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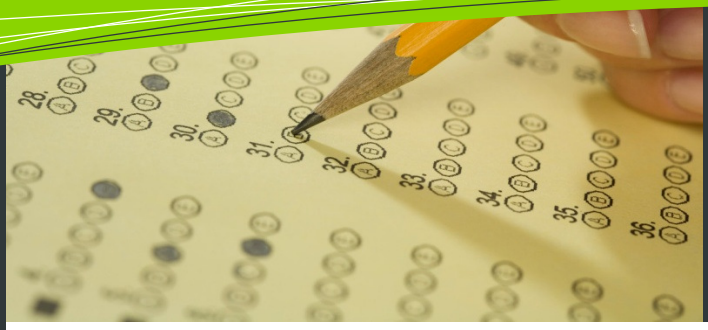
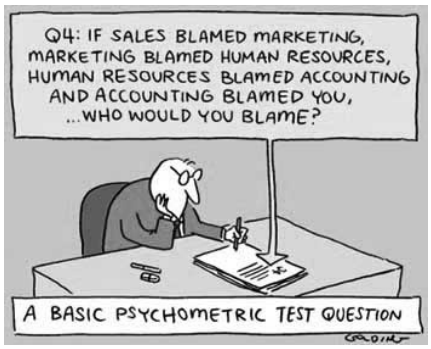


Client Services:

- 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

Redundancy Selection - Objectivity a Must

The recent case ***Gilbert v. Transfield Services (New Zealand) Limited*** ([2013] NZEmpC 71) is well known for its criticism of the use of psychometric testing in selecting employees for redundancy. The Court held that such testing amounted to *". . . taking into account irrelevant criteria (psychometric and personality type testing designed for potential new employees where none was in that position)."*



However, another significant factor in finding the redundancy dismissal unjustified in that case was the Court's finding that the company also ignored relevant criteria - skills and experience – when making its decision.

Transfield was required by the terms of its collective agreement to take into account "*skills and attributes*" of its employees:

"46.6 The Company reserves the right to select Employees for redundancy on the basis that it retains Employees who by reason of skills and attributes are, in the Company's opinion, necessary for continuing operations."

Interpreting this clause, the Court said:

"[103] I conclude as a matter of interpretation that the collective agreement's reference to "skills and attributes" included employees' technical skills. Again, it was not open to the company to re-interpret this document unilaterally and decide that such skills would play no, or even a lesser, part in the assessment of employees for redundancy purposes. . . ."

Unfortunately, Transfield did not include technical skills in its selection criteria, to the Court's displeasure:

"[121] Whilst it is surprising that health and safety skill and knowledge were removed from the initial pool selection criteria, the discounting of employee technical skills (which was acknowledged by Mr Evans and Ms Leon) was contrary to cl 46.6 of the collective agreement. Although Ms Leon may or may not have been correct when she asserted that "Employees can always be trained in technical skills and therefore this was no longer a differentiator between employees", the collective agreement did not permit Transfield to simply ignore its requirements in this way and, I have to say, for less than impressive reasons."

While this case interpreted a specific clause in a collective agreement dealing with selection for redundancy, the Court appears to go further than that in making the following finding:

"[142] Again, Ms Service is right in principle that subjective assessments in such an exercise of redundancy selection have a place. This Court so found in Bourne v Real Journeys Ltd. But neither did the collective agreement permit, ***nor can a redundancy selection process be a fair and reasonable one, if it is based entirely on the subjective assessments of the managers who designed and operated it.*** *Objectively assessable and provable criteria were also a part of the process. So, too, were the consideration of relevant, and the rejection of irrelevant, criteria in that assessment."*

There were a number of other factors at play in the ***Transfield*** case that led to a finding of unjustified dismissal, including a failure by the company to provide sufficient information to the employee in terms of the good faith provisions [s.4(1A)] of the Act, as determined in the ***Wrigley*** case (see *The Advocate* Issue 196).

However, the Court's general view on selection means that employers must now closely examine their selection processes in redundancy situations and ensure that these include both objective and subjective criterion for selection.

And whatever you do, make sure it is a more robust system than that reported in ***Jinkinson v. Oceania Gold*** [2010] NZEmpC 102 where the scoring system adopted by the employer was:

"Score each category on a scale of 1 (shit) to five (legend)."

That case also resulted in an unjustified dismissal due to flawed selection processes and other failures.

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 **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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Considering a Work Trial? Forget it !!

Up until now, the '*work trial'* has been a relatively commonplace event, allowing a brief assessment of a potential employee without the complications of employment. Anecdotally, it has been in common usage in the retail, food and beverage service industries. In '*The Advocate'*, Issue 216, we reported on a case where the Employment Relations Authority upheld the validity of such a trial, then in Issue 217 a further case where the trial was held to constitute employment, and its ending an unjustified dismissal. The employer in the latter case appealed the Authority's decision and now the Court in ***Salad Bowl Ltd v. Howe-Thornley*** [2013] NZEmpC 152 has determined the matter.

In brief, Howe-Thornley trialed for work with the employer, for several hours over two days. When the employer became suspicious that Howe-Thornley had taken $50 from the till, she concluded the trial, by way of text message. Howe-Thornley received no payment for the trial but on completion she had been allowed to make herself a free salad.

The Chief Judge of the Employment Court found against the employer on several fronts. Firstly, he held that Howe-Thornley expected to be remunerated for the trial (and did receive non-monetary reward by way of a free salad) and therefore could not be called a '*volunteer'* under the Employment Relations Act 2000. He then went on to find an employment relationship existed between Howe-Thornley and the Salad Bowl:

"[51] Was the defendant "a person intending to work" and therefore an employee? The evidence establishes that she had been offered, and accepted, work as an employee, even if this was for as short a period as several hours as was the plaintiff's original intention for the employment trial, and then followed by a period in which the plaintiff's assessment of the defendant's candidacy would be considered and its decision communicated to the employee. More than that, the defendant performed work for the plaintiff that contributed to its commercial enterprise.

[52] I conclude that the parties were employee and employer during the work trial period and up until Ms Howe-Thornley was dismissed by text message."

The Chief Judge next considered whether the employment was of a fixed term nature under s.66 of the Act, and if so whether it was a valid fixed term agreement because such an agreement cannot be used to determine the suitability of an employee for permanent engagement pursuant to the Employment Relations Act:

"[77] For the foregoing reasons I conclude that Ms Howe-Thornley was engaged by the plaintiff in employment of fixed duration, the ending of which was to be the communication to her of its decision whether she would be engaged as a permanent employee. Because of that employment agreement's non-compliance with s 66, its fixed term, which would have precluded the defendant from access to the personal grievance procedure, is not effective. In these circumstances Ms Howe-Thornley was, in law, an employee of indefinite duration (a permanent employee) who was dismissed by the plaintiff."

On this basis she was entitled to bring a personal grievance, and (not surprisingly given the method of dismissal) was found to have been unjustifiably dismissed.

The Court's decision effectively rules out such trial, with the Court stating that the appropriate way to handle such issues is the 90 day trial period provisions [s.67A and 67B of the Act]:

"[106] The enactment by Parliament of ss 67A and 67B of the Act, together with the prohibition on suitability for employment being a valid ground for a fixed term agreement under s 66, may mean that if a potential employer wants to "try out" a potential employee, that person may have to be engaged as an employee on a trial period of appropriate duration under s 67A. Although this would require greater compliance costs on the part of both parties, such an arrangement would offer some protections to the employee during the trial period but would also enable the employer to conclude that the employee is unsuitable for the position and to terminate the arrangement without the risk of an unjustified dismissal personal grievance."

This, of course, has its complications, as there will need to be a good faith bargaining for an employment agreement prior to employment and associated time and cost issues, for what may be a very short term of employment. Nevertheless, the old style of work trial should not now be utilised in view of the Chief Judge's decision.