IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 77
5434804

	BETWEEN	TYAGI PARIKSHIT Applicant
	AND	JAMES RICHARDSON (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Vonda Hodgson and Harriet Quinlan, Counsel for the Respondent
Investigation Meeting:	7 November 2014
Determination:	16 March 2015

DETERMINATION OF THE AUTHORITY

A. The trial period provision in Tyagi Parikshit's employment agreement with James Richardson (NZ) Limited was ineffective as he was not given a reasonable opportunity to seek independent advice before signing the agreement.

B. Mr Parikshit is entitled to proceed with his personal grievance about his dismissal by James Richardson (NZ) Limited.

C. The parties are directed to further mediation.

Employment relationship problem

[1] James Richardson (NZ) Limited (JRL) employed Tyagi Parikshit from 16 April 2013 until he was dismissed on 11 July 2013. He worked as a '3IC' in its duty free retail store at Auckland International Airport. JRL's decision to dismiss Mr

Parikshit followed four review meetings with him. On dismissal, he was paid one week in lieu of notice.

[2] Mr Parikshit was told his dismissal was made under this term of his employment agreement:

> *Your employment is subject to a 90 day Trial Period in accordance with section 67A of the Employment Relations Act 2000. The Trial Period commences when you begin employment with us and you commence duties on a JR/Duty Free site. At any time during the Trial Period, we may (not withstanding anything else in this agreement) terminate your employment by giving you one week's notice in writing, or by paying you your pay in lieu of all or part of that notice.*
>
> *In accordance with the Employment Relations Act 2000 you are not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal if we give you a notice of termination of your employment before the end of the Trial Period.*

[3] He was dismissed on the eighty-seventh day of his employment with JRL.

[4] Mr Parikshit raised a personal grievance for unjustified dismissal and, on several grounds, for unjustified disadvantage. The disadvantages were said to comprise not receiving the same training opportunities as other staff, inadequate procedures followed in review meetings with him, and discrimination on the basis of race or national origin.

[5] In reply to Mr Parikshit's application to the Authority JRL challenged his right to pursue the dismissal grievance due to the trial period term in his employment agreement and the operation of s67A of the Employment Relations Act 2000 (the Act). While JRL did not accept there was any substance to Mr Parikshit's disadvantage claims there was no issue as to whether he was entitled to pursue those claims in the Authority as s67B(3) of the Act expressly preserves the right to pursue such disadvantage and discrimination grievances. A valid trial provision only prohibits dismissal grievances.

Preliminary issue for determination

[6] I had to determine, as a preliminary question, the validity or effectiveness of the trial term in Mr Parikshit's employment agreement. If the term were effective (by having been entered in a manner compliant with the requirements of s67A and s67B

of the Act, as interpreted in case law by the Employment Court), the Authority lacked jurisdiction to investigate and determine his dismissal grievance. It could then only consider his disadvantage claims.

[7] With the agreement of the parties I sought to resolve the preliminary jurisdictional issue on the basis of affidavit evidence (in order to contain costs) but reserved the option of conducting an interviews with those witnesses to clarify any points of fact.[1] The affidavits lodged did identify a factual issue about when Mr Parikshit got the intended employment agreement from JRL. That issue was important to the legal question of whether he then had sufficient opportunity to consider and seek advice on the agreement. This legal question was considered – in relation to the effectiveness of the 90 day trial periods allowed under s67A of the Act – by the Employment Court in *Blackmore v Honick Properties Limited* in this way (emphasis added):[2]

> *[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.*
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> *[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.***
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> *[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.*[3] *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.*
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> *[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*

[1] Section 160(1)(c) of the Employment Relations Act 2000 (the Act).
[2] [2011] NZEmpC 152.
[3] *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 11.

> *challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee.*
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> *[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.*
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> *[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****.*
> *…*
> *[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.*

[8] In light of the Court's interpretation of the statutory requirements, the issue for resolution became whether what JRL had done in commencing its employment relationship with Mr Parikshit had included strict compliance with its obligation under s63A(2)(c) of the Act to give him a reasonable opportunity to seek independent advice about its intended agreement. Did he have "*a few days or even more, depending on the circumstances*" to do so?

The investigation

[9] The following witnesses gave written and oral evidence to the Authority investigation on this preliminary issue:

(i) Mr Parikshit.

