BUDDLE FINDLAY

90 day trial periods - the 2019 law change

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On 6 May 2019 it became unlawful for employers to use trial periods unless they employ fewer than 20 employees. This law change overturned the law that had been in place since 1 April 2011 which allowed all employers, regardless of size to use trial periods. Trial periods were first introduced on 1 March 2009 and only allowed employers with fewer than 20 employees to use them. Essentially this recent law change (May 2019) has done nothing more than restore the law to what it was when trial periods were first introduced.

Despite this recent change, all the technical requirements surrounding trial periods remain and these provisions need to be strictly adhered to if an employer wants to rely on the trial period and end it lawfully. If an employer meets these requirements the employee whose trial period has ended cannot bring a personal grievance for unjustifiable dismissal. However, if these requirements are not met the trial period will not be lawful and any termination based on it will be unjustifiable. An affected employee would then be entitled to the standard range of remedies for an unjustifiable dismissal, eg loss of wages, and hurt and humiliation.

Based on figures produced by the Ministry of Business, Innovation & Employment (MBIE), 29% of employees in New Zealand are employed by enterprises with fewer than 20 employees (about 615,000 employees). There are about 140,000 employers in this category and about 100,000 of these employers have only 1-5 employees. By way of comparison there are about 15,000 employers who have 20 or more employees. As a result of this recent law change none of these employers will now be able to use trial periods lawfully.

Various arguments have been made in favour of and opposed to trial periods. The arguments in favour generally focus on the complexities of employment law around termination and the impact on the employer, particularly small employers. It is said that this is a disincentive to employ whereas trial periods encourage employers to employ when they might not otherwise do so. It is argued that this is particularly in relation to disadvantaged job seekers, eg beneficiaries, non-workers, recent migrants or young people etc. Arguments against focus on the vulnerability of those who are said to most usually be subjected to trial periods (ie those at the bottom of the labour market) and the ability of the employer to terminate in circumstances where it might otherwise not do so or not be able to do so.

MBIE suggests that based on the National Survey of Employers 2012/13 trial periods were widely used by employers, ie 59% of employers who had taken on new staff in the last year used trial periods. This usage was more or less the same between employers with fewer than 20 employees and larger employers. Of those surveyed 32% said they would not have employed if a trial period was not available to them. However, MOTU, an Economic and Public Policy Research Organisation, has also undertaken some research in this area. MOTU found no evidence to suggest that the ability to use trial periods significantly increases firms' overall hiring. It also found no evidence to suggest that this policy increased the probability that a new hire was a disadvantaged job seeker, or that it had increased short term hiring. Interestingly, it also found no evidence that the policy made workers less willing to change jobs even where their new employer was able to use a trial period.

However, this policy debate is now largely moot with the policy decision having been taken and the law changed. Overall this is a relatively modest policy shift and it takes the labour market back to what the law was when trial periods were first introduced. It leaves trial periods available for use by the bulk of New Zealand's small and medium sized employers, but not for larger and therefore usually better resourced employers.

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