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More 90 Day Trial Period Woes

Further to Issue 187 of "*The Advocate*", which outlined the implications arising from the first Employment Court determination dealing with trial periods (***Smith v. Stokes Valley Pharmacy***), a recent decision of the Employment Court – ***Blackmore v. Honick Properties Limited*** [2011] NZEmpC 152, has reinforced its earlier judgment in respect to restrictions to an employer's ability to rely upon a trial period provision to terminate employment; particularly if the individual employment agreement containing the trial period was not signed prior to the employee commencing employment. The Court also reached the conclusion that the employer had not complied with the legislative obligations for bargaining for an individual employment agreement specified in s.63A of the Employment Relations Act 2000.

The Court heard detailed evidence of both the nature of pre-employment discussions and also the way in which the employer presented the individual employment agreement to the employee for signing and reached the following conclusions:

1. The employee was able to pursue an unjustified dismissal claim, despite the fact that he had signed an individual employment agreement which contained a trial period provision; and

2. The employer had not complied with section 63A(2) of the Employment Relations Act 2000 which provides that an employer **must do** the following when bargaining for an individual employment agreement:

   "(a) provide to the employee a copy of the intended agreement under discussion; and
   (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
   (c) give the employee a reasonable opportunity to seek that advice; and
   (d) consider any issues that the employee raises and respond to them."

The relevant facts in this case involved a formal offer of employment being made to the employee by way of letter dated 5 October 2010. The letter of offer outlined a number of terms and conditions of employment and also provided "*If you are happy with the content of this letter, please sign below as acceptance of this offer. Upon acceptance of this position a Federated Farmers Employment Contract will be filled out outlining the above conditions."*

This letter did not contain any reference to the proposed 90 day trial period and the employee had no knowledge of the *"Federated Farmers Employment Contract"* at the time of accepting the offer of employment by way of an email of 10 October 2010.

The employee resigned from the position he occupied at the time and worked out one month's notice before starting work at the employer's Waimiha property at 7.00 am on 15 November 2010. Shortly after 8.00 am on the first day of work the employer provided the employee with a copy of the proposed individual employment agreement. The Court identified the following facts surrounding the signing of the individual employment agreement:

"[14] There was no negotiation about the intended employment agreement. Mr Mathis simply pointed out to Mr Blackmore the essential contents of the agreement and got the latter to initial most of the changes that had been made to the template agreement in handwriting by Mr Mathis. Mr Mathis did not advise Mr Blackmore that he was entitled to seek independent advice about the intended agreement. Nor did he give him a reasonable opportunity to seek that advice. Clearly, also, Mr Mathis did not consider any issues that Mr Blackmore raised and respond to them, both because Mr Blackmore did not do so but also because he had no opportunity to seek independent advice about the intended agreement that may have raised for consideration such issues and responses to them.

[15] There was no discussion between Mr Mathis and Mr Blackmore about the 90 day trial period included expressly in the agreement. Mr Mathis was anxious for Mr Blackmore to begin work. He told him that there was much to be done on the farm that day and conveyed to him the impression that the employment agreement should be signed so that Mr Blackmore could get on with farming work."

The Court noted at that time the employee had already *"burnt his proverbial bridges by resigning from his previous employment and moving his family to a new farm . . . he did not know what the consequences would be for him and his family if he either declined to sign the agreement presented to him that morning, or even insisted upon his statutory right to obtain independent advice about it. Mr Blackmore feared that if he took such a course he might then be dismissed just after he had started work."*

The Court found that in these circumstances the employee "*made the reluctant election to sign the employment agreement. . .".*

On 31 January 2011 the employer gave the employee two weeks' notice that his employment would not be continued after the end of the 90 day trial period.

Trial Period

In determining that the trial period was not valid the Court referred to its previous decision in the ***Stokes Valley*** case and reiterated that for an individual employment agreement to contain a valid trial period provision the individual employment agreement must be entered into before the employee has begun work for the new employer.

