**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2010] NZEMPC 111**
**WRC 14/10**

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| IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| BETWEEN | HEATHER SMITH<br>Plaintiff |
| AND | STOKES VALLEY PHARMACY (2009) LIMITED<br>Defendant |

Hearing: 9 and 10 August 2010
(Heard at Wellington)

Appearances: Peter Cranney and Carolyn Mayston, Counsel for Plaintiff
Tim Cleary, Counsel for Defendant

Judgment: 26 August 2010

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**JUDGMENT OF CHIEF JUDGE GL COLGAN**

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**(a) The plaintiff is not precluded in law from bringing and maintaining her proceedings including for the personal grievances of unjustified dismissal from, and unjustified disadvantage in, employment or otherwise at common law for breach or breaches of contract.**

**(b) The plaintiff was disadvantaged unjustifiably in, and dismissed unjustifiably from, her employment with the defendant.**

**(c) The defendant breached s 4 (the "good faith" provisions) of the Employment Relations Act 2000 and the parties' individual employment agreement.**

**(d) Remedies for the plaintiff's claims for which the defendant is liable are reserved for settlement or subsequent determination by the Court except that there will be no award of penalties against the defendant.**

**(e) There will be no orders as to costs between the parties on this preliminary hearing although costs are henceforth at large.**

## Nature of proceeding

[1] This case, removed by the Employment Relations Authority to this Court for hearing at first instance, addresses the interpretation and application in practice of ss 67A and 67B of the Employment Relations Act 2000 (the Act). These are the sections, inserted as from 1 March 2009 by s 7 of the Employment Relations Amendment Act 2008, which deal with provisions for trial periods of employment for 90 days or less. The case is the first that has come to this Court for consideration of these new sections. It raises some, but not all, controversial features of the new law but will address only those that arise for decision on the facts. There are other cases in which other questions under the sections will be for interpretation.

## Scope of hearing

[2] The parties agreed that the hearing would be confined to the preliminary jurisdictional questions about what causes of action, if any, Ms Smith may have against the company and, if so, its liability to Ms Smith. The inquiry may extend, if appropriate, to determining whether Ms Smith was dismissed unjustifiably, whether she may have an unjustified disadvantaged personal grievance, and whether the defendant breached her employment agreement for which it may be liable in damages and for penalties. Inherent in these determinations, if appropriate, will be whether Ms Smith is entitled to recover lost wages and compensation under s 123(1)(c). The amounts of such remedies will not, however, be determined but will rather be left to the parties to attempt to settle in the first instance but with leave to reconvene the hearing if that is not possible.

[3] Commendably and realistically, Mr Cleary conceded that if the Court determines that ss 67A and 67B do not preclude access to a claim for unjustified dismissal, the circumstances surrounding the ending of Ms Smith's employment were such that it is inevitable that she will be found to have been unjustifiably dismissed.

## The new legislation

[4] Sections 67A and 67B are as follows:

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

(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer as defined in subsection (4).

(2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that—

(a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and

(b) during that period the employer may dismiss the employee; and

(c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

(3) Employee means an employee who has not been previously employed by the employer.

(4) Employer means an employer who, at the beginning of the day on which the employment agreement is entered into, employs fewer than 20 employees.

(5) To avoid doubt, a trial provision may be included in an employment agreement under—

(a) section 61(1)(a), but subject to section 61(1)(b):

(b) section 63(2)(b).

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

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).

(4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.

> (5) Subsection (4) applies subject to the following provisions:
>
> (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
>
> (b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[5] A "trial period" under s 67A may be distinguished from "[p]robationary arrangements" under s 67 although the two provisions contain some similarities. There is, however, no suggestion by the defendant of s 67 being relevant to the issues in this case. The plaintiff says that if the arrangements do not constitute a trial period under ss 67A and 67B, they may amount to a s 67 probationary period.

## Relevant facts

[6] Heather Smith is a 33 year old who has worked in a variety of retail assistant positions since she was aged 18. These have included at various supermarkets and at a retail chain store. Each of those different periods of employment has been for a substantial period when compared to the frequent mobility of employees in that field. At the time of the birth of her child in April 2004 Ms Smith was working for a food manufacturer and, having taken maternity leave for a little more than three months, she returned to that employment. Following a further period in footwear retailing, Ms Smith began work, on 19 March 2007, as a retail pharmacy assistant at a pharmacy known as Ross Cook Amcal in the Wellington suburb of Stokes Valley. She worked there for the pharmacist, Ross Cook, and his wife, Sandra Cook, from 19 March 2007 to 30 September 2009. The Cooks operated their business as a company, Stokes Valley Pharmacy Limited. The company was Ms Smith's employer.

[7] Ms Smith had a 15 year record of employment with various employers in various fields but in the majority of which she was engaged in retail sales. There is no suggestion that she moved between employers because of any dissatisfaction with her work or generally.

[8] In the period of her last 2½ years at Ross Cook Amcal Ms Smith developed experience in pharmacy retail and was well regarded by her employers. Ms Smith had undertaken a number of courses appropriate to her work in pharmacy retail and enjoyed her interaction with customers from the local area.

[9] Towards the end of August 2009 Mr and Mrs Cook gathered their five staff at a meeting to announce that they had sold the business. Although Mr and Mrs Cook were unable to provide Ms Smith and other employees with any certainty of ongoing employment, the staff were introduced to purchasers Karen King and Paul Kearns who indicated that if they wished to stay on working at the pharmacy which Ms King and Mr Kearns were to purchase, they would be interviewed. Ms King in particular indicated that she was happy to continue the Cooks' harmonious employee team relationship. The Kearns/King ownership and operation of the pharmacy business was under the aegis of the large pharmacy industry body known as Pharmacy Brands. It part owned the defendant and was very involved in the establishment and operation of the business.

[10] Although nervous about what the change in ownership of the business might bring, Ms Smith was as confident as she could be that she would be able to continue to work there. She needed the work to support her family and pay the bills.

[11] In September 2009 Ms Smith was interviewed by Ms King and Mr Kearns. Ms King said to Ms Smith that she and Mr Kearns would be taking over the business on 1 October 2009. On 14 September 2009 Ms King telephoned Ms Smith to say that the plaintiff had "got the job" and that a contract would be sent out in the mail which would probably arrive the following week. In the event, the outgoing employer (Mrs Cook) handed Ms Smith a letter and attached draft contract at work on 29 September as the Cooks remained as vendor owners until the end of September 2009.

[12] On the same day as she received the new employer's draft employment agreement (29 September 2009), Ms Smith sent an SMS or text message to Ms King asking her new employer to ring her that evening at home as she had a couple of questions about the draft employment agreement. This was done and Ms King and

Ms Smith agreed that she would retain her current hourly rate, that she would be required to give four weeks' notice if she resigned, and that "targets and goals" would be discussed later. Ms Smith had not then noticed the inclusion of a trial period in the draft agreement and did not therefore discuss this with Ms King at that time.

