

90 Day Trial Periods – How will this affect your business?

The Government has delivered on its pre-election promise to allow employers of small and medium sized businesses to take on new employees for trial periods. The new law amends the Employment Relations Act 2000 and will come into effect on 1 March 2009. It will enable employers with less than 20 employees to determine new employees' suitability for permanent employment in the first 90 days of their employment, without the risk of legal proceedings for unjustified dismissal in the event their employment is terminated.

Trial periods are an established part of employment laws in most OECD member states and many employers in New Zealand have been either frustrated or sometimes ignorant of the fact that new starts who are dismissed during their trial period can still bring an unjustified dismissal claim against their employer. The new law changes this and, provided you are an eligible employer, this new law will affect your business.

Are you an eligible employer?

Trial periods can only be entered into by employers who employ 19 or fewer employees. The number of employees, however, is calculated at the beginning of the day on which the employment agreement is entered into. This means that an employer who employs 19 employees at the beginning of the day may hire, say, five new employees on that day and still be able to enter into a trial period for the new employees. Although the employer employs 24 staff at the end of the day, any trial periods agreed to are still valid because the employer only employed 19 staff at the beginning of the day. The Act broadly defines an employer as "a person employing any employee or employees", so subsidiary entities with less than 19 employees should remain eligible, even if they are part of a larger group of companies.

Trial periods cannot be used for employees who have worked for the employer before. This is intended to prevent employers hiring and firing the same employee every 90 days.

Getting started – trial periods in employment agreements

A trial period must be agreed to by the new employee and the employer. This agreement must be included in the employee's written employment agreement.

The employment agreement must state, or be to the effect, that:

- for a specified period (not exceeding 90 days), the employee is to serve a trial period; and
- during that period the employer may dismiss the employee; and



- if the employer dismisses the employee, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

Generally speaking, trial periods can be agreed between an employer and an employee employed under a collective agreement. However, there cannot be any inconsistency between any variation to the collective agreement about trial periods and the terms and conditions in the collective agreement.

And if it's not working out?

An employer wishing to terminate an employee's employment under a trial period must give the employee notice of termination before the end of the trial period. This is the case whether the dismissal takes effect before, at, or after the end of the trial period. This is an important point that employers must be aware of. If the trial period expires before the employer has informed the employee that their employment will be terminated, the employee is not deemed to be employed within the trial period and is therefore entitled to pursue a personal grievance for unjustified dismissal.

Employers must comply with any agreed notice period. It is possible to specify a shorter notice period to apply during the trial period.

Under the new law, an employee under a trial period retains the right to access Mediation Services and mediation is "available" to parties in relation to the dismissal. Employers may be reluctant to attend mediation and/or offer any settlement monies to an employee dismissed while on "trial", particularly as there is no further course of redress available after mediation.

Do employees on "trial" have any rights?

Employees can still bring a personal grievance or legal proceedings for any of the following:

- an unjustified action;
- discrimination;
- sexual harassment;
- racial harassment;
- duress (in relation to membership or non-membership of a union or employees' organisation);
- if their employer has failed to comply with a requirement of Part 6A (relating to continuity of employment if an employee is affected by restructuring).

By way of example, employees will still have access to personal grievance procedures during their trial period if their employment is disadvantaged by an unjustified action by their employer. For example, an employee whose pay is unilaterally reduced during their trial period will be able to commence a personal grievance claim for unjustified action against their employer.

Some uncertainties...

What is not clear is how non-barred claims (eg unjustified action) will interact with the prohibition on personal grievance claims in circumstances where an employee is also dismissed. For example, what

options are available to an employee who is dismissed for pregnancy during their trial period but who, apart from the dismissal, was not subject to any act or acts of discrimination by her employer? Under the new law, it appears the employee would be unable to claim remedies for any loss or hurt arising from the actual dismissal, even though it was clearly an act of discrimination.

Another uncertainty concerns the extent to which employers are obliged to consult with “trial” employees about restructuring. The Act exempts employers from the requirement to comply with section 4(1A)(c) of the Act (ie to provide affected employees with access to information about a proposed restructuring and consider their feedback). The Act does not, however, exempt employers from the requirement to act in good faith towards all employees, including in restructuring/redundancy situations (section 4(4)(d-e) of the Act). Does this mean that employers can select “trial” employees for redundancy without consulting with them at all?

Do you want us to include a trial period in your employment agreements?

We will review your template employment agreement and review the agreement for legal compliance for \$250 (excluding GST and disbursements). If your agreement is not compliant, we will advise you what needs to be changed and discuss next steps with you.

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