

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 163  
3046012

BETWEEN PHIA VENTER  
Applicant

AND ACCOUNTING  
MANAGEMENT LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Danny Gelb for Applicant  
Lawrence Ponniah for Respondent

Investigation Meeting: 20 March 2019

Submissions Received: 20 March 2019

Oral Determination: 20 March 2019

Record of Oral  
Determination: 20 March 2019

---

**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

---

- A. The Authority has no jurisdiction to investigate and determine Ms Venter's claim for unjustified dismissal.**
- B. Accounting Management Limited is ordered to reimburse Ms Venter the sum of \$89.19 plus interest under s 131 of the Act within 14 days of the date of this determination.**
- C. Costs are reserved.**

## **Employment relationship problem**

[1] Ms Venter worked for Accounting Management Limited (AML) from 2 July 2018 until her dismissal on 14 August 2018 as a Senior BAS Accountant. AML is a small accounting practice employing two senior accountants together with Mr Stanton, the sole director and shareholder, acting as the principle.

[2] Ms Venter attended two interviews with Mr Stanton in June 2018 which had been arranged through SCI Recruitment. An offer of employment setting out the key terms of proposed salary, provision of a car park and payment of Ms Venter's annual Chartered Accountants Australia and New Zealand (CAANZ) membership was advised to Ms Venter by telephone and then confirmed in writing on 15 June 2018.

[3] The email confirming the offer of employment stated that the salary, carpark and membership fees were the "...main..." terms and that the "...full employment agreement..." would be sent the following Tuesday or Wednesday.

[4] As promised, on Tuesday 19 June Ms Venter was provided with the full terms of employment by way of a proposed individual employment agreement. Ms Venter signed the employment agreement on 21 June. In addition to the key terms advised to Ms Venter on 15 June the proposed employment agreement provided for a start date of 2 July and specified the hours of work including that Ms Venter was required to work five days of the week, Monday to Friday inclusive with start and finish times of 9 am and 5 pm. The proposed employment agreement also provided for Ms Venter's employment to be subject to a trial period of 90 days.

[5] Ms Venter was dismissed with two weeks' notice in reliance on the 90 day trial period on 14 August 2018. Ms Venter challenges her dismissal which she says was unjustified and seeks remedies. Ms Venter also claims reimbursement of her annual Chartered Accountants Australia and New Zealand (CAANZ) membership fees.

[6] AML says s 67B of the Act bars Ms Venter from pursuing a personal grievance for unjustified dismissal.

## **Issues**

[7] In order to resolve Ms Venter's employment relationship problems I must determine the following questions:

- a) Is Ms Venter barred from taking a personal grievance for unjustified dismissal?
- b) If the answer to a) is no, was Ms Venter unjustifiably dismissed and if so what if any remedies should be awarded?
- c) Is Ms Venter entitled to reimbursement of her CAANZ membership fee?

[8] 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 as a result. It has not recorded all evidence and submissions received.

## **90 day trial period**

[9] I am satisfied the 90 day trial period clause in the employment agreement meets the requirements of s 67A of the Act in that the written employment agreement provided for a trial period of 90 days or less. The trial provision was in writing and stated:

- a) That for a 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.

[10] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[11] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.<sup>1</sup>

[12] Ms Venter says that on 15 June when she accepted the offer of employment she became an employee because she was a “person intending to work” as defined in ss 6 and 5 of the Act. Section 67A(3) extends the meaning of employee to include an employee who has not been previously employed by the employer.

[13] At the investigation meeting Ms Venter was clear about the importance of having flexibility in her hours of work. This requirement was raised during the interviews with Mr Stanton. During the interview process Ms Venter told Mr Stanton that she would like to work from home. Mr Stanton told me, and I accept his evidence, that he had been insistent with Ms Venter that the role was a full time role and was office bound.

[14] After 3 or 4 days of starting work Ms Venter approached Mr Stanton and requested a change to her start and finish times. Instead of 9 to 5 Ms Venter asked to start at 6 am and finish at 2 pm. Mr Stanton refused this request. He explained his concerns that Ms Venter was a new employee, it was still dark at 6 am, and she would be required to open an office building on her own. Ms Venter told Mr Stanton that if she could not have the flexibility she wanted their business relationship could not go forward.

[15] Such was the importance of the hours of work to Ms Venter that she was prepared to walk away from the job if she could not achieve the flexibility she was seeking. Given that, it is surprising Ms Venter did not raise any questions at the time the offer was made on 15 June about the hours of work. I have concluded this is because she was aware the full terms of the offer would be set out in the written employment agreement which she received on 19 June.

[16] Accordingly, I have concluded Ms Venter accepted a conditional offer of employment on 15 June. The only agreed terms were the rate of pay, the provision of a carpark and payment of the CAANZ membership fee. Other key terms such as start date and hours of work were not part of that offer.

---

<sup>1</sup> Ibid at [82].

[17] Ms Venter entered into a binding employment agreement when she signed the written employment agreement on 21 June. The written agreement contained the full terms of employment including the main aspects contained in the email on 15 June relating to salary, carpark and payment of CAANZ membership fees.

[18] As explained by the Court in *Blackmore v Honick Properties Ltd* the words used in s 67A(2)(a) of the Act allow for the trial period to begin on the day work starts which may be some time after the employment agreement was entered into.<sup>2</sup>

[19] The purpose of the trial period is to allow the employee to be assessed while working. As noted by the Court in *Roach v Nazareth Care Charitable Trust Board* the reference to an employee having been “previously employed” is where there has already been an opportunity to assess the employee’s suitability for the work.<sup>3</sup>

[20] Following *Roach* I have concluded s 67A(3) does not apply because Ms Venter was not an employee who had been previously employed by AML when she signed the employment agreement on 21 June 2018. Notwithstanding that, the trial period provision did not take effect until Ms Venter started work on 2 July.

[21] Ms Venter was dismissed in accordance with the requirements of the employment agreement which provided for two weeks’ notice and payment in lieu of notice at AML’s discretion.

[22] I find AML complied with the employment agreement when it dismissed Ms Venter and is able to rely on s 67B(2) of the Act. The Authority does not have jurisdiction to investigate Ms Venter’s claim of unjustified dismissal.

### **Payment of CAANZ membership**

[23] In accordance with the promise made through the employment agreement to pay Ms Venter’s CAANZ membership Ms Venter received and paid an invoice for her membership on 5 July by credit card. This was despite her employment agreement stating that her CAANZ membership would be paid by AML directly to CAANZ.

---

<sup>2</sup> *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.

<sup>3</sup> *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123 at [45].

[24] Ms Venter seeks reimbursement of \$773 being the annual membership fee for the 2018/2019 subscription year. When Ms Venter started working for her new employer, one of the terms of employment included the payment of Ms Venter's CAANZ membership fee.

[25] I am satisfied Ms Venter should receive reimbursement of the portion of the membership fee attributable to her employment with AML. The balance is clearly recoverable from her new employer.

[26] Accounting Management Limited is ordered to reimburse Ms Venter the sum of \$89.19 under s 131 of the Act within 14 days of the date of this determination.

[27] Ms Venter seeks the payment of interest on the money to be reimbursed. In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion of interest on the amount awarded.<sup>4</sup>

[28] Within 14 days of the date of this determination AML must pay interest on the CAANZ membership fee of \$89.19 calculated from 14 August 2018 until payment. It should use the internet calculator found at the following link to calculate the interest payable: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

### **Costs**

[29] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so AML shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Venter shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

---

<sup>4</sup> Employment Relations Act 2000, Sch 2 cl 11.

[30] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority