



## Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
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## More Trouble with Trial Periods

A recent determination of the Employment Relations Authority has continued on with the strict interpretation, applied by both the Authority and the Employment Court, in respect to the validity or otherwise of trial period provisions.

In *Du Plooy v. Lighthouse ECE Limited* [2016] NZERA 282 the Authority was determining the validity of the trial period provision included in Ms Du Plooy's individual employment agreement which provided:

### **"15.0 Trial period**

15.1 A trial period will apply for a period of ninety (90) days ('the Trial Period') under s 67A Employment Relations Act 2000, to assess and confirm the suitability of the Employee for the position.

15.2 During the Trial Period, the Employee and Employer will deal with the other in the good faith. However, the Employer may terminate the employment relationship on one (1) week's notice and the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of a dismissal."

It was argued on behalf of Ms Du Plooy that the trial period provision did not meet the requirements of s67A of the Employment Relations Act 2000 (the Act) because it did not specify the starting date of her 90 day trial, contrary to the requirement of s67A(2)(a) of the Act.

The employer maintained that the trial period provision met the requirements in s 67A of the Act because the commencement date of employment was set out in a schedule to the employment agreement so it was clear the parties intended for the trial period to begin at the commencement of Ms Du Plooy's employment.

In this regard the individual employment agreement provided:

*"The commencement date of employment is: 22 November 2015."*

In determining whether the trial period provision could be relied upon by the employer to "deprive Ms Du Plooy of the right to bring a dismissal grievance against it", the Authority examined the requirements of s.6A(2) of the Employment Relations Act which provides:

*"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."

The Authority determined:

1. *"Clause 15 does not make any reference to the date on which the 90 day trial period commences. It does not cross reference to the commencement date recorded on p.17 of the employment agreement, although it was open to it to have done so."*
2. *"Clause 15.1 does not expressly state that the trial period starts at the beginning of Ms Du Plooy's employment. It is therefore necessary to decide whether or not the reference in clause 15.1 to the fact that the trial period "will apply for a period of 90 calendar days" meets the requirement in s 67A(2) that the clause is "to the effect" that it starts on Ms Du Plooy's first day of employment."*
3. *"I find that it does not reasonably imply that the 90 days starts on the first day Ms Du Plooy starts work for Lighthouse."*

## 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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In reaching these conclusions the Authority held:

*“The Employment Court in Smith v Stokes Valley Pharmacy [1] made it clear that a strict interpretation should be given to s 67A because it deprives an employee of the right to invoke the personal grievance provisions in the Act in certain specified circumstances. . .*

*[24] I consider that the failure of clause 15.1 to specify when (or include words to that effect) the trial period was to start means that Ms Du Plooy was not effectively advised of the date on which the trial period would commence.”*

Consequently the Authority determined that the employer was precluded from relying on the trial period provision and therefore the employee was able to pursue a personal grievance for unjustified dismissal.

## Transgender ‘Transition’

A recent Employment Relations Authority determination concerning a transgender woman who worked as a hairdresser, determined that the employer’s conduct, after the employee told her employer that she had decided to transition to a woman, was such that the employee’s claim of constructive dismissal was upheld. The Authority determined that during a meeting on 14 April the employer raised the following concerns with the employee’s ‘transition’:

- 2.1 “Safety issues” which arose from the employer’s belief that they could not stop clients having negative feedback about the employee’s transition, “making adverse comments or engaging in blokey banter” that may upset or offend the employee.
- 2.2 The employer’s concern that the employee’s decision to live as a woman may make clients uncomfortable.
- 2.3 That the employer did not see the employee’s transition as “fitting with the commercial profile of the business”.
- 2.4 The employee told the employer that “she could not be somewhere where she couldn’t be herself, Mr Swan asked her if she wanted to resign.”

The Authority determined:

*“[28] I find that this is not a situation where Ms Hemmingson freely or voluntarily resigned. I accept Ms Hemmingson’s evidence that she felt she had no choice but to resign because of what had been communicated to her during the 14 April meeting.*

*[29] Ms Hemmingson had been told by her employer that:*

- a. her transition would make clients uncomfortable;*
- b. she had to be able to see that clients would be uncomfortable;*
- c. her transition created “safety concerns” in the workplace;*
- d. it believed it could not keep her safe at work because adverse comments were likely to be made by its clients;*

*e. her transition was not ‘on brand’ and/or was inconsistent with the brand message and image;*

*f. her transition meant she no longer fitted the commercial profile of the business;*

*g. if her transition did not work out she could come back to work if she presented as her male persona. . .*

*[34] I consider that telling Ms Hemmingson that her transition was not going to work for the business, that her gender identification meant she was not on brand and no longer fitted the commercial profile for the business, that her transition created safety issues, that her employer was concerned about her safety at work, that she must understand how clients would be uncomfortable and that she would likely also be uncomfortable, all created a situation where Ms Hemmingson reasonably felt she had no option but to resign.”*

The Authority determined that the way in which the employer dealt with the employee’s disclosure of her transition amounted to a fundamental breach of trust and confidence. The employer approached the situation with a pre-determined view that the employee’s decision to transition did not suit the business and the employee did not have a fair or reasonable opportunity to talk through the issues. When the employee told her employer that she was unable to continue acting as a man to attend work, the employer asked her if she wanted to resign. This effectively gave the employee no choice but to leave work immediately.

The Authority reiterated that “An employer does not have to use the words “you are dismissed” for there to be a dismissal in law. The situation Mr Swan created led to Ms Hemmingson’s employment ending.”

In finding the employee had been unjustifiably dismissed the Authority ordered the employer to pay the employee lost remuneration of \$3,248.00 and an \$11,000.00 compensatory sum, making it an expensive lesson for the employer in this unusual case.