Prāctica Legal April 2015

EMPLOYMENT LAW FOCUS

THIS ISSUE: UNDERPERFORMING EMPLOYEES AND MORE TRIAL PERIOD PROBLEMS

Underperforming employees can be a real problem for employers. But what can be done about them?

Where an employee's performance is not of the required standard, many employers try to deal with the matter as some form of misconduct or serious misconduct. A Performance Improvement Plan ('PIP') is a procedure that aims to improve an employee's performance, or terminate employment where the required standard is not met. Often there are a number of issues that, in combination, add up to poor performance such as tardiness, errors and missed deadlines, however, none of these individually can be classed as misconduct or serious misconduct.

Unfortunately, PIPs can be one of the most time-consuming, complex and frustrating procedures in employment law and it is not

THIS MONTH'S DEAL!

The **first three subscribers** to contact Practica Legal will receive a free Performance Improvement Plan ('PIP') template which can be used as a guide to proposing and implementing a PIP.

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Phone: (07) 839 6449 Mob: 027 459 3375
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email: info@practicalegal.co.nz
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surprising that many employers try to find other alternatives to exit an underperforming employee.

REMEMBER!

INCREASE TO THE MINIMUM WAGE

From 1 April 2015 the adult minimum wage increased by 50c per hour to $14.75. The starting-out and training hourly minimum wage increased by 40 cents to $11.80.

A recent Employment Court case decision demonstrates just how drawn out and complex these matters can become. *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 follows the troubled employment of an IRD solicitor which spanned some 26 years. The employee's manager described the extensive efforts the IRD had taken over a 20 year period to try and remedy this particular employee's problems including: engaging a psychologist, arranging mediation, accommodating attendance on a course on managing relationships, investing significantly in Mr Yan's training and career development and rearranging work commitments.

Despite these efforts, a formal PIP was eventually commenced over a 12 month period which resulted in the employee's dismissal. It would be fair to say that the average private employer could not afford to be quite this patient!

Employers often struggle particularly when deciding a fair duration for a PIP and when attempting to set concrete measurable standards to measure improvement.

The dismissal in *Yan* was found to be justified by both the Employment Relations Authority and, on appeal, by the Employment Court. At [4] Inglis J offers some sympathetic support to employers in this difficult situation when she quoted Chief Judge Colgan's comments from another IRD case, *Bagchi v Chief Executive of the Inland Revenue Department* [2008] 5 NZELR 767 (EmpC), at [70]:

> *...It is, after all, the employer, that sets the expected standards and must assess those. It is also the employer that is aware of, and must deal with, the consequences of poor performance on the enterprise and other staff. All the court can do is to ensure that the decision to dismiss was taken in good faith, fairly and reasonably and otherwise is a decision that it is reasonably open to the employer to make.*

Judge Inglis at [3] also helpfully summarised the framework employers should keep in mind to ensure that a decision to dismiss following an unsuccessful PIP, is viewed as fair, reasonable and made in good faith:

a) Did the employer in fact become dissatisfied with the employee's performance?

b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?

c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?

d) Was the employee given a reasonable time to attain the required standards?

e) *Following the expiry of a reasonable time:*

   i) *Use of an objective assessment of measurable targets?*

   ii) *Fairly putting tentative conclusions before the employee?*

   iii) *Listening to the employee's explanation with an open mind?*

   iv) *Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).*

   v) *Exhausting all remedial steps including training, counselling and exploring redeployment.*

Whilst steps a) to c) above are fairly simple to implement and provide evidence for, the subjective discretion that an employee is likely to challenge creeps in from d) onwards and this is what really causes the headache for employers.

While a 12 month PIP may be reasonable for a government department (although I would argue that even then, it is unusually long), it may be completely unreasonable to expect this from a private employer, particularly a small employer with few staff. Typically, PIPs occur over a 1-3 month period.

Although there is no magic bullet to overcome these dilemmas, it is recommended that employers formalise performance improvement procedures as soon as it becomes clear performance is unsatisfactory and keep meticulous, measureable records such as number and date of errors, missed deadlines and customer complaints in an effort to try and establish measurable goals.

For more information on how to deal with employee performance issues email us at: **info@practicalegal.co.nz**

COURTSIDE

Recent Employment Court and Authority Decisions

Continuing issues over trial period dismissals. Dismissing employees under trial periods continue to cause problems as the two recent cases below show.

