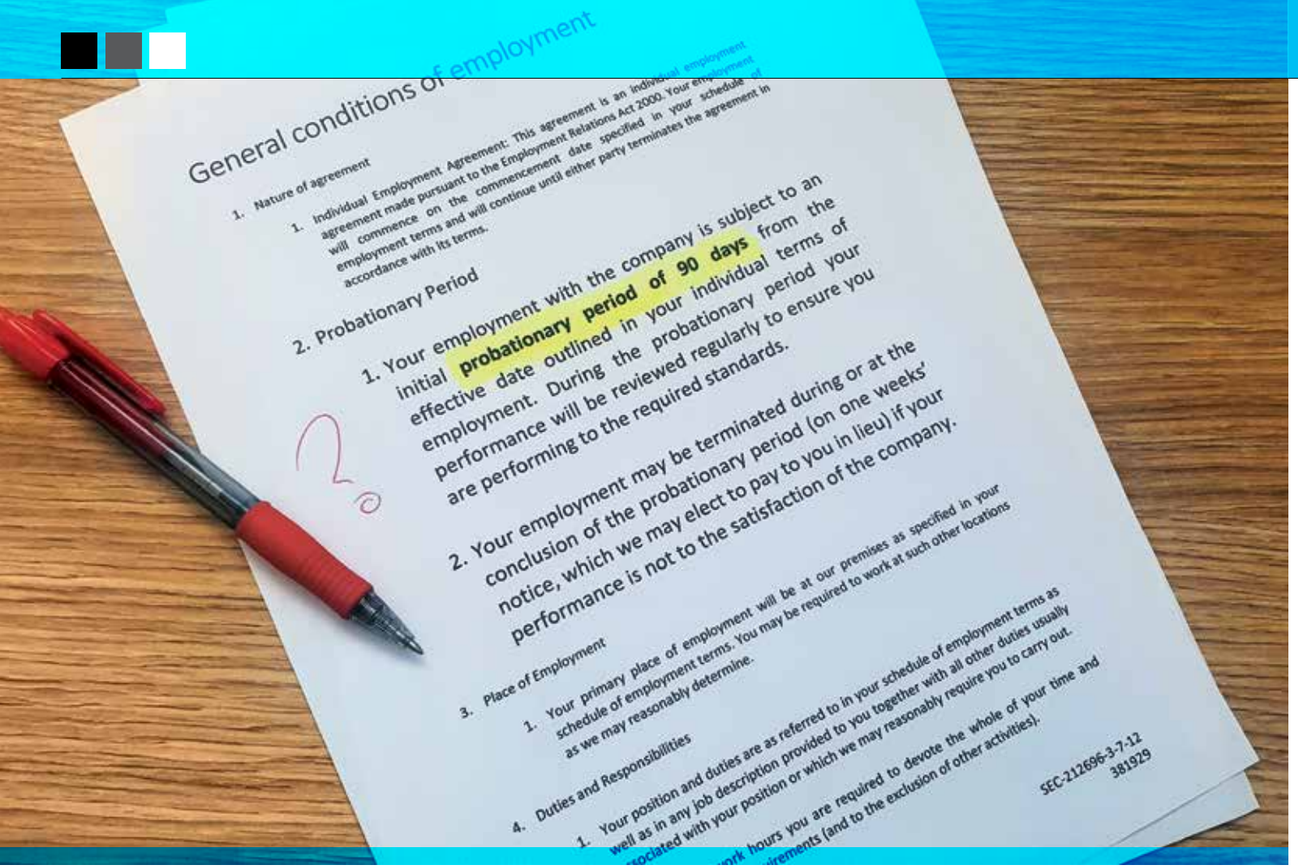

PROBATIONARY PERIOD
AN EXPLANATION

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The purpose of a probationary period is to test the suitability of an employee before their employment becomes permanent. In entering a period of probation, of course, the employee is made aware that their performance will be subject to scrutiny and review.

A probationary period is different to a 90-day trial period. The major difference between a 90-day trial period and a probationary period is that a trial period works to prevent an employee from bringing a personal grievance for unjustified dismissal, therefore, the employee is not entitled to fair treatment in respect of a trial period dismissal. By law, a probationary period does not work in this way; an employee is entitled to fair treatment.

When the 90-day trial period legislation came into existence under the Employment Relations Amendment Act 2008, it was only small- to medium-sized employers who employed fewer than 20 employees that were permitted to use trial periods. Later, as part of the 2010 amendment, the 90-day trial period was then made available to all employers to use. More recently, the 2018 amendment restored the previous restriction that small- to medium-sized employers can only use the trial period, and that change came into effect on 6 May 2019. So larger employers have been no longer able to use trial periods and can only use probationary periods.

What we have found is that in response to this, many of the larger employers are using Probationary Period clauses when onboarding new employees and these larger employers are often wording the probationary period clause to sound like a 90-day trial period. For example, larger employers are calling it a "90-day probationary period". We have subsequently dealt with many cases that involve the termination of employment in reliance on a probationary period framed in this way, and it can be relatively straightforward to deal with if the employer has dismissed an employee in reliance of a probationary period but is unable to justify the dismissal beyond just relying on the words of a written probationary period clause.

> "Employees still have rights under the probationary period"

Probationary arrangements and the law

Section 67 of the Employment Relations Act 2000 permits parties to an employment relationship to agree that the employee will serve a period of probation at commencement of employment, this reads:

(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of the employment, —

(a) the fact of the probation period must be specified in writing in the employment agreement; and

(b) neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.

(2) Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.

(3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.

The important part to this is (1)(b) where it's clear that an employer cannot simply terminate an employee's employment on reliance of a probationary period without being able to justify termination both substantively and procedurally.

The leading case on probationary arrangements in employment is Nelson Air Limited v New Zealand Airline Pilots Association [1994] 2 ERNZ 665 (CA), here the Court of Appeal said:

"Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end."

The legislative framework under the Employment Relations Act 2000 includes the application of the duty of good faith and the test of justification. This is simply that an employee is entitled to access to information relevant to the continuation of the employee's employment about a decision to dismiss and is given an opportunity to comment before that decision is made, an employer is required to genuinely consider those comments before making a decision; and whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Other factors may be considered as being appropriate in assessing whether a dismissal is justified.

Employee rights during a probationary period

An employee should be allowed to work out the full probationary period; they should receive proper training and should be made aware of any shortcomings or problems during the probationary period.

Because the purpose of the probationary period is to assess an employee's suitability for a job, the employee should be given every opportunity to demonstrate to the employer that they will be suitable.

If an employer withholds any concerns during a probationary period as to the employee's shortcomings, the employee would have reasonably developed an expectation of continued employment. Therefore, a surprise dismissal at the end of a probationary period without prior warning from the employer will easily result in dismissal being unjustified.

What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. Whether you're an employee or employer and you need assistance with any employment issue we are here to help. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.