



Trial Periods on Trial - Again!

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- General advice in relation to all employee-related issues
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There has recently (15 August 2017) been another Employment Court determination, **Farmer Motor Group Limited (FMG) v. Adam McKenzie**, [2017] NZEmpC 98, which determined that the termination of employment in reliance upon a trial period provision was unjustified. This determination has again emphasised the strict compliance which is required with both the legislative and contractual provisions concerning trial periods.

This case involved a challenge of an Employment Relations Authority determination, which held that the notice provisions contained within the trial period provision in the individual employment agreement which required "written notice" had not been complied with. On this basis the Authority determined FMG could not rely upon the trial period provisions in the Employment Relations Act because it had not provided "notice," as required by the trial period provisions of the Act.

The factual findings of the Authority's determination, as follows, were not in dispute before the Court:

1. Mr McKenzie, the employee, had arrived late for work on 11 March.
2. The employee's supervisor, Blair Woolford had talked to him about why he was late and also mentioned some concerns as to how the employee had carried out his work during the previous 3 days.



3. Mr Woolford advised Mr McKenzie that as a result of these concerns and Mr McKenzie's lateness on 11 March, that he had concluded that Mr McKenzie was unsuitable for permanent employment.
4. Mr Woolford then told Mr McKenzie that his employment was being terminated under the trial period provision, that his dismissal was effective immediately and that Mr McKenzie would be paid his salary entitlement for the notice period, in lieu of him working out those four weeks.
5. Mr McKenzie left the workplace on that day and did not return again.
6. On 16 March, which would have been the usual pay day if Mr McKenzie was still at work, FMG paid him four weeks salary and his holiday pay entitlement.
7. Mr McKenzie had signed his employment agreement before starting work with FMG. The trial period provision in the applicable individual employment agreement provided as follows:

"Trial period

- 5.1 *The Employee is to serve a trial period for 90 days from the beginning of the Employee's employment. During that trial period the Employer may dismiss the Employee and, if the Employer does so, the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal."*

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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8. The notice provision in the individual employment agreement provided:

"Termination of Employment

35.1 ... [T]his agreement may be terminated by either party on not less than **four weeks' notice in writing** to the other party.

35.2 The Employer must have grounds for termination of employment in accordance with New Zealand law. This does not alter the effect of, and is subject to, any trial provision in this agreement.

35.3 **If the Employer is terminating on notice under this or any other clause, the Employer is entitled to pay the Employee in lieu of all or part of the required period of notice or to at any time require the Employee not attend work for all or any part of the notice period.**

The Authority determined that the trial period provision in the individual employment agreement (outlined above) complied with the requirements of sections 67A and 67B of the Employment Relations Act however held that the notice given to Mr McKenzie by the employer did not comply with the notice requirements in the employment agreement because the individual employment agreement required that notice be given in "**writing**". Consequently the Authority determined that as FMG did not comply with the contractual terms, it could not rely upon the trial period to prevent Mr McKenzie from pursuing a personal grievance claim of unjustified dismissal. It is this aspect of the Authority's determination which was the subject of challenge to the Employment Court.

The Court identified that the issue which it was required to determine was whether Mr McKenzie was prevented from pursuing a personal grievance for unjustified dismissal due to the trial period provision in his individual employment agreement **or** whether because of the failure to give written notice, the dismissal in reliance upon the trial period provision was not valid and consequently the employee is able to pursue a personal grievance claim.

In reaching a decision that Mr McKenzie was able to pursue a personal grievance claim the Court determined the following:

1. Termination of employment for an employee on a trial period is required to be on notice in accordance with S.67B of the Employment Relations Act.
2. If an employer chooses to summarily dismiss an employee (i.e. to terminate without notice), that employer cannot rely upon the 90 day trial period provision to prevent an employee taking a personal grievance claim for unjustified dismissal.

3. Payment in lieu of notice could not be regarded as a substitute for the requirement to give written notice which was expressly provided for in the applicable individual employment agreement. The Court noted:

"[29] Payment in lieu is not an alternative to providing notice whether oral or written as the agreement provides, but simply an alternative to the employer requiring the employee to work out the period of notice which is given."

and

"[31] In the present case it is clear that the parties have established the method of giving notice which must be in writing. There is nothing in the statute which entitles the parties to abrogate that requirement. . . ."

4. The Court again emphasised that trial period provisions would be the subject of strict interpretation:

"[30] I agree with the analysis made by the member of the Authority in this case in reliance on both Smith and Modern Transport Engineers that the 90-day trial period provisions removed a fundamental right to bring proceedings for an unjustifiable dismissal and accordingly must be given strict interpretation both in respect of the statutory provisions applying and the contractual provisions. That was the primary principle enunciated by Chief Judge Colgan in Smith and it prevails in this case."

Therefore it will be essential that in addition to complying with the legislative requirements of the Employment Relations Act, that all contractual obligations are met when terminating an employee in reliance on a trial period provision. This Employment Court determination has emphasised that strict compliance with the contractual notice provisions will be required to be given to terminate the employment of an employee on a trial period.

However the Court has also indicated that provided notice is given in accordance with an employment agreement it may in some circumstances then be open to make a payment in lieu of notice. However we would suggest that you seek advice before acting in this manner.

Given this latest determination you may also wish to review the notice requirements in your employment agreements to ensure you are aware of your obligations in this regard.