IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 55
5608145

	BETWEEN	JOSEPH McSHERRY Applicant
	A N D	KUMARA HOTEL LIMITED trading as THEATRE ROYAL HOTEL KUMARA Respondent

Member of Authority:	Helen Doyle
Representatives:	David Carruthers, Counsel for Applicant Timothy McGinn, Counsel for Respondent
Investigation Meeting:	31 January 2017 at Christchurch
Submissions Received:	31 January 2017, from the Applicant 31 January and 8 February 2017, from the Respondent
Date of Determination:	13 April 2017

DETERMINATION OF THE AUTHORITY

A Joseph McSherry was unjustifiably disadvantaged and unjustifiably dismissed in and from his employment with Kumara Hotel Limited trading as Theatre Royal Hotel Kumara. The following orders have been made taking contribution into account:

(i) Reimbursement of lost wages in the sum of $10,206.42 gross under s 123(1)(b) of the Employment Relations Act 2000.

(ii) Compensation for the loss of a benefit in the sum of $1785 under s 123 (1)(c)(i) of the Employment Relations Act 2000.

(iii) Compensation for humiliation, loss of dignity and injury to feelings in the sum of $11,900 without deduction.

B I have reserved the issue of costs and failing agreement have set a timetable for an exchange.

Employment relationship problem

[1] Joseph McSherry was employed by Kumara Hotel Limited trading as Theatre Royal (Kumara Hotel) from 14 October 2015 until his employment agreement was terminated with four weeks' notice from 10 December 2015. Mr McSherry's individual employment agreement (the employment agreement) with Kumara Hotel stated that his role was operations manager and that his salary was $60,000 with accommodation included.

[2] Mr McSherry says he was unjustifiably dismissed and the trial period in clause 7 of the employment agreement pursuant to s 67A and s 67B of the Employment Relations Act 2000 (the Act) cannot be relied on by Kumara Hotel.

[3] Mr McSherry says further that he was unjustifiably disadvantaged in his employment with Kumara Hotel. He says that he was not provided with a hotel apartment as agreed. He was only given one month's notice and not the six weeks' notice in his employment agreement. Mr McSherry says that from the time he commenced at the Kumara Hotel his position was unilaterally changed to hotel and kitchen manager, a lesser role, and this disadvantaged him.

[4] Mr McSherry in his statement of problem sought reimbursement of lost wages quantified at the time of the investigation meeting in the sum of $15,000, compensation for the failure to provide the self-contained apartment in a sum later quantified as $20,000 in final submissions and compensation in the sum of $30,000 later claimed as $25,000 for both unjustified disadvantage and dismissal claims together with costs.

[5] There were two claims that were made for the first time in the statement of evidence. The first was a claim for payment for an additional two weeks' notice and the second, although only referred to in Mr McSherry's statement of evidence and not

referred to in Mr Carruthers final submissions, is a claim for reimbursement of the costs in shifting to New Zealand of $5000. The first claim may have some significance in terms of the 90 day trial period and/or may be weighed if the Authority gets to the point of considering an award of reimbursement of lost wages. The second claim was not in the statement of problem which raises fundamental fairness issues to Kumara Hotel. Importantly there was no information provided to the Authority to support any loss. There may have been an airfare expense, but Mr McSherry was flying to New Zealand shortly before he commenced employment to celebrate a significant birthday. I am not prepared to consider a claim for the cost of shifting to New Zealand for these reasons.

[6] Kumara Hotel is a duly incorporated company having its registered office at Christchurch and carrying on the business as a Hotel with accommodation and restaurant. Kumara Hotel says that Mr McSherry was not dismissed and agreed to a variation of his role to head chef during the trial period and he was to continue in that role. It says Mr McSherry then elected to resign at the end of the trial period. Alternatively, Kumara Hotel says that if Mr McSherry is found to be dismissed, it was entitled to dismiss him in reliance on the trial period in the employment agreement.

[7] Kumara Hotel says Mr McSherry does not have an unjustified disadvantage claim and that it met the contractual commitment to provide accommodation to him but he elected to move to alternative accommodation in Greymouth. It says that any notice period was agreed to if it is found it is not consistent with the employment agreement provisions or there was an affirmation of the breach. It says that he agreed to a new role.

The issues

[8] The Authority needs to consider the following issues:

(a) How did the relationship end?

(b) If Mr McSherry was dismissed then was Kumara Hotel able to rely on the 90 day trial period in the employment agreement?

(c) If not then was the dismissal justified?

(d) Was the notice given in accordance with the employment agreement or otherwise agreed between the parties?

(e) Was there was a breach of the employment agreement to provide a hotel apartment?

(f) Was there a unilateral change to the position Mr McSherry was employed to undertake?

(g) If the dismissal was unjustified and/or actions are unjustified and caused disadvantage then what remedies should be awarded and are there issue of contribution and mitigation?

How did the relationship end?

[9] Mr McGinn was instructed after the matter had been set down for an investigation meeting. He lodged an amended statement in reply including that the relationship did not end by dismissal and that Mr McSherry agreed to a new role from which he resigned. There is a threshold issue therefore as to whether Mr McSherry was dismissed.

