

trial periods

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 needs to 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.

[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.]

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:

- That the trial period is for a specified period of time (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- During that 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 that dismissal.

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 be employing fewer than 20 employees, on the day that the employer enter into an agreement with the new employee.
2. Ensure that 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 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 that:
 - a) The trial period is for a specified period (not exceeding 90 days), to start at the beginning of the employee's employment;
 - b) during that period the employer may dismiss the employee; and
 - c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
5. Before the employee commences employment and starts work, the employer must make sure that the employee:

- a) receives a copy of their employment agreement containing the written trial period provision;
- b) is made aware of the trial period provision contained in their employment agreement;
- c) has had a reasonable opportunity to seek independent advice on the employment agreement; and
- d) 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 that there is a valid trial period in place and ensure that 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 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 that the employee can bring a support person 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 in the Appendix.
4. Following the meeting, notice of termination of employment must be 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 in the Appendix.

5. The applicable notice period is that 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 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, i.e. 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 with employing the person, the trial period is likely to be invalid. This is because the employee may be seen as having 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.

Appendix

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

Please note that the following letter template requires you to complete 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 – Trial Period

This letter is to advise you that you are required to attend a meeting on [date and time], to be held at [details of meeting location] to discuss the possibility of your employment ending under the terms of the trial period outlined in your employment agreement.

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

We have met with you several times to discuss our concerns regarding your performance. [Explain concerns and how they have been addressed to date]. Following these discussions, we do not feel there has been a significant improvement.

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

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

Yours sincerely,

[Sign off details]

Letter B: Notice of termination under the trial period

Please note that the following letter template requires you to complete 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 [date].

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 [x days/weeks'] notice and we would like you to work out your notice period. Therefore, your last day of work will be [date].

You will be paid your final pay, including outstanding wages, and holiday pay on [date].
[Add in any other handover matters, for example please return all uniform items issued to you in a clean and tidy state no later than [date] so we can process your final pay].

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

Yours sincerely,
[Sign off details]