[13] Clause 10 of Ms Smith's proposed (and later executed) individual employment agreement with the defendant was a standard provision for all employment agreements and provided as follows:

> **10. Trial Period**
>
> 10.1 You will initially be employed with us on 90 day trial or probationary basis:
>
> (a) During the first four weeks of this trial period (the training period), you will be expected to gain competency in all of your position's requirements.
>
> (b) During the balance of this trial period (the consolidation period) you will be expected to demonstrate and maintain this required level of competency.
>
> 10.2 During the trial period you may be dismissed and you are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
>
> 10.3 The parties acknowledge and agree that the terms of this clause constitute a trial provision within the meaning of s67A of the Employment Relations Act 2000.
>
> 10.4 After successful completion of the trial period you will be considered to be fully trained and competent, to manage your duties.
>
> 10.5 To assist you in your training and subsequent consolidation we will hold regular appraisal meetings where we can ensure you are notified on your performance and any improvements. We will give you full training and encouragement to ensure your targets are achieved.

[14] Clause 1.1 of the agreement provided that cl 10 (and indeed the whole agreement) was not retrospective. It says:

> 1.1 This agreement will start on the day that it is signed by you, and will remain in force until either the Company or you terminate it. If we propose to make any changes to the terms of your employment with us, we will first consult and negotiate with you.

[15] Clause 19 of the employment agreement provided for its termination as follows:

> 19.1 Either party may terminate your employment at any time by giving the other 4 weeks written notice:
>
> 19.2 The Company may terminate your employment ***without notice*** for:
>
> (a) Serious misconduct;
>
> (b) A serious breach of this agreement;
>
> (c) A breach of clause 3 (regarding statements when applying for this position);
>
> (d) Any act or omission in the course of employment which endangers the health or safety of any person, including you;
>
> (e) Not declaring a conflict of interest;
>
> 19.3 The Company may terminate your employment at any time if you are unable, due to medical reasons, to perform your duties to a satisfactory standard. In making our decision, we must take into account:
>
> (a) The nature of the illness or incapacity, and their prospects and timeframe for recovery;
>
> (b) The length of time it is reasonable for us to keep your position open;
>
> (c) Anything else which you ask us to take into account.

[16] Clause 10 was subject to cl 19 and the latter was not modified by cl 10 in respect of dismissal during or after a trial period.

[17] Clause 32 ("**Severability**") provided:

> 32.1 Where any provision of this Agreement is rendered void, unenforceable or otherwise ineffective by operation of law, all other provisions in this agreement will remain in place.

[18] Clause 33 ("**Completeness**") provides:

> 33.1 The terms and conditions set out in this agreement replace any previous arrangements and understandings between us.

[19] Read in conjunction with cl 1.1, which provided that the terms of the written agreement would take effect upon its signing, cl 33 cancelled the effect of any

previous arrangements between the parties including those on which Ms Smith was engaged when she worked for the defendant on 1 October.

[20] When Ms Smith's stepmother went through the draft agreement with her between 30 September and 2 October, she pointed out to Ms Smith the 90 day trial period and advised the plaintiff to ask her new employer about this.

[21] Ms King and Mr Kearns took over the business and began to operate it, at least so far as staff employment was concerned, at 9 am on 1 October 2009. They told Ms Smith to carry on with her job as usual and as she would have done with the previous owners. Ms Smith did so on 1 October 2009.

[22] On the following day, 2 October 2009, Ms Smith sat down with Mr Kearns to discuss the form of draft employment agreement and for its execution. Ms Smith says that she expressed her concern about the 90 day trial period as she told Mr Kearns that she had been doing the same work for the previous owners. She says Mr Kearns responded that she should not worry too much about the trial period as it was "in all the contracts". Ms Smith said she was reassured to hear this and believed her job to be safe. Ms Smith then signed her new employment agreement including the 90 day trial provision set out above. Mr Kearns denies that there was any discussion about the trial period and says that when he asked Ms Smith if she was happy to sign the agreement she concurred and did so.

[23] To the extent that it may be relevant to the outcome of the case, I conclude that immediately before signing the employment agreement on 2 October, Ms Smith did raise a general query about the proposed trial period. This did not go so far as to state a disagreement with its inclusion in the agreement. I find that Mr Kearns' response that Ms Smith should not be concerned about it because such a clause was in all agreements, was intended to indicate to, and was accepted by, her that she was not being singled out for different treatment among the pharmacy's employees. That was indeed the position because cl 10 was a standard provision in all the defendant's employment agreements. Mr Kearns was acting on the advice of Pharmacy Brand's solicitors that employment agreements should contain this clause and it was in these circumstances that both Ms Smith and Mr Kearns signed the employment agreement

on 2 October, their signatures signifying and evidencing Ms Smith's acceptance from that date of the terms and conditions of her employment.

[24] Within a relatively short time, however, it became clear that the defendant appeared dissatisfied with Ms Smith's performance. Ms Smith for her part felt that she was being sidelined with her new employer preferring other employees. This situation continued on and off in October and November 2009.

[25] Ms Smith was trained to handle new products and on new procedures from time to time during the first two months or so of her probationary period. Some of this training was undertaken by product representatives but other parts by Mr Kearns and Ms King as and when required and on the shop floor. It was the defendant's case that Ms Smith was provided with informal feedback during and immediately after these occasions so that even if not spelt out explicitly, they believed Ms Smith ought to have been able to gauge their assessment of her performance by such means. There were, however, no regular meetings with Ms Smith in the sense of providing a dedicated time away from the shop floor on a scheduled basis to address comprehensively the plaintiff's performance of her job, her employer's expectations, and what might be necessary to meet these where there were deficiencies.

[26] On 8 December 2009 at Ms King's request, Ms Smith spent the day at the defendant's other pharmacy to cover a sick leave absence but at the end of that day Ms King and Mr Kearns together told her that she was to be dismissed summarily and that they were entitled to do so because it was within the 90 day trial period. When Ms Smith asked what she had done wrong, she says their response was that she was not what they were looking for and that she was inexperienced. They say they were unresponsive to Ms Smith's requests because they had been told they were entitled to refuse to provide reasons or other explanations.

[27] Again to the extent that it may be necessary to determine the issues in this case (which I consider it is not), I accept Ms Smith's evidence that although Mr Kearns and Ms King appeared embarrassed and were unwilling to engage in dialogue with her about the reasons for her summary dismissal, Mr Kearns nevertheless did admit very briefly to their concerns about her work performance and

suitability for the job. Although believing themselves not required to give any explanation and wishing to stick strictly to the script that they had been advised to follow, it was a natural human reaction to try to give an answer, as I am satisfied Mr King did, in a situation that was mutually unusual and stressful.

[28] The only reason that Mr Kearns and/or Ms King gave to Ms Smith for her summary dismissal was that she was "not what we were looking for" and that she was "inexperienced".

