New Zealand Journal of Employment Relations 37(1): 70-81

Revisiting *Stokes Valley*: Trial Periods and Statutory Interpretation

SCOTT WORTHY*

The introduction of up to 90 day trial periods for employees in 2009 and their extension from employers with fewer than 20 employees to cover all employers earlier this year has generated much debate.[1] Those in favour of the change argued that 90 day trials would encourage employers to hire new and possibly jobless employees and provide much needed flexibility in employment arrangements. Those against argued that the change was exploitative of trial employees, destructive to their confidence and denied employees access to basic employment rights. That policy debate is interesting and will, no doubt, continue. However, discussion of the merits of 90 day trials has overshadowed the substantive effect of trial periods and how the relevant legislation has been and should be interpreted. Addressing the effect and interpretation of trial periods is the subject of this paper. Trial periods may, or may not, be here to stay but understanding how the Employment Court has interpreted trial periods and the methodology of that interpretation has lasting implications for employment law.

In *Smith v Stokes Valley Pharmacy (2009) Ltd*,[2] Chief Judge Colgan examined for the first and, until recently the only time in the Employment Court,[3] the interpretation of trial periods. His Honour's judgment, produced under some urgency, carefully examines trial periods in the context of the Employment Relations Act (ERA) 2000 (the Act). In doing so, the Court makes a number of important observations and decisions regarding trial periods while acknowledging that many issues regarding the interpretation of trial periods remain open. This paper explores two aspects of the interpretation of trial periods which are apparent in that judgment. First, the paper considers the strict interpretation given by the Court to the trial period provisions because, the Court argued, they restrict access to justice. Secondly, and relatedly, the paper examines the way legislative history was used to give meaning to the trial period provisions. In both these cases, the paper argues that although the Court was correct to employ strict reading and legislative history to give meaning to trial periods, the Court may, with respect, have erred in aspects of the application of those approaches to trial periods. The paper concludes by discussing how the Court saw the relationship between the trial period provisions and the remainder of the ERA. In this aspect of its decision, the Court gives valuable guidance as to how amendment acts should be reconciled with the primary act.

The *Stokes Valley* Decision

The facts in *Stokes Valley* are straightforward but they turn out to be decisive. Heather Smith was a 33 year old employee who had worked in a variety of retail positions, including at a supermarket and a chain store. In March 2007, she began work as a retail pharmacy assistant at the Ross Cook Amcal Pharmacy in Stokes Valley. Her employer was Stokes Valley Pharmacy Ltd and she worked under the supervision of Mr. and Mrs. Cook, the pharmacist and his wife. In her 2 and a half years at the pharmacy, Ms Smith developed skills in retail pharmacy and was well regarded by her employer; she enjoyed working at the pharmacy.

* Scott Worthy is Judges' Clerk, Employment Court, Wellington

[1] See, for example, the differing perspectives on trial periods in [2010] ELB 79-83. The views expressed in this article are entirely the author's own.
[2] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253.
[3] See the recent decision of *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

In August 2009, the Cooks decided to sell their business. The method of sale was that Stokes Valley Pharmacy Ltd would sell the business as a going concern to Stokes Valley Pharmacy (2009) Ltd. Stokes Valley Pharmacy (2009) Ltd was owned by both Mr. Paul Kearns and Ms. Karen King, who would operate the pharmacy, and a large pharmacy operator, Pharmacy Brands. The Cooks informed staff that, in these circumstances, there could be no certainty of ongoing employment but those employees who wished to stay on with the new company were welcome to apply to be interviewed. Ms Smith duly applied and after an interview was offered a position. She was given a letter of offer and an employment contract. Clause 10 of that employment agreement contained a trial period of 90 days which purported to be a trial provision within the meaning of the ERA 2000 as amended. The employment agreement was expressed to be not retrospective and to replace any previous understanding between the parties. Before Ms. Smith signed her employment agreement or Ms. King or Mr. Kearns took over the pharmacy, Ms. Smith had some time to consider the agreement and asked Ms. King some questions about it.

