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Trial Periods

The new National Government has made good, effective 1 March, its promise to introduce a procedure that will enable employers to give potential employees a test run (a goods return “policy”, if you like, to see if the person is right for the job).

The “policy” does not cover all employers, and employers who want to take advantage of it will have to comply with the “policy”.

The requirements

What are the limitations on using a trial period:

- It applies only to employers who employ 19 or fewer employees;
- It cannot apply if the employee has previously been employed by the employer; and
- The trial period cannot be more than 90 days.

What are the requirements to use a trial period:

- The trial period must be in writing as part of the employment agreement;
- The provision in the employment agreement must provide:
 - A specified trial period (not exceeding 90 days);
 - That the employer can dismiss the employee during the trial period;
 - That if the employer does dismiss the employee during the trial period then the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal; and
- The employer and employee must both bargain in a fair way about the proposed trial period.

Notice

If the employer decides to dismiss, notice must be given within the trial period, even if the dismissal does not become effective until after the trial period ends.

The consequence

If the employer and the employee agree on a trial period, an employee who is dismissed before the end of a trial period cannot raise a personal grievance on the grounds of unjustified dismissal. Certain residual rights remain to raise a personal grievance on other grounds, such as discrimination or harassment or an unjustified action by the employer that disadvantaged the employee.

The catch

The most glaring problem with the way the “policy” has been drafted is that trial employees still retain the right to bring personal grievance claims based on disadvantage. This could include claims made over issues such as:

- Unfair treatment prior to dismissal;
- Lack of warnings or procedurally defective warnings;
- Lack of supervision or training;
- Failure to consult regarding redundancy; and
- Disparity of treatment in relation to other employees.

In some respects, retention of these rights appears to have been deliberate. Minister of Labour, Kate Wilkinson, has said in speeches that the [Act] has safety mechanisms to ensure that it is fair and balanced and a win-win for both employer and employee.

Conclusion

The new “policy” may not be the dispute free zone that some employers believe it was meant to be.

Time will tell, as cases are brought before the Employment Relations Authority.

Cullen –The Employment Law Firm would be happy to assist employers with drafting appropriate clauses for their employment agreements if they meet the criteria to employ employees on trial periods.