Trial periods as and of themselves are not the problem. The problem only arises when someone is either dismissed under a trial period incorrectly, or is dismissed under a trial period that was not set up properly to begin with so was never valid. For tips on both the setting up of a valid trial period and for safely dismissing under a trial period, see the **'Learning Points'** section at the end of this newsletter.

Tyagi Parikshit v James Richardson (NZ) Limited **[2015] NZERA Auckland 77.**

Mr Parikshit ('P') successfully interviewed for a position as 3IC in a duty free retail store owned by James Richardson (NZ) Limited ('JR') at Auckland International Airport.

His employment was subject to a 90 day trial period. He was dismissed on Day 87 of the trial period following four review meetings and was paid out one week's pay in lieu of notice in accordance with the trial period clause in his employment agreement.

Section 67B(1) of the Employment relations Act 2000 ('Act') states that where an employee who is subject to a trial period is given notice of dismissal prior to the conclusion of a trial period, that employee will not able to bring a personal grievance in relation to the dismissal.

P raised a personal grievance in relation to the dismissal claiming the trial period was not valid.

Timeline: P was made a verbal offer of employment on 10 April 2013 and was sent an email on 11 April confirming he was to start a three day induction course on 16 April and asking him to bring a number of documents on 16 April including criminal history check and tax declaration form. This email did not contain a letter of offer or an individual employment agreement ('IEA').

On 12 April 2013 P was sent an email which contained a letter of offer, an IEA and a schedule to the IEA. The email asked him to read through all the attached documents and when he was happy with them to email acceptance of the offer. It also asked him to bring signed copies of the attached documents with him on 16 April and a similar list of documents as the 11 April email had requested.

DON'T FORGET!

PAID PARENTAL LEAVE EXTENDED

From 1 April 2015 the parental leave payment period has been extended from 14 weeks to 16 weeks.

P did not reply to the 12 April email but arrived 30 minutes early on 16 April for induction. When asked for the signed documents he claimed he had not received the 12 April email and had not printed or signed the documents. JR's HR consultant knew it was important that an IEA with a trial period be signed *prior* to commencement of employment and therefore printed out a fresh set of copies for P and spent time going through the letter of offer and the IEA with P.

P went through the documents, signed them, then and there, and commenced with the induction programme.

Authority's Decision: Quoting substantially from the 2011 decision of the Employment Court in *Blackmore v Honick*, the Employment Relations Authority ('ERA') held that the trial period was not valid because P had not had reasonable opportunity to seek independent advice on the intended IEA as required by s 63A(2)(c) of the Act. Following *Blackmore*, an employee should be provided with at least a few days or more in which to consider an IEA and obtain advice if they wish.

The ERA held that if it were true that P had not seen the 12 April email, then he effectively, had only been given 30 minutes to consider the IEA. Even if it were not true and he had seen the 12 April email, the email was sent late Friday afternoon only one full working day prior to commencing the induction course on Tuesday 16 April which would still be insufficient time.

The Authority held that JR had failed to comply with its statutory requirements when entering an employment agreement, and therefore, could not rely on the trial provisions in that agreement which would have prevented P from raising a personal grievance in relation to the dismissal.

Hutchison v Canon New Zealand Ltd **[2014] NZERA Wellington 72**

Some of you may have been following the debate about the implications of this case on the New Zealand Employment Relations Practitioners group on LinkedIn.

On 1 February 2013, Mr Hutchison ('H') received and signed an IEA for a position with Canon New Zealand Ltd ('Canon') commencing on 4 March 2013. The IEA contained a 90 day trial period which stated*: "[Canon] may terminate your employment at any time during the trial period by giving you one week's written notice or payment instead of notice. You must give CNZ two weeks' written notice should you wish to leave your employment during the trial period."*

On Day 88 H received a letter from Canon outlining concerns they had about his performance and inviting him to a meeting the following day offering him the opportunity to respond to these concerns. The letter stated that the meeting may result in the termination of his employment.

H attended the meeting the following day (Day 89) and at the conclusion was told orally that Canon was terminating his employment. That evening, Canon deposited the equivalent of one week's pay into H's bank account, being the one week's pay instead of notice. It was not until Day 93 that Canon confirmed in writing that it was terminating his employment on one week's notice.

Although H argued before the ERA that the trial period was invalid for a number of different reasons, those reasons were all dismissed--except one.

Sections 67B(1) and (2) of the Act states:
(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by <u>giving the employee notice of the termination before the end of the trial period</u>, whether the termination takes effect before, at, or after the end of the trial period; [Emphasis added]
(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance of legal proceedings in respect of the dismissal.

