



90 DAY TRIAL EMPLOYMENT PERIODS –EMPLOYERS’ EXPERIENCES

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Abstract

This report presents the results of Department of Labour research into employers’ experiences of trial employment periods. The research aimed to assess the extent to which employers knew about trial periods, the impacts of trial periods on employers, and employers’ perceptions of the costs of using trial periods. Data was collected through two employer surveys, and interviews with employers, employees and union officials. The research found that employer awareness of trial periods was high, although detailed knowledge was less common. The trial period provision was used by half of eligible employers, irrespective of their level of knowledge, with high levels of satisfaction. Employers faced no costs in implementing the provision, and there were indications of cost savings for employers from simplified dismissal processes.

Introduction

On 1 March 2009 an amendment to the Employment Relations Act 2000 came into effect allowing trial employment periods. To be eligible, businesses with 19 or fewer employees, when hiring a new employee, can start them on a trial period of up to 90 calendar days. Under the amendment, the employee, if dismissed, is unable to raise a personal grievance for reasons of unjustified dismissal, but still has the right to protections against discrimination, sexual and racial harassment, duress or unjustified action by an employer that disadvantages the employee. Employees are still able to access mediation, and good faith still applies to the relationship. Both the employer and employee must agree to the trial period in writing. A trial period can be entered into only once between the employer and employee.

Broadly, the objectives of trial periods are to encourage small and medium enterprises to take on employees, while reducing employment relationship problems experienced by small businesses, and to provide opportunities for those disadvantaged in the labour market.

This research was carried out by the Department of Labour eight months after the trial period amendment came into effect to assess the extent of employers’ and employees’ knowledge of trial periods, the changes experienced by employers and employees as a result of implementing trial periods, and employers’ perceptions of the level of regulatory compliance costs relative to benefits. This paper includes only the employer perspective.¹

In addition, there were a number of policy assumptions about the operation of the trial period that this research sought to test. These assumptions were that employers would be aware but not necessarily knowledgeable about the use of trial periods although they would have sufficient knowledge to implement trial periods that complied with the legislation; using trial periods would lower costs for employers and would create extra job opportunities, particularly for employees who might suffer disadvantage in the labour market; and that trial periods would reduce employment relationship problems experienced by employers in small businesses.

Method

This study used data collected from an initial phone survey of employers to determine the knowledge and prevalence of trial periods and to recruit employers for a more detailed, follow-up internet or mail survey. Unless otherwise specified, the results stated here are from the follow-up survey.²

The sampling frame for the initial survey was an employer database of 33,576 employers from which a random sample of 3,600 employers was drawn. Although the sample was not a random probability sample of New Zealand businesses, it was an approximate match of the actual industry distribution in New Zealand. Overall, 1391 employers (39%) completed the initial survey, of which 989 were small employers (1-19 employees). 771 employers completed the follow-up survey, of which 527 were small employers (1-19 employees).³

The study also included qualitative research that involved semi-structured interviews with 31 people: 15 employers,

13 employees, two union officials, and one person from a social support agency.⁴

Previous Research

Probationary employment periods are common internationally. Such periods are, though, generally associated with reaching minimum tenure in a job before becoming eligible for statutory employment protection, rather than being a mechanism to allow employers to gauge employee suitability. There is an extensive literature on the effects of employment protection legislation, and within this body of literature there are some studies, both theoretical and empirical, that look at probationary or 'grievance free' periods. Overall, though, the international literature that is focused on the effects of probationary employment periods in relation to employee suitability is minimal. Further, because most of the literature is set within the context of workers covered by employment protection legislation, it is not strictly applicable to the New Zealand situation where notice periods and/or severance pay are not legally regulated. Although most employees in New Zealand covered by a collective agreement have contractual provisions governing redundancy pay or notice, only a small minority of employees in small and medium enterprises (under 50 employees) are covered (Department of Labour 2009). This means that in relation to trial periods, employer and employee decision-making in New Zealand may deviate from that theorised or observed in the international literature.

Broadly, the labour economics literature shows that employment protection legislation reduces both dismissals and hiring, and increases the use of casual and temporary labour. It also has the effect of protecting the employment of certain groups while increasing the unemployment risk for others. The effects appear to be more pronounced in more volatile industries. However, the overall impact of such legislation on aggregate unemployment is unclear, both in economic theory and in the empirical evidence (Autor et al 2007, Cazes & Nesporova 2003, Garibaldi et al 2003, Marinescu 2009). Exemptions to employment protection legislation (achieved through firm size thresholds, minimum job tenure before eligibility, or both) are found to increase both hiring and firing but have a similarly unclear overall impact on unemployment (Garibaldi et al 2003, Riphahn & Thalmaier 1999, Marinescu 2009).

There are empirical studies that illustrate the differing effects in particular industries or for particular groups of people. In the United States, Autor et al (2007) used firm-level data from the Annual Survey of Manufacturers and the Longitudinal Business Database to analyse the effects of wrongful-discharge protections. This study found some evidence of strong employment growth following the introduction of mandatory employment protection (as well as confirmation that employment protection legislation reduces hiring and firing). A further example is provided by a large scale employee survey in Germany focused on the terms and conditions under which employment relationships end, and the effects of statutory

protection against dismissal. This study found that statutory protection against dismissal did not work against labour market flexibility: the number of terminations of employment remained consistently high (Dribbusch 2003).

Key results

Knowledge of trial periods

A majority of employers (62% and 74% in the initial and follow-up surveys respectively) could correctly answer 'yes/no' questions about key details of the use of trial periods, but the qualitative research showed that comprehensive knowledge of trial periods was less common. Misconceptions related to dismissal procedures under a trial period, including the length of the trial period required prior to dismissal, and whether the trial period only applied to full-time permanent employees. However, not all employers had hired anyone since trial periods came into effect and the qualitative research suggested that employers preferred to access information about trial periods as and when they felt they needed to. Employers' main sources of information about trial periods were the mass media, the Department of Labour, professional bodies and trade associations.

Three quarters of employers responding to the follow-up survey knew employers and employees needed to agree mutually to a trial period, and 62% of employers knew that trial periods needed to be agreed in writing (in a written employment agreement). The qualitative research showed that, in practice, this meant that trial periods were included in employment agreements and the offer of employment was conditional on the employee's acceptance of a trial period, as with other terms and conditions of the employment agreement.

Use of trial periods

Of the 265 employers who had hired someone since 1 March 2009 in the follow-up survey, half (n=134) had used a trial period when hiring at least one employee. Employers tended to use trial periods with all or none of their (new) employees, rather than only with some of them. There were no significant differences between employers who used trial periods and employers who did not in relation to their knowledge of trial periods.

The qualitative research showed that employers generally raised the issue of a trial period while recruiting the employee, although where the trial period was included in an employment agreement, this was not necessarily signed before employment began.

Reasons for using trial periods related to checking an employee's suitability for the job before making a commitment to employment (79%), and being able to dismiss the employee easily if they were unsuitable for the job (35%). The qualitative research showed that reasons for not using trial periods included the length of

the employment period (i.e. trial periods were less likely to be used for shorter periods of employment), the employers' views of employment relationships generally, whether the employer knew the applicant, and the accuracy of the information the employer had about using trial periods.

Employment outcomes

Three quarters (74%) of those employed on a trial period had retained their employment after the trial period was over (a further 5% were still working within the trial period at the time of the survey). Employers who had dismissed employees did so largely for performance related reasons (22 out of 29 employers dismissing employees), followed by attitudinal reasons (14 out of 29 employers). In relation to the last employee they had hired on a trial period, 40% of employers in the initial survey stated they would not have or were not likely to have hired that person without the trial period.

Of the 'last employee hired on a trial period' group, 52% of employees were male and 49% were female; the ethnicity of this group broadly matched that of the whole New Zealand employed population. A little under half of the 'last employee hired on a trial period' group were youth (15-24 years).

There is no comparable data available showing the gender, ethnicity and age distribution of people hired by small firms in 2008, for example, so it is not possible to comment on whether trial periods are being used disproportionately for some groups. In the qualitative research, some employers favoured using a trial period because they tended to employ youth, including students, and employers viewed young people as inexperienced and thus potentially risky to employ.

In the qualitative research, some employers said they would consider hiring disadvantaged workers specifically because of the trial period and one had done so already. However, most employers interviewed were seeking the best candidate available regardless of whether they might be categorised as disadvantaged job seekers. The qualitative research suggested that employers seldom changed their method or frequency of monitoring their employees' performance or communicating with their employees because of the trial period. Such monitoring and communication from the employer sometimes led to the employee leaving before they were dismissed. Thus the use of trial periods may have averted protracted employment relationship problems in some cases.

The small number of employees who were not retained were mainly dismissed either in the first couple of weeks (9 of the 28 dismissals), or else towards the end of the second month/start of the third month of the trial period (12 of the 28 dismissals). Only a small number of employees were dismissed towards the end of the 90 days.

Costs incurred by employers

The qualitative research showed that employers had not incurred any costs in implementing trial periods, but some would have incurred costs either by dismissing or retaining unsuitable staff had the trial period not been used. Nor did employers think that there was any impact on clients and customers as it was considered they would not know that the staff were on a trial period. The survey research did not examine cost-benefits to employers of using trial periods.

Effect of trial periods on the employment relationship

The qualitative research found little employer reflection on whether or how trial periods affected the nature of the employment relationship. All of the employers interviewed in the qualitative research who currently used trial periods would continue to use them, and could not think of situations in which they would not.

Satisfaction

Employers were very positive about how well the trial periods were working for them - 87% of employers thought trial periods were working well.

Discussion

The research found that employers had sufficient knowledge to negotiate trial periods that complied with the legislation (although the Employment Court's first judgment on the interpretation and application of the 90 day trial period provisions, delivered in August 2010, after this research was carried out, may give employers cause to reconsider whether they feel they have sufficient knowledge to comply with the law.⁵)

Half of hiring employers had used a trial period in the first eight months since their introduction (the time period covered in the survey research). Most employees (74%) were retained past the trial period, just under a quarter (22%) were dismissed using the provisions of the trial period, and the remaining 5% were still working within the trial period. Performance issues were the main reason given for dismissal. There was no data available with which to compare this dismissal rate with that of dismissals by small firms prior to the introduction of trial periods, but this is an important area to look at further.

