



90-DAY TRIAL PERIOD

Introduction

A valid trial period gives an employer the opportunity to assess a new employee's fit, ability, and performance. Trial periods can last for a maximum of 90 days. If the trial period is valid, it enables an employer to dismiss an employee either during or before the end of the trial period, and then prevents the employee from raising a personal grievance or other legal proceedings regarding the dismissal. Employees can still raise grievances for other claims, including for disadvantage, discrimination and/or harassment.

The trial period must be valid for an employer to enforce it

Given the effect a trial period could have on a new employee's employment, the Courts interpret trial period provisions strictly and require employers to show the trial period provision was valid. Invalid trial period provisions cannot be used to dismiss an employee, and if they are, expose the employer to claims for unjustified dismissal.

It's important that all parts of the employment agreement are correctly completed. One particular provision that is relevant to the trial period is the employee's commencement date (their "first day of work"). This needs to be completed on the basis the trial period provision refers to it.

Employment agreements may include robust trial period provisions. However, whether the provision can be used or is valid will still depend on the five points identified below.

In order for a trial period to be valid:

1. The employee must be a genuinely "new employee";
2. At the time the employment agreement was signed, the employer must have had 19 or fewer employees (20 or more employees and the employer cannot use trial periods);
3. The trial period provision must be in writing in the employment agreement, and must specify the duration of the trial period and when it commences;
4. The trial period provision in the employment agreement must have been bargained for in "good faith"; and
5. The employee must have signed the employment agreement before

If any one of these five points is not satisfied, the trial period is unlikely to be valid.

1. The employee must be a “new employee”

A trial period provision can only be included in employment agreements for genuinely new employees. If an employer has previously employed or engaged the employee (including on a fixed term or casual basis), they will not be a “new employee”, and any trial period provision will likely be invalid.

Importantly, pre-work trials where a potential employee has been compensated in any way (whether or not they were paid wages) or where they add any value to a business is likely to be seen as ‘employment’ meaning this potential employee also wouldn’t be a “new employee”.

2. The employer must have 19 or fewer employees

Trial periods are only available to employers with 19 or fewer employees. The moment in time at which this is assessed is the moment when the potential employee signs the proposed employment agreement. If the employer has 20 or more employees at this time, they are not able to include trial period provisions in employment agreements. Employers in this position can make use of probationary periods instead.

3. Trial period provisions must be in writing

Every trial period provision must be in writing and included in the relevant employment agreement. They must clearly specify:

The effect of the trial period (the employee can be dismissed by the employer and is prevented from raising a personal grievance or other legal proceedings because of that dismissal);

When the trial period commences (generally the provision will specify the trial period commences on the employee’s first day of employment); and

How long the trial period lasts (generally trial periods last the maximum allowed under the law, which is 90 days. Conceivably a trial period could last for less than 90 days. Trial periods cannot last for longer than 90 days, even if the employee agrees).

4. Trial periods must be bargained for in good faith

An employee cannot be forced to accept a trial period provision. If an employer wants to include a trial period, they are expected to bargain with the potential employee in good faith.

This does not mean that an employer must remove a trial period provision from the proposed employment agreement at the request of a potential employee. But it does require the employer to keep an open mind and genuinely consider any feedback from the potential employee.

If, having considered the potential employee's wishes, the employer still wants to make employment conditional on a trial period, the employer should confirm that with the potential employee, at which point it is the potential employee's choice whether to accept or refuse employment.

Good faith also requires the employer to have provided the potential employee with the proposed employment agreement in reasonable time for that employee to obtain independent advice.

5. The agreement must have been signed before the employee commences work

The potential employee must have signed the proposed employment agreement before they commence work in order for any trial period provision to be valid. If the employee signs the agreement after they have commenced work, it is unlikely the provision will be valid.

Dismissal under a trial period

If an employer is satisfied a trial period provision is valid and they want to rely on it to dismiss an employee, they need to communicate that decision to the employee in writing within the trial period. That means for a 90-day trial period the decision must be communicated within 90 days.

It is important any trial period also specify the notice period that applies. This could be a different notice period to the general notice period.

Provided the decision is communicated within the trial period, the employee's notice period can extend beyond that period. For example, if an employer communicated a decision to dismiss an employee on day 89 of their employment using a valid trial period provision, the employee's notice period can extend beyond day 90 without affecting the decision.

For further support please contact the Rural Employee Support Team 0800 694 121 or email: support@ruralemployeesupport.co.nz