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Employment update

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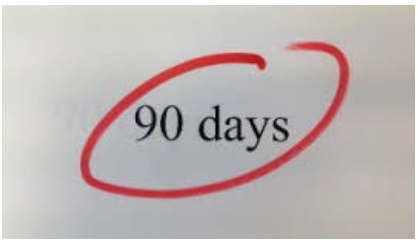
90 day Trial Period— Are you really covered?



A case determined in August this year by the Auckland ERA is starting to attract some attention, due to what could be argued is an overly strict application of Section 67A(2) of the Employment Relations Act 2000.

The key part is:

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.

Briefly, the employee was on a 90 day trial period and the employer, incorrectly as it turns out, thought it could rely on the clause to terminate the employment within 90 days of when the employee started work.

The clause in question simply stated "A trial period will apply for a period of 90 days...to assess and confirm the suitability of the Employee for the position".

The 90 day trial period clause was challenged by the employee on the grounds the clause did not state **that the trial period commenced at the beginning of her employment.**

Elsewhere in the agreement, the start date of employment was stated.

The ERA found that because the clause did not state when the trial period commenced that it was unenforceable.

As a result, the employer was precluded from relying on the 90 days clause as a defence against an unjustified dismissal claim.

The lesson here is one of drafting but also being aware that the ERA and the Employment Court have continuously signaled they will apply a very technical and strict interpretation of the Trial Period.

All employers should review their 90 day trial period clause.

Are employees bound to follow company Policies and Procedures?

Have you ever wondered what the legal status of your Policies, Procedures, Codes of Conduct, Operations Manuals, House Rules etc are? We have recently had to consider this question. Our research has revealed the legal principles set out below.

Contractual term

Company policies and procedures will only become a contractual term of employment if they are expressly incorporated by reference in the relevant employment agreement. A typical clause may provide:

"The employee agrees to comply with all notified rules, regulations, policies and procedures of the employer. The employer reserves the right to vary at its discretion any rules, regulations, policies or procedures"

The effect of this clause is that once the employment agreement is signed by the parties, the parties are contractually bound to comply with those notified rules, regulations, policies and procedures.

If an employee breaches any of the notified rules, regulations, policies and procedures, then the employer can bring a breach of contract claim against the employee. The more common scenario however is that the employer will raise a breach of the rules, regulations, policies or procedures as a misconduct or serious misconduct allegation which could result in disciplinary action against the employee.

Can you vary Policies and Procedures?

The Court has found that an employment agreement can expressly allow an employer to unilaterally vary policies. That is a lawful provision and the Courts will uphold that right. While policies are in effect they will have contractual force according to the wording of the policy. An employer, who has the ability to unilaterally vary policies, can decide to delete policies. Once a policy is deleted it will have no further contractual force.

Is an employee bound to follow a Policy even if they have not read the Policy?

The Court of Appeal considered this issue. It was decided that an employee who has agreed in their employment agreement to comply with the employer's Policies and Procedures, is bound by those Policies. This is the case even if they have not read them or are not familiar with the contents of the Policies. The Court said that in these circumstances employees have an obligation to make sure that they were familiar with the contents of the Policies.

What if there is no reference to company Policies and Procedures in the employment agreement?

In this situation, the policies and procedures do not form part of the contractual terms of employment.

Despite not being a contractual term of employment, the Court has recognised that the day-to-day operation of work can be governed by policy manuals unilaterally promulgated by the employer. These policy manuals will apply to employees so long as the policy manuals and their notification are fair and reasonable.

The Court has also found that a fair and reasonable employer will follow its own Policies, even though the Policy may not be an express term of employment.

There have been numerous cases where employers have disciplinary policies which do not form part of the contractual terms of employment. The employer then has a disciplinary issue but does not follow its own disciplinary Policy. In these cases the employer's actions have been held to be unjustified because the Courts have said that a fair and reasonable employer will follow its own Policies and Procedures.

Summary

Check whether your company's Policies and Procedures are referred to in the employment agreement.

If they are, check whether the company has the ability to amend the Policies and Procedures from time to time.

If you are unsure about the status of your Policies and Procedures contact us for specific advice.

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