IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 152
ARC 37/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RICKY BLACKMORE Plaintiff
AND	HONICK PROPERTIES LIMITED Defendant

Hearing: 25 October 2011
(Heard at Hamilton)
and by memoranda of submissions filed on 3 and 10 November 2011

Appearances: Gregory Bennett, advocate for plaintiff
Erin Burke, counsel for defendant

Judgment: 24 November 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This judgment, in a proceeding removed for hearing in this Court by the Employment Relations Authority, deals with the preliminary issue whether Ricky Blackmore is entitled to bring a personal grievance for unjustified dismissal. The defendant, Honick Properties Limited (HPL), says that Mr Blackmore was subject to a 90 day trial period and that his dismissal within this period disqualifies him from claiming that he was dismissed unjustifiably.

Relevant facts

[2] HPL owns and operates farms, several of which are in the Waikato and King Country regions, on which it has employees in a variety of positions. There is no

dispute that at the relevant time HPL employed fewer than 20 employees.[1] Mr Blackmore is an experienced farm manager who, before his employment with HPL, was employed by another entity on another farm in the Whanganui district.

[3] Mr Blackmore heard that HPL had a vacancy for a farm manager and he visited the two separate properties leased by HPL which together constituted the King Country farm for which it required a manager. Subsequently, arrangements were made for HPL's Steve Mathis to meet with Mr Blackmore and his wife at the Whanganui farm where he was then working. Mr Mathis was accompanied by his wife, Rachel Mathis, and the parties' discussions included whether one manager would be sufficient for HPL's purposes with Mr Blackmore taking the view, from what he knew, that some casual staff would also be required.

[4] The parties disagree about whether there was discussion between Messers Blackmore and Mathis about whether the position would be subject to a 90 day trial period. Mr Blackmore's case is that he raised this matter and made it clear to Mr Mathis that he would not be interested in the position if it was subject to a 90 day trial period and that Mr Mathis then assured him that HPL would not require this. At that time, in early October 2010, Mr Blackmore was in secure employment as a farm manager and was confident that he could remain so for at least the following 18 months that his employer leased the land on which Mr Blackmore managed the farm in Whanganui. HPL's position, on the other hand, is that there was simply no discussion about a trial period.

[5] I am inclined to accept the defendant's case on this point but it is not essential to decision of the case that this disagreement be determined however.

[6] Messrs Blackmore and Mathis also disagree about whether, at this meeting, Mr Mathis offered Mr Blackmore employment. I am inclined to accept Mr Blackmore's version of this difference, although I consider that the most Mr Mathis did was to indicate the probability of an offer of employment. Again, resolution of this conflict is not necessary to the decision of the preliminary issue.

[1] At the relevant time, a statutory prerequisite for a 90 day trial period.

[7] By letter dated 5 October 2010 addressed to Mr Blackmore, HPL formally offered him employment in the following terms:

> I would like to formally offer you the position as Farm Manager on our Waimiha farms, in Waimiha in which we provide the following:
>
> 1. Base salary of $60,000 per annum
> 2. Tax free dog and tool allowance of $100/week.
> 3. A four wheeler motorbike, fuel and oil.
> 4. Start date 25 October 2010.
> 5. Reimbursement for all farm phone calls.
> 6. Relocation Costs of $700, (to be refunded if employment ends within a 12 month period).
> 7. Review after six months of employment.
>
> You will need to provide the following:
>
> 1. Farming tools
> 2. Three working dogs
> 3. Vet costs of Dogs
>
> A job description will be drawn up for your laying out the expectations while running this property. You will be working alongside [casual] staff and maybe a full-time shepherd in the future should it be required.
>
> We look forward to having you onboard and if you have any queries please do not hesitate in calling me. If you are happy with the content of this letter, please sign below as acceptance of this offer.
>
> Upon acceptance of this position a Federated Farmers Employment Contract will be filled out outlining the above conditions.

[8] There was no reference to a 90 day trial period in this letter and indeed the offer of a "review after six months of employment" confirmed that Mr Blackmore's work performance would be reviewed after the expiry of that period. The other notable feature of the letter of offer is the proposal that a "Federated Farmers employment contract" would be filled out "outlining the above conditions" "upon acceptance of this position". No form of Federated Farmers employment contract was enclosed with the offer and Mr Blackmore had not ever seen, or been subject to, such a contract. Mr Mathis confirmed in evidence that New Zealand Federated Farmers employment agreement templates are only available to members of that organisation as I infer HPL was.

[9] Mr Blackmore responded to this formal offer of employment in a short email sent on 10 October 2010 saying:

> It is with great pleasure I accept the position as Farm Manager on Waione Station/Worthington Farm. I have therefore given one month's notice as from today my last working day being Wednesday 10th November 2010. The only thing to finalise will be the removal.

[10] There is no suggestion either that Mr Blackmore was a member of a union that may have had a collective agreement with HPL or that HPL was a party to any collective agreement.

[11] After working out a month's notice at his previous employment, Mr Blackmore and his family moved to HPL's Waimiha property on Friday 12 November 2010. On the following day, Saturday 13 November 2010, Mr Mathis came to the house and had a brief conversation with Mr Blackmore. There was no reference to an employment agreement during this meeting and, more particularly, Mr Mathis did not give Mr Blackmore any information about what HPL's written employment agreement would contain.

[12] After settling into the new accommodation, Mr Blackmore began work at about 7 am on Monday 15 November 2010. This is the usual start time for farm managers in these circumstances and that is confirmed by the terms of the written agreement drawn up by the defendant.

[13] Shortly after 8 am on that first day of work with HPL, Mr Blackmore met with Mr Mathis who gave him for the first time an intended employment agreement.[2] Mr Mathis was anxious to finalise this paperwork and to get on with showing Mr Blackmore around the farm properties with a view to bringing him up to speed with his management responsibilities. I accept Mr Blackmore's evidence, and reject Mr Mathis's to the contrary, that the intended employment agreement was partially completed by Mr Mathis when it was first presented to Mr Blackmore. In addition to deleting alternative provisions and entering some details particular to the employer's operation, this lengthy form of employment agreement was largely pre-prepared by Federated Farmers. As to trial or probationary arrangements, the agreement contemplated that one of these would be specified by deleting the other.

[2] Following the statutory description of such a document in s 63A (2)(a) of the Act.

Mr Mathis had deleted the alternative provision for a probationary period so that a 90 day trial period was stipulated for.

[14] There was no negotiation about the intended employment agreement. Mr Mathis simply pointed out to Mr Blackmore the essential contents of the agreement and got the latter to initial most of the changes that had been made to the template agreement in handwriting by Mr Mathis. Mr Mathis did not advise Mr Blackmore that he was entitled to seek independent advice about the intended agreement. Nor did he give him a reasonable opportunity to seek that advice. Clearly, also, Mr Mathis did not consider any issues that Mr Blackmore raised and respond to them, both because Mr Blackmore did not do so but also because he had no opportunity to seek independent advice about the intended agreement that may have raised for consideration such issues and responses to them.

[15] There was no discussion between Mr Mathis and Mr Blackmore about the 90 day trial period included expressly in the agreement. Mr Mathis was anxious for Mr Blackmore to begin work. He told him that there was much to be done on the farm that day and conveyed to him the impression that the employment agreement should be signed so that Mr Blackmore could get on with farming work.

[16] Mr Blackmore had relied upon the October exchange of correspondence between the parties about the essential contents of their employment agreement. Although there had been reference to a Federated Farmers form of agreement that would have to be signed, Mr Blackmore was not aware of the contents of this or, even if he had been, there is no suggestion that HPL may have wished to have had a probationary period as opposed to a 90 day trial period. No Federated Farmers form of agreement had been given to Mr Blackmore although there had been ample opportunities for this to have occurred before the morning of 15 November 2010.

[17] Mr Blackmore had burnt his proverbial bridges by resigning from his previous employment and moving his family to a new farm. He was wary of what he categorises as abuse by some farm employers of 90 day trial periods but did not know what the consequence would be for him and his family if he either declined to sign the agreement presented to him that morning, or even insisted upon his statutory

right to obtain independent advice about it. Mr Blackmore feared that if he took such a course he might then be dismissed just after he had started work.

[18] In these circumstances, Mr Blackmore made the reluctant election to sign the employment agreement as it seemed clear Mr Mathis wanted him to do so there and then and, it is safe to assume, relied on a hope that things would not go wrong within the first 90 days.

[19] Mr Blackmore and his wife were both uncomfortable about the employer's insistence upon a 90 day trial period and the pressure which Mr Blackmore felt to sign the agreement. They exchanged meaningful looks between them but considered that Mr Blackmore had no alternative but to agree to HPL's terms. He had resigned from his previous employment and they had moved themselves and their family to HPL's farm. They were uncertain about what might happen if Mr Blackmore refused to agree to a 90 day trial period and, of course, they had no independent advice or an opportunity after taking such advice to consider their options and negotiate about the terms of the agreement.

[20] Mr Blackmore's wife wrote his name in the employment agreement although he signed it. Mr Blackmore signed the employment agreement presented to him there and then despite a provision acknowledging that he had been given an opportunity to take independent advice about it, which he had not. The employment agreement specified that it had come into force on 15 November 2010 and it was signed by Mr Blackmore and Mr Mathis on behalf of HPL on that same date.

[21] On or about 31 January 2011 Mr Mathis told Mr Blackmore that his employment would not be continued after the end of the 90 day trial period and, on 6 February 2011, Mr Mathis gave Mr Blackmore two weeks' notice of dismissal and a further week's occupation of the manager's house on the property.

[22] The standard or template Federated Farmers' employment agreement used by HPL stipulates for either a trial period under ss 67A and 67B, or a probationary period of employment under s 67. HPL engages all staff on 90 day trial periods "due

to the transience of dairy farm workers and the difficulty of finding good workers …" and does not agree to vary that practice.