(ii) JRL recruitment consultant Pauline Gonsier, who made a verbal offer of employment to Mr Parikshit by telephone on 10 April 2013 and sent him an email on 11 April confirming he was to start a three-day induction and training programme on 16 April. Her email included some employment-related documents (such as forms for a criminal history check, tax code declaration

and KiwiSaver) but not the JRL letter of offer or its intended employment agreement.

(iii) JRL payroll coordinator Sarah O'Donnell, who sent Mr Parikshit an email on Friday, 12 April 2013 at 4.05 pm. She and other JRL witnesses were sure that email was sent with attached digital copies of a letter of offer, an employment agreement and a schedule to the employment agreement. The text of her email referred to "*this Offer of Employment from JR/Duty Free*" and asked him to "*bring a signed copy of each document*" to the induction.

(iv) JRL's human resources administrator Megan Adams, who spoke with Mr Parikshit when he arrived on 16 April about half an hour early for the induction session but without the expected copy of his signed employment agreement.

(v) JRL's Human Resources advisor John Ryan, who met Mr Parikshit for the first time on the morning of 16 April after Ms Adams told him Mr Parikshit had arrived without a signed copy of his employment agreement. Mr Ryan then took Mr Parikshit to a private meeting room and spent some time talking to him about the letter of offer and employment agreement. He then left Mr Parikshit for around 10 to 15 minutes to go through the documents by himself. Mr Parikshit signed the documents and handed them to Mr Ryan before the induction session began. Mr Ryan asked Mr Parikshit if he had any questions about the documents had just signed and he answered no.

[10] At the Authority investigation meeting Mr Parikshit and JRL's counsel had the opportunity to ask questions of the witnesses and to make closing submissions. As permitted by s174E of the Act this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on issues requiring resolution.

The circumstances – what happened?

[11] This was not a matter where the effectiveness of the trial period turned on whether the employee had already begun work when she or he signed the agreement. I have taken as a matter of fact that Mr Parikshit employment began from the beginning of the induction session – because the position description attached to the agreement he signed referred to "*commencement*" from the 16 April induction – and

he was later paid for the hours spent on the three day induction and training programme that began then. Because Mr Parikshit turned up around half an hour early, the event of his looking at and signing the agreement occurred before that induction session began, albeit by a matter of minutes.

[12] Resolution of the jurisdictional issue in Mr Parikshit's case required consideration of two evidential or factual questions. Firstly, did the second email, sent to him by Ms O'Donnell on Friday 12 April at 4.05pm, include attachments comprising a scanned PDF copy of a letter of offer and the intended employment agreement, and, if so, had he or could he have seen the email and attachments before he arrived for the 16 April induction session? Secondly, how had JRL human resources personnel dealt with the circumstances of Mr Parikshit turning up without a signed copy of the agreement and, particularly, how did he then come to sign the agreement before the induction session began?

The 12 April email

[13] Ms O'Donnell made the arrangements for this email to be sent to Mr Parikshit. It had the subject heading "*Offer of employment from JR Duty Free*" and included this paragraph (with emphasis added):

> *Please read through all documents clearly and when you are happy with them, please indicate that you are accepting the offer* ***by replying to this email****.* ***On your induction please bring a signed copy of each document*** *to John Ryan at JR/Duty Free Support Office. Please bring with you, your IRD number, bank account details, Passport and drivers licence.*

[14] On the copy of that email that Ms O'Donnell submitted with her affidavit those documents were shown as attachments in pdf format and were listed as a letter of offer, an employment agreement and a schedule (which comprised a position description, the hours of work and remuneration). A screen shot of sent items from an archive folder of Ms O'Donnell's emails listed the 16 April email to Mr Parikshit. That item on the list included a paperclip symbol. The symbol indicated attachments were sent with the email.

[15] Ms O'Donnell said she had prepared the documents for the offer of employment to Mr Parikshit after receiving a form containing the necessary specific details for him from Ms Gonsier earlier in the afternoon of 16 April. The documents

Ms O'Donnell drafted were then sent to a JRL human resources manager for approval before being sent by email at 4.05pm.

[16] Asked in the Authority investigation about the short time frame between the Friday and Mr Parikshit's Tuesday induction date, Ms O'Donnell agreed it was unusual as, in her experience of preparing employment documents for candidates, JRL tried to give "*as much time as possible*".

[17] The letter of offer, which Ms O'Donnell was sure was attached to the email, stated that, to accept the offer, Mr Parikshit should sign the employment agreement, initial the schedule and "*return all the above stated documents to get to me no later than 4pm 15 April 2013*". The 'me' referred to was the signatory to that letter, Mr Ryan.