[29] Other events, including the consequences of a both economic and emotional nature of Ms Smith's summary dismissal are not for decision in this part of the judgment so will not be referred to unless and until that may be appropriate if the parties cannot now resolve Ms Smith's claims. It is relevant, however, to record that no notice of her summary dismissal was given to Ms Smith. She received two weeks pay sometime later but it was only after several months and proceedings had been issued in the Employment Relations Authority that the defendant acknowledged an obligation to make a further payment of 2 weeks wages, presumably in lieu of the 4 weeks contractual notice period that it had failed to give.

[30] Mr and Mrs Cook, the vendors of Ross Cook Amcal Pharmacy and Ms Smith's employers for more than three years, provided Ms Smith with a written reference on 4 November 2009 that provided:

> I have had the pleasure in working with Heather Smith for just over three years.
>
> Heather demonstrated very good customer understanding and [was] always prepared to do 'the extra bit'. Heather was a well planned loyal and reliable committed employee.
>
> I would have no hesitation in recommending Heather to a prospective employer in an appropriate sales role and would wish her and her family well for the future.

[31] Ms Smith's representative wrote to the defendant, well within 60 days of her dismissal seeking reasons in writing for that. This was pursuant to s 120 of the Act. On advice, the defendant refused to provide those reasons relying on what it considered was its entitlement to do so under s 67B(5). At least until Ms Smith

heard the evidence for the defendant at the hearing in this Court, she was unaware of the defendant's reasons for dismissing her.

[32] I had the opportunity to observe Ms Smith, Mr Kearns and Ms King explain what happened at both the beginning and end of their employment relationship. In many ways this was a not uncommon employment situation. Ms Smith was an established and experienced retail assistant on a relatively low hourly rate of pay and very dependent on her job and earnings for her economic survival and that of her family. In employment relationships, she was on her own in the sense that she did not have access to advice from a union or from expert knowledgeable friends or family. Ms Smith accepted at face value what she was told by her employer and was loath to challenge or otherwise rock the boat because of her vulnerable economic circumstances.

[33] When presented with an impressive looking and comprehensive employment agreement that had been prepared by solicitors and, although having raised queries about some aspects of it and obtained assurances about these, Ms Smith was not about to jeopardise the security of her ongoing employment by resisting agreeing to such parts as the trial provision. As in many cases seen by this Court, I think Ms Smith appreciated that there might be some risk in agreeing to the terms stipulated for by her employer but hoped, based on her past record, that this would be minimal and that things would work out and go well.

[34] Mr Kearns and Ms King were young recent migrants, professionally qualified in their specialist field, but inexperienced in owning and operating their own business and in the employment relations aspect of that in particular. Although theirs was not a franchise arrangement, their commercial relationship with the substantial pharmacy brand organisation known as Pharmacy Brands was not dissimilar to one of franchisor/franchisee. Pharmacy Brands was a fifty percent shareholder in the new company with Mr Kearns and Ms King holding the balance of the shares themselves. Pharmacy Brands provided comprehensive training and assistance to the employer including recourse to its lawyers for general and specific advice.

[35] The employment agreement used for all employees of the defendant was a standard form of agreement prepared by Pharmacy Brands' lawyers. Although some individual details required completion, I doubt that there would have been much scope for major revision of the standard document. Both when engaging staff for the takeover of the business and when contemplating dismissing Ms Smith, Mr Kearns and Ms King took the advice of Pharmacy Brands' solicitors and followed it, in some instances literally or slavishly. For example, when Mr Kearns came to dismiss Ms Smith he had a written script that he had practiced and which he followed, concerned that he should not deviate from it. If Mr Kearns and Ms King had been inclined to act more naturally and spontaneously in their dealings with Ms Smith at the time of the dismissal, they resisted doing so. That was because they had been told that they were not required to respond to Ms Smith's questions and, I suspect, from a fear of compromising their position in law if they did so. As I later conclude, that was an erroneous strategy and, if my surmise about the reasoning behind it is accurate, a regrettable situation for both parties.

## Interpretation and application of sections 67A and 67B

[36] Section 5(1) of the Interpretation Act 1999 requires that: "The meaning of an enactment must be ascertained from its text and in the light of its purpose." Although, under subs (2) and subs (3) the matters that may be considered in ascertaining meaning include such provisions of it as preambles, analyses, tables of contents, headings, departs and sections, marginal notes and others, because this was a small amendment by additions to existing legislation, only a few of those internal indicia exist.

[37] Section 4 of the Employment Relations Amendment Act 2008 provided that the relevant purposes of ss 67A and 67B are:

> to provide when an employment agreement may specify a trial period of 90 days or less, during which an employee can be dismissed and cannot bring a personal grievance or other legal proceedings in respect of the dismissal, subject to certain exceptions; …

[38] Where, however, the text may be unclear even in light of the purpose or scheme of the whole Act, I have had recourse to material generated in the legislative process which may assist in its interpretation.

[39] For recourse to legislative interpretive material, Mr Cleary went back to the Private Members Bill introduced by Wayne Mapp MP as he then was in 2006. This was the Employment Relations (Probationary Employment) Amendment Bill, a private member's Bill which, although it went to and was reported on by a Select Committee, nevertheless did not survive the balance of the legislative process.

[40] I do not think that great weight can be given to the content of the 2006 Bill when interpreting ss 67A and 67B which came from a Government Bill introduced in 2008 and was enacted without recourse to the important Select Committee process of most such legislation. They were very different bills, albeit on the same subject.

[41] Rather, I find more useful the explanatory notes to the Employment Relations Amendment Bill 2008 which accompanied the Bill on its introduction into the House by the Minister. As regards "trial periods" the explanatory note said:

> The Bill enables employers in small and medium sized businesses to take on new employees for trial periods. 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.
>
> 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.
>
> Under the Bill, employers, who employ fewer than 20 employees, and new employees may agree to a trial period of employment of up to 90 days. During this period, either party may terminate the employment relationship and the employee may not raise a personal grievance on the grounds of unjustified dismissal. Parties are still able to access mediation services, but the employee cannot take the matter further to the Employment Relations Authority or the Employment Court. However, other types of remedies, such as remedies for discrimination, or sexual or racial harassment, will remain available to the employee if that type of behaviour has occurred.
>
> An employer and employee may agree to a trial period only once. If an employer decides to re-employ the employee, the option to agree to another trial period will not be available.

[42] The explanatory note to the Bill also stated:

> … trial periods are agreed to in good faith as part of a written employment agreement signed by both parties at the beginning of the employment relationship between the employee and the employer …

[43] The "Bills Digest" prepared "to assist consideration of the Bill by Members of Parliament ... has no official status." It is, nevertheless, one of a number of sources of information that may tend to indicate the collective parliamentary intention but, as with all such materials, it must yield ultimately to the words of the enactment if it conflicts with them.