[10] The evidence on behalf of Kumara Hotel was that while Mr McSherry was introduced to staff as the new operations manager he never actually commenced in that role and only ever worked in a kitchen management/ head chef role. The role of operations manager required a restructure of the roles of head chef and resident hotel custodian. I am satisfied that staff in those two positions expected some change to their roles when Mr McSherry commenced his employment.

[11] Averil Lark was the general manager of the Kumara Hotel when Mr McSherry commenced employment on 14 October 2015 and she had interactions with him at the time of an interim offer of employment when he was still in Australia and again at the time he signed the written employment agreement.

[12] The day after Mr McSherry started his employment, the head chief resigned giving two weeks' notice. Ms Lark said that Mr McSherry thereafter agreed to assume the head chef role which had an impact on his capacity to undertake the operations manager role and meant that he did not in fact undertake the role of operation manager at all before the relationship ended. Mr McSherry denied that he

ever accepted or wanted the role of head chef. He agreed that his responsibilities changed to accommodate the absence of a head chef, but said it was agreed the role did not need to be replaced and the work could be undertaken by two Chef de Parties. He said that he was undertaking some of the duties of an operations manager.

[13] Ms Lark provided reports and emails which recorded relevant matters to determining aspects of the relationship. Mr McSherry did not take serious issue with the content of the notes and I have, given the passage of time, placed reliance on them. In order to determine how the relationship ended it is helpful in the circumstances of this case to consider some events leading up to that time.

[14] From the written information referred to below I am satisfied that the situation involving the departure of the head chef and the inability to progress the proposed management restructure was seen as temporary in nature and subject to re-evaluation at the end of November 2015.

[15] A management restructure progress report dated 1 November 2015 prepared by Ms Lark for the director /owners of the Hotel stated that she had instructed Mr McSherry with the departure of the head chef to concentrate fully on the head chef role and kitchen management until the department is under control. To further complicate the situation, another manager had indicated an intention to resign and Ms Lark wrote that she had no alternative but to continue in her current role as overall operations and general manager. The situation, Ms Lark wrote, would be re-evaluated at the end of the month. It was also recorded that the employee in the resident custodian role would be left in that role for the present time. That impacted on the ability of Mr McSherry to live in the hotel apartment as the resident custodian continued to stay there. The hotel apartment had not been available when Mr McSherry started in his role on 14 October 2015 but he was told that it would be available on 14 November 2015 and he was able to stay in the meantime in the staff house across the road.

[16] There was a meeting on 4 November between Mr McSherry and Ms Lark. A memorandum dated 5 November 2015 was provided to staff following the discussions held with Mr McSherry and the other staff about the management restructure. Materially the memorandum provided that the proposed management restructure with the appointment of Mr McSherry as operations manager had not been able to progress because of the departure of the head chef. It recorded that Mr McSherry had taken

over the kitchen management and head chef role and that there had been a decision not to employ a Sous chef but the two Chef de Parties would report to Mr McSherry. Ms Lark was to carry on with managing the overall operations of the hotel as general manager with all staff reporting to her. The memorandum provided that the situation would be re-evaluated at the end of the month.

[17] Mr McSherry enquired again on or after 14 November 2015 about the hotel apartment. There was then a further meeting on 18 November between Ms Lark and Mr McSherry. The discussion that occurred at that meeting was summarised by Ms Lark in an email to Mr McSherry dated 19 November 2015. I shall set out the relevant contents of the email because it captures what was happening with the relationship and the parties views about it.

[18] The email states that the main role [for Mr McSherry] changed from *proposed position as Operations Manager to Kitchen Management and Head Chef role* when the head chef departed. There was a record of discussions about day to day operational matters and performance concerns requiring improvement. The performance concerns included the manner in which Mr McSherry addressed staff and language concerns. The email recorded that Ms Lark did not have the confidence to proceed with the management restructure and that the first month of Mr McSherry's employment had not given her faith in his suitability as an operations manager. She wrote that defaulting to acting head chef, which she described as a role Mr McSherry had enthusiastically offered to take over, had changed his job description significantly. She wanted to see considerable performance in the next month to determine the future of his employment. Meanwhile Ms Lark wrote she would continue to pay the salary offered in the employment agreement and provide free accommodation in the staff house. On its face, the email supported Mr McSherry had been deemed unsuitable for the operations manager role on the basis of his performance in another role and in particular his interactions with staff in that role. That had a consequence that he would not be able to live in the hotel apartment as the hotel accommodation went hand in hand with the operations manager role.

[19] Mr McSherry for his part is recorded in the email as having said he would not have returned from Australia if the hotel apartment had not been included in the package and that he was not happy to continue in the staff house. He is recorded as saying about the head chef role that if that had been the position offered he would not

have returned from Australia and he did so with the sole intention of being the operations manager to live in the hotel apartment. Ms Lark is recorded as saying that as she recalled he was keen to be considered for the head chef role and that was why they had kept in touch. Ms Lark, the email reflects, pointed out that Mr McSherry was still on trial and that the 90 day trial period is put in place to determine the suitability of the employee for the position that they have been employed to perform. The email concluded with advice that Ms Lark would continue to re-evaluate the situation on a regular basis. It appeared any re-evaluation was to be on Mr McSherry's performance in the changed role.