Ms. King and Mr. Kearns took over operation of the pharmacy business on 1 October 2009. Ms. Smith worked, as she normally had on that day. The next day, 2 October 2009, she sat down with Mr. Smith and, after asking some questions about the trial period, she signed the employment agreement.

Within a short time it became clear that Mr. Kearns and Ms. King were dissatisfied with Ms Smith's job performance. On 8 December 2009, Ms. Smith was informed that she was dismissed under the trial provision. Crucially, both employers declined to go into any detail about why they had dismissed Ms. Smith, apart from saying generally that Ms Smith was not what they were looking for and that she was inexperienced. Within 60 days of her dismissal, Ms. Smith's representative wrote seeking reasons for the dismissal pursuant to s 120 of the ERA, which requires reasons to be given in such circumstances. This request was declined, with Ms Smith's former employer relying on the trial period provision s 67B(5)(b) which does not require reasons to be given under s 120 when the dismissal takes place during a trial period.

Summing up the factual situation, the Chief Judge observed:[4]

> In many ways this was a not uncommon employment situation. Ms. Smith was an established and experienced retail assistant on a relatively low hourly rate of pay and very dependent on her job and earnings for her economic survival and that of her family. In employment relationships, she was on her own in the sense that she did not have access to advice from a union or from expert knowledgeable friends or family. Ms. Smith accepted at face value what she was told by her employer and was loath to challenge or otherwise rock the boat because of her vulnerable economic circumstances. ... Ms. Smith appreciated that there might be some risk in agreeing to the terms stipulated for by her employer but hoped, based on her past record, that this would be minimal and that things would work out and go well. ... Mr. Kearns and Ms. King were young recent migrants, professionally qualified in their specialist field, but inexperienced in owning and operating their own business and in the employment relations aspect of that in particular.

With these facts in mind, the Chief Judge then went on to interpret and apply the trial provisions as they stood at the time of dismissal in December 2009. Those provisions relevantly provided:[5]

---

[4] Ibid at [32]-[34].

[5] Section 67A(4) was deleted by the Employment Relations Amendment Act (No 2) 2010 with effect from 1 April 2011. Thus any sized employer may now make use of trial periods.

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 as defined in subsection (4).

(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) Employer means an employer who, at the beginning of the day on which the employment agreement is entered into, employs fewer than 20 employees.

...

67B Effect of trial provision under section 67A

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).

(4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.

(5) Subsection (4) applies subject to the following provisions:

(a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and

(b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

The effect of these provisions is to remove access to personal grievance procedures for those dismissed under a valid trial period. That trial period must be in writing, not exceed 90 days, commence at the beginning of employment and applies only to an employee who has not been previously employed by the employer. All the normal rights of employees, including the rights not to be dismissed on unlawful discrimination grounds remain, subject to the specific exemptions in s 67B. As the Chief Judge has noted:

> The new sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded.[6]

Strict Reading

In deciding *Stokes Valley*, the Chief Judge determined that ss 67A and 67B should be interpreted strictly. His Honour explained the reasoning for that decision in this way:[7]

> Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in and dismissals from employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

The Chief Judge then went to on apply a strict reading of ss 67A and 67B in two ways. First, he held that Ms. Smith was not bound by the trial period because she had been previously employed by her employer on 1 October 2009 before agreeing to the trial period the next day. In addition, the Court considered that because of Ms. Smith's retail work experience, she was not the type of employee for which trial periods had been designed. The Court suggested that this was another reason as to why Ms. Smith could not be subject to a trial period. Secondly, the Court held that Ms. Smith was, notwithstanding the exemption to s 120 provided in s 67B(5)(b), entitled to oral reasons as to why her employment had been terminated because the duty of good faith requires employers and employees to be responsive and communicative with each other.

