

Fire at Will? Not Quite

The National Government recently announced its decision to introduce a Bill which will allow all employers, rather than just small employers, to rely on 90-day trial periods for new employees. This decision has been criticised by opponents who argue that the current 90-day trial period legislation provides employers with a right to "fire at will". A recent Employment Court decision shows that this is not quite the case.

In **Smith v Stokes Valley Pharmacy (2009) Limited**, an employee was dismissed during a 90-day trial period but successfully claimed that she was unjustifiably dismissed and that she had been unjustifiably disadvantaged by her employer.

Background

Stokes Valley Pharmacy had employed Heather Smith as a retail assistant for over two years. On 1 October 2009, the pharmacy was sold and Ms Smith started working for the new owners. Although she was provided with an employment agreement which contained a 90-day trial period, she did not sign this agreement until the following day.

Around two months later, but still within her 90-day trial period, Ms Smith was dismissed summarily. When Ms Smith asked why she had been dismissed, her employer was reluctant to provide her with a reason, but advised her that she was "not what they were looking for" and that she was "inexperienced".

Employment Court Decision

The Employment Court emphasised that the new statutory trial period provision removed longstanding employee protections and access to dispute resolution and that, as such, they should be interpreted strictly and not liberally.

Under the statutory trial period provisions, a 90-day trial period can only be used for employees not previously employed by the employer. The Court found that, as Ms Smith had worked for one day for the new employees on her existing terms and conditions of employment, she was not a "new employee" when she signed her employment agreement. On that basis alone, the Employment Court found that Ms Smith was not prevented from challenging her dismissal.

In addition, the Act requires an employer to provide an employee being dismissed during a 90-day trial period with notice of their dismissal. In this case, although Ms Smith's employment agreement allowed her employer to make a payment in lieu of her notice period, the employer only paid her two weeks' wages rather than the required four weeks of notice under her employment agreement. The Court found that the employer therefore gave deficient notice and that for this reason too, she was not precluded from challenging her dismissal.

As Ms Smith's dismissal was not conducted in accordance with the statutory trial period provision, the Court went on to find that Ms Smith was unjustifiably dismissed and that she suffered unjustified disadvantage as a result. The Court also noted that Ms Smith's trial period clause promised to provide assistance, full training, encouragement and regular appraisal meetings. As these regular appraisal meetings did not occur, the Court found that this failure meant that Ms Smith's dismissal was unjustified and also constituted a separate disadvantage.

The Court also considered the effect of the good faith provisions in the Employment Relations Act 2000 and whether an employer had to provide reasons for their dismissal to an employee dismissed during a valid trial period. The Court found that an employer's obligation of good faith and its duty to be responsive and communicative requires an employer to provide an explanation for an employee's dismissal, which is not misleading or deceptive, when such an explanation is sought.

Key Points for Employers

- Trial periods can only be used for employees who have not previously worked for the company – make sure employees sign their employment agreement **before** they commence employment.
- Employees who are dismissed pursuant to a trial period must be provided with full notice of their dismissal or full payment in lieu of their notice.
- Employers do not have to give reasons for an employee's dismissal in the first instance, but should provide an explanation (which is not misleading or deceptive), if an employee asks why they have been dismissed.
- Keep trial periods simple – do not add unnecessary obligations that must be met before an employee can be dismissed.

Submissions for this Bill are due on 13 September 2010 and the report from the Select Committee is due back 5 November 2010.

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