On the facts before it in the present case the Court stated:

"[42] The argument for Mr Blackmore in this case is stronger than it was for Ms Smith in the Stokes Valley Pharmacy case. That is in the sense that before her employment began, Ms Smith was offered a draft or proposed written individual employment agreement which contained a trial period clause. She had an opportunity to consider that and to obtain advice about it which she took. It was the execution of that agreement after employment had started which was problematic (indeed fatal) for the employer in Stokes Valley Pharmacy.

[43] In this case, by contrast, Mr Blackmore had no such opportunity to consider, take advice on, or negotiate the draft or proposed employment agreement containing a trial period. It was first presented to him for acceptance that day, after his employment with HPL had commenced.

[44] I conclude that when he executed the individual employment agreement containing the trial provision period, Mr Blackmore was an existing employee of HPL and, therefore, as set out in s 67A(3), was an employee who had been employed previously by the employer. Mr Blackmore was not, therefore, by the special definition of 'employee' in subs (3), an employee able to enter into an employment agreement containing a trial period provision as set out in s 67A(1). "

The Court also went further and determined that Mr Blackmore had become an employee on 10 October 2010, when he had accepted the employer's offer of employment:

"[48] In accordance with the definition of employee in ss 6 and 5 of the Act, Mr Blackmore became an employee of HPL on 10 October 2010 when he was offered, and accepted, employment with HPL. . .

[49] But even at the very latest, his employment commenced for all purposes at 7 am on 15 November 2010, also before the individual employment agreement containing the trial period provision, was entered into. Although in a way that was different factually from that of the employee in the Stokes Valley Pharmacy case, Mr Blackmore was likewise an employee who had been employed previously by HPL when the employment agreement containing the trial period provision was entered into."

In reaching this decision the Court rejected the premise that the effect of its judgment would place an *"unduly onerous obligation on an employer"* and provided the following practical advice to employers in this regard:

"This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement have been settled, and the agreement has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of commencement of work."

Unfair Bargaining

In regard to the issue of compliance with s.63A of the Employment Relations Act 2000, the Court held:

"[79] HPL did not give Mr Blackmore the statutory opportunity to consider, take advice about, and then to discuss or negotiate the terms and conditions of the individual employment agreement including the 90 day trial period.

[80] Although Mr Blackmore completed an acknowledgement that he had taken this opportunity, that is clearly not so. Mr Mathis was anxious for Mr Blackmore to start work on that morning — there were important tasks to be done on the farm that day. Mr Mathis wanted the agreement signed and this formality concluded. It does not matter that Mr Blackmore might not then have protested and demanded his statutory right to a reasonable period for consideration of, and advice on, the employment agreement. In the circumstances, it was understandable that he did not do so.

[81] However, the law requires more of an employer than an employee should acknowledge that such an opportunity has been provided. The obligation on an employer is to give that opportunity even if the employee may appear to wish to sign the agreement immediately without taking it and, unlike here, freely."

Therefore the common practice of requiring employees to sign an acknowledgement that they have had the opportunity of seeking independent advice will be worthless if in fact that acknowledgement does not reflect the reality.

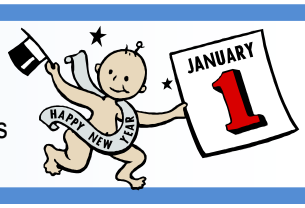
The Court provided further practical advice to employers in respect to the length of time which should be allowed for an employee to seek independent advice:

". . . the law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend upon the circumstances of the case. However, realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like), fulfil the employer's statutory obligations."

In summary this case addresses the need for employers to ensure that in bargaining for an individual employment agreement that they are acting in compliance with the provisions of the Employment Relations Act 2000 and further must ensure that an employee signs an individual employment agreement which contains a trial period provision **before** becoming an employee (i.e. before there is an offer and acceptance). Any offer of employment should therefore be expressly conditional upon the employee's agreement to the terms and conditions of a written individual employment agreement, in respect of which they are given a reasonable opportunity of seeking advice prior to signing.

Welcome Back to Work !

We trust you have all had a relaxing festive season. We wish you all the best for a prosperous New Year and look forward to providing you with assistance.



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