February. This would not have been the case if the respondent had purchased the business on 2 February, or become the employer of the staff from that date.

[47] Having established to my satisfaction that the settlement date was 1 March 2015, I do not find it likely that the respondent would have entered into employment with the staff before that date. Whilst they paid the wages after 15 February, this was part of the commercial arrangement between the respondent company and the previous owner prior to the settlement date.

[48] Mr Zhang's involvement in the business up to 25 February was partially as an observer, and partially as an agent of the previous owner, who had to step back from the running of the business while his son was ill. This was the evidence of Ms Zhang, which is supported by the wording of the first short agreement dated 30 January 2015.

[49] In conclusion, I find that the arrangement between Ms Lumb-Vaipapa and the respondent before 25 February was not one of employment but that she remained an employee of the previous owner until either 1 March, when it ceased to own the business, or 25 February when she became employed under the terms of the respondent. In any event, she was not employed by the respondent prior to signing the agreement.

**Was Ms Lumb-Vaipapa's dismissal in compliance with the terms of the trial period, and the individual employment agreement?**

[50] Again, having found that the terms of the trial period clause was not compliant with the requirements of the Act, I do not need to consider this issue. However, having heard evidence on the matter and being in a position to reach a conclusion, I shall address the question briefly.

*Was the dismissal within the 90 day period?*

[51] If the trial period clause had been compliant with the Act, and if the clause had stated that the trial period was for a period of 90 days, the answer to this question would be yes, as the dismissal was effected on the 87<sup>th</sup> day after signature of the employment agreement.

*Was the dismissal effected in accordance with the notice requirements of the employment agreement?*

[52] Ms Lumb-Vaipapa and Mr Zhang essentially agreed in evidence that she was not given any notice of the dismissal, and that she left work on the day she was dismissed. Mr Zhang said that the intention had been that the dismissal letter was going to be given to Ms Lumb-Vaipapa the previous day, but that the employee who was tasked with doing so was too afraid to. Ms Lumb-Vaipapa also stated in evidence that she was not paid in lieu of notice, as she was only paid up to the 22 May, the date of the dismissal. This evidence was not contradicted by the respondent.

[53] His Honour Chief Judge Colgan examined the giving of notice when a trial period applies in *Stokes Valley Pharmacy*, at paragraph [61]. He stated as follows:

*Because a termination of which notice must be given may lawfully occur at any point over a span of time including during, at the moment of conclusion and after the end of a trial provision, "notice" must be more than simply advice of dismissal. Rather, the subsection contemplates that it will be advice of when, in future, the dismissal will take effect. That accords with the long established common law requirements of dismissal on notice which can be either express or, if not, "reasonable notice". It is necessary, however, that the giving of the notice of termination of the employment agreement must be before the end of the trial period. It is significant, also, that the notice is of termination of the employment agreement (containing the trial provision) and not of employment although, in practice, the two will often be the same. It is possible, however, to contemplate that there may be matters in the*

*employment agreement that would survive a termination of the employment. Section 67B(1), however, requires that it be the employment agreement that is terminated.*

[54] His Honour Chief Judge Colgan also addressed the interplay between the requirements of the statutory provisions at ss 67A and 67B on the one hand, and the contents of the employment agreement on the other, in paragraphs [106] and [107] of *Stokes Valley Pharmacy*:

*[106] ...Sections 67A and 67B are a statutory permission for certain provisions to be included in employment agreements within specified parameters but the sections do not purport to override the parties' entitlement otherwise in law to conclude the terms of their own bargain. What s 67B prevents is not contractual, but is otherwise the statutory entitlement of employees to challenge a dismissal by personal grievance.*

*[107] The sections are intended to complement parties' agreements and, indeed, require, for their effective operation, those agreements to address certain issues. I conclude that one of those issues is the requirement of notice and it would be irrational to interpret the statutory reference to notice as being other than the contractual notice in any particular case. Nor can the statutory requirement for notice be interpreted as its antithesis, no notice, which is the essence of summary dismissal. That, too, is consistent with the general nature of the trial provision sections. Although there may be instances of misconduct or serious misconduct during a trial period for which an employer may dismiss an employee summarily and justifiably, that is a long established feature of employment law and is not addressed by this legislation. Rather, trial provisions or trial periods conclude for reasons of unsatisfactory work performance or incompatibility or reasons of that sort. These are ones that the law has traditionally treated as giving grounds for dismissal on notice and not summarily.*

[55] I interpret these passages as being authority for the proposition that parties may agree in their employment agreements that, where the terms of the employment agreement are clear, payment in lieu of notice may be paid without the employer falling foul of the requirements of s 67B of the Act.