[18] Ms O'Donnell's email and Mr Ryan's letter required different acts to indicate acceptance of the offer – by either replying to the email or by returning the signed documents by the stated date. Ms O'Donnell said both her email and the letter of offer were in the standard wording used for candidates. Mr Ryan described the difference in what the candidate was asked to do as "*an administrative error*". In any case, Mr Parikshit neither replied to Ms O'Donnell's email nor provided Mr Ryan with the signed documents on 15 April. Neither Ms O'Donnell nor Mr Ryan had made any check in regard to that apparent failure of response before Mr Parikshit turned up early for the induction session on 16 April.

[19] In his evidence to the Authority investigation Mr Parikshit denied receiving the 12 April email.

[20] As a matter of probability – of what was more likely than not – I have concluded the email was sent as Ms O'Donnell said in her evidence. However I was not satisfied that it could be established – to the same evidential standard – that Mr Parikshit had, in fact, received the email and its attachments.

[21] There was no doubt he had the technical capability to receive and read such an email. He had received and responded to one from Ms Gonsier the day before. He said he had two iPads and two laptop computers in his family home, his wife was a software engineer, and they had a printer that would have enabled him to print out attached documents if he needed to.

[22] One possibility Mr Parikshit said was mentioned by JRL personnel on 16 April was that Ms O'Donnell's 12 April email, with attachments, could have been caught in a 'spam' filter as Mr Parikshit said he had checked his emails, on his iPad, before he went to JRL's premises on 16 April "*and there was nothing*". The 'spam' query was raised by Mr Parikshit only in his oral evidence at the Authority investigation. There was no computer forensic evidence to support or discount it.

[23] However – considered in the circumstances at the time that Mr Parikshit was offered the job – there was no incentive for him not to have responded to the 12 April email or to say he had not received the attached documents. He was very keen to take up the job. Mr Ryan recalled, from his impression of meeting Mr Parikshit on 16 April, that Mr Parikshit was "*very enthusiastic and positive*" about starting work at JRL.

[24] Mr Parikshit had promptly replied to the email he received from Ms Gonsier on 11 April that had confirmed the details of the induction day and had stated this would include "*completing paperwork*". His one-line response (sent around an hour after getting Ms Gonsier's message) was: "*No problem as spoken will be there for my induction and training.*" If he had seen Ms O'Donnell's email of 12 April it was unlikely he would not have replied in a similar vein. The short time that he took to look at and then sign the employment agreement on 16 April was consistent with that apparent willingness and responsiveness.

[25] I was not dissuaded from that view by two elements of doubt raised in the evidence of JRL witnesses and its closing submissions. Firstly, Ms Gonsier's email of 11 April included a sentence (in a page-and-a-half description of the induction programme) that stated he should bring his "*signed employment contract (if you haven't returned it)*" but Mr Parikshit made no inquiry before 16 April – if he truly had not seen Ms O'Donnell's email and attachments – about why that contract or agreement had not been sent to him. Secondly, Mr Parikshit had his passport, driver's license, IRD number and bank account details with him on 16 April. Those items had been referred to in Ms O'Donnell's 12 April email as necessary to bring with him on 16 April. The suggested inference was that, having those items with him, Mr Parikshit must have read the email containing the direction to bring them.

[26] In respect of the first doubt, it was just as likely that Mr Parikshit simply gave no thought to the employment documents and expected such 'paperwork' would be sorted out at the induction. On the second doubt, Ms Gonsier's email of 11 April had also referred to bringing his passport and driver's licence and Mr Parikshit said he could remember his IRD number off by heart and happened to have a copy of something with his bank account number on it in his car on the day. None of those four items was particularly remarkable or unusual for Mr Parikshit to have on him in any event. As a matter of likelihood, it did not support the inference that he must have known to bring them from having read the 12 April email.

[27] Another possibility – which, on the available evidence, could not be given a stronger description as more likely than not – was that Mr Parikshit did see the 12 April email and either did not understand what was required of him or had simply just not bothered to do what it asked of him. As a result he turned up on the morning of 16 April and made up an excuse about not having got the 12 April email and its attached documents to cover for the mistake or omission he had made. While I did not discount that possibility, the outcome of this determination (for the reasons stated later in it) would not have been different if that was what Mr Parikshit had in fact done.

