IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 19
EMPC 107/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KUMARA HOTEL LIMITED Plaintiff
AND	JOSEPH MCSHERRY Defendant

Hearing: 31 October and 1 November 2017

Appearances: T McGinn, counsel for plaintiff
D Carruthers, counsel for defendant

Judgment: 15 March 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr McSherry works in the hospitality industry and has done so for many years, predominantly in Australia. He describes himself as being something of a gypsy, moving between jobs on a regular basis.

[2] Mr McSherry returned to New Zealand in December 2014 to attend a friend's sixtieth birthday. While in New Zealand he signed up with The Recruitment Network Ltd (RNL), a business which places workers in hotels and restaurants. He was sent to work at the plaintiff's hotel in Kumara as a chef. The role was to provide temporary cover until the plaintiff could find a permanent replacement for a chef who had unexpectedly left.

[3] Mr McSherry worked in this temporary role for around two months. During this time, he struck up an amicable working relationship with Mrs Lark, the general manager. Mrs Lark had come to the hotel to assist her friends, Mr and Mrs Fitzgibbon, who had recently purchased and refurbished the hotel and who had gone overseas on an extended holiday. Mrs Lark had been in the hospitality industry for approximately 40 years and was happy to help out, doing what she could to ensure that the Kumara Hotel was operating in an efficient and successful manner.

[4] Mrs Lark evidently formed a favourable impression of Mr McSherry and his capabilities. They had numerous conversations about the possibility that he might return to work at the hotel on a more permanent basis. These conversations centred on a role as chef. When Mr McSherry's temporary stint at the hotel came to an end and he returned to Australia, communication between the two did not. Mr McSherry contacted Mrs Lark, providing his email details "in case" she needed to "drop [him] a line at any stage". For her part, Mrs Lark responded enthusiastically, advising Mr McSherry that she would definitely keep him posted.

[5] A new chef started at the Kumara Hotel in March 2015. Mrs Lark had reservations about the chef's abilities and took an active role in drawing her concerns to his attention. She continued to correspond with Mr McSherry during this time, advising him of her dissatisfaction with various aspects of the new chef's performance and advising that if he was to leave it might create an opportunity for Mr McSherry at the hotel.

[6] All of this was running in parallel with a restructuring exercise that Mrs Lark was pursuing. The restructuring involved potential changes to the new chef's position and a live-in custodian role. At the time the custodian resided in a self-contained flat in the hotel as part of her employment agreement. The proposal was that a new role of operations manager would be created. That role would take on some of the chef's responsibilities (around the ordering of supplies and the like), and a new reporting line would be created between the chef and the operations manager, rather than between the chef and the general manager. The custodian role would also be changed. It was proposed that the duties associated with living on site would be removed, along with the self-contained live-in accommodation. The custodian

duties, and the self-contained accommodation, would transfer to the new operations manager role under the restructuring proposal.

[7] Mrs Lark considered that Mr McSherry might be interested in the proposed operations manager position. She raised the possibility by way of email dated 7 July 2015. Mr McSherry responded by saying he was interested but that it would need to be at a salary of $60,000, plus live-in accommodation at the hotel. I interpolate that at this point Mr McSherry had been struggling to find much work in Australia and was evidently keen to return to New Zealand. This is clearly reflected in his communications to Mrs Lark around this time.

[8] Mrs Lark was encouraged by Mr McSherry's response. On 21 July 2015 she sent him a document entitled "Interim OFFER OF EMPLOYMENT". It set out the base terms on which he would be employed, namely in an operations manager position, on a salary of $60,000, and with accommodation provided. Mr McSherry responded enthusiastically, advising: "I accept …".

[9] As it happened, Mr McSherry was due to return to New Zealand for his own sixtieth birthday and he arranged to meet with Mrs Lark at Rangiora. The meeting took place on 7 September 2015. No mention was made of a 90-day trial period, although other aspects of the role were discussed.

[10] The next evening Mrs Lark emailed Mr McSherry a written employment agreement. In the cover email she advised that the agreement was: "just the basic Hospitality New Zealand Contract – same as everyone gets. With individual aspects that pertain to each position." The agreement contained a 90-day trial period provision. The interim agreement (which I will refer to as the "first agreement") had contained no such provision.