[23] It would not be appropriate to consider the merits or otherwise of Mr Blackmore's dismissal because this case has, so far, been confined to the preliminary question whether he is entitled to bring a personal grievance for unjustified dismissal. It should not be assumed that even if Mr Blackmore is entitled to challenge the justification for his dismissal, that this will be found to have been unjustified. The defendant's case, even now, discloses potentially tenable evidence that its dismissal of Mr Blackmore may have been justifiable under the pre-2010 amendment tests set out in s 103A of the Act.

Alternative grounds for decision of case

[24] After the hearing concluded on 25 October 2011 and I began this judgment by making decisions about the relevant facts, I concluded that s 63A(2) had not been complied with by the defendant. Although that had been raised with counsel for the defendant during the hearing, and submissions made about its consequences, this had not been considered in the light of s 68 of the Act relating to unfair bargaining for individual agreements, and s 69 which deals with the remedies for unfair bargaining. These may include, potentially, variation of an employment agreement or otherwise the severing, with retrospective effect, of a provision affected by the unfair bargaining. In these circumstances, the parties were given, and took, an opportunity to make further submissions on these issues by memorandum.

[25] Accordingly, I propose to deal with the judgment in the case in two parts. The first will decide whether the individual employment agreement contained a trial period in conformity with s 67A. The second alternative decision will be whether the individual employment agreement (and, in particular, the trial period provision) was bargained for unfairly and, if so, what should be the consequence of that.

Relevant statutory provisions

[26] Several sections of the Act are applicable to this case. I will set out all sections relevant to the two issues that will nevertheless be decided separately. The parts at issue have been highlighted by underlining. Although out of numerical order, the first are ss 67A and 67B which 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 ….
>
> (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) *Repealed.*
>
> (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.

[27] The remaining sections relate to the alternative basis for decision of the case. The next relevant section is s 63A ("Bargaining for individual employment agreement or individual terms and conditions in employment agreement") which provides materially as follows:

(1) This section applies when bargaining for terms and conditions of employment in the following situations:

…

(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:

(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

…

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and

(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and

(c) give the employee a reasonable opportunity to seek that advice; and

(d) consider any issues that the employee raises and respond to them.

(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

…

(7) In this section, employee includes a prospective employee.

[28] Next is s 60A ("Good faith in bargaining for individual employment agreement") as follows:

(1) The matters that are relevant to whether an employee and employer bargaining for an individual employment agreement are dealing with each other in good faith include the circumstances of the employee and employer.

(2) For the purposes of subsection (1), circumstances, in relation to an employee and an employer, include—
  (a) the operational environment of the employee and employer; and
  (b) the resources available to the employee and employer.

[29] Next is s 68 ("Unfair bargaining for individual employment agreements") which provides materially:

(1) Bargaining for an individual employment agreement is unfair if—
  (a) 1 or more of paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (person A); and
  (b) the other party to the agreement (person B) or another person who is acting on person B's behalf—
    (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or
    (ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.

(2) The circumstances are that person A, at the time of bargaining for or entering into the agreement,—

…

  (c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or
  (d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.

[30] Section 69 ("Remedies for unfair bargaining") is as follows:

(1) If a party to an individual employment agreement is found to have bargained unfairly under section 68, the Authority may do 1 or more of the following things:
  (a) make an order that the party pay to the other party such sum, by way of compensation, as the Authority thinks fit:
  (b) make an order cancelling or varying the agreement:
  (c) make such other order as it thinks fit in the circumstances.

(2) The Authority must not make an order under subsection (1)(b) unless the requirements in section 164 have been met, and that section applies accordingly with all necessary modifications.

[31] Section 164 ("Application to individual employment agreements of law relating to contracts") is referred to in s 69 above and is as follows:

> Where the Authority, has, under section 69(1)(b) or section 162, the power to make an order cancelling or varying an individual employment agreement or any term of such an agreement, the Authority may make such an order only if—
>
> (a) the Authority (whether or not it gave any direction under section 159(1)(b) in relation to the matter)—
>
> (i) has identified the problem in relation to the agreement; and
>
> (ii) has directed the parties to attempt in good faith to resolve that problem; and
>
> (b) the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation; and
>
> (c) despite the use of mediation, the problem has not been resolved; and
>
> (d) the Authority is satisfied that any remedy other than such an order would be inappropriate or inadequate.

[32] Section 65 ("Terms and conditions of employment where no collective agreement applies") provides materially:

> (1) The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer—
>
> (a) must be in writing; and
>
> (b) may contain such terms and conditions as the employee and employer think fit.
>
> (2) However, the individual employment agreement—
>
> …
>
> (b) must not contain anything—
>
> (i) contrary to law; or
>
> (ii) inconsistent with this Act.

[33] Section 6 ("Meaning of employee") is materially as follows:

> (1) In this Act, unless the context otherwise requires, employee—
>
> …
>
> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; …

[34] Finally, a "person intending to work" is defined in s 5 ("Interpretation") as "a person who has been offered, and accepted, work as an employee; and intended work has a corresponding meaning."

