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The 90 Day Trial – Is It Enforceable?

The Employment Relations Act 2000 allows a 90 day trial period. In particular Section 67A of the Act states that during a trial period (not exceeding 90 days) the employer may dismiss the employee and the employee is not entitled to bring a Personal Grievance claim against the employer in respect of that dismissal.

For the purposes of this section the definition of **employee** is defined as being someone “who has not been previously employed by the employer”. This seemingly simple definition has rendered some trial periods unenforceable.

For example in a recent case an employee was awarded more than \$8,500.00 in compensation when he was dismissed during a 90 day trial period that was held to be invalid and therefore did not exist for the employer to rely on.

In this case the employee David applied for a job in a central city café and was asked to work a paid eight hour shift in order for the employer to assess his suitability for the position. On completion of the shift the employer gave David a verbal offer of employment. A few weeks later on the morning David was to commence his full time role, he was handed an employment agreement which included a trial period provision. David signed the agreement prior to commencing his shift. Nearly four weeks later David was advised by his employer that his employment had been terminated.

The Employment Relations Authority held that if an employee has previously performed any work, that employee will not be considered a “new” employee

and the result being that the trial period would have no effect.

Where an Employer mistakenly relies on a faulty trial period provision and then dismisses their employee without due process (which is not required under the 90 day trial period) they could be exposed to a personal grievance for an unjustified dismissal.

In David’s case the Authority held that David’s first eight hour shift amounted to employment and therefore he was not a “new” employee for the purposes of the trial period provision to apply. As a result the trial period in David’s employment agreement was unenforceable and he had been unjustifiably dismissed.

For those employers seeking to rely on trial period provisions it is worth taking the following steps prior to an employee commencing paid work:

- a) provide the employee with a copy of the employment agreement; and
- b) advise the employee of their right to seek independent advice before they sign the agreement; and
- c) provide the employee with sufficient opportunity to seek that independent advice.

20 MINUTE FREE

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