Legal Torque

FIRST EMPLOYMENT COURT DECISION ON 90 DAY TRIAL PERIOD

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As many of you will have heard, the Government has decided to extend the 90 day trial period to all employers. Currently only employers with fewer than 20 employees can hire employees on a trial period. As of 1 April 2011 that will be extended so that any employer can take advantage of the 90 day trial period.

The significance of having a trial period is that an employer can dismiss an employee within that 90 day period and the employee is not entitled to pursue a personal grievance in relation to the dismissal. They can still pursue a personal grievance in relation to discrimination or disadvantage though.

We have now had our first Court decision involving a trial period provision. The case was *Smith v Stokes Valley Pharmacy (2009) Limited*. By way of brief background, Heather Smith began working as a retail pharmacy assistant at Ross Cook Amcal in the Wellington suburb of Stokes Valley in March 2007. In 2009 the business was sold with the new employer, Stokes Valley Pharmacy (2009) Limited, taking over the business on 1 October 2009.

Ms Smith was offered a job with the new employer and she was given a draft employment agreement on 29 September 2009. What was highly relevant was that Ms Smith began working with her new employer on 1 October 2009 without having signed the agreement. She signed the agreement on 2 October 2009.

Within a relatively short period of time, her employer became dissatisfied with her performance and in December she was summarily dismissed. When Ms Smith attempted to bring proceedings for unjustified dismissal, the employer raised as a defence the trial period provision.

The Employment Court held that the trial period clause in the employment agreement was not valid and that the employer was not entitled to rely on it, the reason being that when Ms Smith signed the agreement on 2 October she was already an employee, albeit for a short period (one day). As Ms Smith was an existing employee the trial period did not comply with the provisions of the Employment Relations Act which provides that the trial period can only apply where an employee has not previously been employed by that employer. On 2 October when Ms Smith signed the agreement, that was her second day of work so she was already an employee. Ms Smith was therefore not barred from bringing her personal grievance claim for unjustified dismissal.

This decision is hugely significant. In our experience many employers do not require their employees to sign the employment agreement before they actually commence work. Based on the Employment Court's decision in this case, if an employee does not sign their employment agreement before commencing work then the trial period provision will be of no effect.

The other important aspect of the decision was in relation to how the obligation to act in good faith fits with the trial period provisions.

Ms Smith had in that case requested from her employer the reasons why she was being dismissed. The Court held that while an employer is not required to notify an employee of their proposal to terminate the employee's employment or to offer the employee an opportunity to comment on any such proposal, this does not preclude an employee from seeking and being entitled to receive an explanation for the dismissal at the time when notice of it is given.

Accordingly, if an employee asks for a reason why their employment is being terminated then the employer must provide it in good faith. The Court observed that significant obligations of good faith remain on employers.

With the trial period provisions being extended to all employers, it is important that employers and employees are aware of the requirements for a valid trial period provision.

For more information on this topic please feel free to contact Cathy Bormans of Fortune Manning direct dial number 09 915 2412.

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