

The “Pre-employment Test” or Work Trial

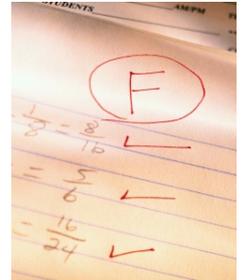
An issue that arises from time to time is whether a person who carries out a work trial is actually an employee or simply ‘trying out’ for a job. Issues like this become even more complicated if any money changes hands between the employer and the prospective employee.

In a recent Employment Relations Authority case, *Hussein v. Otahuhu Community Pharmacy Ltd*, the grievant, Ms Hussein, claimed to have been unjustifiably dismissed from the pharmacy. The pharmacy in turn claimed that Ms Hussein was never an employee.

The facts were as follows:

1. Mr Atia (pharmacy owner) sought to obtain a subsidised employee through WINZ.
2. A work broker (Mr Prasad) at WINZ advised that a suitable person (Ms Hussein) with beauty therapy and massage skills, was registered with WINZ.
3. Mr Prasad interviewed Ms Hussein regarding the pharmacy role, but did not discuss any terms and conditions of employment because he was waiting for subsidy calculation forms to be completed by Mr Atia.
4. Mr Atia agreed to interview Ms Hussein, and was advised by Mr Prasad that Mr Atia could give Ms Hussein a pre-employment test as part of the interview process.
5. Mr Atia interviewed Ms Hussein, expressed some concerns about her work history, discussed his plans for the pharmacy (including offering massage and beauty therapy) and, after a further discussion with Mr Prasad (during which Mr Prasad urged him to give Ms Hussein a pre-employment trial) asked Ms Hussein to return the following day for a pre-employment test as part of the interview process. This was later disputed by Ms Hussein.
6. No discussion took place about terms and conditions of employment.
7. Ms Hussein returned the next day, carried out some duties in the pharmacy but avoided serving customers. Ms Hussein later confirmed to the Authority that she suffered from a social anxiety.
8. Mr Atia decided to test Ms Hussein’s massage skills by requesting her to massage his neck. He then indicated to her that her massage skills were poor and that he expected her beauty therapy skills would be similarly poor and he would not employ her.

9. Ms Hussein denied that Mr Atia said he would not employ her, but agreed that Mr Atia had said her massage skills were ‘bullshit’ and stated that she had felt insulted by him.



10. Mr Atia said that when he had advised Ms Hussein she had not passed her pre-employment test, Ms Hussein asked him for \$30 for food shopping. Mr Atia said he agreed to pay the money when Ms Hussein became agitated.
11. There appeared to be an agreement that Ms Hussein would return on a further occasion to complete some vacuuming she promised to do in return for the \$30 however she elected not to return, and claimed that she had been dismissed.

In its determination, the Authority considered whether Ms Hussein was ever an employee as defined by the Employment Relations Act 2000:

[41] In deciding whether Ms Hussein was employed by the Pharmacy, I apply s 6 of the Act which provides:

“s 6 Meaning of employee:

- (1) *In this Act, unless the context otherwise requires, employee —*
 - (a.) *Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
- (2) *In deciding ... whether a person is employed by another person under a contract of service, the ... Authority- ... must determine the real nature of the relationship between them.*
- (3) *For the purposes of subsection (2) ... or the Authority-*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the parties*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship ”*

[42] In s 5 of the Act a person intending to work is defined:

“Person intending to work means a person who has been offered and accepted, work as an employee; and intended work has a corresponding meaning.”

[43] Fundamental to both sections 5 and 6 of the Act is the concept of offer and acceptance. Applicants for a position have been held to be outside the scope of the personal grievance procedures. As stated by Judge Shaw in *Hayden v Wellington Free Ambulance Service*: "... it is intended that relief available under the Act is only available where a person has actually been employed on settled terms and conditions"

[44] In *Weal v Leusen Holdings Ltd t/a Heather-lea Rest Home* the then Chief Judge Goddard stated:

"An employment contract, in common with every other kind of contract, displays certain basic characteristics. There must be an offer by one party to the other and an acceptance by that other. Moreover, that acceptance must be communicated to the party making the offer."

The Authority went on to find that there were no settled terms and conditions of employment during the first interview for the role, and therefore no offer and acceptance.

The Authority next considered the events surrounding the pre-employment test itself and again decided that in this setting there were no settled terms and conditions of employment agreed to between the parties. It considered the \$30 payment to be *"in the nature of an ad hoc payment made to an independent contractor"*. It also found there was no agreement on hours of work and further, that Mr Atia had informed Ms Hussein that he would not be offering her a job. Finally, it found that there had been no confirmation of whether a subsidy was available, nor had Ms Hussein informed WINZ that she had accepted an offer: It then went on to find:

"[55] Having considered: "the real nature of the relationship" between Mr Atia and Ms Hussein in accordance with s 6(2) of the Act, I find that in the complete absence of settled terms and conditions of employment there had been no offer and acceptance, and indeed no evidence of contractual intention or certainty to support the existence of an employment contract between Ms Hussein and Mr Atia.

[56] I determine that Ms Hussein was not an employee of the Pharmacy.

[57] As I have determined that Ms Hussein was not an employee in accordance with the Act, Ms Hussein is unable to pursue a personal grievance claim and I am unable to assist her any further."

This case demonstrates the complexity of the issues surrounding pre-work trials as part of a recruitment process. Clearly, such trials are permissible, however they should be clearly documented, of short duration and if any payment is to be made it should be in the form of reimbursement for tangible costs such as travel expenses (and as above, the reason for the payment documented). Lack of clarity around pre-employment work trials can leave the employer exposed to a personal grievance from a dissatisfied applicant.

Training: Employment Relations Practice Course



Our next Employment Relations Practice Course has been set down for **Tuesday 9 and Wednesday 10 April 2013**.

Places on this course are strictly limited. Details in regard to the course can be found on our website - www.mgz.co.nz/training. If you wish to book a place for this course please contact us.

Increase to Minimum Wage

New minimum wage rates come into effect on **1 April 2013**.

The **adult minimum wage** will increase from \$13.50 to **\$13.75** an hour before tax.

The **training and new entrants'** minimum wages will increase from \$10.80 to **\$11.00** an hour before tax (or 80 percent of the adult minimum wage).



KiwiSaver Minimum Contribution Increase



Employee contributions:

From 1 April 2013, the minimum employee contribution rate increases from 2% to 3% for all members. This change will require employers to increase the level of payroll deduction for employees who are currently contributing at the 2% rate.

Compulsory Employer contributions:

Similarly from 1 April 2013 the minimum employer contributions to KiwiSaver accounts also increases to 3%. This will require employers to increase their contributions (except where already contributing at or above 3%).

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.

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