

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 330  
5334515

BETWEEN

STUART SIMMONS  
Applicant

AND

COLLINS STAINLESS STEEL  
FABRICATORS LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Applicant  
Russell Drake for Respondent

Investigation Meeting: 14 June 2011

Submissions Received: 24 June 2011

Determination: 26 July 2011

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**DETERMINATION OF THE AUTHORITY**

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**A Mr Simmons is precluded from taking a personal grievance for unjustified dismissal pursuant to section 67B of the Employment Relations Act.**

**B Costs are reserved**

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[1] Mr Stuart Simmons was employed as a mechanic by Collins Stainless Steel Fabricators Limited (Collins) on 13 September 2010. Mr Simmons says that two weeks after he commenced employment he was presented with a written employment agreement which he signed and returned on that same day to Mr Dennis Collins, Managing Director. Mr Simmons says he was then dismissed on 29 November 2010. He challenges that dismissal which he says was unjustified and seeks remedies.

[2] Collins denies the claims and says Mr Simmons was employed subject to an initial 90 day trial period pursuant to s 67A of the Employment Relations Act (the Act). Mr Collins says Mr Simmons was given a copy of the intended employment agreement prior to him commencing work but did not sign it until 27 September 2010.

[3] Collins says further that Mr Simmons was dismissed as a result of him not adhering to health and safety policies in that he continually refused to wear the protective clothing provided to him in the manner required. Following several refusals to wear the protective clothing correctly Mr Collins concluded that Mr Simmons was not suitable to be employed within the business as he created an unacceptable health and safety risk to himself and others working on the site.

### **Section 67A**

[4] The employment agreement was provided to Mr Simmons prior to him commencing his employment. At the time of offering employment to Mr Simmons, Mr Collins had discussions with him about his rate of pay and the fact that his employment would be subject to a 90 day trial period pursuant to the Act. Mr Simmons acknowledged agreement with the terms discussed which were then reduced to writing for him to sign off. On the strength of the verbal offer and acceptance Mr Simmons resigned from his current employment.

[5] A copy of the written terms and conditions of employment including clause 11.0 was provided to Mr Simmons. Clause 11.0 was bolded and highlighted in green and states:

- (a) The Employee, upon signing this agreement, agrees to serve a Trial Period, commencing on the Employee's first day of employment, for the period specified in **Schedule A**.
- (b) During the trial period the Employer can dismiss the Employee, by giving the employee notice of the termination, regardless of when the termination takes effect, and the Employee is not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal.

An Employee dismissed in accordance with this provision shall not be provided access to, or opportunity to comment on, any information relating to the Employer's decision to dismiss.

- (c) The notice period during the trial period is one week, however, upon the expiry of the trial period, the notice period specified in **Schedule A** shall apply. Please note: the right of the Employer to dismiss the Employee without notice for serious misconduct will remain.

Where the Employee is dismissed in accordance with this provision the Employer may, at its discretion, elect to pay to the Employee in lieu of notice, for all or any part of the notice period;

- (d) To avoid doubt, this provision shall not apply where:
- (i) the Employee is an existing employee; or
  - (ii) the Employee was previously employed by the Employer; or
  - (iii) the Employer employed 20 or more employees on the day on which this agreement was entered into; or
  - (iv) The trial period is unspecified in **Schedule A**; or
  - (v) The trial period specified in **Schedule A** is expired.

[6] Despite not signing the agreement, Mr Simmons commenced work on 13 September 2010. Mr Collins attempted several times to get the signed employment agreement returned by Mr Simmons but these attempts failed. Each time Mr Simmons acknowledged that he had no issues with the terms and conditions set out in the agreement.

[7] After two weeks Mrs Collins printed off a new copy of the agreement. Mr Simmons signed the agreement and initialled each page. The clauses dealing with the 90 day trial period had been highlighted. When Mr Simmons initialled each page he raised no issues as to the 90 day trial period.

[8] The Act requires that in order for a trial period pursuant to ss 67A and 67B to be effective the employment agreement must contain a written provision to the effect that the specified period does not exceed 90 days starting at the beginning of the employee's employment, that during that period the employer may dismiss the employee and in those circumstances the employee will not be entitled to bring a personal grievance in respect of that dismissal.

