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# Trendz

*Keeping you up with the play*

## IF IN DOUBT, THROW THEM OUT

*The lead-up to Christmas 2008 saw the new National government pick up its mandate, roll up its sleeves, and roll out a flurry of legislation as part of its "100-day action plan". Amidst the bills passed under urgency was the Employment Relations Amendment Act 2008, implementing National's election promise of 90-day trial periods for new employees.*

The Amendment has been controversial for many reasons, including the speed of its implementation, the lack of consultation, and its likely impact on employees, employers and the workforce as a whole. Nevertheless, come 1 March 2009, if you are an employer that has a staff of less than 20 (that is, 19 or fewer), you may agree with a new employee to a trial period of up to 90-days, during which you may dismiss the employee without fear of a personal grievance for unjustified dismissal.

### ***In a Nutshell***

The legislation:

- Allows an employer and employee to agree to a trial period for a specified period, beginning at the start of an employee's employment and lasting up to 90 days;
- Allows the employer to dismiss the employee within the specified trial period;
- Restricts the employee from bringing a personal grievance or other legal proceeding in respect of the dismissal;
- Exempts the employer from being required to provide reasons for the dismissal under either s4(1A)(c) or s120;
- Specifies that in all other respects an employee on trial is to be treated no differently from any other employee.

### ***To Trial or Not to Trial?***

The new trial periods are not automatic and they are not compulsory. If you are an employer of less than 20 employees and think a trial period might be for you, there are some things you may wish to consider.

- Is a trial period right for the kinds of employees you wish to attract to your business? A trial period in effect allows employers to "take a chance" on employees which would otherwise present a risk, and is most suited to first-timers or those re-entering the workforce. Potential employees with a more proven work record may prefer an employer who does not require a trial period.
- Trial periods should not be used indiscriminately in place of good recruitment practices. It is still much better for your organisation, in terms of cost and culture, to have solid recruitment practices in place aimed at ensuring you get the right person first time!
- A trial period does not exempt an employer from the usual obligations it owes to employees, including the duty to maintain a safe workplace and one free from harassment or discrimination, to pay minimum wage, to provide statutory holidays and annual leave, and employee protection obligations. Employees on trial periods are still entitled to raise personal grievances for unjustified disadvantage, sexual or racial harassment, duress or failure to comply with employee protection requirements or serious breaches of good faith and they retain full access to all employment relations services, including mediation.
- Importantly, all of an employer's obligations of good faith (except only the requirement to consult and provide information prior to dismissal) remain. An employer must therefore continue to deal in good faith, not mislead or deceive, be responsive and communicative and be active and constructive in establishing and maintaining a productive employment relationship with an employee on trial. In our opinion, this would include providing training, feedback and support; an employee who does not receive adequate support and is dismissed for being unable to swim in the deep end may still have grounds for an unjustified disadvantage claim.
- It is unclear as yet how these 90-day trial periods might interact with the probationary periods allowed for in s67 of the Employment Relations Act, which has been retained. It is quite conceivable that an employment agreement might contain both, although a s67 probationary period would carry with it more rights for the employee.

### ***Key Things to Remember***

If you do want to go for a probationary period, keep in mind the following things:

- The employee must be new, and must not have been previously employed by the employer;
- At the time of hiring, the employer must have less than 20 employees. Although the legislation does not specify, this is most likely to include part-time or casual staff, but not independent contractors or volunteers.
- If you have 20 or more employees, you may not make use of the new Amendment, but can continue to use the probationary provisions allowed by s67 of the Act.
- The trial period must be written into the employees employment agreement;
- Trial periods cannot be rolled over – the maximum is 90 days;

### **Probationary Periods: Key Things to Remember (Cont.)**

- You must give notice of the intended termination before the expiry of the 90 days (even if the dismissal would not take effect until after the expiry of the 90 days), or the employment will become permanent upon expiry of the trial period and any dismissal can be challenged in the usual way.
- It's a good idea to plan regular reviews over the probationary period, which will enable a properly informed decision towards the end of the probationary period as to whether to allow the appointment to become permanent.
- You must, in the words of the Act, treat an employee on trial "no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect" in all matters other than dismissal;
- An employee on trial may still bring a personal grievance in respect of matters other than dismissal, and still has full access to dispute resolution services;

**If you need advice as to whether a 90-day trial period is right for your business, or assistance drafting a suitable clause, please contact us.**

### **NATIONAL MAKES ITS MARK ON KIWISAVER**

Prior to Christmas, National also made a number of changes to Kiwisaver. The changes will commence on 1 April 2009, and are:

- The minimum employee contribution rate will reduce from 4% to 2% of gross salary or wages and will be the default rate for new members;
- The \$40 fee subsidy for employees will be discontinued;
- Compulsory employer contributions will be capped at 2% (although employers may agree to pay more), and will not increase in future years;
- The employer tax credit will be discontinued;
- The exemption from Employer Superannuation contribution tax will be capped at 2%.

Despite changes to Kiwisaver the core of the scheme remains unaltered namely:

- It is voluntary;
- Automatic enrolment of new employees with an opt out right;
- \$1000 kick start payment on joining;
- The scheme member tax credit of up to \$20 per week;
- Mortgage diversion, deposit subsidy and first-home withdrawal provisions are retained.

The new Employment Relations Amendment Act 2008 has also repealed the short-lived ability for employees to take personal grievances if they had been "adversely affected" by joining Kiwisaver. The change essentially returns, from 13 December 2008, an employer's ability to negotiate "total remuneration packages". These remuneration packages may factor in the employer's compulsory contributions, allowing an employer to pay an equivalent wage to both an employee who belongs to a Kiwisaver scheme and one who doesn't, and essentially transferring the obligation to pay employer contributions to the employee who chooses to opt into Kiwisaver.

National envisages that compulsory employer contributions will become a part of the normal wage bargaining process. In order to do this however, employers must specifically identify and account for the amount of total remuneration that will form the employer's compulsory contribution, and must negotiate for the package in good faith. Failure to do so will mean that the employer contributions must be paid for in addition to the employee's wage package.

These changes are not as yet reflected in the available Kiwisaver guides, and employers may like to consider making those enrolled or planning to enrol aware of the changes. Full details can be found at <http://www.ird.govt.nz/news-updates/like-to-know-april-2009-kiwisaver-changes.html>. If you require advice as to whether your current total remuneration approach to compulsory employer contributions complies with the new legislation, contact BBA.



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