[PLEASE NOTE. Restaurant Association members are strongly advised to seek guidance from the helpline team on 0800 737 827 if you have any employment questions.]

An employer with less than 20 employees can use a 90-day trial period for new employees. The employee will not be able to raise a personal grievance for unjustified dismissal if they are dismissed under the trial period. However, there are strict processes the employer must follow to ensure the trial period is valid and enforceable.

**PLEASE NOTE:**

Restaurant Association members are strongly advised to seek guidance from the Helpline Team on 0800 737 827. Please note the Helpline team is available from 6 January 2020.

A trial period is a provision agreed with the employee and forms part of an employment agreement. For the trial period to be valid and enforceable, it must include the following:

* The trial period is for a specified period of time (not exceeding 90 days), to start at the beginning of the employee’s employment, the employee is to serve a trial period; and
* During the trial period, the employer may dismiss the employee; and
* The employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

Please note, a trial period is not a blanket protection from personal grievance disadvantage claims.

Validity of the trial period

**If the employer intends to use the trial period for their new employee, the following steps must be taken to ensure there is a valid trial period to rely on:**

1. The employer must employ fewer than 20 employees, on the day the employer enters into an agreement with the new employee.
2. Ensure the employee has not been previously employed by the employer – even if this was only on a casual employment basis, in a different position or for an unpaid evaluation period.
3. The trial period provision must be expressed in an offer of employment letter and written in the employee’s employment agreement.
4. The trial period provision contained in the employment agreement must include:
5. A specified period (not exceeding 90 days), to start at the beginning of the employee’s employment, the employee is to serve a trial period;
6. during that period the employer may dismiss the employee; and
7. if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
8. Before the employee commences employment and starts work, the employer must make sure the employee:
9. receives a copy of their employment agreement containing the written trial period provision;
10. is made aware of the trial period provision contained in their employment agreement;
11. has had a reasonable opportunity to seek independent advice on the employment agreement; and
12. signs, dates and returns the employment agreement.

Ending employment during the trial period

**In order to dismiss an employee during their trial period the following steps must be taken:**

**1.** Check there is a valid trial period in place and ensure the employees’ employment period to date is well within the 90 calendar days.

**2.** In the first instance, raise the issues at hand and give the employee the opportunity to improve in the areas of concern. Ensure adequate training, support and assistance is consistently provided to minimise risk of unjustified disadvantage claims.

The employer is not required to give an employee access to information, or the opportunity to comment on the information, before a decision to dismiss is made. However, as a measure of good faith following a proper process is recommended when terminating under the trial period.

**3**. If no improvement is seen, invite the employee to a meeting in writing. The invitation letter should state the employee can bring a support person and/or representative to the meeting and the purpose of the meeting is to discuss the possibility of their employment ending under the terms of the trial period.

**Please use template letter A provided at the Appendix.**

**4.** Following the meeting, notice of termination of employment mustbe given before the end of the trial period. Therefore, notice of termination must be given before the 90 calendar days expires. However, the notice period and final day of employment can run past the 90 calendar days.

**Please use template letter B provided at the Appendix.**

**5**. The applicable notice period is contained in the trial period provision in the employee’s employment agreement. If there is no notice period specified in the trial period provision, then the general notice contained in the termination or notice clause of the employment agreement is to be applied. Ensure the employee works out their notice period - do not pay in lieu of notice for a trial period termination.

**6.** If the employee requests it, the employer must give the employee a reason as to why they are being dismissed during their trial period. The reason given must not be misleading or deceptive. The employer is not required to provide a statement in writing of the reasons for the dismissal, for example, the reason can be given verbally.

Important points to note

* The employer must ensure the employee’s trial period is valid by following the steps outlined above. If the trial period is not valid, the employer cannot enforce the trial period and will be subject to the usual procedural fairness rules.
* With a termination under the trial period, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. However, the employee can still raise other grievances or legal proceedings on grounds such as disadvantage or discrimination.

Evaluation periods

As a part of the recruitment process, the employer may want to assess the applicant’s skills before giving an offer of employment. If the evaluation period is run incorrectly and the employer proceeds or with employing the person, the trial period is likely to be invalid. This is because the employee may be seen to have been previously employed by the employer.

