**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2013] NZEmpC 152**
**CRC 10/13**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | THE SALAD BOWL LIMITED<br>Plaintiff |
| AND | AMBERLEIGH HOWE-THORNLEY<br>Defendant |

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| Hearing: | 11 July 2013 and by memoranda filed on 22 and 26 July 2013<br>(Heard at Nelson) |
| Appearances: | Bryan Forrest, advocate for plaintiff<br>Kevin Murray and Shayne Boyce, advocates for defendant |
| Judgment: | 16 August 2013 |

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**JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] This case raises questions about trial work periods, payment for these, access to statutory grievance and wage recovery procedures, and touches on broader but associated issues of experiential work, internships, and the like at the other end of a spectrum of such arrangements.

[2] The plaintiff proposed expanding its Nelson operations by adding a mobile cart outlet to its existing shop premises. It needed another employee for this operation. To this end, it placed an advertisement in a local newspaper containing minimal information about the nature of the position. It was for an "outgoing" person to work between 15 and 20 hours per week in the middle of the day. Persons interested were invited to leave their CV at the company's shop premises.

[3] The defendant dropped off her CV and was subsequently contacted by the owner of the company (Randi Westphal) who invited Ms Howe-Thornley to an

interview at the shop premises. It appears that the defendant was the only person invited to an interview at that stage.

[4] There are disagreements between the witnesses for each side as to what was said and done by Ms Westphal and Ms Howe-Thornley at relevant times. Rather than rehearse the controversial versions of these, I will set out my findings which have been reached by applying conventional evidence conflict resolution techniques. These have included:

- assessing which of two contradictory accounts is the more probable;
- taking account of corroborative documentary records generated at the time or otherwise before the spectre of litigation arose; and
- the commonsense that a specialist court can bring to assessing the probabilities of interactions between human beings who are not lawyers or other relevant experts, leading to what was hoped by both to be mutually beneficial employment.

[5] I have also taken into account the natural human frailties of attempting to remember, almost a year later, what were then apparently innocuous discussions and the occasional elevation to what one would wish to have heard, of what was in fact said. In this case I have had the particular advantage of text messages between the parties about relevant events, which have been preserved. They both speak for themselves and, in some instances, tend to confirm the probable accuracy of one party's account of what was spoken. These records also assist in gauging the reasonableness of what one or other party claims to have assumed from their content.

[6] The interview provided an opportunity for Ms Westphal to assess the defendant's appearance, demeanour, experience and theoretical suitability for the job. It also allowed the defendant to ask questions about the position and generally to impress Ms Westphal as to her candidacy. As to the prospect of Ms Howe-Thornley's employment following the interview, I find that Ms Westphal said that if her checks of the defendant's referees and her subsequent work trial proved to be

satisfactory, then there seemed to be no reason why the defendant would not be hired for so-called 'permanent' (although part-time) employment or what might more accurately be called employment of indefinite duration.

[7] The particular skill that the plaintiff was looking for in an employee was the ability to "multi-task" in a small workplace at which there were a number of functions to be performed and, in the case of the prospective mobile cart, by one person. Ms Westphal considered that she could not determine a candidate's ability to multi-task on the basis of an interview alone and wished to assess the candidate's performance of those tasks before making an offer of permanent employment.

[8] Ms Howe-Thornley's interview concluded with Ms Westphal introducing the defendant to the shop manager and saying, in the defendant's presence, that Ms Howe-Thornley would be coming in to undertake a three hour work trial on a future date during which she would be supervised and appraised by the store manager.

[9] I do not accept the defendant's case that she was offered, and accepted, permanent employment at the initial interview. I consider that she has elevated, mistakenly and unjustifiably, Ms Westphal's hopeful but conditional prognosis that an offer of employment would ensue. The defendant's claim that an agreement for permanent employment was concluded is inconsistent with the basis on which the interview meeting concluded by express reference to a forthcoming work trial. Reinforcing that decision is the common ground that there was no discussion about remuneration at that interview and that no draft individual employment agreement was presented to the defendant as was the plaintiff's practice when making offers of permanent employment. It is also inconsistent with the plaintiff having made an offer of permanent employment at that time, that the local authority's consent to the operation of the mobile cart, for which an employee was sought, had not then been given.

[10] The next event was a telephone call from Ms Westphal to Ms Howe-Thornley on the evening of Sunday 19 August 2012. Ms Westphal invited Ms Howe-Thornley to come to the plaintiff's shop on the following day at 11 am for a work trial. Ms Westphal advised the defendant that consent for the operation of the mobile cart had

not yet been granted and although the shop business was in its slow winter season, the defendant should come in the next day. Ms Westphal also advised Ms Howe-Thornley of the business's dress and staff presentation expectations to be met on the following day.

[11] Ms Howe-Thornley attended at the shop premises at 11 am on Monday 20 August 2012 and, under the supervision of the store manager, assisted with a range of tasks including food preparation and cleaning but which did not involve direct interaction with customers or money handling. The defendant was given a company T-shirt to wear. There were no discussions between Ms Howe-Thornley and the store manager about the prospect of the defendant's employment: the store manager had no authority to do so and was involved only with the supervision and observation of Ms Howe-Thornley. Unfortunately, after about 1.5 hours, the store manager fell ill. Ms Westphal came to the premises to relieve her and closed the business for the day, meaning that only about half of the intended three hour work trial was able to be completed by the defendant.

[12] Ms Howe-Thornley was invited to, and did, return to the shop at 11 am on the following day and continued her work trial, supervised and observed by Ms Westphal because of the manager's continued absence through illness. On this day, the defendant's range of duties expanded to contact with customers and operating the till. The work trial concluded after about 1.75 hours on that day at which point Ms Howe-Thornley was invited by Ms Westphal to make herself a salad at no cost, which she did before departing.

[13] Over several preceding days Ms Westphal had been attempting unsuccessfully to speak with one of Ms Howe-Thornley's referees, the owner of a takeaway food business at which she was then working in a part-time and casual capacity.

[14] Later on the second day of the defendant's work trial, Ms Westphal cashed up and reconciled the shop's takings, leading her to believe that there was an unprecedented shortfall of a little more than $50 and that a $50 note, which she had seen in the till earlier in the day, was no longer there. Ms Westphal came to the

prompt and sure conclusion that it could only have been Ms Howe-Thornley who was responsible for the discrepancy and that the defendant had stolen the $50 note. This prompted Ms Westphal to renew her attempts to discuss the defendant with her current employer and she was able to do so on that day, focusing during their discussion on the question of the defendant's general honesty as an employee. The information that the defendant's referee proffered during his telephone discussion with Ms Westphal caused her to have additional concerns about the propriety of the defendant's conduct in serving customers who were friends and this reinforced in Ms Westphal's mind the conclusion she had reached about what she considered to be the money missing from her shop.

[15] Ms Westphal sent Ms Howe-Thornley a text (SMS) message that evening, the material part of which read: "No need to come into the salad bowl tomorrow. We'll be in touch". Ms Howe-Thornley's understanding of the position was that she could expect to start work on the mobile cart within a few days and that Ms Westphal's text was consistent with that plan.

[16] On 27 August 2012 there was an exchange of texts between the two women when, in response to Ms Howe-Thornley's inquiry about what she was to do on that day, Ms Westphal responded that she was to do nothing but return the work T-shirt and that she should feel free to get another job. Ms Westphal subsequently confirmed that there was to be no job for the defendant and when Ms Howe-Thornley inquired about being paid for working previously, Ms Westphal responded: "Money missing from till is reason you don't have a job!". When Ms Howe-Thornley expressed surprise and indicated that she had no idea to what Ms Westphal was referring, the plaintiff's peremptory response was "Goodbye".

[17] The next events in the saga concern what happened after Ms Howe-Thornley involved her advocate and raised a grievance. They are not relevant to the preliminary question whether Ms Howe-Thornley was an employee of the plaintiff and so entitled to bring a personal grievance that she had been dismissed unjustifiably.

## The Authority's determination

[18] The Employment Relations Authority concluded,[1] without difficulty, that Ms Howe-Thornley had been working for the plaintiff on the two days that she attended at its premises as described above. This took account also of the plaintiff's acceptance that, as a matter of practice, it paid what it described as "prospective employees" for performing a pre-employment trial. But for the allegedly missing money, the plaintiff's case was that it would probably have paid Ms Howe-Thornley for those days worked. The Authority concluded that there had been an exchange of labour for remuneration that ought to have been paid and that the fundamental characteristics of an employment agreement had been present.

[19] Alternatively, the Authority concluded that 'trial periods' in employment are now required by legislation to be confirmed in writing before employment is commenced. It continued:[2]

> … They are also, according to this statutory scheme, paid employment and there is no facility for unpaid experiments. It is arguable the industry practice Ms Westphal evidenced of a short unpaid trial followed by a formal 90 day paid trial is an unlawful [device] which deprives prospective employees of their statutory rights. Finally, and putting aside, the debate about what was said in the interview, there is an argument Ms Howe-Thornley was a person intending to work and may pursue a personal grievance in any event.

[20] Having found the fact of employment, the Authority then went on to consider whether Ms Howe-Thornley's dismissal was unjustified. It was not in any doubt that she had been dismissed. The Authority concluded that the employer failed comprehensively to satisfy any of the minimum statutory tests of justification for dismissal under s 103A of the Employment Relations Act.

[21] The plaintiff's reason for dismissal was the serious allegation that Ms Howe-Thornley was responsible for the disappearance of a substantial sum of money, in effect its theft by her. As the Authority found, there was no discussion or attempt to ascertain what had happened or why. The Authority said:[3]

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[1] [2013] NZERA Christchurch 25.
[2] At [22].
[3] At [27].

> … The folly of such a course is exhibited by the fact Ms Westphal originally thought Ms Howe-Thornley had removed two other items in addition to the money. She now accepts that was not the case yet it was in her mind and influenced the decision when it was made.

[22] Despite an absence of "resources" as a small trader, the Authority concluded that this did not excuse the plaintiff's comprehensive failure to adhere to the basic requirements of natural justice now in the legislation. It could have, but did not, obtain professional advice and, indeed, chose not to.

[23] Turning to remedies, the Authority found under s 128(2) of the Employment Relations Act that it was required to order payment of a sum equal to the lesser of the actual loss or three months' ordinary time remuneration. It awarded $67.50, being five hours' pay for the hours actually worked ($13.50 per hour), $1,215 as compensation for wages lost as a result of the dismissal, and $5,000 as compensation for humiliation, loss of dignity, and injury to feelings under s 123(1)(c) of the Employment Relations Act.

## The wider picture

[24] I was told by the advocates that work trials of the sort exemplified by this case are very common, at least in the retail, food and beverage service industries, and associated sectors. It is, in the apparent absence of research data, difficult to determine how many of such arrangements end peremptorily by a decision of the employer not to continue to engage the employee for what might be a wide variety of reasons including incompatibility with other staff, inability to perform the work required, or the like. In some, although probably fewer, cases it may be the employee who elects not to continue to work for the same or another variety of reasons.

[25] Short work trials such as occurred in this case are less open to abuse of vulnerable job seekers, and therefore of less concern, than longer term varieties of the same phenomenon. Unpaid or inadequately remunerated 'internships', the acquisition of 'work experience', and other like categorisations of long-term unpaid or underpaid work, especially in times of high unemployment and/or in fields where there is an over-supply of applicants for work, have attracted the attention of

academics and practitioners recently in Australia and elsewhere. This has resulted in the production of a substantial report on this phenomenon for Fair Work Australia.[4] Many aspects of this comprehensive research and report are applicable to New Zealand. This judgment, however, decides the particular case, although insofar as issues of law are concerned, with regard to the broader picture of the legal status of trial work.

[26] Without deciding the issue for this case or generally, it would be very rare that an interview alone with a prospective employee would amount to work in an employment relationship for which there might be an expectation of payment of the employee and in which other employment rights and obligations arise. I would put into the same category a prospective employee's observation of a workplace so long as this was for a reasonable period commensurate with the purpose of such an observation and the nature of the work performed there. Such would, in most cases, be of benefit primarily to the prospective employee rather than to the prospective employer in the sense that it would allow the prospective employee to consider whether to continue with the appointment application process.

[27] Where the reasonableness line is likely to be crossed most commonly and "work" may be engaged in, for which there may be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee's activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the need for the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.

[28] Although it is not impossible to imagine a pre-permanent employment work trial lasting less than three hours (although in this case that was the equivalent of one working day), the Court must decide the legal nature of this process, also taking into

[4] "Unpaid Work Research Report – Student Placements & Unpaid Work" (12 June 2013) Fair Work Ombudsman, http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/unpaid-work-research-report.aspx.

account longer trial periods. The Australian research into unpaid work referred to above, illustrates that substantially longer periods are a feature of work in a number of sectors and that, in extreme cases, unpaid or inadequately remunerated 'internships' may occupy very long periods. Experience shows both that what happens in Australia may well happen in this country and that employment trends in New Zealand frequently follow Australia's. The principles applied to the categorisation in law of pre-permanent employment trial periods must be applicable not just to the particular facts of one case but across the board of such arrangements, both actual and realistically potential.

## Was the work trial "employment"?

[29] The case turns on whether the plaintiff and the defendant were employer and employee in an employment relationship in the nature of a contract of service when Ms Westphal told Ms Howe-Thornley that there was to be no further work for her. If the answer to that question is in the affirmative, then this amounted to a dismissal of the defendant for which the plaintiff must establish justification under s 103A of the Employment Relations Act. As in the Authority, so too at the hearing in this Court, there was little, if any, justification shown by the plaintiff for a dismissal as required by s 103A if this was a dismissal from employment.

[30] The case raises the important issue whether the enactment of ss 67A and 67B of the Employment Relations Act means that all work trials, such as occurred in this case, are now governed by those provisions and must conform to them. The Authority Member found that to be so, contributing to his determination that the defendant was dismissed unjustifiably.

[31] The Authority was correct to consider the effect of ss 67A and 67B of the Employment Relations Act which address trial periods in employment. These provide expressly for such arrangements. Although usually and colloquially described as '90 day trial periods', it must be remembered that the 90 days is a maximum period. It is lawful for parties to agree to a shorter trial period so long as the other statutory requirements are met. This could be potentially for a trial period as short as a working day or even less.

[32] The argument for the plaintiff is, however, that this was a pre-employment trial, entered into before the parties were in an employment relationship, so that the provisions of ss 67A and 67B are inapplicable.

[33] Subsection (3) of s 67A defines an employee, for the purposes of s 67A(1) as an employee who has not been previously employed by the employer. "Employee" is also defined generally and relevantly in s 6 (via s 5) of the Employment Relations Act as follows:

> In this Act, unless the context otherwise requires, employee—
>
> (1) (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 homeworker; or
> (ii) a person intending to work; but
> (c) excludes a volunteer who—
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
> (ii) receives no reward for work performed as a volunteer; …
>
> (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.
>
> …

[34] Section 6(1)(b) includes, materially for the purposes of this case, "a person intending to work". That phrase is defined in s 5 to mean "a person who has been offered, and accepted, work as an employee …".

[35] Was the defendant a "volunteer" and excluded thereby from being an employee? As noted above, s 6(1)(c) exempts a volunteer from being an employee and defines that exemption as being applicable to one who "does not expect to be rewarded for work to be performed as a volunteer; and … receives no reward for work performed as a volunteer …".

[36] The evidence establishes that at the outset of the trial, the plaintiff intended to pay the defendant for her work performed during the employment trial although did not communicate this to her. The s 6 definition, however, focuses not on what the plaintiff may have told the defendant, but on the defendant's expectation. It is more

probable than not that the defendant expected to be rewarded for those periods that she attended at the plaintiff's premises and undertook work. That is consistent with her inquiry, immediately upon being told that there was no job for her, about her remuneration for the period in which she had performed work. In addition, the defendant was "rewarded" for her performance of the trial by being given lunch by the plaintiff on the second day.

[37] I conclude both that Ms Howe-Thornley did expect to be rewarded monetarily for the performance of a three hour work trial and that she did receive a non-monetary "reward" for the work performed by her, albeit nominally, in the form of a free salad offered to, and accepted by, her at the end of the trial work period. Applying these facts to the Employment Relations Act's legal, the defendant was not a volunteer.

[38] But that is not the only way in which someone can be found not to have been an employee: simply because one is not a "volunteer", does not make one an "employee". If someone claiming to be an employee does not meet the test under s 6(1)(a) of the Employment Relations Act, then he or she cannot have that status.

[39] I consider the effects of ss 67A and 67B on the status of the work trial differently from the Authority. If an employer wishes to be able to dismiss or disadvantage an employee without the risk of a personal grievance being brought, ss 67A and 67B allow the parties to agree to the performance of a trial period of no more than 90 days under other statutory conditions which do not need to be elaborated on in this judgment. The statutory emphasis is not on allowing or prohibiting trial periods, but on the consequences of having such periods if they comply (or do not) with the statute. In other words, ss 67A and 67B do not go so far as to prevent any trial period unless it is in compliance with those sections as the Authority appears to have found. But ss 67A and 67B are not the only statutory provisions relevant to a work trial.

[40] The legislative scheme for employment trials is discernible by considering ss 66 (fixed term employment), 67 (probationary periods) and 67A together. An initial prerequisite for the application of each of these sections is an employment

relationship of employer and employee. At its simplest and chronologically earliest stage, one becomes an employee by being offered employment and by acceptance of that offer.[5] That, however, begs the question of what is employment. It, too, is defined in the Employment Relations Act as "work for hire or reward under a contract of service". If there exist the necessary constituents of a contract of service, then one or more of ss 66, 67 and 67A address how it may be permissible in law to try out the job or for a mutual assessment of the employee's suitability for permanent employment.

[41] Starting with s 67, New Zealand employment law has long recognised that a contract of service can include a probationary period. The nature, duration and other detail of a probationary period is not addressed in s 67. Those parameters have been determined by courts in individual cases as have also the effects on dismissals of employees in reliance on the existence of a probationary period. In essence, a probationary period must be one of only reasonable duration having regard to all the relevant circumstances of the employer, the employee, the job, and the like. Although an employee on probation under s 67 is not precluded from access to any of the statutory dispute resolution mechanisms, the law recognises that a probationer will be under observation by an employer during and at the conclusion of a probationary period. The standards of justification for the termination of the employee's employment during or at the end of that probationary period will take account of the fact of it.[6]

[42] Next, s 67A (in combination with s 67B) has more recently added to the longer standing concept of a probationary period, a more prescribed "trial period" which has express statutory consequences. This may be for a period of up to 90 days after the commencement of employment but, in contrast to s 67, a dismissal from a lawful trial period is generally not challengeable by personal grievance. Some fundamental employment rights are nevertheless protected during a trial period which can only be agreed to in respect of a new employee.[7]

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[5] Section 6(1)(b)(ii) and s 5 definition of "person intending to work".
[6] See, for example, *Nelson Air Ltd v New Zealand Airline Pilots Association* [1994] 2 ERNZ 665 (CA); and *Slater (t/a Carpet North) v Smith* [1994] 1 ERNZ 869.
[7] See, for example, *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 15.

[43] Finally, there is s 66 (fixed term agreements) which also affects the lawfulness of employment trials. Parties may agree that their employment relationship will be for a fixed term, ascertainable by an end date or a particular identified event or the conclusion of a specified project. The consequence of fixed term employment is that the conclusion of it as contemplated, agreed, and recorded does not constitute a dismissal of the employee with what would otherwise be consequent personal grievance rights.

[44] As in the case of s 67A also, s 66 is subject to a number of detailed protections which include, pertinently for this case, that a fixed term agreement entered into "to establish the suitability of the employee for permanent employment"[8] cannot qualify the employment for immunity from personal grievance at the expiry of the fixed term.[9] So, if parties enter into a fixed term of employment for the purpose of assessing the suitability of the employee for permanent employment, the employer cannot dismiss with impunity and in reliance on the fixed term, at the conclusion of that period, if the employee elects to treat the fixed term as ineffective, including by asserting that he or she had permanent employment.

[45] This is not a single coherent and comprehensive treatment by Parliament of work trial periods. These sections are, nevertheless, applicable if there are parties who can be said to be in a relationship of employer and employee and have a contract of service as those terms are defined in the Act.

[46] There is another relevant legislative provision. Section 63A provides an exception to the generally received wisdom that, with some exceptions, the Employment Relations Act does not govern the relationship of prospective employer and prospective employee. Section 63A addresses minimum standards of bargaining for individual employment agreements or other individual terms and conditions in an employment agreement. Subsection (1) includes, amongst the circumstances of its applicability: "(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee …". Subsection (1)(f) confirms that the section also applies

[8] Section 66(3).
[9] Section 66(3)(b).

"where a fixed term of employment, or probationary or trial period of employment, is proposed …".

[47] If the parties in this case agreed to "employment", s 63A applies to such work trial periods by virtue of subs (7), which defines "employee" to include "a prospective employee".

[48] For s 66 to apply to the circumstances of this case, the words "employment", "employee", and "employer" must be interpreted as extending to the prospect of the relationship or those statuses. Section 63A just discussed is relevant in determining this. Bargaining for, or about the terms and conditions of, an employment agreement occurs in law before the agreement is achieved: it is pre-contractual. So, to use the example of "employee" under s 63A, an employee must mean more than the words' definition in s 6, that being "any person … employed by an employer to do any work for hire or reward under a contract of service …". It must also mean more than s 6's extended definition of an employee under s 6(1)(b)(ii), "a person intending to work" which is defined in turn under s 5 as "a person who has been offered, and accepted, work as an employee …". That is because bargaining about the terms and conditions of employment to be offered and accepted must include bargaining before offer and acceptance. It is unrealistic and wrong to define narrowly what happens as, in effect, contract first, negotiations about its terms and conditions second.

[49] So it follows that a prospective employer, that is one with whom a prospective employee is bargaining about the terms and conditions of prospective employment, must comply with s 63A(2). This will include by providing to the "prospective" employee a copy of the intended agreement under discussion, advising the prospective employee that he or she is entitled to seek independent advice about it, giving the prospective employee a reasonable opportunity to seek advice, and considering any issues that the prospective employee raises and responding to them. Failure to comply with these requirements does not alone render an employment agreement subsequently entered into ineffective, but does make a prospective employer liable to a penalty under s 63A(3).

[50] It follows from this analysis that a prospective employer such as the plaintiff in this case must comply with s 63A(2) of the Employment Relations Act if bargaining with a prospective employee about the proposed terms and conditions of an employment agreement, including a fixed term agreement under s 66 if the work trial amounts to employment.

[51] Was the defendant "a person intending to work" and therefore an employee? The evidence establishes that she had been offered, and accepted, work as an employee, even if this was for as short a period as several hours as was the plaintiff's original intention for the employment trial, and then followed by a period in which the plaintiff's assessment of the defendant's candidacy would be considered and its decision communicated to the employee. More than that, the defendant performed work for the plaintiff that contributed to its commercial enterprise.

[52] I conclude that the parties were employee and employer during the work trial period and up until Ms Howe-Thornley was dismissed by text message.

## Was the trial fixed term employment?

[53] If, as I have found, the parties agreed that Ms Howe-Thornley would work for the plaintiff for a period of the trial and until the plaintiff determined her suitability for engagement, what is the effect of s 66 (fixed term employment) of the Employment Relations Act?

[54] This was not a point that had occurred to, or at least was not argued by, the advocates at the hearing. It arose for me when considering my judgment. Accordingly, I invited and received written submissions from the parties on the point.

[55] Rather than the defendant's work trial being governed by ss 67A and 67B of the Employment Relations Act alone as the Authority found, I consider that s 66 is also relevant in determining whether the defendant was entitled in law to claim remedies for unjustified dismissal.

[56] Section 66 provides materially (with emphasis on relevant parts italicised):

> **66 Fixed term employment**
> (1) *An employee and an employer may agree that the employment of the employee will end—*
> *(a) at the close of a specified date or period; or*
> *(b) on the occurrence of a specified event;*
> …
> (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—*
> *(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way*; and
> (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
> (3) *The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
> (a) to exclude or limit the rights of the employee under this Act:
> *(b) to establish the suitability of the employee for permanent employment*:
> (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
> (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—*
> *(a) the way in which the employment will end; and*
> *(b) the reasons for ending the employment in that way.*
> (5) *Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
> (6) *However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection* (1)—
> (a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
> (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective*.

[57] The plaintiff says that the statuses of the parties were, and were only ever, those of recruiter and job applicant and they were never employer and employee in any legal sense.

[58] The plaintiff denies ever having offered the defendant employment, whether for a fixed term or otherwise. It says that the defendant was, in effect, a volunteer for a three hour pre-employment evaluation which was not itself employment. It relies on the general statement of Judge Shaw in *Hayden v Wellington Free*

*Ambulance Service*[10] that: "… it is intended that relief available under the Act is only available where a person has actually been employed on settled terms and conditions". Further, the plaintiff relies on the words of Chief Judge Goddard in *Weal v Leusen Holdings Ltd t/a Heather-lea Rest Home*[11] that:

> An employment contract, in common with every other kind of contract, displays certain basic characteristics. There must be an offer by one party to the other and an acceptance by that other. Moreover, that acceptance must be communicated to the party making the offer.

[59] The plaintiff says that the requirements for settled terms including offer and acceptance are not diminished in the case of a fixed term agreement and, indeed, they are even more necessary because such an agreement, it says, is required to be evidenced in writing under s 66(4). Although all individual employment agreements are required to be in writing (s 65(1)(a)), non-compliance with these statutory requirements does not invalidate an employment agreement: *Warwick Henderson Gallery Ltd v Weston*.[12] Because there is an absence of writing evidencing an employment agreement does not mean in law that there is no such agreement.

[60] For reasons already set out, however, I have determined that the parties were employer and employee at the relevant times. The defendant was not a volunteer. The next question is whether their employment agreement was for a fixed term.

[61] The requirement under s 66 for a fixed term agreement to be in writing relates not to the validity or lawfulness of the agreement per se but, rather, to the lawfulness of its fixed term nature. So, in the absence of compliance with the statutory provisions, an employer will not be entitled to end the employment in reliance on the fixed term and preclude the employee from access to the personal grievance procedure. I accept, nevertheless, that the other fundamental and essential constituents of a contract for service must be established for there to be an individual employment agreement including for a fixed term.

[62] The plaintiff submits that because a fixed term agreement under s 66 can, in theory, also incorporate a 90 day trial period under s 67A, it is not possible to

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[10] [2002] 1 ERNZ 399 at [28].
[11] [2002] 1 ERNZ 655 at [30].
[12] [2005] ERNZ 921 (CA).

describe a pre-employment trial as fixed term employment. I do not think that is right. While, at least in theory, a fixed term agreement may be able to incorporate a s 67A trial period, it could only do so once, including if the employer stipulates for this in the way that the plaintiff in this case could theoretically have done.

[63] The plaintiff submits that the facts in this case do not support a finding that the pre-permanent employment trial could have been a separate period of fixed term employment. That is because, the plaintiff says, the defendant responded to an advertisement offering 15-20 hours per week on a mobile cart for which Council approval had not yet been obtained and the construction of which cart was then incomplete. That is, however, a wrong analysis of the facts when one considers the cryptic contents of the advertisement. It was simply for 15-20 hours per week in the middle of the day. There was no reference in the advertisement to where the work would be performed or any conditions attaching to the existence of the work. Although I accept that Ms Westphal probably told Ms Howe-Thornley at the interview of these contingencies, the plaintiff nevertheless concluded that the defendant's interview had been satisfactory and put her forward for a work trial.

[64] In these circumstances I have concluded that the defendant would have been offered permanent work by the plaintiff if she trialled satisfactorily, if construction of the cart was completed (there seems little doubt that this would have occurred), and if the local authority had granted consent to the operation of the mobile cart, another eventuality that appeared to be imminent at the time of dismissal. There is no suggestion that the defendant was not employed permanently for any reason other than the plaintiff's assumptions about her honesty.

[65] Finally, the plaintiff submits that there is no legislative prescription as to employment recruitment processes and that what the law does not specifically forbid, it permits. Therefore, Mr Forrest submits, the recruitment process in this case could and did include reasonable demonstrations of work ability, irrespective of whether the employment was to be permanent or fixed term, but that the demonstration of work ability was just that and did not constitute employment.

[66] If the defendant and the plaintiff were "an employee" and "an employer" respectively, and if the work which Ms Howe-Thornley performed during her three hour (one working day) trial amounted to "the employment of the employee", I find that the parties agreed that this would end upon a specified event, namely the plaintiff's communication to the defendant of its decision about permanent employment. If that work trial amounted to "fixed term employment" as defined in s 66(1), the following subsections determine whether its ending amounted to the conclusion of the fixed term, in which event Ms Howe-Thornley could not be said to have been dismissed or permitted to bring a personal grievance relating to a dismissal.

[67] Even if it might be said that the subs (2)(b) requirements (of advising the employee of when or how her employment would end and the reasons for it ending in that way) were fulfilled, the plaintiff faces insurmountable difficulties with subss (2)(a), (3) and (4). The plaintiff's reason for conducting the work trial was to assess Ms Howe-Thornley's suitability for the permanent part-time position it had advertised and for which it had interviewed her. Subsection (3)(b) provides, however, that "to establish the suitability of the employee for permanent employment" is not "a genuine reason" for the purposes of subs (2)(a). There was also no compliance with subs (4) that the agreement was to be in writing, which it was not.

[68] Parliament has prohibited employers from engaging employees for fixed terms of employment for the purpose of establishing their suitability for "permanent employment". Parliament has provided for employers to establish the suitability of employees by permitting either "probationary arrangements" under s 67 or, more recently, 'trial periods' (of 90 days or less) under s 67A. Employers cannot use fixed term employments for this purpose: if they do, such arrangements lose their fixed term advantages for employers.

[69] To return to the crucial and controversial issues under s 66, were Ms Howe-Thornley and the plaintiff company, employer and employee during the work trial period and was what Ms Howe-Thornley did "employment"?

[70] The defendant did more than simply observe the operation or even undertake practical tests as might, for example, an applicant for a position as a word processor operator be asked to perform a set typing exercise designed for the purpose of comparing a number of applicants on an equal footing. In this case Ms Howe-Thornley actually performed the work that needed to be undertaken in the business. She prepared the salad vegetables that were sold to customers, she cleaned up before and after actual orders had been fulfilled, she took and processed the real orders of real customers, she received payment and gave change for real orders recording these real transactions on the shop till, and she undertook other work affecting directly the operation of the business during its opening hours. She was required to dress in the business's uniform, to present herself as a "permanent employee" would (hair tied back, tattoo concealed etc). Although no doubt she did all these things somewhat less efficiently than an experienced employee would have done, the work performed during her work trial was nevertheless the actual performance of integral parts of the business.

[71] The first test under s 66(1)(b) that "an employee and an employer may agree that the employment of the employee will end … on the occurrence of a specified event …" would appear to be met by the parties' agreement that there would be a three hour trial following which the plaintiff would decide whether to appoint the defendant as a permanent employee. That advice was the specified event.

[72] Next, under subs (2), s 66 requires that the employer must both have "genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way … and … advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way".

[73] At least inferentially, the plaintiff made known to Ms Howe-Thornley when her employment would end (the completion of the trial following which the plaintiff would assess and then advise the defendant whether it wished to engage the plaintiff in "permanent employment"), and the reason for it ending in that way.

[74] However, subs (3) provides an insurmountable problem for the plaintiff. It states that reasons which "are not genuine reasons for the purpose of subs (2)(a) [include] to establish the suitability of the employee for permanent employment …". As I have already noted, too, there was no compliance with the subs (4) requirement for a written agreement.

[75] Section 66(5) provides that if "the reasons for ending the employment are not genuine reasons based on reasonable grounds", the validity of the employment agreement between the parties is not affected. Subsection (6) provides, also, that if the employer does not comply with subs (4) (including having a statement of genuine reasons for ending the employment in the way that the employer has stipulated for), the former employee may elect to treat that term as ineffective. Ms Howe-Thornley has done so in this case.

[76] The case law applies the non-adherence to those requirements in practice to mean that the fixed term of the employment is ineffective so that the employee is, in effect, engaged as an employee of indefinite duration.[13] This allows the ending of the employment relationship at the initiative of the employer to be treated as a dismissal for personal grievance purposes rather than as the agreed completion of a fixed term which would not be a dismissal and would therefore not give personal grievance rights.

[77] For the foregoing reasons I conclude that Ms Howe-Thornley was engaged by the plaintiff in employment of fixed duration, the ending of which was to be the communication to her of its decision whether she would be engaged as a permanent employee. Because of that employment agreement's non-compliance with s 66, its fixed term, which would have precluded the defendant from access to the personal grievance procedure, is not effective. In these circumstances Ms Howe-Thornley was, in law, an employee of indefinite duration (a permanent employee) who was dismissed by the plaintiff.

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[13] *Norske Skog Tasman Ltd v Clarke* [2004] 3 NZLR 323, [2004] 1 ERNZ 127 (CA).

[78] Before dealing with questions of justification for that dismissal, however, there is an alternative way of categorising the nature of the parties' legal relationship at the time of its unilateral termination by the plaintiff.

## Conditional employment of indefinite duration?

[79] Another way to determine the status in law of the work trial is to consider whether the plaintiff engaged Ms Howe-Thornley as an employee of indefinite duration (a permanent employee) but subject to two conditions being satisfied. The first of those conditions was the successful completion by her of the three hour work trial. The second condition was a satisfactory referee check. Such an analysis is consistent with the advice given to Ms Howe-Thornley by Ms Westphal at the end of the defendant's interview, namely that the plaintiff could not see any reason why the defendant would not be engaged subject to those two conditions being satisfied.

[80] If Ms Howe-Thornley was, thereby, an employee (someone who had been offered, and accepted, employment even on a conditional basis), the plaintiff cannot avoid liability for unjustified dismissal solely upon its conclusion that the defendant had failed to satisfy either or both of these conditions and irrespective of the fairness and reasonableness of the way in which it went about reaching that conclusion.

[81] As an employee, Ms Howe-Thornley was entitled to be treated fairly and reasonably and in good faith by the plaintiff. So, for example, pursuant to s 4(4)(bb), the duty of good faith applied to "any matter arising under or in relation to an individual employment agreement while the agreement is in force". Pursuant to s 4(5) the matters specified in subs (4) (of which (bb) is one) are non-exhaustive examples of the circumstances in which the duty of good faith applies.

[82] Examples of the duty of good faith in practice are set out in s 4(1A) and include a requirement on parties to an employment relationship to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative …". That obligation would encompass, in practice, a requirement on the plaintiff to at least raise its suspicions or concerns about Ms Howe-Thornley with her and to give her an

opportunity to address these before dismissing her summarily in reliance upon them. There is a long history of case law emphasising the need to do so where there are serious suggestions or allegations of dishonesty which might also encompass the commission of an offence or crime against the employer: see, for example, *Honda New Zealand Ltd v New Zealand Boilermakers Union.*[14]

[83] That obligation is also reinforced by s 4(1A)(c) which:

> … requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected —
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[84] Those good faith requirements of natural justice are now reiterated in effect in s 103A(3) of the Employment Relations Act which sets out minimum requirements for justification of disadvantages in, or dismissals from, employment.

[85] It follows that if, during the period of the work trial and immediately afterwards pending the plaintiff's assessment of her, the defendant was not a fixed term employee but was an employee of indefinite duration of the plaintiff, albeit conditionally, the plaintiff was required to act towards the defendant fairly, reasonably and in good faith. It was not entitled, in the process of fulfilling those conditions, to disadvantage or to dismiss the defendant unjustifiably as set out in s 103A.

[86] If the defendant was not a fixed term employee but, rather, a permanent employee of the plaintiff at the time of her dismissal, she was entitled to bring a personal grievance alleging that she had been dismissed unjustifiably and the onus of establishing justification for that dismissal was on the plaintiff.

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[14] (1990) ERNZ Sel Cas 855.

## Decision of challenge

[87] I conclude that Ms Westphal offered Ms Howe-Thornley employment of limited duration for a fixed term until the plaintiff communicated its decision whether to engage her permanently. Ms Howe-Thornley accepted that offer. No remuneration for that period was agreed upon. The failure to pay Ms Howe-Thornley was unlawful under the Minimum Wage Act but neither the failure to agree upon a rate of remuneration nor the non-payment of any money to Ms Howe-Thornley invalidates the parties' agreement. The terms of that fixed period of employment included that Ms Howe-Thornley was to work as directed in the plaintiff's retail premises to establish her suitability for employment. She was required to dress and otherwise present herself to customers as a member of the staff of the business. The offer, which was accepted by the defendant, included a working day's employment which was three hours and it was to continue until Ms Westphal communicated her decision about permanent employment to the defendant.

[88] But for s 66 of the Employment Relations Act, termination by the employer of the employment so agreed to by the parties may not have enabled the bringing of a personal grievance by the defendant although, in any event, the plaintiff would have had to pay the defendant at least the minimum hourly rate of remuneration under the Minimum Wage Act. It does not detract from the fixed term nature of that employment that, depending upon the fulfilment of two conditions, a satisfactory referee check and a satisfactory trial, it was anticipated that Ms Westphal would offer Ms Howe-Thornley permanent employment.

[89] The consequence of the breach of s 66 by the plaintiff is that it was not entitled to terminate the employment in reliance upon the expiry of the fixed term. In those circumstances the employment is deemed in law to have permanent employment.

[90] The plaintiff determined not to have anything more to do with Ms Howe-Thornley once Ms Westphal came to the conclusion that the defendant had stolen money from the business. Whether the reference check was therefore a satisfactory one depended, in part, upon that prior conclusion by Ms Westphal. The plaintiff was

not entitled in law to reach the conclusion that it did about Ms Howe-Thornley's honesty as an employee without affording her the minimum protections required of employers by the statute when dealing with employees, and otherwise of trust, confidence and fair dealing at common law.

[91] Alternatively, if the work trial was not fixed term employment, then I would conclude that it was conditional employment of indefinite duration ("permanent" employment). At the time of its termination by the employer, the conditions had yet to be fulfilled fairly and reasonably.

## Justification for dismissal

[92] I agree with the Authority that the plaintiff has failed to establish justification for Ms Howe-Thornley's dismissal. Section 103A requires the Court to consider, on an objective basis, 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 occurred.

[93] Subsection (3) sets out four particular but non-exhaustive factors that the Court is required to consider in determining the foregoing test under subs (1) and (2). These are:

> (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.

[94] There was no compliance by the plaintiff with any of these basic natural justice tests. Nor is the plaintiff saved by subs (5) which states that the Court:

> … must not determine a dismissal … 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.

[95] The plaintiff's complete non-compliance with subs (3) cannot be described as "minor". Nor did its failure not result in the defendant being treated unfairly. Indeed, as the Authority found also, not only did the defendant not have any opportunity to explain what were serious allegations against her, but these included some charges which were clearly not sustainable and could have been established as such by Ms Howe-Thornley at the time had she been given an opportunity to do so.

