



Questions and Answers on the 90-Days Bill

1. Isn't it too hard for small businesses to employ new staff?

There's no real evidence that small businesses actually have big problems with employees who bring unjustified personal grievance claims in the first 90 days of employment. There don't seem to be that many cases in the Employment Relations Authority (ERA) relating to the first 90 days at all.

A comment from an interviewee in a recent Massey University research report into employment practices of SMEs is telling: "the trial period is just really a means of me being able to dismiss them if I don't like them, or if they're not fitting in."¹

The strange thing about National's bill is that, where an employer and a worker were having a disagreement, this bill might make it harder to resolve. First it stops the parties from using the ERA's free mediation service. Then it puts these disputes outside the specialised jurisdiction of the Employment Court and means they could only be settled in the civil courts.

Probationary employment is already allowed in New Zealand. Case law around probation periods has already established that during a probationary period, an employee can expect to be under, "close and critical assessment".

But, to balance that, employers are expected to tell the employee about their concerns, hear the employee's point of view and consider it in a fair manner. Not a great deal to ask of employers. In fact – given what they will already have invested in the recruitment process in terms of money and time – it's actually in their interest.

2. Won't people who can't get work now get a good chance to prove themselves to an employer?

That's Don Brash's argument. In his words, a 90 day no rights period will help people who are, "too young, too old or too brown" to get a job when they otherwise couldn't.

Unfortunately, that looks a lot like discrimination. Age and ethnicity have nothing to do with someone's employability.

But, more importantly, probationary employment is not a good chance to prove yourself if you have no rights and the employer has no responsibilities. Without any

¹. Comments from interviewee in "*It's the people that you know: A report on SMEs & their human resource practices*", New Zealand Centre for SME Research, Massey University. Presented at 'The Fourth Symposium of the New Zealand Centre for SME Research: The People Behind the Profit', February 21 2006. <http://sme-centre.massey.ac.nz>

rules around probationary employment, a new employee could work as hard as they possibly could to prove themselves and still be let go at the end of their probationary period without any reason given.

This bill will not actually create any job opportunities. There is a job vacancy because there is work to do, not because the worker asked to do it is easy to fire. All this bill does is create an incentive for employers to exploit new workers - to use the threat of instant dismissal to make them work longer and harder.

Rather than creating jobs, it will turn good jobs into bad jobs. It will allow employers to be lazy about their recruitment, knowing they can simply kick out new staff they don't like.

If Don Brash wants to tackle the issue of employment opportunities for people currently excluded from work, he needs to invest in their skills not take away their rights. Training, targeted development opportunities and active case management can all help to get people into work.

3. Isn't New Zealand out of step with other countries because we don't have probationary employment?

Well, as mentioned earlier, we do have probationary employment. It's just that it's not a no-rights probationary employment. Does that even matter? Unlike New Zealand, other countries haven't recently enjoyed the some of the highest levels of growth and lowest unemployment rates in the OECD either.

Even if you think it does matter, the difference between New Zealand and other countries isn't so clear cut when you look at the details. Many of those countries have more stringent employment law to start with. Equally, legislation must be considered alongside regulation, case law, employment agreements and social norms. In other countries these factors place significant limits on probationary employment. In a New Zealand context, the behaviour of some employers shows they will exploit National's proposed changes without remorse.

In most other OECD countries probationary employment does not mean a total loss of rights during probation. In fact, it often means a very limited change in employee rights. For example, in Germany probation reduces the notice period for a new employee from four weeks to two. Equally, in eight OECD countries legislated probationary periods are less than 90 days.

If New Zealand isn't really out of step with other countries, National's bill will make sure we are. Completely stripping away workers rights would only bring us closer to the US, where studies suggest as many as 200,000 people a year are wrongly dismissed with no remedy.

Furthermore, the World Bank has said for two years in a row that New Zealand ranks top out of 155 countries for ease of doing business. They recently released

further breakdowns of their data, which showed New Zealand ranks 4th in the world for flexibility of labour regulations – that is, New Zealand employers face some of the least restrictions on the hiring and firing of workers.

4. Workers can quit a job when they like – why can't employers sack workers when the like?

In practical terms, employers are in a much stronger position than employees when it comes to entering an employment relationship. Individual employees are at a disadvantage – they usually have fewer resources to start with and they rely on their job for their income and, as a result, their economic survival. In contrast a company or organisation has dedicated resources for managing its staff and getting its employees to act in the company's interest. And when one employee stops working it can be inconvenient for the company – even costly – but it doesn't usually mean the company won't be able to pay the bills.

Not letting an employee quit at all would be forcing them to work. Under International Labour Organisation conventions that is not allowed.

In any case, workers still have to give notice when they quit. Under National's bill employers do not have to give a new worker any notice at all.

5. Why shouldn't the boss be able to sack bad employees?

They can. They just have to give the employee a fair hearing when they do it. All National's bill will do is take away the fair hearing. In doing so, it takes away any idea of natural justice and leaves a new employee with nothing to back them up when they begin a new job.

Currently case law requires an employer to do just three things for a probationary employee: tell the employee about their concerns, hear the employee's point of view and consider it in a fair manner. That isn't hard.

In the end National's bill only rewards employees who are too lazy to manage new staff properly or who intentionally wish to exploit new workers.

In Australia, where similar employee rights have been removed, there are already numerous examples of employers making bad decisions. Like the Victorian engineering firm that sacked a worker for smirking at the boss or the Tasmanian manufacturer who wanted to sack any worker who was having family problems at home.

Not all employers are like this – but some are. Those that aren't don't need the law changed. For those that are, it's vital we keep some rules to protect the people who start working for them.