[44] The Digest notes:

> An employee who is so dismissed [during the trial period of up to 90 days] may not bring a personal grievance or legal proceedings in respect of dismissal. Such an employee may not avail themselves [sic] of "good faith" provisions under s4(1A)(c)(i) or s120(2) of the Act.

[45] On the first reading of the Employment Relations Amendment Bill on 9 December 2008 the Minister of Labour said in her introductory speech:

> This bill is not about taking away rights; it is about giving opportunities. …
>
> … No existing employees can be put on to a trial period; it is an option that will be available to employees wanting to be given an opportunity to work in small and medium sized businesses.
> …
> … the employer, under this bill, can employ an employee with a trial period only if that employee has not previously been employed by that employer.
> …
> … The bill will give … new employees the opportunities to get on the employment ladder. It 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.

[46] During the Bill's second reading in the House, the Minister said:

> This bill is a moderate bill. It has been prepared to protect the rights of employees. It has been prepared and drafted to give new employees the opportunity to say "Give me a go; I will prove myself." and to get their foot in the employment door. …
> …
> … This bill applies only to new employees. It will not affect existing employees, and the trial period is established only by agreement. So it is up

> to the new employee to say "Give me a trial period." The bill will not affect the rights of existing employees.
> …
> … We have specifically provided, in our bill, that an employee is one who has not been previously employed by that employer.

[47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing.

[48] Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

[49] The new provisions in ss 67A and 67B were intended to address the circumstances of "new" employees, that is of people who had not previously been employed or who had not been employed recently or for whom obtaining employment might have proved difficult for any other reason. The scheme of the provisions, as it was promoted, was to allow employers some latitude in engaging and dismissing new employees in respect of whom there might be some risk of compatibility or other work performance issue. Read together, ss 67A and 67B both provide for a new form of "trial period" (otherwise known under s 67 as a "type of probationary arrangement") and remove some existing employee entitlements to challenge at law a dismissal.

[50] Section 67A(1) provides that the persons who may enter into an employment agreement containing a trial provision as is defined in subs (2), are an employee (so defined in subs (3)) and an employer (so defined in subs (4)). It is notable that what

is entered into is not a trial provision but an employment agreement containing a trial provision. It is also significant that Parliament has addressed the entry into an employment agreement (containing a trial provision) as opposed, for example, to the variation of an employment agreement to provide for a trial provision therein. This confirms that the scheme is available only in respect of new employees and not existing or previous employees.

[51] Section 67A(2) defines the phrase "trial provision" that appears in s 67A and s 67B. First, a "trial provision" must be "a written provision in an employment agreement". Next, a trial provision must state, "or is to the effect, that [it states] ..." a number of things. The first of these things to be stated or effected is that there is to be "a specified trial period" which does not exceed 90 days. Next, the start of that trial period is "at the beginning of the employee's employment". Next, the trial provision must state that the employee is "to serve a trial period". All those requirements are in s 67A(2)(a).

[52] Next, the written trial provision must state or be to the effect that, "during that [specified] period [not exceeding 90 days] the employer may dismiss the employee". That requirement comes from s 67A(2)(b).

[53] Finally, under s 67A(2)(c) the written trial provision must state or be to the effect that if the employer does dismiss the employee during the trial period, "the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal."

[54] Next, s 67A defines "employee" at subs (3) as "an employee who has not been previously employed by the employer". That definition builds on the definition of "employee" in s 5 by creating, for the purpose of ss 67A and 67B, a narrower class of employee.

[55] So ss 5 and 6 of the Act are also relevant to the interpretation of ss 67A and 67B. Section 5 simply refers the definition of employee to s 6 which provides relevantly:

**6 Meaning of employee**

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a 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.

[56] Relevant also is the definition of the phrase "a person intending to work" set out in s 6(1)(b). That definition is in s 5 and "means a person who has been offered, and accepted, work as an employee ...".

[57] The definition of "employer" in s 67A(4) deals only with the number of employees (fewer than 20) employed at the beginning of the day in which the employment agreement is entered into. In this case there is no dispute that the employer employed fewer than 20 employees at the relevant time. Subsection (4) is, nevertheless, significant in that it reinforces the importance of both the entering into of an employment agreement, and the date on which that employment agreement is entered into.

[58] Finally, s 67A(5), although not directly relevant to the questions in this case, confirms that a trial provision may be included in an employment agreement where there is a relevant collective agreement also in force. Such a trial provision may not, however, be inconsistent with the terms and conditions in the collective agreement. Finally, subs (5) also confirms that a trial provision may be included in an employment agreement agreed upon for the first 30 days of employment for an employee who is not a member of a union but in which there is an applicable collective agreement.

[59] While s 67A defines the legal nature and parameters of a trial provision including a trial period, s 67B denotes the effects or consequences of the existence in law of a valid trial provision as defined.

[60] Section 67B(1) applies if an employer terminates an employment agreement containing a trial provision by giving the employee notice of the termination before the end of the trial period. It does not matter, however, whether the termination takes effect before, at or after the end of the trial period. That is an important provision for the decision of this case. That is because the parties dispute what must constitute "notice" referred to.

[61] Because a termination of which notice must be given may lawfully occur at any point over a span of time including during, at the moment of conclusion and after the end of a trial provision, "notice" must be more than simply advice of dismissal. Rather, the subsection contemplates that it will be advice of when, in future, the dismissal will take effect. That accords with the long established common law requirements of dismissal on notice which can be either express or, if not, "reasonable notice". It is necessary, however, that the giving of the notice of termination of the employment agreement must be before the end of the trial period. It is significant, also, that the notice is of termination of the employment agreement (containing the trial provision) and not of employment although, in practice, the two will often be the same. It is possible, however, to contemplate that there may be matters in the employment agreement that would survive a termination of the employment. Section 67B(1), however, requires that it be the employment agreement that is terminated.

[62] Section 67B(2) disqualifies an employee from bringing "a personal grievance or legal proceedings in respect of the dismissal" if that employee's employment agreement has been terminated in accordance with subs (1). So disqualification from bringing a personal grievance is dependent upon lawful termination of the employment agreement under subs (1). If there is no lawful termination in subs (1), then the personal grievance barrier under subs (2) does not apply.

[63] The next significant point under subs (2) is that what may not be brought is "a personal grievance or legal proceedings in respect of the dismissal". I interpret that phrase to mean "a personal grievance in respect of the dismissal or legal proceedings in respect of the dismissal". Subsection (2) does not purport to bar access to any personal grievance but only to such a personal grievance as is "in

respect of the dismissal". That means, in practice, and by reference to s 103, that it is only a personal grievance under s 103(1)(a) ("a claim ... that the employee has been unjustifiably dismissed"), so that other personal grievances under s 103 are not barred. In particular, still available to an employee dismissed lawfully under subs (1), is access to what is generally described as the procedure for an unjustified disadvantage grievance under s 103(1)(b) as well as to grievances arising from alleged discrimination, sexual and racial harassment and other similar more specific grievances under s 103.

