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THE ADVOCATE

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# Employee Protection Provisions Revisited

In our September 2009 issue of ñ*The Advocate*ò we referred to the case of ***Hoyte v Hapag-Lloyd (NZ) Ltd*** 8/8/08 an Employment Authority decision which highlighted the need for an employer to comply with its own employment agreement containing an employment protection provision (EPP). An EPP must contain a process that the employer is required to follow in the event of restructuring. This includes negotiating with a new employer about restructuring to the extent that it relates to affected employees. Additionally it includes negotiations as to whether employees will transfer to the new employer on the same terms and conditions of employment. The process to be followed to determine what entitlements, if any, are available for employees who do not transfer to the new employer must also be addressed.

The requirements of such a provision are set out in s.69OJ of the Employment Relations Act 2000. The Act does not however set out the consequences of failing to comply with the section.

Another case concerning the issue of compliance with s.69OJ of the Act is that of ***Pulp & Paper Industry Council of the Manufacturing & Construction Workers' Union v Norske Skog Tasman Ltd*** 26/8/08, initially heard in the Employment Relations Authority. The issue was whether by compliance order, the employer should be prevented from progressing its intended restructuring until the parties agreed on an EPP provision in its proposed collective employment agreement. The employer wanted to restructure the wood processing part of its papermaking operation. Extensive discussions had taken place regarding the EPP in the course of negotiations over a period of 18 months however agreement had not been reached. The union and its members declined to participate in the restructuring consultation process saying that restructuring could not proceed until an EPP had been agreed.

The Authority concluded that Parliament had not deliberately omitted a sanction for non-compliance with s.69OJ, but had inadvertently overlooked the consequences of non-compliance.

The Authority determined that it was implicit in s.69OJ that a restructuring could not proceed unless and until the employment agreements of the affected employees contained EPPs. The Authority made a compliance order requiring the parties *"to negotiate until such time as they comply with s.69OJ. Until an EPP is agreed the respondent is not to implement its proposed restructuring".*

This decision was appealed by the respondent and the matter proceeded before the court by way of a hearing de novo. A full court was convened and a judgment was handed down on 9/12/09. The Court found, for a variety of reasons, that ñ*the failure to provide a sanction for non-compliance with s.69OJ is equally consistent with deliberation as it is with inadvertence".*

The Court agreed with the submissions of Norske Skog that the content of the relevant provisions of the employment agreement said to contain the statutory requirements of an EPP was the important factor, and not the fact they were not labelled EPP. It was found however, in this instance, that the employment agreements did not contain an EPP as required by s 69OJ.

It further determined that Norske Skog was entitled to progress its restructuring as it had given a *"very fair and generous undertaking as to how it will conduct its restructuring. Indeed, if the undertaking were to be translated into the terms and conditions of an EPP agreed between the parties, we consider that it would fulfil more than adequately the statutory requirements for an EPP."*

The decision must be treated with particular regard to the fact the employer had provided very full and detailed undertakings as to its future conduct regarding negotiations which allowed the court sufficient comfort that the employees would be adequately protected.

## Another Milestone !

On 8 March 2010 McPhail Gibson & Zwart Ltd have been in business for 15 years. We would like to take this opportunity to thank our clients for their ongoing support and we look forward to being of assistance for another 15 years . . . (at least !!)


## Review of Part 6A of the Employment Relations Act 2000

The Department of Labour is currently seeking submissions in regard to a review of Part 6A of the Employment Relations Act 2000. Part 6A provides a framework for continuity of employment where an employer's business undergoes restructuring and the work of employees is assigned to a new employer. In particular it affects industries where work is often contracted out, such as cleaning, food and laundry services. Submissions close on 15 March 2010. If you require assistance in preparing submissions or would like us to address any specific issues in our MGZ Ltd submissions please contact Amanda Munting-Kilworth on 03 365 2345 or email amanda@mgz.co.nz

# 90 Day Trial Period v Probationary Clause

Pursuant to s67A of the Employment Relations Act, employers with less than 20 employees are able to utilise the 90 day trial period.

Several conditions are to be met with regard to a trial provision :

- It is for a specified period not exceeding 90 days
- It is for an employee who has not previously been employed by the employer
- The employer, on the day the agreement was entered into, employs fewer than 20 employees

During the trial period the employer may dismiss the employee and the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

A trial provision does not prevent an employee from bringing a personal grievance or legal proceedings on any of the following grounds:

- Unjustifiable action by the employer leading to the employee's disadvantage
- The employee has been discriminated against
- Sexual harassment of the employee
- Racial harassment of the employee
- The employee has been subjected to duress in relation to membership or non-membership of a union or employees organisation
- The employer has failed to comply with a requirement of Part 6A (EPPs).

S67B(4) of the Act specifies that 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 a trial provision that has ceased to exist, subject to the following:

- in observing the obligation of dealing in good faith with the employee, the employer is not required, in making a decision whether to terminate an employment agreement, to provide the employee with access to information relevant to the continuation of the employees' employment, relevant to the decision, nor to provide an opportunity to comment before the decision is made and further
- the employer is not required to comply with a request for a statement of reasons for dismissal under s120 of the Act.

While a trial period allows for termination of the employment agreement without scrutiny as to the reasons for termination, a recent decision appears to suggest that care must be taken by the employer. This sent alarm bells ringing in recent media coverage.

In the Authority decision of ***Nicole Schneider v BBX Distribution PTY Ltd as agent for BBX Management Ltd*** (now Barter Management (NZ) Ltd) 20/01/2010 Member P Montgomery stated *"The 90 day trial period does not exempt an employer from the duty of providing the opportunity for an employee to be heard when dismissal is contemplated."*

The 90 day trial provision applies only to employment agreements entered into after 1 March 2009. The Authority acknowledged it clearly did not apply in this instance as the parties entered the employment relationship on 26 January 2009. It is possible that the Authority may have mistakenly referred to a trial period when in fact the matter centred around a three month **probationary** period. The reference to providing an opportunity for the employee to be heard in relation to a 90 day trial period does not appear to be in line with the express provisions of the Employment Relations Act 2000.

A **probationary** period (s.67 of the Act) in comparison can be utilised by small and large businesses alike. Such a provision has the benefit of flexibility as to the term of the probationary period. In some instances a particular role demands a longer period than the next and it is important that an employment agreement reflects this.

Like a 90 day trial period a **probationary** period must be specified in writing. Failure to do so entitles the employee to treat the provision as ineffective. An employer is however required to comply with the requirements of procedural fairness when dismissing an employee during or at the conclusion of a probationary period.

The object of a **probationary** period is to assess an employee's suitability for a role and to assist an employee in succeeding in the role. A probationary period is in fact performance management. Currently the minimum requirements of the employer are:

- Fair warning: an employee must be informed whether or not their performance is up to the standard required by the employer;
- An obligation to communicate concerns it has about the employee's shortcomings;
- An obligation to supervise and review performance.

Thus, obligations of good faith and procedural fairness exist in relation to a **probationary** provision. Such a provision provides the basis for clear guidelines for performance management of an employee in the early stages of employment.

**Summary:**

If an employer fits the specified requirements (set out above) which allows the use of a trial provision this is a useful option. Given that the introduction of the 90 day trial period is relatively new, and therefore case law is limited, we would advise that it is good management practice to communicate fully with any employee under a 90 day trial provision as to any shortcomings of the employees performance and to where practicable provide assistance to the employee to meet performance/conduct expectations.



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