The Chief Judge began his reasoning for applying a strict reading with a statement that employee access to a personal grievance procedure is a longstanding employee right. The personal grievance procedure in the current ERA was first introduced in a recognisable form into New Zealand law in 1973. That year's Industrial Relations Act introduced, via s 117, the concept of unjustifiable dismissal as distinct from what the common law termed wrongful dismissal. That change was significant as it broadened the ability of employees to challenge dismissals, moving away from the limitations of common law wrongful dismissal.[8] A personal grievance procedure has been carried over throughout the significant changes made to employment law since the 1970s, culminating in s 103 of the current ERA. It is also important to note that the current Act appears to abolish the common law right to sue for wrongful dismissal because s 113 of the Act provides that the only way to challenge a dismissal is through the personal grievance procedure in the Act. This eliminates any possible argument that, in limiting the personal grievance procedure through trial periods, Parliament was merely altering a statutory process that it itself invented. Because access to the personal grievance procedure is the only way to contest a dismissal in a New Zealand judicial body, it is clear that the effect of ss 67A and 67B is to remove previous and longstanding rights of access to the courts for judicial determination and relief.

The Chief Judge also stated that, because the trial provisions remove that access to justice, they should be read strictly. The principle of interpretation that express words are required before a limitation will be imposed on a citizen's access to the courts has a long heritage. Where possible,

---

[6] *Stokes Valley*, above n 2, at [83].
[7] *Stokes Valley*, above n 2, at [48].
[8] Bill Hodge "The Exaltation of Procedure" (paper presented to the Employment Law Conference, 1996) at 7-9.

courts will read down or interpret strictly such provisions so as to narrow their effect and preserve access to the courts. This is because, as Chief Justice Elias has put it, "[a]ccess to the Courts for vindication of legal right is part of the rule of law."[9] As Avory J expressed the principle in *Chester v Bateson*:[10]

> In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing less than express words in the statute taking away the right of the King's subjects of access to the Court of justice would authorize or justify it.

So, ingrained is the principle that it prompted the majority of the Court of Appeal, after referring to *Chester v Bateson*, to state that:[11]

> Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

The principle has also been employed in the Employment Court. In *Swann v ACI NZ Ltd and NZ Amalgamated Engineering Etc IUOW,*[12] the Employment Court's predecessor, the Labour Court, accepted the submission that "there is a presumption that clear and express words are required to remove a citizen's right of access to the Court."[13] In *Ngapuhi Fisheries v Taurua,* the Court decided that it could not have been Parliament's intention, at least without using clear words, to remove existing procedural rights in the transitional provisions of the current ERA.[14] Chief Judge Colgan, in his concurring judgment in *Credit Consultants Debt Services NZ Ltd v Wilson (No 4),*[15] also referred to this principle in expressing his reluctant agreement with his full Court colleagues that the Employment Court had lost its power to grant injunctions except in relation to strikes or lockouts. As this long history of the application of the principle makes clear, a strict reading of provisions with restrict access to the courts is an appropriate and necessary protection of the rule of law and the principle of legality.

My difficulty with the Court's approach comes not in the Court's decision to read ss 67A and 67B strictly but in the Court's application of a strict reading in this case. It is clear that the Court, although not stating so explicitly, gives a strict reading to s 67A(3) which defines an employee who may enter into a trial period as "an employee who has not been previously employed by the employer." After correctly concluding that Ms. Smith was not an employee as defined in the statute because she had been previously employed by the employer, albeit for one day, the Court went on to state that:[16]

> Even ignoring the legal position just determined, Ms Smith could hardly have been described as a "new" employee except in the narrow and technical sense that she had not previously been employed by the defendant company which purchased the business of her previous employer and took on many of its existing staff including her. She was 33 years of age with a history of diverse retail sales experience including, most recently, more than 2½

[9] *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [1].
[10] *Chester v Bateson* [1920] 1 KB 829 at 836.
[11] *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390 per Cooke, McMullin and Ongley JJ.
[12] *Swann v ACI NZ Ltd and NZ Amalgamated Engineering Etc IUOW* (1990) ERNZ Sel Cas 909.
[13] Ibid at 919.
[14] *Ngapuhi Fisheries v Taurua* [2002] 1 ERNZ 562 at [34].
[15] *Credit Consultants Debt Services NZ Ltd v Wilson (No 4)* [2007] ERNZ 446.
[16] *Stokes Valley,* above n 2, at [89]. However, see the Chief Judge's comment and clarification of the reasoning in this paragraph of *Stokes Valley* in *Blackmore,* above n 3, at [111]-[112].

