

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Nadine Sprung (Applicant)  
**AND** Khan Marjan Limited (Respondent)  
**REPRESENTATIVES** Greg Peplow, Advocate for Applicant  
Sardar Taher, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 31 October 2001  
**DATE OF DETERMINATION** 14 November 2001

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

Nadine Sprung says that she was unjustifiably dismissed by her former employer, Khan Marjan Limited.

The parties disagree over whether Ms Sprung was employed for a trial period which, the employer says, she did not complete satisfactorily despite warnings, or whether there was no such trial period and no warnings.

A penalty has also been sought in respect of the company's failure to comply with s 64(2) of the Employment Relations Act 2000 by failing to:

- (a) provide Ms Sprung with a copy of the intended employment agreement with the contents required by s 65(2);
- (b) advise Ms Sprung that she was entitled to seek independent advice about the intended agreement; and
- (c) give her a reasonable opportunity to seek that advice.

**Background**

In early 2001 Sardar Taher, a director of Khan Marjan Limited, was preparing to open a restaurant to be named Khan Marjan Restaurant. As part of this process he was recruiting staff, and one of the positions he advertised was that of restaurant manager. Ms Sprung replied to the advertisement.

Mr Taher was impressed enough after his first interview with Ms Sprung to arrange a second interview. However he was familiar with the requirements of restaurant management as he already operated a restaurant in Tauranga, and it appeared to him from Ms Sprung's CV that she was light on practical professional experience as a restaurant manager. From the CV as well as references Ms

Sprung provided to me that was plainly the case, although Ms Sprung's references were very good and she had a current manager's certificate under the Sale of Liquour Regulations 1990. However as a result of the relative lack of practical management experience in Ms Sprung's background, Mr Taher decided to offer her the position subject to a two week trial period.

I do not accept Ms Sprung's evidence that the arrangement was merely a review period. She has misunderstood the purpose of the trial period as Mr Taher explained it to her. It is true that there was to be an element of review involved in the sense that Ms Sprung's rate of pay and hours of work might be reconsidered at the end of the trial period, and this was at least partly because, at the time of the interviews, the restaurant had not opened. For that reason it would be necessary in any event to review matters once the restaurant had opened.

However it was Ms Sprung's evidence that the arrangement did not go beyond this, and in particular that it did not include the possibility that her own performance would be subject to an initial two week trial. I consider this unlikely, principally because Mr Taher had identified the weakness in Ms Sprung's CV and he impressed me as a person who attempted to run a tight but professional ship. Secondly the other waiting staff employed shortly after Ms Sprung were all engaged on two week trial periods and I consider it unlikely that, in the circumstances, Mr Taher would have distinguished between Ms Sprung and those staff members when it came to imposing a trial period.

Ms Sprung's commencement date depended on when the restaurant obtained its liquor licence. It was expected that would happen on Tuesday 27 March 2001, but the licence was eventually made available on Wednesday 28 March. That evening was Ms Sprung's first shift as manager.

It was common ground that Mr Taher and Ms Sprung sat down together at the end of most of Ms Sprung's shifts to discuss that evening's work. These discussions could last for as long as an hour, and would include discussions about what had gone wrong and how Ms Sprung could make improvements. It was Mr Taher's view that he should not have to have so many discussions with a manager, and it was a reflection of Ms Sprung's inexperience that he had to spend so much time doing so.

During the discussions Mr Taher covered particular problems such as a failure to ensure the waiting staff were organised so that the kitchen staff was not inundated with orders from several tables at once. He considered that Ms Sprung was not controlling the dining area very well in terms of her customer relations and deployment of staff. He believed it helped the restaurant to appear fuller than it was, and therefore more appealing, if diners were seated at window tables, but Ms Sprung would seat diners at the back when the restaurant was empty, emphasising the emptiness. He also raised a concern about cutlery not always being on the table when a diner was seated, and unnecessarily long waits before a menu was provided to customers.

Mr Taher expanded on these concerns at the investigation meeting by referring to incidents involving unsatisfactory service to customers. On one occasion Ms Sprung had taken only three orders from a table of four. Although that was rectified, the fourth meal still came late and a diner complained about the service. Mr Taher gave free meals to the whole table to compensate. On another occasion a member of a party of 13 expressed dissatisfaction with her experience at the restaurant.

There was also an incident in which a function for 16 – 20 people had been organised, and a set menu arranged in advance. During the evening Mr Taher noticed Ms Sprung standing at the bar, angry. When he asked what was wrong she replied that some people in the group did not want the set menu, and wanted to order from the a la carte menu instead. Mr Taher's attitude was that

customers should be given what they want and any problems could be sorted out in the kitchen. His principal concern was with retaining business, even if he made a loss on that function.

Ms Sprung denied that she was the person who was angry, and said the problem had come from one of the waitresses in attendance at the table. While that may have been where the problem was initiated, she has missed the point that, as manager, it was for her to deal with the problem. She also acknowledged she had problems with Mr Taher apparently changing his mind in respect of restaurant procedures, and Mr Taher gave evidence that she raised the a la carte incident with him at the time as an example of his apparent inconsistency. I regard the incident as an example of the effect of Ms Sprung's inexperience.

