MGZ | mcphail gibson & zwart ltd

THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 284

November 2018

A Win and a Loss for Trial Periods

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

A recent case that was reported widely in the media raises interesting and novel issues about 90 day trials. The case ***Roach v. Nazareth Care Charitable Trust Board*** was heard in the Employment Court in Christchurch.

Mr Roach was offered a job as Business Manager on 16 June 2016. The parties subsequently agreed an employment agreement containing a 90 day trial provision. He was due to start on 10 October 2016. Subsequent to signing the agreement he was offered an alternative position as General Manager of Nazareth Care. He signed a second employment agreement on 6 September 2016 which also contained a 90 day trial period and a start date of 10 October 2016. Mr Roach never started the role of Business Manager and did not perform any of its duties or responsibilities. He started work as the General Manager on 10 October 2016. On 28 November 2016 Mr Roach was called to a meeting and dismissed in reliance on the 90 day trial period provision in his individual employment agreement and paid in lieu of notice.

Mr Roach challenged the dismissal firstly arguing that his second employment agreement as General Manager did not contain a valid 90 day trial period provision because when he signed the agreement he was already an employee, having been previously engaged by Nazareth Care as Business Manager. He said he therefore fell within s.67A(3) Employment Relations Act which precludes a trial period provision where an employee has been '*previously employed by the employer*'.

An '*employee*' is defined in s.6 of the Act as including:

". . . (ii) a person intending to work; … "

A '*person intending to work*' is further defined in s.5 as meaning:

"a person who has been offered, and accepted, work as an employee; and intended work has a corresponding meaning".

Put simply, Mr Roach argued that because he had an employment agreement as Business Manager he was an employee. Therefore, he argued, his second agreement, as General Manager could not contain a valid 90 day trial provision. In this he relied on the earlier decisions of ***Smith v. Stokes Valley Pharmacy (2009) Ltd*** and ***Blackmore v. Honick Properties Ltd*** 2011 (both of which have been considered in earlier issues of the Advocate [Issues 187 and 202]) which established that a trial period provision that is signed after the employee started work was not valid because they were already an employee when the agreement was signed. Mr Roach also relied on the more recent decision of ***Kumara Hotel v. McSherry*** [2018]. In that case the hotel created a new position of Operations Manager and invited Mr McSherry by email to apply for it. The email contained basic terms and conditions of employment, but no 90 day trial. Mr McSherry replied accepting the offer. He was subsequently provided with and signed a written employment agreement containing a trial period. He then started work. Soon after Mr McSherry started the Chef resigned and he temporarily replaced the Chef. Within the 90 days he was advised he would be dismissed as Operations Manager under the trial period but advised that he could stay on as Chef.

The Court held that:

"Once the parties have entered into a binding employment agreement the employee is employed by the employer for the purposes of s 67A. The corollary of that is that the employer is then precluded from seeking to rely on a 90-day trial period provision contained in a subsequent agreement, whether entered into before or after work actually commences."

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 **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

Contact Details:

Level 2

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Raewyn Gibson
E: raewyn@mgz.co.nz
M: 0274 387 802

Peter Zwart
E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

It was determined that Mr McSherry became an employee when he accepted the offer of employment because he became a person intending to work, and the hotel could not therefore rely on the subsequently signed employment agreement containing the trial period.

In the Nazareth Care case, Mr Roach drew a comparison with the McSherry decision, stating simply that at the time that he signed the agreement as General Manager, he was already an employee; it was immaterial, he argued, that he never '*worked*' as Business Manager, just as it had been for Mr McSherry.

The Court did not accept this argument, relying on the purpose of s.67A(3) which is the provision which defines the word '*employee*' in the context of trial periods as an '*employee who has not been previously employed by the employer*'. S.67(2)(a) provides for a 90 day trial period *'starting at the beginning of the employee's employment'.*

The Court held that:

"[45] . . .An interpretation of s 67A(3) that is consistent with s 67A(2)(a), . . . means that what is being referred to by an employee having been "previously employed" is where there has already been an opportunity to assess the employee's suitability for the work. . ."

And

"[46] . . . Mr Roach's employment status immediately before signing the General Manager's agreement, is that he was an employee for a limited purpose but not otherwise. He could pursue a personal grievance for unjustified dismissal if the offer of employment had been withdrawn but, once work started, could not do so during the trial period.

[47] It follows that I accept Nazareth Care's submissions that s 67A(3) does not apply because Mr Roach had not been previously employed. The result is that Mr Roach was not an employee who had been previously employed by Nazareth Care at the point in time when he signed the employment agreement as a General Manager and subsequently started work. Nazareth Care was, therefore, entitled to offer him an employment agreement as General Manager containing a trial provision which took effect from the beginning of his work on 10 October 2016."

The General Manager's agreement therefore contained a valid trial period.

However as an alternative, Mr Roach argued that even if the trial period provision was valid, he was not given proper notice because the wording of the trial period provision precluded payment in lieu of working notice. At the time of dismissal, Mr Roach was told that he would be paid one week's pay in lieu of notice and he left the workplace immediately. S.67B refers specifically to notice during the trial period allowing employers to terminate "*by giving the employee notice of the termination*".

His employment agreement provided for unusual notice provisions, stating:

"In the event that the Employer terminates the employment agreement for a reason other than serious misconduct, the Employer reserves the right to:

a. Require the Employee to cease working and make payment to the Employee in lieu of providing notice.

b. Require the Employee to undertake alternate duties."

It further stated:

"During the trial period, the Employer's normal notice period does not apply. Instead, either the Employee or the Employer may end this agreement by giving 1 week [sic] notice before the trial period ends. The Employer might decide to pay the Employee not to work. For serious misconduct, the Employee may be dismissed without notice."

Mr Roach argued that the provision provided for paid leave, it did not allow for dismissal followed by a payment. Relying on the decision ***Farmer Motor Group v. McKenzie*** claiming that the reference to notice in s.67B(1) of the Act means 'the contractual notice in the employment agreement' and that because the trial provisions remove a fundamental right to bring proceedings (see ***Stokes Valley Pharmacy)*** this must be interpreted strictly. The Court accepted this argument and found that Mr Roach was summarily dismissed:

"[60] . . . Mr Roach was summarily dismissed and there is no suggestion that any grounds existed for doing so. Nothing in cl 3.2 or cl 3.3 allowed for this type of dismissal. Clause 3.3 comes the closest, where it refers to the employer deciding to pay the employee not to work. That phrase, however, is at best ambiguous. I consider the clause requires notice to be given and that it can be followed by garden leave but it does not authorise cessation of employment and payment in lieu. Had the parties intended for payment in lieu to be available during the trial the agreement could easily have said so. . ."

Nazareth Care did not comply with the notice provisions and therefore could not rely on the 90 day trial provision, he was therefore unjustifiably dismissed.

The particular notice provisions in this agreement were unusual. The message however is that when terminating in reliance of a 90 day trial period the employer must be particularly vigilant to ensure that they follow the notice provisions within the employment agreement.

Similarly while the factual scenario of this case is also unusual, the effect of this case and the earlier ***McSherry*** decision means that employers should take care around any offer of employment where they intend to use a 90 day trial period. If in doubt, seek assistance before making an offer of employment.