



## COVERSHEET

<b>Minister</b>	Hon Brooke van Velden	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	100-day Action Plan: Extending the Availability of 90-day Trials to All Employers	<b>Date to be published</b>	21 February 2024

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
December 2023	100-day Action Plan: Extending the Availability of 90-day Trials to All Employers	Office of the Minister for Workplace Relations and Safety
6 December 2023	100-day Action Plan: Extending the Availability of 90-day Trials to All Employers 100-23-MIN-0002 Minute	Cabinet Office

### Information redacted

**YES / NO** (please select)

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Some information has been withheld for the reason of international relations.

**In confidence**

Office of the Minister for Workplace Relations and Safety  
Cabinet

**100-day action plan: Extending the availability of 90-day trials to all employers**

**Proposal**

- 1 This paper seeks Cabinet’s agreement to amend the *Employment Relations Act 2000* to extend the availability of 90-day trials to all employers as part of our 100-day action plan.

**Relation to Government priorities**

- 2 The commitment to extend the availability of 90-day trials to all employers is part of the National – ACT New Zealand Coalition Agreement.

**Executive Summary**

- 3 Starting a new employment relationship is a point of risk for both employers and employees. Where a new relationship is not working for an employee, they can provide notice and leave the relationship. By contrast, employers face significant process requirements to dismiss an employee, as well as the risk that the employee raises a personal grievance claim for unjustified dismissal.
- 4 These potential costs and risks may make employers reluctant to hire new employees, particularly those with less recent or relevant work experience, or in situations where there are information asymmetries that the employer would not be able to ascertain prior to employment. This can exacerbate disadvantage in the labour market over time. Trial periods are intended to mitigate this problem by enabling an employer to dismiss an employee for any reason during the period (of up to 90 days).
- 5 The previous Government restricted the use of trial periods to employers with fewer than 20 employees. However, all employers face risks when hiring new employees and significant procedural requirements to dismiss an employee. As agreed in the National – ACT New Zealand Coalition Agreement, I therefore propose to extend the availability of 90-day trials to all employers. This will increase the confidence of employers when hiring new employees, particularly those that may have otherwise been overlooked by employers or deemed too risky.
- 6 The introduction of legislation to enable the extension of 90-day trials to all employers is part of the Government’s 100-day action plan. To expedite the legislative process, I propose to adopt the recently introduced ACT New Zealand Member’s Bill which proposes to extend the availability of 90-day trial periods to all employers. I propose the Bill be sent to Select Committee for a six-month consideration period.

**Employment regulations impose costs and risks on employers when dismissing staff, which may discourage employers from hiring new employees**

- 7 Employment relationships in New Zealand are regulated primarily through the *Employment Relations Act 2000* (the Act). The Act provides a framework for employers and employees to build productive employment relationships in good faith in all aspects of the employment environment and relationship.
- 8 Entering a new employment relationship is a point of risk for employers and employees. For example, an employer may find the employee does not have the right skills for the job or has a poor attitude. Conversely, an employee may find the job is not what they expected.
- 9 In situations where the relationship is not working for the employee, they can leave the employment relationship by giving fair and reasonable notice or the notice outlined in their employment agreement.
- 10 By contrast, if the relationship is not working for the employer, the Act places greater procedural requirements to end the relationship. Employers may only dismiss an employee for a good reason, which includes:
  - 10.1 serious misconduct
  - 10.2 repeated misconduct
  - 10.3 performance issues
  - 10.4 redundancy
  - 10.5 incompatibility
  - 10.6 incapacity.
- 11 As well as having a good reason for dismissal, employers must follow a fair and reasonable process, underpinned by the requirement to act in good faith. This generally includes investigating the matter, communicating concerns to the employee, providing clear standards to meet and a genuine opportunity to improve, considering mitigating factors, and alternatives. This process can require a significant investment in time and effort for employers.
- 12 An employee may bring a personal grievance for unjustified dismissal if they believe that the employer did not have a good reason to dismiss them, or that the process was unfair. Parties may seek assistance from Government dispute resolution services (e.g. Employment Mediation Services provided by the Ministry of Business, Innovation and Employment (MBIE)) or the employee may bring their grievance directly to the Employment Relations Authority (the Authority) for determination. Either party may challenge the Authority's determination in the Employment Court (the Court) if unsatisfied with the result.
- 13 The Authority and the Court may award remedies, such as reinstating the employee or placing the employee in a no less advantageous position, reimbursing the employee, providing compensation, or disciplinary action against the employer.