16 April

[28] Mr Ryan's evidence – in paraphrased form – was that he doubted Mr Parikshit had not known about the letter of offer and employment agreement when he turned up the induction session but, because Mr Ryan knew it was important to have a signed employment agreement before the induction session began, Mr Ryan took what he considered was suitable remedial action as Mr Parikshit had turned up early and there was time to do so. Mr Ryan got copies of the documents printed out and spent some time with Mr Parikshit in a private meeting room explaining the offer letter, the employment agreement and the details in its schedules. He also told Mr Parikshit there was no pressure to sign the employment agreement and Mr Parikshit could take the time he needed to read and understand the information. Mr Parikshit came out of the meeting room 10 to 15 minutes later and told Mr Ryan he had signed the documents. In response to a question then asked by Mr Ryan, Mr Parikshit said he had no questions about them.

[29] In answer to a question during the Authority investigation Mr Ryan confirmed that he had not told Mr Parikshit that he could get independent advice before signing the documents. However Mr Ryan said that entitlement was referred to in the letter of offer that Mr Ryan had told Mr Parikshit to read. Mr Ryan said if Mr Parikshit had wanted to get advice, his induction session would have been rescheduled to another date. Mr Ryan recalled that he had once done that, on another occasion, for a prospective employee who had asked. Ms Adams' evidence confirmed that, if such a request had been made, Mr Parikshit's induction would likely have taken place the following week as such sessions were usually scheduled each week.

[30] After Mr Ryan left him alone Mr Parikshit said he then left the room himself and asked to speak with Ms Gonsier. He said she came into the meeting room and, when he asked what was important in the documents, she had told him that they were the same as she had discussed earlier with him, that he only needed to check the pay rate and she confirmed he would also receive commission. Ms Gonsier agreed she had talked "*briefly*" in the room with Mr Parikshit but did not remember saying what he claimed she had said. However she was sure she had not told him to sign the agreement that day, as that was not something she would do. It was clear from her evidence that she had not told him of the opportunity to get independent advice about the employment agreement, either then or earlier when she had contacted him with the verbal offer. She described that as something for the "*HR side*" to do rather than part of her recruitment role.

Conclusion: no reasonable opportunity, no valid trial period

[31] In either of the two scenarios revealed by those circumstances JRL failed to provide Mr Parikshit with the reasonable opportunity required by 63A(2)(c) of the Act to seek independent advice about its intended employment agreement with him.

[32] If the scenario suggested by Mr Parikshit's account was correct (about not seeing the 12 April email and its attachments), he arrived at his future employer's premises on 16 April and had half-an-hour to consider and accept the employment agreement. Although under no overt pressure – with no suggestion that Mr Ryan in any way 'stood over' him to sign the agreement – Mr Parikshit was nevertheless

subject to the more subtle influence of not wanting to get off on the wrong foot with JRL personnel before his first day at work had properly begun. He had failed to turn up with documents he was told he was expected to have brought with him and he was aware that the induction session he was supposed to attend was due to start soon. It was no answer to that situation for Mr Ryan to say Mr Parikshit could have asked for more time and would have been given it, even accepting (as I have) that Mr Ryan was entirely sincere in what he said about what he would have done if asked. The statute does not put the onus on the worker to ask for the opportunity. It places that obligation on the employer to provide it as a matter of course and without request. Even if Mr Parikshit had known he could have asked for his induction to be delayed until the following week, and had wanted that opportunity, he faced a financial consequence which was that his paid employment would then start later. Realistically he was not going to make such a request.

[33] The Court's analysis in *Blackmore* carefully set a flexible gauge for assessing how long was reasonably required for the opportunity to get independent advice. However the 30 minutes or so available to Mr Parikshit on 16 April – in the circumstances of the induction session being about to start and with Mr Parikshit knowing he was not able to attend it without having signed an employment agreement – was (in a practical sense) no different from openly insisting on immediate execution, which the Court held an employer was not entitled at law to insist upon.[4]

[34] The other scenario – based on disbelieving Mr Parikshit's denial about seeing the 12 April email and, instead, accepting the account of JRL witnesses that he probably had – nevertheless led to the same conclusion about a failure to provide the reasonable opportunity to seek independent advice.

[35] That conclusion relied on the Court's analysis in *Blackmore* that an employer would "*probably*" not fulfil its statutory obligations if the signed return of an employment agreement was required "*within less than a few days or even more*" after its presentation to a potential employee. Again, the Court carefully set a flexible gauge for that assessment based on the specific circumstances and referred to some factors relevant to the facts of the *Blackmore* case.

