IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 216
5335765

	BETWEEN	RICKY BLACKMORE
	AND	HONICK PROPERTIES LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	Greg Bennett for applicant Andrea Proudfoot for respondent
Submissions Received:	26 April 2011 from Applicant, 5 May 2011 from Respondent
Determination:	23 May 2011

DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR REMOVAL

Employment Relationship Problem

[1] In November 2010, Mr Blackmore was employed as the manager of a farm owned by the respondent. His substantive problem concerns an alleged personal grievance arising out of his dismissal early this year. As acknowledged in the originating Statement of Problem the parties had executed a written agreement based on a standard form agreement prepared by the Federated Farmers Association for its members. It contained the following provision:

> *"4.1 A 90 Day Trial Period*
>
> *(Where the Employee has not previously been employed by this Employer, and there are 19 or fewer Employees)*[1]

[1] I understand that there is no dispute that there were 19 or fewer employees in this enterprise.

The parties agree that this employment is subject to a trial period of 90 days, pursuant to the Employment Relations Act 2000.

The trial period shall begin on the date the Employee commences duties and end on 11/02/2011.

The Employee acknowledges that during this trial period, the Employer may dismiss the Employee by giving one week's notice prior to the end of the trial period, and in the event of dismissal, that the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal."

[2] It was signed on 15 November 2010 which was Mr Blackmore's first day of work. However Mr Blackmore says that the job was offered and accepted during the month of October. He says that the offer and acceptance were based on express agreement that there would be no "90 day trial" and in reliance on this he resigned from his previous job. Since this was in a different part of the country he and his family relocated to take up the new role. When presented with the written contract after arrival at the farm he felt he had no choice but to sign it. His position now is that his employer "*should not be allowed to go back on his word and that his actions have been deceptive and calculating."*

[3] The respondent disputes that the offer of employment was made on the basis that there would be no "90 day trial." It also says that even if it was, the written agreement would supersede anything that went before. The respondent has reserved the right to lodge a full statement in reply should Mr Blackmore be given leave to pursue his grievance.

[4] Mr Blackmore now seeks to have the employment relationship problem removed to the Employment Court. Section 178 of the Employment Relations Act provides for removal as follows:

"(1) *Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*

(2) The Authority may order the removal of the matter, or any part of it, to the Court if-

(a) an important question of law is likely to arise in the matter other than incidentally; or

…

(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[5] The applicant says the following question of law arises in the matter:

"Does estopple [sic] *strike down the 90 day trial period if the employer says they are waiving the 90 day trial and then includes it in the employment agreement?"*

[6] The respondent opposes removal. It says that if there is any preliminary issue for determination (which, relying on the written agreement, it disputes) that preliminary issue should be heard by the Authority. Specifically it has suggested that the most appropriate process would be for the Authority to determine (as a first step) the limited factual question of whether there was an undertaking as alleged by the applicant.

Issues

[7] The matter for determination here is whether the employment relationship problem should be removed to the Court. There are two issues for determination:

i. whether any of the grounds set out in section 178 is present in this case, and if so

ii. whether the Authority should exercise its discretion to remove the matter.

(i) Is there an important question of law?

[8] Mr Blackmore claims that he was offered and accepted work on the understanding that there would be no "90 day trial." Purporting to have acted in reliance on the oral agreement, he now says that his employer cannot hold him to a subsequent written agreement that contained a 90 day trial provision.

[9] Section 67A of the Employment Relations Act 2000 provides as follows:

> *"(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer…*
>
> *(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.*
>
> *(3) Employee means an employee who has not been previously employed by the employer"*

[10] Sections 67A and 67B came into effect on 1 March 2009. They have not, as yet, been the subject of a great deal of litigation. The recent case of *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] 7 NZELR 444 does however offer guidance on the interpretation and application of sections 67A and 67B. At paragraph [48] Chief Judge Colgan notes:

"Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated."

[11] In that case the written employment agreement was not executed until the second day of employment. It was found that the employee was not a new employee and the "trial provision" was ineffective. The following extracts set out relevant parts of the reasoning behind that decision:

" [50] …"*the scheme is available only in respect of new employees and not existing or previous employees…*

[54] …s 67A defines "employee' at subs (3) as "an employee who had not been previously employed by an employer.*" That definition builds on the definition of "employee' in s 5 by creating, for the purpose of ss 67A and 67B, a narrower class of employee.*

[55] So ss 5 and 6 of the Act are also relevant to the interpretation of ss 67A and 67B. Section 5 simply refers the definition of employee to s6 which provides relevantly:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee-

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes –

(i) a homeworker; or

(ii) a person intending to work….

[12] At paragraph [56] Judge Colgan notes:

> *"Relevant also is the definition of the phrase* "a person intending to work*" set out in s6(1)(b). That definition is in s 5 and* "means a person who has been offered, and accepted, work as an employee."

[13] Although the respondent has reserved its rights in respect of the statement in reply, I have been given to understand that there is no dispute that Mr Blackmore was offered and accepted work in October 2010. If it were to be found that he became an employee at that point, it would give rise to the question whether he can be held to a "trial provision" contained in a written agreement entered into a month later.

[14] Whether or not the answer is to be found in the doctrine of estoppel, or by the interpretation and application of relevant provisions of the Employment Contracts Act, this is a question of law, and an important one. The first ground in section 178 has been made out.

(ii) Should the Authority exercise its discretion to remove?

[15] The question whether the Authority should exercise its discretion to remove requires particular consideration in light of the respondent's suggestion as summarised in paragraph [6].

[16] The respondent's position is that it would make no difference if there was prior express agreement to exclude a 90 trial. However in the hope of avoiding the need to determine the legal issues involved it says the Authority should instead start by investigating and determining the factual question whether there was an undertaking to "*waive the 90 day trial."* This suggestion is premised on the assumption that if that factual point is determined in the respondent's favour, the whole thing will go away.

[17] The problem is that it may not. The principles set out in *Stokes Valley Pharmacy* indicate that a similar question might arise even in the absence of any alleged undertaking. That is to say, if Mr Blackmore were found to be an employee in October, and nothing was said either way about a 90 day trial, it would still leave the question whether the trial could be introduced when the agreement was reduced to writing a month later.

[18] The respondent's suggestion about how to proceed was a sensible and pragmatic one however it is based on an oversimplification of the issues. The employment relationship problem is not amenable to being split up into parts.

[19] Now that "trial provisions" may be applied by enterprises of all sizes, the questions in this case are important not just for the parties but for many employers and employees. It is desirable that they be determined by the Court in order to provide greater certainty for all parties entering into employment agreements.

[20] The matter is therefore removed to the Court.

Yvonne Oldfield
Member of the Employment Relations Authority