MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Evaluation of the Short-term Outcomes of the 2010 Changes to the Employment Relations Act and Holidays Act

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Ministry of Business, Innovation and Employment
PO Box 3705
Wellington
New Zealand
www.dol.govt.nz
www.mbie.govt.nz

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Background

In 2011 legislative amendments were introduced to the Employment Relations Act 2000 and the Holidays Act 2003.[1] These amendments were designed to improve the operation of the labour market by achieving lower compliance costs for employers, faster problem resolution, greater clarity and more choice and flexibility for employers and employees.

This is phase 2 of a two-phase evaluation of the amendments. The first phase evaluated the then-Department of Labour's role in implementing the legislative changes.[2] The purpose of this phase is to understand the extent to which the changes are working as intended, and to identify factors that have influenced the short-term outcomes observed so far amongst employers, employees and intermediaries such as unions and problem resolution providers. This is a short-term outcomes evaluation; the full effects of the variety of changes introduced, such as changes to problem resolution processes, are likely to take longer to fully emerge.[3]

It focuses on the following key areas of legislative change:

- Allowing all employers the option to use trial periods of up to 90 days.
- Changes to the Holidays Act, in particular:
  - the ability to cash in up to one week of annual holidays
  - the ability to transfer public holidays to another working day
  - providing a different method of calculating payments for some types of leave and holidays, called Average Daily Pay or ADP, and
  - making it easier for employers to ask for proof of sickness or injury.
- Changing unions' access to workplaces conditional on employer consent and clarifying that employers are able to communicate directly with employees during collective bargaining.
- Making changes to problem resolution institutions and processes.

Objectives of the legislative changes

The overarching outcomes intended by the legislative amendments were to:

- reduce compliance costs for businesses
- reduce employment relationship problems
- improve the balance of fairness
- provide more clarity and guidance to users of the legislation.

Specifically, the main intended outcomes of extending trial periods to cover all employers were to:

[1] Most changes to both Acts took effect on 1 April 2011, although some changes to the Holidays Act took effect in 2010 and one change to the Employment Relations Act took effect on 1 July 2011.

[2] Fawthorpe, L. & Johri, R. (2011). *Employment Relations Amendment Act 2010 and Holidays Amendment Act 2010. Phase 1: Evaluation of the Department of Labour's implementation*. Department of Labour.

[3] Labour inspector (LI) practices have also changed as a result of the amendments to the Employment Relations Act and Holidays Act. These legislative changes have created new statutory functions and extended their powers. A separate evaluation project (an unpublished Labour Inspector Practice Change evaluation) was completed in February 2013 and focused on the legislative and associated practice changes for labour inspectors. The review of changes to these practices is not covered in this report.

- give more businesses the confidence to take on new staff
- encourage employers to provide more job opportunities for disadvantaged job seekers.

The main intended outcomes of the Holidays Act changes were to:

- make the Act easier for businesses and employees to understand and apply
- make the Act more readily applicable to a range of employment arrangements, thereby increasing choice and flexibility.

Finally, the main intended outcome of amending problem resolution institutions and processes were to:

- help resolve workplace disputes faster.

Research method and approach taken

The evaluation involved a mixed-methods approach, bringing data together from a number of sources including:

- examining results from four surveys, covering employers, employees and unions
- interviews with key commentators, employers, employees, unions and providers of employment relations services, such as mediators
- analysis of case law and administrative data.

The four surveys used had maximum margins of error for the total sample at the 95 percent confidence level ranging from approximately +/-2.5 per cent (for the Survey of Working Life employee sub-sample) to +/- 5.7% (for the 2011/12 National Survey of Employers). Margins of error for sub samples, for example for larger businesses only or for groups working in particular industries, were larger than for the total sample. The limitations of sample size were mitigated by triangulating results across the four quantitative data sources, as well as against the qualitative findings from the interviews.

Key findings

Overall, the findings indicate that the amendments to the Acts have achieved some of the policy objectives in the short-term.

Trial periods

Trial periods are being used by both small and large firms across a range of industries and positions, at higher and lower skill levels. Survey results indicate that the use of trial periods was spread across most groups that started work during 2012, including the more disadvantaged groups such as Māori and youth. Interviews with employers revealed that the main reason for their use is to help manage risk when trialling new staff.

Employers reported in interviews that trial periods have reduced the potential cost of dismissals (and thereby the risk of new hires), and not added any additional costs. Results from the National Survey of Employers (NSE) show that 72 per cent of employers who had used trial periods had not dismissed an employee on a trial period; 27 percent of employers had dismissed at least one employee during or at the end of the trial period. Interviews with employers who had dismissed staff indicated they followed correct procedures and said they more comfortable that there would be no comebacks.

Generally, neither employers nor employees reported that trial periods had changed the nature of their usual employer/employee relationships.

Holidays Act changes

The Holidays Act changes have increased flexibility and increased choices for some employers and employees, although choices for some were hindered by a lack of awareness of understanding of some of the amendments or of the previous legislative requirements.

Some employers interviewed reported that they are finding that the Holidays Act provisions are difficult to apply in some work arrangements, such as for people with variable work hours or shifts. In particular, translating employee entitlements from a daily to an hourly measure for payroll systems is creating difficulty for some employers.

The impacts of the Holidays Act changes on firms' direct and compliance costs were minor. For firms that had implemented the changes, most reported that costs remained the same. In general, the compliance costs for calculating entitlements and payments have remained the same.

Union access and communications during collective bargaining

The changes to union access and communications during collective bargaining were reported to have little impact among employers and unions and did not increase the number of problems reported.

Problem resolution institutions and processes

The amendments that related to mediation have made little difference to the flexibility of the service. The provision for formal recommendations by the mediator has increased the choices available to the parties in a dispute. However, it is not clear how often this is taken up, or how often recommendations are accepted as there are no records kept. This provision has increased the use of informal recommendations by mediators.

It is unclear whether the amendments to problem resolution processes have affected the duration of employment problems. Respondents reported little change in the time taken to resolve cases as a consequence of the implementation of the amendments, and administrative data supported this finding. Other factors (like restructuring in some institutions) are likely to have had a stronger effect on their duration.

Key commentators said that fairness in problem resolution processes was relatively well balanced between employers and employees. The balance has not significantly changed as a result of the amendments. The changes to the test of justification have not resulted in any practical changes, although codifying of the tests may have increased the transparency to the disputants.

The amendment relating to preventing mediation settlements being agreed for less than minimum entitlements was sometimes seen as not helping the balance of fairness in situations where the employer did not have enough funds to pay the employee's full entitlement. As such, agreement could not always be achieved in some cases.

Conclusions

Trial periods have provided greater opportunities for workers to be hired

A key objective of trial periods was to create more employment opportunities, especially for disadvantaged job seekers. Survey results showed that around one third of employers hired some people they would not have otherwise hired. This supports the results of the previous evaluation by the Department of Labour that some employers were more confident about taking the risk of hiring someone they might not ordinarily hire. Qualitative findings from interviews also showed that some employers were now more prepared to give job opportunities to groups they would not have previously considered.