[11] Mrs Lark followed up her earlier email the next morning. She specifically referred to the 90-day trial provision, advising that:

> It is NZ law now, that all contracts are subject to a 90 day trial period. You could look this up if you want to, but it is a mutually beneficial clause.

[12] Mr McSherry responded advising that he had read the agreement; understood it fully; and noted that it was "all fairly straightforward and standard."

[13] Mr McSherry arrived at the Kumara Hotel in mid-September 2015 and appears to have made an immediate impact on the chef. It seems that the chef, who was described in evidence as being sensitive and prone to taking offence, did not react well to observations Mr McSherry made about the dishes on the hotel menu. The chef announced his departure and left the next day. This left an immediate gap in the kitchen. Mr McSherry promptly offered to cover the chef duties. Mrs Lark promptly accepted his offer. It will be recalled that Mr McSherry and Mrs Lark had earlier discussed the possibility of him taking on the role of chef at the hotel, which was an option that they had (at least at that time) been keen on. It was not, however, the role Mr McSherry had ultimately been appointed to. While it may have been regarded as a happy coincidence of timing, I accept that taking on chef duties following the sudden departure of the then chef was viewed by both parties as a temporary stop-gap measure until a replacement could be appointed.

[14] While Mr McSherry had hoped to be moving into the self-contained flat in the hotel, this never eventuated. The restructuring foreshadowed in Mrs Lark's earlier correspondence had not been concluded by the time of Mr McSherry's arrival, and the custodian (who had made it clear that she wanted to stay in the hotel flat) remained firmly ensconced there. Mr McSherry was accommodated across the road from the hotel in a house shared with one other hotel worker. Mr McSherry was unimpressed with the living arrangements and subsequently decided to live elsewhere at his own expense.

[15] Mr McSherry's time in the kitchen did not go well, at least from Mrs Lark's perspective. She raised several issues with him from a relatively early stage, including as to the way in which he related to staff. Mr McSherry was also unhappy with the way things were going. He was particularly unhappy about not being able to move into the hotel flat. His once positive relationship with Mrs Lark began to deteriorate.

[16] Mrs Lark met with Mr McSherry on 10 December 2015 and advised him that he was considered unsuitable for the operations manager role and that his employment in that role would be terminated under the 90-day trial period clause in his agreement. She made it clear that he could, however, carry on as chef and that the situation could be reviewed after the busy summer period. Mr McSherry was taken by surprise at the meeting. He agreed to stay on. Two days later he gave notice, advising that his last day would be 11 January 2016. Mr McSherry successfully pursued a claim of unjustified dismissal in the Employment Realtions Authority.[1] Kumara Hotel challenged the Authority's determination on a de novo basis.

[17] Against this fairly straightforward factual background, a number of less straightforward issues arise:

(a) Was Mr McSherry dismissed?

(b) If so, is he prevented from pursuing a claim of unjustified dismissal by virtue of s 67A of the Employment Relations Act 2000 (the Act)?

(c) If not, was he unjustifiably dismissed?

(d) If so, what relief is he entitled to?

(e) Has Mr McSherry established a claim for unjustified disadvantage?

Dismissal?

[18] Mr McGinn, counsel for the plaintiff, submitted that Mr McSherry had not been dismissed, despite the fact that Mrs Lark had purported to terminate his position as operations manager under the 90-day trial period provision in the second

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1 *McSherry v Kumara Hotel Ltd* [2017] NZERA Christchurch 55.

agreement during the course of the meeting on 10 December. Two alternative arguments were advanced on the plaintiff's behalf.

[19] The first was that while Mr McSherry had been employed as operations manager, he never took up that role. Instead he was employed (under an unwritten agreement) as a chef. Mr McGinn submitted that it was Mr McSherry who decided to bring his own employment to an end, and did so when he left on 11 January 2016. Mr McGinn noted (correctly) that no claim of constructive dismissal had been advanced on the defendant's behalf and that his claim was focused on an alleged dismissal from the role of operations manager on 10 December 2015.

[20] The second argument was that Mr McSherry's employment agreement had been varied from operations manager to chef and that he had never been dismissed from the latter role.

[21] There are difficulties with both arguments. It is common ground that Mr McSherry arrived at the Kumara Hotel and started in his role as operations manager. Circumstances changed and he took on alternative duties on an interim basis to help the plaintiff out of a difficult situation. He was able to do this because of his previous training and experience. There was, however, no agreement that Mr McSherry's position would change. The mere fact that an employee takes on other, additional or different tasks on a temporary basis (as Mr McSherry did) does not mean that their position changes. Nor does it absolve the employer from their contractual obligations under the relevant employment agreement.[2]

[22] As I have said, Mr McSherry was employed as an operations manager and commenced work at the hotel in that role. It is revealing that at the relevant time Mrs Lark considered Mr McSherry to be the operations manager, given that she purported to dismiss him from that position on 10 December 2015. She had earlier concluded that he was unsuitable for the role he had been appointed to and would (in her words) be incapable of "flowering" into it. I have no difficulty concluding that Mr McSherry was dismissed as operations manager on 10 December 2015.

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[2] See, for example, *Wills v Goodman Fielder New Zealand Ltd* [2014] NZEmpC 233 at [115].

Application of trial period clause?

[23] It is convenient to set out the trial period provisions in the Act at this point. They provide that:

> **67A When employment agreement may contain provision for trial period for 90 days or less**
>
> (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.
>
> (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that—
>
> (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
>
> (b) during that period the employer may dismiss the employee; and
>
> (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
>
> (3) **Employee** means an employee who has not been previously employed by the employer.
>
> …
>
> (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).
>
> **67B Effect of trial provision under section 67A**
>
> (1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
>
> (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
>
> (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (j).
>
> (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
>
> (5) Subsection (4) applies subject to the following provisions:
>
> (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and

(b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[24] Mr Carruthers, counsel for the defendant, advanced a cascading range of arguments in support of the submission that the 90-day trial period provision contained within the second agreement was unenforceable. They can be summarised as follows:

(a) The trial period provision in the second agreement (if otherwise operative) was unenforceable on the basis of unfair bargaining and/or misrepresentation (the unfair bargaining/misrepresentation argument);

(b) Mr McSherry's work at the Kumara Hotel for a two-month period prior to taking on the role of operations manager meant that he had previously been "employed" by it for the purposes of s 67A(3). That meant that the 90-day trial period provision in the second agreement (if otherwise operative) was unenforceable (the previous employment argument);

(c) Mr McSherry was employed under the first agreement. It did not include a 90-day trial period provision. Such a provision could not subsequently be incorporated by way of further agreement (the first agreement argument).

[25] I have concluded (for the reasons set out below) that the absence of a 90-day trial period provision in the first agreement is fatal to the plaintiff's argument that the 90-day trial period provision in the second agreement provides a shield to the claim of unjustified dismissal. I touch on the other arguments raised by the parties for completeness.

Unfair bargaining

[26] The defendant submits that the plaintiff engaged in unfair bargaining and that this had the effect of invalidating the 90-day trial period provision in the

employment agreement (assuming, for present purposes, that it was otherwise operative). The argument centres on Mrs Lark's email of 8 September advising that 90-day trial periods are compulsory in New Zealand and that they are mutually beneficial.

[27] The main plank of the argument was s 68(2)(d). In this regard it was said that Mr McSherry did not have "the information or the opportunity to seek advice as required by [s 63A]" at the time of bargaining for or entering into the agreement; and that Mrs Lark knew, or ought reasonably to have known, that to be so (s 68(1)(b)(i) and (ii)). It was submitted that what Mrs Lark told Mr McSherry was incorrect and, in context, effectively undermined the opportunity for him to seek advice. It was also argued that Mr McSherry reasonably relied on the skill, care or advice of Mrs Lark (s 68(1)(b)(i), (ii)) and that Mrs Lark knew that Mr McSherry was relying on her skill, care or advice, or ought reasonably to have known that this was so (s 68(2)(b)).

