



Tribulations of Trial Periods

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While the law has been in place for a while, there are still cases working through the Authority where employees who have been employed under a trial period have made successful claims of unjustified dismissal.

While limited to small employers, the intention of trial periods is to allow employers to assess the suitability of an employee within the first 90 days of employment. If the employee does not measure up, an employer can dismiss that employee and, subject to compliance with the law and clause in question, the employee cannot bring a personal grievance for the dismissal. Personal grievances can still be brought for certain other matters, such as unjustified disadvantage, discrimination, sexual or racial harassment etc.

It is worthwhile noting some key points about trial periods at the outset:

- (a) Only small employers can use a trial period, i.e. those employers with less than 20 employees
- (b) In order to rely on the clause, it must be recorded in writing and the employee must have had a reasonable opportunity to review and seek advice on the agreement, signed and returned before they start work.
- (c) There is a strict requirement for adhering to the 90 day time period (which includes weekends). If an employer wants to rely on a trial period clause, notice must be given within this timeframe. Notice must also be given in compliance with the clause.

In a recent case, *Bera v Best Health Foods Limited* [2020] NZERA 474, the validity of a trial period clause and consequential dismissal were challenged. While the trial period clause was held to be valid, issues arose over the application of the clause, in particular how the dismissal was effected and the notice was provided.

The applicant commenced work on a Thursday and worked the following two days. At the start of the next week, which was Monday 20 January 2020, the applicant was required to write content for the company website.

After some attempt, the applicant was called to a meeting with the employer at the end of the following day, 21 January 2020. It was a short meeting at 4:30pm, and the applicant was informed by the employer that *"he was unhappy with [the applicant's] work and that she was not needed any further. [The applicant] collected her belongings and left the workplace"*.

After the meeting, the employer sent a letter by email to Ms Bera at 5:44pm on 21 January 2020 that provided the applicant notice of her employment being terminated on the 25 January 2020 and it recorded *"[W]e are paying for the next three working days, but you don't need to come to work for us"*.

It is the dismissal on 21 January, and the subsequent letter that the Authority viewed as problematic. The notice requirements in the trial period clause read:

"During the trial period, your employment may be terminated with three days' notice by either party, or payment in lieu of such notice."



**Happy New Year and
Welcome back to Work!**

We trust you found time to relax and unwind over the festive season. We wish you all the best for 2021, which hopefully won't be as challenging as 2020. The Team at MGZ look forward to providing you with assistance.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart, Dean Kilpatrick, Jane Taylor or David Appleton.**

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The Authority found that the employer had not complied with the clause when dismissing the applicant at 4:30pm on 21 January 2020. The finding was “that no notice written or otherwise, was given to [the applicant] until after she had been dismissed at the brief meeting on 21 January 2020 and she had been ‘sent away’ from the workplace”. The Authority went on to determine:

“[40] It is my view that s 67B (1) of the Act clearly envisages the giving of notice prior to the ending of an employment relationship. Giving notice after the point of dismissal is defective notice.

...

[45] In the circumstances I find that [the applicant] was summarily dismissed and nothing in [the applicant’s] employment agreement (exempting serious misconduct) or arguably s 67B of the Act, provides for summary dismissal without requisite prior notice being given.

[46] I find that with the failure to give prior notice, BHF is unable to rely upon s 67B (1) to justify its decision to summarily dismiss [the applicant]. The lack of prior notice in this context renders the trial period inoperable.”

Having determined the trial period clause had not been complied with the Authority made short work determining the applicant had been unjustifiably dismissed. The applicant was awarded lost wages in the amount \$3774.58 and compensation of \$12,000.

This is another case that illustrates the need for compliance with the requirements in the Employment Relations Act 2000 and the applicable clause when dismissing an employee on a trial period. We can assist with the drafting and application of a trial period, so do not hesitate to contact one of the team and MGZ Employment Law.

Is Your Privacy Policy Up to Date?



You may recall that our November Advocate outlined the new amendments to the Privacy Act which came into force on 1 December 2020 (<https://www.mgz.co.nz/wp-content/uploads/2020/11/November-2020-308.pdf>). The new Act provides a timely opportunity for you to review and update your Privacy Policy and to ensure that staff are being given all the information required under the Information Privacy Principles.

If you have not yet reviewed your Privacy Policy and Privacy Information Statement to ensure they meet current legal requirements, or if you need a new Policy or Privacy Information Statement, we are happy to provide updated versions tailored to your business. Please do not hesitate to get in touch if we can assist.



Minimum Wage to Increase

The Government has confirmed that the minimum wage will increase from \$18.90 to \$20.00 on 1 April 2021. The Starting Out and Training minimum wages will also rise to \$16.00, 80% of the adult minimum wage.