

PROBATIONARY OR TRIAL PERIODS IN EMPLOYMENT AGREEMENTS – ARE THEY LAWFUL?

PROPOSED LAW CHANGE

A recent private Member's Bill has sparked debate around the use of probationary periods. Many employers want to give new employees a go but are concerned about the risk of expensive and protracted personal grievances if it doesn't work out. Taking on new staff can be a costly exercise. The risks increase for employees with little or no work experience or qualifications. The bill, if passed, would mean that for the first 90 days of employment an employer could terminate an employee's employment and the employee would not have recourse to the personal grievance and dispute provisions in the Employment Relations Act 2000.

NEWS FLASH: As reported in The New Zealand Herald on Thursday 23 November 2006 the private Member's Bill has been defeated and the current law continues to apply to trial periods.

CURRENT LAW

At the moment the law allows employers to use probationary periods but with restrictions. Section 67 of the Employment Relations Act 2000 currently sets out the following rules:

- The probationary or trial period must be set out in writing in the employee's employment agreement; and
- If the employee's employment is terminated at the end of the probationary period, the law relating to unjustifiable dismissals continues to apply.

A dismissal will be justifiable if the employer has a good reason for the dismissal such as performance shortcomings, and the employer has followed a fair process in reaching its decision to dismiss. Without good reason or fair process the employer is likely to face personal grievance claims.

FAIR PROCESS

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Getting the process right can be a headache for employers but it need not be.

It is a good idea to plan review dates throughout the probationary period. At those review dates the employee's performance can be considered and feedback given. Any shortcomings in performance should be dealt with promptly, and the employee should have an opportunity to take steps to meet the required standard. Standards, and what is required to meet them, should be set out in specific terms. The employer should assist the employee to reach the required standards such as providing training and any resources necessary to do the job.

If the employer has carried out reviews throughout the probationary period, the employer may then finally review the employee's performance at the end of the probationary period to determine whether to confirm the employee's employment as permanent. If termination of employment is a possible outcome, a formal disciplinary meeting should be held.

CHECKLIST

It is important to remember the following points **before** an employee's probationary period comes to an end:

- Set up review meetings with the employee during the trial period and stick to them;
- Raise any areas of concern with the employee about his or her performance as soon as possible;
- Give the employee an opportunity to respond to the area of concern and provide an explanation or feedback;
- Advise the employee of the specific performance concern in advance of any disciplinary meeting and tell them that a possible outcome might be the termination of their employment;
- Advise the employee that they may have a support person or legal advisor with them at any disciplinary meeting;

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- Take these steps before the probationary period ends if you are not happy with the employee's performance.

Probationary periods are lawful and they are a useful tool for alerting an employee that their performance will be closely monitored during the initial stages of employment. However, unless and until there is a law change, an employer cannot simply terminate an employee's employment during a probationary period without good reason and without proper process.

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