However it was not possible to determine whether the introduction of trial periods has resulted in a net increase in employment. The lack of a "control group" of firms (for whom trial periods were not introduced) means that the impacts of the policy change cannot be isolated from other factors that may have affected employment levels, such as wider economic conditions. Although trial period were introduced initially for small firms, and then extended to all firms, there was no statistically significant difference in the rate of use of trial periods between small and large firms.

Survey results generally showed that a wide range of people were recruited on trial periods. While this included groups that were disadvantaged in the labour market to a certain extent, it was apparent from interviews with some employers, that trial periods were often applied as a standard feature in employment agreements.

The changes to the Holidays Act have partially met aims of the amendments

The effect of the changes to the Holidays Act on flexibility was influenced by variable levels of employer understanding of the changes; while some have found it easy to interpret and implement the changes, others have found them difficult to apply to their current employment arrangements. As such, the changes have not resolved some pre-existing difficulties with understanding some provisions of the Act, such as how to determine holiday pay. However, both employers and employees, and some unions also noted flexible arrangements already in place, some of which were informal, which have lessened the impact of some of the changes. The view among many employers was that the inherent complexities of the Holidays Act remain difficult to understand in parts and costly to apply correctly to existing employment practices. The cost tends to be compounded by the limited flexibility of some payroll systems.

The objective of reducing compliance costs for leave provisions does not seem to have been achieved in sectors with high ongoing administrative costs, where very variable hours were worked.

The changes to problem resolution institutions and processes have had limited impact

Amendments to problem resolution processes have generally not affected costs or changed the balance of fairness. No clear link can be drawn between the amendments to problem resolution processes and institutions and the length of time problems take to be resolved. The amendments have not reduced costs and in some cases may have increased compliance costs, partly due to the increased emphasis on parties following correct procedures.

Overall knowledge and understanding of the changes could be improved

An underlying theme that emerged from this evaluation is that the successful uptake of the changes in the short-term has been affected by variable levels of understanding of all the changes, particularly among employees. The uneven employer and employee knowledge of the changes, coupled with the use of a wide range of information sources, suggests that communication about legislative amendments should be clear, consistent and accessible to both employers and employees. Further monitoring of the levels of access, use and understanding of various facets of the Acts will probably be required.

1 Introduction

The purpose of this evaluation is to understand the extent to which a package of legislative amendments to the Employment Relations Act and Holidays Act introduced in 2010 and 2011 are working as intended, and to identify factors that have influenced the short-term outcomes observed so far amongst employers, employees and intermediaries such as unions and problem resolution providers. This is a short-term outcomes evaluation; the full effects of the variety of changes introduced, such as changes to problem resolution processes, are likely to take longer to fully emerge.

1.1 Background – scope and objectives of the 2010 legislative amendments

While the changes to both Acts applied to different aspects of the employment relationship, overall the changes were sought as a means to achieve more simplified, workable and effective solutions to issues faced by businesses, employees, and employment relations services working with what are regarded as complex pieces of legislation. The changes were intended to align with the government's broad objectives of reduced costs, improved fairness, choice, and flexibility for employers and employees.

The stated objectives of the Acts were not altered; however the changes made to the Acts were quite extensive. Some, such as the changes to the Holidays Act for example, increasing options around annual and public holidays, applied to most employers and employees. In addition a number of changes made to the Employment Relations Act in 2010 related to the processes of resolving problems between employers and employees. Some of these changes were new provisions, while others codified existing practice (including common law).

It was intended that the changes to both Acts would be of benefit to all employers and employees to some extent, and that there would be no, or limited, increased direct costs for employers (or employees) as a result of any of the changes.

1.2 Research questions and methods used

The main research questions were designed to determine if the intended outcomes were achieved and are as follows:

1. Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
2. Is the legislation now more readily applicable to a range of working arrangements?
3. Have the amendments improved choice and flexibility for employers and employees?
4. Have the amendments improved the balance of fairness for employers and employees?
5. Have the amendments reduced direct and compliance costs for employers and other parties?
6. Are the amendments helping resolve employment relationship problems faster?
7. Have the amendments given businesses more confidence to take on new staff?

1.2.1 Scope and methods used in evaluation

This evaluation focused on the key changes to the Acts. Some smaller amendments to the Acts have not been covered, although some have been addressed in a separate implementation evaluation.[4] The relevant research questions, such as the extent to which the amendments were used and understood, and whether they are achieving the key outcomes sought, were applied to each main amendment. The four broad areas of amendments covered by the research questions are as follows:

- enabling all employers to have the option to use trial periods
- changes to the Holidays Act (cashing up annual holidays, transferring public holidays, payment for some holidays and leave and providing proof of sickness)[5]
- making union access to workplaces conditional on employer consent and clarifying that employers are able to communicate directly with employees during collective bargaining, and
- changes in provisions relating to employment problem resolution.[6]

The evaluation followed a mixed-methods approach. Survey data was used to quantitatively assess awareness and uptake of the new provisions. Qualitative interviews with a broad selection of labour market participants and key commentators were used to validate survey findings, and explore issues in more detail, such as the underlying drivers of decisions and perceptions of impacts. The evaluation findings and conclusions are therefore based on a synthesis of the best available sources of quantitative and qualitative data. The methods used in this assessment were sufficient to see the preliminary effects of what the amendments were trying to achieve. Areas where the coverage or detail obtained was incomplete are noted in the text.

1.3 Description of survey and interview sources

The seven main sources of information used in the evaluation, and some of the key features of the sample size and population, are shown in Table 1. The surveys used had maximum margins of error for the total sample at the 95 percent confidence level ranging from approximately +/- 2.5 per cent (for the Survey of Working Life employee sub-sample) to +/- 5.7% (for the 2011/12 National Survey of Employers). Margins of error for sub samples, for example for larger businesses only or for groups working in particular industries, are larger than for the total sample. The limitations of sample size were mitigated by triangulating results across the four quantitative data sources, as well as against the qualitative findings from the interviews.

[4] *Employment Relations Amendment Act 2010 and Holidays Amendment Act 2010. Phase 1: Evaluation of the Department of Labour's implementation*. Department of Labour, 2011

[5] These were considered the key amendments to the Holidays Act. A number of other changes, such as the provision related to the treatment of holidays and leave during a 'closedown period', were not evaluated in this study.

[6] Some changes to the ERA (such as the requirement for the Authority to prioritise cases that had been to mediation) were not considered as extensively in the research.

Table 1: Main sources of information used in the evaluation

Key features	Union survey	National Survey of Employers (NSE)	UMR Telephone Omnibus survey[7]	Statistics NZ Survey of Working Life	Employer interviews[8]	Employee interviews	Key commentator interviews
Population	Unions in all main sectors, across NZ	NZ employers, by business establishment as per Statistics New Zealand business frame	Persons 18+ across NZ	Employed individuals in households across NZ	Auckland, Wellington, Hawke's Bay	Across NZ	Across NZ
Sample size	138 registered unions	1,529 (random stratified)	1,500	14,335 (stratified sample)	19	20	28
Response rate	27%	44%	na (quota sample)	84%	na	na	na
Date of fieldwork	May 2013	October 2012 to March 2013	April 2013	December quarter 2012	April to June 2013	May to June 2013	April to July 2013
Maximum margin of error for the total sample at the 95 percent confidence level	Not available	+/- 4.2% for 2012/13 NSE, +/- 5.7% for 2011/12 NSE	+/- 3.5%	Approx +/- 2.5% for the total employee sub-population	na	na	na

A further outline of the information sources used, the methodology and key caveats in relation to the data are listed in Appendix E.

1.4 Structure of the report

The remaining structure of this report is as follows:

[7] The UMR omnibus survey is a fortnightly telephone survey of New Zealanders aged 18 and over, run by UMR Research, a market research and evaluation company. Refer to Appendix E for more details.

[8] See Table 5 in Appendix B for a breakdown of size and sector of employers interviewed. They were identified as larger, (50 + employees) medium sized (20-49 employees) or smaller (under 20 employees) to broadly align with survey classifications used in this evaluation.

- Chapter 2 addresses the relevant research questions in turn across each of the four areas of legislative change, as outlined in the bullet points in section 2.1.
- Given the wide applicability of some of the legislative changes, Chapter 3 considers the possible unintended consequences of the changes.
- Chapter 4 contains a discussion and conclusions, focusing on whether the various parts of the 2010 changes are contributing to the policy objectives as set out in the key research questions.

Appendix A gives an overview of the 2010 changes under evaluation. Appendix B contains further details about the research objectives. Appendix C provides details on the data tables, while Appendices D – F provide further details on data sources and methods.

2 Findings from the evaluation

2.1 Trial periods

Beginning on 1 March 2009, an amendment to the Employment Relations Act 2000 enabled employers with fewer than 20 employees to make an offer of employment that includes a trial period of up to 90 calendar days for new employees. After 1 April 2011, the trial period provision for new employees was extended to cover all employers. Earlier research on trial periods indicated that trial periods were working well for smaller employers.[9]

The relevant main research questions relating to the extension of trial periods that are addressed in this section are:

- Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
- Is the legislation now more readily applicable to a range of working arrangements?
- Have the amendments reduced direct and compliance costs for employers and parties?
- Are the amendments helping resolve employment relationship problems faster?
- Have the amendments given businesses more confidence to take on new staff?

2.1.1 The uptake of trial periods

Trial periods are widely used by employers, with Table 2 showing that over half (59 per cent) of employers who had taken on new staff in the past year used trial periods. This table also shows that use was similar amongst both smaller employers (fewer than 20 employees, referred to as SMEs from here on) and larger employers (20 or more employees). There was no statistically significant difference in the use of trial periods between smaller and larger employers.

Table 2: Prevalence of use of trial periods, by size of employer[10]

Use trial periods?	Proportion of all employers who had taken on new staff (%)	Fewer than 20 employees (%)	20+ employees (%)
No	39	39	38
Yes	59	59	60
Don't know or would not say	2	2	1

Source: National Survey of Employers 2012/13

Statistics New Zealand's Survey of Working Life (SoWL) provides information on the number of *employees* on trial periods. According to the SoWL just over one third (36 per cent) of employees who started their current main job in the last 12 months started on a trial period, as shown in

[9] *Employers' perspectives on trial periods.* DoL (2012)

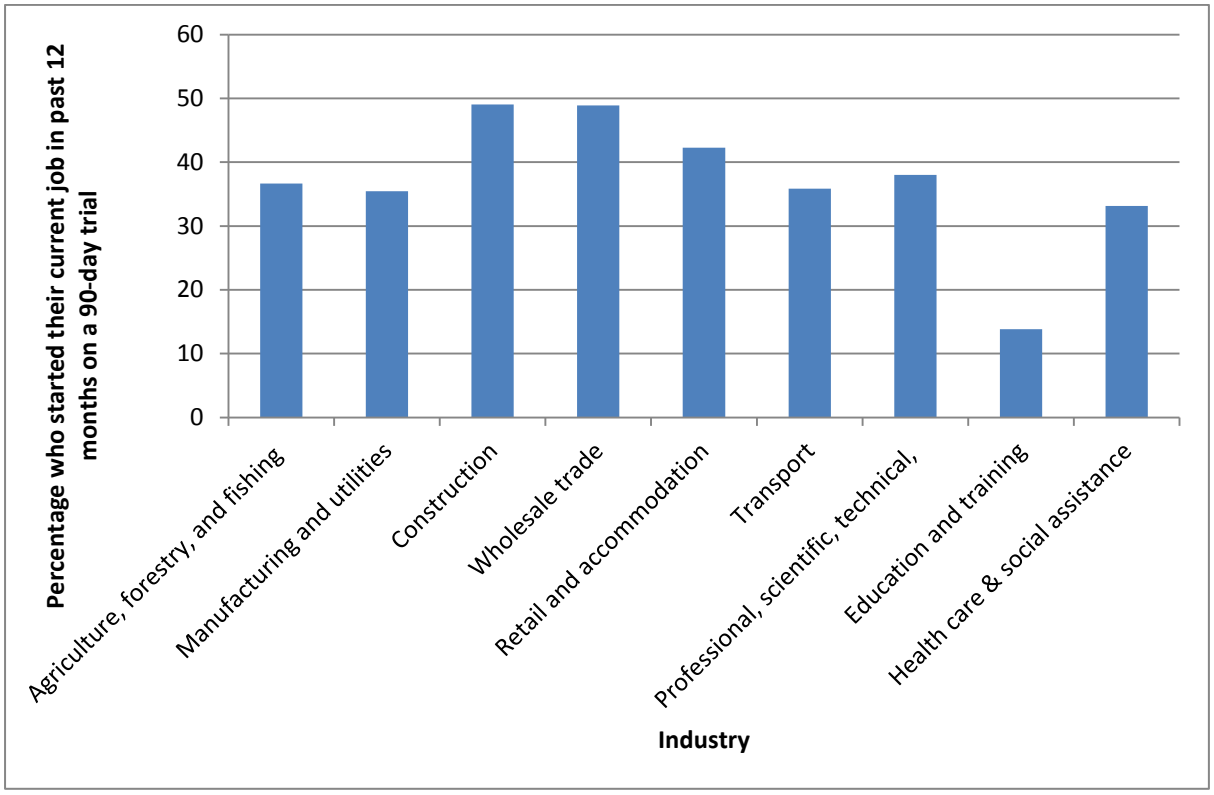
[10] All information from the SoWL referring to trial period use relates to employees who started their current main job on a trial period in the 12 months preceding the survey.

Appendix Table C1.[11] The UMR Telephone Omnibus survey (UMR) also reported a similar proportion, with 35 per cent of employees starting in any job in the last two years hired on a trial period.

When considering the type of work employees starting on trial periods are involved in, Chart 1 shows that the industries with the highest use of trial periods were construction and wholesale trade (both 49 per cent), with education and training (14 per cent) having the lowest use. Only the education and training results are significantly different to the overall average of 36 per cent.

