

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 24  
3037734

BETWEEN	MICHELLE WALTERS Applicant
AND	RODNEY SURGICAL CENTRE LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Dean Organ, Advocate for the Applicant Alan Stuart, Counsel for the Respondent
Investigation Meeting:	15 January 2019
Determination:	21 January 2019

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Michelle Walters, claims that she was unjustifiably dismissed by the Respondent, Rodney Surgical Centre Limited (RSC), on 18 July 2018.

[2] RSC denies that Ms Walters was unjustifiably dismissed and claims that she was justifiably dismissed in accordance with a clause in her employment agreement which stated that her employment was subject to a 90 day trial period.

**Issue**

[3] This determination addresses the preliminary issue of whether or not Ms Walters was subject to a trial period provision which concluded at the end of the 90 day period from her commencement date with RSC.

## **Background**

[4] RSC is a private surgical centre located on the North Shore.

[5] During March 2018 Ms Walters responded to an advertisement placed by RSC on the Seek website for an Accounts and Contract Administrator. The job description for the position stated that essential skills required for the position included a diploma or degree in Business Administration, Bookkeeping, Accounting or Finance, and prior experience in accounts and/or book keeping.

[6] Ms Walters felt qualified to undertake the position as she held a Diploma in Book Keeping and had experience working in that area. She was selected for interview and met with Ms Marianne Davidson-Beker, Chief Executive Officer, on 4 April 2018.

[7] During the interview Ms Davidson-Beker said she had explained the role and the terms of the job offer, including the fact that there was a 90 day trial period.

[8] Ms Walters confirmed that a 90 trial period had been discussed and said that she was familiar with 90 day trial periods as she had had 90 day trial provisions in previous employment.

[9] Following the interview Ms Davidson-Beker said that she had sent a job offer letter to Ms Walters on 6 April 2018 together with a copy of an individual employment agreement (the Employment Agreement), and job description.

[10] The job offer letter sent by Ms Davidson-Beker and dated 5 April 2018 stated: "If you disagree with, do not understand or wish to clarify anything, please phone me to discuss any issue you wish to raise." It also stated:

You are entitled to seek independent advice and may discuss the employment agreement with a person of your choice. The independent advice you seek may be a family member, a lawyer or someone you trust.

### *The Employment Agreement*

[11] Ms Davidson-Beker said she had prepared the Employment Agreement by using as a template an employment agreement previously prepared for another employee and 'cut and pasting' in the appropriate sections. In so doing she had omitted to alter the details on Schedule 1 of the Employment Agreement.

[12] The Employment Agreement contained the following at clause 2.1 which was headed **‘Period of Assessment’**:

2.1 90 Day Trial Period

2.1.1 The parties agree that this employment is subject to a 90 Day Trial Period pursuant to sections 67A and B of the Employment Relations Act 2000 to assess and confirm the suitability of the Employee for the position.

2.1.2. The Employee acknowledges that he or she has not been previously employed by the Employer.

2.1.3. The 90 Day Trial Period shall start when the Employee commences work on the date specified in the Statement of Personal Terms in Schedule 1 of this agreement.

2.1.4 The Employee accepts that during this 90 Day Trial Period, the Employer may dismiss the employee by giving the period of notice as detailed in Schedule 1 of this agreement or at the Employer’s sole discretion payment in lieu of notice.

2.1.5 This notice must be given within the 90 Day Trial Period, even if the actual dismissal does not become effective until after the 90 Day Trial Period ends.

2.1.6 The employee accepts that in the event of dismissal, the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of this dismissal.

[13] Schedule 1 of the Employment Agreement omitted the Date of Physical Commencement of Work 2018 in the relevant section. It did state in the section for that purpose:

TRIAL PERIOD

Last day of 90 Day Trial Period: 5<sup>th</sup> June 2018

Notice period for termination during the 90 Day Trial Period: 1 week

[14] Ms Walters said she had received the offer letter and attachments on or about 6 April 2018. She had read the Employment Agreement but had not taken independent advice on its terms as she regarded it as a ‘standard employment agreement.

[15] Ms Walters had signed and dated the Employment Agreement on 9 April 2018 below the statement: “I have had an adequate opportunity to read, consider and take independent advice before agreeing to the terms of this employment agreement, which records all of the terms agreed between us.”

[16] Ms Walters said that she had not noticed during that time that the last day of the trial period which had been stated as 5 June 2018 on Schedule 1 of the Employment Agreement was not in accordance with 90 days from the commencement date of her employment.

[17] Ms Walters commenced employment in the position of Accounts and Contract Administrator on 26 April 2018.

*Job Change and Letter of Variation*

[18] During late May 2018 Ms Davidson-Beker said she had discussed with Ms Walters a change in her position from Accounts and Contract Administrator to Medical Administrator and Reception Cover.

[19] Ms Walters had agreed to the change provided that it was agreed she would maintain full-time employment but said there had been no discussion about the last day of the 90 trial period on that occasion.

[20] Ms Davidson-Beker said that as a result of the job change she had started to create a new job description for Ms Walters on 1 June 2018, and at that point noticed that the date stated on Schedule 1 of the Employment Agreement as the last day of the 90 day trial period was wrong.

[21] Shortly thereafter Ms Davidson-Beker's husband became ill and as a result she had been absent from work for much of June. It was not until she returned to work full-time at the end of June 2018 she had given a Letter of Variation to Ms Walters.

[22] The Letter of Variation stated:

This Variation to the Employment Agreement dated [April 6<sup>th</sup> 2018] is intended to reflect changes to the original terms and conditions which have been agreed to by the Employer and Employee.

**THE TERMS OF VARIATION**

**1. [job description change of title and some duties].**

**1.1 [Original job description was Accounts and Contract Administrator changed to Medical Administrator and Reception Cover].**

The employee agrees to the above changes.

The parties intend that in all other respects the terms and conditions of the employment agreement dated [April 6<sup>th</sup> 2018] reflects the agreement between the parties and that read together the original agreement and this variation set out the terms and conditions of employment. The 90 day trial clauses in your original contract dated April 6<sup>th</sup> 2018 are still based from your original start date of 26<sup>th</sup> April 2018 with the last day of the 90 day trial period set at 26<sup>th</sup> July 2018.

**Date of Commencement**

The parties intend that this variation will take effect from [1<sup>st</sup> June 2018].

The Employee acknowledges that she has been provided with a copy of the new job description and this agreement and been advised that she is entitled to take advice upon this proposed variation before signature.

[23] Ms Davidson-Beker said that when she had given the Letter of Variation to Ms Walters she had apologised for the length of time taken to provide her with the paperwork after the agreement to the job change at the end of May 2018.

[24] At that time she said she had explained the whole of the Letter of Variation to Ms Walters, including the incorrect expiry date for the trial period, and that she had changed this to the correct date for the expiry of the 90 day trial period to 26 July 2018 which was the date 90 days after 26 April 2018, the commencement date of Ms Walter's employment.

[25] Ms Walters said that Ms Davidson-Beker had given her the Letter of Variation on or about the beginning of July 2018 when she was sitting at her desk but there had been no discussion about it at that time.

[26] Ms Kerry Borich, Accounts Administrator, said her desk was adjacent to that of Ms Walters. She recalled Ms Davidson-Beker speaking to Ms Walters at her desk on or about the end of June 2018, and she had heard Ms Davidson-Beker giving a document to Ms Walters and saying that she had completed a new job description.

[27] Ms Borich had not listened to the whole of the conversation between Ms Davidson-Beker and Ms Walters, however towards the end of their conversation she had heard Ms Davidson-Beker telling Ms Walters to seek legal advice and to contact her if there was anything she (Ms Walters) wanted to discuss.

[28] Ms Walters said she had taken the Letter of Variation home with her when she left work and placed it on her bedside table where it remained until Ms Davidson-Beker had reminded her of it. She had returned it on 5 July 2018 when they both signed it.

[29] She had not taken advice on the Letter of Variation, and said she had: "taken it on face value". It was only subsequently that she had noticed the sentence relating to the date change to the 90 day trial period and considered that RSC had been trying to mislead her.

[30] Ms Davidson-Beker said there had been no intention to mislead Ms Walters; her intention had merely been to correct a mistake in the Employment Agreement.

**Was Ms Walters subject to a trial period provision which concluded at the end of the 90 day period from her commencement date with RSC?**

[31] The Employment Relations Act 2000 (the Act) makes provision for trial periods at ss 67A and 67B. The Act states:

**S 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 previously been employed by an employer

**S 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.

[32] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[33] This exclusion from the usual legal provisions as applies in the case of trial periods means that they have to be applied strictly. In *Smith v Stokes Valley Pharmacy (2009) Limited* Chief Judge Colgan stated<sup>1</sup>

Sections 6A and 67B remove longstanding employee protection and access to dispute resolution and 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 it is clearly articulated.

[34] The 90 day trial period provisions are no longer a new provision in employment law. That does not lessen the requirement that they are to be interpreted strictly.

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [48]

[35] RSC's position and evidence is that what occurred in drafting the Employment Agreement was that a mistake was made. It is submitted on her behalf that Ms Walters relied upon the mistake to the extent that after 5 June 2018 she believed she was a permanent employee and no longer subject to the provisions of a trial period.

[36] I observe that Ms Walters' written and oral evidence does not reflect this understanding; rather the evidence supports the fact that she had been informed that there was to be a 90 trial period at the interview. There is no evidence that a trial period of a specified date had been discussed between her and Ms Davidson-Beker during the job interview and following receipt of the Employment Agreement and of Schedule 1. Ms Walters did not query this understanding with Ms Davidson-Beker or avail herself of independent advice.

[37] Ms Walters' evidence was that a 90 day trial period was not a novel circumstance to her as she had been subjected to 90 day trial periods in previous employments.