- 14 The personal grievance process can be lengthy and costly for the employer, including legal fees, investment of time, and potential costs if the personal grievance is successful.
- 15 Employers have consistently highlighted that the costs associated with dismissing an employee, and the risk of a personal grievance claim, can make them reluctant to hire new employees. This is likely to be the case where the employer considers that there is a higher risk that an employee may not be a good match, for example where the jobseeker is new to the labour market, their experience may not be a perfect match, or where the jobseeker has had a significant gap in employment.

### **Trial periods allow employers to reduce these costs and risks in the first 90 days, increasing confidence to take on new employees**

- 16 Currently, the Act enables employers with fewer than 20 employees to include a trial period of up to 90 days in employment agreements. Trial periods reduce risk by enabling an employer to dismiss an employee for any reason during the period (of up to 90 days), and the employee cannot bring a personal grievance claim for unjustified dismissal.<sup>1</sup>
- 17 An employer must comply with the procedural requirements under the Act to be able to rely on a trial period when dismissing staff.<sup>2</sup> If employers do not meet these requirements, the trial provision may be deemed invalid and a personal grievance for unjustified dismissal may be successful.

### **The previous Government limited the availability of trial periods to employers with fewer than 20 employees**

- 18 In 2009, trial periods were introduced for employers with fewer than 20 employees. This was intended to provide employers with confidence when hiring new employees and, through reducing the risk of new hires to employers, enable extra opportunities for employees, particularly those who are disadvantaged in the labour market [CAB Min (08) 45/3].
- 19 In 2011, the availability of trial periods was extended to all employers, allowing them to benefit from the reduced risk and potential cost of a poor match via the use of trial periods. This was part of a package of reforms intended to reduce costs, support more effective and efficient processes, and improve workplace productivity [CAB Min (10) 24/6A].
- 20 In 2018, the previous Labour-led Government restricted the availability of trial periods to employers with fewer than 20 employees. The intent was to balance:

20.1 providing employees with security from the outset of employment

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<sup>1</sup> Employees may still bring personal grievances for other matters not relating to the dismissal, such as discrimination, harassment, or being disadvantaged in their employment.

<sup>2</sup> For a 90-day trial provision to be valid it must; be agreed by the employee before commencing work, specify the period of the trial that the employer may dismiss the employee during the period, and state that the employee may not raise a personal grievance for unjustified dismissal. The Authority and the Court have developed a strict approach to compliance with these procedural requirements.

- 20.2 reducing the costs associated with hiring for small to medium-sized businesses who they considered may be less able to manage the costs and risks associated with the hiring process.

## **I propose to extend the availability of 90-day trial periods to all employers**

- 21 Entering a new employment relationship is a point of risk for *all* employers, not just those with fewer than 20 employees. As agreed in the National – ACT New Zealand Coalition Agreement, I therefore propose to extend the availability of 90-day trial periods to all employers. Extending trial periods would provide an important tool for employers with 20 or more employees to mitigate risks when hiring employees and increase labour market flexibility.
- 22 Extending the availability of 90-day trial periods will increase the confidence of employers with 20 or more employees when hiring new employees, particularly those deemed to be too risky.
- 23 This will significantly expand the availability and potential use of trial periods. Currently, trial periods are available to around 89 percent of employers, who employ 28 percent of employees. Extending the availability of trial periods to all employers will extend availability to the remaining 11 percent of employers, who employ 72 percent of employees.<sup>3</sup>
- 24 Extending the availability of 90-day trial provisions does not mean that all new employees will have trial provisions, rather it provides the option for employers to include a trial provision in the employment agreements they offer to employees.
- 25 When trial periods were available to all employers, a 2018/19 MBIE survey indicated that around 68 percent of employers (who had hired an employee in the previous year) used trial periods for at least one of their new employees, and around a quarter of those using 90-day trials had dismissed an employee during the trial period.<sup>4</sup> Older data from a 2012 Statistics NZ survey (also when trial periods were available to all employers) indicated that approximately 36 percent of employees who started a new job were on a 90-day trial.<sup>5</sup> However, there is no evidence regarding the number of employees dismissed during a trial period.