[56] This question arises because of the wording of s 67B(1) which refers to the employer terminating the employment agreement by giving the employee notice of the termination before the end of the trial period. It is my analysis that, paying in lieu of notice pursuant to a clause in a binding employment agreement is not at odds with Chief Judge Colgan's finding that the giving of the notice is notice of termination of the employment agreement and not of the employment itself. A pay in lieu of notice clause provides a mechanism for the employment agreement to terminate; namely, on

the day of the notice provided that payment in lieu of notice is given. This is not the same as summary dismissal, where no payment in lieu of notice would be due.

[57] Therefore, it is my interpretation that s 67B(1) does not override the bargain entered into by the parties.

[58] Applying this to the facts in this case, Ms Lumb-Vaipapa was entitled to one day's notice under the terms of the trial period (had it been valid). Alternatively, she could have been lawfully dismissed with pay in lieu of that day's notice. However, she neither received a day's notice nor payment in lieu of it. I therefore conclude that, had the trial period clause been valid, the dismissal would not have been in accordance with it in any event.

### **Conclusion**

[59] I conclude that the trial period was not valid and that the respondent cannot rely upon it to justify the dismissal. I must now examine whether the dismissal was justified by reason of the normal test of justification set out in s 103A of the Act.

[60] Section 103A of the Act provides as follows:

***Section 103A Test of justification***

*(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

*(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

*(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*  
*(a) minor; and*  
*(b) did not result in the employee being treated unfairly.*

[61] The reason given by the respondent for Ms Lumb-Vaipapa's dismissal is that she broke two pieces of equipment and used to bang things when she got angry. Ms Lumb-Vaipapa said that she did accidentally start a blender when there was a spoon in it. However, whilst this bent the spoon it did not stop the blender from working. She says that the blender was already cracked, that it was still working when she was dismissed, and even recently, when she had visited Dough Boys since her dismissal.

[62] Ms Lumb-Vaipapa also said that she was working one Sunday when the ice cream maker had stopped working, but that it was fixed by one of the staff members the next day. She was not responsible for it having stopped operating she said. Ms Lumb-Vaipapa also vehemently denied banging things at work when she was unhappy.

[63] Mr Zhang said in evidence that Ms Lumb-Vaipapa used to get angry and break plates, that they had to replace the blender and that they had to pay to get the ice cream maker repaired.

[64] On balance, I prefer Ms Lumb-Vaipapa's evidence as she gave a detailed account of both incidents relating to the blender and ice cream maker, whereas Mr Zhang's evidence was much vaguer. However, even if I were to accept Mr Zhang's evidence, on its own evidence the respondent did not give Ms Lumb-Vaipapa any warning about these issues possibly leading to her dismissal. All they said to her was that she had to be careful.

[65] Section 67B makes clear that an employee with a trial period in their agreement is to be treated no differently from an employee whose agreement contains no trial provision, or one whose trial period has ceased to effect. A trial period also does not excuse the employer from complying with all aspects of the employment agreement, save where they relate to the raising of a personal grievance, or replicate the provisions of s 4(1)(c) and 120 of the Act.

[66] Clause 4.1 of the employment agreement between the respondent and Ms Lumb-Vaipapa obliged the respondent to:

- a. Act as a good employer in all dealings with the employee; and
- b. Deal with the employee and any representative of the employee in good faith in all aspects of the employment relationship.

[67] In failing to advise Ms Lumb-Vaipapa that she may face dismissal for breaking the equipment, the respondent was not acting towards her in good faith. This was a duty that the respondent had even if the trial period clause had been valid.

[68] The Authority also saw a copy of the respondent Staff Work Rules which had been issued to Ms Lumb-Vaipapa. Whilst it is stated not to be a contract, it does set out what the employee can expect from the employer. Part 13 of this document stated the following:

*Manager and Employees are strongly encouraged to discuss job performance and goals on an informal day-to-day basis. It is vital that staffs [sic] are given constant feedback and are recognized for positive and proactive performance. If necessary, staff should be given guidelines to suggest improvements. Your supervisor will keep you updated regularly to avoid any situations that may arise from a lack of performance.*

[69] This document created an expectation that any dissatisfaction with Ms Lumb-Vaipapa's performance would be addressed with her. She said, which I accept, that no one told her of any concerns about her allegedly banging things when she got angry. Again, this obligation upon the respondent, which arose out of the duty of good faith, was present even under a valid trial period.

[70] However, given that the trial period was not valid, prior to dismissal the respondent was obliged to comply with the steps set out in s 4(1A)(c) and 103A. It plainly did not. Before dismissing her, the respondent did not raise its concerns with Ms Lumb-Vaipapa, it did not give her a reasonable opportunity to respond to its concerns and it did not consider any explanation in relation to the allegations. It also did not afford her the right of a support person prior to dismissal.

[71] Whilst the respondent will say that it genuinely believed that it was protected by the trial period, and that it did not fail to follow a fair process deliberately, which I accept, the consequences of the respondent's mistake in drafting a trial period that was not compliant cannot be borne by Ms Lumb-Vaipapa. She had a legitimate expectation that the terms of her employment agreement would be compliant with the law.

