**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2016] NZERA Christchurch 112
5603223

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| | BETWEEN | BRIDGET PAINTER<br>Applicant |
| | A N D | EPIC HAIR DESIGNS NZ LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Chrissy Gordon, Advocate for Applicant<br>Lance Holland, Advocate for Respondent |
| Investigation Meeting: | 12 July 2016 at Christchurch |
| Submissions Received: | 12 July 2016 for Applicant<br>12 July 2016 for Respondent |
| Date of Determination: | 20 July 2016 |

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## DETERMINATION OF THE AUTHORITY

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**A.** **Ms Painter was lawfully dismissed pursuant to a statutory trial period clause in her individual employment agreement.**

**B.** **The Authority therefore has no jurisdiction to investigate her unjustified dismissal personal grievance. I dismiss her unjustified disadvantage personal grievance.**

**C.** **The successful respondent was not legally represented, and so I make no order as to costs.**

**Employment relationship problem**

[1] Ms Painter claims that she was unjustifiably dismissed from her employment on 11 November 2015. She also claims that she was subjected to an unjustified disadvantage in her employment, which relates to the dismissal.

[2] The respondent denies that Ms Painter was dismissed unjustifiably, and relies upon a trial period contained in an individual employment agreement signed by Ms Painter on 15 September 2015.

[3] Ms Painter, however, asserts that the trial period was invalid as she was an employee prior to signing her employment agreement, with effect from 18 August 2015, when she cut hair as a test as part of the interview process. The respondent asserts in return that Ms Painter was not an employee as a result of spending three hours on 18 August 2015 undertaking a test as the respondent gained no economic benefit from Ms Painter's activity on that day.

[4] In order to reduce costs, the investigation meeting addressed not only whether the 90 day trial period was valid but also whether the dismissal was procedurally and substantially justified, in the event that the trial period turned out not to be valid.

**Brief accounts of the facts leading to the dismissal**

[5] The respondent is a hair salon operating in Rangiora. Ms Painter is an experienced hairstylist with 16 years' experience. She applied for the position of Hairdresser – Senior Stylist and was interviewed by one of the directors of the respondent company, Amanda Ellis, on 13 August 2015. It was agreed that Ms Painter would need to complete a pre-employment test.[1] The test would involve colouring and styling two models.

[6] The two models were sourced by Ms Ellis by way of a posting on the Waikuku Beach Fan Club Facebook page. The test took place on 18 August 2015 at the respondent's premises. It is uncontested that the two models did not make any payment to the respondent for the services they received during the test.

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[1] The word used in the evidence was "trial", but in order to avoid confusion between that three hour trial and the 90 day trial, I shall use the word "test" to indicate the three hour trial that took place as part of the interview process.

[7] Ms Painter was told the following day that she was going to be offered the position, and started work at the salon on 15 September 2015. It is uncontested that Ms Painter was given a copy of the employment agreement prior to 15 September, and that she signed it first thing on her first day, prior to undertaking any work.

[8] The material clauses of the employment agreement signed by Ms Painter are as follows:

> 3.1 **Individual Agreement of Ongoing and Indefinite Duration**
> This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on **15th of September 2015** and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.
>
> 3.2 **Trial Period**
> A trial period will apply for a period of **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.
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> 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. The employee may pursue a personal grievance on grounds as specified in sections 103(1)b-g of the Employment Relations Act 2000 (such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).
>
> Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67A(5) of the Employment Relations Act 2000.
>
> …
> 13. *Termination of Employment*
>
> 13.1 **Termination of trial period**
> The employer may terminate the trial period by providing **7 calendar days** notice to the employee within the trial period.
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> 13.2 **General Termination**
> The Employer may terminate this agreement for cause, by providing **14 calendar days** notice in writing to the Employee. Likewise, the Employee is required to give **14 calendar days** notice of resignation. The Employer may, at

> its discretion, pay remuneration in lieu of some or all of this notice period.

[9] It is the evidence of Ms Painter that she would have fortnightly meetings with Ms Ellis and was given the impression during those meetings that she was doing well. She says that Ms Ellis never mentioned that she was not performing up to standard.

[10] Ms Painter said in her written evidence that there was one complaint from a client about having to wait, the cost, and the blondness of her hair. Ms Painter says that, as far as she was concerned, there were no other concerns or complaints about her work.

[11] During her oral evidence, Ms Painter said that another client had been aggressive with her during a cut, and, I understand, had walked out, but that she had told Ms Ellis about this herself, who had said that they did not want clients like that.

[12] Ms Painter was called into a meeting on 11 November 2015 and told that her performance was not good enough, and that she was being terminated under the 90 day trial period. Ms Painter said that she was told that she did not always give her clients a magazine, and that she asked Ms Ellis to give her another chance, but that Ms Ellis did not want to, as the trial period end was approaching.