### *Evidence on the impact of 90-day trial provisions is mixed*

- 26 Several employer surveys have indicated significant support for 90-day trials and that employers use them for their intended purpose.<sup>6</sup>

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<sup>3</sup> Data from Statistics NZ, *New Zealand business demography statistics: as at February 2023*.

<sup>4</sup> Data from MBIE's 2018/19 *National Survey of Employers*.

<sup>5</sup> Data from Statistics NZ (2012), *Survey of Working Life*.

<sup>6</sup> For example, the 2018/19 National Survey of Employers found that the top two reasons for using a trial period were to check the person's skills or ability to the job, and/or to check if the person was reliable and had the right attitude or fit. A 2023 Simpson Grierson poll found that 29 percent of employers ranked extending 90-day trials as one of their top priorities. See: Simpson Grierson (2023), *Pre-election survey - top issues for employers*.

- 27 In 2016, the Treasury commissioned Motu Economic and Public Policy Research (Motu) to evaluate the impact of trial periods. Despite the survey findings above, Motu did not find any significant economy-wide effect of the policy change on:
- 27.1 the quantity of hiring
  - 27.2 the quantity of hiring into employment relationships that are short, or that last beyond the trial period
  - 27.3 the probability that a new hire is a disadvantaged jobseeker, such as youth, young Māori or Pasifika, former beneficiaries, jobseeker beneficiaries, recent migrants, people who were previously non-workers, and school or tertiary education leavers
  - 27.4 the survival rate of new employment relationships
  - 27.5 employees' willingness to change jobs.
- 28 The research concluded that while the policy has had little aggregate impact on employers' hiring and retention decisions, it is likely to have reduced dismissal costs for firms that do decide to dismiss a new employee, and increased perceptions of insecurity for employees who are hired on a trial period. This was despite the fact that *actual* insecurity for employees remained unchanged.
- 29 Though Motu's research did not find major economy-wide impacts from extending the availability of 90-day trials, it is still the case that for individual businesses, being able to mitigate the risk of a poor employment match is valuable. The impact of a poor performing employee can be significant, and the procedural requirements for dismissing them, and the costs and risks associated with this, are high. The extension of 90-day trials will increase their confidence in hiring new employees, particularly those disadvantaged in the labour market.
- 30 On balance, I consider that the benefits to employers outweigh the increased perceived insecurity for employees.

### **I propose to adopt a Member's Bill to expedite the legislative process**

- 31 The usual process for amending an Act is to draft a Government Bill. However, an ACT New Zealand Member's Bill, which proposes to extend the availability of 90-day trial periods, was introduced to Parliament in August 2023, but has not yet had its first reading. This Bill is fit-for-purpose to extend the availability of 90-day trials to all employers and does not require amendment. The Member who introduced the Bill retired at the 2023 election and Todd Stephenson has subsequently picked up the Bill.
- 32 I therefore propose that the Government adopts the Employment Relations (Trial Periods) Amendment Bill (the Bill).<sup>7</sup> The Bill would then proceed through Parliament as a Government Bill.

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<sup>7</sup> The Member in charge of the Bill must also consent to the Government adopting the Bill. I have confirmed with Todd Stephenson that he consents to the Bill being adopted.

- 33 I propose that the Bill be sent to the Education and Workforce Committee (or renamed equivalent) for a six-month consideration. The Bill will come into force on the day after the date on which the Bill receives the Royal Assent, by mid-2024.

### **Cost-of-living implications**

- 34 There are no direct cost-of-living implications associated with extending the availability of 90-day trial periods.

### **Financial implications**

- 35 There are no financial implications associated with extending the availability of 90-day trial periods.

