

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 419
3018915 and 3018133

BETWEEN

SANDRA SAVRIM
Applicant in 3018915
Respondent in 3018133

AND

WELLINGTON HOSPITALITY
GROUP LIMITED
Applicant in 3018133
Respondent in 3018915

Member of Authority: Trish MacKinnon

Representatives: No appearance by or for the Applicant
Jaesen Sumner and Angela Yiavasis, counsel for the
Respondent

Investigation Meeting: 10 October 2018

Submissions and Further Information Received: 5 November 2018

Date of Determination: 16 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sandra Savrim claims Wellington Hospitality Group Limited (WHG) breached her employment agreement. She seeks the remedy of specific performance and damages. Ms Savrim also claims to have been unjustifiably disadvantaged by WHG's refusal to engage her at work and asks the Authority to impose a penalty for the breach of her employment agreement. She seeks reimbursement of lost wages and damages for non-economic loss, plus costs.

[2] WHG denies it breached Ms Savrim's employment agreement and opposes the remedies and penalty she seeks. It asserts Ms Savrim's conduct amounted to a repudiation of the employment agreement which it could therefore cancel under section 7 of the Contractual Remedies Act 1979.¹ It asks the Authority to determine a number of questions relating to the relevant employment agreement and, in particular, to the validity and enforceability of its trial period provisions. It too seeks costs.

[3] Ms Savrim objects to the Authority's jurisdiction to deal with WHG's application which she views as a breach of process. She asks the Authority to dismiss that application as vexatious.

[4] Following a telephone conference with the parties on 31 October 2017, it was agreed the proceedings brought by each of the parties would be consolidated and all matters heard in one investigation meeting.

The Authority's investigation

[5] An investigation meeting was initially set down for 24 January 2018 with witness statements timetabled in the intervening period. Both parties provided witness statements. The investigation meeting did not proceed at that time as, approximately a week before it was scheduled to take place, Ms Savrim requested a postponement based on a medical certificate she provided. The Authority agreed to the adjournment on the basis of that medical certificate.

[6] Ms Savrim provided further medical certificates over the next several months and the investigation meeting did not take place until 10 October 2018. For reasons explained later in this determination, I set the matter down for that date and declined Ms Savrim's subsequent request for a further postponement, notifying her that the investigation meeting was likely to proceed in her absence if she chose not to attend.

[7] Ms Savrim did not attend the investigation meeting on 10 October 2018. I delayed the start for 15 minutes while an Authority Officer attempted unsuccessfully to make contact with Ms Savrim, leaving a voicemail for her to contact the Authority Officer. There was no response. As I was satisfied Ms Savrim had been properly notified of the date, time and

¹ Now s 36 of the Contract and Commercial Law Act 2017.

venue of the investigation meeting, I proceeded in her absence in accordance with clause 12 of Schedule 2 to the Employment Relations Act 2000 (the Act).

[8] Ms Savrim had previously filed a signed and dated witness statement in the Authority on 21 November 2017 in accordance with the timetable for the investigation meeting that had been scheduled to take place in January 2018. That evidence was neither sworn nor affirmed and was not able to be tested by way of questioning by the Authority or cross examination by counsel for WHG. This impacted on the weight I accorded to that evidence in considering the parties' claims.

[9] Three witnesses provided evidence for WHG, one of them being by way of affidavit with the Authority's agreement. That person, a director of WHG, made himself available for questioning.

[10] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Relevant background and evidence

[11] Ms Savrim, who is originally from Mauritius, had been working in Auckland since October 2013 at the time she applied for the position of Group Accountant with WHG in November 2016. Part of the application form required Ms Savrim to confirm she had the right to work in New Zealand. Her answer was in the affirmative: "I'm a permanent resident and/or Australian citizen".

[12] Mr Cormac Denton, WHG's Chief Financial Officer, interviewed Ms Savrim on Skype. He also arranged for the company's recruiter to talk with Ms Savrim to assess whether she would be a suitable fit with WHG. Mr Denton noted in evidence he had not felt the need to ask Ms Savrim about her visa status during this process in light of her response on the application form to the question concerning her right to work in New Zealand.

