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WHEN DOES A 90-DAY TRIAL PERIOD START?

Until now, it has been generally assumed that a 90-day trial clause must state a date when the trial starts. A decision of the Employment Court (*Watts & Hughes Construction Limited v De Buyzer [[2019] NZEmpC 116); 04/09/2019])*, just released, gives more clarity.

Mr de Buyzer signed an employment agreement with Watts & Hughes on 13 December 2016 and started work on 9 January 2017. He acknowledged that he had been informed he was entitled to seek independent advice about the agreement before he signed it, and that he had a reasonable opportunity to do so.

On 25 March 2017 he was advised in writing that his employment would end on 3 April 2017 under the 90-day trial provision of his agreement.

The trail clause in question reads:

> *"3 Trial period*
>
> *3.1 The Employee's employment is subject to a Trial Period of 90 days in accordance with S 67A of the Employment Relations Act 2000.*
>
> *3.2 The Employer may terminate the Employee's employment during the Trial Period. If the Employer does so the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*
>
> *3.3 One week's notice will be given to an Employee dismissed during or at the end of the Trial Period. In respect of any dismissal occurring within the 90-day trial period the Employer will act in good faith and be open and communicative with the Employee."*
>
> (Emphasis added.)

Mr Be Buyzer raised a personal grievance, and the Christchurch Employment Relations Authority found that Watts & Hughes could not rely on the clause because it did not state when the trial period was to commence. The dismissal was therefore unjustifiable, and Mr De Buyzer was awarded compensation.

Watts & Hughes challenged the determination.

The Employment Court examined section 67A(2) of the Employment Relations Act 2000 which reads:

"67(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."

(Emphasis added).

The Court noted that Section 67A does not require any particular form of words in a trial clause. The phrase "to the effect that" in s 67A(2) means that a trial clause is valid if it has the same general meaning and leads to the same result as specified in that section.

The Court noted that Mr De Buyzer's trial clause did not state when the trial period started, but it did state that the trial period was "in accordance with s 67A of the Employment Relations Act 2000". This wording was consistent with other parts of the employment agreement, for example, public holidays are given and paid "in accordance with the provisions of the current legislation", and accumulation of sick leave is "in accordance with the Holidays Act 2003".

The Court said that the words "in accordance with" in Mr De Buyer's trial clause meant to be in harmony or conformity with section 67A(2). That section requires a trial clause to be for a specified period (not exceeding 90 days) starting at the beginning of the employee's employment. Mr Buyzer's trial clause was to the effect that for the first 90 days of his employment, he was subject to a trial period. So there was no ambiguity in the trial clause.

That is also what the clause would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties to the agreement at the time they entered into it. In other words, the language the parties used must be read in the context of the document as a whole and the surrounding circumstances.

Both parties understood from the outset that the employment was subject to a 90-day trial period. Mr de Buyzer raised no issue with that. He started work on 9 January 2017 with no pre-employment induction or training. It follows logically that the trial period started then too. In the circumstances that existed, there was no other time at which the trial period could reasonably have commenced.

The trial clause in Mr De Buyzer's agreement therefore complied with section 67A of the Act and under section 67B of the Act Mr De Buyzer could not bring a personal grievance for unjustifiable dismissal.

The Authority's determination was set aside Mr De Buyzer was ordered to return the $32,562.48 plus interest, to the employer.

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