Results by occupation confirmed the industry results, with technicians and trades workers, followed by sales workers, most likely to start on trial periods (46 per cent and 44 per cent respectively), as shown in Table C2. The UMR survey results by occupation were similar, although some lower skilled groups like labourers and community and personal service workers were the most prominent (Table C3). Overall, the occupation data from both these surveys indicates wide use among most occupations, although there was significantly lower use among professionals, which could be expected given trial periods were aimed to assist workers at greater risk of unemployment.

Chart 1: Prevalence of use by new employees on a trial period, by industry of employee



Source: SoWL, 2012

Trial periods are used in a wide range of working arrangements (Table C2). SoWL data shows that employees in permanent jobs were significantly more likely to have started on a trial period than those in temporary jobs, (43.3 per cent and 15.8 per cent, respectively). This finding is consistent with the results from the NSE revealing that some employers didn't use trial periods when hiring for a short-term role only or where trial periods were not deemed appropriate for the type of role being

[11] All appendix tables referred to in the report are prefixed with the appendix number 'C'.

filled. Interviews also showed that short-term staff were often not employed on trial periods, although they provided examples of a range of employment arrangements where trial periods were used, such as fixed term as well as permanent employees working regular and irregular hours, full-time or part-time, or in seasonal work. Some employers used trial periods for all new permanent staff, whilst others used it more selectively (for example, for staff on permanent as opposed to seasonal or fixed term contracts, or non-managerial positions).

Those on individual agreements were somewhat more likely to have started on trial periods than those on collective agreements (CEA), as shown in Table C2.This was reflected in the interviews with employers that showed where CEAs existed, employers tended to have established performance systems for staff specified in their agreements, which made it less likely that new employees would start on a trial period. Some employers interviewed said they had reached an agreement on CEAs with their unions that excluded the use of trial periods. The union survey results showed that 14 of the 37 survey respondents said that since the law change they had negotiated CEAs excluding the use of trial periods, in agreement with the employer, (Table C15). However, the most extensive analysis of provisions for trial periods in CEAs found that in general references to trial periods remain uncommon: three per cent of employees were covered by CEAs containing a clause that included trial periods, while only one per cent of employees were covered by a CEA with a clause that specifically excluded them from employment on a trial period.[12]

2.1.2 How trial periods are understood and applied in practice

Most employers understood the main features of trial periods and how they operated. They knew employees needed to agree to trial periods in writing before work started and that trial periods applied only to new staff.

Employees knew they did not have the same employment protections as employees not on trial periods. They understood they could be dismissed at short notice without reason, but some were unsure about their rights if they had a disagreement during the trial period. The younger employees in particular were generally accepting of them as they considered them a common feature in employment agreements. Some had experienced probationary periods before the law changes and therefore stated that they were used to the idea of having a trial provision. For example a technical engineer said believed that mistakes could lead to a quick dismissal, and a service support person had experienced what he believed were similar probationary systems for new staff in Australia.

For some employers, the need for employee agreement to a trial period was not well understood or communicated to the people they hired, and while most employers were aware a trial period could be negotiated, some employers said they considered trial periods were not negotiable. For example, an Auckland manufacturer indicated that having a discussion with staff about the trial period clause in their employment agreements could lead to them being perceived as a less desirable employer.

[12] Based on analysis by Victoria Management School, Industrial Relations Centre (2013). In comparison, 10 per cent of employees were covered by CEAs with clauses for a probation period.

"If it wasn't there by law and we put it in our contracts and said to people, 'You are going to have a three-month probationary period' I think it would invoke a lot more conversation and a lot more reticence to work for us."

2.1.3 Information sources used to gain understanding

Employers reported using Ministry of Business, Innovation and Employment (MBIE)/Department of Labour most frequently as an information resource for employment law which includes trial periods, (57 per cent), followed by lawyers and accountants (55 per cent). (Table C13).

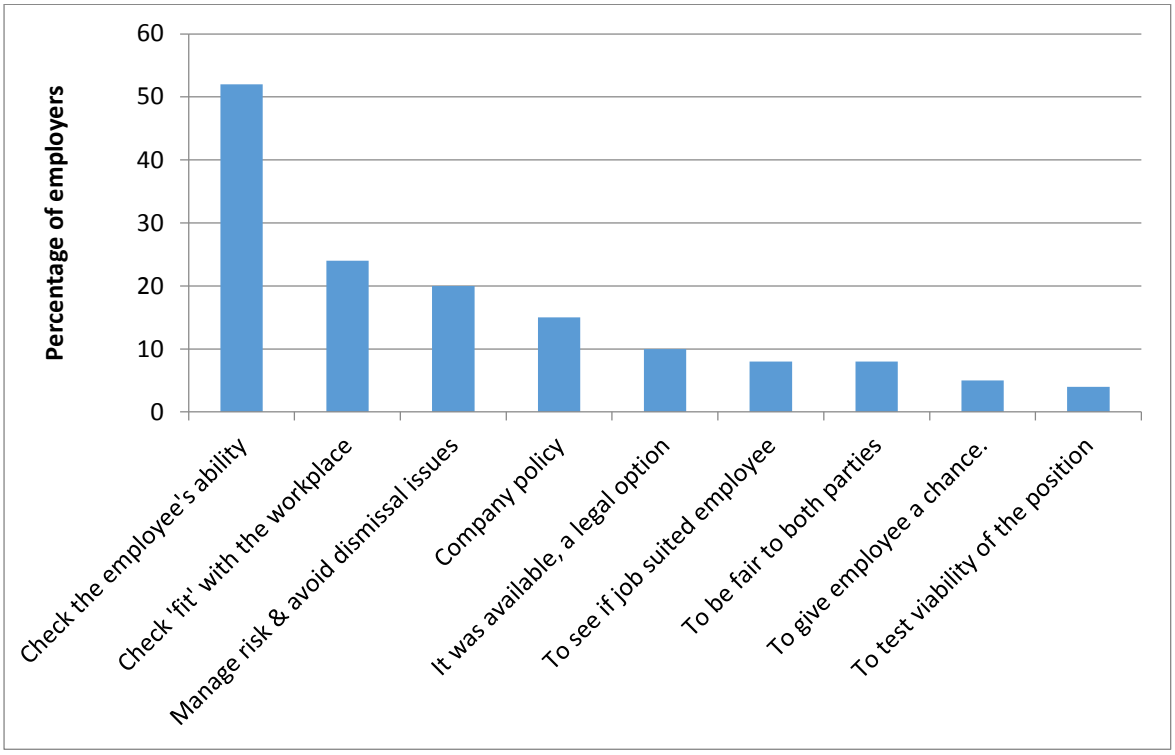
For the general public, the Internet was the most frequently used information source for employment law (38 per cent) and was more than twice as likely to be used as any other source. (Table C14). Two employees (in construction and hospitality) learned the trial periods they were offered were not being applied correctly – one had only been told verbally that they would be on a trial period, and the other was shown the clause after starting employment. They had found information on trial periods via the Internet and the MBIE Contact Centre respectively. Both said that their employer had been unaware of how to correctly apply trial periods. The lack of awareness of information is supported by evidence from the 2011 implementation evaluation, which noted that the publication of information and guidelines for users was less than optimal due to issues such as timing constraints and lack of clarity of ownership of some tasks.

