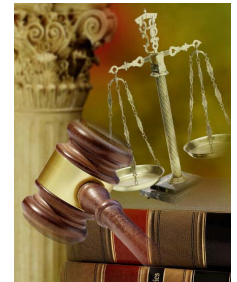


TRIAL PERIOD CASE – EMPLOYMENT COURT DECISION



Heather Smith v Stokes Valley Pharmacy (2009) Limited [2010] NZEMPC 111 WRC 14/10

This case is the first to come before the Employment Court for consideration of ss 67A and 67B of the Employment Relations Act 2000, and it deals with interpretation of the trial period provisions.

By way of background, the plaintiff had been employed by a Mr and Mrs Cook at Stokes Valley Pharmacy for two and a half years before they announced the sale of their business.

The new owners Karen King and Paul Kearns were to be half share owners in the business with a large industry body known as Pharmacy Brands. King and Kearns indicated that they wished to continue the existing employment relationship with the plaintiff. She was interviewed for, and subsequently offered a position on 14 September 2009 which was similar to her existing position.

On 29 September she received the new employer's draft employment agreement. Meanwhile the Cooks had remained her employer under the previous employment agreement until the new owners took over on 1 October 2009.

Between 30 September and 2 October Smith's stepmother went through the proposed employment agreement with her and pointed out the inclusion of a 90 day trial period clause.

On 2 October Smith and Kearns met to discuss the employment agreement and sign it. Having raised a concern about the trial period Smith was reassured that it was simply a standard provision in all of their employment agreements. Reassured by this and assuming that her job was to be safe Smith signed the agreement.

In due course the defendant became dissatisfied with the performance of Smith and on 8 December 2009 King and Kearns advised Smith that she was to be summarily dismissed pursuant to the 90 day trial period. When asked for a reason, this was refused, other than a general statement that she was not what they were looking for and was inexperienced.

When Smith's representative sought reasons for the dismissal pursuant to s.120 of the ERA 2000 this was refused in reliance on s.67B(5). The matter was taken to the Employment Relations Authority where it was removed to the Employment Court for hearing at first instance to address the interpretation and application of ss67A and 67B of the Act.

Sections 67A and 67B are as follows:

67A When employment agreement may contain provision for trial period for 90 days or less

1. *An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer as defined in subsection (4).*

2. *Trial provision means a written provision in an employment agreement that states, or is to the effect, that:-*

- a) *for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and*
- b) *during that period the employer may dismiss the employee; and*
- c) *if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal*

3. *Employee means an employee who has not been previously employed by the employer*

4. *Employer means an employer who, at the beginning of the day on which the employment agreement is entered into, employs fewer than 20 employees*

5. *To avoid doubt, a trial provision may be included in an employment agreement under: –*

- a) *section 61(1)(a), but subject to section 61(1)(b)*
- b) *section 63(2)(b).*

67B Effect of trial provision under section 67A

1. *This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether termination takes effect before, at or after the end of the trial period.*
2. *An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.*
3. *Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).*
4. *An employee whose employment agreement contains a trial period 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 contains a trial provision that has ceased to have effect.*
5. *Subsection (4) applies subject to the following provisions:*
 - a) *in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section and*
 - b) *the employer is not required to comply with e request under section 120 that relates to terminating an employment agreement under this section.*

Are you required to give a reason for the dismissal?

It would appear so. The Court chose to adopt a strict interpretation of the trial period provisions as the sections were viewed by the court as removing longstanding employee protections and access to dispute resolution.

Section 67B(2) disqualifies an employee from bringing a personal grievance or legal proceedings in respect of the dismissal. Access to bring an unjustified disadvantage claim under s103(1)(a) is still available as well as grievances arising from alleged discrimination, sexual and racial harassment and other similar more specific grievances under s.103.

The Court stated that although subsection (4) provides that an employee is precluded from bringing a personal grievance for unjustified dismissal, they may nevertheless expect no lesser treatment than would an employee whose employment agreement contains no trial provisions.

It was stated by the Court that the effect of s67B(5)(a) therefore is to relieve an employer only from providing the employee with information about the decision relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made. Other s.4 good faith obligations remain applicable.

In relation to section 67B(5)(b) in the view of the Court this only precludes what would otherwise be the requirement to give reasons for dismissal in writing when subsequently and formally called upon to do so. It does not preclude an employer being asked and being obliged to provide an explanation for dismissal at the time of giving notice to conclude a trial period.

What the Court appears to be saying is that s4 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 such explanations at the time of giving notice.

[78] *“ To refuse to give an employee being dismissed otherwise lawfully, any explanation about why that is happening, is not only inconsistent with the statutory obligation to be ‘responsive and communicative’ but is arguably the antithesis of that requirement of good faith behaviour between parties in the employment relationship. This obligation is unaffected by ss 67A and 67B.”*

[81] *“So whilst an employer is not obliged to notify an employee of the employer's proposal to end the employee's employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee seeking and being entitled to receive an explanation for the dismissal at the time when notice of it is given.”*

[82] *“ Interpreting the section 67A and 67B obligations strictly and against the removal of rights of access to justice I consider that an employer, upon giving notice of termination of an employment relationship in reliance on s 67B, is not entitled in law to refuse to give an explanation for such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead or deceive the employee”.*

Was Ms Smith a ‘new employee’ as required by s67A(3)?

The Court held that that when the written employment agreement was entered into, Ms Smith had been previously employed by the defendant, albeit for a short period. Immediately before 1 October 2009, Ms Smith was employed by the Cooks. As from the start of business on 1 October 2009, Ms Smith's employer was the defendant company.

In the absence of agreement to any new, additional or alternative terms of her employment on that first day, her previous terms and conditions of employment continued to be the basis of her new contract with the defendant until varied according to the written agreement executed on 2 October.

The Court held that she was not, therefore, an ‘employee’ as defined in s 67A. She was an existing employee and therefore one whose circumstances were not covered by s 67A. The trial period was therefore not one in compliance with s 67A. The benefits to the employer of a trial period, including its ability to dismiss the employee within the first 90 days of employment without risk of challenge by personal grievance, were not available to it.

Was the un-executed employment agreement binding?

As with most contracts, and employment agreements the Judge concluded that the parties did not intend that they would each be bound by the draft written agreement unless and until that was executed by the writing of their signatures. Colgan J stated, *“The application of signatures, in this case, and generally, signifies both mutual agreement to the written provisions and a solemn intention to be bound by them.”*

In addition there was absence of reference to retrospectivity and therefore the Judge does not accept that the employer's draft form of the employment agreement established the agreed terms and conditions as from 29 September when she received it, or as from 1 October when she began work for the defendant.

The interpretation of the trial provisions led the Court to conclude that plaintiff is not precluded from bringing her personal grievance claim for unjustified dismissal.

What we can take from this decision is that when dismissing an employee in reliance on a trial period provision, if asked for the reason for dismissal, it would be prudent to be mindful of the good faith obligations required by s4 of the Act, and offering more information than a cursory *“it hasn't worked out”*. Also the parties must have entered into the agreement before employment formally begins. If you require any assistance with a dismissal you may be facing please do not hesitate to contact us to discuss the best approach

Post – Earthquake

As the clean up continues and businesses are looking to return to operation you may find, as an employer, that you are required for example, to make decisions about health and safety matters, granting sick leave/annual leave, varying working hours and/or duties, requiring employees to work from home, or possibly having to make employees redundant.

If you have any concerns that you wish to discuss, please do not hesitate to call a member of the MGZ team.