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[4] At [64].

[36] The particular circumstances in Mr Parikshit's case were that he was sent the email at 4.05pm on a Friday. Even if it were the case that he had in fact received the email (contrary to his denial) and had even read its contents immediately, there was little prospect that he could have then sought and got independent, professional advice about the intended agreement before Monday, 15 April. Ignoring the statement in the letter of offer that the agreement should have been returned by 4pm on 15 April and, instead, taking the notion in Ms O'Donnell's covering email that he could bring a signed copy to the induction (starting at 9.30am on 16 April), Mr Parikshit would have had only that single working day on the Monday to seek and get advice, consider it and (possibly) request any variations he might want as a result.

[37] In oral evidence Mr Ryan said he considered the two days of the weekend and the Monday ample time for the purpose. I have not agreed with that proposition because I considered it was contrary to the Court's conclusion that "*a few days or even more, depending on the circumstances*" was required. The circumstances, in this case, include JRL having a sophisticated recruitment and human resources capacity, with specialist personnel and carefully developed procedures, able to send intended employment agreements to potential employees much earlier than was provided to Mr Parikshit. It was also able to have identified the potential problem with Mr Parikshit earlier, if it had followed the steps referred to in the correspondence it prepared to send to him. Ms O'Donnell had not checked why no reply was received to her email. Mr Ryan was not been alerted to a failure to provide by Mr Parikshit to provide an agreement by 4pm, 15 April as required in the letter of offer that bore Mr Ryan's signature.

[38] This reality of JRL's capacity to do better was confirmed by Mr Ryan's evidence that JRL had, since Mr Parikshit raised his claim, improved the steps it took to get intended agreements to potential employees and have them returned before induction sessions.

[39] JRL submitted the Court's analysis in *Blackmore* was *obiter dictum* – that is observations by the judge ranging beyond the legal principles strictly necessary to decide the outcome on the particular facts of that case. It suggested the Court in *Blackmore* had already decided the trial period was not valid for other reasons before opining generally on the operation of the statute (including the passage from that

judgment set out earlier in this determination). JRL submitted those observations by the Court set the benchmark or threshold of 'reasonable opportunity' too high and, as *obiter*, were not binding on the Authority in its determination on the circumstances of Mr Parikshit's case.

[40] I have not agreed with that proposition but even if, on a narrow reading of its *Blackmore* decision, the Court's analysis of the practical requirements of the operation of the statute was *obiter*, it nevertheless must be highly influential when the Authority considers similar issues. Parliament – post *Stokes* and post *Blackmore* – has twice had the opportunity, when making other amendments to the Act, to adjust the wording of s67A and s67B if the Court's consistent analysis of the trail period provisions was overly prescriptive or otherwise inconsistent with parliamentary intention, but the legislature had not elected to do so.

[41] Even without the Court's guidance that "*a few days*" was probably not sufficient, I would have concluded – in the particular circumstances of JRL's dealings with Mr Parikshit – that one working day was not a reasonable opportunity to seek, get and consider independent advice about an intended employment agreement.

[42] Accordingly, in respect of both scenarios considered above, I concluded JRL failed to comply with the statutory requirements for entering an employment agreement with Mr Parikshit. Consequently JRL could not rely on the trial provisions in that agreement that would have otherwise disentitled Mr Parikshit from bringing a personal grievance for his dismissal.

Next step: direction to mediation

[43] On the basis of that conclusion the Authority may now proceed to investigate Mr Parikshit's dismissal grievance as well as his disadvantage grievances, if he wishes to pursue them. However no implication should be taken from this determination as to the merits or otherwise of his grievance claims or their eventual prospects for success. Rather, the conclusion concerns only facts and legal principles that applied to the start of the employment relationship and the arrangements for it, not what happened during it or at its end.

[44] The situation now however is different from when the parties first attended mediation. As a result the parties are directed to further mediation to consider whether they might now resolve the issues between them in light of the Authority's determination as to whether the trial period provisions could be relied upon for the dismissal. If mediation does not resolve the matter, and Mr Parikshit wishes the Authority to then proceed with an investigation, he should promptly advise the Authority.

Costs

[45] It was not apparent whether Mr Parikshit had incurred any legal costs in dealing with the preliminary jurisdictional issue but, to allow for the event that he may have, costs are reserved.

Robin Arthur
Member of the Employment Relations Authority