

90 Day Trial Periods For New Employees – Avoiding Pitfalls

A Department of Labour survey shows that 60% of employers are now using trial periods, and more intend to use them in the future.

Employers are using trial periods to reduce risk by:

- Checking on an employee's ability to do a job before employing them permanently
- Employing someone with the skills required, but making sure he or she has the right 'fit' for their work place
- Testing the viability of a position (rather than a person) within the business

80% of employers continue employing staff once the trial period has ended.

However, recent cases show that without proper paperwork and procedure, an employer may still face a personal grievance when attempting to use a trial period.

In *Blackmore v Honick Properties Limited*, the Employment Court dealt with a case where an employee offered a farm management position to Mr Blackmore in a letter dated 5 October 2010. Mr Blackmore accepted 5 days later in a short email. He began work at 7am on 15 November 2010. An hour after starting work, the employer handed Mr Blackmore an employment agreement containing a trial period clause. There was no negotiation – the employer simply asked for a signature before the employee started his farming duties. Mr Blackmore reluctantly signed, fearing dismissal if he refused. He was dismissed with notice under the trial period clause, on 6 February 2011.

The Employment Court said that when Mr Blackmore had accepted the employer's offer on 10 October 2010, he became a "*person intending to work*", and therefore an employee entitled to raise a personal grievance from then. Alternatively, because he had already worked for an hour before signing, he was an existing employee and therefore no longer eligible for a trial period.

The Employment Court also said that the employer was in breach of its obligations to:

- Provide Mr Blackmore with a copy of the intended agreement under discussion
- Advise him that he was entitled to seek legal advice about it.
- Give him a reasonable opportunity to do so; and
- Consider or respond to any issues that he raised

The Court said that the employer had acted unfairly – he gave the employee the agreement too late, the agreement contained largely 'non-negotiable' provisions in a situation that pressured the employee to sign without seeking advice or being able to consider/negotiate the terms in a meaningful way.

The lesson is that to be able to rely on a trial period, the employer must give the employee the agreement a reasonable time before the employee starts work – the written agreement should be sent with any offer of employment.

Article provided by Mike Toepfer from Aspiring Law