Although he viewed the content of at least some of the after-work discussions as amounting to a warning, Mr Taher also characterised the warnings as 'soft'. Ms Sprung's view of the content of the discussions was that Mr Taher would explain to her what he thought could be done better, although she did not understand her employment to be under threat. According to Mr Taher, as the mistakes continued, his warnings became 'stronger'. He told Ms Sprung that she would not have a job at the end of her trial period if she did not fix the problems.

The incident that led to Mr Taher's concluding that he was not prepared to continue employing Ms Sprung occurred during the evening shift on Saturday 7 April 2001. It was common ground that the night was a busy one, but Mr Taher perceived that the waitresses were disorganised and the lack of any method in their taking of orders was causing problems in the kitchen. At the end of the evening one diner said to Mr Taher that he would lose business if Ms Sprung continued as manager. This was not the first time a customer had threatened a loss of business and as Mr Taher took the prospect of losing business most seriously he was very concerned by the remark. He said in evidence that he told Ms Sprung during their discussion at the end of the shift that her employment might not continue.

On Sunday 8 April Ms Sprung reported for work on her shift. She denied that she did so with any knowledge that her employment may not be continued. Leaving aside whether she had been told of the possibility the night before, Ms Sprung agreed that she had approached Mr Taher about a week earlier to ask about whether the waitresses' trial periods would lead to permanent employment, and was told the decision would be made in another week. She said she was asking on behalf of the waitresses only and was not including herself. Mr Taher said she had included herself. The best I can make of that evidence is that, although in her mind Ms Sprung may have excluded herself from the group engaged under a trial period, she was not correct to do so. I accept the possibility she did not make it clear to Mr Taher that she was excluding herself from the scope of her enquiry, but he was entitled to assume that she was including herself. That was because he was in possession of the correct information to the effect that Ms Sprung was also engaged under a two week trial period.

In any event, by 8 April Ms Sprung was at least aware that her initial two week period of employment was about to expire and she expected to discuss her progress.

It was common ground that Mr Taher and Ms Sprung had a discussion about Ms Sprung's performance, and the incident of the evening before. Mr Taher said he 'tried to be soft' when he told Ms Sprung that he believed she had strengths in some areas but not in others, and that he would not be continuing with her employment. Ms Sprung believed that she was performing adequately, and that she had not done anything so major as to give grounds for dismissal.

Another major conflict in the evidence concerned Ms Sprung's denial of ever being expressly told her continuing employment was in jeopardy unless she improved, while Mr Taher gave evidence that on several occasions he had done exactly that. His evidence was contained in part in a written

statement, which was so well prepared that it appeared he had received professional help with it although he represented himself at the meeting. However the substance of his oral evidence came up to a similar level and Mr Taher appeared to be well-informed on employment procedures. The doubt I had about his evidence on the matter of warnings was that he mentioned several times that he attempted to be ‘soft’ with Ms Sprung. If that were so, then it was less likely that he had made clear to Ms Sprung that her continuing employment was in jeopardy. However he identified that later the warnings became ‘strong’, and that he told Ms Sprung expressly that if she carried on as she was then she would not have a job.

In contrast Ms Sprung was adamant that she had no warnings. However she was equally adamant that she was not employed on a two week trial period and I have found that she misconstrued the arrangements on that point. There was also an element in her evidence of a failure to understand the importance of the concerns being put to her even when they were put clearly. Thus I conclude, on balance, that Ms Sprung did receive prior warning that the continuation of her employment beyond the trial period was at risk. The concerns about her performance were put to her in association with express warnings, but they were tempered with Mr Taher’s attempts to be encouraging and Ms Sprung did not appreciate why the concerns were important to Mr Taher. I consider it likely that was at the heart of why Ms Sprung believed her trial period was going well.

Finally, Ms Sprung said in her written statement that the reason given to her for the termination of her employment was that Mr Taher and his wife had decided to take over the management of the restaurant. However that statement was based on a reference which Mr Taher provided and which read as follows:

“To whom it may concern

Hereby we confirm that NADINE SPRUNG worked two (2) weeks trial as Manager for Khan Marjan Restaurant, 34 Anzac Street, Takapuna Central.

But we decided to handle the management of the restaurant ourselves.

If you have any enquiries feel free to contact me any time.”

The reference was not provided in response to a request for written reasons for the dismissal – it was provided in fulfilment of Mr Taher’s promise to Ms Sprung that a reference would be provided. Mr Taher explained to Ms Sprung on 8 April that he and his wife would take over the management of the restaurant, rather than employing someone else, but that was as a result of the decision not to continue with Ms Sprung’s employment rather than being the reason for the decision. The reference is, appropriately, silent on why Ms Sprung’s trial period did not continue and why Mr Taher and his wife decided to take over the management themselves.

Ms Sprung was fortunate enough to secure new employment commencing 24 April 2001.

