



**cullings** is the newsletter of  
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DISCLAIMER: This newsletter is intended to provide our clients with general information. While all statements are believed to be correct, no liability can be accepted for incorrect statements. Readers should not act or rely on this general information without seeking specific legal advice.

## Courts taking strict approach to 90-day trial periods

The 90-day trial period has been nothing if not controversial. While proponents of the law highlighted the freedom it gave to employers to hire new staff, it has also been criticised of protecting bad employer behaviour and making it harder for employees to be heard in the workplace.

A further case regarding 90-day trial periods has demonstrated the Employment Court's strict interpretation of laws that take away workers rights.

### The Farm Manager

In late 2010 Mr Blackmore was offered a job as the farm manager of Honick Properties Limited (HPL) in the King Country. The terms of the offer sent via email did not include a 90-day trial period clause. Mr Blackmore accepted the offer and then "burned his proverbial bridges" by resigning from his previous job as a farm manager and uprooting his family from Whanganui to the King Country.

Mr Blackmore had just started his first day on the job when his manager, Mr Mathis, arrived with an employment agreement. Mr Mathis was anxious for Mr Blackmore to begin work and wanted him to sign the agreement. While he pointed out the essential terms of the agreement, including the 90-day trial period, he did not advise Mr Blackmore to seek legal advice. Mr Blackmore signed the agreement and then continued working.

About 11 weeks later Mr Mathis gave Mr Blackmore notice that his employment with HPL would not continue after the 90-day trial period. One week later Mr Blackmore received two weeks' notice of his dismissal.

Mr Blackmore sought to bring a personal grievance for unjustified dismissal. HPL argued that he could not do this because he agreed to a 90-day trial period.

### Panel for External Legal Services to Government

**Cullen – The Employment Law Firm** is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

### The Employment Court

The two main issues were whether the employment agreement included a 90-day trial period, and if it did whether the agreement was bargained for fairly.

The first issue turned on whether Mr Blackmore had previously been employed by HPL when he agreed to the 90-day trial period. The Court found that Mr Blackmore became an employee from the time he accepted the offer via email. As he was already an employee, Mr Mathis could not then require him to enter into a trial 90-day period. This left the door open for Mr Blackmore to bring a personal grievance.

The Court then asked whether it was unduly onerous for an employer wanting a trial period to make an offer of employment in writing and, at the same time, include a written individual employment agreement, which has the trial period provision.

In response it was pointed out that the requirements are statutory obligations. Secondly, they are "the quid pro quo" for the significant advantages that the employer gains by removing the employee's right to challenge the justification for dismissal.

The Court then explored what effect unfair bargaining would have had on an otherwise valid 90-day trial period clause. It would not have been enough for Mr Blackmore to acknowledge he had taken the opportunity

## 90-day trial periods continued...

to consider the 90-day trial period clause. Mr Mathis had to give him an actual opportunity to consider it, even if Mr Blackmore had appeared willing to sign the agreement immediately.

Opportunity to consider the agreement will not exist if there is pressure to sign immediately. An employer must give time to the proposed employee to go away and get advice, even if the employee does not take that opportunity.

Ultimately the trial period did not apply to Mr Blackmore.

## A Final Caution

This case provides helpful clarification on the status of people who are intending to work. A new employer cannot unjustifiably give notice of termination to such a person before their employment actually commences, even if that person has agreed to a 90-day trial period. As far as the law is concerned as soon as someone agrees to an employment agreement, he or she becomes an employee for the purposes of being entitled to bring a personal grievance for unjustified dismissal.

This protects people who give notice for one job to start another, only then to be given notice by the new employer that it no longer wishes to engage them. An employer is only able to give notice under a 90-day trial period between the day work commences and the 90 days following.

## Summary

The 90-day trial period was enacted to lower employer risk in hiring new staff. The trade-off in the employment landscape is that any prospective employee will lose the right to challenge the employer's justification for dismissal.

The Employment Court has delivered the message loud and clear that employers must pay a price for this trade-off:

- the offer of employment must be in writing with the terms of employment including the 90-day trial period;
- any proposed 90-day trial period will not be enforceable against someone who has either been previously employed by the employer, or who has already accepted employment with the employer (before being given an employment agreement to sign containing a 90-day trial period);
- the proposed employee must be advised that he or she is entitled to seek independent advice about the agreement under discussion;
- actual opportunity must be given to seek that advice, even if the proposed employee is willing to accept the agreement immediately; and
- the employer must consider any issues raised by the proposed employee following any advice sought, and then respond to those issues.

Even then, an employer cannot give notice under the 90-day trial period to someone who has yet to commence actual work. If notice is given then the employee can bring a personal grievance for unjustified dismissal.

## MANAGING POOR EMPLOYEE PERFORMANCE LUNCHTIME SEMINAR – 18 APRIL 2012

**M**anaging poor employee performance can be a very difficult issue for employers, managers and HR advisers. However, it is very important that it is dealt with in the proper way so as to minimise risk.

Many employers are uncertain about how to proceed with a performance management process and are unsure of what outcomes can result from the process.

Peter Cullen, Partner, and Sarah Cates, Solicitor, from **Cullen — The Employment Law Firm**, will be presenting this seminar which is designed to give practical and sound advice to employers.

Issues covered in the seminar will include:

- Employee performance
- Effects of poor performance
- Key principles

- Measuring performance
- Causes of poor performance
- Addressing poor performance
- Performance management
- Formal process
- Warnings
- Dismissal

**Date:** Wednesday, 18 April 2012

**Time:** 12:00pm - 1:30pm

**Location:** NZIM Central, Level 7, Lumley House, 3 Hunter St

**Price:** Members — Free

Non Members — \$17.39 plus GST

**Enrol:** [www.nzimcentral.co.nz](http://www.nzimcentral.co.nz)

or call NZIM toll free 0800 373 700