[64] Just what constitute "legal proceedings in respect of the dismissal" that are other than a personal grievance under s 103(1)(a), is problematic. That is because of the effect of s 113 of the Act (personal grievance provisions only way to challenge dismissal) which provides:

> **113 Personal grievance provisions only way to challenge dismissal**
> (1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.
> (2) Nothing in subsection (1) prevents an action under this Part to recover—
> (a) wages relating to a period of notice or alleged period of notice; or
> (b) wages or other money relating to the employment prior to the dismissal; or
> (c) other money payable on dismissal.

[65] Although the phrase in s 67B(2) "or legal proceedings in respect of the dismissal" may have meant, for example, a claim for wrongful dismissal at common law, that has long been precluded by s 113. It is unnecessary, in deciding this case, to determine what the phrase 'legal proceedings in respect of the dismissal' means and that difficult question is best left to a case in which it arises.

[66] Section 67B(3) emphasises expressly the limited barrier established by subs (2). It reiterates the concept of a "personal grievance or legal proceedings" and confirms that no employee, even one subject to a trial period under these sections, can be prevented from bringing a personal grievance under s 103(1)(b)-(g). Quite what constitutes "legal proceedings" on any of the grounds specified in

s 103(1)(b)-(g) which is not a personal grievance, is also puzzling but neither is it for decision in this case.

[67] Subsection (4) provides that even an employee precluded from bringing a personal grievance for unjustified dismissal may nevertheless expect no lesser treatment as would an employee whose employment agreement contains no trial provisions or an employee whose employment agreement contains a trial provision that has ceased to have effect. Although this equal treatment provision is linked expressly to access to mediation services, it is broader than that. What it specifies is that trial period employees are to be treated no differently than others. It may be said that the rights provided by subs (4) are, however in respect of a dismissal, rights without a remedy, at least in the sense of the remedy of challenge at law.

[68] Subsection (5), however, narrows the classes of what I have called equal treatment provided for in subs (4) by excluding only two sorts of it. First, under subs (5)(a), what is otherwise the obligation upon an employer of good faith dealing as set out in s 4 of the Act does not extend to compliance by the employer with s 4(1A)(c) in making a decision whether to terminate an employment agreement under s 67B. The relevant parts of s 4 provide (with the excluded subs (1A)(c) in bold for identification purposes):

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the 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; and
>
> **(c) without limiting paragraph (b), 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.**
>
> (1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.
>
> (1C) For the purpose of subsection (1B), good reason includes—
> (a) complying with statutory requirements to maintain confidentiality:
> (b) protecting the privacy of natural persons:
> (c) protecting the commercial position of an employer from being unreasonably prejudiced.
>
> (2) The employment relationships are those between—
> (a) an employer and an employee employed by the employer:
> …
> (4) The duty of good faith in subsection (1) applies to the following matters:
> …
> (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:
> …
> (5) The matters specified in subsection (4) are examples and do not limit subsection (1).

[69] The effect of s 67B(5)(a) therefore is to relieve an employer in the making of a decision whether to terminate an employment agreement containing a trial provision pursuant to the terms of that provision, only from providing the employee with information relevant to the continuation of the employee's employment about that decision and an opportunity to comment on the information before the decision is made. Other s 4 good faith obligations apply and are enforceable, but other than by personal grievance for unjustified dismissal. Even absent subs (1A)(c) good faith obligations, those remaining under s 4 are significant and enforceable by trial period employees.

[70] The second exclusion from the statutory good faith and fair dealing obligations contained in s 4, is that set out in s 67B(5)(b). It removes from the employer what would otherwise be the obligation to comply with a request under s 120 relating to a lawful termination of employment under s 67B.

[71] Section 120 provides:

> **120 Statement of reasons for dismissal**
> (1) Where an employee is dismissed, that employee may, within 60 days after the dismissal or within 60 days after the employee has become aware of the dismissal, whichever is the later, request the employer to provide a statement in writing of the reasons for the dismissal.
>
> (2) Every employer to whom a request is made under subsection (1) must, within 14 days after the day on which the request is received, provide the statement to the person who made the request.

[72] So the effect of subs (5) of s 67B is to relieve an employer of any obligation to advise of proposals for a prospective dismissal or an opportunity for the employee to comment on those before the dismissal takes place and, after the event, to give reasons in writing for the dismissal. These exemptions also depend upon a lawful termination of the employment otherwise under s 67B.

[73] Whether an employer dismissing, otherwise lawfully, an employee pursuant to s 67B must or should give the employee any explanation for the dismissal when giving notice of that, is not straight foward. On the one hand, the scheme of ss 67A and 67B is not that employers should be able to dismiss arbitrarily or capriciously, that is without having any reasons to do so. Rather, the scheme of the 90 day trial process is to remove from challenge by unjustified dismissal personal grievance, a dismissal for reasons including lack of progress in training, lack of performance, incompatibility with the job or with others, and such other criteria as are susceptible to reason.

[74] Although not a statutory factor, for those employees at risk of not obtaining employment other than on a 90 day trial, it is important to know why they may have failed the trial even if they have a limited ability to challenge that. Such employees should not be deprived of the ability to learn from an unsuccessful trial so that they can use its lessons in any future employment opportunities.

[75] Nor should the natural human wish to know of the reasons for a significant setback in one's working life be discounted. People are often prepared to accept a

setback, albeit reluctantly, if they know the reasons behind their failure and even if it may be difficult or impossible to change that outcome.

[76] So there are good employment relations and human personality reasons for giving explanations for the failures of trials under ss 67A and 67B.

[77] Does the law preclude these? Section 67B(5)(b) only precludes what would otherwise be the requirement to give reasons for dismissal in writing when subsequently and formally called upon to do so. It does not preclude an employer being asked and being obliged to provide an explanation for the dismissal at the time of giving notice to conclude a trial period.

[78] Excluding the good faith obligations under s 4(1A)(c) as required by s 67B(5)(a), the balance of the good faith duties under s 4 tend to favour a requirement on employers to give such explanations at the time of giving notice. Not only must the employer neither mislead nor deceive or act in a manner that is likely to mislead or deceive under subs (1), but subs (1A)(b) requires parties to an employment relationship (which is their status when notice of termination of a s 67A arrangement is given) to be active and constructive and, in particular, to be "responsive and communicative". To refuse to give to an employee being dismissed otherwise lawfully, any explanation about why that is happening, is not only inconsistent with the statutory obligation to be "responsive and communicative" but is arguably the antithesis of that requirement of good faith behaviour between the parties in the employment relationship. This obligation is unaffected by ss 67A and 67B.