Interviews with employers indicated that the Employers and Manufacturers Association (EMA) was a useful source of information, while employees interviewed often seemed to rely on colleagues or the Internet.

2.1.4 When and why employers use trial periods

In the NSE, when asked why they had hired their most recent employee on a trial period, employers most commonly said this was to check the employee's ability to do the job before committing to employing them long-term (52 per cent). All reasons for use are shown in Chart 2.

Chart 2: Reasons for use of trial periods



Source: NSE, 2012/13

The interviews with employers indicated that these reasons often overlapped, but when asked why they used trial periods, the respondents tended to say that the underlying reason was to reduce the risk of hiring. In this regard, trial periods were regarded as a 'safety net' to lower the risk of costly employment problems if employers misjudged the capability of those they hire.

"What we do is we take it as a safety blanket that if we do choose someone that they're going to fit the needs of our business."
Auckland medium-sized manufacturer

The NSE results show that employers who did not use trial periods were most likely not to have used them because they knew the existing skills of the candidate (26 per cent) or because their existing methods for recruiting and dismissal were effective (19 per cent).

Employers interviewed added some further reasons for not using trial periods including:

- existing performance management processes (sometimes spelt out in CEAs) dealt effectively with probation/performance matters
- a concern that it might make them less attractive employers, or not 'employers of choice'.

These reasons for non-use tended to apply to larger employers interviewed, who were more likely to have capability in place for the performance management (and selection) of staff. All SMEs interviewed for the qualitative research said they had used or would use trial periods.

Interviews with employers also showed that some employers still chose to use trial periods although they knew the skills of the candidate and had well established recruitment methods. Trial periods

enabled them to further reduce the risks when recruiting someone, because it offered 'insurance' if a hire did not work out.

2.1.5 How trial periods are negotiated

Employers interviewed who used trial periods entered them as a standard clause in employment agreements for most, and sometimes all, new appointments. They said this was an easy approach that required minimal change to their existing processes.

> *"It's standard in all the contracts. Basically we have a standard contract for everybody."*
> Medium-sized manufacturer, Auckland

One employer who had some staff on CEAs had introduced trial periods for new staff as part of their letter of offer to new employees, alongside the CEA.[13] In other cases, trial periods replaced existing employer practices of applying trial or probation periods. Some employers found they could introduce trial periods by adapting the previous wording used.

> *"We have a lot of people coming in from offshore and [an existing] probationary period was necessary so it was just a matter of swapping the terminology in our employment agreements. And in other areas it was just introduced into the employment agreement."*
> Large transport employer, Auckland

Most employees who had experienced trial periods said that trial periods were applied to them as part of a standard, written employment agreement. One exception (a construction labourer) was only told verbally that he was starting on a trial period. In another case, an Auckland barman employed under a trial period also used it as an employer to employ two marketing staff. In his second job as an employer, he was aware of the requirement to agree to the trial period before employment began – but as an employee he had experienced this rule not being applied.

Both employers and employees interviewed said that, as trial periods were part of the employment agreement, there was little room for negotiation. No employer said their staff had ever questioned the provision, so they were unable to provide information on how they might negotiate it.

> *"It is spelt out in their employment agreement. Nobody's come back and negotiated it."*
> Large Auckland transport provider

Employers had mixed practices in regard to discussing trial periods verbally in the recruitment process. Some employers made it clear to prospective employees that trial period provisions were in their employment agreements, however, employees recruited under the trial periods said there was little or no verbal discussion before starting, and most did not feel a discussion was required as they understood trial periods were the 'norm'. They usually believed or read that it would last the full 90 days (not less).

A marketing employee got her job through a recruitment agent, who did not discuss trial periods.

[13] If a CEA does not specify the terms for a trial period the employer may include a trial period in their letter of offer to the new employee.

"It was just in the contract, there was no discussion about the 90 day trial period or anything like that. I went through a recruitment agent, there was no discussion with them, it's sort of just, I suppose, common knowledge that there's a trial period, but it didn't surprise me to see it in the contract."

In one case an employee (part-time accounts officer) did query the trial period after she had read her employment agreement, as it was for longer than the trial (or probation) period she had previously experienced:

"They just said that, okay, this is a permanent job which we are offering you and here are the terms and conditions, [sic] please make sure that you read through all of it, which I usually do, and when I read through it and when it said 90 day, it actually was a bit different for me, so I asked my employer how is it not 60 and how is it 90, so he explained to me that there have been some changes as per the law, and he told me to look it up on the website and if I still have any questions I can come back to him."

She accepted the job, but in this and other cases, employees were given the impression that trial periods had become standard practice, and as noted earlier this seemed to be a perception among some employers as well.

2.1.6 Impact on costs and flexibility

Trial periods were not expected to impose additional costs, and employers interviewed who used trial periods identified trial periods were simple to use and gave them greater flexibility to manage the recruitment process with no extra costs. The lack of costs reflected the administrative simplicity of inserting it as a standard clause in employment agreements for new employees, and the fact that few employees raised any questions or issues in regard to the trial period.

In terms of additional savings, some employers interviewed said that trial periods had or were likely to have reduced the administrative costs of dismissals if a problem arose.

"On the operational side of the business it definitely would have been a lot more work, as it has been for me, getting rid of people … performance managing people out."
Medium-sized agriculture, forestry and fishing firm, Hawke's Bay

In two other cases, small employers said they had used the provisions to dismiss a staff member who might otherwise have absorbed a lot of time to remove.

A further saving was in potential legal costs to the employer if a dismissal became a lengthy, legal employment problem.

"I think just in the very few cases we've terminated in the trial period it gives you that feeling of security that there's not going to be that comeback. There's always a risk whenever you dismiss and so I suppose it's just really reassured us through that process that we might have made a bad recruitment decision but it's not going to really come back and bite us."
Medium-sized health services, Hawke's Bay

Employers who said there were lower costs of dismissals tended to be smaller, with less financial and HR resources. Four SMEs, run by owner-managers, said they had previously experienced costly and time-consuming legal disputes removing unsatisfactory staff, and now said that there were

reassured by having trial periods in place, although few said they had used the provisions to dismiss someone.

2.1.7 Impact on employment relationship problems

Employers interviewed stated that trial periods had not created further employment relationship issues with their staff. Some employers said the ability to end employment more quickly was fairer to the employee rather than dragging the process out. A transport operator had found one aspect of trial periods worked against them, however, when a new recruit in an important engineering role suddenly decided to leave without giving him four weeks' notice as specified in the employment agreement. The employer said he could do little about this as it was still within the trial period.

Employees had mixed views about trial periods. They accepted them; partly because they believed (or had been told) it was common practice and part of the employment scene. Some said that they liked the possibility of being able to leave at very short notice (as noted above), and some also said they could understand the need for trial periods as 'bad' employees could cause problems if not picked up early.

