CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

WE KNOW HUMAN RESOURCES

TRIAL & PROBATIONARY PERIODS

QUICK GUIDE

This guide provides summarised information on trial and probationary periods and incorporates the legislative changes effective from 1 March 2009 and 1 April 2011.

CAN I APPLY A TRIAL/PROBATIONARY PERIOD?

Taking on a new employee represents a considerable investment of an employer's resources and it is therefore sensible to ensure that the investment is properly managed in order to avoid wasteful or adverse outcomes.

The Statutory 90-day Scheme

From 1 March 2009 The Employment Relations Act 2000 permitted the inclusion of a trial period, not exceeding 90 days, in employment agreements, in respect of *new employees* for organisations having fewer than 20 employees. On 1 April 2011 this was extended to all organisations.

Both you and the employee must agree to the inclusion of the 90-day trial and this must be expressly provided in the written employment agreement or the employee can treat the 'trial period' as ineffective.

WHAT IS THE EFFECT OF A TRIAL PERIOD?

If the employer terminates employment during the trial period (or after that time provided notice of termination has been given during the trial period) then the employee will not be able to bring a personal grievance or other legal proceedings on the grounds of unjustified dismissal. The parties will, however, still have access to mediation services and the obligations of good faith continue to apply. For a trail period to be valid *it is essential* that there is a written provision within the employment agreement specifying -

- the employee is required to serve a trial period of a specified duration (not exceeding 90 days); and
- during that period the employer may dismiss the employee; and
- if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal; and

furthermore, it is *absolutely critical* that the employment agreement be signed before or at the point at which employment commences. The statutory 90-day trial period can only apply to new employees. If employment commences prior to the signing of an employment agreement – even where there may have been discussions regarding the trial – then the employee will not be regarded as a "new" employee and consequently the employer will not be able to rely upon the trial period.

As a matter of good practice an employer should always ensure that new employees have a real opportunity to obtain independent advice about the proposed terms of employment. This is particularly appropriate when a trial period is being proposed.

Where employment is terminated within the trial period (not exceeding 90 days) an employer is not required to implement a formal performance management process before terminating employment. That

notwithstanding, the rules of "good faith" and specifically the mutual duty to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative", do apply and so potential still exists for claims of unjustified disadvantage or breaches of good faith.

Where an employee requests reasons for their employment being terminated they must be provided with the real reasons.

Nothing prevents an employee from seeking remedies in relation to other matters such as unlawful discrimination or sexual or racial harassment arising in the course of the employment relationship.

- ***IMPORTANT UPDATE – SEPTEMBER 2014 – A decision of the ERA has raised questions about the validity of paying wages in lieu of notice when terminating employment under the 90-day trial provisions. If correct this would allow a personal grievance to be raised notwithstanding that termination has occurred within the 90-day period. An appeal is pending; however, until such time as the matter has been decided by the Employment Court, employers are strongly advised not to terminate employment by payment in lieu of notice if in doing so they wish to rely upon the 90-day trial provisions.***

OTHER PROBATIONARY ARRANGEMENTS

Whilst the provision of a statutory trial period will meet most organisations needs, it is, nevertheless, possible to have a trial period of 90 days running in conjunction with a probationary period of an agreed and longer duration. It should be noted, however, that the restrictions around the ability to bring a personal grievance for an alleged unjustified dismissal will only apply to the lesser trial period.

An employer may also wish to utilize a probationary period when considering existing employees for new roles.

A trial or probationary period should be of an appropriate duration to assess the employee's abilities against the range of duties involved. For example, a one-month trial period may be too short for a position where one key task arises once a quarter. The most common period is three months, but a shorter or longer period could be appropriate. The probationary period and indeed the trial period should include both monitoring and the provision of feed-back to the employee on a regular basis if they are to be effective.

A probationary period can be extended by mutual agreement or at the employer's discretion if this is specifically permitted in the written employment agreement.

WHAT IS THE EFFECT OF A PROBATIONARY PERIOD?

Unlike the 90-day trial the existence of a probationary period does not significantly affect the rules relating to unjustifiable dismissal. This means that an employee can take a personal grievance due to a dismissal that occurs during or at the end of a probationary period in the same way that they can challenge any other decision to terminate employment. To successfully defend such a challenge an employer you must be able to show good and sufficient reason for dismissing the employee and that a fair and thorough process preceded any such decision.

It is a myth that having a probationary period gives an employer the right to suddenly decide at the end of the period that things are not working out and then dismiss the employee. If you reach the end of the probationary period and terminate employment without having followed a fair process the employee will have

strong grounds for a personal grievance.

WHAT IF THE **EMPLOYEE'S PERFORMANCE IS POOR DURING THE PROBATIONARY** PERIOD?

Firstly check your employment agreement and/or house rules and make sure you comply with any requirements set out in these documents. To ensure that you have time to conduct an acceptable performance management process before the end of the probationary period, it is important that you begin to monitor the employee's performance right from the start and address issues as soon as they come to light.

performance and, if applicable, training to assist them in reaching the required standards of performance. It is important that standards are clear and unambiguous, and you should ensure that the Employee fully understands what is expected of them.

If problems persist despite coaching and counselling it will be necessary to undertake a formal performance management process that may result in employment being terminated either during or at the end of the probationary period. The employee should be afforded the opportunity to be represented throughout any performance management process.

This process should involve formal warnings. The employee must be made aware of:

- The aspects of their performance that are deficient,
- What the required standards of performance are and how these are measured,
- The specific improvements that are required and the timeframe for improvement, and
- The consequences of failing to meet the required standards in the set timeframe (termination of employment at the end of the trial period).

These are general principles - if your employee's performance is unacceptable during the probationary period please contact us before you take any action and we will advise you how best to address the situation. For further information on the warnings process, including a step-by-step explanation of how to give a warning, see our 'Quick Guide –Managing Poor Performance'.

SO WHY HAVE A PROBATIONARY PERIOD?

Where Employers apply probationary periods – either in the case of existing employees moving into new roles or as an extension of a trial period - a full and fair process must be followed before terminating employment during a probationary period.

One major benefit of probationary or trial periods is that they set the expectations of the employer and employee for the first part of the relationship. Both parties are aware that the employee's performance is on trial. The employee has a defined timeframe in which to reach the required standards of performance. Likewise the employer has a defined period to evaluate the employee's suitability for ongoing employment. Also, there is a greater opportunity for support, cooperation, and clear communication than may otherwise be the case, as the employer can schedule regular meetings with the employee to give feedback and consider any training that may be necessary.

Another potential benefit is the ability to incorporate specific terms into the probationary period (in the written employment agreement) – for example, a lesser notice period for termination of employment within the probationary period than would otherwise be the case.

For further information regarding Probationary Periods or other aspects of Employment Relations/Human Resources, please contact the Chamber email info@cecc.org.nz or phone 03 366 5096.