[79] As against that, the Legislature's intention is clearly not to require reasons when these are sought after the dismissal, pursuant to s 120. At first glance, it might therefore be seen as inconsistent to require an explanation for the dismissal to be given at the time notice of dismissal is given. On the other hand, Parliament has elected to address only the s120 obligation and not the s4 obligation to be responsive and communicative under which an explanation for the notice of dismissal would appear to be necessary if requested.

[80] Finally in this analysis, is the question whether s 4(1A)(c) determines the issue when s 67B(5)(a) exempts employers from compliance with those particular good faith obligations. On the one hand it is arguable that notice of termination of employment has an adverse effect on the continuation of that employment. But I consider the more persuasive argument to be that subs (1A)(c) addresses the position when an employer is proposing to make a decision that will affect continued employment and not, as in s 67B, is giving notice of its termination. Further, the obligations under subs (1A)(c)(i) and (ii) of providing relevant information and an opportunity to comment on it, are not applicable to the giving of notice of a decision to terminate employment.

[81] So whilst an employer is not obliged to notify an employee of the employer's proposal to end the employee's employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee seeking and being entitled to receive an explanation for the dismissal at the time when notice of it is given.

[82] Interpreting the section 67A and 67B obligations strictly and against the removal of rights of access to justice unless clearly so expressed as set out earlier in this judgment, I consider that an employer, upon giving notice of termination of an employment relationship in reliance on s 67B, is not entitled in law to refuse to give an explanation for such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead or deceive the employee.

[83] The new sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.

## Decision of the case

[84] I deal with the series of arguments of validity/invalidity sequentially and irrespective of result in each.

## A "new employee"?

[85] When Ms Smith executed the employment agreement with the defendant on 2 October 2009, was she "an employee" in terms of s 67? Section 67A(3) defines an employee as one "who has not been previously employed by the employer". On 1 October 2009 Ms Smith was employed by the defendant. Her employment with her previous employers had concluded and although she had not then entered into a written employment agreement with the defendant, the defendant was, nevertheless, her employer. It follows that when the written employment agreement was entered into, Ms Smith had been previously employed by the defendant, albeit for a short period. She was not, therefore, an "employee" as defined in s 67A. She was an existing employee and therefore one whose circumstances were not covered by s 67A. The trial period was therefore not one in compliance with s 67A. The benefits to the employer of a trial period, including its ability to dismiss the employee within the first 90 days of employment without risk of challenge by personal grievance, were not available to it.

[86] While still employed by the previous owners of the pharmacy business Ms Smith was interviewed by the prospective new owners and was offered and accepted continuing employment in the job, albeit with a new employer. At the time of the offer and acceptance of employment between the defendant and the plaintiff, no express terms and conditions of employment were agreed although they had been discussed and the employer's draft amended in some respects. Agreement, by signing the written agreement, had still not taken place.

[87] Immediately before 1 October 2009, Ms Smith's previous employers ceased to be so. As from the start of business on 1 October 2009, Ms Smith's employer was the defendant company. In the absence of agreement to any new, additional or

alternative terms and conditions of her employment on that first day, her previous terms and conditions of employment continued to be the basis of her new contract with the defendant until varied according to the written agreement executed on 2 October.

[88] It was, of course, competent for the defendant to seek Ms Smith's agreement to alter her previous terms and conditions as it did on 29 September 2009. But when, several days later, Ms Smith agreed to those alterations by signing a new individual employment agreement, she was not a new employee of the defendant but an existing employee. Her circumstances did not meet the statutory definition of "employee" in s 67A.

[89] Even ignoring the legal position just determined, Ms Smith could hardly have been described as a "new" employee except in the narrow and technical sense that she had not previously been employed by the defendant company which purchased the business of her previous employer and took on many of its existing staff including her. She was 33 years of age with a history of diverse retail sales experience including, most recently, more than 2½ years working satisfactorily in the actual business that was purchased by the defendant. There is no suggestion on the evidence that there was any element of employment risk for either party of the sort that was said to be the philosophy behind the enactment of ss 67A and 67B.

[90] It follows that ss 67A and 67B do not apply and the defendant is not entitled to rely upon the 90 day trial period in Ms Smith's individual employment agreement and the exclusion of personal grievance rights in s 67B.

[91] I conclude that Ms Smith is entitled to challenge her dismissal by way of personal grievance (or otherwise as is available to her under the legislation) and s 103A will determine questions of justification for her dismissal.

## Notice of termination of employment

[92] There is an alternative argument advanced by the plaintiff if her first does not succeed as it has. It is that the defendant did not give Ms Smith notice of dismissal

and/or breached its obligation to pay four weeks' wages in lieu of notice, thus not complying with the requirement in s 67B of the Act. This provides that the dismissal grievance exclusion only operates if an employer terminates an employment agreement containing a trial provision under s 67A "by giving an employee notice of the termination".

[93] I am satisfied that Mr Kearns dismissed Ms Smith on 8 December 2009. He did so by telling her that she had been unsuccessful in completing her 90 day trial period and that her employment with the business was terminated with immediate effect. The written memorandum upon which Mr Kearns relied provided:

> … We confirm that we have decided to terminate your employment in accordance with clause 6 of your employment agreement.
>
> We are prepared to pay you in lieu of having to work out the notice period of 2 weeks.

[94] After Ms Smith asked why she was being dismissed, Ms King confirmed that they were dismissing her that day.

[95] Section 67B requires, as part of the circumstances to be established if access to personal grievance procedure is precluded, that notice of termination of employment must be given. There is no statutory indication how this may or must be done, the length of the notice, or whether an employer may make a payment in lieu of notice.

[96] In this case Ms Smith's employment agreement provided that except in certain instances justifying summary (without notice) dismissal, her contract was terminable by not less than four weeks' notice in writing.

[97] Ms Smith's employment agreement required the employer to give four weeks' notice of dismissal, including where termination of the employment agreement was undertaken in reliance on the trial period, as it was in this case. Although it also permitted expressly the company to make a payment in place of some or all of the notice period not given, the payment made by the defendant of two weeks' wages was deficient by half for a summary dismissal, as this was. Deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as

s 67B requires. A termination of employment on short notice is, unless accepted, ineffective notice: *Brown v New Zealand Tourism Board.*[1] Ms Smith did not accept the termination of her employment so that the employment agreement was not terminated on notice as the law required. For this reason, also, she is not precluded from challenging her dismissal by personal grievance.

## An un-executed employment agreement?

[98] Faced with the difficulty of the combined effects of clauses 1.1 and 10 of the employment agreement, and s 67A(2)(a), Mr Cleary was driven to an alternative submission. This was that although Ms Smith and the company did not execute a written employment agreement between them until after the start of Ms Smith's employment with the company, the unsigned draft agreement which had been provided earlier to Ms Smith nevertheless constituted the written individual employment agreement incorporating a trial period as is a pre-requisite of s 67A. Mr Cleary emphasised the evidence that the draft agreement was received by Ms Smith on about 29 September when it was handed to her by her then employer on behalf of the defendant. Counsel submitted that Ms Smith had an opportunity (and took it) to take the draft agreement home, to consider it and to discuss it with family members.