None of the employees who had experienced trial periods understood it to have changed the way they were recruited, as for most it was simply a clause added to their employment agreement. Once at work, employees did not feel they were treated differently by colleagues during the trial period and their impression was that all other newcomers were also on a trial period. Some employers made sure they had built trial periods into their training and performance management processes. However, no employee interviewed said their performance was monitored or reviewed while on a trial period. Some said this was a concern.

Key commentators said that the number of employment problems concerning trial periods had fallen, especially since the landmark *Stokes Valley Pharmacy* decision[14], which had clarified the process employers needed to follow and the good faith provisions that apply during a trial period.

2.1.8 Impact on employment

A key question in this evaluation is whether employers are confident to take on new staff as a result of the trial period provisions. Answering this with certainty would require a detailed statistical counterfactual comparison between firms that did and did not use trial periods, isolating the effect of wider economic and other factors and over a sufficiently long period. Such an analysis is not realistically possible due to data constraints and a lack of an identifiable 'control group', and has not been attempted in this report.

The 2012/13 NSE asked employers who had used trial periods if they would have hired the person they most recently employed had they not been able to do so using a trial period. In answer, 32 per cent of employers said they would not, while 62 per cent said they would have hired the employee anyway.[15] The percentage who said they would not is broadly similar amongst both larger and smaller firms.

Employers interviewed were asked whether they thought the use of trial periods resulted in them being more likely to hire people, and a wider range of people, than before. Larger or medium-sized

[14] See, for example, *Employment Case Law Update.* Simpson Grierson (2012):
[15] *Trial periods at a glance.* MBIE (2013).

employers tended to say they behaved as they had done before, with the amount of recruitment depending on demand (or funding arrangements) rather than changes in employment law.

"I don't think we've taken on any more people, I mean we only take on people we need to have."
Auckland medium-sized manufacturer

However, SMEs seemed more confident about employing new staff due to trial periods. An Auckland marketing employer (employing about 10 sales staff) said they were more comfortable about hiring:

"It doubled my business overnight purely because I'm not afraid of growth, and I'm not afraid of employing."

The lower risk entailed with recruitment for smaller more risk-averse organisations was put like this by another SME:

"We can't afford to employ somebody and make a mistake with the person that we employ and have that there, a big costly mistake, because our revenues are low and if it means that we can employ somebody and if we make a mistake we can get somebody else in, then [we're] more inclined to take that leap into getting a person on."

A common theme was for employers to continue to still seek the right person for the role.

"We're very glad it's there and we'd hate to see it go, but it doesn't affect our decision making because really, a bad appointment is far worse than a good vacancy. We'd rather wait for the right person."
Hawke's Bay medium-sized construction firm

2.1.9 Impact on type of people hired

Trial periods were intended to encourage employers to give opportunities to those facing greater labour market disadvantage. The SoWL results show that employees more likely to have started their current main job in the past 12 months on a trial period included:

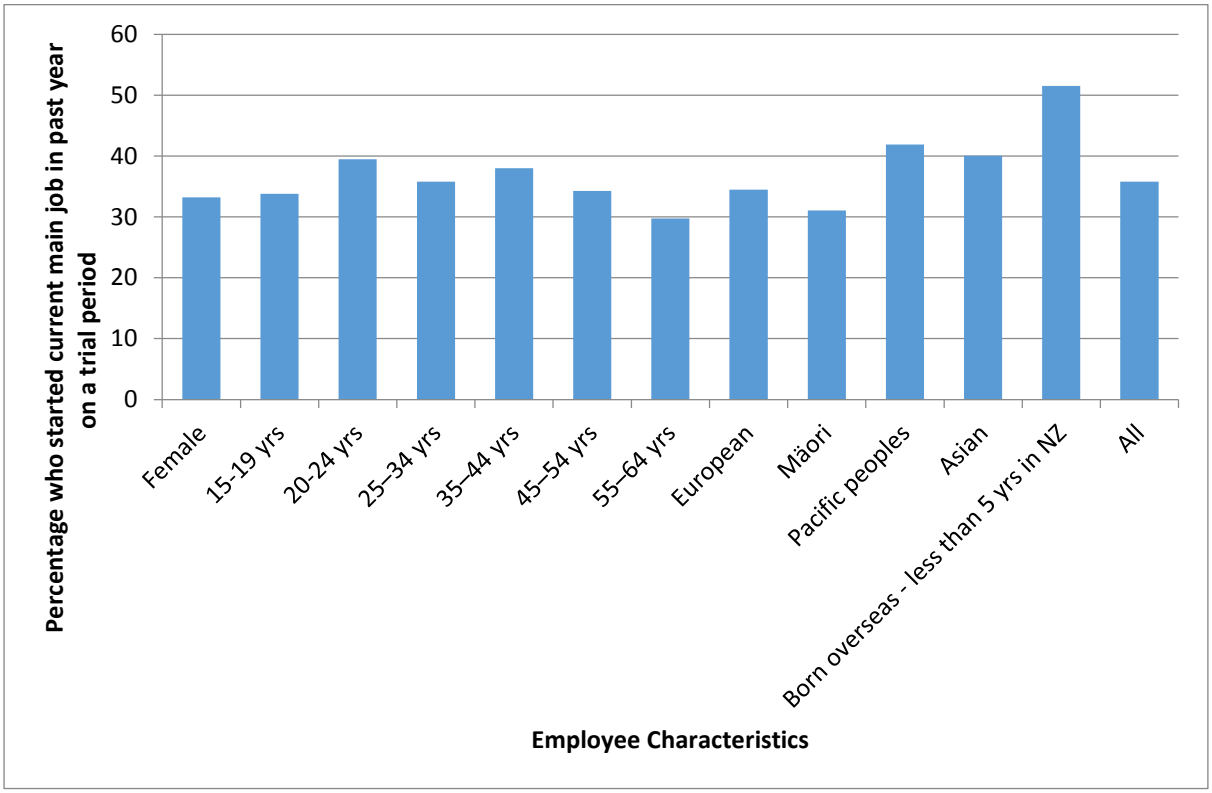
- recent migrants
- Pacific peoples
- employees with vocational or trade qualifications, or school qualifications
- technicians and trades workers, sales workers, and managers.

Chart 3 shows the proportion of people who started their current job in the past year on a trial period, according to a number of key characteristics. The total proportion of people who started on a trial period was 35.8 per cent. While no groups were specifically targeted by the trial period legislation, the chart includes a selection of groups that might face labour market disadvantage, based on lower than average labour force participation rates and higher than average unemployment rates as indicators. These groups include women, youth, Māori and Pacific peoples. For example, over the year ended December 2013, compared with an overall unemployment rate of 6.2 per cent, the unemployment rate was 6.9 per cent for women, 11.2 per cent for those aged 20-24, 12.9 per cent for Māori and 15.2 per cent for Pacific peoples.[16] Young people aged 15 - 24 may

[16] According to Statistics New Zealand Household Labour Force Survey results, for the four quarters to December 2013.

be especially disadvantaged during periods of slower growth as they account for a high share of new inflows into the labour market, and their lack of experience makes them riskier for employers to hire.[17]

Chart 3: Key characteristics of those hired using trial periods



Source: Statistics New Zealand SoWL

Chart 3 shows that trial periods were applied to a wide range of people. It gives the appearance of slightly less use of trial periods with disadvantaged groups like youth and Māori. However, caution should be applied when drawing inferences from these findings as, due to the relatively small sample size, none of these percentage differences from the total proportion of 35.8 per cent were statistically significant.

