



cullings is the newsletter of
**Cullen – the Employment
Law Firm**

Level 8

Kirkcaldies North Tower

45 Johnston St, Wellington

Phone 04 499 5534

Fax 04 499 7443

enquiries@cullenlaw.co.nz

www.cullenlaw.co.nz

PO Box 10 891, The Terrace

Wellington 6143

New Zealand

Peter Cullen

Partner

peter@cullenlaw.co.nz

David Burton

Partner

david@cullenlaw.co.nz

Charles McGuinness

Senior Solicitor

charles@cullenlaw.co.nz

Jenny Jermy

Senior Solicitor

Jenny@cullenlaw.co.nz

Sheryl Waring

Solicitor

sheryl@cullenlaw.co.nz

Sarah Cates

Solicitor

sarah@cullenlaw.co.nz

DISCLAIMER: This newsletter is intended to provide our clients with general information. While all statements are believed to be correct, no liability can be accepted for incorrect statements. Readers should not act or rely on this general information without seeking specific legal advice.

90-Day Trial Periods

On 1 April 2011, 90-day trial periods became available to all employers to implement in the workplace. Previously 90-day trial periods were limited to employers with fewer than 20 employees.

Since the earlier introduction of 90-day trial Periods to employers with under 20 employees, a number of cases have highlighted that the law is not without its inherent risks.

The Pharmacy

In 2009 an employee named Heather Smith was employed at Stokes Valley Pharmacy. She was engaged in the position of Pharmacy Assistant. Ms Smith started work at the Pharmacy in 2007, but in 2009 the store took on new ownership and Heather was asked to sign a new employment agreement with the new owners.

The new owners sent Heather a new employment agreement on 29 September 2009. Ms Smith said she did not notice that the new agreement contained a 90 day trial period. Before she had signed her agreement the new owners took over the business and began to operate it. They did so from 1 October 2009. Ms Smith signed her agreement after some discussions on 2 October 2009, one day later.

On 8 December 2009, at the Employers request, Ms Smith spent the day at another of the employer's pharmacies to cover a sick leave absence. At the end of that day the owners together told Heather that she was to be dismissed summarily under her 90 day trial period. When Heather asked what she had done wrong, the response was that she was not what the company was looking for and that she was inexperienced. The owners said they believed that they were entitled to refuse to provide reasons or other explanations.

The Authority said that Heather had suffered economic and emotional consequences because of the dismissal. It went on to highlight

some of the pitfalls of the 90-day periods. Essentially, it said that:

- 90-Day trial periods must be agreed upon and signed before the commencement of employment, not in retrospect or during the course of the relationship;
- If the employee is not a 'new' employee at the time they sign their employment agreement then the 90-day trial period will be invalid;
- The terms of a trial period, including providing the employee with the prescribed notice period, must be followed;
- Any self-imposed obligations, such as a statement that the employer will conduct regular performance assessments or provide training during the trial period, must be met.

The Office Assistant

In a later 2010 case an employee named Nicole Schneider was employed by BBX Management Limited, now called Barter Management (NZ). She was a receptionist/office assistant/trade co-ordinator.

On 20 March 2009 Ms Schneider completed and returned a performance review. The review was sent to head office in Sydney. On that same day the employer told Nicole that her employment was being terminated. No reason was given but she was simply told that the company "had to let you go". Immediately after the phonecall Nicole was handed a written dismissal letter personally signed by the company's Managing Director, who was in Australia at the time.

Nicole's employment agreement had commenced on 26 January 2009. The 90 day trial periods law only applied to employment agreements entered into after 1 March 2009. This meant that in Nicole's case the provisions did not apply. The Authority was not required to

90-day trial periods ... continued

consider the 90-day clause as it did not apply. However, it went some way to considering the purpose of trial periods anyway.

The Authority said that *the 90 day trial period does not exempt an employer from the duty of providing the opportunity for an employee to be heard when dismissal is contemplated*. It stated that the "axiomatic failure" of the employer to provide Ms Schneider with an opportunity to state her case prior to any decision being made was fatal to the employer which had also acted in total lack of good faith or fair process. In the words of the Authority, "*a classic case of fait accompli*". The dismissal was determined to be unjustified. BBX was ordered to pay \$9000 in compensation and 13 weeks pay.

The Risks

90-Day Trial Periods are by no means a failsafe way to get rid of employees within 90 days.

Trial Periods allow employers the opportunity to assess whether an employee is right for their position. This

is a benefit to employers. In order for trial periods to be relied upon however they must be followed to the letter and must comply with the legislative requirements outlined above.

Employers will be looking to make use of 90-day trial periods for new employees from now on. The key is to ensure that commitments are not made in a 90-day clause that the employer does not intend to fulfill. Employers are still required to treat employees fairly and reasonably throughout the trial period.

Please contact us if you would like us to provide our trial period package which includes:

- Standard trial period clause
- Letter of advice to you for your business

Please also do not hesitate to contact us if you have any queries in relation to 90-day trial periods in general.