

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 55  
5392841

BETWEEN                      JASJEET SINGH AHUJA aka  
    JAZZ AHUJA  
    Applicant

A N D                              EDEN MOZAIK LIMITED  
    Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:           Applicant in person  
    Dionne Smith, Director, Respondent

Investigation Meeting:    12 February 2013 at Auckland

Date of Determination:    18 February 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.    The Authority does not have jurisdiction to hear Mr Ahuja's dismissal grievance because his employment agreement contains a 90 day trial period provision which complies with the requirements of s.67A of the Employment Relations Act 2000;**
- B.    Eden Mozaik Limited failed to give Mr Ahuja 7 days notice of termination of his employment during the 90 day trial period in accordance with his individual employment agreement. Eden Mozaik Limited is ordered to pay Mr Ahuja the sum of \$637.00 gross;**
- C.    Costs are to lie where they fall.**

**Employment relationship problem**

[1] The respondent, Eden Mozaik Limited (Eden Mozaik), operates a number of cafés mainly in Auckland with one in Hamilton. In Auckland, Eden Mozaik has cafés in Grafton, Parnell, New Lynn, Victoria Park Market, Constellation Drive, North Shore and last year opened a café in Mt Eden.

[2] Mr Jazz Ahuja was employed by Eden Mozaik as a chef under a written individual employment agreement dated 12 July 2012 (employment agreement) which contained a 90 day trial period provision. Mr Ahuja was dismissed on 20 August 2012.

[3] Under s.67A of the Employment Relations Act 2000 (the Act), parties may include in an employment agreement for a new employee, a trial period provision which allows the employer to dismiss the employee within 90 days of the beginning of their employment without the employee having recourse to “*a personal grievance or other legal proceeding*” in respect of the dismissal.

[4] If the trial period provision in Mr Ahuja’s employment agreement meets the requirements of s.67A of the Act, the Authority does not have jurisdiction to hear his dismissal grievance.

[5] Mr Ahuja could not legally agree to the trial period provision if he had already been employed by Eden Mozaik before the parties signed the employment agreement because a trial period provision may only apply to a new employee.

[6] Mr Ahuja seems to claim he was employed before signing the employment agreement. Therefore, he was an employee previously employed by Eden Mozaik and not a new employee as required by s.67A of the Act. This would mean the trial period in the employment agreement would be invalid.

[7] Mr Ahuja says that based on assurances of employment from Eden Mozaik’s head chef Tui Chang before he signed the employment agreement, he resigned from his position at The Hangar Bar. Mr Ahuja says he was then unjustifiably dismissed by Eden Mozaik and he seeks remedies under the Act.

[8] Eden Mozaik says the trial period provision was valid, Mr Ahuja was dismissed in accordance with it and the Authority can not determine the dismissal grievance.

## Issues

[9] In determining whether the Authority can determine Mr Ahuja's dismissal grievance the following issues must be considered:

- (a) Is the trial period provision in Mr Ahuja's employment agreement valid?
- (b) Was Mr Ahuja already an employee when he signed the employment agreement? and
- (c) If the trial period was valid and Mr Ahuja was not already an employee when he signed the agreement, did Eden Mozaik give him notice of termination in accordance with the terms of his employment agreement?

### ***Is the trial period provision in Mr Ahuja's employment agreement valid?***

[10] If the trial period is a valid one it will preclude the Authority from determining Mr Ahuja's dismissal grievance.

[11] On the face of it the trial period in Mr Ahuja's employment agreement complies with s.67A of the Act. The trial period is contained in clause 3.2 of Mr Ahuja's written employment agreement dated 12 July 2012 signed by both parties.

[12] Clause 3.2 of the employment agreement states that the:

*...trial period will apply for a period of **NOT EXCEEDING 90 CALENDAR DAYS** employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer. During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal...*

### ***Was Mr Ahuja already an employee when he signed the employment agreement?***

[13] As part of determining the validity of the trial period provision, the Authority must consider whether Mr Ahuja was already employed by Eden Mozaik when he signed the employment agreement.

[14] Under s.67(3) of the Act and as specified in clause 3.2 of the employment agreement, a trial period can only apply to a new employee. Section 6(1)(b)(ii) of the Act defines "employee" to include a "person intending to work", i.e. someone who

has accepted an offer of employment but who has not actually started work for the employer.

[15] The Employment Court in *Blackmore v. Honick Properties Ltd*<sup>1</sup> is authority for the proposition that in order to meet the requirements of s.67A of the Act, the trial period has to be presented in a written employment agreement to a prospective employee at the time the offer of employment is made and not after the prospective employee has already accepted the offer of employment.

[16] In about June 2012, an opportunity arose for Eden Mozaik to set up a café in Mt Eden, which it hoped to open in mid-July. Suitable staff were sought by Eden Mozaik for its new café.

[17] On 27 June 2012, Mr Ahuja responded to an advertisement placed on Trade Me by Ms Dionne Smith, Eden Mozaik's Operations Manager and one of its Directors. In his reply to the advertisement, Mr Ahuja indicated a strong interest in working for Eden Mozaik. On 28 June, Ms Smith replied asking Mr Ahuja if he would come in for an interview.

[18] Mr Ahuja met with Helen Knowles at Eden Mozaik's head office in Grafton for a short interview. Ms Knowles is Eden Mozaik's Grafton Store Manager and has been with Eden Mozaik for approximately 5 years. The interview was short and casual. Mr Ahuja told Ms Knowles about his experience which was limited to mainly cold section work, pizza and desserts. Employment arrangements were not discussed and Ms Knowles told Mr Ahuja she would get back to him as she was doing a number of interviews.

[19] A day or so later, Mr Ahuja received a phone call from Ms Knowles, asking him to come in for a *trial*. Ms Knowles says this was Eden Mozaik's normal practice before offering employment. Such *trials* were usually for a few hours over one or two days so a prospective employee could get a feel for how Eden Mozaik worked. Also, Ms Knowles says it gives a prospective employee the opportunity to see if they liked the work. Ms Knowles says the *trials* are short, voluntary and unpaid for this reason.

[20] On 29 and 30 June, Mr Ahuja *tried* from about 6.00am to 12.30pm at Eden Mozaik's café at Constellation Drive, North Shore. Mr Ahuja was shown around the

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<sup>1</sup> [2011] NZEmpC 152

kitchen, asked to marinate some food and he helped make the muffins and pumpkin soup. At the end of the two day *trial*, the head chef, Mr Tui Chang and Mr Ahuja discussed the possibility of Mr Ahuja being a Pizza Chef at the new Mt Eden café when it opened, because Mr Ahuja had experience making pizzas.

[21] In his witness statement, Mr Ahuja said that on 9 July he was offered a Chef's position at Eden Mozaik's restaurant in Mt Eden and that he signed a written employment agreement dated 12 July 2012. At the Investigation Meeting, Mr Ahuja says the offer of employment was at an earlier time and was made by Mr Chang following his *trial*. No terms of employment such as wages or hours of work were discussed. Mr Ahuja says he believed Mr Chang had the authority to make the offer and after it was made he resigned from his job at The Hangar Bar. Mr Chang says he does not have authority to make job offers and did not do so.

[22] On 9 July, a staff meeting was held. Ms Smith, Mr Chang and a number of staff to be employed including Mr Ahuja attended. Ms Smith handed out draft employment agreements to those staff to whom Eden Mozaik wished to offer employment, including Mr Ahuja. The meeting lasted about two hours and Ms Smith took her time going through the employment agreement, pointing out that there was a trial provision, and suggesting that those being offered employment take the agreement away, talk to their Mums, Dads or get legal advice if they wished, before signing.

[23] Mr Ahuja took the agreement and discussed it with his Aunt and Uncle and four days later returned the agreement signed.

[24] It is my view that there was no offer and acceptance of employment following the *trial*. No terms of employment were discussed and Mr Ahuja did not resign from his job at The Hangar Bar. Mr Ahuja continued to work at The Hangar Bar during July. On 9 July 2012, Mr Ahuja was provided with a written employment agreement by Eden Mozaik containing terms and conditions of employment, including a trial period provision. Mr Ahuja was given a reasonable opportunity to take advice and did take advice about the employment agreement before signing and returning it three days later.

[25] On about 15 July after signing the written employment agreement, Mr Ahuja gave two weeks' notice to his current employer, the Waitakere Licensing Trust which

operated The Hangar Bar. The two week notice period expired on 29 July and Mr Ahuja began work at Eden Mozaik on 31 July 2012.

[26] It is my finding that at the time of signing the written employment agreement on 12 July, Mr Ahuja had not been previously employed by Eden Mozaik, he had volunteered to *trial* for a couple of days to get the feel for working at Eden Mozaik. Mr Ahuja fails to discharge the onus of establishing he was already an employee<sup>2</sup> when he signed the employment agreement on 12 July.

[27] I find Eden Mozaik complied with the requirement to ensure Mr Ahuja's trial period provision was mutually agreed in writing before Mr Ahuja accepted the offer of employment and therefore became an employee. Mr Ahuja was given a reasonable opportunity to take advice on the proposed terms of the offer of employment, including regarding the effect of the trial period provision.

[28] I therefore find that Mr Ahuja's employment agreement contains a valid 90 day trial period provision which complies with the requirements of s.67A of the Act.

[29] Mr Ahuja's employment did not start well and he was not offered any further work from 7 August. On 20 August, Mr Ahuja met with Ms Smith and it was made clear there was no further employment for him at Eden Mozaik. Mr Ahuja claims he was unjustifiably dismissed. Mr Ahuja's dismissal occurred within the 90 day trial period specified in his written employment agreement. Mr Ahuja is prevented from bring a personal grievance.

***If the trial period was valid and Mr Ahuja was not already an employee when he signed the agreement, did Eden Mozaik give him notice of termination in accordance with the terms of his employment agreement?***

[30] Clause 13.1 of Mr Ahuja's employment agreement provides that the employer may terminate the trial period by providing one week's (7 days) notice to the employee within the trial period.

[31] Mr Ahuja did not receive any notice of termination. Ms Smith confirmed at a meeting on 20 August that Mr Ahuja would not be offered any further work with Eden Mozaik. Mr Ahuja did not receive any notice as required under his employment agreement. I find that Mr Ahuja was entitled to be given seven days' notice of termination of employment during the trial period under clause 13.1 of his

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<sup>2</sup> In terms of the s 6 definition in the Act

employment agreement. During his short period of employment by Eden Mozaik, Mr Ahuja was paid at the rate of \$14 gross for a total of 28.73 hours spread across 4.5 days. This equates to approximately 6.5 hours a day.

[32] I order Eden Mozaik to pay Mr Ahuja 7 days notice calculated at 6.5 hours a day at the rate of \$14.00 gross an hour. The total is \$637.00 gross.

### **Costs**

[33] Each party was partially successful and so I order costs to lie where they fall.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**