[96] There is another aspect of the case that the Authority did not address but which strengthens the defendant's case of unjustified dismissal. One of the reasons that Ms Westphal said she had for not engaging Ms Howe-Thornley was that the latter was said to have asked if she could be paid "in cash". That phrase, which I accept is the one that Ms Westphal said Ms Howe-Thornley used, is capable of a number of meanings, at least one of which is an innocent meaning. Employees, or at least those engaged, as Ms Howe-Thornley might have been, are entitled to be paid their wages "in cash" as opposed, for example, to payment by cheque or, more commonly these days, direct credit to a bank account. There may be a number of legitimate reasons that people still seek to be paid in cash and, however inconvenient that may be to employers, the law allows it.[15] Ms Westphal, however, did not check with the defendant what she meant but assumed the worst of Ms Howe-Thornley and held against her that she had been asked to pay an employee without income tax being deducted. That, too, was an unwarranted inference on the part of the plaintiff, at least without further inquiry.

[97] The irony of this ground for dismissal, however, is that the evidence established (Ms Westphal admitted) that she pays work trialists, such as Ms Howe-Thornley, both "in cash" and without deduction of PAYE tax, where such people are not engaged longer-term although otherwise complete their employment trials. Ms Westphal attempted to justify this by saying that such people are "contractors". This was a very unconvincing explanation for the same conduct that Ms Westphal held

[15] Wages Protection Act 1983, s 9.

against Ms Howe-Thornley. Ms Westphal could not explain the failure to deduct withholding tax payments from payment to a contractor if that had been what she considered the defendant to be, which I do not accept in any event.

[98] It follows, in my conclusion and as the Authority determined correctly, that Ms Howe-Thornley was dismissed unjustifiably by the plaintiff. I confirm the Authority's finding that the defendant's dismissal was unjustified under s 103A.

## Remedies for unjustified dismissal

[99] There was little, if any, attention paid by the parties at the hearing to the remedial consequences of a finding of unjustified dismissal. The Authority awarded compensation for unpaid wages of $67.50, being five hours at the statutory minimum rate. It awarded the defendant $1,215 calculated as 15 hours per week times the six weeks that she took to obtain replacement employment. The Authority correctly had regard to s 128(2) of the Employment Relations Act requiring it to order the payment of a sum equal to the lesser of that actually lost or three months' ordinary time remuneration. Ms Howe-Thornley's actual loss of $1,215 was the lesser sum.

[100] Turning to compensation under s 123(1)(c)(i) of the Employment Relations Act, the Authority awarded the not insignificant sum of $5,000 when the short duration of the employment is taken into account. There was, however on the other hand, significant distress and humiliation experienced by Ms Howe-Thornley who was branded a thief, including in some prominent news media accounts of the case in which Ms Westphal contributed her views of Ms Howe-Thornley after the Authority's determination had been issued. Being stigmatised as a thief from one's employer, and particularly in the absence of both an opportunity to refute that allegation and of the sort of evidence supporting it that would now be expected, was particularly damaging to Ms Howe-Thornley. Nothing seen or heard by me would persuade me that the Authority's award of $5,000 was so excessive that I would be prepared to interfere with it.

[101] I also agree with the Authority that there should be no reduction in Ms Howe-Thornley's remedies for contributory conduct under s 124 of the Employment Relations Act.

[102] The statutory consequence of delivering this judgment is that the Authority's orders are set aside automatically despite the Court's complete agreement with them. Accordingly, I re-make as orders of this Court precisely those orders made by the Authority set out at [40] of its determination of 1 February 2013.

[103] As a result of Ms Howe-Thornley's attempts to enforce her Authority determination through the District Court, the sums in issue have been paid to an interest bearing account administered by the Registrar of this Court. Unless the plaintiff applies earlier to the Registrar for an order for the further preservation of those sums, they (together with interest earned on them) may be paid out to the defendant after the expiry of 30 days from the date of this judgment.

[104] The defendant is entitled to costs. If these cannot be agreed upon by the parties, the defendant may apply by memorandum filed and served within 30 days of the date of this judgment, with the plaintiff having the same period thereafter within which to respond by memorandum.

## Comment

[105] Although not for decision in this case, the field of employment or pre-permanent employment trials raises widespread and important questions. I will mention only two examples although there may be many more. What is the status of people undertaking practicums as part of a training or qualification, for example trainee teachers on assignments to schools teaching students under supervision and being appraised? What of the legal status of trainee doctors attending with consultants in hospitals and undertaking professional tasks consistent with their training and skills? It has been thought unlikely that such trainees would be employees of schools' boards of trustees or the relevant district health boards, but the level of work undertaken by them may impose a degree of legal liability on those persons vis-à-vis third parties.

[106] The enactment by Parliament of ss 67A and 67B of the Act, together with the prohibition on suitability for employment being a valid ground for a fixed term agreement under s 66, may mean that if a potential employer wants to "try out" a potential employee, that person may have to be engaged as an employee on a trial period of appropriate duration under s 67A. Although this would require greater compliance costs on the part of both parties, such an arrangement would offer some protections to the employee during the trial period but would also enable the employer to conclude that the employee is unsuitable for the position and to terminate the arrangement without the risk of an unjustified dismissal personal grievance.

[107] Coming closer to the circumstances of this case, I do not underestimate the practical consequences of this decision to employers in the retail food and beverage sector wishing to assess the merits of prospective employees. Indeed, such trials have some benefits for prospective employees as well. This case illustrates what happens at one end of a potentially very broad spectrum of similar practices which are open to abuse.

If it is thought that the consequences of this judgment will impose unreasonably arduous obligations on prospective employers and prospective employees, especially in cases such as this, it is not for the Court to interpret and apply legislation in a way that it thinks might be reasonable or realistic, or what it should be. Rather, it may be that Parliament should reconsider the scope of the restrictions that it wishes to impose concerning work trials and how best to both prohibit the abuses of these that can occur and also allow reasonable, practicable, and fair assessments of potential employment to be undertaken by both parties.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 16 August 2013