[28] Mrs Lark was an experienced person, having worked in the hospitality industry for a long time. So was Mr McSherry. He had been working for much of his adult life in hospitality, both within New Zealand and overseas, in a great many jobs. He was not lacking intelligence or business nous. The interactions between Mr McSherry and Mrs Lark were clearly on a relatively equal footing at the relevant time. Any suggestion that he was somehow reliant on Mrs Lark, and that this undermined his ability to properly consider the draft agreement, appear to me to be stretching the reality of the situation. And, as Mr McGinn pointed out, the ground shifted somewhat in evidence in terms of what Mr McSherry says he took from Mrs Lark's advice. First he said that he did not know about the 90-day trial period clause in the agreement. He then said that he relied on what Mrs Lark had said.

[29] What Mrs Lark told Mr McSherry in relation to 90-day trial period provisions is not in dispute. It was wrong. She told him that he could "look it up" if he wanted to check what she had said, but he chose not to do so. Nor did he take any steps to seek advice in relation to the draft agreement. Rather he gave evidence that he had read the draft agreement at the time and that he understood it. I am not satisfied,

based on the evidence before the Court, that the grounds in s 68 have been made out in the particular circumstances.

Previously employed?

[30] Section 67A only applies to "an employee who has not been previously employed by the employer." Mr Carruthers argued that Mr McSherry had previously been employed by the Kumara Hotel, thereby ousting the operation of the trial period provisions.

[31] There were two strings to the argument advanced by the defendant. First, that (applying the usual approach under s 6 of the Act (definition of "employee")) the real nature of the relationship between Mr McSherry and the hotel during his prior period of work there was one of employee/employer. Second, even if the real nature of the relationship did not point to one of employment in terms of the usual approach to determining status under s 6, the underlying policy objective of s 67A (namely to exclude relationships where the employer had had a previous opportunity to assess the worker and to encourage employers to engage inexperienced workers) supported an extended definition.

[32] As to the first argument, I am not satisfied, based on the paucity of evidence before the Court, that the real nature of the relationship between Mr McSherry and the plaintiff during his original time at the hotel was as employee and employer.[3] The documentation which was before the Court tended to suggest otherwise. And, while not determinative, Mr McSherry himself confirmed in evidence that he thought that he was an employee of RNL, as reflected in the CV he provided the plaintiff with when he applied for the position of operations manager. The defendant's argument based on s 6 and the real nature of the relationship cannot succeed on the evidence before the Court.

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[3] For a recent discussion of the approach to assessing whether a worker is an employee see *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150.

[33] The second argument hinges on legislative purpose. The legislative intent underlying the 90-day trial period provision was set out in the explanatory note to the Employment Relations Amendment Bill 2008. There it was said that:

> *This will enable those employers to determine the employees' suitability for permanent employment, without the risk of legal proceedings for unjustified dismissal in the event the employment is terminated.* Such trial periods can be particularly important for small and medium sized businesses, as they often face higher recruitment and dismissal costs relative to larger employers who have dedicated human resources departments. Small and medium sized businesses, therefore, face higher risks in taking a chance on a new employee. *This Bill will provide opportunities for those who might suffer disadvantage in the labour market, for example employees who are new to the workforce or returning to the workforce after some time away or specific groups at risk of negative employment outcomes*.
>
> (Emphasis added)

[34] There is room for argument that the context of s 67A, having regard to its underlying purpose, requires that "employee" be given a broader meaning than that contained within s 6 ("any person of any age employed by an employer to do any work for hire or reward under a contract of service"… "unless the context otherwise requires").[4] The difficulty I perceive with this analysis is the wording of s 67A(3) itself, and the definition of employee contained within it ("**Employee means** an employee who has not been previously employed by the employer"). The defendant's approach seeks to read into s 67A(3) words that are not there. As Mr McGinn points out, it appears that Parliament (for whatever reason) deliberately chose to use a relatively narrow formulation, referring to "employed", "employee" and "employer" rather than, for example, a person previously "engaged to work". This seems to me to undermine the sort of loose and all-encompassing construction that would be required under the defendant's analysis.