A lawful trial period?

[35] Decision of this question turns on whether, at the time the individual employment agreement containing the trial period provisions was entered into, Mr Blackmore had or had not been employed previously by HPL. If he had been, then the legislation does not permit the parties to have entered into a valid trial period.

[36] This was one of the questions considered in the first (and only other) judgment on s 67A that has come before the Court, *Smith v Stokes Valley Pharmacy (2009) Ltd*.[3] This judgment and its consequences for employers and employees were known at the time Mr Blackmore and HPL entered into the formal elements of their employment relationship and, in particular I assume, the judgment would have been known to Federated Farms and its employment advisers. HPL relied upon the Federated Farmers' form of employment agreement containing a trial period clause.

Stokes Valley Pharmacy **case**

[37] At [47] in *Stokes Valley Pharmacy* the Court concluded that the relevant legislative documents affirmed its interpretation of the then new trial period provisions as follows:

> [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. …
> …
> [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.

[3] [2010] NZEmpC 111.

[38] At [51] the Court confirmed that s 67A(2) requires that the start of a trial period is "at the beginning of the employee's employment".

[39] Next, at [54] the Court held:

> [54] ... 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.

[40] Finally, at [83] the Court concluded:

> [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.

[41] In *Stokes Valley Pharmacy*, as in this case, the individual employment agreement purporting to contain a trial provision was entered into after the employee had begun work for the new employer, albeit shortly afterwards. At [85] of *Stokes Valley Pharmacy* the Court held:

> … 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.

Decision of trial period validity question

[42] The argument for Mr Blackmore in this case is stronger than it was for Ms Smith in the *Stokes Valley Pharmacy* case. That is in the sense that before her employment began, Ms Smith was offered a draft or proposed written individual employment agreement which contained a trial period clause. She had an

opportunity to consider that and to obtain advice about it which she took. It was the execution of that agreement after employment had started which was problematic (indeed fatal) for the employer in *Stokes Valley Pharmacy*.

[43] In this case, by contrast, Mr Blackmore had no such opportunity to consider, take advice on, or negotiate the draft or proposed employment agreement containing a trial period. It was first presented to him for acceptance that day, after his employment with HPL had commenced.

[44] I conclude that when he executed the individual employment agreement containing the trial provision period, Mr Blackmore was an existing employee of HPL and, therefore, as set out in s 67A(3), was an employee who had been employed previously by the employer. Mr Blackmore was not, therefore, by the special definition of "employee" in subs (3), an employee able to enter into an employment agreement containing a trial period provision as set out in s 67A(1).

[45] How and when had Mr Blackmore been employed previously by the employer?

[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.

[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[4] definition of the adjective "previous" as meaning "existing or occurring before in time or order".

[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

[4] 11th ed Revised 2008, Oxford University Press, Oxford.

even most purposes as from that date, Mr Blackmore was an employee entitled to access to the statutory personal grievance procedure from that date.

[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.

[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.

[55] Parliament cannot have intended the extended meaning of "employee" set out above to have meant that there would thereby also come into existence the range of obligations of an employment relationship from the point of acceptance of an offer of employment. One need only contemplate the hypothetical case of a sales employee for Pepsi Cola who applies for, is offered, and accepts a sales role with Coca Cola. The employee is obliged to give Pepsi a month's notice so that the work for Coca Cola will not commence for a month after the offer and acceptance. The employee continues to be employed by Pepsi for that period of a month. The usual obligations of an employment relationship, such as not working in competition with one's employer and the incidence in practice of trust and confidence, could not be performed with both "employers" contemporaneously.

[56] The extended definition of "employee" as a person intending to work and meaning someone who has been offered and accepted employment, was enacted as a legislative response to the judgment of the Arbitration Court in *Auckland Clerical and Office Staff Employees IUOW v Wilson*.[5] There, an employee was offered and accepted employment to begin on a specified future date and relinquished her existing position in reliance upon this. Before work actually started, the employer advised the employee that she would not be engaged after all. The Court determined that because employment had not begun, the employee could not claim by personal grievance that she had been dismissed unjustifiably and compensated for the wrong suffered by her. The extended definition of "employee" was subsequently included in the legislation in precisely the same terms as it now appears.

[5] [1980] ACJ 357.

[57] It is significant that Parliament addressed the consequence of the judgment in *Wilson* by deeming that a person in those circumstances is to be regarded as an employee for the purposes of enabling a grievance for unjustified dismissal to be brought, even if the work with the new employer has not yet commenced.

[58] In this case the extended definition of "employee" is engaged because the dispute turns on whether Mr Blackmore is entitled to have access to a personal grievance for unjustified dismissal. Therefore, as from the completion of the process of offer and acceptance of employment, Mr Blackmore became an employee of HPL to the extent that he was entitled to bring a grievance against it as from 10 October 2010 when he accepted its offer of employment.