[99] Mr Cleary submitted that, although the draft agreement was altered on 2 October immediately before it was signed, and as a result of discussions over the previous few days, these changes related only to wage rates and Ms Smith's uniform. Although there had been a discussion about the period of notice of termination of employment, this remained unaltered. Counsel said that, in these circumstances, Ms Smith must be presumed to have been aware of the content of the employer's draft employment agreement and must be taken to have accepted its provisions and their application to her employment as from the first day of it with the defendant, 1 October. Counsel pointed out that the minimum legislative requirements for an individual employment agreement include that it must be in writing but that there is no requirement that it be signed by either party or both. In these circumstances, Mr Cleary submitted that, although not formally executed until after Ms Smith had

[1] [2000] 2 ERNZ 43, 50 at lines 37-43.

begun employment with the defendant, the agreement was nevertheless applicable in law to that relationship from its outset.

[100] On the other hand, the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound to the obligations and benefits contained in the agreement. Conversely, until that symbolic but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.

[101] As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they would each be bound by the draft written agreement unless and until that was executed by the writing of their signatures. That was the defendant's intention when Mr King met with Ms Smith on 2 October for this purpose. The application of signatures, in this case and generally, signifies both mutual agreement to the written provisions and a solemn intention to be bound by them. Therefore, those legal consequences do not apply beforehand, at least not if, as in this case, there is an express exclusion of retrospectivity or even if there is an absence of reference to retrospectivity.

[102] In some respects, also, alterations to the draft form of the agreement were not written into it until immediately before signature on 2 October so that contradictory provisions in draft form could not have amounted to agreed terms and conditions of employment before that date.

[103] For these reasons I do not accept that the employer's draft form of employment agreement established the agreed terms and conditions of Ms Smith's employment as from 29 September when she received it, or as from 1 October when she began work for the defendant. Rather, Ms Smith's terms and conditions of employment before 1 October were those in her written individual employment agreement with Stokes Valley Pharmacy Limited. On 1 October, when Ms Smith commenced employment with the defendant and worked for it, her terms and conditions of employment were not agreed in writing and must be inferred. I conclude that, on 1 October, Ms Smith continued to be engaged on her previous

terms and conditions, albeit with the defendant company. Indeed the evidence is that the defendant's advice to her on that day was that she should continue to work as usual, that is as she had been with her previous employer. The provisions of the individual employment agreement with the defendant did not commence until that agreement was signed by both parties at some time on 2 October.

## A statutory non-contractual notice?

[104] As a further alternative, Mr Cleary argued that the necessity for termination of employment on notice under s 7B is a discrete statutory requirement that bears no relevance to any contractual notice provision such as existed in this case or even, if there was none, to the default common law position of reasonable notice. Counsel submitted that so long as notice, presumably any notice, of termination was given, this would satisfy the statutory requirement for it.

[105] Even if this is correct (and for reasons I set out subsequently, I do not consider that it is), there is the inescapable fact in this case that Ms Smith was given no notice of the termination of her employment. The statute does not provide an alternative in the form of payment of a sum of money instead of notice and in the circumstances Mr Cleary was driven to argue that it must be implicit in the statutory requirement of notice that a payment can be made to satisfy that requirement if no notice is given.

[106] I do not accept the defendant's argument that the "notice" required under the statute is some undefined period of notice that is not the same as, and may indeed be inconsistent with, the contractual notice agreed between the parties or, in the absence of such an agreement, the well established implied common law term of reasonable notice. Sections 67A and 67B are a statutory permission for certain provisions to be included in employment agreements within specified parameters but the sections do not purport to override the parties' entitlement otherwise in law to conclude the terms of their own bargain. What s 67B prevents is not contractual, but is otherwise the statutory entitlement of employees to challenge a dismissal by personal grievance.

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

[108] For these reasons, any dismissal of Ms Smith in reliance on the protections afforded to the defendant by s 67B must necessarily have been a dismissal on notice and, in this case as agreed expressly, four weeks' notice. Ms Smith's summary dismissal was in breach of s 67B(2) which also deprives the defendant of the protection from an unjustified dismissal claim.

## Breach of the employment agreement's trial period requirements?

[109] Clause 10 of Ms Smith's employment agreement imposed obligations on the employer during the trial period. The parties' 90 day "trial" or "probationary" period was divided into two parts. For the first four weeks of the trial, which was described as "the training period", Ms Smith was "expected to gain competency in all of your position's requirements." During the balance of the period (62 days assuming that the first four weeks were 28 days) described as "the consolidation period", Ms Smith was expected "to demonstrate and maintain this required level of competency." Clause 10.5 provided that "[t]o assist you in your training and subsequent consolidation we will hold regular appraisal meetings where we can ensure you are notified on your performance and any improvements. We will give you full training and encouragement to ensure your targets are achieved."

[110] There were no meetings, regular or otherwise, in the sense of a discrete period or periods of time for the purposes of appraising performance and notifying and discussing requirement improvements. Rather, it was the case for the defendant that these matters were discussed with Ms Smith on the job as and when she performed some task under observation or supervision or ad hoc matters came to her employer's attention. Such discussions tended to occur in the shop between dealings with customers and were not recorded or planned in writing.

[111] Because the alleged absence of "regular appraisal meetings" to ensure notification of "your employment and any improvements" is the basis of the claim of breach and because there is disagreement as to what was required by the contract, it is necessary to determine what was meant by the parties.

[112] The defendant's witnesses say that such was the small scale nature of their business (a retail pharmacy) and because each of Mr Kearns and Ms King was a working pharmacist as well as a shop manager and owner, there could have been no opportunity, and none was contemplated, to conduct performance assessment and improvement meetings as might take place in larger enterprises with structured management. That must, however, be compared to the fact that there were staff meetings which took place away from the public areas of the retail pharmacy, not only meetings of all staff but meetings with individual staff.

[113] Relevant also is the fact that cl 10.5 was drafted and stipulated for by the employer which should not be permitted to read down the words that it chose to use to express these obligations that it placed upon itself as an integral part of the quid pro quo for the trial period.

[114] Not irrelevant to this and a number of other similar questions in the litigation, is the fact that although in one sense the defendant was a small or medium enterprise, it was nevertheless closely associated with a substantial business brand organisation in the nature of a franchisor which provided skilled advice and management systems to those associated with it including, through their company, Mr Kearns and Ms King. In the area of employment relations with which this case is concerned, the defendant relied heavily on the advice of the Pharmacy Brands organisation and its

lawyers. Its standard form of employment agreement was prepared by those lawyers and the defendant both took advice about its employment agreements and stuck closely to advice and even pre-arranged scripts provided by Pharmacy Brands' lawyers.