[13] Ms Painter said that she was paid out her seven days' notice in lieu. She had not realised this at first, she said, and thought she would be working her notice. She was contacted by a client later on the day of her dismissal, who told her that her appointment with Ms Painter had been cancelled by Ms Ellis. It was only when Ms Painter had then telephoned Ms Ellis the same day, who told her that she had "been given notice", that she realised that she was being paid in lieu of notice instead. She said in evidence that she was not bothered by being paid in lieu of notice.

[14] Ms Ellis' evidence is that she had three meetings with Ms Painter during the seven weeks of her employment, on 29 September, 13 October and 30 October 2015. Ms Ellis says that, during the second and third meetings, she told Ms Painter that her service needed to be stepped up, and addressed her failure to give her clients a full service.

[15] Ms Ellis says in her written evidence that, after those three meetings, it was clear that Ms Painter's service was not going to improve and, indeed, that her service, skills and attitude towards clients and staff members was getting worse and that they

were getting "complaint after complaint". Ms Ellis gave oral evidence about these complaints, but it is not necessary to repeat that evidence her as it is only relevant if the 90 day statutory trial period was not lawfully relied upon.

[16] Regarding giving Ms Painter payment in lieu of notice, Ms Ellis says that she did mention this to Ms Painter during the dismissal meeting and, whilst she could not recall what Ms Painter said, Ms Painter did not protest. There is mention in the letter of termination of paying Ms Painter in lieu of notice.

[17] The letter, which was handed to Ms Painter on 11 November 2015, read as follows:

> 11/11/15
>
> Bridget Painter
>
> Dear Bridget,
>
> Your trial period with us at Epic Hair Designs is due to end on 13 December 2015.
>
> We would like to thank you for your time here at Epic Hair Designs.
>
> We have been assesing [sic] you are over the last 7 weeks of your trial period and feel that you [sic] service unfortuantly [sic] is not up to the standered [sic] required as explained to you in your interview and many times scince [sic].
>
> Some days your service is OK and other days not great. We have had more than a few complaints in regards to your service and feel that this is not good enough and as a new businuss [sic] we cant [sic] afford for this to happen.
>
> We confirm that we have decided not to continue employment beyond this point of your trial period. As a result your employment will end on 18 November 2015.
>
> You will be paid out for the period worked so far this week being Tuesday 10 November 2015 and we are giving you 7 days notice as per the trial agreement.
>
> We will not require you to return and will pay you out for this time. All owing holiday pay will be paid out in your final pay.
>
> We ask that you please return your keys and take your things with you.
>
> Regards
> Amanda Ellis & Lance Holland
> Directors

**The issues**

[18] The following issues need to be determined by the Authority:

(a) Was Ms Painter lawfully dismissed pursuant to a valid trial period provision in her employment agreement;

(b) If not, was the dismissal procedurally and substantively unjustified?

(c) Was Ms Painter unjustifiably disadvantaged in her employment?

**Was Ms Painter lawfully dismissed pursuant to a valid trial period in her employment agreement?**

[19] The following elements need to be considered in respect of this question:

(a) Did the test that Ms Painter did on 18 August 2015 constitute "employment", so that Ms Painter became an employee of the respondent prior to signing her individual employment agreement?

(b) Did Ms Painter commence work on 15 September 2015 prior to her signing the individual employment agreement?

(c) Was the trial period provision correctly implemented, given that Ms Painter was paid in lieu of notice?

**Relevant legal principles**

[20] Sections 67A and 67B of the Employment Relations Act 2000 (the Act) provide 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 section 61(1)(a), but subject to section 61(1)(b).

**67B Effect of trial provision under section 67A**
(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (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.

[21] It has been established by the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Ltd*[2] that an employer cannot rely upon a statutory trial period clause if the employee commenced employment prior to entering into the agreement. This is because of the definition of "employee" contained in s 67A(3) of the Act which states that that term means "an employee who has not been previously employed by the employer".

[22] In the case of *Blackmore v Honick Properties Ltd* [3], the Employment Court stated, at paragraph [71] the following:

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2 [2010] NZEmpC 111
3 ]2011] NZEmpC 152; [2011] ERNZ 445

> 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 [sic] if they are careful that such agreements are entered into before, and not after (even shortly after) work commences.

[23] This issue is relevant to the current proceedings because Ms Painter argues that her test on 18 August 2015 constituted employment, so that she was employed prior to agreeing to the statutory trial contained in her individual employment agreement, and that this precludes her satisfying the definition of "employee" in s67A(3) of the Act.

[24] The inquiry as to whether this is the case can be assisted by reference to the definition of "employer" in s.5 of the Act and the definition of "employee" in s.6(1)-(3) of the Act.