### **Legislative implications**

- 36 Legislation will be required to amend the Act to extend the availability of 90-day trials to all employers. There are no consequential amendments as a result of the proposed legislation.
- 37 The Legislation Programme for the Government has not yet been set. Extending the availability of 90-day trial periods to all employers is a part of the National – ACT New Zealand Coalition Agreement, as well as the 100-Day Action Plan. I recommend that the Employment Relations (Trial Periods) Amendment Bill be included on the Legislation Programme.
- 38 The Employment Relations (Trial Periods) Amendment Bill does not change the position on whether the *Employment Relations Act 2000* binds the Crown.

### **Impact Analysis**

#### *Regulatory Impact Statement*

- 39 A Regulatory Impact Statement (RIS) has been completed and is attached. The requirement for quality assurance of RISs has been suspended for decisions relating to 100-Day Plan proposals taken within the 100 Days. However, MBIE notes that the RIS has been internally peer reviewed and consider that it is fit-for-purpose to inform Cabinet’s consideration, given the time constraints.

#### *Climate Implications of Policy Assessment*

- 40 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

### **Population Implications**

- 41 Māori, Pacific peoples, disabled people, youth (under 25), and people in rural communities all experience disproportionately high rates of unemployment and may face greater disadvantage in the labour market. Extending the availability of 90-day

trial periods to all employers will increase employer confidence when hiring new staff, particularly when hiring those disadvantaged in the labour market.

- 42 Data from a 2012 Statistics NZ survey found there was a higher likelihood of starting on a trial period for those born overseas and who had lived in NZ for less than five years, Pacific peoples and those of Asian descent. There was little variation by age or gender, and Māori were less likely to have started on a trial period.<sup>8</sup>
- 43 Motu did not find evidence that the 90-day trial period policy increased the probability that a new hire was a disadvantaged jobseeker.<sup>9</sup> However, the research also did not find any negative labour market impacts on disadvantaged jobseekers.

## Human Rights

- 44 The Ministry of Justice assessed the Employment Relations (Trial Periods) Amendment Bill for consistency with the *New Zealand Bill of Rights Act 1990*. No issues were identified. International relations

## Consultation

- 45 The Treasury and the Department of the Prime Minister and Cabinet were consulted on this paper.

## Communications

- 46 The Government has publicly committed to extending the availability of 90-day trials to all employers as part of the National – ACT New Zealand coalition agreement.
- 47 I intend to make a further announcement confirming the Parliamentary process for the Employment Relations (Trial Periods) Amendment Bill. The MBIE communications team will work with my office to develop a communications package, including a communications plan, stakeholder engagement approach, press release, reactive Q&As and key messages.
- 48 MBIE provides information for employers, unions, and employees through its website, contact centre and other customer services on an ongoing basis. Once the Bill is passed, MBIE will update guidance on the Employment New Zealand website, updating the employment agreement builder, and inform stakeholders.

## Proactive Release

- 49 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of decisions being confirmed by Cabinet.

## Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

<sup>8</sup> Data from Statistics NZ (2012), *Survey of Working Life*.

<sup>9</sup> Motu defined disadvantaged jobseekers as the following: beneficiaries, jobseeker beneficiaries, non-workers, recent migrants, youths under 25 years old, Māori or Pasifika under 25 years old, and education leavers.



**IN CONFIDENCE**

*Extends the availability of 90-day trial periods to all employers*

- 1 **note** that the *Employment Relations Act 2000* enables employers with fewer than 20 employees to employ new employees on a trial period of up to 90 days, during which the employer can dismiss the employee for any reason;
- 2 **note** the National – ACT New Zealand Coalition agreement committed to extending the availability of trial periods to all employers;
- 3 **agree** to amend the Act to extend the availability of trial periods to all employers;

*Adopts the Member's Bill to expedite the legislative process*

- 4 **agree** that the Employment Relations (Trial Periods) Amendment Bill be adopted by the Government;
- 5 **agree** to include the Employment Relations (Trial Periods) Amendment Bill on the Legislation Programme.
- 6 **agree** that the Bill be set down for First Reading following consultation with the Leader of the House;
- 7 **agree** that the government propose that the Bill be:
  - 7.1.1 referred to the Education and Workforce Select Committee (or renamed equivalent);
  - 7.1.2 enacted by mid-2024;
- 8 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy in this paper, on any issues that arise during the Parliamentary process, including transitional provisions.

Authorised for lodgement

Hon Brooke van Velden

Minister for Workplace Relations and Safety