> years working satisfactorily in the actual business that was purchased by the defendant. There is no suggestion on the evidence that there was any element of employment risk for either party of the sort that was said to be the philosophy behind the enactment of ss 67A and 67B.

The Court appears to be saying that, despite the definition of employee which excludes only previously employed employees from the operation of a trial period, Ms. Smith is not eligible for a second reason, namely that she was not, because of her retail experience; the sort of risky employee that trial periods were designed to help into the workforce. In part, that conclusion is based upon a misreading of the legislative history where the Court impermissibly equates the definition in the ERA of a trial period eligible employee with the Court's own conception of a "new employee" which the Court bases on the examples of new employees discussed in Parliament. I will come back to that point in the next section of this paper; but the conclusion is also based on giving the definition of employee a strict reading which reads down the application of the definition to exclude well qualified or experienced employees (based on the legislative purpose of trial periods), not merely employees previously employed by the same employer.

It is well to focus on the words and meaning of s 67A(3), but those words are capable of only one fair meaning and, that is, employees who were previously employed by the employer may not be the subject of a trial period. This has two effects. First, any employee who is a current employee of the employer and, already began the employment relationship, may not be subject to a trial period. This includes employees who have worked for the employer for one day, like Ms. Smith, or 30 years. Second, the definition excludes those who have worked for the employer and then left employment but who now wish to return to the same employer.

Given this clear language, the Court's attempt to further narrow the pool of employees ineligible for a trial period, thus preserving the access of those employees to the courts, is impermissible. As Lord Reid described, the principle of strict interpretation of an ouster clause in *Anisminic Ltd v Foreign Compensation Commission*:[17]

> It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

With respect to the meaning of employee, the statutory definition is reasonably capable of only one meaning. A strict reading of the definition which narrows the range of employees eligible for a trial period is not possible.

The Court itself makes the point that there must be two possible meanings for the strict meaning to be preferred when it analyses whether an employer is entitled to refuse to give reasons for dismissal to an employee terminated under a trial provision. Section 67B(5)(b) states that an employer is not required to comply with s 120 of the ERA which mandates that employers must provide written reasons for the dismissal on request within 60 days of the dismissal. The effect of s 120 is to put the employee in a position of knowing the real or purported reasons for his or her dismissal before the 90 day limit for raising a personal grievance expires. Section 120 is, therefore, an important provision that is implicated in the decision by an employee whether to raise a personal grievance at all; it is a significant part of the personal grievance mechanism. It affects both decisions about raising a personal grievance and provides a basis for an employee to argue to the Employment Relations Authority or to the Court that the dismissal was unjustified.

[17] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 170.

In interpreting s 67B(5)(b), the Court, in essence, considered that s 67B(5)(b) could have two meanings. First, it could act to exclude the possibility of an employee receiving a reason for his or her dismissal. After all, the whole point of 90 day trials is to allow an employer to dismiss an employee without risk of the employer's reasons being subject to the scrutiny of the courts which could normally occur. However, a second interpretation of s 67B(5)(b) is that it merely removes the requirement under s 120, leaving most of the other requirements of good faith including the requirement to be responsive and communicative in s 4(1A)(b) of the Act in place. The Court, applying a strict interpretation that minimised the intrusion on the rights of employees under the Act, rightly chose the second interpretation.[18] That is, because, in the case of s 67B(5)(b), there were two possible interpretations consistent with the statutory language and purpose and reasonably available to the Court.