[20] There was a further meeting on 10 December between Ms Lark and Mr McSherry summarised in an email from Ms Lark to Mr McSherry on the same date. This is the meeting in which Mr McSherry says his employment was terminated. Under the operations manager position the email provides that for reasons discussed at the meeting and previously *Under the 90 day Trial clause the contract will be terminated at its expiration date. (which is officially 11th January*). Under the heading head chef role it provides that Mr McSherry had expressed his interest in continuing to be employed as he is currently, in the kitchen management role throughout the summer months with a review of the situation at the end of the season. The email ends with W*e concluded the meeting with no decision made to change your current employment situation or to terminate your employment.*

[21] Mr McSherry accepted that he had given the impression that he was comfortable to stay initially to Ms Lark but said that on reflection he did not want to stay after what he said were serious breaches and he instructed Mr Carruthers.

[22] Mr Carruthers by letter dated 16 December 2015 wrote to Ms Lark and amongst other matter raised a personal grievance claim that Mr McSherry's employment had been terminated under the 90 day trial period which was not considered, in the letter, to be an available option for Kumara Hotel. It suggested in the letter that the termination was in retaliation for Mr McSherry raising an issue about live in accommodation. Mr Carruthers wrote that Kumara Hotel had breached its obligations about the accommodation. The provision of which, Mr Carruthers noted, had not eventuated. Mr Carruthers set out an expectation that Mr McSherry's employment would continue and that he would be reimbursed for accommodation he

had had to pay for himself as Mr McSherry had shifted out of the staff accommodation in or about 18 November 2015.

[23] Ms Lark was on leave from the week before Christmas. She heard from another manager that Mr McSherry was leaving on 11 January 2016 and received a copy of Mr Carruthers letter of 16 December 2015.

[24] On 21 December 2015 Mr McSherry and Ms Lark spoke by telephone. Ms Lark recorded the discussion in an email of the same date which she sent to Mr McSherry.

[25] Ms Lark acknowledged in the email the letter from Mr Carruthers and expressed her disappointment that Mr McSherry had taken this approach. She noted that it was understood from the meeting on 10 December that Mr McSherry had clearly been given *notice of termination of contract as operations manager under the 90 day trial clause to 11 January 2016.* She wrote that although given the option of leaving sooner, Mr McSherry had expressed an interest in continuing as head chef for the summer months with the suggestion that there be a review of options at the end of the season. Ms Lark noted there was no definite decision made at that stage regarding a new contract as from 11 January but there was *indeed consideration* that you may continue your employment as head chef for the summer. Ms Lark pointed out in the email that it was clear that consideration to continue working through the summer is no longer an option. She referred to some performance concerns with respect to rudeness and bad behaviour and why Mr McSherry's suitability for the position of operations manager was questionable. She also referred to the matter of the accommodation having always been available for Mr McSherry but that he made a choice to leave for rented accommodation in Greymouth. Mr McSherry worked out the notice period until 11 January 2016.

[26] Mr McGinn submits in the context above that Mr McSherry resigned and the reference about termination of the contract for operations manager he says was taken out of context when read with the email of 10 December. That email includes, he submits, that no decision was made to change the current employment or terminate the employment situation.

[27] There was clear advice, I find, on 10 December 2015 that Mr McSherry's employment agreement as operations manager would terminate under the 90 day trial

period on 11 January 2016. It was agreed that Mr McSherry would work out his notice period and he was initially amenable at the 10 December 2015 meeting to staying on for the summer as head chef. The details of that were informal and contractually uncertain, which is supported by Ms Lark stating in her email of 21 December 2015 that there was no definite decision as to a contract after 11 January 2015. Ms Lark suggested, in answer to a question from Mr Carruthers, that the reference to termination under the trial period at the meeting on 10 December 2015 was simply administrative to deal with the position of operations manager.

[28] However, Ms Lark had told Mr McSherry earlier on 18 November 2015 that he was still on trial and that the 90 day trial is in place to determine suitability of the employee for the position they have been employed to perform. Ms Lark had an opportunity to clarify if there was, in fact, some mistake when Mr Carruthers raised a personal grievance on 16 December 2015. She confirmed again in her email of 21 December 2015 to Mr McSherry that there was clear notice of termination of the employment agreement for operations manager under the 90 day trial clause to 11 January 2016.

[29] I find that Mr McSherry was dismissed from his employment and in doing so Kumara Hotel relied on the 90 day trial period in the employment agreement. He did not resign. His employment ended at the end of the notice period.

Was there a valid trial period?

[30] Mr McGinn submits that if Kumara Hotel is not successful in its argument that Mr McSherry resigned from his employment then clause 7 of the employment agreement contains a valid trial period under s 67A of the Act and Mr McSherry is precluded from bringing a personal grievance related to his dismissal under s 67B of the Act.

[31] Clause 7 provides as follows:

> 7.1 The employee shall be employed on a trial basis for the first 90 calendar days of employment commencing on the employee's day of work to enable the employer to determine the employee's suitability for permanent employment.
>
> 7.2 Where the conduct or performance of the employee during the trial period is likely to affect continued employment, the employer shall advise employee specifying the area of dissatisfaction, the

> improvement required, and the period of time by which that improvement is to be achieved.
>
> 7.3 During the trial period the employer may terminate the employment for any reason (including giving notice or termination) and the employee will not be able to challenge a dismissal as a personal grievance or in any other legal proceeding.
>
> 7.4 Where the employment is terminated in accordance with this provision the employee shall receive a notice of termination as provided in Clause 12.1 of this Agreement. However, the employer shall retain the right to dismiss the employee without notice for serious misconduct.
>
> 7.5 Notwithstanding Clause 7.3 and 7.4, Clause 13.1 in this employment agreement and any applicable policies of the employer relating to training or disciplinary or performance management procedures will not apply during the Trial Period but the employer may, in its sole discretion, apply some other training or disciplinary or performance management process.

