

TRIAL PERIODS AND KIWISAVER: THE EMPLOYMENT RELATIONS AMENDMENT ACT 2008

Parliament enacted the Employment Relations Amendment Act 2008 (the "Act") on 16 December 2008. It amends the Employment Relations Act 2000 to allow parties to agree to a trial period during which an employer may dismiss an employee without fear of facing proceedings in respect of the dismissal, subject to certain exceptions. The Act also repeals the amendments made by the Employment Relations (Breaks, Infant Feeding and Other Matters) Amendment Act 2008 relating to KiwiSaver.

THE TRIAL PERIOD PROVISION

From 1 March 2009, employers and employees may enter into an employment agreement that provides for a trial period ("a TPP"). The parties must put any TPP in writing and state that the employee will be trialed for a specified period not exceeding 90 days starting from the first day of employment (the "period"). During the period, the employer may dismiss the employee without fear of being faced with a personal grievance claim or other legal proceedings in respect of the dismissal ("proceedings").

ELIGIBILITY

Only employers who employ 19 or fewer employees qualify for the use of a TPP and it cannot be used more than once with any specific employee or at all for previously employed or current employees. Therefore employers intending to use a TPP must ensure that an employee is not returning after a break from the workplace or that the TPP is being used as a way to test an employee for an internal promotion. Employers should also factor in the number of current employees each time they enter into an agreement containing a TPP, including casual and temporary employees. Although an individual can negotiate a TPP as an additional term where collective employment agreements are involved – a TPP cannot contravene the terms in the applicable collective employment agreement. Unions may gain traction in recruiting new members by advertising that a TPP is inconsistent with the applicable collective employment agreement.

DISMISSING

Section 67B requires notice of termination to occur during the period itself although termination may take effect prior to, on, or subsequent to the final day of the period. Despite not being able to bring proceedings regarding the dismissal, an employee may bring proceedings based on all the other grounds listed in s 103(1) of the ERA including unjustified disadvantage, discrimination, sexual or racial harassment and an employer's failure to observe the requirements regarding restructuring and redundancy as outlined in Part 6A of the ERA. Additionally, employees can access the mediation services of the Department of Labour in respect of the dismissal (but not the Employment Relations Authority or the Employment Court) and employers must otherwise treat them as they would employees with no TPP or an expired TPP in their employment agreement. Significantly, the duty of good faith owed to such employees excludes the employer's obligation to provide access to and the opportunity to comment on information regarding the continuation of an employee's employment. An employee dismissed validly under s 67B cannot ask why they were dismissed either in contrast to other employees who may demand reasons for their dismissal in writing from the employer.

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KIWI SAVER CHANGES

Subsequent to our INFORM in September 2008, the Act reverses employees' ability to bring a personal grievance claim against their employer where they consider they have been adversely affected in their employment due to their membership of KiwiSaver or a complying Superannuation fund. Furthermore, the Taxation (Urgent Measures and Annual Rates) Act 2008 (the "Taxation Act"), confirms that compulsory employer contributions ("CECs") must be paid on top of employee's existing pay when they join a KiwiSaver compliant scheme where the employment agreement does not account for the CECs, therefore the Government viewed that the KiwiSaver 'discrimination' provision in the Employment Relations Act 2000 no longer served a purpose.

From 15 December 2008, the new legislation provides that employers and employees may enter into a total remuneration package ("TRP") - agreements whereby the salary or hourly rate offered to an employee is inclusive of the CECs to an employee's KiwiSaver fund and which may revert back to a cash equivalent where the employee elects to take a contributions holiday from KiwiSaver. However, where the contractual terms and conditions in the employment agreement fail to specify the inclusion of CECs in an employee's total remuneration, it must be paid in addition to the employee's gross salary or wages.

Because the changes are not retrospective; any employment agreements entered into between 9 September 2008 and 15 December 2008 must be dealt in accordance with the previous legislation.

The Taxation Act also makes further changes to the KiwiSaver Act 2006 (the "KiwiSaver Act") that become effective from 1 April 2009 including:

- Capping compulsory employer contributions at 2 percent;
- Reducing the minimum employee contribution from 4 percent to 2 percent;
- Discontinuation of the employer tax credit;
- Capping the Employer Superannuation Contribution Tax exemption at 2 percent of employee's gross salary/wages; and
- Discontinuation of the KiwiSaver member fee subsidy.

However the following KiwiSaver provisions remain unchanged:

- Employee Tax Credit up to \$20 per week;
- \$1,000 kick-start;
- Mortgage diversion; and
- First home deposit subsidy and withdrawal provisions.

If you have any questions regarding trial periods or KiwiSaver and how these changes affect you and your business, please contact one of our Consultants or Employment Lawyers who will be happy to assist you.

CONCLUSION

Any total remuneration package must be negotiated in good faith between employer and employee because any failure to do so may undermine the enforceability of such an agreement or give rise to a claim by an employee that the employer has breached the duty of good faith. Additionally, the changes may require employers to revisit any employment agreements dealing with a total remuneration package to ensure that they comply.

The ability to use a trial period provision should boost the confidence of small and medium sized employers to engage employees that do not possess proven work experience, skills or qualifications. It promises to assist those who might otherwise struggle to obtain employment and make it easier for employers to dismiss an underperforming employee during a trial period. Although some employers may use this to avoid having to engage the employee on a more permanent basis - the truth is that most employers retain good employees! Any employers considering such action should also note that the Act allows employees to initiate proceedings on a number of alternative grounds – for example, for any unfair or unreasonable actions of an employer that result in an unjustified disadvantage. Therefore employers should keep abreast of their obligations to minimise the risk of facing increasingly diverse claims in the future.

We'll keep you posted for any developments to this, but please contact us if you have any questions.