

## Charitable Trust's approach to trial periods uncharitable

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A recent decision to come out of the Christchurch Employment Court, *Roach v Nazareth Care Charitable Trust*, has highlighted the importance of complying with notice provisions when relying on a 90-day trial period to dismiss an employee.

The plaintiff, Mr Roach, was dismissed from his role as General Manager by Nazareth Care Charitable Trust (the Trust). His employment agreement was subject to a 90-day trial period. His dismissal occurred within 90-days of him commencing work. Unusually, Mr Roach had previously been offered and accepted a Business Manager's position at the Trust, which was also subject to a 90-day trial period. However, Mr Roach never started work in the Business Manager's position, performing none of the associated duties and responsibilities, before he was offered and accepted the General Manager position.

Mr Roach argued the Trust could not rely on the 90-day trial period because:

- The 90-day trial period was invalid because he had been a previous employee of the Trust
- The Trust failed to give him the notice required under the trial period clause.

### Had Mr Roach been previously employed by the Trust?

The Court first considered whether Mr Roach had previously been employed by the Trust, such that the trial period could not be relied upon. Mr Roach had signed a Business Manager employment agreement prior to being offered the General Manager employment agreement. Mr Roach argued he was an 'employee' because he was 'a person intending to work' (defined in section 5 of the Employment Relations Act 2000 (ERA) as "a person who has been offered and accepted work"). If Mr Roach was an employee of the Trust from the moment he signed the Business Manager agreement accepting work then the second employment agreement (for the General Manager position) could not contain a valid 90 day trial provision. Section 67A of the Employment Relations Act 2000 precludes trial provisions from operating where an employee has been "previously employed" by the employer.

The Court agreed with the Trust that the purpose of section 67A is to enable an employer to assess an employee's suitability for the position without opening itself up to a potential personal grievance action should it dismiss the employee.

Judge Smith emphasised that actual performance of the tasks is required, not mere agreement to carry out those tasks. As no work had been undertaken under the first agreement, the Trust could have a trial period in Mr Roach's second employment agreement. This approach could have been reconciled with the definition of "employee" in the Act, which is prefixed with "unless the context requires otherwise". However, the Court did not go so far as to say that the context of the trial period provisions in the Act required a narrower definition of "employee" (to exclude a person intending to work).

The Court noted that the Act creates the unusual situation where employees with 90-day trial periods in their employment agreements have more rights in relation to bringing a personal grievance before they commence work than they do for the first 90 days (ie they can bring an unjustified dismissal personal grievance from the time the employment agreement is signed up until he or she starts work, but not from that time until the end of the trial period).

### Payment in lieu of notice

Mr Roach also argued the Trust could not rely on the trial period clause because he was not given the required one week's notice. Critically, the trial period in his employment agreement did not contemplate a payment in lieu of notice. When it terminated Mr Roach's employment, the Trust paid him one week's pay in lieu of notice. The Court found that the Trust's failure to comply with the trial period clause meant that it could not rely on it to prevent Mr Roach from raising an unjustified dismissal claim.

### Unjustified dismissal

The Court then went on to consider whether Mr Roach had been unjustifiably dismissed. Prior to the dismissal, the Trust failed to communicate any concerns it had to Mr Roach. Mr Roach was completely unaware of any issues the Trust had with his workplace conduct. Secondly, there was no evidence in support of an argument that the Trust's concerns were justified. Judge Smith ultimately decided that "relying on unsubstantiated concerns in emails without further inquiry, or attempting to discuss them with Mr Roach, was not what a fair and reasonable employer could have done".

Without the protection of the 90-day trial period, the Court inevitably found the Trust had unjustifiably dismissed Mr Roach.

The Court awarded Mr Roach 12 months lost wages, at a value of \$115,000 (plus interest). In making this award, the Court noted that Mr Roach's actual loss had been substantial. He had remained unemployed for a long time, despite making 97 job applications. In addition to lost wages, Mr Roach was awarded \$25,000 for hurt and humiliation.

## Takeaway

It is critical that an employer includes and follows the trial period provisions in the employment agreement before terminating employment. While employees can be terminated under trial period provisions by making a payment in lieu of notice, they can only do so if a payment in lieu is specified in the trial period clause contained in the employment agreement.

The purpose of section 67A is to allow the employer the opportunity to assess the employee undertaking work. A trial period commences when the employee actually performs work under the employment agreement.

Mistakes with trial periods can be very expensive, in this case costing the employer in excess of \$140,000 plus legal costs.

The decision can be found [here](#).

*From everyone in our Buddle Findlay National Employment Team, we wish you and your families a very happy and relaxing Christmas, and would like to thank you for your support throughout the year.*

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