[13] Shortly afterwards, Ms Savrim was verbally offered the position and on 14 December 2016 Mr Denton emailed her to formally offer her the position, attaching an employment agreement. The offer was conditional on Ms Savrim providing "confirmation of NZ ID or providing proof of obtaining the necessary work visa from Immigration NZ and relevant

ID's". Mr Denton asked Ms Savrim to consider the employment agreement, take advice on it, and contact him if she had any questions. He noted he had included a start date of 1 February 2017, based on his initial discussion with her, and asked if that was a suitable date for her.

[14] When Mr Denton had not received the signed employment agreement by 22 December 2016, he emailed Ms Savrim to ask if there were any issues. They had a telephone conversation the following day in which Ms Savrim advised Mr Denton that she had an existing application for permanent residency under the skilled migrant category that required her to maintain ongoing employment. She told him it was open to her to change employers but she was required to notify Immigration New Zealand (INZ) and apply to transfer her employment to WHG from her current employer. She advised him that could be done within two weeks.

[15] Mr Denton said he was surprised Ms Savrim was waiting for a visa to enable her to work for WHG in view of her previous confirmation that she had the right to work in New Zealand. However, as she had expressed confidence that her permanent residency would be approved before the agreed 1 February 2017 commencement date, Mr Denton said he was in no doubt that she would be able to start her employment with WHG on that date.

[16] That did not happen. However, Mr Denton remained optimistic Ms Savrim would be able to join WHG soon. He provided assistance to her when she requested a minor change to her employment agreement and changes to her job description to expedite her visa prospects. Mr Denton noted in an email to Ms Savrim on 13 February 2017 that the employment agreement he had sent her was now out of date "given the start date was two weeks ago" and that WHG would now have to issue her a new one, which it would do once her visa situation was sorted. Ms Savrim made no comment on that at the time. Mr Denton also provided a letter of support in March 2017 to assist Ms Savrim in her application to INZ for a work visa.

[17] At Ms Savrim's request, on 21 March 2017 Mr Denton signed the employment agreement containing the job description and job title as amended by agreement between them and the Health and Safety policy pages. He emailed it to Ms Savrim with the completed section C of the INZ form for employers offering employment to an overseas person based on the non-availability of New Zealand residents.

[18] In her written evidence Ms Savrim said that she had applied for a work visa on 31 March 2017 and resigned from her role as Finance Manager with her then current employer

that day. She had earlier informed Mr Denton she was required to provide four weeks' notice.

[19] Mr Denton requested an update on Ms Savrim's visa status some weeks later having heard nothing from Ms Savrim for more than a month. He expressed concern at the delays and the effect on WHG which was in a period of growth and needed someone in the new role. Ms Savrim responded that she was doing all she could to expedite the visa but that it could take up to 60 days.

[20] On 15 May 2017 Mr Denton wrote to Ms Savrim, again having heard nothing from her in recent weeks, noting that WHG had been eagerly awaiting her arrival to take up her role since 1 February. He referred to the pressure that was being put on the rest of the WHG team by the role not being filled and said it had come to the stage where he was unsure when her start date would be.

[21] He noted that "to be fair on the workload of the team" he needed to take the role back out to market while they waited for Ms Savrim's visa to come through as he couldn't be sure "if and when you will be able to join the team." Mr Denton's preference, as he made clear to Ms Savrim, was for her visa to come through and for her to join the team. Mr Denton ended by asking for her feedback on the current state of her visa application and what she thought was "a fair outcome of the current situation".

[22] On 26 May 2017 Ms Savrim telephoned Mr Denton at his request and informed him INZ had requested further clarification of the recruitment process for the position and had confirmed a timeframe of 8 June. Mr Denton advised Ms Savrim that if WHG had not heard from INZ by that date, it would need to re-advertise the position. He provided the further information about the recruitment process to Ms Savrim and on 29 May signed and sent to INZ the letter Ms Savrim had drafted on the basis of the further information.

[23] When Mr Denton contacted Ms Savrim on 8 June, she advised she had not heard anything further from INZ. He then re-advertised the position and informed Ms Savrim of this on 9 June. She thanked him for the update and undertook to inform him when she heard from INZ.