[72] In summary, I find that Ms Lumb-Vaipapa's dismissal was in breach of the requirements of the Act and that it was both procedurally and substantively unjustified.

## **Remedies**

[73] Section 123(1) of the Act provides:

### ***123 Remedies***

*(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

*(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*

*(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*

*(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

*(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*

*(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

*(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:*

[74] Section 128 of the Act provides:

### ***128 Reimbursement***

*(1) This section applies where the Authority or the court determines, in respect of any employee,—*

*(a) that the employee has a personal grievance; and*

*(b) that the employee has lost remuneration as a result of the personal grievance.*

*(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

*(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[75] Ms Lumb-Vaipapa earned \$16 an hour with the respondent. She says that she found a new job with Z Energy one week after her dismissal, but that she was not paid for the first week of that employment (as she was apparently training) and that when she did start earning, she was on minimum wage. She stayed with Z Energy for two months.

[76] The Authority saw Ms Lumb-Vaipapa's payslips for the period 16 February 2015 to 24 May 2015. She said in evidence that they were *fake*, as they had not been issued at the time of her employment, but in bulk to her counsel after her dismissal, and because they purported to show PAYE and Student Loan deducted but that the Inland Revenue had no records of the respondent having paid any tax for her.

[77] Ms Zhang says that tax was paid but that the Inland Revenue Department failed to account for their payments. This is perfectly possible, and I understand that Ms Zhang and Mr Cahill have been trying to resolve this issue of tax.

[78] Despite Ms Lumb-Vaipapa saying that the records are fake, she could not say they were inaccurate in terms of the hours they state she worked and the rate of pay. They are the only records that the Authority has seen and so I base the calculation of Ms Lumb-Vaipapa's loss on these payslips.

[79] Over a period of 14 weeks, Ms Lumb-Vaipapa was paid an average weekly gross of \$683.95. This is what she is entitled to in respect of her week of unemployment. She is not entitled to any reimbursement in respect of the second week of no pay, as she was employed by then by Z Energy. As Ms Lumb-Vaipapa was paid less than \$16 an hour by Z Energy, I would have considered awarding her a sum in respect of her continuing loss during the period of her employment there, which was two months. However, Ms Lumb-Vaipapa gave no details of what her total earnings at Z Energy were, and so I am unable to calculate her total continuing loss during that period.

[80] In respect of Ms Lumb-Vaipapa's humiliation, loss of dignity and injury to feelings, I accept that she did suffer a moderate level of such effects as a result of her dismissal. She said that it *broke her* and that *it was horrible*. She said that it was *one of the worst experiences of her life*, as she had trusted the respondent. It took her a while to get over the effects she said, even after she had started work at Z Energy. She said also that she had loved her job at Dough Boys, and that she had hated the job

at Z Energy. She had no choice, however, but to take the job at Z Energy because she was in urgent need of income. All of this evidence is credible (and, indeed, Ms Lumb-Vaipapa became distressed at recounting it) and it was not challenged by the respondent.

[81] The Employment Court judgement in *Hall v Dionex*, [2015] NZEmpC 29, assessed compensation awards as having stagnated over time. With this in mind, I assess an appropriate amount of compensation in this case for moderate levels of humiliation, loss of dignity and injury to feelings at \$12,000.

[82] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s 124 of the Act).

[83] I have already found that I prefer Ms Lumb-Vaipapa's evidence in respect of the damage to the equipment and the allegation of banging things when she got angry. On balance, I do not find that there is any cogent evidence that Ms Lumb-Vaipapa contributed to the situation that gave rise to her personal grievance. Accordingly, I decline to reduce the awards.

### *Recommendation*

[84] It is a common mistake of employers to believe that a trial period clause in an employment agreement is an unassailable defence against unjustified dismissal claims. However, the law relating to trial periods is complex and easy to get wrong, as this case illustrates.

[85] I recommend that the respondent reviews its trial period clause, with the benefit of specialist legal advice if necessary, and take steps to ensure that, notwithstanding the trial period, the respondent complies with the other terms of its employment agreement and work rules.

### **Orders**

[86] I order the respondent to pay to Ms Lumb-Vaipapa:

- a. The gross sum of \$683.95 in terms of loss of wages; and
- b. The sum of \$12,000 pursuant to s 123(1)(c)(i) of the Act.

**Costs**

[87] I reserve costs. The parties are to attempt to agree how costs are to be dealt with between them, but if they are unable to do so within 21 days of the date of this determination, any party seeking costs may serve and lodge a memorandum within a further 28 days<sup>5</sup> and any reply may be served and lodged within a further 14 days.

David Appleton  
Member of the Employment Relations Authority

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<sup>5</sup> This period takes into account the Christmas and New Year holiday period.