

TRIAL PERIODS IN EMPLOYMENT

Employers may make an offer of employment that includes a trial period of up to 90 days. The effect of a valid trial period provision is that new employees can be dismissed within 90 days of starting employment and are prevented from raising a personal grievance for unjustified dismissal.

While many employers have taken the opportunity to insert such a clause in new employment agreements, a decision to dismiss relying on this has frequently come back to bite when the employment institutions have found the trial period clause to be invalid and the dismissal therefore unjustified.

The aim of this article is to remind employers what is required for a trial period clause to be enforceable and how to avoid potential fish-hooks.

A trial period clause:

- Must be agreed in writing and the employee must have a reasonable chance to seek advice on the proposed employment agreement before signing it. The clause should also contain a separate notice period to that of the general termination section of the agreement.
- Must include the specific wording as set out in s 67A of the Employment Relations Act 2000. The clause should clearly contain a reference to the legislation, state that it is a trial period, that the employer may terminate the employment at any time during the period without justification and that an employee cannot bring a personal grievance in respect of dismissal. A trial period clause which does not contain these elements will not be enforceable.
- Can only apply to new employees, not to someone previously employed by the employer or who is an existing employee. In a key Employment Court decision, it was held that the employee was able to access the statutory personal grievance procedure *from the time he was offered and accepted employment*, not when the agreement was signed. It is therefore advisable that an employer provide a copy of the proposed employment agreement at the time an offer of employment is made and that the trial period clause clearly states that the trial period starts on the first day the employee actually starts work.

It is important to remember, that a trial period is not the same thing as a probationary period (more on probationary periods in a later article).

In summary, the ability to include a trial period provision in a new employee's employment agreement can undoubtedly encourage employers to take on a new employee as it minimises the risks associated with terminating employment if that person does not "work out". However, to be effective, this must be done properly. An employer must also keep in mind that a trial period provision does not prevent an employee accessing mediation services or raising a personal grievance on other grounds such as discrimination, harassment or unjustified action by the employer.