

## NEWSLETTER - MAY 2009

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**EMPLOYEE TOLD “YOU’RE TOO BIG FOR THE JOB”**

A recent Employment Relations Authority (ERA) decision highlights that due process still needs to be followed when utilising the 90 day probationary period law.

*Douglas v Godfrey Haulage Limited* (Employment Relations Authority, Auckland, April 2009)

**THE FACTS**

In or about September 2007 the employer advertised for drivers. The employee submitted an application to the employer. Eventually he was telephoned and invited to an interview.

Prior to the interview the employee attended a medical examination as previously agreed. At the conclusion of the examination the occupational health nurse telephoned the employer to inform it of the result of the examination. This was later communicated by email:

*“Work fit (recommended for this position). To be a good employee he really needs to lose weight. His right knee causes him a lot of pain which requires twice daily pain medication.”*

During the interview, the employee was asked if he would have problems getting up a ladder on the truck. The employee said he would not.

The employee was telephoned later in the day and told that the job was his. When he arrived at the depot, the employee was given an induction package which included the employer’s conditions of employment and induction handbook, and also their collective employment agreement. The documents were signed on 19 September 2007.

The employee commenced employment on Monday 24 September 2007 and continued a week’s training to Friday 28 September 2007. He worked again on Monday 1 October 2007.

On Tuesday 2 October 2007 the employee arrived at work at 2.30 pm. At 2.45 pm the employer telephoned him while he was in the smoko room. The employer inquired how he was getting on with the job. The employee told him it was different to long haul, he was enjoying the job and all was well. The employer then stated *“I’ve got a problem, I think you should finish up”*. When the employee asked why, he was told he should look at joining a gym and hiring a personal trainer to assist him in losing weight. He was also informed that as he was a member of Southern Cross they would subsidise a stomach stapling operation costing \$15,000.00.

The employee protested that he had done nothing wrong. He asked why the employer wanted him to leave. The employer replied *“you’ve done nothing wrong, you’re too big for the job”*. The employee was asked to finish immediately. He was then asked to hand back his ID card.

**THE ARGUMENT**

The employee’s employment agreement provided for a three month probationary period under section 67 of the Employment Relations Act 2000.

At the investigation meeting, the employer stated that with a contractual provision a trial period could be ended at any time during the stated three months. This was not accepted by the ERA.

The employer further argued that a one week trial period was agreed and was not successful. This was also rejected by the ERA.

**THE DETERMINATION**

The ERA held that the employee was unjustifiably dismissed over the telephone by the employer on Tuesday 2 October 2007. Accordingly the employee was awarded \$10,500.00 for lost wages and compensation for hurt and humiliation of \$4,000.00.

**EMPLOYERS WATCH FOR FACEBOOK FAUX PAS**

First there was My Space, then Bebo, along came Facebook and now Twitter. It is very easy to waste away the hours on any of these sites at home or work.

On these sites it is common to see people post comments such as “thank God it’s Friday” and “what a day”. However, where does the employer stand if an employee blogs *“man I hate working for company X”* or *“do not buy from my employer, they will rip you off”*?



**EMPLOYERS WATCH FOR FACEBOOK FAUX PAS** (Con't)

If the employee posts the offending comments during work time, using the company IT system, the employer should go straight to their internet policy. If the policy outlines clear limits then the appropriate investigation and disciplinary action can take place.

Any disciplinary action may be more difficult to justify when an employee makes the comments outside of work time. In order to justify the disciplinary action the employer must show a clear relationship between the conduct and employment. A frustrated, *“my boss sucks”* may not justify disciplinary action in the way that *“my employer is a crook and a rip off merchant”* might, one potentially bringing the company into disrepute and the other only reflecting an employees view at that date and time.

In any event, now would be the time for employers to review their internet policies to make sure they provide for such events.

**JOB VETTING PRACTICES MAY BREACH PRIVACY ACT 1993**

The Privacy Commissioner Marie Schroff has announced that all employers and vetting agencies may be breaching the Privacy Act 1993 with some practices of collecting and storing information about job applicants.

Questions have arisen about consents the Tertiary Education Commission (TEC) seeks from applicants via a third party contractor.

The application forms ask job seekers to sign consent for Resume Check Limited to carry out background, resume and reference checks, and for *“any relevant third party”* to provide information to the agency about them.

Whether they were successful or not in their application for a TEC position, they are also asked to agree to Resume Check Limited holding the information indefinitely for future pre-employment vetting.

The Privacy Commissioner points out that realistically applicants have *“little real choice but to sign the forms vetting agencies ask of them”*.

Furthermore, The Privacy Commissioner is concerned of instances where employers or vetting agencies were requiring applicants to give authority for wide collections of personal information from any source and then that information being used indefinitely.

It is important that employers and agencies advise prospective employees:

- 1 How information will be used;
- 2 How it will be stored; and
- 3 How long it will be stored for.

While there has not been a ruling on this matter, employers should take the Commissioner’s comments as forewarning of the treatment that could be expected should an employee or prospective employee complain about the collection of information.

**SEARCH ORDERS NOW POSSIBLE THROUGH EMPLOYMENT COURT**

If you have good reason to believe that one of your employees has information or property belonging to you, one of the most important tools you have as an employer is to obtain a Search Order from the Court.

The Search Order allows the employer to search for and take away certain property – usually documents and computers.

Previously an employer had to issue proceedings in the High Court to obtain a Search Order. However, the Employment Court has confirmed that following changes to the High Court Rules in late 2008, the Employment Court now has the power to make Search Orders in employment related matters.

**NINE DAY FORTNIGHT SCHEME EXTENDED**

The Government has extended the nine day fortnight job protection scheme to include companies with 50 to 100 employees. Previously a company had to have more than 100 employees to be eligible.

Extending the scheme opens it to another 2,000 companies and around 150,000 employees.

To date the scheme has had moderate success with three large companies joining up saving around 117 jobs.

**EMPLOYMENT RELATIONS TEAM**  
 If you have any queries in respect of the above, or any other employment law issues, please contact a member of Lane Neave’s Employment Relations Team: Glenn Jones, Andrew Shaw, David Caldwell, Amy Shakespeare and Fiona McMillan.