[35] While legislative purpose may usefully inform the proper interpretation of a provision, it is not the starting point for analysis or a substitute for it. In other words, the question of whether Mr McSherry was previously employed by the Hotel for the

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[4] In *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 483, (2016) NZELR 468 at [58]-[60]; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, (2017) 14 NZELR 877 at [54]-[65] the Courts found that the reference to "employees" in s 82(1)(b) of the Act has a broader meaning than the definition of "employee" in s 6 having regard to the context of the former provision. Note however that unlike s 67A, s 82(1)(b) contains no internal explanation of what the term "employee" means for the purposes of that provision.

purposes of s 67A is not answered by asking whether he was an experienced worker in the hospitality industry who had, at some stage in the past, spent time cooking in the plaintiff's hotel kitchen. To the extent that obiter observations[5] in *Smith v Stokes Valley Pharmacy (2009) Ltd*[6] may be taken to suggest otherwise (as I understood Mr Carruthers to be submitting), I respectfully disagree.[7]

[36] I conclude that s 67A is not disengaged simply because Mr McSherry previously spent time working at the hotel. That is because he was not previously an employee employed by it during his temporary stint there.[8]

The first agreement

[37] The defendant argued that he was employed by the plaintiff under the first agreement. Because it did not contain a 90-day trial period provision, such a provision could not subsequently be imposed. Mr Carruthers relied on *Blackmore v Honick Properties Ltd* in support of this line of argument.[9]

[38] The plaintiff argued that the first agreement was too uncertain in its terms. In this regard Mrs Lark gave evidence that she saw the offer of employment to Mr McSherry as being conditional on the outcome of the restructuring process, saying:

> The nature of Joe's offer remained dependent on what I saw as a complicated restructuring process affecting two other roles being completed smoothly. I couldn't begin the restructuring process at the time of the interim offer as I was going to be on leave until 20 August so that process was going to be delayed. The position needed to be advertised to test whether there were other suitable applicants, as well as consultation with other staff to be affected before any appointment could progress. I also pointed out to Joe again in my email that we could not promise Joe the Hotel flat accommodation until the restructuring process was resolved.

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5 The finding already having been made on other grounds that the trial period provision did not apply under Ms Smith's employment agreement.

6 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [89]-[91].

7 See [89]-[91].

8 Compare the approach adopted in *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152, [2013] ERNZ 326; the person's work was known to the employer after a "pre-employment assessment".

9 *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.

[39] However, under cross-examination she accepted that the meeting in Rangiora was "just a courteous thing" and said that "my word was my offer and I all along expected that Joe would be the right person for the job". She also confirmed that she had "no intention of ever withdrawing the offer" and she took no steps to do so. The contemporaneous documentation clearly reflects Mr McSherry's acceptance of the offer that had been put to him. Mrs Lark's "welcome aboard!" response of 22 July 2015 reinforces the point that the parties had by this stage reached a binding agreement. That agreement set out the key terms on which Mr McSherry was to be employed by the plaintiff on an annual salary of $60,000 and that accommodation would be provided. The agreement did not contain a trial period provision.

[40] Mr McGinn submitted that *Blackmore* had been misunderstood and a trial period provision can still apply when there is a preliminary offer and acceptance of an employment agreement, subject only to the employee not actually starting work before the contract containing the trial period clause is signed. He submitted that in *Blackmore* the trial period was held to be invalid because the employee had started work an hour before the contract was signed. That is not, as Mr McGinn pointed out, the situation in the present case.

[41] It is convenient to set out the relevant extracts from *Blackmore* on which Mr McGinn particularly relied to support the submission that the judgment has been misunderstood:

> [46] In accordance with the conclusion in *Stokes Valley Pharmacy*, an employee employed previously includes someone who has worked at some time in the past for the employer but has ceased that employment. It also includes an existing or current employee of the employer.
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> [47] Although the statute speaks of a trial period for an employee who has not "previously" been an employee of the employer, this includes "currently" an employee of the employer. This accords with the Concise Oxford English Dictionary's definition of the adjective "previous" as meaning "existing or occurring before in time or order". (footnote omitted)
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> [48] In accordance with the definition of employee in ss 6 and 5 of the Act, *Mr Blackmore became an employee of HPL on 10 October 2010 when he was offered, and accepted, employment with HPL. Although clearly not an employee for all or even most purposes as from that date, Mr Blackmore was an employee entitled to access to the statutory personal grievance procedure from that date*.
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> (Emphasis added)

[42] I understood Mr McGinn to submit that [48] above meant that Mr Blackmore could only be an employee for the purposes of accessing the statutory personal grievance procedure if he was dismissed before that date. Such an interpretation does not sit comfortably with the observation in [49]:

> [49] But even at the very latest, his employment commenced for all purposes at 7 am on 15 November 2010, also before the individual employment agreement containing the trial period provision, was entered into. Although in a way that was different factually from that of the employee in the *Stokes Valley Pharmacy* case, Mr Blackmore was likewise an employee who had been employed previously by HPL when the employment agreement containing the trial period provision was entered into.