[59] In practice, an employer cannot require lawfully an existing employee to enter into a trial period in the course of current employment. The legislative emphasis is upon new employment relationships that have not already begun. That is consistent with the parliamentary rhetoric[6] that trial periods would allow employers to take on staff that they would not otherwise engage and would allow persons who would not otherwise be taken on by reason of their inexperience or past history or other disadvantageous circumstances to get a job and prove themselves worthy of it.

[60] In this case, as in *Stokes Valley Pharmacy*, the trial period is ineffectual by reason of Mr Blackmore's status as an employee before the agreement was entered into.

Does the result of the case impose an unworkable practice?

[61] Is it an unduly onerous obligation on an employer, seeking to include a trial period in an employment agreement, to require that the offer of employment to the employee be both in writing and include a proposed written individual employment agreement which includes provisions that comply with s 67A?

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[6] See the judgment in *Stokes Valley Pharmacy* for an account of this extraneous interpretative material.

[62] Although, irrespective of the inclusion of trial period provisions, this practice is observed by many well resourced employers, its practicability must also be considered in relation to smaller scale business enterprises that may lack such resources or access to them. I note that in this case, as also in *Stokes Valley*, the employer was a member of and assisted by a business organisation that was well resourced to give advice to the employer.

[63] The law already requires that all individual employment agreements be in writing and contain certain minimum provisions. So, in light of the statutory necessity to have a written individual employment agreement, and the acknowledgement of the practice that these documents are prepared by employers, it becomes then a matter of timing as to when such a document is prepared and presented to a potential employee.

[64] Next, the law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend upon the circumstances of the case. However, realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like), fulfil the employer's statutory obligations.

[65] After this Court's judgment in *Stokes Valley Pharmacy*, Parliament legislated on the topic but did not do so in a way that affected the application of the judgment in that case. Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential precondition of a trial period.

[66] It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. The benefits of ss 67A and 67B, as the Court emphasised in *Stokes Valley Pharmacy*, are the quid pro quo for the significant

advantages to the employer of removing longstanding rights of challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee.

[67] For these reasons, I do not think it could be said that the requirements on an employer seeking to have those advantages are either impractical or onerous.

[68] Ultimately, of course, it is not a question of whether this Court considers those advantages too onerous in any event. Rather, Parliament has legislated these constraints and requirements, and it is not for this Court to say whether employers should be required to comply with the legislation or be relieved of its obligations. Statutory requirements must be complied with and, for the reasons set out by the Court in *Stokes Valley*, strictly.

[69] Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. Such a provision is only permissible where a "prospective employee" (to use the words of the extended definition of employee in s 63A(7)) has neither worked previously for the employer nor, at the time that a trial period is entered into or at such later time as it commences, is an existing employee of the employer.

[70] What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement have been settled, and the agreement has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the

specified date of commencement of the agreement, usually in practice the date of commencement of work.

[71] It might be said that the parties' individual employment agreement was executed only about an hour or so after Mr Blackmore began work for HPL so that he could not really be said to have worked for the company previously when the agreement was entered into. However, certainty and predictability for employers wishing to use trial periods are important. This will ensue if they are careful that such agreements are entered into before, and not after (even shortly after), work commences. Additionally, in this case, if HPL had allowed Mr Blackmore the reasonable opportunity required by the statute to consider, take advice on, and also possibly bargain about, the form of agreement, it would have been at least several days later after the date of commencing work that he would have signed an agreement containing a trial period if he had been minded to do so.

[72] Mr Mathis first showed Mr Blackmore the proposed agreement early on a working day morning at the start of a week in an isolated rural area. Even if Mr Blackmore had taken a first opportunity to consider the agreement that evening, it would, realistically, have been at least several days before he could have obtained professional advice about it and further time would no doubt have elapsed if he had wished to discuss it with Mr Mathis with a view to negotiating changes. It would not be unrealistic to surmise that a period of a week or more might have elapsed between Mr Blackmore starting work and the agreement (containing the trial period) being entered into. So even if the de minimis argument about Mr Blackmore's previous employment for HPL were to be considered, if the company had complied with its statutory obligations, he would have been employed by it for a substantially longer period and, therefore, employed by it "previously".

[73] This analysis also points to the importance of employers wishing to engage employees on trial periods of ensuring that a proposed agreement containing such a clause is made available to the prospective employee a sufficient time before work is intended to begin. This will both allow for compliance with the statutory obligations of consideration, advice and bargaining, and ensure that an employee to be subject to a trial period does not fall into the category of a "previous" employee.

[74] Indeed, it is good employment practice to do so even if a proposed individual employment agreement does not contain a trial period. It is tempting fate to postpone formalising an employment agreement, by signing a written individual employment agreement, until after work has commenced. What if the new employee declines to agree to the written terms and conditions proposed by the employer if these differ from those previously agreed orally and/or are inconsistent with those being worked? An employer in these circumstances may be on unsure ground, insisting upon execution of such an agreement. Equally, if not more risky, may be the consequences of either disadvantaging the employee in employment or purporting to dismiss, in effect, because the employee declines to vary a current employment agreement.

