

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2019] NZERA 311
3054175**

BETWEEN CINNAMON ROBINSON
Applicant

AND A.B.C. PHOTOSIGNS NZ
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Moss , Advocate for the Applicant
Bill Matheson, Representing the Respondent

Investigation Meeting: On the Papers

Determination: 27 May 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Cinnamon Robinson, claims that she was unjustifiably dismissed from her employment with the Respondent, A.B.C.Photosigns Limited (ABCP).

[2] ABCP denies that Ms Robinson was unjustifiably dismissed and claims that she was justifiably dismissed in accordance with a valid trial period provision.

The issues

[3] This determination addresses as a preliminary issue whether or not Ms Robinson was employed in accordance with a valid trial period provision pursuant to s 67A of the Employment Relations Act 2000.

Note

[4] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Background

[5] ABCP is a family owned print company based in Auckland.

[6] Ms Robinson applied for a position as Receptionist/Customer Service in September 2018 and was interviewed by Mr Don Matheson, Managing Director, on 20 September 2018.

[7] Following reference checks, Ms Robinson was invited to attend for a work trial on 21 September 2018. Terms and conditions of employment in relation to the role of Receptionist/Customer Service were discussed during a meeting with Mr Don Matheson, Director and Shareholder, and Mr Matheson indicated to Ms Robinson that he would be sending her an employment agreement.

[8] Following the meeting Ms Robinson and Mr Matheson exchanged a number of text messages over the period 21 to 24 September 2018.

[9] Ms Robinson commenced work on Tuesday 25 September 2018. She was presented with a written employment agreement (the Employment Agreement) on 27 September 2018 and after reading it she sent a text message to Mr Matheson stating:

For yr records only
Start date =
Tues 25/9
(not 24)

Maybe change acceptance date 27/9
Return to you tomoro 28/9
I will amend my copy al gd. Thanks
C

[10] Ms Robinson and Mr Don Matheson met on 1 October 2018 at which date Ms Robinson signed and dated an offer letter which stated:

I am pleased to offer you the position of Receptionist/Customer Service at ABC Photosigns (NZ) Ltd based at starting on 24/09/2018. Attached is an employment agreement setting out the proposed terms and conditions.

...

[11] The Employment Agreement also stated the start as 24 September 2019. It included a trial period stating: "The first 90 days will be a trial period, starting from the first day of work." and setting out the conditions applying during the trial period.

[12] On 4 October 2019 Ms Robinson received an email from Mr Matheson which advised her that her employment was being terminated in accordance with the 90 day trial period provision.

Was Ms Robinson employed in accordance with a valid trial period provision?

[13] The Act makes provision for trial periods at ss. 67A and 67B. The Act states:

S 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 previously been employed by an employer

S 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 person grievance in respect of the dismissal.

[14] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[15] Subsection (3) of s 67A of the Act defines an employee, for the purposes of s 67A(1) as an employee who has not been previously employed by the employer.

[16] The central issue in this case is whether or not Ms Robinson was already an employee before she signed the Offer Letter attached to the Employment Agreement with ABCP on 1 October 2018.

[17] There is no dispute that Ms Robinson commenced employment at ABCP on 25 September 2018.

[18] ABCP submits that Ms Robinson had agreed to the 90 day trial period prior to 25 September 2018 and the parties signed the Employment Agreement at a later day and time convenient to each party. In other words that it was the intention of the parties that there would be a trial period prior to the employment commencing subsequently.

[19] In *Smith v Stokes Valley Pharmacy* Chief Judge Colgan commented that:

“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”¹

[20] In *Blackmore v Honick Properties Ltd*² the Employment Court stated in respect to trial periods:³

[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.

[21] I find that at the time Ms Robinson signed the offer letter to which the written Employment Agreement was attached on 1 October 2018, she was already an employee of ABCP because her employment had already commenced on 25 September 2018.

[22] I determine that Ms Robinson was not employed in accordance with a valid trial period provision pursuant to s 67A of the Employment Relations Act 2000.

Next Steps

[23] The Authority will contact the parties shortly to arrange a case management call to progress the application.

Costs

[24] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority

¹ [2010] NZEMPC 111at [48]

² [2011] NZEmpC 152

³ *ibid* at paras [69] & [70]