[32] Section 67A of the Act provides for a trial period of 90 days or less as defined in subsection (2) to be entered into by an employee and employer. Employee is defined in s 67A (3) of the Act as below:

> **(3) Employee** means an employee who has not been previously employed by the employer.

[33] Section 67B of the Act provides the effect of a trial period under section 67A if an employer terminates an employment agreement containing a trial provision under s 67A by giving notice of the termination before the end of the trial period. Subsection 67B (2) provides:

> (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.

[34] Mr Carruthers submits that the trial period is not valid or able to be relied on. He says Mr McSherry was not a new employee under s 67A (3) of the Act because he had previously been employed by Kumara Hotel albeit through a placement agency for a period of time in early 2015. Further or alternatively there was an offer and acceptance of employment with Kumara Hotel on 22 July 2015, so by the time the employment agreement was signed Mr McSherry was already an employee of

Kumara Hotel. He also says that there was unfair bargaining at the time the written employment agreement was entered into and the clause should be deleted.

Not a new employee?

[35] Mr McSherry was placed by The Recruitment Network Limited (RNL), a specialist hospitality temping agency, with Kumara Hotel in or about February 2015 where he worked as a chef for about 9 days. RNL paid his wages. Mr McSherry undertook other engagements whilst employed by RNL in other establishments.

[36] Mr Carruthers submits that Mr McSherry was employed indirectly by Kumara Hotel and was not, therefore, a new employee as defined in s 67A (3) of the Act. Mr McGinn submits that Mr McSherry is a new employee.

[37] The Employment Court in *Smith v Stokes Valley Pharmacy*[1] emphasised the intention of Parliament in the enactment of ss 67A and 67B, to take into account employment risk. It did not rule out in an obiter comment a possibility that the definition of "employee" could be given a wider construction.[2] Ms Smith in that matter had worked for over two years at a business sold to the employer. Her employment agreement was not signed, however, before she started work for the employer, so it was found she was an existing and not a new employee on that basis. Chief Judge Colgan in *Smith* stated by way of obiter that even ignoring that legal position, Ms Smith had been working for more than 2 and a half years in the actual business purchased by the defendant and could hardly have been described as a "new" employee except in the narrow and technical sense.[3]

[38] The importance of the legislative intention was further emphasised in the Employment Court judgment in *Blackmore v Honick Properties Ltd*[4] where it was stated that the emphasis for the legislation was that trial periods would allow employers to take on staff that they would not otherwise have engaged because of inexperience or past history or other disadvantageous circumstances to get a job and prove their worthiness.[5] There was a further statement that the provision is only permissible where *a "prospective employee" (to use the words of the extended*

[1] [2010] NZEmpC 111, [2010] ERNZ 253
[2] At [89]
[3] Above n 1 at [89]
[4] [2011] NZEmpC 152, [2011] ERNZ 445
[5] At [59]

definition of employee in s 63A(7) has neither worked previously for the employer nor, is an existing employee of the employer.[6]

[39] There has been consideration of tripartite employment relationships like Mr McSherry's placement by RNL with Kumara Hotel by the full Court of the Employment Court in *McDonald v Ontrack Infrastructure Limited.*[7] It was held in *Ontrack* that it is possible that a person could be employed by a person who was not originally his employer but the employer had a commercial relationship which included the exclusive provision of the employee's services to that third party.

[40] Mr McSherry only worked for a short period at Kumara Hotel when employed by RNL. Whilst the door to a finding that a person could be employed in such circumstances may not be closed, the circumstances of the placement by RNL in this matter does not, I find, prevent Kumara Hotel from having recourse to the advantages of ss 67A and 67B in the Act.

[41] The second argument advanced by Mr Carruthers is that Mr McSherry had become an employee of Kumara Hotel before he signed the employment agreement on 10 September. This was on the basis that Mr McSherry was offered and accepted employment from 22 July 2015 becoming a person intending to work.

[42] Ms Lark visited the Kumara Hotel when Mr McSherry worked there in February 2015 on assignment from RNL. Mr McSherry then returned to Perth and then moved to Broome where he had been working for the previous four years. Ms Lark contacted Mr McSherry and a series of emails was exchanged between them sounding out whether Mr McSherry would be interested in returning and working at Kumara Hotel. Emails started to get more serious in nature from 3 July 2015. On 7 July Ms Lark attached a draft position description for a hotel operations manager to an email to Mr McSherry and he responded and advised that it sounded like a very exciting opportunity and that he would be very interested. He wrote that he was assuming the role was full-time and not seasonal. On 12 July 2015 Ms Lark sent a lengthy email to Mr McSherry setting out detail of the other employees at Kumara Hotel and their positions, the accommodation available, the hours and start dates.

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[6] At [69]
[7] [2010] NZEmpC 132, [2010] ERNZ 223

[43] The email on 21 July 2015 contained what is expressed to be an interim offer of employment. In that email Ms Lark advises, amongst other things, there is a complicated restructuring process to go through to enable the management position to be effective. The issue around that was how the new operations management position would impact on the existing positions of head chef and resident custodian. Ms Lark advised that they were not able to act on anything until 20 August 2015 and not able to legally advertise the position until there had been meetings and consultations with the two employees in question. Mr McSherry understood from the email that his appointment could not be announced until then either. Ms Lark wrote *So in good faith, I am sending you an Interim Offer of Employment – which is a good handshake (attached).*

[44] The interim offer of employment attached was headed Theatre Royal Hotel Kumara and stated that *We wish to offer you the position of Operations Manager*. It set out that this is a full time permanent position and the salary of $60,000 per annum. The hours of work depending on business demand, were expressed to be between 40 and 50 hours weekly and accommodation was to be provided. Initially it stated this may be in the staff house until the hotel apartment became available. Mr McSherry was to report directly to the general manager, to be responsible for the overall operations of all departments within the hotel with all staff reporting to him, and a hands-on role with rostered chef shifts as required. It stated that an overview of how the position was perceived had been discussed with Mr McSherry and would be formalised by 20 August. The start date was still to be finalised, but there was currently a week of induction working with the general manager in site on September and taking up the position in October, not earlier than 12 October 2015. The notice of termination of employment was expressed to be six weeks.

[45] Mr McSherry responded to that offer and said in an email to Ms Lark also dated 21July 2015 amongst other matters that:

> I accept, everything is great and yes I understand about some of the employment difficulties they have to be overcome….
>
> I am very excited about this position and keep thinking of things that may help down the track, mainly marketing ideas…Thank you for this opportunity…
>
> I will now move forward and firstly look into my General Managers Licence, and plan flights and working out things this end, with the intention of being there as planned in September. If initially I have

> to stay in the staff house that is not a problem although I would like to move into the flat as soon as it is available.
> ---
> I look forward to being part of the Theatre Royal team.

[46] Ms Lark responded on 22 July and said amongst other matters; *great response*, and *thank you* and that she looked forward to having Mr McSherry as part of the team and to working with him and *welcome aboard*.

[47] Mr McGinn did not accept in his submission that the above constituted an offer and acceptance from 22 July 2015. He placed some reliance on the communication and offer being conditional by virtue of the reference to the restructuring process and not being able to act on anything until 20 August and some doubt about the outcome.

[48] I find when the communication is considered as a whole, the offer to Mr McSherry is not conditional. To the extent that uncertainty is expressed, it is about the restructure process and its impact and implications on other staff and not Mr McSherry's role. The word interim does not detract from the offer and the conditions therein. It is, I find, an offer capable of being accepted and it was accepted. The date 20 August 2015 is mentioned by Ms Lark in the email of 21 July attaching the offer in the context of not being able to officially announce Mr McSherry's appointment until after that date because of the legal situation with other staff and the restructuring.

[49] I find, as Chief Judge Colgan did in *Blackmore*,[8] that Mr McSherry had in accordance with the definition of employee in ss 6 and 5 of the Act become an employee on 22 July 2015 when he was offered and accepted employment with Kumara Hotel. The argument that there was offer and acceptance is perhaps stronger than for Mr Blackmore. When Mr Blackmore was offered and accepted the position there was specific reference to a Federated Farmers Employment Contract outlining the conditions in the offer being filled out although it was not attached. There was nothing in the offer made to Mr McSherry of that nature or that the offer was subject to or conditional on a written employment agreement being signed. Mr McSherry was offered a full time permanent position with Kumara Hotel, not a position subject to trial, and he accepted the role on that basis. He was under s 6 (1)(b)(ii) of the Act a person intending to work.

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[8] Above n 4

[50] Chief Judge Colgan said in *Blackmore* that an employee intending to work, someone who had been offered and accepted employment, as Mr McSherry was from 22 July 2015 is not an employee for all or even most purposes but is an employee entitled to access the statutory personal grievance procedure.[9] Mr McSherry could have accessed the personal grievance process from 22 July 2015. Mr McGinn submits that there is a logical problem if Mr McSherry is deemed to be an employee from the point of acceptance of the interim offer with the intended commencement date in the employment agreement. This was a matter considered in *Blackmore* and answered. The trial period could have been agreed to have come into force on the day of commencement of employment.[10]

[51] Mr McSherry could not be required, as an existing employee, to enter into a trial period. I find that the trial period in the employment agreement dated 10 September 2015 is ineffectual as Mr McSherry was already an employee before the agreement was signed.

Unfair bargaining

[52] Unfair bargaining for an individual employment agreement is found at s 68 of the Act. One of the aspects relied on is that Ms Lark in an email to Mr McSherry dated 8 September 2015 before the employment agreement was signed advised him amongst other matters that *It is NZ law now, that all contracts are subject to a 90 day trial period. You could look this up if you want to, but it is a mutually beneficial clause.*

[53] Ms Lark said in her evidence that her experience is with the Hospitality New Zealand contract, a standard employment agreement with individual conditions set out in an attached schedule. It has a trial period provision and Ms Lark said that she concluded that such a provision was a legal requirement. Whilst Ms Lark therefore may not have intended to misrepresent the situation to Mr McSherry before he signed the agreement she clearly did. It is not NZ law that all contracts have a 90 day trial period and it is not usually seen as a mutually beneficial clause.