[115] I conclude that by reference to regular meetings for the purpose of performance assessment and improvement, the defendant intended a more structured and formal process for the attainment of these objectives than occurred in practice. There was no regularity about the "meetings" that the defendant's witnesses said took place. Rather, these interactions with Ms Smith were ad hoc and irregular. I conclude, also, that it was not intended that this performance assessment and improvement process would be entirely devoid of any record keeping or other structure. So interpreted, I am satisfied that the defendant did breach its self-imposed contractual obligation to provide performance assessment and improvement of and for Ms Smith by regular meetings undertaken for this purpose.

[116] Clause 10 of Ms Smith's employment agreement could not be criticised as harsh or oppressive if proposed for, and agreed to by, a prospective employee new to the business and, as ss 67A and 67B intend, who might not otherwise get a job because of what have been described as his or her employment risk factors. Clause 10 provided admirably for a specific period of training and attainment of competency and a second and subsequent consolidation period in which there was an expectation of demonstration and maintenance of required levels of competency.

[117] The clause also provided for assistance in both training and subsequent consolidation by the holding of regular appraisal meetings where there would be notification of performance and of required improvements. The clause provided for the provision of training and encouragement to ensure that what were intended to be specified targets would be achieved. Notice of termination of employment under the trial period was specified to be 4 weeks.

[118] It was the non-performance of these trial period obligations by the employer which means that its treatment during the employment and its dismissal of Ms Smith were unjustified. The defendant did not comply with its self-imposed (and laudable)

obligations of training, performance assessment and guidance during the trial period. Its failure to hold regular appraisal meetings and to ensure that Ms Smith was notified about her performance and any improvements and to encourage her to ensure that targets were achieved was a breach of that employment agreement. So too was the defendant's failure to establish performance targets for Ms Smith as it stated or at least inferred it would.

[119] This breach of contract also constituted an unjustified disadvantage to Ms Smith during her employment pursuant to s103(1)(b) of the Act. Ms Smith was disadvantaged in her employment in the sense that she was deprived of the opportunity to perform her employment to a standard which would have avoided her dismissal.

## Justification for dismissal

[120] In addition to the breaches of cl 10 of the employment agreement by the defendant between 2 October and 8 December 2009, the way in which the defendant went about dismissing the plaintiff for reasons of alleged inadequate performance fails the justification test in s103(1)(a). The defendant did not act towards the plaintiff as a fair and reasonable employer would have done in all the circumstances at the time.

[121] Ms Smith had no inkling that her continued employment was in jeopardy. She received no notice of the meeting on 8 December 2009 at which she was dismissed: She was simply asked to stay behind at the end of the day to meet with the company's directors. Ms Smith was not told, either before the meeting or even at it, of her alleged inadequacies. This was in breach of the good faith obligations contained in s 4 of the Act. Ms Smith was not offered the opportunity to have assistance or representation on this occasion. When she inquired what she had done to warrant her summary dismissal she was given only the baldest of explanations. Ms Smith was dismissed summarily in breach of the parties' employment agreement that reserved this most severe mode of dismissal for serious misconduct and like cause but not for inadequate performance which was said to have been the reason for her dismissal.

[122] In short, there was a complete failure or refusal by the defendant to act as a fair and reasonable employer would have acted in all the circumstances at the time. It did so solely because it thought it was entitled to so act. It was, of course, not obliged to treat Ms Smith as it did. It could have treated her decently and sensitively even if it had been justified (which it was not) in terminating her employment pursuant to the trial period entitlements under the statute.

[123] These are not elements of unreasonableness detected only by minute and pedantic scrutiny after the event. To the contrary, they stand out a signal failures of fair and reasonable treatment and were conceded to be such by the defendant's counsel.

[124] Ms Smith's dismissal was also substantively unjustified, that is a fair and reasonable employer would not have dismissed Ms Smith at the time and in the relevant circumstances. That is because the defendant failed to comply with its obligations of training, performance assessment and improvement under the employment agreement. It did not hold the regular meetings for these purposes to which it committed itself. It did not even provide the targets that it said it would train and encourage Ms Smith to attain during the first 90 days of her employment with it. A fair and reasonable employer in all the circumstances, and at the time, would not have dismissed Ms Smith for performance inadequacies that were attributable to the defendant's failures to comply with its contractual obligations.

[125] It was these absences of justification that Mr Cleary considered properly would cause the dismissal to have been unjustified if this issue was justiciable as I have found it to be.

[126] For these reasons, Ms Smith's dismissal was unjustified because it failed both s103A tests.

## Costs

[127] This has been a test case, at least on the preliminary issue of the interpretation and application of ss 67A and 67B. Although costs may be in issue on the hearing of

the merits of Ms Smith's personal grievance, I do not propose to make any orders for costs as between the parties on this preliminary issue.

## Comment

[128] This is a case involving new and complex law. The defendant, through its working directors, had little or no experience of New Zealand employment law and relied very substantially on the legal and in particular employment law advice received from its industry body's solicitors. Mr Kearns and Ms King cannot really be criticised for the heavy reliance that they placed on that advice and for having followed it as well as they were able. In that sense, this case is in some ways a test not of the employer's employment abilities, but rather of its legal advice.

## Summary of judgment

[129] Because of the defendant's non-compliance with ss 67A and 67B of the Employment Relations Act 2000, cl 10 ("Trial period") of the parties' employment agreement does not prohibit access to the personal grievance procedures under s 103(1)(a). Independently, the plaintiff's summary dismissal by the defendant was in breach of s 67B.

[130] Consequently, the plaintiff is not precluded from bringing her personal grievance for unjustified dismissal.

[131] In addition and independently of the foregoing conclusions, the plaintiff is entitled to bring a personal grievance for unjustified disadvantage in employment and/or a claim at common law for breach of contract by the defendant.

[132] The defendant's summary dismissal of the plaintiff on 8 December 2009 was unjustified. It was not what a fair and reasonable employer would have done at the time in all the relevant circumstances and how it was done did not meet that statutory test either. The plaintiff's remedies for unjustified dismissal and the other causes of action that she has brought and that this judgment determines her entitlement to maintain, are adjourned to enable the parties to attempt to settle them. If no such

settlement can be achieved, whether with mediation assistance or between counsel or otherwise within the period of 6 weeks from the date of this judgment, leave is reserved for the plaintiff to apply to reconvene the hearing on questions of remedy.

[133] Because of the novelty of the issues and my other findings about the nature of the defendant's culpability, I decline to award penalties against the defendant for breaches of the statute and of the employment agreement that I am satisfied it has committed.

[134] This has been a test case interpreting and applying new legislation and in these circumstances I am not prepared to make any orders as to costs between the parties to this stage of the proceedings.

[135] The judgment originally issued on 24 August 2010 has been recalled because of an error in para [97]. This judgment reissued in substitution differs from the original only in respect of its para [97] but otherwise the reasoning and result are unaffected.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Thursday 26 August 2010