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Trial Periods – Employers must allow Employees subject to a trial period to work out their notice period or risk the trial period being held invalid

The Employment Relations Authority (ERA) recently found that an employer who gives notice to dismiss an employee within the 90 day trial period must allow their employee to work out their notice period for the trial period to be lawfully terminated.

For the termination of the trial period to be valid an employee must be allowed to work out their notice.

The ERA determination referred to the Employment Court decision of *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 which stated that the statute does not expressly allow employers to pay employees in lieu of them working out any notice period.



If payment is made instead of notice, this will invalidate the trial period clause and enable an employee to challenge their dismissal.

The ERA has once again strictly interpreted the law. Employers must proceed with caution when deciding to dismiss an employee in reliance on a trial period clause. It would appear that making a payment in lieu of notice, even if that is provided for in the employment agreement, will not meet the obligation under the Act which requires that an employee is given notice of termination.

What can you do?

- Allow an employee to work out the contractual notice period;
- Make provision in your employment agreement to place an employee on garden leave; and/or
- Provide minimal notice, i.e. one week or less.

The ERA's decision was challenged by both parties to the Employment Court. However, both parties withdrew their challenge. This means we do not have a ruling from the Employment Court as to whether the ERA has correctly interpreted the law. Until this issue is resolved we advise you to err on the side of caution and provide notice.

When dismissing an employee in reliance on a trial period you need to:

- Notify the employee that you are giving notice of termination of their employment agreement within the 90 day trial period;
- Allow the employee to work out their contractual notice period; and
- Not pay employees in lieu of the notice period.

This will allow compliance with the law as it is currently interpreted. We will update you with any further clarification provided from the Courts.

Is signing a letter of offer enough to indicate acceptance of the Employment Agreement containing a trial period clause?

The ERA considered this issue in *Hall v Smith Crane & Construction Limited* [2014] NZERA Christchurch 146. Mr Hall was living in England and was sent a letter of offer and an employment agreement from Smith Crane & Construction before he started work.

Mr Crane signed the written letter of offer and emailed it back to the Employer however Mr Crane did not sign and return the employment agreement that had been sent to him before he started work. Mr Hall commenced work on 13 January 2014. When his employers became aware that he had not signed the IEA, they arranged for him to sign it on 11 February 2015.

Mr Hall was dismissed in reliance on the 90-day trial period clause in the IEA. The ERA found that the trial period clause was unenforceable. The ERA emphasised the importance of ensuring trial periods are agreed to in writing before employees begin work.

What does this mean?

Employers need to ensure they follow proper processes when engaging new employees, and in terminating employees in reliance on a trial period clause.

- Ensure new employee's return their signed employment agreements to you well **before** their first day of work.
- Allow those employees who are given notice of termination within the 90 day trial period to work out their notice periods and do not pay them in lieu of the notice period.

Please contact Jeff Goldstein or Linda Ryder if you have any questions about the contents of this article or any other employment matters.

Training Seminar Series

We will be holding various training seminars over the coming months in relation to the new Employment Relations Act amendments which come into force in March and the proposed amendments to Health and Safety Legislation. We are also holding a seminar about the Employment Relations Act amendments and the proposed health and safety legislation amendments specific to those in the Aged Care Industry. Flyers are attached if you would like to register your attendance.



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