

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 254
5549272**

BETWEEN MATTHEW PHILLIPS
Applicant

AND MODERN TRANSPORT
ENGINEERS (2002) LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mike Harrison, Advocate for Applicant
Mark Flyger, Advocate for Respondent

Investigation Meeting: 20 August 2015 at Hamilton

Submissions received: 20 August 2015 from Applicant and from Respondent

Date of Oral Determination: 20 August 2015

Date of written
determination 21 August 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr Matthew Phillips, claims that he was unjustifiably dismissed on or about 16 February 2015 by the Respondent, Modern Transport Engineers (2000) Ltd (MTE).

[2] MTE denies that Mr Phillips was unjustifiably dismissed and claims that he was justifiably dismissed in accordance with a trial period provision in a written employment agreement.

[3] This determination addresses the issue of whether or not Mr Phillips' employment with MTE was subject to a valid trail period provision pursuant to s 67A of the Employment Relations Act 2000 (the Act).

Brief Background Facts

[4] MTE manufactures specialized heavy transport trailers for use in New Zealand and Australia. Mr Phillips commenced employment with MTE in the position of Storeman on 5 January 2015.

[5] Mr Phillips applied for the position of Storeman in response to an advertisement on Trade-me and was interviewed by Mr Steve Annan, Production Manager at MTE and the MTE Procurement Manager, on or about late November 2014.

[6] This initial meeting was followed by a second meeting between Mr Phillips and Mr Annan which involved a MTE site tour, and by Mr Annan making Mr Phillips a telephone offer of employment.

[7] Mr Annan asked Mr Flyger, MTE Accountant, to draft an employment agreement in respect of Mr Phillips' employment. Mr Annan said that the employment agreement was in a standard format used throughout MTE and contained a trial period provision.

[8] At a third meeting held on 10 December 2014 Mr Phillips completed all pre-employment documentation, and was provided with the proposed employment agreement.

[9] Mr Phillips said he glanced through this, and advised that he would like an opportunity to take it away and read it. This was agreed, but his understanding was that he had to return the employment agreement in a timely manner within 24 or 48 hours or the job offer would expire.

[10] Mr Phillips said that he had not been told by Mr Annan that the proposed employment agreement contained a trial period provision, nor did he recall seeing a trial period clause in the employment agreement provided to him.

[11] He had not been advised by Mr Annan that he was entitled to seek independent advice on the proposed employment agreement prior to signing it, and as he had been working night shifts during this period, he would have found it difficult to do so in the time period before the acceptance deadline.

[12] Mr Annan said that Mr Phillips was provided with an opportunity to read the proposed employment agreement during the third meeting, but that Mr Phillips had chosen to take it away with him instead.

[13] He said he had not discussed the 90 day trial period provision in the employment agreement with Mr Phillips, nor had he advised Mr Phillips that he had the right to seek independent advice before signing it. However he said that there had been no time pressure placed on Mr Phillips to complete it.

[14] Mr Phillips said that when he had returned the signed employment agreement to Mr Annan, he had asked for a copy of it and had been told that this would be posted to him; however he had not received a copy of it by post.

[15] Mr Annan said that once the employment agreement had been signed by Mr Phillips, he had given it to Ms Delwyn Kennington, the Office Manager at MTE, together with the pre-employment documentation completed by Mr Phillips.

[16] This documentation was needed by Ms Kennington in order that Mr Phillips could be set up as a new employee on MTE's time clock system and accounting system

[17] Ms Kennington was unsure on exactly which date she had completed the steps to enter Mr Phillips as a new employee on the time clock system and accounting system, however said that she would not have completed these steps without having seen Mr Phillips' signed employment agreement.

[18] When Mr Phillips commenced employment on 5 January 2015 the steps had not been completed to enter him into the MTE time clock system and the hours he had worked had been logged manually by Mr Annan. It was not until Ms Kennington returned from annual leave the following week that the steps to enter Mr Phillips on the time clock system were completed.

[19] Ms Kennington said that in accordance with her normal procedure she would have filed Mr Phillips' employment agreement in the staff filing system.

[20] Ms Kennington said she could not recall if the signed employment agreement contained a trial period provision, although this was a standard clause inclusion which was included in all employment agreements for new employees.

[21] Mr Phillips said that after commencing employment he had experienced difficulties in his relationship with the Procurement Manager.

[22] Mr Phillips said he again requested a copy of the employment agreement, on 15 and 24 January 2015 and on 3 February 2015, but had not received a copy as requested.

[23] Ms Kennington said that other than initially, she did not recall Mr Phillips asking for a copy of his employment agreement.

[24] Mr Annan said that in light of concerns he had with Mr Phillips he had discussed the situation with Mr Flyger and they had viewed Mr Phillips employment agreement on Mr Flyger's computer screen.

[25] On 16 February 2015 Mr Annan and Mr Flyger, met with Mr Phillips and advised him that MTE intended to terminate his employment in reliance on the 90 day trial period provision in the employment agreement.

[26] Mr Phillips asked to see the employment agreement. Mr Flyger had accessed it on his computer system; Mr Phillips had requested a copy and had been provided with a printed copy of an employment agreement with another employee's name on it.

[27] Mr Phillips said that it was a copy of his employment agreement that he wanted to see, however a copy had not been provided to him during the meeting, and he had been told that a copy would be posted to him.

[28] Following the meeting on 16 February 2015 Mr Annan asked Ms Kennington for a copy of Mr Phillips' employment agreement. However when Ms Kennington checked the staff filing cabinet, she found that Mr Phillips' employee file was missing in its entirety.

[29] Ms Kennington said when questioned that she believed Mr Phillips may have taken the file, but there was no evidence provided in support of what is a serious allegation.

[30] Mr Phillips' employment with MTE was terminated on 16 February 2015.

Determination

[31] Employers are under a duty pursuant to s 63A of the Act to provide employees at the time of engagement with:

- a copy of the intended agreement (s. 63A(2)(a));
- advice that he or she is entitled to seek independent advice about the intended agreement (s. 63A (2)(b)); and
- to provide an opportunity for the employee to seek independent advice on the intended agreement. s 63A(2)(c)

[32] Pursuant to s. 64 of the Act, employers must: “*retain a signed copy of the employee’s individual employment agreement or the current terms and conditions of employment that make up the employee’s individual terms and conditions of employment*”.

[33] The Act makes provision for trial periods for a specified period not exceeding 90 days pursuant to ss 67A and 67B. The Act states at s 67A (2):

(2) ***Trial provision*** means a written provision in an employment agreement that states, or is to the effect, that –

[34] In the Employment Court case of *Blackmore v Honick Properties Ltd*¹ the Chief Judge addressed the issue of trial periods, noting:²

[70] What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee.

[35] MTE has been unable to provide a signed copy of the written employment agreements between it and Mr Phillips, although it has provided a copy of an employment agreement which it states is in a format which is standard to that issued to all new employees.

[36] The standard employment agreement provided by MTE contains a trial period provision at clause 3.1 of the agreement. Clause 3.1 has no specific heading and is not otherwise conspicuous. There is no clause in the standard employment agreement that advises the prospective employee that he or she is entitled to seek independent advice on it.

[37] Mr Phillips does not dispute that he signed a written employment agreement; and that he was allowed to take it away with him. He cannot recall if it contained a 90 day trial period provision. He was on night shifts at the time which hindered him seeking independent advice.

[38] Mr Annan confirmed he was aware Mr Phillips was on night shifts at the time of taking away the intended employment agreement, but disputes that he subjected Mr Phillips to pressure to sign it. Although Mr Phillips said that there was an offer letter stating there was a time restriction for acceptance of the employment offer, I find there is no evidence confirming that that was the case.

[39] The issue for determination is not whether there was a signed employment agreement therefore, but whether or not it contained a 90 day trial period provision.

¹ [2011] NZEmpC 152

² Ibid at paras [69] & [70]

[40] The statutory onus was on MTE as the employer to ensure that:

- (i) a trial period provision had been included and agreed in a written employment agreement between itself and Mr Phillips;
- (ii) to provide Mr Phillips with a copy of the signed employment agreement, and
- (iii) to retain a signed copy itself.

[41] Whilst Mr Annan and Ms Kennington's evidence is that a signed copy was retained, MTE cannot now locate it, and Mr Phillips disputes that a copy was provided to him at the time of signing or subsequently, despite his requesting one both at the time of signing and subsequently.

[42] I find it significant that MTE did not provide Mr Phillips with a copy of the written employment agreement as apparently accessed on Mr Flyger's computer system some time before the meeting, and instead provided Mr Phillips with the employment agreement of another employee at the meeting..

[43] Nor was MTE able to provide a signed copy following the meeting because Mr Phillips' entire employment file had apparently disappeared.

[44] Whilst I accept that the standard employment agreement provided in evidence by MTE contains a 90 day trial period provision, and that Mr Phillips accepts he signed the employment agreement he had been provided by Mr Annan, I find this does not confirm that the employment agreement provided to Mr Phillips contained a 90 day trial period provision.

[45] MTE having failed to fulfil the s 64 statutory requirements in the Act in regards to retaining a copy of the signed employment, I find that it cannot now seek to rely on the trial period provisions in the employment agreement to prevent Mr Phillips bringing a claim for unjustifiable dismissal.

[46] Accordingly I determine that there is no valid trial period provision and that Mr Phillips is thereby not precluded from bringing a personal grievance claim against MTE.

[47] Mr Phillips may therefore progress his unjustifiable dismissal grievance, although this determination contains no implications as to the merits or otherwise of his grievance.

[48] The parties have not been to mediation as yet, and are directed to attend mediation on the basis that, the preliminary issue having been resolved, they might now be able to resolve the substantive issue between them.

[49] Should mediation not resolve the issue, Mr Phillips is to revert to the Authority in order to progress the investigation of the substantive issue to a hearing date.

Costs

[50] Costs are reserved pending a final resolution of this matter.

Eleanor Robinson
Member of the Employment Relations Authority