[43] This seems to me to reflect an acceptance by the Court that Mr Blackmore was an employee for the purposes of s 67A when he accepted the offer but, even if that was not so, he was an employee when he later started work. Both events preceded the agreement which contained the trial period provision which the employer subsequently sought to rely on. The observations which then followed reinforce the point:

> [50] The principal argument for the defendant that a trial period should be able to be agreed after the commencement of employment, as occurred in this case, relied on a submission about the potential consequences of finding that employment commenced immediately upon acceptance of the offer of it. In the context of this case, Ms Burke accepted that offer and acceptance of employment was concluded between the parties on about 10 October 2010. However, Mr Blackmore did not begin work for HPL until more than a month later, on 15 November 2010. Counsel's submission was that if Mr Blackmore's employment and, therefore, the 90 day trial, were deemed to have begun more than a month before work actually started, more than a third of the trial period would have been ineffectual. Ms Burke submitted that an even more extended timeframe between acceptance of an offer of employment and its commencement might, theoretically in these circumstances, mean that the entire 90 day period for assessing the employee's performance would expire before work even began, thus negating entirely the purpose of the trial.
>
> [51] There are, however, two answers to those concerns.
>
> [52] The first is that a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work. The phrase in s 67A(2)(a) "… starting at the beginning of the employee's employment …" means when the employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date.

> [53] So the trial period agreed in these terms simply becomes one of a number of terms and conditions of employment that will take effect at a future date when the job starts.
>
> [54] The second is, for reasons upon which I will elaborate, that the extended definition of "employee" in s 6 of the Act applies only to deeming a person to be an employee before the commencement of work for the purpose of being able to bring a personal grievance for unjustified dismissal during that period.

[44] It is well established that some, but not all, obligations and entitlements commence on the offer and acceptance of employment being completed. Specifically, work can still be undertaken in competition with the new employer prior to the work commencing;[10] a personal grievance can be pursued for unjustified dismissal even though work for the new employer has not yet been done.[11]

[45] I approach the issue on the following basis. Once the parties have entered into a binding employment agreement the employee is employed by the employer for the purposes of s 67A. The corollary of that is that the employer is then precluded from seeking to rely on a 90-day trial period provision contained in a subsequent agreement, whether entered into before or after work actually commences.

[46] On this analysis it follows that Mr McSherry became an employee for the purposes of s 67A when he accepted the offer of employment contained within the first agreement. That agreement did not contain a trial period provision, presumably because the plaintiff was happy to offer Mr McSherry employment without further testing his suitability for the role via the trial period route. That may well be because he was, by this time, known to Mrs Lark who plainly believed that he would be an asset to the hotel.

[47] The first agreement, which did not contain a 90-day trial period provision, is fatal to the plaintiff's argument that the provision in the second agreement (which did) provides a shield to the claim of unjustified dismissal. It does not.

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10 *Blackmore* at [55].

11 The Fair Trading Act 1986, s 12 reinforces the obligations on an employer prior to employment beginning.

Remedies

[48] The plaintiff contended that the defendant was not entitled to the relief ordered by the Authority. The defendant sought orders confirming the orders made in that forum. It is convenient to deal with each head of relief in turn.

Notice period

[49] Mr McSherry claims that he was only given four weeks' notice but was entitled to six under his employment agreement. I agree. The plaintiff is accordingly ordered to pay the defendant a sum equivalent to the short-fall.

Accommodation

[50] The agreement referred to "accommodation provided". It did not specify where the accommodation would be. Mr McSherry accepts that accommodation was provided to him. It was not, however, to his liking. His complaint is that he understood, from his discussions with Mrs Lark, that he would be put in the self-contained flat in the hotel.