[25] "Employer" is defined as follows:

> … a person employing any employee or employees; and includes a person engaging or employing a homeworker.

[26] "Employee" is defined in s.6(1)-(3) as (omitting irrelevant provisions):

> **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;
> …
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
> (3) For the purposes of subsection (2), the court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[27] A "person intending to work" is defined in s 5 of the Act as a person who has been offered, and accepted, work as an employee.

[28] The question of whether a work trial (in the sense of a test to ascertain the suitability of a prospective employee) constitutes employment was examined by the Employment Court in the case of *Salad Bowl Ltd v Howe-Thornley*[4] The Court examined the question of whether Ms Howe-Thornley was "a person intending to work". It examined the definition of "person intending to work" and stated that the line between an interview alone and "work" is likely to be crossed when there is a requirement for payment and where the employer gains an economic benefit from the employee's activity.[5] This second part of the test was restated in paragraph [51] of *Salad Bowl* where it was stated that the defendant performed work for the plaintiff that "contributed to its commercial enterprise".

***Was the test undertaken by Ms Painter on 18 August 2015 employment?***

[29] It is the respondent's case that Ms Painter was paid for her time undertaking the test after she commenced work in her first payment, as a gesture of goodwill. This precludes Ms Painter being a volunteer during the test, as she did receive payment, albeit later, with her first pay packet.

[30] However, the respondent maintains that the test Ms Painter carried out on 18 August 2015 did not contribute to its commercial enterprise, as the models did not pay anything for their haircuts and colours. In fact, the test caused the respondent loss, as products were used which were not charged to either Ms Painter or the models.

[31] Ms Gordon argues on behalf of Ms Painter that the trial contributed to the respondent's commercial enterprise because:

a. Although the models did not pay for the service, the respondent advertised for models on Facebook, which gave the business exposure within the client catchment area and may have attracted new clients;

b. It is quite common for business to use a loss leader or free offer to entice new clients;

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4 [2013] NZEmpC 152

5 Ibid at [27]

c. One model posted a 5 star rating on the respondent's Facebook page, and described the excellent service that had been provided; and

d. This model also became a regular client of the respondent.

[32] I address these points in turn. First, I do not accept that the respondent advertising for the models is relevant, even if that did increase its exposure to the public. This is because *Salad Bowl* makes clear that it is the prospective employee's activity[6] or work[7] that must contribute to the commercial enterprise. It was the respondent that advertised, not Ms Painter.

[33] I do not accept, either, that the test was a loss leader or free offer. It was a test to ascertain Ms Painter's skill levels. The only way the respondent could test her skill levels was by having her cut someone's hair. Again, the loss leader argument refers to what the respondent did, rather than what Ms Painter did.

[34] Regarding the third argument, I agree that a positive posting on the respondent's Facebook page from the model could have contributed to its commercial enterprise, or that it could have gained an economic benefit from it. However, there is no evidence that it actually did, and *Salad Bowl* does not speak in terms of possible gain, but actual gain. In addition, any economic gain would have derived from the action of the model in posting the comment, not from Ms Painter's work. Therefore, I believe the connection is too tenuous, and do not accept that this argument succeeds either.

[35] The final argument is that the model became a regular client of the salon. I accept that the model did become a client of the salon. I also accept that she did so because of Ms Painter's cut during the test. The enthusiastic Facebook post by the model confirms this. Does this mean that the salon gained an economic benefit from the activity? *Salad Bowl* makes clear that the economic benefit need not be "optimal"[8]. It also refers, at paragraph [27], to "economic or other business or operational benefit". This implies that the benefit need not be just revenue received by the business as a result of the work done by the employee.

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[6] Paragraph [27]
[7] Paragraph [51]
[8] Paragraph [27]

[36] However, if I accept that the model deciding to become a client means that Ms Painter's test resulted in an economic or other business or operational benefit, so that Ms Painter was an employee at that point, and her trial period was thereby invalidated, those consequences would flow from an action (the model deciding to become a client) that the respondent had no control over. That cannot have been the intention behind the Employment Court's judgement.

[37] The situation would have been different if the salon had been so pleased with the haircut given to the model by Ms Painter that they photographed her, and used her for advertising, thereby winning new clients.

[38] I believe that the phrase "other business or operational benefit" is intended to apply to a situation where the prospective employee does a task which directly benefits the prospective employer, such as doing administrative duties, say, or cleaning, which the employer directly controls. It cannot be intended to cover a situation where the question of whether a benefit is gained or not depends on the whim of a third party.

[39] On balance, therefore, I am satisfied that the pre-employment test carried out by Ms Painter on 18 August 2015 did not constitute employment, and that Ms Painter did not become an employee by carrying out the test. The test did not, therefore, invalidate the operation of the 90 day trial period.

