PHARMACY GUILD OF NEW ZEALAND

Guide to trial or probation periods

This guide summaries the steps you need to be aware of when using a probationary period or 90-day trial period allowed under the Employment Relations Act 2000.

We have put together the following guide to assist members to implement probationary and 90-day trial periods and how to deal with issues when a new employee is not performing as expected and ensure the clauses within your employment agreements meet the requirements of the Act. Due to recent case law, we would recommend seeking advice before making a payment in lieu of notice upon termination.

Further assistance - If you are considering termination of employment under a trial period, we recommend that you call the HR advice line on 0800 484 347 or email hradvice@pgnz.org.nz, as early as possible.

Trial periods

The Employment Relations Act 2000 allows for employers of up to 19 employees to include a trial period of up to 90 days in an employment agreement for a new employee. Employers of 20 or more employees are not able to use trial periods.

The Act also provides that an employee who is dismissed during a trial period is not able to take grievance action against the employer for unjustified dismissal. Despite this, it is important to be aware that an improperly used trial period can still result in a dispute in the Employment Relations Authority or Employment Court. To be legally compliant, trial period clauses need to be valid – and this can come down to the exact wording in the clause.

Getting it right from the beginning

For a trial period to be valid, the following must hold true:

- A valid clause is included in the employee's employment agreement and included with the offer – a trial period clause cannot be added at a later date.
- The employee has the right to independent advice and should not be forced into being employed on a trial period, or pressured to sign an employment agreement on the spot.
- The employment agreement needs to be signed by the new employee before they commence work (not the morning they start or after their first week).
- The employee must be new to that business and not have worked for that employer before. This can be tricky with work trials – if you have 'trialled' a potential employee without signing any documentation and the work they did could be seen as contributing to the bottom line of your business then the employment relationship could have technically already begun and any trial period added to an employment agreement may not be valid.

- The trial period cannot be any longer than 90 (calendar) days – it can be shorter but no longer and not extended if the employer needs more time to assess performance.

The trial period must have a valid notice period outlined in the employment agreement (for example, an 8-week trial period may have a 1-week notice period).

While an employee cannot take a personal grievance for unjustified dismissal under the trial period, they can take a personal grievance for disadvantage. Disadvantage may include being treated differently to other staff, not having adequate training, or not being told until the 89th day of the trial period that there are issues with their performance and that their employment is terminated. Employees on trial period are also entitled to all minimum employment rights (for example, in relation to annual leave and minimum pay).

There is often confusion about probationary periods vs trial periods – to dismiss an employee and not be at risk of a personal grievance for unjustified dismissal, employers need to use a valid trial period.

Manage the risk

To avoid these potential pitfalls and to remove any possibility of disadvantage, a robust process is advised to manage all employees on trial periods. We recommend taking the following steps:

- Ensure a valid trial period clause is included in the employment agreement.
- Make sure the prospective employee signs their employment agreement before the start date. If there is a delay in the agreement being signed then it is best to delay the start date. Ensure the employee has access to independent advice before signing the agreement.
- After four weeks of employment (or sooner if problems are apparent earlier) organise a meeting with the employee to discuss performance, including both what the employee is doing well and the not-so-good aspects of their performance. Explain your expectations during the weeks ahead for the employee to reach the required standard. Keep a note on the employee's file about what was discussed. Consider whether any further training is required and arrange that if necessary.
- After eight weeks of employment (again, sooner if warranted) arrange a further meeting with the employee and, if there are still concerns about performance, make it clear to the employee that you are becoming concerned and are considering termination under the trial period clause. Tell the employee that before you make your final decision you would like to meet again in one or two days' time in a formal meeting to give an opportunity for the employee to ask questions or make suggestions. Invite the employee to bring a support person to the meeting if they wish.
- In the formal meeting, outline your concerns with the employee's performance backing your concerns with facts. Ask the employee for their point of view on your concerns and provide them with an opportunity to give any feedback.
- After listening to the employee's explanation at this meeting, adjourn for an hour or so to consider your decision. Resume the meeting and advise the employee of that decision.
- If you decide to terminate the employment you should do so on notice according to the employment agreement. Whilst many employees would rather be paid their notice out in lieu rather than work it after being dismissed, this needs to be put to them and the employee can decide whether to work it out or not. Your letter of dismissal should refer to the trial provision of the employment agreement. As long as notice is given within the 90 days, it can be worked out after the 90th day.
- If you decide to allow more time to assess performance you still have about four weeks to do that, and in that case we suggest you call another formal meeting within that time period to make a final decision.

In some circumstances it may become obvious after a very short period of employment that the new employee is unsuitable for the job and further time is unlikely to result in any improvement. In that case call your formal meeting as soon as you reach the view that termination is appropriate. Once again ask them to bring a support person and tell them you are considering termination under the trial period clause.

If you are considering ending employment, please get in touch with our HR advice line on 0800 484 347 or email hradvice@pgnz.org.nz, as early as possible.

Key points:

- A 90-day trial period can only be used for the first occasion an employee works for the business.
- The employee needs to be advised of the trial period and recorded in the employment agreement as part of the offer of employment.
- The employee must have had sufficient time to consider the proposed terms and must have signed the employment agreement before the employment starts.
- A valid trial period clause does protect the employer from a personal grievance for unjustified dismissal, but it does not protect from claims of unjustified disadvantage on the grounds that the employee has been treated unfairly.
- Good process from the start is essential to avoid the risk of a personal grievance and a finding that the trial period was invalid.

Probationary periods

What is a probationary period?

- Section 67 of the Employment Relations Act provides for employment agreements to contain probationary arrangements but does not define probationary period (unlike, with “trial periods").
- Ministry of Business Innovation and Employment website provides that probationary periods "can be used to find out if an employee can do a new job or for employees who are changing jobs with the same employer".
- It is a useful tool to assess whether an employee can do the new job.
- There is no set time limit for how long a probationary period may be for. Three months is a standard period and is generally reasonable in most jobs. If you are thinking of a longer probationary period, we recommend checking with the Guild’s HR advisor to ensure its reasonable in the circumstances.

What’s the process for a probationary period?

- The details of a probationary period must be in a written employment agreement which needs to be signed before the employee starts work.
- The probationary period clause must set out the length of time of the probationary period and what will happen at the end of the period.
- During the probationary period, the employer must supervise and review employee’s performance, and provide any necessary training and support.
- The employer must communicate any concerns to the employee regarding their performance.
- If things are going well at the end of the probationary period, there are no special steps to take. The employee will continue employment on their existing terms.

- If things are not going well, it's important to know that you can't simply end employment at the end of the probationary period. The employee must be assessed fairly and given the details of why their employment will not be continuing.
- Employees can raise a personal grievance for actions taken during a probationary period, so a fair process needs to be followed before terminating their employment or taking any formal disciplinary action. Any termination must be for cause, for example, for poor performance or misconduct.
- A fair process means:
    - Providing the necessary support and training to the new employee.
    - Regularly assessing and reviewing the employee's performance.
    - Raising any concerns about the employee's performance directly with the employee.
    - Advising the employee if they are not meeting the required standards of performance.
    - Going through the warning process if the employee's performance does not improve (this includes inviting the employee to a meeting in writing, setting out the performance concerns, hearing from the employee, potentially issuing a warning, and then if no improvement, a final written warning and then possibly dismissal).