[75] All these factors point to the importance, especially in cases of trial periods, of getting the formalities completed in a lawful sequence and in good time.

Alternative decision based on unfair bargaining

[76] If I am wrong that Mr Blackmore's existing employee status precluded the employer from stipulating for a trial period, then it is necessary to determine whether HPL's non-compliance with s 63A may bring about the same or a similar result in practice.

[77] Section 67A not only specifies some minimum conditions for a valid trial period but also allows the parties some latitude within a trial period. So, for example, while a trial period cannot exceed 90 days, it may be for less than that. The period of notice required to be given for the lawful termination of a trial period before its expiry is likewise negotiable and not set by the legislation. In these circumstances, combined with the requirement of the law that a trial period be in writing, a potential employee's opportunity to consider, take advice about, and negotiate over, both the fact and content of a proposed trial period is very important.

[78] Those rights are preserved by s 63A of the Act (set out at [27]) including in respect of trial periods under s 67A. In this case there is no dispute that the terms of the trial period, upon which the defendant relies, were first given to Mr Blackmore

on the morning of Monday 15 November 2010, very shortly before they were signed up by him.

[79] HPL did not give Mr Blackmore the statutory opportunity to consider, take advice about, and then to discuss or negotiate the terms and conditions of the individual employment agreement including the 90 day trial period.

[80] Although Mr Blackmore completed an acknowledgement that he had taken this opportunity, that is clearly not so. Mr Mathis was anxious for Mr Blackmore to start work on that morning – there were important tasks to be done on the farm that day. Mr Mathis wanted the agreement signed and this formality concluded. It does not matter that Mr Blackmore might not then have protested and demanded his statutory right to a reasonable period for consideration of, and advice on, the employment agreement. In the circumstances, it was understandable that he did not do so.

[81] However, the law requires more of an employer than an employee should acknowledge that such an opportunity has been provided. The obligation on an employer is to give that opportunity even if the employee may appear to wish to sign the agreement immediately without taking it and, unlike here, freely.

[82] Although not in any egregious way, the defendant's conduct in this important part of establishing an employment relationship illustrates what the Act describes in the object section (s 3) as "… the inherent inequality of power in employment relationships …".

[83] In the circumstances of this case, an employer's obligation is to provide the written agreement (including the 90 day trial period) a sufficiently reasonable time before the commencement of work if the employee is to have that opportunity. The opportunity will not exist as the statute requires it to, if there is pressure to sign immediately after the form of agreement is presented. The opportunity for consideration, advice and negotiation must be a real opportunity as opposed to a nominal or minimal opportunity as I am satisfied was the effect of Mr Mathis's conduct on the morning of 15 November 2010.

[84] But breach of s 63A is not the end of the matter. I am grateful to Ms Burke for her comprehensive submissions on behalf of the defendant opposing any relief against the trial period clause following a finding of breach of s 63A(2)(b) of the Act.

[85] First, Ms Burke submitted that the consequence of a breach of s 63A (remedy of penalty) is set out in, and limited by, subs (3). Counsel submitted that where breach is inadvertent and the outcome would probably have been the same absent breach, a penalty should be nominal. I do not agree, however, that the breach here was inadvertent. While I accept that Mr Mathis's conduct was not egregious, it was he who set the tone of the meeting with Mr Blackmore as one that needed to be disposed of promptly to allow a busy working day to continue. The statutory obligation to allow reasonable time for consideration, taking advice, and negotiation is one that rests on an employer, particularly where the employer has prepared the employment agreement which has not previously been seen by the prospective employee. It is regrettable that in addition to using the Federated Farmers template employment agreement, HPL did not also take its organisation's advice about how it was to be used. It is, however, a natural inference that if an agreement contains an acknowledgement that these rights have been provided, as this one did, one would expect that they would have been as a matter of good faith.

[86] Nor do I accept the defendant's contention that if HPL had complied with s 63A(2), the outcome would probably have been the same if, by that, Ms Burke means that Mr Blackmore would have signed the individual employment agreement containing the trial period. The adamance of Mr Blackmore's evidence on this point, and the absence of any evidence about what HPL may have done in those circumstances, can only really leave the matter undecided. I accept there would have been significant incentive for Mr Blackmore to have agreed in the circumstances, albeit very reluctantly. He had burnt his proverbial bridges job-wise and had moved his family to another part of the country. On the other hand, had he been given the opportunity to take advice, this would no doubt have included advice that he was already an employee engaged on an oral and/or written employment agreement and that the defendant could not easily have dismissed him in these circumstances. For

these reasons, I cannot accept that the outcome would have been the same if HPL had complied with its obligations.

[87] Next, Ms Burke emphasised s 63A(4) to the effect that a breach does not affect the "validity" of an employment agreement. For reasons set out elsewhere in this judgment, I do not accept that this means both that an individual employment agreement settled in breach of s 63A(2) must continue in all respects and that the only consequence of a breach may be a penalty.

