

## **90 Day Trial Period**

The new law on 90 day trial periods comes into effect on 1 March 2009. This prevents employees from bringing a personal grievance for unjustified dismissal within their first 90 days of employment, when the trial period has been agreed upon in their employment agreement.

### ***Focus on small to medium sized businesses***

This law has come into effect to ease the dismissal process challenges for small businesses. Only businesses with 19 or fewer employees may enter a trial period agreement. The 19 employee limit includes all persons employed on the date the employment agreement is entered into, including casual and part time employees. The trial period can only apply to new employees, not to existing employees. The same employee cannot be placed onto a trial period a second time.

### ***Trial period agreement***

The 90 day trial period will not occur automatically. The employer and employee must agree upon a provision within the employment agreement. This agreement can only be entered into on or after 1 March 2009. The trial period provision must specify:

- 1) What period of time the trial period will apply to (not exceeding 90 days)
- 2) That during this trial period the employer may dismiss the employee
- 3) That if the employee is dismissed during this period of time, then the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

### ***Good Faith negotiations***

Employers are required to enter into the trial period agreement in good faith. Good faith negotiations require the employer to take the following steps when giving the employee the employment agreement:

- 1) Provide the employee with the agreement in advance of commencing employment
- 2) Suggest that the employee may obtain independent advice upon the agreement with they wish
- 3) Advise the employee to contact the employer (designated contact person) if they wish to discuss anything about the employment agreement.
- 4) Consider and respond to any communications from the employee about the agreement.

### ***Termination during the trial period***

The trial period only prevents an employee from bringing a claim of unjustified dismissal. Employees are still able to bring a grievance claim on other grounds including unjustified disadvantage, discrimination and harassment. For this reason it is important that an employer still continues to treat the employee fairly and reasonably during the course of that trial period. If there is a decision to dismiss during the trial period it would be prudent for an employer to follow a process before giving that decision.

### ***Giving notice of the termination***

The employer must give notice of the termination during the trial period. The actual termination itself need not take place within the trial period timeframe. This means that the decision of termination must be communicated to the employee within the trial period, but the notice given may still roll over the trial period. No minimum notice period is stated in the legislation, which indicates it may be possible to have a short notice period in the trial period provision.

### **Reasons for dismissal**

The usual requirement to communicate the reasons for dismissal in writing to the employee after they are terminated does not apply when an employee has been terminated during their trial period. Nonetheless it may be prudent for employer to communicate their fair reason for the dismissal in writing to reduce the risk of the employee claiming harassment or discrimination occurred.

### **Probationary periods**

The new trial period legislation does not prevent the ability to also use probationary periods at the same time. Probationary periods (as opposed to the new “trial periods”) were legal before the introduction of this law. Having a probationary period provision in an employment agreement makes it slightly easier to dismiss an employee during the specified period, than in the usual course of employment. However a process does still need to be followed when an employee is dismissed during a probationary period. The employer appears to have the option to have both a 90 day trial period provision in their employment agreement, as well as a longer probationary period provision (6 months for example).

### **Sample Clauses**

The EMA has created the follow sample clauses for possible inclusion into future employment agreements

*“The employee and employer agree that the employee’s employment is subject to a trial period:*

- a) Of xxxxxxx days duration (being a period that is no longer than ninety days) and the trial period will commence on the first day of employment;*
- b) During that trial period the employer may dismiss the employee or give notice of dismissal; and*
- c) If the employer does so, the employee is not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal.*

*The employee has been given the opportunity to discuss this provision and has been advised of their right to seek independent advice.”*

### Sample Clause for Shorter Notice Period

*“Notwithstanding any other provision in this employment agreement, the notice period for termination of employment during the trial period is xxxxxxxx [recommendation is one week]. The employer may in its discretion make payment in lieu of notice. In the case of serious misconduct, the employer may dismiss the employee without notice. If the employee does not give the required amount of notice, then an amount equivalent to the unworked notice period will be deducted from their final pay including any outstanding wages or holiday pay.”*

**NB:** A shorter notice period clause may be inconsistent with a collective employment agreement. Please check your collective employment agreement.

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