[54] I find Mr McSherry reasonably relied on the advice of Ms Lark about 90 day trial clauses on behalf of Kumara Hotel. She ought to have known such reliance was

[9] At [48]
[10] At [52],[53] and [54]

likely because Mr McSherry, having spent several years in Australia, was not familiar with New Zealand law. It was also likely that she would know as a result of the number of constructive and friendly exchanges prior and after the interim offer of employment Mr McSherry was more likely to have trust and confidence in her.

[55] If I had not already found as I have that Mr McSherry was an existing employee then I would have found on the above basis that the bargaining was unfair. Mr Carruthers wanted clause 7 deleted as that was the only provision an issue was taken with in the employment agreement. The Authority cannot order the deletion of clause 7 under s 69 which provides the remedies for unfair bargaining without the requirements in s 164 being met. Whilst the Authority has under s 164 identified the problem in relation to the agreement, the parties would need to be directed to mediation and attempt in good faith to resolve the problem. I am not minded given my earlier finding to direct that.

[56] In conclusion, therefore, at the time that Mr McSherry was dismissed Kumara Hotel considered it could rely on the trial period provision but I have found that Mr McSherry was an existing employee and could not be required to enter into a trial provision. Kumara Hotel is therefore obliged to justify its decision to dismiss Mr McSherry in the usual way.

Justification of the dismissal

[57] The Authority in determining whether a dismissal and an action is justifiable has regard to the test of justification in s 103A of the Act and assesses whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[58] There are unusual aspects to this matter. Mr McSherry did not, the evidence supports, commence the role he was employed for as operations manager. Instead he was temporarily instructed from on or about the first day of his employment to perform other duties as the head chef had resigned. He did not have particular concerns about that in the context that the situation was to be re-evaluated and temporary. On 18 November 2015 some four weeks after Mr McSherry had commenced working, Ms Lark advised Mr McSherry that the first month of his employment had not given her faith in his suitability to perform the operations manager role. Mr McSherry advised that he would not have returned to New Zealand

for the head chef role or if he could not have had the hotel flat. He did not from the record of that meeting, I find, agree to a different role nor could he have been taken at an earlier time to have agreed to a different role. On 10 December 2015 Mr McSherry's employment agreement was terminated with notice in reliance on the trial period.

[59] The process adopted was not fair and did not meet the procedural fairness requirements in s 103A of the Act. Mr McSherry was assessed on his performance in another role undertaken on a temporary basis and because of that it was decided that he was unsuitable to undertake the role he had been employed to do. He had no input into that decision before it was made or knowledge that performance in a temporary role was to determine his ability to perform the role he had been employed to do. He had no opportunity to persuade Ms Lark otherwise in terms of her decision. The decision changed the fundamental nature of the employment agreement the parties had reached, including, but not limited to, the permanency of his role and the accommodation, both important aspects of the relationship to Mr McSherry.

[60] The lack of a fair process overlapped, I find, with substantive fairness to such a degree that Kumara Hotel is not able to establish that its dismissal was substantively unjustified.

[61] I find that Mr McSherry was unjustifiably dismissed and he is entitled to an assessment of remedies which I will turn to after considering the alleged unjustified action causing disadvantage.

Inadequate notice

[62] Mr McSherry says that he should have been provided with six weeks' notice as set out in schedule A to his employment agreement when his employment was terminated. Clause 12.1 of the employment agreement provides for two weeks' notice of termination or resignation and does not refer to schedule A. Schedule A contains a summary of Mr McSherry's individual terms and conditions with a description of his work, place of work, his salary and hours of work and refers to notice of termination of 6 weeks which accords with the interim offer he accepted.

[63] The notice given to Mr McSherry when he was dismissed was four weeks which was given, I find, in all likelihood because that period reflected the expiry of

the 90 day period. Mr McSherry did not raise any issue at the time but I am not satisfied that he initiated that period of notice.

[64] Schedule A reflected the individual terms and conditions of employment as they pertained to Mr McSherry and the notice of termination of six weeks in schedule A was the notice period that should have been given to Mr McSherry when his employment agreement was terminated. Whilst I am not prepared to treat this as a separate claim for reasons already set out it can be a matter to be considered when determining the lost remuneration claim.

The hotel apartment

[65] Mr McGinn submits that the contractual commitment in schedule A was to provide accommodation without further elaboration and that was done with the provision to Mr McSherry of a four bedroom self-contained staff house, shared with one other across the road from the hotel with free rent and power. Mr McGinn says that after 18 November 2015 Mr McSherry chose to move out of that accommodation and moved into accommodation with another person paying his rent in cash. Further, he submits that had Mr McSherry lived in the hotel he would have had responsibilities of dealing with issues as they occurred which was part of the operations manager role. Mr McGinn submits that rather than adding a burden the reverse could be said as there was no such burden assumed by living in the staff house.

[66] The interim offer of employment provided that accommodation is provided and noted that *initially this may be in the staff house until the hotel apartment becomes available.* Schedule A of the employment agreement provided for a salary of $60,000 per annum with *accommodation included.*

[67] The accommodation to be provided under schedule A was the hotel apartment as discussed and agreed. Mr McSherry knew there could be some delay in securing the hotel flat. He was advised on commencement of his employment on 14 October 2015 that he should be able to shift into the hotel apartment on or after 14 November 2015. The issue was raised with Ms Lark again close to that date. A meeting was held on 18 November 2015. At the end of that meeting it was clear Mr McSherry would not be performing the role of operations manager or shifting into the hotel apartment. Mr McSherry also raised a concern that I do not need to set out here about the staff accommodation. Ms Lark said that that matter was never able to be proven.

[68] I find that the failure to provide the agreed hotel flat accommodation at the latest by 14 November 2015 was a breach of Mr McSherry's employment agreement and an unjustified action. The evidence supported that it was a particularly important part of the agreement to him.

[69] In terms of disadvantage Mr McGinn submits that the hotel apartment was not self-contained and was not in fact better than the staff accommodation. He submits Mr McSherry would have had to share the apartment or at least it was not absolutely private. Mr McGinn placed some focus on responsibilities Mr McSherry did not have to undertake because he was not in the hotel apartment. He submits that there was no disadvantage and no loss of a benefit.

[70] There was, I find, a benefit to Mr McSherry with the hotel apartment as he did not have to share the apartment when he was there. The flat would have been occupied by someone else on the nights that he was away to cover those responsibilities but that person, as I understand the evidence, would have occupied the second bedroom. It was part of Mr McSherry's agreement with Kumara Hotel that he would undertake the responsibilities and he understood and accepted that those went hand in hand with the hotel flat when he accepted the role.

[71] Mr McSherry was unjustifiably disadvantaged by the breach of his employment agreement to provide him with accommodation in the hotel apartment.

The unilateral change in role

[72] Mr McSherry having been offered and accepted a role for operations manager undertook different duties for a period of time on the basis that it was temporary in nature and would be re-evaluated. I have placed some weight particularly on the evidence of an employee, Joyce, who worked in the kitchen at the time. Joyce said in her written evidence Mr McSherry initially had good intentions but when it was clear that the role, he said to her, he had been offered was not to eventuate then he became annoyed and angry. He felt that he had been *shafted*. She accepted under questioning from Mr Carruthers that Mr McSherry wanted to be an operations manager and not a head chef. I heard from other employees at the time Mr McSherry was employed about some significant concerns they had about him when he worked in the head chef/kitchen management role to the point where it seemed clear they did not want to and/or did not like working with him. They spoke to Ms Lark about their concerns.

[73] I find that Mr McSherry's role was unilaterally changed from 18 November 2015, five weeks after he had commenced his employment to a different and lesser role without consultation. He was, I find, angry and upset by that change and the fact that he would not be performing the role he was employed to perform. The evidence supported that the change and lack of consultation also had unfortunate consequences for other staff who worked with him because he was angry, and they found his behaviour inappropriate. It is interesting to note that when he was placed at the Hotel by RNL he was well thought of by staff. I find that the actions of Kumara Hotel in unilaterally changing the role of Mr McSherry without consultation to a role which was lesser in nature, and in all likelihood seasonal rather than permanent, was unjustified and whilst he continued to receive the same salary it caused him disadvantage because it was not the role he wanted or was employed to perform. It was in the nature of a demotion.

[74] Mr McSherry has a personal grievance that he was unjustifiably disadvantaged in his employment because of the failure to provide accommodation as agreed and the unilateral change to his role. He is entitled to an assessment of remedies.

Remedies

Lost wages

[75] The Authority is required under s 128(2) of the Act to order the payment of a sum equal to the lesser of the sum actually lost or 3 months' ordinary time remuneration. The Authority may under s 128(3) in the exercise of its discretion order payment of a sum for lost wages beyond 3 months.

[76] Mr McSherry seeks the sum of $15,000 based on two months without any work and further loss of earnings for a period he received payment at a lower rate than at the Kumara Hotel.

[77] Mr McGinn submits that there was limited evidence about attempts to find employment for two months before he secured employment on 7 March 2016 at a rest home in Christchurch. Mr McGinn also submits that I should assess the reasonableness of the failure by Mr McSherry to continue working as a head chef.

[78] I have found there were breaches on the part of Kumara Hotel and they were serious. Objectively assessed the foundation the relationship was initially built on

changed and shifted. Mr McSherry was not in a position to exert any control over that and was faced with considerable uncertainty throughout the entire relationship. I do not find that in those circumstances failing to continue to work for Kumara Hotel should disentitle Mr McSherry from reimbursement of lost wages but I do take the limited evidence about mitigation and the unlikelihood of the relationship continuing beyond three months into account. I weigh that an additional two weeks' notice should have been given or paid out. I limit any reimbursement taking all matters into account to three months.

[79] The period from 11 January 2016 to 11 April 2016 is three months or 13 weeks. There were no earnings at all from 11 January to 7 March which is a period of 8 weeks. The loss for that period is calculated on the basis of the salary of $60,000 divided by 52 which is $1153.85 per week multiplied by 8 to arrive at the figure of $9230.80 gross.

[80] The period from 7 March to 11 April is five weeks. Mr McSherry was paid a salary of $31,122 in his new role which is $598.50 gross per week. The weekly sum he would have received at Kumara Hotel is $1153.85 multiplied by 5 which is $5769.25. The sum received in alternative employment is $598.50 per week which multiplied by 5 weeks is $2992.50. The difference is calculated by taking from $5769.25 the sum of $2992.50 which leaves a balance of $2776.75 gross. The total lost wages for a three month period is the sum of $9,230.80 plus $2776.75 which is $12007.55 gross subject to any assessment of contribution.

Compensation for loss of the benefit of accommodation

[81] Mr McSherry seeks the sum of $20,000 compensation although this could be both for the loss of any benefit under s 123 (c)(ii) and compensation under s 123 (c)(i).

[82] There is nothing in the employment agreement or earlier communication leading to the interim offer about the value of the hotel accommodation. There has been no assessment by Mr McSherry or Kumara Hotel as to the value of the hotel apartment in Kumara.

[83] Mr McGinn submits that is the end of the matter as alternative accommodation was provided. The wording of s 123 (1)(c)(ii) of the Act is broad enough to enable the Authority to make some assessment of the loss of a benefit which can be of a

monetary kind or other kind which the employee might reasonably have been expected to obtain if the personal grievance had not arisen. That sits, I find, with the role of the Authority under s 157 of the Act to make a determination according to the substantial merits of the case without regard to technicalities.

[84] The loss of the benefit is the accommodation that was agreed to. It was accommodation in the hotel flat that did not have to be shared whilst Mr McSherry occupied it and went hand in hand with the responsibilities of the senior operations manager role. The fact that there was other accommodation provided must be taken into account and the fact that accommodation came with greater responsibilities can be weighed as can the fact that, the bed aside, the flat was not otherwise, Ms Lark said, furnished.

[85] I find it fair to assess the basis of the loss of a benefit taking all those matters into account at $100 per week being the difference in value of the provided shared accommodation and the hotel apartment from 14 November 2015 until 11 April 2016. On or about 18 November 2015 Mr McSherry left the staff accommodation and went to live elsewhere but could not provide detail of the rent he paid or how much it was. I cannot therefore make any assessment on that. I will simply assess loss on the same basis after that time.

[86] The period from 14 November 2015 to 11 April 2016 is 21 weeks and two days. I shall assess the loss of a benefit on the full 21 weeks at $100 multiplied by 21 week which is $2100 subject to contribution.

Compensation under s 123 (1)(c)(i) of the Act

[87] Mr McSherry wants compensation of $25,000. Mr McGinn submits that his evidence was very limited and essentially amounted to a concern about a gap in his curriculum vitae. Mr McSherry, I have also recorded, expressed he was headhunted from his base and existing role in Australia and felt *shafted* as a result of what transpired with breaches of contract and the other position being seasonal in nature.

[88] I found Mr McSherry to be quite understated in his evidence about compensation but nevertheless I accept he felt significantly humiliated and suffered injury to his feelings by what transpired very soon after he started at the hotel and his termination. It is clear that he was initially very excited and enthusiastic about the role that was offered to him which he accepted. He was essentially headhunted. He

travelled from Australia to undertake the role in the small West Coast town of Kumara. I accept that the role and its permanence and the hotel apartment were important. Mr McSherry did not undertake the operations manager role or at the very least fully, he was effectively demoted to a lesser role, the resident custodian continued to live in the hotel apartment and then his employment was terminated under a 90 day trial provision because of his performance as head chef. He regarded his employment agreement as breached but was really quite powerless to change matters.

[89] I find that subject to any assessment of contribution McSherry is entitled to an award under this head that reflects the significant humiliation and loss of dignity suffered in the above unusual circumstances in the sum of $14,000.

Contribution

[90] When the Authority has found personal grievances as it has in this case I am required to consider the extent to which the actions of Mr McSherry contributed, if indeed they did, to the situation that gave rise to each of his personal grievance claims under s 124 of the Act. I am then required to assess whether to reduce the remedies that he would otherwise have been awarded.

[91] I heard from a number of employees who worked with Mr McSherry that his behaviour was problematic and caused them concern. I find that Mr McSherry's staff interactions between 5 November and 18 November/10 December 2015 did, on the balance of probabilities, play some part in Ms Lark's decision to unilaterally change his role and then terminate his employment agreement for the role of operations manager.

[92] I have to balance against that the very short period of assessment and significant procedural deficiencies. I also take into account even though there was evidence of issues with Mr McSherry and staff relationships, Ms Lark was agreeable to Mr McSherry staying on in the head chef role. I cannot additionally disregard a very strong possibility that Mr McSherry's behaviour, whilst concerning, unacceptable, and unfair on other staff, largely resulted from the way he had been treated.

[93] I find that there was some moderate contribution to the situation that gave rise to the personal grievances and the remedies above are to be reduced by 15%.

Orders of the Authority

[94] Taking contribution into account I make the following orders:

a. I order Kumara Hotel Limited to pay to Joseph McSherry the sum of $10,206.42 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

b. I order Kumara Hotel Limited to pay to Joseph McSherry the sum of $1785 being compensation for the loss of a benefit of accommodation under s 123 (1)(c)(ii) of the Employment Relations Act 2000.

c. I order Kumara Hotel Limited to pay to Joseph McSherry the sum of $11,900 being compensation under s 123(1)(c)(i) of the Act.

Costs

[95] I reserve the issue of costs. Failing agreement on the issue of costs Mr Carruthers has until 27 April 2017 to lodge and serve submission as to costs and Mr McGinn has until 11 May 2017 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority