90-DAY TRIAL PERIOD LAW FOR EMPLOYERS AND EMPLOYEES

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Employers are frequently mucking up the 90-day trial period when attempting to hire and fire new staff and it's costing them. When used correctly, the 90-day trial period is a useful tool that's designed to protect small- to medium-sized employers from people who might misrepresent their ability and for employers to quickly weed out those they hire that do not fit. But it must be done correctly, otherwise a dismissed employee may be entitled to a large payday. We've put together some advice for both employers and employees.

Trial periods can be challenged as being ineffective where the trial period may be held to be invalid, and this includes the situation where the employer fails to properly give notice under the trial period provision. While it's important for employers to be aware of how trial periods need to be written and followed correctly, we believe that employees should know what their rights are and that they take the advantage when their trial period may be challenged, if they are dismissed under it.

In employment law, where correctly done, what a 90-day trial period provision does is precludes an employee's ability to pursue a personal grievance claim for unjustified dismissal; the employer's duty of good faith to disclose information wherein making a decision whether to terminate an employment agreement does not apply, and the employer would also not be required to provide a statement of reasons in writing for dismissal.

The difficulty that we often see employers face is that often an employer will not follow their own trial period correctly or the wording of the trial period may not comply with the Employment Relations Act 2000, specifically sections 67A and 67B of the Act.

The Employment Court endorses the view that trial period provisions are to be strictly interpreted. This is because they attempt to remove the longstanding employee protections and access to dispute resolution and justice because they are an exception to the general employee protective scheme of the Act. The leading case on this is Smith v Stokes Valley Pharmacy (2009) Ltd [2010] NZEmpC 111 and this position has not changed since.

How an employer can rely on the trial period

The following steps are required:

- The employer employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into.
- The employee is a new employee and has not previously worked for the employer. This would mean that the employee does not start work until after having signed their employment agreement.
- The employee is provided with and advised that the employment agreement contains a trial period provision; advised that the employee is entitled to seek independent advice about the intended agreement; given a reasonable opportunity to seek advice; and the employer considers any issues that the employee raises and responds to them. This is called good faith bargaining.
- In terms of section 67A(2), the trial period clause is written to words to the effect that:
  - for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
  - during that period, the small- to medium-sized employer may dismiss the employee; and
  - if the small- to medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- dismissing the employee, notice must be given in accordance with the trial period provision and notice must be given before the end of the trial period. Section 67B(1) and subsequent decisions of the Employment Court require employers to give notice correctly.

Common but simple mistakes employers make

These common mistakes relate mainly to the formation of the trial period:

- Not providing any written employment agreement at all or the written agreement does not contain a trial period provision.
- Where the trial period provision does not meet the three conditions of section 67A(2) as described above.

> "90-day trial period dismissals can be challenged"

- Not specifying in an employment agreement when the trial period starts. This can also become a difficulty where there's a training period or period of induction and the start date of the trial period is not clear.
- Where the trial period is for more than 90 days duration. For example, specifying a duration of three months is a common mistake because this exceeds 90 days.
- Where the trial period is described as being "up to 90 days". This does not precisely specify its length and therefore does not comply with the Act.
- Not documenting that good faith bargaining has occurred (good faith bargaining is described above).
- Where the employee signs the employment agreement after starting work. It's advisable that an employee, when signing in this situation, does not 'backdate' their date of signature so that the employee can later easily prove that they started work before signing.
- Giving notice of dismissal outside of the trial period.

Incorrect notice can invalidate a trial period

Strict interpretation also applies to the way notice is actioned by the employer. Deficient notice is not lawful notice and notice must be given in accordance with the trial period provision and the Act.

There was a case that came before the Employment Court where an employer attempted to make a payment in lieu of notice when its trial period provision did not expressly allow for it. This was in Roach v Nazareth Care Charitable Trust Board [2018] NZEmpC 123.

In that case, part of the trial period provision included words stating that "the employer might decide to pay the employee not to work". This was held by the Court to be ambiguous. The judge made a comparison between this clause and a more comprehensive clause in the general termination provisions, which allowed for payment in lieu of notice outside of the trial period only.

The conclusion was that if the employer was to contractually exercise a payment in lieu in reliance of the trial period clause, then the wording of the trial period clause should have deliberately allowed for a payment to be made in lieu of notice. Mr Roach was, therefore, successful in his claim.

Giving notice correctly

Payment cannot be made in place of giving notice. Notice must first be properly given. If the trial period calls for notice to be in writing, then it must be given in writing. Notice must be more than simple advice of dismissal and that it must comply with the employment agreement.

An employer giving notice should articulate clearly that the employee is being given notice under the trial period clause in their employment agreement; refer to the notice period or the specific trial provision that refers to the notice period; if the employee is entitled to work out their notice period then the employee should be able to do so.

If there's a valid provision for the employer to make a payment in lieu of the employee working out the notice period, then this can be exercised but we say do so with caution and we recommend that employers seek advice on this first.

Where an employer pays notice incorrectly such that the notice paid is deficient, then the employer will not be able to rely upon the trial period either. It's important to be careful with calendar dates not only in giving notice but also making payment correctly and reflective of contractual notice.

What we can do for employers and employees

While we take cases for employees and often do so on a 'no win no fee' basis to chase compensation, lost wages, and costs, we also defend employers and give appropriate advice to employers on how to use 90-day trial periods correctly.

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court.

Whether you're an employee or employer and you need assistance with any employment issue, we are here to help.

No matter the situation, we recommend you speak to us for professional advice before you take action. ■

For more details, contact Lawrence Anderson on 0800 946 549 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz