

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 73/10  
5297513

BETWEEN

HEATHER SMITH  
Applicant

AND

STOKES VALLEY  
PHARMACY (2009) LTD  
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicant  
Andrew Cook for the Respondent

Investigation Meeting: By way of submissions received by 20 April 2010

Determination: 22 April 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] The applicant has sought to have the employment relationship problem between her and the respondent (the Pharmacy) removed to the Employment Court, for it to hear and determine the matter, pursuant to ss.178(2)(a) and (d). While the Pharmacy considers that no important questions of law have been identified, because of the likelihood of a challenge and for reasons of cost it neither consents to nor opposes removal to the Court.

[2] The issues for determination are whether the grounds for removal, namely the existence of an important question or questions of law and/or a positive use of the Authority's discretion *in all the circumstances*, are made out and if so, whether in its residual discretion the Authority should still remove the matter to the Court.

[3] Ms Smith was dismissed by the Pharmacy, purportedly in reliance of a trial period under s.67A (as inserted on 1 March 2009) of the Act, which provides for trial periods for 90 days or less in some circumstances, for smaller employers.

[4] *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, sets out what constitutes an important question of law. Such a question will be important if its resolution can affect a large number of employers or employees, or if the consequences of the answer to the question are of major significance to employment law generally.

[5] On behalf of Ms Smith Mr Cranney has identified a number of what he says are important questions of law in relation to Ms Smith's dismissal by the Pharmacy. First, he submits there is an important question of law as to whether the Pharmacy can rely on the trial period, as the employment agreement was signed the day after Ms Smith started work. In its statement in reply the Pharmacy submitted that this question was frivolous *as clearly the trial provision became effective at the beginning of her employment, or within one day.*

[6] It is clear that this is a question of law however, as s.67A does not specifically provide for this eventuality. Although a *trial period* must provide to the effect that for a specified period, not exceeding 90 days, the employee is to serve a trial period, that period commences at the beginning of the employee's employment. I accept Mr Cranney's submission that large numbers of employees may be affected by such a question, because many employees do not sign employment agreements until after they start work.

[7] The second question about whether the trial provision is therefore of no effect follows on from the first issue.

[8] The third question of law relates to whether payment in lieu of notice is *giving notice* in the form required by s.67B. The form of notice required is not specified in s.67B and I therefore accept that this is an important question of law. Again this is likely to affect a large number of employees and employers. I do not accept, as submitted by Mr Cook, that this is a question of fact rather than law. The issues of notice and the effect of payment in lieu of notice are mixed questions of fact and law, see for example *G FW Agri-Products v. Gibson (CA)* [1995] 2 ERNZ 323.

[9] Finally, Mr Cranney submits that there are important questions of law in relation to the meaning of the phrase *legal proceedings in respect of the dismissal* in s.67B(2), over actions for underpayment of notice, damages for breach of an employment agreement, penalties; the effect of non-compliance with s.63A and whether and what remedies are available in respect of a personal grievance by way of unjustifiable action, rather than unjustified dismissal.

[10] I also accept that these are questions of law and that they may have wide impact on a large number of employees and employers who seek to utilise the trial provisions of the Act.

[11] I am not aware of any Court judgments which deal specifically with these issues. I therefore conclude that they are also important questions of law, although some may depend on findings of fact, which the Court will be able to do as easily as the Authority if the matter is removed to it. Furthermore, I accept that the answers to all the above questions, testing as they do new legislative provisions, will be of significance to employment law generally. Most or all of the questions posed on behalf of Ms Smith are therefore capable of constituting important questions of law. Accordingly, because of their potential widespread impact, I have no hesitation in concluding that there are important questions of law raised and that there are no reasons, particularly as the Pharmacy has not opposed removal, for the matter not to be removed to the Court. Because of my findings on this first ground for removal, I do not need to address the second ground for removal; i.e. in all the circumstances.

[12] I therefore order the removal of the whole of the employment relationship problem (recorded as 5297513) between Heather Smith and Stokes Valley Pharmacy (2009) Ltd, to the Employment Court for it to hear and determine without the Authority investigating the matter.

**G J Wood**  
**Member of the Employment Relations Authority**