Probationary periods

A probationary period is not the same as a trial period. Employers who employ 20 or more employees cannot use the trial period, so may choose to use a probationary period instead.

Employees and employers can agree to a probationary period. The probationary period must be specified in writing in the employee’s employment agreement. If an employee is dismissed during or at the end of a probationary period, they are still entitled to raise a personal grievance for unjustified dismissal. Therefore, it is imperative to follow a formal performance management or disciplinary process with the issue of formal written warnings and/or instant dismissal, to justify the dismissal within the probationary period. Likewise, for a proper procedure to be followed to reach the decision to dismiss.

Appendix

**Letter A: Meeting invitation for employee to discuss the possibility of their employment ending under the terms of the trial period**

*Please note, the following letter template requires you to complete the details that pertain to your particular situation. You will need to complete the fields in [brackets like this].*

[Letterhead]

[Company name] Limited trading as [Trading name]

[Business Address]

[Date]

[Employee’s full name]

By email: [Employee’s email address]

Dear [Employee’s name]

**Employment – 90 Day trial period**

This letter is to advise you are required to attend a meeting at [00:00am/pm] on [day] [date][month] 2019/20, to be held at [details of meeting location – ensure suitable and private] to discuss the possibility of your employment ending under the terms of the trial period, as outlined in your employment agreement.

This meeting is an opportunity for you to provide feedback to me before any final decisions are made in regard to your employment with [company name] Limited.

We have met with you several times to discuss our concerns in regard to your performance. [Remove this if you have not met the employee] The major areas of concern relate to [insert general summary, for example, failing to perform the tasks and responsibilities of your role as a Front of House Team Member to the standard expected], as is outlined in your job description. employment agreement and our House Rules and polices [if applicable].

We have informally raised our concerns in regard to [insert concern, for example, the standard of your work performance] several times since you commenced employment with the Company on [insert commencement date] [month][year].

**The issues and concerns are, specifically:**

**[List with detail]**

***Example of how to frame typical issues and concerns with detail***

* ***Lack of communication with your fellow team members to ensure the smooth and efficient running of service, especially during the busy times***

*We have spoken to you about the importance of communicating as a team and working together to ensure we provide excellent hospitality to all out guests.*

*Unfortunately, we have not seen an improvement in regard to this communication aspect.*

Following our informal discussions with you about the issues and concerns, as outlined above, combined with the provision of on-going training and assistance to you, we do not feel there has been a significant improvement.

Please feel free to bring a representative and/or a support person to this meeting. I will be attending the meeting with [full name], [job title], who will be present to take minutes of the meeting.

Please feel free to contact me if you have any questions at this stage.

Yours sincerely

[Full name]

[Company Director or job title]

[Company name] Limited

**Letter B: Notice of termination under the trial period**

*Please note, the following letter template requires you to complete the details that pertain to your particular situation. You will need to complete the fields in [brackets like this].*

[Letterhead]

[Company name] Limited trading as [Trading name]

[Business address]

[Date]

[Employee’s full name]

By email: [Employee’s email address]

Dear [Employee’s name],

**Termination of Employment during Trial Period**

The purpose of this letter is to inform you we are giving you notice of the termination of your employment, in accordance with the trial period provision of your employment agreement following our meeting with you on [day][date][month][year].

As you are aware, while you are on a trial period, we do not have to consult with you, or give you any reason for termination.

You are entitled to [number/days/weeks’] notice and we would like you to work out your notice period. Therefore, your last day of work will be [day] [date][month][year].

You will be paid your final pay, including outstanding wages and annual leave entitlements, including holiday pay on [day][date][month][year], as per the usual pay run.

[Add in any other handover matters such as return of property, for example,

Please return all uniform items issued to you in a clean and tidy state no later than [insert time, day, month, year] so we can process your final pay.

On behalf of [Company name] Limited, I want to thank you for your service and wish you all the best for the future.

Yours sincerely

[Full name]

[Company Director/job title]

[Company name Limited]

**Please note, Restaurant Association Members are advised to seek further guidance from the helpline team on 0800737 827 from 6 January 2020**