A general observation may be made that youth are more likely to work in casual or temporary jobs, where the use of trial periods was significantly lower.[18]

Recent migrants are viewed as a disadvantaged group because, although they are often well qualified, they may lack relevant New Zealand work experience. Chart 3 shows that recent migrants (those born overseas who had lived less than five years in New Zealand), appeared to be more likely to start on trial periods, at over half compared to the average of 35.8 per cent. Again however, the difference was not statistically significant. The slightly higher rates for Asian and Pacific peoples may reflect the influence of having a higher proportion of recent migrants.

[17] Department of Labour, (2009).
[18] As reported in the SoWL (2012).

The UMR results (based on a smaller sample) were broadly similar, with a slightly greater use among males, and less use among professionals and clerical workers (Table C3). The ethnic and age results of the two surveys are not directly comparable, as they are not classified in the same way.

Interview findings suggested that trial periods were applied to people with a wide range of skills and experience, as well as the more risky, newer entrants to the job market. Some larger employers had established methods of selection that gave careful consideration to a range of people, and the use of trial periods did not seem to change their selection criteria.

"We have really broad recruitment and resourcing sectors as it is, so we often look at people outside of the square or not necessarily fitting the cultural norms and we take them through quite an intensive recruitment phase, so I'm not entirely convinced … that a 90 day trial would mean that we would employ somebody that we wouldn't ordinarily employ, because we've got a very strong set of values and behaviours that we adhere to for very valuable reasons."
Large transport employer, Wellington

One employer in a small Auckland marketing firm used a trial period to take a chance on a migrant without the ideal qualities for the job.

"I said, 'I can see that you can add some value over here and you could help me in this other area while you're training … let's give it 90 days and let's see whether or not you think you can get yourself up to speed with our training in order to be able to make yourself valuable for the business.' I'm so glad I did that. She's probably the best employee I have now."

In another example, an employer stated that they encouraged to fill a clerical role with an older female who seemed to have the right skills but lacked experience specific to the job.

A small Wellington retailer, who employed younger lower skilled staff, also indicated it did increase the range of people considered, if not the number:

"It doesn't make me employ more people but … it would help to employ somebody who might be a bit marginal."

However, for employers, a 'marginal' person sometimes meant skilled but without job-specific experience, rather than someone who belonged to a group that faced labour market disadvantage.

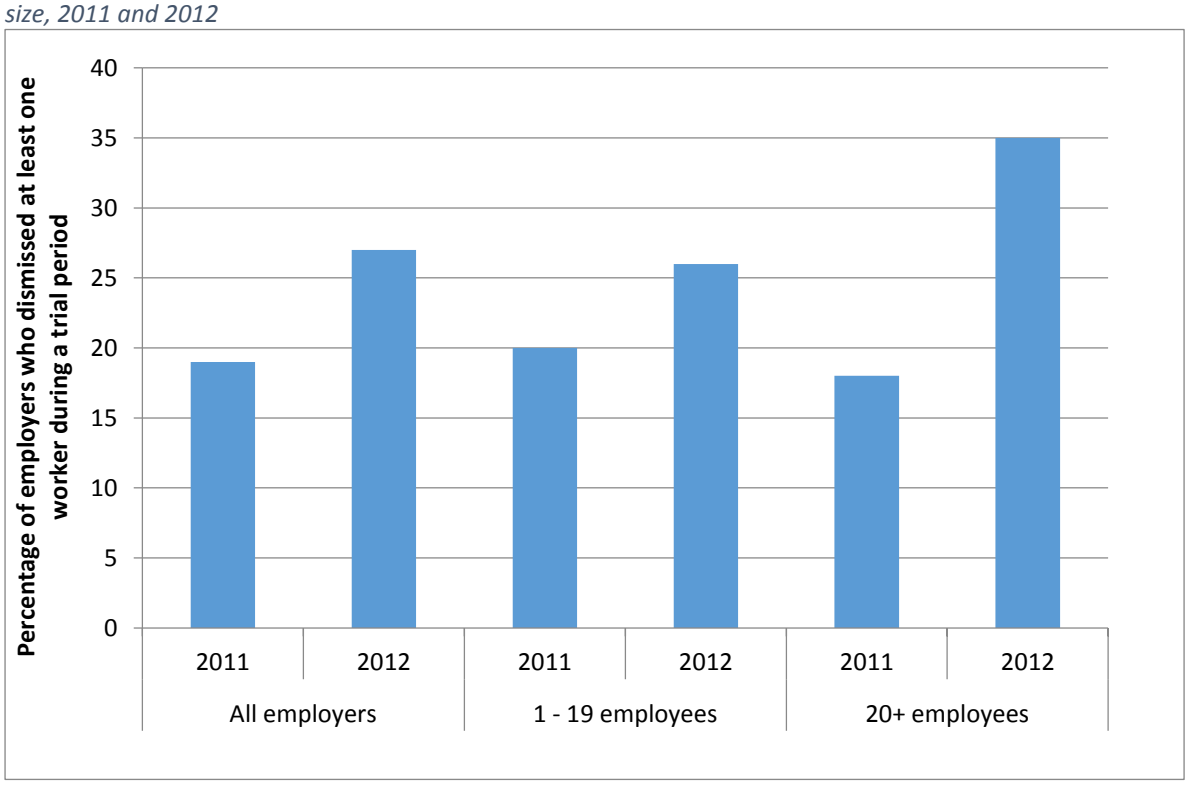
2.1.10 Impact on dismissals[19]

The 2012/13 NSE asked employers whether they had dismissed any employees during a trial period. Chart 4 shows that in 2012/13, more than one quarter of employers who had used trial periods (27 per cent) said they had dismissed at least one staff member during or at the end of a trial period in the last 12 months. While this was up from 19 per cent the year before, the difference is not statistically significant. Comparing results from the 2011/12 and 2012/13 surveys by business size shows a rise in the proportion of larger firms who had dismissed one or more employees who started on a trial period. While this increase in the use of trial periods for larger businesses is statistically significant, it is likely to reflect that the first survey was conducted only about six months after trial periods were introduced for larger employers. That is, larger employers would not have

[19] As noted in appendix E, caution should be used when comparing the 2011/2012 NSE with the 2012/13 NSE, as different sample frames were used for the two surveys.

been entitled to use trial period provisions over the full year's reference period for the 2011/12 survey. The increase in the proportion of smaller employers who had dismissed employees between 2011/12 and 2012/13 is not statistically significant.