To be clear, the Court was correct in holding that Ms. Smith was not eligible for a 90 day trial because she had been previously employed by the employer. However, despite an appropriately strict reading of the statute, the Court was incorrect to suggest that Ms. Smith's experience was also disqualifying. That construction is not a possible meaning of the statute and not a meaning open to the Court; Parliament had expressed itself well enough in its decision to debar trial periods only from those previously employed by the employer.

Legislative History

The Court in *Stokes Valley* examines the legislative history of the Employment Relations Amendment Act 2008 in detail. It does so in order to flesh out the purpose of the Act in order to comply with the injunction of s 5 of the Interpretation Act 1999 which requires that the "meaning of an enactment must be ascertained from its text and in the light of its purpose." Since the abandonment of the exclusionary rule for legislative history in 1986,[19] New Zealand courts have regularly referred to legislative history to clarify the meaning of statutes. This is both because the courts increasingly view meaning as contextual and because courts are required to address the purpose of the legislation they seek to interpret. As Justice Keith has stated: "meaning is not to be ascertained *only* from the immediate text. The surrounding law and often other material will be relevant ..."[20], and with respect to purpose, Justice Tipping, writing for the Supreme Court, has stated that:[21]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. ... Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

In discussing the legislative history, the Chief Judge focused on discerning the reasons that were given in Parliament as to why trial periods were necessary. His Honour quotes from the explanatory note to the bill, the "Bills digest" and from two passages from the Minister of Labour's speeches in

[18] This interpretation is also preferable for the reasons discussed in the third section of this paper.
[19] *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) at 701.
[20] *R v Pora* [2001] 2 NZLR 37 (CA) at [104] (emphasis original).
[21] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]-[24].

the House at the first and second readings. The quotation from the explanatory note includes the following passage:[22]

> This Bill will provide opportunities for those who might suffer disadvantage in the labour market, for example employees who are new to the workforce or returning to the workforce after some time away or specific groups at risk of negative employment outcomes.

Also excerpted is this passage from the first reading speech by the Minister:[23]

> The Bill will give … new employees the opportunities to get on the employment ladder. It will provide opportunities for those who might suffer disadvantage in the labour market — for example, employees who are new to the workforce or returning to the workforce after some time away, or specific groups at risk of negative employment outcomes.

These passages quoted by the Court are a fair reflection of the justification for trial periods given by promoters of the bill. In essence, trial periods would allow employers to take on employees who suffered from risk factors, such as inexperience, time away from the workplace or employees who had difficult personal histories. As the Chief Judge summed up the legislative history:[24]

> The new provisions in ss 67A and 67B were intended to address the circumstances of "new" employees, that is, of people who had not previously been employed or who had not been employed recently or for whom obtaining employment might have proved difficult for any other reason. The scheme of the provisions, as it was promoted, was to allow employers some latitude in engaging and dismissing new employees in respect of whom there might be some risk of compatibility or other work performance issue.

This recourse to legislative history in order to understand the purpose of the bill is both unexceptional in modern New Zealand judgments and unobjectionable.[25] However, the potential difficulties with legislative history usually arise when this parliamentary history and purpose is applied to interpreting the statute. Indeed, the application of the legislative history to the statute in this case reveals some of the inherent dangers that a court can face when using parliamentary history and, in particular, relying on parliamentary debates.

The first difficulty is that by focusing on what was said in Parliament, the court takes its eye off the statutory text. Thus, when considering whether Ms. Smith was an employee previously employed by the employer and, therefore, ineligible for a trial period, the Court in the passage I have previously highlighted above reflects on the fact that Ms. Smith was not an employee with the risk factors used in Parliament to justify the introduction of 90 day trials. Because Ms Smith had substantial retail experience and had not been out of the workforce, the Court suggests she was not the sort of "new employee" that Parliament thought trial periods would apply to and, therefore, not potentially subject to a trial period. Thus, the Court uses the legislative history to fashion an alternate meaning for the statutory definition which it then prefers on the strict reading grounds that this meaning excludes fewer employees from the personal grievance procedures.

