

90-day trial periods: Just too risky to bear?

A series of recent decisions from the Employment Relations Authority shows once again the Authority's preparedness to strike down 90-day trial provisions in employment agreements based on legalistic and rigid grounds.

Stuart Dalzell, Partner and Jackie Frampton, Associate examine the issues

In *Honey v Lighthouse ECE Ltd* [2016] NZERA Auckland 284, Ms Honey was employed as an Early Childcare Teacher by Lighthouse ECE Limited (Lighthouse) under an employment agreement containing a 90-day trial provision.

While she was still within the first 90 days of her employment, Lighthouse emailed Ms Honey to say it had terminated her employment under the 90-day trial period provision – straightforward, one might think.

However, Ms Honey claimed that the 90-day trial period provision in her employment agreement did not meet the requirements of s 67A of the Employment Relations Act 2000 (the Act) and therefore could not be relied on because it did not specify the starting date of her 90-day trial.

The statutory requirements

To appreciate the searching and careful nature of this argument, it is useful to look briefly at section 67A(2) of the Act; relevantly, this states:

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...[emphasis added]

The trial period provision in clause 9 of Ms Honey's employment agreement said:

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.

The issue

The issue was whether the 90-day trial provision of Ms Honey's employment agreement stated or was "to the effect" (as per s.67A(2)(a) of the Act) that the trial period provision starts at the beginning of her employment.

Understandably, Lighthouse argued that on a straightforward reading of clause 15, the parties had clearly intended the trial period would begin at the commencement of Ms Honey's employment; there was no other date on which the trial would reasonably begin.

However, the Authority did not accept that argument.

Clause 15.1 did not expressly state that the trial period started at the beginning of Ms Honey's employment so the

Authority considered 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" met the requirement in s.67A(2) that the clause was "to the effect" that it starts on Ms Honey's first day of employment.

The Authority found that the clause did not "reasonably imply" that the 90 days starts on the first day Ms Honey starts work for Lighthouse.

The reasoning relied on was that there were a number of circumstances in which the parties could conceivably have agreed that the 90-day trial period does not start on the commencement date of employment but rather when the employee actually starts undertaking the work she or he has been employed to do. For example, an employee may be undergoing a lengthy induction or an overseas temporary placement, or may be undertaking offsite training or secondment work for an external entity until the work that they have actually been employed to do begins. The Authority said that in such circumstances, the parties may have decided to agree that the trial period provision would start from the date on which the employee actually starts undertaking the work they are required to do in the position they have been employed for.

The problem with the Authority's reasoning is that under section 67A(2)(a) of the Act the trial period starts "at the beginning of the employee's employment" and the Act does not allow for a 90-day trial period to begin later than the beginning of the employee's employment. The scenarios referred to by the Authority where the 90-day trial begins later would not be within the terms of section 67A(2)(a), so in those situations the employer could

not rely on the trial provision and it would have no effect.

The Authority also relied on the decision of the Employment Court in *Smith v. Stokes Valley Pharmacy* [2010] NZEmpC 111, which 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.

As clause 15.1 did not expressly specify when the trial period was to start, Ms Honey was not effectively advised of the date on which the trial period would commence.

Counsel for Lighthouse submitted that the reference in clause 15.1 that the trial period will apply for a period of 90 days “under s.67A” incorporated the requirement from that section that the trial period starts on commencement of employment. The Authority responded that Ms Honey could not reasonably be expected to have known that and the prescriptive nature of s.67A of the Act means that an obligation is on an employer to ensure that it has clearly and specifically met all of the requirements of s.67A of the Act before it is permitted to rely on the validity of the trial period provision.

Lighthouse was unable to rely on the trial period provision in clause 15 of Ms Honey’s employment agreement on the grounds that it does not meet the requirements of s.67A(2)(a) of the Act because it failed to state or contain words “to the effect that” the trial period commenced on the first day Ms Honey started work.

Lighthouse also dismissed three other employees in reliance on identical 90 day trial provisions and the Authority also refused to uphold those 90 day trial provisions for the same reasons in *Clark v Lighthouse ECE Ltd* [2016] NZERA Auckland 281, *Du Plooy v Lighthouse ECE Ltd* [2016] NZERA

Auckland 282 and *Baxter v Lighthouse ECE Ltd* [2016] NZERA Auckland 283.

Comment

Clause 15.1 may have hinted that the trial period would start on day one of Ms Honey’s employment but did not say it in so many words. Furthermore, taking a scrutinizing look at the clause the Authority was not prepared even to uphold the clause on the basis that it was “to the effect” that the 90-day trial started on Ms Honey’s first day of employment.

The consequences of a valid 90-day trial period are serious for employees. Even so, some might consider this a very harsh result, and contrary to the reasonable expectations of the parties. Ms Honey’s dismissal must now be justified by Lighthouse, which would seem an unlikely proposition.

This series of decisions are a reminder of the extremely scrutinizing approach taken by the Employment Relations Authority to issues involving 90-day trial provisions and its preparedness to invalidate such provisions even where the grounds for doing so appear highly legalistic and rigid. Employers should always seek legal advice before using a 90-day trial provision in order to ensure that the provision will have the desired effect.