[38] I therefore turn to consider what the parties intended at the time the contract between them was entered into. In *Firm PI 1 Ltd v Zurich Australian Insurance Limited* the Supreme Court stated in respect of contractual interpretation:<sup>2</sup>

It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background" it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[39] Whilst the legislation refers to a 90 day trial period in s 67A and 67B of the Act, s 67A (2) (a) states that a trial period pursuant to this section of the Act is not to exceed a period of 90 days. This means that a trial period does not have to be of a full 90 days duration, it can be for a lesser specified period.

[40] I find that a reasonable person on reading the Employment Agreement would conclude from clause 2.1 that there was to be a 90 day trial period pursuant to the Act, and that in accordance with Schedule 1 that trial period was to be for a period of less than 90 days terminating on 5 June 2018.

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<sup>2</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Limited* [2014] NZSC 147 at [60]

[41] However the reasonable person is to have all the background knowledge reasonably available to the parties at the time of the contract which would inform the intention of the parties.

[42] As observed Ms Walters was familiar with 90 day trial periods applying upon commencement of her employment and terminating 90 days following her start date. In reading and considering the terms of the Employment Agreement Ms Walters had seen no need to obtain independent advice on what she regarded as a 'standard employment agreement'. Nor had she queried the last day date of the trial period as stated to be 5 June 2018 with Ms Davidson-Beker despite the clear invitation to raise any issue she required clarifying in the letter of offer dated 6 April 2018 and the evidence that a 90 day trial had been discussed at the interview rather than some lesser period..

[43] I have considered whether or not Ms Walters may have considered 5 June 2018 as constituting a date 90 days from the commencement of her employment on 26 April 2018 but I conclude in light of her financial qualifications and experience that this is unlikely to have been the case.

[44] Ms Walters received the Letter of Variation at the end of June; this was after the expiry of the 5 June 2018 date in Schedule 1 of the Employment Agreement. The first part of the Letter of Variation contains the variation to the contractual terms; this is evident by the fact that it is entitled THE TERMS OF VARIATION and immediately beneath it is the statement: "The employee agrees to the above changes".

[45] The paragraph immediately beneath that statement refers to there being no other changes to the Employment Agreement and includes the statement:

The 90 day trial clauses in your original contract dated 6<sup>th</sup> April 2018 are still based from your original start date of 26<sup>th</sup> April 2018 with the last day of the 90 day trial period set at 26<sup>th</sup> July 2018.

[46] Whilst this is a clear statement in the body of the Letter of Variation there is no reference to the date of 5 June 2018 having been a mistake in Schedule 1 of the Employment Agreement.

[47] Whilst I accept the evidence of Ms Davidson-Beker that she spoke to Ms Walters about the variation to her Employment Agreement, and that, as supported by the evidence of Ms Borich, she advised Ms Walters to take advice on the Letter of Variation, there is no

evidence establishing that Ms Walters had been told that the date of 5 June 2018 had been a mistake which was being corrected at this point.

[48] Ms Walters acknowledges in the acknowledgment section of the Letter of Variation which she had signed and dated 5 July 2018 that she had: “been advised that she is entitled to take advice upon this proposed variation before signature” and she had the Letter of Variation for approximately a week before returning and signing it. That was ample time in which to take advice had she seen the need to do so.

[49] Ms Walters did not query the date variance in the Letter of Variation to that on Schedule 1 of the Employment Agreement which I consider may have been attributable to the fact that she was aware at the time the Employment Agreement was entered into that what was intended by the parties was that there would be a trial period which would be a period of 90 days from the date of the commencement of her employment.

[50] However this may also have been attributable to the fact that her attention had not been drawn to the alleged mistake, and had it been, she might have turned her mind to it and queried it on the basis that she believed the end date of the trial period had expired.

[51] In this case I accept that there may have been a genuine mistake made by Ms Davidson-Beker in compiling Schedule 1 of the Employment Agreement and that the intention of the parties at the time at which the contract was entered into was that there would be a trial period for 90 days commencing from the date Ms Walters commenced employment on 26 April 2018.

[52] However trial periods must be interpreted strictly as made clear in *Stokes* because of their being: “an exception to the general employee protective scheme of the Act”.<sup>3</sup>

[53] The Employment Agreement signed by the parties on 9 April 2018 stated that the last day of the 90 Trial Period would be 5<sup>th</sup> June 2018. Accordingly I find that Ms Walters was entitled to rely upon the written agreement between the parties as recorded in the Employment Agreement which both parties had signed on 9 April 2018 in accordance with which the last day of the trial period was to the 5 June 2018.

[54] I determine that Ms Walters was not subject to a trial period provision which concluded at the end of the 90 day period from her commencement date with RSC.

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<sup>3</sup> See above n 1

**Next Steps**

[55] The Authority will contact the parties shortly to arrange a case management call to progress the application.

**Costs**

[56] Costs are reserved pending the conclusion of the substantive matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**