[9] Clause 11.0 was clearly a s 67A and s 67B arrangement for a trial period pursuant to the Act. In the leading Employment Court decision regarding the interpretation of ss 67A and 67B the Employment Court held that for the agreement to be binding it had to be properly executed, that is, signed by both parties.<sup>1</sup> The Courts reasoning was based on its conclusion that the parties in that case did not intend to be bound by the draft written agreement unless and until it was executed by the writing of their signatures.

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<sup>1</sup> *Smith v Stocks Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

[10] This case is different in a number of respects, to the facts in *Smith v Stokes Valley Pharmacy*. In that case Ms Smith had worked in the business previously, albeit for a different legal entity, but had been doing the same job and at the same location for a number of years before the new employer purchased and took over the business. In the present case, Mr Simmons had been working for a different employer albeit at or about the same location. At times Mr Simmons did work in the same workshop as used by Collins, however, the work was not for Collins and Mr Collins himself had not authority over Mr Simmons.

[11] On her first day of employment under the new owners Ms Smith continued to be employed on the same terms and conditions of employment as she had enjoyed with the previous owner of the business and received a draft employment agreement which was provided to her only after she commenced employment. In the present case, Mr Simmons received a bundle of documents prior to commencing employment, including:

- a letter setting out the offer of employment which included a statement that the employment would be subject to a trial period from the date of commencement and this sentence was highlighted to draw Mr Simmons attention to it;
- the individual employment agreement, which again had the applicable clauses highlighted so that it was prominent;
- the company motor vehicle policy
- the company house rules
- a personal details form; and
- an IRD tax information form

[12] Mr Simmons disputed that he had received the bundle of documents as set out above, prior to commencing his employment. However, I have preferred the evidence of the respondent in this regard and find it is more likely than not that Mr Simmons did receive all the documents as described. On his first day of employment Mr Simmons signed the Motor Vehicle Policy document and handed it to Mrs Romoana Collins, a joint owner and Director of Collins. Mrs Collins is responsible for all the administrative and office functions of the business including the maintenance of

personal files and employment documentation. Mrs Collins says Mr Simmons handed her the signed form which she also signed and dated and told her he knew he wasn't able to drive any vehicles without it. Mr Simmons told Mrs Collins that he would bring the employment agreement back the next day and that he had no issues with it.

[13] In *Smith v Stokes Valley Pharmacy* there was no discussion with Ms Smith during the hand over period, which indicated that she would be subject to a trial period clause pursuant to ss 67A and 67B. In this present case, Mr Simmons was told explicitly that his employment would be subject to a trial period of 90 days. At the time of this discussion Mr Simmons acknowledged his agreement to this requirement.

[14] I am satisfied Mr Simmons was fully aware that he was entering an employment relationship on the understanding that his employment would be subject to a trial period of 90 days. Mr Simmons had received a copy of the agreement to consider and execute prior to commencing his employment with the relevant provisions highlighted to draw his attention to them. I am satisfied that when entering into the employment at the very beginning there was agreement that the employment would be subject to a 90 day trial period pursuant to the Act.

[15] Mr and Mrs Collins made several attempts during Mr Simmons first two weeks of employment to get him to bring the signed employment agreement back to work. Mr Simmons did not do so and finally, Mr Simmons admitted he had lost the original agreement and so Mrs Collins printed off a new copy and had Mr Simmons sign it on 27 September 2010. At each approach by either Mr or Mrs Collins, Mr Simmons made it clear that he had no problems with any of the terms set out in the employment agreement.

[16] There is nothing in ss 67A and 67B that require the employment agreements to be signed, rather the sections require the trial period provision to be stated in writing in the employment agreement. It can not have been the intention of Parliament that the new section would enable an employee to take advantage of a situation where he evades signing the agreement for whatever reason. This would create situation where an employee could dodge their agreement through a minor technicality. I am satisfied that both Mr Simmons and Collins intended at all times leading up to and on the commencement of Mr Simmons employment, to be bound by the terms set out in the written employment agreement including the trial period provisions.

[17] An employee has a responsibility not to lead the employer into thinking that terms and conditions offered in writing had been accepted, if that is not the case. The duty of good faith requires parties to an employment relationship to be active, responsive and communicative. In the light of Mr Simmons' oral confirmation to Mr and Mrs Collins that he had no issues with the terms of employment offered to him, then he must be found to have accepted the terms of employment including the 90 day trial period.

**I find Mr Simmons is precluded from pursuing a personal grievance for unjustified dismissal.**

### **Costs**

[18] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Collins may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Simmons will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[19] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell  
Member of Employment Relations Authority