Unfortunately for Canon, the IEA stated that 'notice' had to be given in writing. While Canon orally told H on Day 89 that they were ending his employment, they did not lawfully (which in employment law terms means in accordance with the terms and conditions in the IEA) give him notice, which needed to be in writing, until Day 93. Although Canon had paid him one week's pay in lieu of working out his notice on Day 89, they had still failed to give him notice in accordance with his IEA until Day 93.

An appeal was lodged by Canon in the Employment Court, however, we understand that this appeal is now not proceeding.

The debate on this matter arises due to a lawyer for Canon stating that the decision in this matter means that employers are being prevented from paying an employee dismissed pursuant to a trial period, in lieu of working out notice.

We disagree that this is what the decision says. Basically, it is arguable that if Canon had given H lawful notice on termination on Day 89 in writing, then they could also lawfully (as it was contained in the IEA) have paid him out one week in lieu of working his notice. Because Canon only told H orally on Day 89 (so this was not lawful notice in accordance with H's IEA), this error could not be rectified by doing something

'other' then lawfully giving him notice such as, paying an amount of money into his bank account.

It is quite a technical decision, and another reason why legal advice should be sought both prior to an employee commencing employment on a trial period and prior to dismissing an employee pursuant to a trial period.

Learning Points

The problem that arises with dismissing an employee pursuant to a trial period is that such a dismissal usually does not follow the rigorous procedure that would be applied if the employee were not on a trial period. Unfortunately, if the trial period is found to be defective, the employee is then free to raise a personal grievance in relation to the dismissal and the employer's procedure will be measured against the s 103A Test of Justification in the Act.

Usually, the steps taken to dismiss someone under a trial period will be substantially less than that required for a non-trial period dismissal, and the dismissal will therefore be found to be unjustified due to procedural failings.

When entering an employment agreement containing a trial period employers need to be mindful of the following:

Prior to employment:

- Allow <u>at least</u> one full week between giving an employee an IEA and expecting them to sign and return it (this should be done whether there is a trial period in the IEA or not);
- The letter of offer should recommend/encourage that the person being offered the position seek independent legal advice before signing;
- Once offer and acceptance has been completed (even orally) the person has already become an employee (as the Act includes persons *intending to work* in this definition). Only *new* employees can be subjected to a trial period, therefore, signing of the IEA needs to occur *prior* to the completion of offer and acceptance and

prior to the person becoming an employee. To overcome this, a letter of offer can be sent at the same time as the IEA and state that the commencement date and the offer of employment itself are both conditional upon the employer receiving a signed copy of the employment agreement before a set date. In this way, the process of offer and acceptance has not been completed, until the employer holds a signed IEA form the employee;

- Never let an employee commence work if they have not returned their IEA prior to the first day. If they arrive on Day 1 and say they have forgotten it, send them home and tell them employment cannot commence and they are not an employee until you have received their signed IEA.

When dismissing under a trial period:

- Check the IEA thoroughly and ascertain what in each case needs to be done to give lawful notice (specifically, how many days or weeks' notice must be given and whether it needs to be in writing or orally);
- 90 days means 90 days (not 3 months). Count exactly how many days since the employee commenced work with the first day of work being Day 1 and make sure you are still inside the trial period when giving notice. The duration of the trial period needs to be specified and can be for a period less than 90 days but cannot be longer than 90 days;
- Lawful notice of termination must be given prior to the end of the trial period (although if the employee is working out their notice period that can continue past the 90 days, provided notice of termination was given prior);
- Do not pay an employee money in lieu of working out their notice unless the trial period clause in the IEA specifically allows for this;
- It is recommended that the notice provision in the trial period clause be shorter than the general termination clause which may be anything from two weeks to three months. However, the notice period should not be less than one week;
- Ensure your trial period clause specifically excludes any other part of the IEA or relevant company policies that relate to what the employer will do to help the employee if their performance is substandard. Otherwise, such commitments to the employee may technically still apply;
- Where at all possible, follow the normal fair procedure you would follow when dismissing an employee not on a trial period. In that way, even if the trial period is subsequently invalidated for one reason or another, the default position is that the employer can still justify the dismissal procedurally, at least (although it may be held to be unjustifiable substantively);
- Seek employment law advice before initiating a dismissal under a trial period.

For more information on how to use trial periods email us: **info@practicalegal.co.nz**