

**MDJLAW LEGAL UPDATE**  
**August 2010**

**90 DAY TRIAL PERIODS – EXTREME CARE REQUIRED**

Chief Judge Colgan has just handed down the first judgment of the Employment Court to examine the March 2009 amendments to the Employment Relations Act 2000 ("ER Act"), which introduced the 90 day trial periods<sup>1</sup> provision. The timing of this decision is also very topical given the Government's proposed extension of the 90 day trial period to all employers, not just those employing fewer than 20 employees. The 90 day trial period provision (s.67A and s.67B of the ER Act) are prescriptive. His Honour Judge Colgan has identified a number of other important points to be aware of, including:

- **New employee** – only a new employee can be subject to a s.67A trial period. In this case, the employee worked for a day before signing the offered employment agreement. The Judge found that this brief period meant that she was not a new employee when she accepted the agreement, and therefore the trial period did not apply.
- **Notice** – dismissal under a trial provision does not relieve the employer from the usual requirement to give notice, either in line with the agreement or, if not mentioned there, for a reasonable period.
- **Reason for dismissal** – S.67B(5)(b) (where there is an enforceable 90 day trial period provision) relieves an employer from compliance with a s.120 request from a dismissed employee for written reasons for the dismissal. Chief Judge Colgan held, however, that the obligations of good faith, and to be responsive and communicative, are not affected. An employer is, therefore, obliged to provide a reason for dismissal if requested, in terms of good faith obligations, and the explanation must not be misleading or deceptive.
- **Form of provision** – any contractual provision seeking to agree to a s.67 trial must contain every element imposed by the section for it to have any effect at all.

In summary, the provision for trial periods is not an 'easy-out' for employers, and the use of such a provision will need to follow a carefully timed and documented process, and any attempt to rely on it will require careful analysis and advice. Employees now have potentially more grounds to challenge such provisions and actions take in reliance on it.

**Employment Bill Update**

The Employment Relations Amendment Bill (No. 2) looking at changes in the areas of union access to workplaces, the personal grievance provisions, collective bargaining, and changes to the employment institutions, was introduced on 16 August 2010, with submissions due by 13 September 2010.

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