### **Determination of the personal grievance**

The leading case on the obligations owed by an employer to an employee undergoing a trial period is a judgement of the Court of Appeal in **Nelson Air Limited v New Zealand Air Line Pilots Association (Inc)** [1994] 2 ERNZ 665. The Court said at p 669:

“The requirements of that obligation [to act fairly] will vary from case to case. Every probationer must be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer’s standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the object is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer,

judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.”

The evidence satisfies me that the employer has met the obligations set out in the above passage. However Ms Sprung’s employment terminated with summary effect, and her advocate submitted that she should have received a reasonable period of notice. The employer’s position was that she was effectively on notice at the outset by virtue of her trial period, and that the existence of warnings enabled the employer to terminate with effect from the end of the trial period.

The parties’ employment agreement had not been reduced to writing and the evidence indicates there was no oral agreement as to the period of notice of termination, either in respect of the trial period or any ongoing permanent employment. There is very little authority on the relationship between trial periods and periods of notice of termination of employment when an employment agreement is silent on the matter.

In **Power Beat International Limited v Frater** [1998] 2 ERNZ 518, however, Judge Colgan observed that the principles relating to notice requirements at the end of a trial period are the same as those applicable at any other time. I understand these principles as being that, if the conduct or other issue leading to a decision not to continue a person’s employment is sufficiently serious, then a summary termination may be justified. If summary termination is not justifiable then termination on notice may be justified where the matters of concern are less serious. If the required notice period is not specified in the agreement, then it falls to be implied. The question of whether summary termination or termination on notice is justified must be addressed with reference to what was open to a fair and reasonable employer.

The employer’s argument here has called into question whether the nature of the arrangement - being a trial period - together with the warnings, entitled the employer to terminate the employment relationship at the end of the trial period in a way that is analogous to the termination of a fixed term contract. In other words the termination is inevitably summary in effect and the question of notice of termination does not arise. An alternative view is that, if the usual principles relating to notice are applicable, then the circumstances are more closely analogous to those of a permanent employee being dismissed for poor performance following warnings.

I prefer the latter view, and therefore apply it to this case. It is clear from Mr Taher’s evidence that he did not turn his mind to the necessity (or not) of providing Ms Sprung with notice of termination beyond reminding her that her trial period was coming to an end. However the trial period itself did not constitute the notice period. As for whether summary dismissal was called for, while Mr Taher was concerned about the vulnerability of the new business and was entitled to enforce his standards of customer service, I am not persuaded that Ms Sprung’s failure to meet those standards amounted to such a fundamental failure as to warrant summary dismissal. She could not help her inexperience and that should be taken into account.

Accordingly I conclude that the dismissal was unjustified and Ms Sprung has a personal grievance.

However I do not accept the submission that a reasonable period of notice would, in the circumstances, have been one month. Ms Sprung was undergoing a trial period, and I consider one week’s notice to be a reasonable period.

## **Remedies**

I have concluded that Ms Sprung has a personal grievance on the narrow ground that she did not receive the notice to which she was entitled. Otherwise her employment would have terminated in any event, and the only loss she has suffered is the loss of the benefit of a notice period.

Ms Sprung's rate of pay was \$12.50 per hour. On a 40-hour week, she should have received \$500.00 (gross) as pay in lieu of notice. Khan Marjan Limited is ordered to pay her that amount.

The injury to Ms Sprung's feelings arising from the lack of notice, as distinct from the loss of her job itself, is likely to be minimal. I also take into account that Mr Taher made genuine offers to assist Mr Sprung to obtain alternative employment. Accordingly I assess the injury to her feelings at \$500.00, and Khan Marjan Limited is ordered to pay her that amount under s 123 (c)(i) of the Employment Relations Act.

### **Determination of application for a penalty**

There is no dispute that the company failed to comply with s 64 of the Act. Mr Taher's response was that he was unaware of the relevant obligations, but has now obtained advice from his lawyer, as well as a draft employment agreement which he intends to use offer to both present and future employees. I accept that the breach was not intentional, and that Mr Taher has taken steps both to better inform himself of his company's obligations as an employer and ensure that no such breach occurs in the future.

I consider it appropriate to acknowledge through the imposition of a penalty that s 64 is an important provision, and is there to protect the interests of both of the parties to an employment agreement. At the same time, while ignorance of the law is no excuse, small businesses face a vast array of legislative obligations and it is not appropriate to penalise them heavily for being unaware of the existence of a new one early in its life.

The company is therefore penalised in the sum of \$250.00. Pursuant to s 136(2) of the Act I order that this amount be paid to Ms Sprung, in recognition of the fact that the provision of a written agreement would have made it absolutely clear to her that she was engaged on a trial period.

### **Costs**

Ms Sprung's position on costs was as set out in the written submissions made on her behalf.

As the successful party Ms Sprung is entitled to a contribution to her costs, but I will defer determining an appropriate amount until I have heard from the employer on the matter. It shall have 14 days in which to file and serve such submissions as it wishes, before I make a determination. If I do not hear from the employer, I will make a determination after the expiry of that period without further reference to it.

**R A Monaghan**  
**Member, Employment Relations Authority**