[51] It is clear that there were discussions about the accommodation. It is also clear that accommodation was an important point from Mr McSherry's perspective. However it is equally clear that the agreement was that accommodation would initially be provided in the staff house located across the road from the hotel and that he would be able to move into the self-contained flat within the hotel itself when it became available. This is reflected in the later agreement, which provided that: "Accommodation is provided – Initially this may be in the Staff House until the Hotel apartment becomes available."

[52] In the event, the hotel apartment did not become available during Mr McSherry's time with the plaintiff because the proposed restructuring did not proceed as Mrs Lark had anticipated and the staff member who was living in the apartment at the time remained living there.

[53] The promise of accommodation in the hotel apartment was conditional. The condition was never satisfied. The promise of accommodation per se was not conditional. This unconditional promise was satisfied. The defendant is not entitled to any relief in relation to accommodation.

Unilateral change of position

[54] Mr McSherry claims that he suffered a unilateral change in position when he took on the chef role when the previous chef departed. He claims that this change was forced on him without consultation. It was Mr McSherry who offered to take on the duties of chef on a temporary basis when the incumbent chef unexpectedly departed. Mrs Lark agreed with the suggestion. I am satisfied that this was a mutually agreed arrangement, intended by both parties as a temporary measure until a replacement chef could be brought on board. In the event the meeting on 10 December intervened. The defendant is not entitled to any relief in relation to the claimed unilateral variation of position.

Unfair bargaining

[55] I have already dealt with the claim of unfair bargaining, and rejected it on the facts. Even if this part of the claim had been made out I would not have ordered any relief, as the effect of the alleged unfair bargaining was nil and no loss was otherwise established.

Unjustified dismissal

[56] As I have already found, Mr McSherry was unjustifiably dismissed from his position of general manager. He was told that he could continue to work at the Hotel as chef. Mr McGinn sought to characterise this as an agreed variation but it lacked the legal requirements for such a variation to be effective. Mr McSherry was plainly caught off guard at the meeting and was shocked to hear that he was being dismissed from the role he had been employed to undertake. The dismissal was in purported reliance on an unenforceable trial period provision.

[57] While Mr McSherry's immediate response to Mrs Lark's suggestion that he stay on in a different role (as a chef) was positive, once he had left the meeting and had time to absorb what had been said and to think things over he decided to leave. In doing so he effectively declined to take on the different role that Mrs Lark had offered to him. For completeness, I do not accept that his departure constituted an abandonment of employment.

[58] I am satisfied that Mr McSherry suffered a loss of wages as a result of his unjustified dismissal. While he could have taken up the role of chef, that was not a realistic option in the circumstances. The evidence was that he left the Hotel on 11 January 2016 and obtained alternative work in Christchurch on 7 March 2016. In the circumstances I am satisfied that an order for reimbursement of lost wages for the intervening period (11 January to 7 March, non inclusive) is appropriate and make such an order accordingly.

[59] I accept that Mr McSherry suffered compensable loss under s 123(1)(c)(i) of the Act. He sought the same award as was made in the Authority, namely $11,900. While I might otherwise have considered a higher award appropriate (on the basis that I would place this case towards the top of the bottom range in terms of the nature and extent of the injury suffered as a result of the plaintiff's unjustified actions[12]), I order the plaintiff to pay the defendant the sum ordered in his favour in the Authority, namely $11,900.

Summary

[60] The plaintiff is ordered to pay the defendant:

(a) A sum equivalent to the two weeks' notice period Mr McSherry ought to have been paid for but was not;

(b) reimbursement for lost wages for the period 11 January 2016 to 7 March 2016 (non-inclusive);

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[12] *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].

(c) $11,900 by way of compensation under s 123(1)(c)(i) of the Act.

[61] These sums are to be paid to Mr McSherry within 20 working days of the date of this judgment.

Costs

[62] Costs are reserved. The parties are encouraged to agree costs. If that does not prove possible the defendant is to file and serve any memorandum together with any supporting material within 20 working days of the date of this judgment; the plaintiff within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 4 pm on 14 March 2018