[24] On 14 June Ms Savrim advised Mr Denton her visa had been approved. He congratulated her and told her said that once WHG had proof of the visa and an employment

agreement with a valid start date in place, it would remove the advertisement for the role. He was keen for her to start before 26 June 2017 but wanted to give Ms Savrim sufficient time to review the employment agreement and take advice on it. He told Ms Savrim the terms and conditions would mirror those of the employment agreement previously agreed between the parties with the minor amendment to minimum hours of work and the Job Description that had been agreed between them before they had both signed the agreement on 21 March 2017.

[25] Ms Savrim provided Mr Denton proof of her visa approval, which was for one year only, and told him she would call to discuss the start date once she had reviewed the amended employment agreement. She was given access to WHG's online HR system on 16 June and was asked to view and sign the agreement online prior to starting work

[26] There was a short period of confusion arising from WHG's Recruitment Training Manager (RTM) sending the original Job Description and employment agreement to Ms Savrim instead of the amended documents that had been agreed by the parties in March 2017 to assist with Ms Savrim's visa application. The delays resulted in the RTM advising Ms Savrim, once the error was corrected, that the start date had been put at 3 July 2018 to give her the time to review the amended documents.

[27] Ms Savrim advised Mr Denton on 29 June 2017 that she was taking advice on the employment agreement. He asked her to confirm an appropriate start date once she had done that. On 3 July Ms Savrim informed Mr Denton that the advice she had received was that her existing employment agreement should have allowed her to attend work on 22 June 2017 as had been proposed by WHG.

[28] She further informed him that, under that employment agreement, she was an existing employee and the employment agreement she was now being asked to sign constituted a new employment agreement with an existing employee. Her advice was that s 67A(3) of the Act did not provide for a trial period to apply to an existing employee "and this inclusion should not be part of this new agreement."

[29] Mr Denton disagreed with that view and in an email of 6 July 2017 noted that Ms Savrim had signed an employment agreement containing the trial period provision on 21 March 2017 and that she had had the opportunity to take advice on the employment agreement, including the trial period provision, prior to signing it. He said the trial period

would start from Ms Savrim's first day of work, i.e. her first day on the job, and WHG did not agree to waiving the 90 day trial period provision. He proposed 10 July as a reasonable date for Ms Savrim's first day of work with WHG.

[30] Mr Denton also expressed concern at the 12 month time frame of the visa she had obtained, noting the role at WHG was full-time and open-ended. He observed that the fact Ms Savrim had applied for a limited duration visa would have been relevant in WHG's decision to offer her the role and should have been brought to his attention during the interview process. He noted her application for the role had shown that she was entitled to work in New Zealand "when that was not the case".

[31] Ms Savrim did not commence work with WHG on 10 July. According to her then legal representative this was because she was concerned WHG would see her attendance as an acceptance by her of the trial period and make her vulnerable to being dismissed summarily. Further correspondence ensued between the parties' legal representatives. They attended mediation but were unable to resolve the issues between them.

[32] On 24 July 2017 Ms Savrim stated, through her lawyer, her intention of commencing work on 27 July. She continued to maintain that the 90 day trial period in her employment agreement had expired. She put WHG on notice that any attempt by it to rely on the clause to dismiss her from her employment would be met by a claim from her.

[33] WHG told her it was clear she had no intention of performing an essential term of the employment agreement, and it did not accept that she was ready and willing to work at WHG despite her assertions to the contrary. At best, in its view, Ms Savrim was willing to work but not subject to an essential term of the Agreement.

[34] It was not willing to establish a start date for her unless she agreed to commence work subject to the 90 day trial period in her employment agreement from the date she actually commenced work. WHG's legal representatives noted their view that Ms Savrim's and their clients' positions appeared to be irreconcilable and informed Ms Savrim they had advised their client to refer the matter to the Authority for determination.

[35] Both parties lodged applications in the Authority in August 2017.

[36] As noted earlier, the matter was to be heard on 24 January 2018. However, that date was vacated following the provision of a medical certificate by Ms Savrim stating that she was currently medically unfit to attend Authority proceedings due to ongoing symptoms she had been suffering from since July 2017.

[37] Further medical certificates were received on a monthly basis from Ms Savrim from January 2018 onwards. On 19 April 2018 the Authority directed Ms Savrim to provide a comprehensive medical certificate sufficient to inform the Authority why she had been unable to attend an Authority hearing since January 2018.

[38] The medical certificate was to contain an indication of when Ms Savrim was likely to be fit to attend a hearing. The direction itemised the requirements that would be made of Ms Savrim during her attendance at a hearing, to ensure the medical practitioner could make a proper assessment of her fitness in relation to those requirements. These included being questioned by the Authority Member; being cross-examined by opposing counsel and re-examined by her own counsel; and preparing, with her counsel, submissions on the matter.

[39] A medical certificate dated 23 April 2018 confirmed Ms Savrim was not, at that time, able to withstand the rigours of an Authority investigation meeting and that a further review with her General Practitioner (GP) would take place in four weeks' time.

[40] At a telephone conference held on 21 June 2018 Ms Savrim's representative at the time requested that any investigation meeting be set down sufficiently far in the future to enable Ms Savrim to return to full health. For that reason the matter was set down for hearing on 10 October 2018, continuing to 11 October if required.

[41] Directions were issued in July 2018 requiring Ms Savrim to provide, by a specified date, information concerning her current physical address, visa status and current legal representative. Ms Savrim failed to comply with those directions.

[42] On 14 August 2018 WHG filed a Memorandum in the Authority accompanied by an affidavit from Mr Denton. The content of those documents concerned an employment agreement Ms Savrim had provided to INZ which purported to be signed by Mr Denton but which he denied having signed. He deposed that neither the signature, nor the printing of his name under the signature, was written by him. Furthermore, the employee's name was

written, and signed, as Sandra Savrimootoo, a name Mr Denton had not previously been aware of, and did not associate with Ms Savrim.

[43] A copy of the Memorandum and affidavit were sent to Ms Savrim for her response. She provided none. Shortly afterwards the Authority became aware of two recent immigration cases in Australia involving a Ms Sandra Savrimootoo who had represented herself by telephone from New Zealand. Ms Savrim was asked on 22 August 2018 to confirm by 31 August 2018 whether she was the Sandra Savrimootoo who had represented herself in the Federal Court of Australia on 8 August 2018,² seeking leave to appeal a judgment of the Federal Circuit Court of Australia (Melbourne) dated 8 February 2018.³

[44] Ms Savrim was informed that this was relevant to the Authority's consideration of the medical certificates she had submitted monthly to the Authority since January 2018. She was notified that a failure to respond was likely to be treated as acknowledgement that she was the applicant in those court hearings. Again Ms Savrim declined to comment.

[45] After considering the information available, I concluded on the balance of probabilities that Ms Sandra Savrim was the Ms Sandra Savrimootoo of those proceedings. The information I considered included the witness statement she had filed in anticipation of the 24 January 2018 investigation meeting that was adjourned at her instigation. Her statement had included the dates she had studied and worked in Australia. These matched the dates referred to by the Australian Federal Circuit Court for the commencement of Ms Savrim's entry into Australia on a student visa and her departure in October 2013.

[46] On 24 September 2018 Ms Savrim sought an adjournment of the investigation meeting set down for 10 and 11 October 2018. She referred to her medical unfitness to attend and her current inability to address the complex employment issues and flow-on consequences from WHG's refusal to honour her employment agreement. Ms Savrim's request for an adjournment was opposed by WHG.

[47] The conclusion I had reached that Ms Savrim was the same person as the Sandra Savrimootoo who had very recently represented herself in the Federal Court of Australia raised concerns over the accuracy of Ms Savrim's medical certificates. As those certificates had been the reason for the delay in the Authority's investigation I summonsed the GP who

² *Savrimootoo v Minister for Immigration and Border Protection* [2018] FCA 1167.

³ *Savrimootoo v Minister for Immigration and anor* [2018] FCCA 449.

had issued them. The purpose was to ask the GP to answer questions relating to her assessment of Ms Savrim's unfitness to attend an Authority investigation meeting, in relation to Ms Savrim's apparent ability to represent herself in the more formal setting of the Federal Australian court system. It was made clear to the GP in the summons that she would not be asked to breach patient confidentiality in the interview.

[48] The GP's responses to my questions clarified that her assessment of Ms Savrim's unfitness to attend an Authority investigation was based, to a large extent, on the symptoms Ms Savrim self-reported. It was also based on her observation of Ms Savrim during their monthly review appointments. The GP said she would be very surprised to learn that Ms Savrim had been able to represent herself recently in the Australian Federal Court. On reflection I concluded Ms Savrim had not shared information with her GP that was pertinent to the doctor's assessment of her fitness to attend an Authority investigation meeting.