The Court has, therefore, used legislative history in a way that strays dangerously far from the text which is being interpreted. This is highlighted by the fact that the discussion of Ms. Smith's

[22] *Stokes Valley*, above n 2, at [41].
[23] *Stokes Valley*, above n 2, at [45].
[24] *Stokes Valley*, above n 2, at [49].
[25] For further discussion of the problems of using legislative history see Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, Princeton, 1997); Johan Steyn "Pepper v Hart; A Re-examination" (2001) 21 OJLS 59.

eligibility for a trial period is headed "A "new employee"?" In fact, the phrase "new employee" appears nowhere in ss 67A and 67B and where the quotation marks arise from is uncertain. The only possibility is that this phrase is used in the legislative history quoted by the Court. However, the Court's task is not to establish whether Ms. Smith was or was not a "new employee" but whether she had been previously employed by the same employer. This error is of the type cautioned against by Justice McGrath, writing extra-judicially when he argued that:[26]

> I suggest that Judges should always be mindful that *Hansard*, along with other parliamentary materials, can be deceptively alluring in the search for purpose in order to clarify meaning. The extrinsic aid cannot carry more weight than the section itself.

This focus on interpreting "new employee" in the Court's judgment also illustrates another danger of legislative history: that parliamentary history may be false advertising. It is clear that parliamentary speeches rarely do anything to persuade members opposed to the Bill to change their minds; that is not the purpose of speeches in the House. Rather, the speeches are political and policy arguments designed for public consumption and, in the case of government members, are made to justify the contents of the Bill. Thus, the government argued that trial periods would only apply to "new employees" as a way to sell the Bill irrespective of the precise words of the statute. Similarly, Part 6A of the Act, which provides that some employees may transfer to a new employer after restructuring, was justified as a necessary protection of "vulnerable employees." In fact, the employee transfer provisions do not apply to "vulnerable employees" but to *all* employees who provide services of the type listed in Schedule 1A of the ERA regardless of their individual pay or conditions.[27] Courts must be careful when cross-checking text with purpose that they are not taken in by potentially misleading political labels such as "new employee" or "vulnerable employee".

The cross-checking of purpose and text is meant to allow purpose and text to inform each other, not for one to overwhelm the other. Courts must disenthrall themselves of any notion that parliamentary history can subsume the text. I would suggest that such caution is particularly appropriate in employment law where the Act contains some lacunae that the Court must do its best to fill in, and examination of purpose and legislative history can be useful sources for interpretation. Parliamentary materials can, therefore, be an important guide in an area of law where sometimes the signposts are few and far between. As Jeffrey Goldsworthy has argued, the literal meaning of a provision is much less substantial than a meaning fleshed out by evidence of intention.[28] However, parliamentary materials must be used carefully and as part of a holistic approach to interpretation which relies, in the end, on the words of the statute, their statutory context and their purpose as gleaned from the statute and its legislative history.

The third difficulty with the use of legislative history that *Stokes Valley* exemplifies is what Professor Jim Evans has described as the danger of "confusing the meaning of the Legislature with its views about application."[29] The passages of legislative history cited by the Court lead the Court to the conclusion that the legislative purpose of trial periods was to allow employers to take on risky employees, that is, employees who may have had a difficult or non-existent employment history, employees who were returning to the workforce or employees who had no relevant work experience. Trial periods were to allow this employee to get a foot in the door and demonstrate his or her capabilities. The Court then takes this purpose as informing the meaning of the trial period provisions. However, that political justification and the related examples of benefitting employees

---

[26] John McGrath "Purpose, *Hansard*, Rights, and Language" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 227 at 231.
[27] *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44 at [52].
[28] Jeffrey Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 185 at 191.
[29] Jim Evans "Controlling the Use of Parliamentary History" (1998) 18 NZULR 1 at 26.

do not require a meaning of s 67A(3) which exempts experienced employees from being subjected to trial periods. In suggesting that this is the case, the Court is confusing the examples of the application of the Bill stated in the House with its meaning. As I have argued, the definition of employees exempted from trial periods is clear; the application examples do not define the meaning of the definition, but merely provide examples of its effect. There is no other meaning of previously employed by the employer available and, in the context of the remainder of ss 67A and 67B, the language is unambiguous.