The ability to use trial periods appeared to have encouraged 40% of employers who had hired someone to do so, however without any counterfactual evidence it cannot be stated categorically that trial periods had created extra job opportunities. The international literature suggests that exemptions to employment protection legislation, such as the trial period legislation, increase both hiring and firing but have an unclear overall

impact on unemployment (Garibaldi et al 2003, Riphahn & Thalmaier 1999, Marinescu 2009).

While employers acknowledged that trial periods could give a chance to disadvantaged job seekers, very few of them used trial periods specifically for this purpose, being focused on hiring the most suitable candidate (who may incidentally have been a disadvantaged job seeker). Employers reported that half of those 'last hired on a trial period' were young people. This reflects a number of factors including the churn of young people in the labour market (that is, they have shorter job tenure than other groups),⁶ the employment rate for the 20–24 year age group which is well above the national rate (Department of Labour 2009b) and the type of jobs and industries using trial periods. However this finding in relation to the 15-24 age group aligns with the international literature on the topic which suggests that strict employment protection legislation reduces the employment of youth (Garibaldi et al 2003, Ochel 2009, OECD 2004). This is an area where further research would be useful.

As half of eligible employers had not used trial periods, this too is an area that could be explored in more depth. For example, although the international literature exploring employers' use of trial periods is very limited, there is research that suggests trial periods are used as a sorting mechanism, as they induce self-selection amongst applicants, attracting those who are confident their work will be acceptable (Loh 1994a, 1994b).

An issue raised in the research but not explored further was employee behaviour after a trial period, with one case in the qualitative research of an employer considering an employee was less productive after the trial period. This effect has been noted in other studies of employee behaviour, particularly in relation to absenteeism after the completion of a trial period (Riphahn & Thalmaier 1999, Riphahn & Ichino 2001). This is another area that could be examined in future research.

The research found some support for the policy assumption that trial periods would lower costs for employers. Employers had not incurred any costs in implementing trial periods, and some had avoided the costs of dismissing or retaining unproductive employees. Employers were generally very satisfied with how the trial period provision was working for them, with very few rating it negatively. Most employers who had used trial periods would continue to use them to lessen the risk of costs associated with dismissing or retaining unsuitable employees. Overall, employers thought the use of trial periods was very beneficial to their business. This aligns with the international research which suggests that a probationary period will mitigate productivity problems caused by employment protection legislation as firms can dismiss workers unsuited to the job at low cost at the beginning of the employment relationship (Autor et al 2007, Kugler 2000, Marinescu 2009).

Conclusion

This research was carried out to explore employers' experiences of the newly introduced trial employment periods in New Zealand. Using survey research and in-depth interviews the research found that in the first year of operation, employer awareness of trial periods was high and a majority of employers knew several key details about the use of trial periods - although comprehensive knowledge of the amendment was less common. Irrespective of their level of knowledge the trial period provision was used by half of eligible employers, with high satisfaction with the way it was working. Employers faced no costs in implementing the provision, and there were indications of cost savings for employers from simplified dismissal processes.

The research was limited by the reliance on employers' self-reporting and constrained by the limits on the length and complexity of the questions inherent in survey research. Nonetheless the research provides a basis for further work on this topic, which is likely to be of continued interest given the recent introduction to Parliament of proposed amendments to the Employment Relations Act to expand the group of employers who can use trial periods.

Notes

1. Readers are referred to the full report *Trial Employment Periods, An evaluation of the first year of operation*, accessible from www.dol.govt.nz for an account of employee experiences.
2. The authors would like to acknowledge methodological advice from Dr Boaz Shulruf and Sarah Crichton.
3. The surveys were used to collect data for a larger research project looking at several amendments to the Employment Relations Act 2000. This paper presents the findings from the trial periods section only.
4. This paper presents the findings from the employer interviews only.
5. *Smith v Stokes Valley Pharmacy (2009) Limited*. The Employment Court held that the trial period clause in Ms Smith's employment agreement was not valid and that the employer was not entitled to rely on it. The reason for this is that when Ms Smith signed and executed the employment agreement she was already an 'employee' for the purposes of section 67A of the Employment Relations Act 2000, if for only one day. As Ms Smith was an existing employee, the Court held that the trial period did not comply with section 67A (which only applies to employees who have not been previously employed by the employer), and therefore she was not barred from bringing her personal grievance claim for unjustified dismissal (Simpson Grierson 2010). The Employment Court's decision (NZEmpc 111 *Smith v Stokes Valley Pharmacy (2009) Limited*) is available from <http://www.justice.govt.nz/courts/employment-court>.

6. Data from the Statistics NZ's Survey of Working Life shows that young employees were much more likely to have shorter job tenure than prime-aged and older employees. Almost half (48 percent) of those aged 15 to 24 years had been in their main job for less than one year compared with 20 percent of prime-aged employees (25 to 54 years) and 11 percent of older employees (55 years+).

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