90-day trial periods – the more obscure claims

While an employee cannot bring a personal grievance or legal proceedings in respect of a dismissal under a valid trial period, this does not prevent the employee from being able to bring a claim *at all*. In this article we touch on the requirements to ensure a dismissal under a trial period is lawful, and some of the more obscure claims that could still be made.

A lawful dismissal under a 90-day trial period

An employer can enter into an employment agreement with an employee that contains a trial period provision where that employee *has not previously been employed by that employer*. In most cases, it will be clear whether or not the employee has previously been employed by the employer. There are situations however where it is not so clear. For example, the Employment Relations Authority has previously held employees who have completed "trial shifts" to not be 'new employees'.[1] It is worth turning your mind to this before including a trial period in an employment agreement.

The trial period may be for a specified period, not exceeding 90 days.

Case law has over time developed further requirements employers must meet to be able to lawfully dismiss an employee under a trial period. This includes:

- Providing a prospective employee the intended employment agreement containing a trial period when making an offer of employment.
- Advising the prospective employee that they are entitled to seek independent advice (including on the trial period).
- Providing the employee a reasonable opportunity to seek advice independent advice (regardless of whether the employee wants to seek advice or not).
- Receiving a signed copy of the employment agreement before the employee starts work.

If an employer dismisses an employee under a valid trial period, where the legal requirements have been complied with, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. However, a failure to fulfil any of the required steps will invalidate the trial period and subsequently render a termination unlawful.

Case law has also established that while an employer is not required to give an explanation when dismissing an employee under a valid trial period, it is not entitled to refuse to give an explanation on request.[2] Nor is an employer entitled to give an explanation that is misleading or deceptive, or that may tend to mislead or deceive the employee. Employers also need to ensure that if they are intending to make a payment in lieu of notice that this is permitted by the employee's employment agreement before doing so.[3]

The more obscure claims

While an employee cannot challenge their dismissal under a valid trial period, that does not prevent them from bringing a claim full stop. Below we outline some

[1] For example, *Numan v The Rockpool Ltd* [2018] NZERA Christchurch 74; *Bazley v Country Hospitality Management (NZ) Ltd* [2016] NZERA Christchurch 129.

[2] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253.

[3] *Ioan v Scott Technology NZ Ltd* [2019] ERNZ 331.

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cases where employees who were dismissed under a 90-day trial period nonetheless made successful claims.

Discrimination

McClelland v Schindler Lifts NZ Ltd[4] involved an employee who was dismissed two months into a 90-day trial period. The employee alleged that the termination of his employment was unlawful because it was based on one of the prohibited grounds of discrimination. The employee had a slight shake or tremor in his hands.

The Human Rights Review Tribunal found that the employee's employment was terminated for reason of a prohibited ground of discrimination (a physical disability or impairment). The termination of the employee's employment was held to be unlawful and a breach of the Human Rights Act.

In *Farrelly v Advance Office Product Ltd* an employee raised a personal grievance alleging that she had been discriminated against in her employment by being dismissed because of a stutter. The employer denied the discrimination claim and said that it lawfully terminated the employee's employment within a valid 90-day trial period. The Employment Relations Authority agreed that the employee had been dismissed because of her stutter, and that this was unlawful discrimination.

Misrepresentation

In *McSherry v Kumara Hotel Ltd* an employee claimed that the bargaining for an individual employment agreement was unfair pursuant to s 68 of the Act.

Before the employment agreement was signed, the employer emailed the employee and advised her:

"*it is NZ law now, that all contracts are subject to a 90 day trial period. You could look this up if you want to, but it is a mutually beneficial clause*".

The Authority noted that whilst the employer may not have intended to misrepresent the situation before the employee signed the agreement, she clearly did. It is not NZ law that all contracts have a 90-day trial period, and it is not usually seen as a mutually beneficial clause.

The Authority found that the employee had reasonably relied on the employer's advice about 90-day trial clauses, and that the employer ought to have known reliance was likely because the employee, having spent several years in Australia, was not familiar with New Zealand law.

The Authority had already found that the trial period was invalid as the employee was an existing employee, however noted that had that not been the case, it would have nonetheless found that the bargaining was unfair.

Notice the trial period is not going well

Singh v Ora HQ Ltd involved a situation where the employee's trial period clause in their employment agreement had a condition that said:

"The Employer is not required to give you reasons for your dismissal but, in good faith, will advise you as early as practicable if the trial period is not going well."

When the employee was dismissed, she raised a personal grievance alleging that the employer had disadvantaged her by not giving her the early advice promised in her employment agreement.

The Employment Relations Authority found the failure to provide such "highlighting" was to her disadvantage as it denied her the opportunity to properly understand and to attempt to remedy any perceived shortcomings in her work or how she carried it out. The omission was more than a minor defect of process because it deprived the employee the opportunity or chance of doing more or working differently in order to change perceptions of her work and how she did it. The result was that the employee was treated unfairly.

[4] [2015] NZHRRT 45.

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The Authority concluded:

[The employer], having made the contractual commitment it made to [the employee] to provide her with early advice if her trial period was "not going well", could not fairly and reasonably have failed to do so. The disadvantage to her was consequently unjustified.

Key takeaways

With the recent law change allowing all employers to utilise 90-day trial periods, now is a good time to ensure your clauses are up to scratch, and you are familiar with the processes. We would ultimately suggest seeking advice before terminating an employee's employment under a trial period.

Want to know more?

If you have any questions about the case, or what it may mean for your workforce, please contact our specialist Employment team.

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