[88] Nor do I accept Ms Burke's next submission that the Court should not invalidate an agreement or any part of an agreement procured by a breach of s 63A(2), unless the agreement or any part of it is onerous or burdensome. Those are not statutory tests which, if they were, would establish a high threshold for effective sanctions against breaches. In any event, as this case shows, a deprivation of rights to challenge by personal grievance a dismissal from employment may be described as onerous and burdensome: the effect of Mr Blackmore's evidence was that he so regarded the trial period.

[89] Nor do I accept that such breaches of s 63A(2) should be categorised as "minor" as Ms Burke submitted. None of the several elements required of an employer by s 63A(2) was adhered to by the defendant. It was more than "a little hasty", as counsel describes it in her submissions, that Mr Blackmore was presented with a detailed and professionally prepared agreement which he felt expected to sign there and then without the statutorily guaranteed benefits of consideration, independent advice, and negotiation. This was neither a minor breach nor a breach of a minor provision in the Act.

[90] Finally, counsel for the defendant emphasised that the plaintiff did not seek remedies for breach of s 63A(2) but had, rather, fashioned his case narrowly by submitting that his trial period had commenced on or about 10 October 2010 when employment was offered and accepted so that, by the time he was dismissed, more than 90 days had passed.

[91] Cases are dynamic and no less so in the course of a hearing. Mr Blackmore's essential concern is that he should not have been subjected to a 90 day trial period. If there is more than one way in which that may be achieved legitimately, then the plaintiff should not be confined to only that narrow form of pleading if, as has now occurred, the parties have been given an opportunity to address alternative arguments to the same end. To seek to confine parties strictly to pleadings, irrespective of the justice of their cases as they emerge, is not only the antithesis of the Employment Court's methodology, but is an antiquated notion now rejected by courts generally. The aim must be to do justice between the parties according to law and following a fair process. That could scarcely be so if the Court were to turn a blind eye to obvious statutory breaches affecting the trial period clause at issue in the case.

[92] HPL's strongest argument in response to these matters being identified, was to point to s 63A(3) and (4) and to say that at worst failure or failures might make it liable to a penalty but that the validity of the employment agreement so entered into was not affected.

[93] The first response to this submission is that the intent of subs (4) is not to negate any consequences of non-compliance with subs (2) except for monetary penalties. To state, as s 63A(3) does, that non-compliance may mean liability for a penalty, does not exclude what might otherwise be the consequences in law of such a failure. Nor does subs (4) have the effect of excluding any other consequence than a penalty.

[94] Rather, the purposes of these two subsections together are to ensure that an employer cannot thereby evade liability for other wrongs that may have been committed by it in the course of the employment that nevertheless ensued despite the unfair bargaining. Subsection (4) in particular confirms that despite an employer's failure to comply with subs (2), the parties' employment agreement is not thereby negated.

[95] It is necessary next to deal with s 63A(4) of the Act that provides, generally, that even if the statutory formalities for entering into a lawful individual employment agreement are not complied with, the agreement is not without effect. So, the

defendant argues, even if HPL failed to comply with s 63A, the only consequence of doing so would be the imposition of a monetary penalty of modest maximum under the Act which is not at issue in this case. HPL's case is that the validity and effect of the employment agreement, including the 90 day trial period, is not vitiated or otherwise affected adversely by this non-compliance with s 63A.

[96] Section 63A (set out at [27] of this judgment) required HPL to do at least four things before entering lawfully into an individual employment agreement with Mr Blackmore. Although this case has addressed the lawfulness of the trial period provisions of that individual employment agreement, the minimum requirements of s 63A(2) applied to the individual agreement as a whole.

[97] The first requirement was to provide Mr Blackmore with a copy of the intended agreement "under discussion". HPL did not comply with this requirement. It presented Mr Blackmore with a substantially complete form of the agreement that it wished him to sign. The spirit of s 63A(2)(a) is to provide an employee or a prospective employee with a copy of an intended agreement that the employee or prospective employee can consider, discuss, and bargain about. HPL's actions on 15 November 2010 did not comply with that first requirement.

[98] Second, HPL was required to advise Mr Blackmore that he was entitled to seek independent advice about the intended agreement. It did not do so. It does not matter in these circumstances that Mr Blackmore signed what was described as a warranty that HPL had complied with its obligations including the obligation under s 63A(2)(b). In the circumstances it is understandable, as a matter of human nature, that Mr Blackmore felt he had no alternative but to sign the agreement, including the so-called warranties even although they were false.

[99] It is likewise with the third requirement under s 63A(2)(c). HPL did not give Mr Blackmore a reasonable opportunity to seek advice about the agreement. Again it is no answer that Mr Blackmore signed a warranty conceding that the company had complied with its legal obligations when it clearly had not. The law's requirement on an employer to give an employee such a reasonable opportunity is designed to avoid just what happened in this case. That is the belated presentation of

an employment agreement, some or even all of the provisions of which were non-negotiable, after the employee had resigned from his previous position and had made substantial commitments to take up new work. HPL was required to provide Mr Blackmore with that opportunity but its actions deprived him of it. Finally, HPL's strategy ensured that it would not have to consider any issues that Mr Blackmore may have raised after seeking independent advice and to respond to these because that strategy precluded the obtaining of such advice.

[100] Section 68(2)(d) (set out at [29] of this judgment) addresses precisely what occurred in this case, namely that where s 63A applied as it did, Mr Blackmore did not have the opportunity to seek advice as required by that section. In these circumstances it is unnecessary to go so far as to examine whether, under subs (2)(c), he was induced to enter into the agreement by oppressive means, undue influence, or duress. On the evidence of HPL's breach of s 63A(2), I conclude that the company bargained unfairly for Mr Blackmore's individual employment agreement.

Consequences of unfair bargaining for trial period

[101] The consequences of such a conclusion are set out in s 69 of the Act and they include, subject to other statutory preconditions, the ability of the Court (acting in this case of removal as the Employment Relations Authority) to vary the individual employment agreement including by deleting from it the 90 day trial provision.

[102] Despite the whole of the agreement having been bargained for unfairly by the employer, it is only the 90 day trial period to which objection has been taken by Mr Blackmore. To vary the agreement by deleting this clause with retrospective effect would have the consequence in this case of requiring HPL to justify its dismissal of Mr Blackmore on its merits. No other contractual benefit or obligation is at issue or should be affected by this conclusion.

[103] Before making an order varying the agreement pursuant to s 69(1)(b) or an order to the same effect striking out the trial period provision ab initio under s 69(1)(c), the Court must follow the statutory course required by s 164 of the Act, even at this relatively advanced stage of proceedings.

[104] First, the Court must identify the problem in relation to the agreement: s 164(a)(i). This judgment does so. The Court must then direct the parties to attempt in good faith to resolve that problem. Although, on the evidence heard by me, this would seem to be a probably futile exercise, the statute nevertheless requires it to be done if the Court is to exercise its remedial powers under s 69 and, of course, in the event that the first conclusion that no trial period was possible in law because he had been employed previously by HPL, it is erroneous. Next, even if the parties' good faith attempts to resolve the problem, including by the use of mediation, are unavailing, the Court would nevertheless have to be satisfied that any remedy other than one under s 69(1)(b) or (c) would be inappropriate or inadequate: s 164(d).

[105] In view of my primary finding in relation to the inapplicability of s 67A, I do not propose to give the parties directions to attempting to resolve the problem in good faith, including by the use of mediation under s 164, but, rather, to reserve leave to either of them to seek such an order if required.

Summary of judgment

[106] Mr Blackmore is entitled to challenge the justification for his dismissal by personal grievance alleging that he was dismissed unjustifiably because when the agreement was entered into, he was an employee of HPL and, therefore, had been employed by it previously. As defined statutorily, Mr Blackmore had, for the purposes of access to the statutory personal grievance procedure, been an employee of HPL as from 10 October 2010, that is a period of approximately five weeks.

[107] If I am wrong in the conclusion that Mr Blackmore had become an employee of HPL for personal grievance purposes from 10 October 2010, then he had been an employee of the company from at least 7 am on 15 October 2010 when he began work for the defendant and before the agreement containing the trial period was either shown to him or signed by him.

[108] Alternatively, if I am wrong in my conclusion that Mr Blackmore had been employed previously by HPL when he entered into an employment agreement containing the trial period provision, that agreement, and the trial period provision in

particular, was unfairly bargained for by HPL. The clause of the individual employment agreement containing that trial period is liable to be deleted with retrospective effect because the defendant bargained unfairly to obtain the benefit of it. However, if necessary, the parties must first attempt to resolve that problem in good faith including by mediation. If it is needed, a direction to that effect may be made. If such attempts at resolution are unavailing, the Court will be required to consider whether any other remedy than an order under s 69(1)(b) or (c) would be inappropriate or inadequate and leave is reserved accordingly for such considerations to be brought back before the Court on reasonable notice.

[109] I make a direction to mediation or further mediation to enable the parties to attempt to settle the merits of Mr Blackmore's claim that he was dismissed unjustifiably. If mediation does not resolve the proceeding, the parties should contact the Registrar who will arrange for a directions conference to enable it to be scheduled to a hearing.

[110] I decline to make any orders for costs in the litigation to this point although they will henceforth be at large.

Clarification of *Stokes Valley Pharmacy* case

[111] Having re-read the judgment in *Stokes Valley Pharmacy*, I should clarify that one paragraph of it was intended to be an observation but did not form part of my decision of the case. It is what lawyers refer to as obiter dicta rather than the ratio decidendi of the case. The paragraph referred to is [89] as follows:

> [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.

[112] I should perhaps have made it clearer, that this was simply an observation, than I did using the opening words of that paragraph "Even ignoring the legal position just determined …". I had intended to convey that the legislative interpretation decided by the judgment and the reasoning behind that accorded with what had been said about the nature and purpose of the legislation during the Parliamentary process of its enactment.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Thursday 24 November 2011