[49] Both of Ms Savrim's Australian Federal Court appearances occurred at times when she was covered by medical certificates stating her unfitness to attend an Authority hearing. After considering all the information before me I concluded that the current medical certificate Ms Savrim had submitted to the Authority did not provide sufficient grounds for vacating the dates set aside for the investigation meeting. I declined Ms Savrim's request for an adjournment.

Issues

[50] The issues for determination arising from Ms Savrim's and WHG's applications are:

- (a) Whether the 90 day trial period provision in the employment agreement executed on 21 March 2017 was valid and enforceable;
- (b) When the trial period was to start;
- (c) Whether the 90 day trial period could commence before Ms Savrim was granted a visa that provided her a legal entitlement to work for WHG;
- (d) Whether WHG breached Ms Savrim's employment agreement by not allowing her to commence work under its terms; and, if so,
- (e) Whether a penalty should be imposed on WHG.

- (f) Whether WHG's actions in not allowing Ms Savrim to commence work unjustifiably disadvantaged her;
- (g) Whether, and if so what, remedies should be awarded if Ms Savrim's claims succeed.
- (h) Whether Ms Savrim's continued refusal to accept the 90 day trial period provision amounted to a repudiation of the IEA.

Relevant law

[51] At all relevant times, s 67A of the Act provided as follows:

67A When employment agreement may contain provision for trial period for 90 days or less

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.
- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that—
 - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
 - (b) during that period the employer may dismiss the employee; and
 - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) **Employee** means an employee who has not been previously employed by the employer.
- (4) *[Repealed]*
- (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).⁴

The employment agreement

[52] The employment agreement attached to Mr Denton's formal offer of employment included, at clause 9, the following **Trial period** provision:

9.1 90 Day Period

The employee will serve a trial period for 90 days from the beginning of the employee's employment. The employee's employment is conditional on the signing and return of this agreement prior to the employee's first day of employment.

⁴ Section 67A was replaced from 6 May 2019. The current proceedings are not affected in accordance with clause 13 of Schedule 1AA of the Act.

9.2 Trial Period Dismissal

During that period the employer may dismiss the employee on giving no less than 3 working days' notice in writing. For the purposes of this subclause a "working day" shall be any day other than a day that falls on a weekend or a public holiday.

9.3 Trial Period Personal Grievance

If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

9.4 Employment Relations Act 2000

The parties acknowledge and agree that the terms of this clause constitute a trial provision within the meaning of s 67A(2) Employment Relations Act 2000.

9.5 Conditions

No other term or condition of this employment agreement shall derogate from this trial provision.

9.6 Serious Misconduct

In all cases the right of the employer to dismiss the employee without notice for serious misconduct will remain.

The trial period provision and its start date

[53] The trial period provision in question was that contained in the employment agreement the parties executed on 21 March 2017. Ms Savrim's position is that the employment agreement specified a commencement date for her employment as 1 February 2017 and she was an employee of WHG from that date. By 14 June 2017, when her work visa came through, the 90 day period of the trial had expired.

[54] Ms Savrim believes WHG could not rely on the trial period provision of that employment agreement or any subsequent employment agreement it asked her to sign. In her view the trial period provision of her employment agreement had expired and WHG could therefore not rely on it. Requiring her to sign a new employment agreement was in breach of the Act as she did not come within the definition of "employee" in s 67A(3). That section defines an employee, for the purposes the ability to enter into a trial period, as an employee who has not previously been employed by the employer.

[55] WHG's view is that the trial period provision was valid and enforceable and the 90 days of the trial period was to start from the date Ms Savrim actually commenced work with it.

[56] I reject Ms Savrim's view of the trial period. While the commencement date was agreed with WHG to be 1 February 2019, it was clear in the communications between the

parties that was dependent upon Ms Savrim obtaining the necessary visa to allow her to take up the position with WHG. I note from Ms Savrim's communications to Mr Denton that she did not resign from her then current employment until 31 March 2017 when it appears she gave, and worked out, four weeks' notice.

[57] In *Blackmore v Honick Properties Limited*⁵ the Employment Court, in considering the matter of when employment commenced stated:

"... a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work. The phrase in s 67A(2)(a) "...starting at the beginning of the employee's employment..." means when the employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date."⁶

[58] The employment agreement in this instance stated a commencement date of 1 February 2017 for the agreement. That was what had been anticipated as Ms Savrim's first day of work when the offer of employment was formally made and accepted. The agreement was specified to be conditional upon the signing and return of the agreement prior to the employee's commencement date. The agreement was signed and dated by both parties on 21 March 2017.

[59] The trial period provision of the employment agreement stated that the 90 day trial period would commence "from the beginning of the employee's employment". The employee's employment was "conditional on the signing and return of this agreement prior to the employee's first day of employment".

[60] That rules out 1 February 2017 being considered the first day of Ms Savrim's employment as the employment agreement was not signed by her until 21 March 2017. Should that date then be considered as the commencement of employment for purposes of the trial period? I do not think it should and find the trial period was to take effect from the date on which Ms Savrim actually started work with WHG.

[61] The alternative would entail the trial period starting and finishing before Ms Savrim had started work with WHG. This would have defeated the purpose of having a trial period, which is to give the employer an opportunity to assess how an employee performs in the role. The Court in *Blackmore* considered a submission putting forward just such a scenario, where

⁵ [2011] ERNZ 445

⁶ N6 at [52]

an extended timeframe between the acceptance of an offer of employment and the commencement of the employment "might, theoretically in these circumstances, mean that the entire 90-day period for assessing the employee's performance would expire before work even began, thus negating entirely the purpose of the trial."⁷

[62] The Court provided two answers to such concerns, the first being the specifying in the employment agreement that the trial period was to begin on the day of commencement of work. The second related to the extended definition of "employee" in s 6 of the Act, which includes "a person intending to work". The Court's view was that the extended definition applied:

"...only to deeming a person to be an employee before the commencement of work for the purpose of being able to bring a personal grievance for unjustifiable dismissal during that period."⁸

[63] In *Roach v Nazareth Care Charitable Trust Board* the Court added a further refinement to *Blackmore* by interpreting "an employee who has not been previously employed by the employer" as describing a situation where there has not already been an opportunity to assess the employee's suitability for the work. WHG had no opportunity to assess Ms Savrim's suitability for the role of Group Accountant/Finance Manager. I accept submissions made for WHG that the trial period was valid and enforceable and was to start from the date Ms Savrim commenced working in that role.

Could Ms Savrim have commenced the trial period before obtaining her work visa?

[64] Once Ms Savrim received her 12 month work visa on 13 June 2017 there was no legal impediment to her commencing work for WHG. She could not have lawfully commenced work for WHG before that date.

[65] While that does not necessarily answer the question as framed by WHG, I do not find it necessary to consider the question further in light of my finding above as to when the trial period was to start.

⁷ N6 at 50.

⁸ N6 at 54.

Did WHG breach Ms Savrim's employment agreement by not allowing her to commence work?

[66] Once WHG was satisfied Ms Savrim had a valid visa there was nothing to prevent it from agreeing a mutually acceptable start date with her. I accept it was keen for her to join its finance team and was willing for her to name an appropriate start date. It nominated the first date, being 22 June 2017. At this point WHG also asked Ms Savrim to sign a new employment agreement reflecting the start date that would apply.

[67] While the new employment agreement should have come as no surprise to Ms Savrim, as Mr Denton had advised her on 13 February 2017 that WHG would need to issue a new agreement once her visa had come through, it diverted discussion from a start date.

[68] WHG acknowledged in the course of communicating with Ms Savrim and her legal representative in July 2017 that it was not necessary for Ms Savrim to sign a new employment agreement. By the time it made that concession, it had already proposed a second start date and Ms Savrim had made clear her belief that the trial period provision of her employment agreement had expired. WHG had stated its position that the trial period would start once she commenced work.

[69] WHG proposed a further date informing Ms Savrim it expected her to report to work on 10 July 2017. She did not comply, as noted earlier, for fear that her attendance would be perceived by WHG as acceptance of the trial period provision and leave her exposed to the possibility of summary dismissal on arrival.

[70] In these circumstances, I do not find WHG breached Ms Savrim's employment agreement by refusing to allow her to start work. She did not start work after she obtained her visa for reasons relating, in the first instance, to her wish to take advice. Subsequently, she did not start work because of her stated disagreement with WHG on what it saw as an important term of the employment agreement.

[71] Both parties proposed starting dates at different times but once it became evident they held diametrically opposed views on the trial period provision of the employment agreement, I find WHG acted reasonably and pragmatically in seeking to have an independent party determine a number of questions relating to that provision.

I find it was mistaken of WHG to request Ms Savrim to sign a new employment agreement for the sole purpose of including the date from which she would commence work with it. It corrected that error, however, and I do not find its actions breached Ms Savrim's employment agreement. It follows that no question of a penalty being imposed on WHG arises.

Unjustifiable disadvantage

[72] Ms Savrim did not attend the Authority's investigation meeting and provided no evidence additional to the witness statement she had filed in November 2017. The Notice of Investigation Meeting, which was sent to Ms Savrim on 9 July 2018, contained the following Note in accordance with Schedule 1, Form 8 of the Employment Relations Authority Regulations 2000:

If the applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the applicant.

[73] This put Ms Savrim clearly on notice that her claims may be dismissed if she failed to attend the investigation meeting. It was incumbent upon her to prosecute her claims by attending, and participating in, the inquisitorial process of an Authority investigation.

[74] WHG submits Ms Savrim's actions have been for the purpose of using it to further her own immigration aspirations and her application to the Authority has been an abuse of process. It invites me to dismiss her claims as frivolous and vexatious.

[75] I am not prepared to make that finding but am also not prepared to make a finding in favour of Ms Savrim in relation to her personal grievance claim in the absence of evidence that is able to be tested through the normal Authority investigation process. Ms Savrim's claim is dismissed for lack of prosecution.

Repudiation of the employment agreement?

[76] WHG submits that Ms Savrim's continued refusal to accept the 90 day trial period amounted to a repudiation of the employment agreement. I have found the trial period was to start when Ms Savrim actually commenced work, not on the date she had been anticipated to start on accepting the offer of employment.

[77] As noted above, both parties proposed various dates for Ms Savrim to commence work after she obtained her visa on 13 June 2017. She was unwilling to start work while WHG required her to accept a new employment agreement containing all the agreed terms of the agreement the parties had executed on 21 March 2018, other than the commencement date. That date was to be changed to reflect the day Ms Savrim started working at WHG.

[78] WHG dropped that requirement but remained clear in its position that it required Ms Savrim to accept the trial period provisions would start from the day she commenced working for WHG. That was the first day her suitability for the duties of the position could be assessed in accordance with the purpose of the trial period provisions. Following correspondence between the parties in June, July and August 2018, and their attendance at mediation in July 2018, Ms Savrim stated her intention to start work firstly on 27 July and then, after further correspondence between the parties, on 10 August 2018.

[79] I find Ms Savrim adopted a mistaken stance on the trial period provisions of the employment agreement but this fell short of constituting a repudiation of that agreement. WHG's claim in that respect fails. It is therefore not necessary for me to address WHG's application made after the Authority's investigation meeting of 10 October 2018 for an amendment to its statement of problem to add the remedy of damages for Ms Savrim's repudiation of the employment agreement.

Summary of findings

[80] Ms Savrim's trial period was to commence on the first day she started working for WHG.

[81] She could not lawfully have started work before 13 June 2018.

[82] WHG did not breach the terms of the employment agreement.

[83] Ms Savrim's claim to have been unjustifiably disadvantaged is dismissed.

[84] Ms Savrim was mistaken in her interpretation of the trial period provision but that did not constitute a repudiation of the employment agreement.

[85] Neither party's claims are dismissed for abuse of process or for being frivolous or vexatious.

Costs

[86] Ms Savrim's claims have failed. The questions posed by WHG have been answered partly but not wholly in its favour. I find it appropriate to reflect that partial success by an award of costs calculated in accordance with the Authority's notional daily tariff.

[87] The investigation meeting was completed within half a day. The tariff for half a day is \$2,250. I order Sandra Savrim to pay that amount to Wellington Hospitality Group Limited as a contribution to the costs it incurred in these matters.

Trish MacKinnon
Member of the Employment Relations Authority