[40] I also do not accept that Ms Painter was a person "intending to work" when she did the test, as she had not yet received an offer of employment. That did not occur until she had passed the test to the satisfaction of Ms Ellis, was made an offer of employment, and she accepted that offer.

***Did Ms Painter carry out work on 15 September 2015 prior to signing the employment agreement?***

[41] This can be answered easily, as the parties are in agreement. Ms Painter did not start work until after she had signed the employment agreement. Therefore, she does not fall foul of the definition of employee in s67A(3) at the point of entering into the agreement, and the trial period is not invalidated for that reason.

***Was the trial period complied with?***

[42] This question arises because Ms Painter was paid in lieu of notice rather than being allowed to work her 7 days' notice. Whilst clause 13.2 of the employment agreement allowed the employer, at its discretion, to pay remuneration in lieu of some or all of the 14 calendar days' notice period set out in that clause, there is no such right reserved under clause 13.1. This simply provides that the employer may terminate the trial period by providing seven calendar days' notice to the employee within the trial period.

[43] I do not accept that the discretion to pay in lieu of notice referred to in clause 13.2 can extend to the situation in clause 13.1. First, clause 13.2 follows clause 13.1 sequentially. Secondly, the notice requirements are dealt with under separate headings and in separate sub-clauses. Third, the notice periods are different. It is clear to me that these sub-clauses are intended to be treated quite separately.

[44] On the face of it, therefore, the respondent has not complied with the requirements of the trial period provision, as the agreement did not allow the respondent to terminate Ms Painter's employment under the trial period by paying in lieu of notice. Clause 13.1 forms part of the trial period provision, by reference.

[45] In paragraph [97] of *Smith v Stokes Valley Pharmacy (2009) Ltd*[9] His Honour Chief Judge Colgan stated that "deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as s.67B requires".

[46] I also refer to paragraph [48] in which His Honour Chief Judge Colgan said the following:

> 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.

[47] In other words, unless Ms Painter agreed to the payment in lieu of notice to terminate her employment under the trial period, applying the strict approach called for in *Stokes Valley*, the breach of clause 13.1 would invalidate the trial period.

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[9] [2010] NZEmpC 111

[48] Clause 3.1 of the agreement states that the clauses in the agreement may be varied or updated by agreement between the parties at any time. There is no requirement that the variation must be in writing.

[49] When I examine the evidence, it appears that Ms Ellis did not obtain the agreement of Ms Painter prior to deciding to pay her in lieu. Whether or not Ms Ellis discussed paying her in lieu, Ms Painter did not appear to have taken that in. It was only later that she realised this. That was not an express agreement.

[50] Did Ms Painter affirm the breach of contract by the respondent? The usual case of affirmation occurs when the innocent party (the victim of the breach) chooses to keep the contract on foot, despite the breach. This cannot apply when the very breach results in or is part and parcel of the ending of the contract.

[51] However, Ms Painter accepted the payment in lieu, did not refuse it, or pay it back, and did not protest. She also said, in her oral evidence, that she was not bothered by being paid in lieu. In light of this, I find that Ms Painter did affirm the breach, by accepting the payment in lieu of 7 calendar days' notice.

[52] It is also arguable that Ms Painter is also estopped from relying on the breach, by having accepted the payment in lieu[10].

[53] As Ms Painter affirmed the breach, the trial period was not invalidated by the respondent choosing to pay Ms Painter in lieu of notice instead of giving her 7 calendar days' notice.

**Determination**

[54] Having found that the statutory 90 day trial period contained in the employment agreement was not invalidated by the pre-employment test, that Ms Painter did not start work until after she had signed the employment agreement and that she affirmed the breach of contract occasioned by paying her in lieu of the 7 calendar days' notice required, I conclude that the respondent was able to rely upon the trial period clause to dismiss Ms Painter without Ms Painter being able to pursue a personal grievance for unjustified dismissal.

**Was Ms Painter subjected to an unjustified disadvantage in her employment?**

[10] See *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43 at [75]-[76] for the necessary components of an estoppel.

[55] Whilst the trial period does not preclude Ms Painter pursuing a personal grievance for disadvantage in her employment, I understand that the disadvantage relied on is the lack of process followed at dismissal. This would amount to the same cause of action as an unjustified dismissal claim. It cannot have been the intention of parliament to allow a personal grievance, which is otherwise precluded by s67B of the Act, to be litigated by calling it a different name. I therefore disallow the personal grievance of unjustified dismissal.

**Costs**

[56] The respondent was represented by its director, Mr Holland, throughout. Therefore, no legal costs have been incurred. I therefore make no order as to costs.

David Appleton
Member of the Employment Relations Authority