



90 Day Trial Periods; a disadvantage

A recent case in the Employment Relations Authority considered an issue that had been previously addressed in one of the first 90 day trial period case; **Smith v. Stokes Valley Pharmacy** (See The Advocate, Issues 180, 187 and 202). In the **Smith** decision the Court considered, among other things, the effect of a trial period on the s.4 good faith obligations, stating that s.4 good faith obligations still apply and that the balance of good faith duties under s.4 tend to favour a requirement on employers to give explanations as to the reason for the termination of employment at the time of giving notice.

In **Singh v. Ora HQ Ltd** April 2016, the Employment Relations Authority came to consider the effect of a specific trial provision. Ms Singh was employed and subsequently dismissed after 78 days of employment. All parties accepted that she was working under a valid 90 day trial provision.

The Employment Relations Authority determined that while Ms Singh was not entitled to pursue a personal grievance in respect of her dismissal, she was entitled to raise a grievance about whether she was unjustifiably disadvantaged before her dismissal.

Under s.67B(5) of the Employment Relations Act the employer, because they were dismissing under a trial period, was not required to provide the employee with information and an opportunity to explain before the decision was made to dismiss.

Ms Singh however challenged the conduct of the employer before the decision to dismiss was made, and the Employment Relations Authority determined that the employer's good faith obligations applied to this period:

"That duty required both her and Ora to be productive, communicative, active and constructive in maintaining a productive employment relationship. Both parties were required not to do anything likely to mislead or deceive the other."

Clause 28.6 of Ms Singh's employment agreement (the Trial Period provision) included the following:

"The Employer is not required to give you reasons for your dismissal but, in good faith, will advise you as early as practicable if the trial period is not going well."

Section 4(1A)(b) of the Act requires:

"(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; "

Ms Singh pursued a personal grievance of unjustified disadvantage on the basis that her employer had not been active, constructive and communicative in telling her that her trial period was not going well.

The Authority found that Ora's contractual obligation to advise Ms Singh 'as early as practicable if the trial period is not going well' was:

"Akin to the requirement referred to at s 103A(3)(b) of the statutory test for the employer to raise any concerns with the worker before [dismissing or] taking any action [against the employee]."

"[20] The statutory test put the onus on Ora to establish what it did was justified. To satisfy that onus Ora had to have sufficient, reliable evidence to persuade the Authority that, more likely than not, Ora had met its general good faith and particular contractual obligations to advise Ms Singh about any concerns over her progress or performance during the trial period."

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

Contact Details:

Ground Floor

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Neil McPhail

Email neil@mgz.co.nz

Mobile 0274 387 803

Raewyn Gibson

Email raewyn@mgz.co.nz

Mobile 0274 387 802

Peter Zwart

Email peter@mgz.co.nz

Mobile 0274 367 757

Ora stated that they had so advised Ms Singh. Mr Wood, her manager had told her, one month into the trial that her employment was 'on the line' and had suggested ways she could improve her performance.

The Authority found that this advice was provided in the context of 'doing what she did better in order to be successful in the company, not that her trial period was not going well'. The Authority found that the evidence of the employer did not establish "to the necessary evidential standard (of being more likely than not) that Ms Singh had negative aspects of feedback about her work sufficiently highlighted so that she would have known or should have known that her trial period was "not going well". Ora had not given her the early advice, as soon as it was practicable to do so, of any such view."

This failure was held to be to her disadvantage because it "denied her the opportunity to properly understand and to attempt to remedy any perceived shortcomings in her work or how she carried it out. The omission was more than a minor defect of process because it deprived Ms Singh of the opportunity or chance of doing more or working differently in order to change perceptions of her work and how she did it. The result was she was treated unfairly."

"Ora, having made the contractual commitment it made to Ms Singh to provide her with early advice if her trial period was "not going well", could not fairly and reasonably have failed to do so. The disadvantage to her was consequently unjustified."

Ms Singh claimed lost wages, lost benefits and compensation for hurt and humiliation. The Authority held that as:

"The disadvantage related to a breach of a contractual term, an assessment of damages was arguably open on a loss of an opportunity basis. However it would have required a calculation of the chances, in the counterfactual scenario of Ms Singh being given early advice as promised, that she would then have altered aspects of her work and how she did it that would have then changed Ora's eventual decision to dismiss her. On the evidence available it was not feasible to make such an assessment. Neither was it necessary to do so given the award, explained later in this determination, of a penalty to be paid to her for the breach. The penalty addressed the harm done so no further remedy in damages was needed."

The Authority correctly determined that there could be no award for lost wages, going on to state that there was a further argument that the dismissal, which could not be challenged by law as unjustified, broke the causal chain for any subsequent loss of wages.

Similarly claims for loss of benefits; a bonus and paid parental leave, were held to be the result of the decision to dismiss rather than the disadvantage so were not compensatable.

Ms Singh claimed compensation for hurt feelings. Her evidence however related directly to the shock etc that she felt as the direct result of her dismissal and how it happened.

"They would be relevant to an award of distress compensation if she was found to be unjustifiably dismissed but such a claim and such a finding was not open to the Authority because Ms Singh, dismissed under a valid trial period, could not bring a personal grievance in respect of the dismissal."

"What she did experience was related to her dismissal, not her established disadvantage grievance, so no award of distress compensation could be made."

The Authority did however award a penalty for breach of good faith and breach of the employment agreement, totalling \$7,000.00.

It held that the failure to advise as early as practicable that the trial was not going well was a breach of good faith because "such an omission was likely to mislead her about the true situation. Ora was liable to a penalty under s 134(1) of the Act for the breach."

The factors for consideration of a penalty include consideration of the harm caused by the breach, the importance of deterring the employer and others from similar breaches and the employer's culpability. More specific matters include the seriousness of the breach, whether it was repeated, the impact on the employee, the employee's vulnerability and remorse of the breaching party.

The Authority determined that because she was on a trial Ms Singh was particularly vulnerable, the information would have improved her prospects of ongoing employment and the harm was therefore serious. The breach was found to be repeated because there were numerous opportunities through the period of employment for her to have been 'put in the picture'.

A significant penalty was therefore provided, all of which was paid to the employee.

Although the outcome of this decision relates specifically to the words used in the clause, it is of significance to all employers. Firstly, trial period clauses should be carefully drafted. Equally important however is the fact that this case emphasises the good faith obligations that will apply irrespective of the fact that there is a valid trial period. Employers must not breach the good faith obligations. That means they must be open and communicative and they must not mislead or deceive.