The fact that the meaning of the s 67A(3) definition of employee sweeps wider than the examples given in the House is not surprising if the purpose of trial provisions is correctly understood. As a focus on the text of ss 67A and 67B makes clear, the purpose of those provisions is to exempt employers from the personal grievance procedures in relation to employees who have not been previously employed and who are, therefore, not known to the employer. The purpose of the provisions is to remove the risk that an employee will be unproductive or unsatisfactory for the employer and the associated risk that the employee will contest his or her dismissal. The examples of risky employees given in the House are consistent with this purpose. The examples themselves, however, are not the same thing as purpose or meaning. Interpreted as they must be in light of the text and the purpose, trial periods may be agreed between employers and employees who have not been previously employed and are, therefore unknown, to the employer. While the House may have given examples of risky employees to justify trial provisions, the effect of those provisions is much broader and more than just risky employees may have trial provisions in their employment agreements.

Again, it is important to point out that the Court's decision to have recourse to legislative history is correct. Such history can provide valuable context to the interpretive task. However, as I have argued, legislative history must be carefully used and its limits well qualified.

Relationship of Trial Provisions to the Remainder of the Act

This discussion and elucidation of the purpose of the trial provisions highlights the fact that the ERA has been frequently amended by governments of various political hues and will likely be so again. The Act itself is the latest in a long line of legislative attempts to regulate employment relationships which have ranged from periodic revolution to tinkering with New Zealand's employment law. These acts have each had their own philosophical approaches and purposes. What the recent amendments to the ERA indicate is that, within the same piece of legislation, different parts of the Act may have different purposes. These purposes could even be seen as conflicting with the purposes of other parts of the Act.

In itself, this would not cause any immediate theoretical difficulty. Section 5 of the Interpretation Act 1999 allows for the meaning of an enactment to be interpreted from the text and in light of its purpose. Thus, as in *Stokes Valley*, the meaning and purpose of an enactment is to be obtained from the text of the amending Act and the parliamentary material relating to that amending Act. Such an approach respects the right of Parliaments to make changes to Acts which reflect the different perspective of the new Parliament. Equally, however, once an amending Act is passed, its meaning draws context from the surrounding Act which presumably embodies the purposes of the original legislation. This is consistent with s 23 of the Interpretation Act 1999 which provides that an "amending enactment is part of the enactment that it amends." As the English Court of Appeal has noted: "[W]hat is to be looked at is the amended statute itself as if it were a free-standing piece of

legislation and its meaning and effect ascertained by an examination of the language of that statute."[30]

In the area of employment law, philosophical and ideological differences that lead to changes to employment law can be relatively stark. At the beginning of this paper, I noted that trial periods were controversial. It can be expected that a change in government would likely lead to their abolition and future governments may then act to reinstate them. At the present time, trial periods sit somewhat uneasily with the requirements of the Act for employees and employees to act in good faith in all aspects of their relationship and for employers to justify both procedurally and substantively their decision to dismiss an employee. It could be said that the purposes of the remainder of the Act which, in the main, place significant burdens on employers and closely regulate employers to address the inherent imbalance of power between employer and employees are not consistent with the trial period provisions. These internal contradictions as to purpose may make reconciliation of the meaning of the statute peculiarly difficult.

In *Stokes Valley*, the Court carefully relates the provisions of the trial periods to the remainder of the Act. As I have noted, the Court concluded that, despite trial period employers being exempt from the requirements of s 120, Ms. Smith had a right to an explanation of the reasons for her dismissal based on the duty of good faith. This gave effect to the good faith duties which pervade the Act. In part, this is justified by an appropriately strict reading of the provision which affects the ability of an employee to access the personal grievance procedure. However, notwithstanding a strict reading, this interpretation of the Act is justified because it reflects the continuing and significant obligations that exist despite the trial period exception. As s 67B(4) states, an employee whose employment agreement contains a trial provision has all the rights of any other employee except with respect to the two matters referred to in subsection 5. While the purpose of the trial provisions was to remove the risk for employers of being subject to the personal grievance procedures in the first 90 days of employment, the text makes clear that good faith duties of communication remained in place and trial employees are generally to be treated no differently than other employees. It is notable that ss 67A and 67B make reference to other provisions of the Act and this is a clear indication that Parliament intended the trial period provisions to sit alongside and interact with existing provisions in the Act. In this respect, *Stokes Valley*'s careful elucidation of the effect of an amending act on existing rights and duties under the principal act is a model as to how to interpret future amending legislation in ways which resolve any potential tension between the old and the new.

Conclusion

Appropriately, in this employment law context, the legal philosopher, Andrei Marmor, has described courts working to interpret statutes as employees carrying out their duty in good faith for their employers, the legislature. Thus, it is possible to see that, in a "moral-political sense, to some extent courts do work for the legislature, and thus, indirectly, for all of us."[31] Of course, it would be unwise to push this analogy too far, and perhaps detrimental to the rule of law to do so. In many respects, courts act more like guardians of the law than employees of the legislature and this is especially so when the courts restrain executive action and the executive's interpretation of the law.[32] As the recent Supreme Court decision in *Hamed v R*,[33] which excluded evidence in some prosecutions related to the Urewera raids demonstrates, courts can be inconvenient employees.

[30] *Inco Europe Ltd v First Choice Distribution (a firm)* [1999] 1 All ER 820 at 823.
[31] Andrei Marmor *Law in the Age of Pluralism* (Oxford University Press, New York, 2007) at 204.
[32] Sian Elias, Chief Justice of New Zealand "Fundamentals: a constitutional conversation" (Harkness Henry Lecture 2011, University of Waikato, Hamilton, 12 September 2011).
[33] *Hamed v R* [2011] NZSC 101.

However, Marmor is on to something when he points out that at "some point [courts] must act like a good employee when instructions have run out: use your own judgment and solve the problem [of statutory interpretation] as best you can."[34] After all, it *is* the function of the courts to say what the law is and, in this respect, it is not too far-fetched to describe courts as acting as an agent of the legislature. In *Stokes Valley*, the Employment Court was faced, for the first time, with new legislation which was complex and substantially affected employee rights. It appropriately resorted to legislative history to create context and purpose for the text and to a strict reading to preserve rights. The decision to use both approaches was correct and protective of both parliamentary sovereignty and individual rights.

The criticisms in this paper have focused on the way legislative history and strict reading were applied. In particular, I have argued that there is no alternative meaning to the definition of employees eligible for a trial period and a strict reading of that definition is impermissible. I have also argued that the Court strayed too far from the text in interpreting the definition and confused the meaning of the statute with the examples of its application envisioned by members of Parliament. I have suggested that when courts make use of legislative history, as they should when interpreting statutes, they must be careful to contextualise parliamentary materials in a way which does not undermine the text of the statute. Cautious, but appropriate use of legislative history can illuminate text and purpose. However, this paper has highlighted the limits of reasoning from legislative history and argued that recourse to parliamentary materials is not a straightforward exercise but a complex dance between parliamentary and statutory texts, purpose and meaning.

At the same time, I have noted the valuable lessons of *Stokes Valley*. The case provides guidance as to how to reconcile amendments to an act with the remainder of a principal act. *Stokes Valley* is also an example of a court acting to strictly read the provisions of an act in a way protective of existing legal rights. Finally, it should be noted that the Court got it right in *Stokes Valley*. Ms. Smith was not eligible for employment under a trial period because she had already been previously employed by the employer. In that conclusion, the Court was itself acting as a good employee faithfully reflecting the parliamentary intent of the legislature and the purpose and meaning of the statute. We can all be grateful that we have such an independent, effective and judicious court as *our* employee.

[34] Marmor, above n 31, at 204.