Chart 4: Percentage of employers using trial periods who have dismissed any employee during a trial period , by size, 2011 and 2012



Source: NSE, 2011/12 and 2012/13

In the UMR survey, in contrast to the employer results, no employee who had started a trial period in the past two years said they had been dismissed while on the trial period.[20] Some (seven per cent) said they chose to leave during or at the end of the trial period, and 22 per cent said they were still in that job and still within the trial period and 51 per cent said they were still in the job at the end of the trial period (Table C4). The reason for the difference between the two surveys is unclear, although reluctance to report being dismissed or leaving before a dismissal occurred may be factors. Of the twelve employees interviewed who were in, or had been subject to, trial periods none had been dismissed.

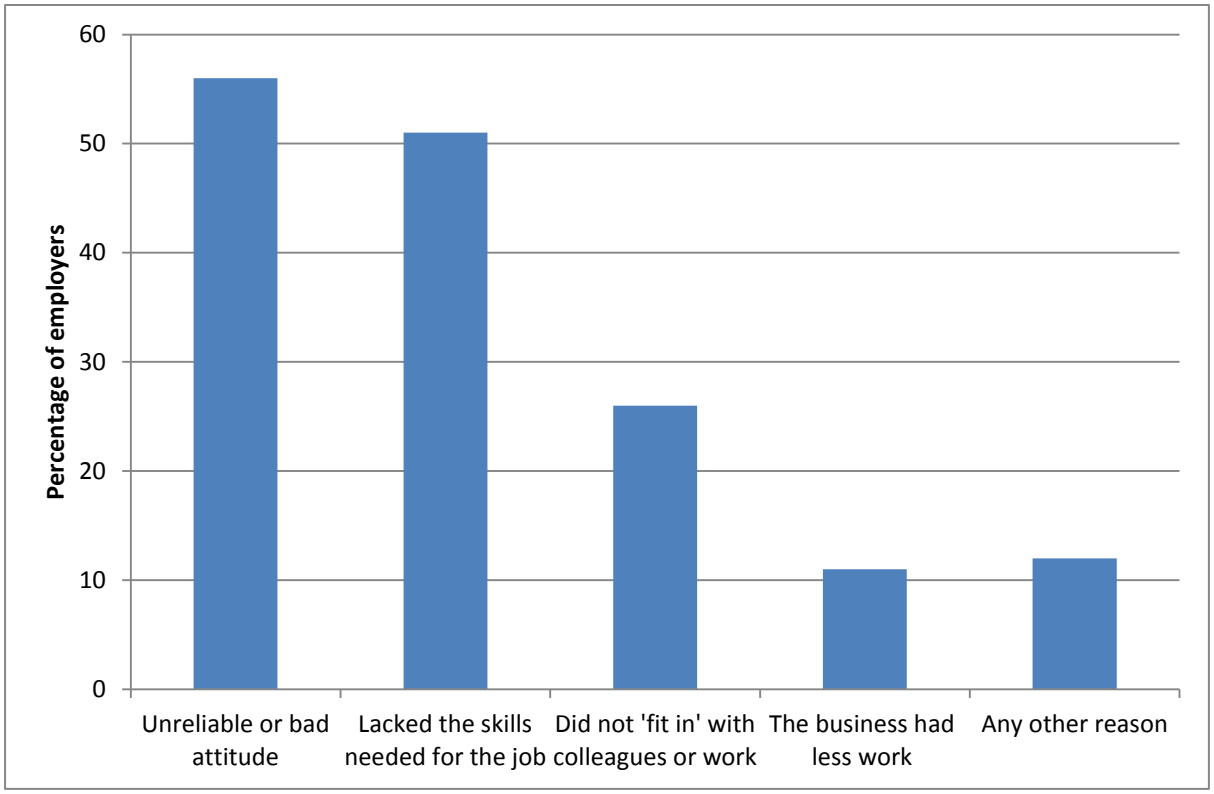
Only one employer interviewed said that more people were dismissed in their business following the introduction of trial periods, and most said they only invoked dismissals rarely, because they still selected their staff carefully. Some employers and employees also reported that dismissals could occur prior to the introduction of trial periods via the use of other probationary or trial employment arrangements.

The 2012/13 NSE asked employers who had used trial periods, and who had dismissed at least one employee during or at the end of their trial period, about their reasons for dismissal. When asked

[20] The more comprehensive SoWL did not ask employees if they had been dismissed under trial provisions.

about the person most recently dismissed while on a trial period, employers gave the reasons shown in Chart 5.

Chart 5: Reasons for dismissal



Source: National Survey of Employers, 2012/13

Employers who had dismissed staff stated that they made efforts to follow a fair and correct process, and one employer described the process:

"We still put it in writing to them, called them for a meeting, gave them the right to have somebody with them, considered what they said and gave them a decision. It wasn't just calling them in and saying, 'Well, you're sacked.'"
Health services, Hawke's Bay

As no employee interviewed had been dismissed on trial periods, it was not possible to learn about how the process works from their perspective, however, those employed on trial periods generally were unsure how the dismissal process might work in practice. Some employers as well as employees said making it easier to hire and then release staff at short notice could cover up poor recruitment practice. Some unions said they believed it enabled employers, if they wished, to make sudden decisions to let staff go without allowing feedback from them or their representatives, however there is no direct evidence from the findings suggesting this is the case.

2.1.11 General satisfaction with trial periods

Employers generally said they were very satisfied with how trial periods were operating. For employees, there were two broad groups in terms of their satisfaction with the trial period process:

A. Those less concerned because they were confident about their skills and abilities.

"I don't have a problem with it because I think if you're good enough in the job position that 90-day trial period shouldn't matter. It's in the employer's best interests to keep you on if you're a good employee."
A younger male retail employee, who had been employed on trial periods three times

B. Those less sure about alternative job prospects.

"I did understand it was a standard process but it is kind of like, how do I say, it makes you hesitant because they can pretty much I guess sack you for no reason."
A younger male customer services officer

Characteristics such as gender and age were balanced across these two groups. Employees accepted trial periods as part of the job, although for some, it was not something they would necessarily choose.

"You are scared, but you know, I still have a month to go and I have to really prove myself, [sic] that mental pressure is there and then when the pressure is there you're not able to perform to the best result and you carry that mental pressure back to your home."
Younger female accounts worker

No employee on a trial period said the process was personally unfair to them, although some said their job was less secure. An experienced caregiver said it seemed unnecessary as she had many years of relevant experience, and already had a clause covering various grounds for dismissal in her employment agreement.

2.2 Holidays Act changes

The amendments to areas of the Holidays Act evaluated in this section are listed in Appendix A. The relevant research questions relating to these amendments that are addressed in turn in this section are:

- Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
- Is the legislation now more readily applicable to a range of working arrangements?
- Have the amendments improved choice and flexibility for employers and employees?
- Have the amendments reduced direct and compliance costs for employers and parties?

2.2.1 Use and understanding of the Holidays Act

Cashing up one week of annual holidays

Just over one third of employers reported that one or more employees had cashed up some of their annual holiday entitlement in the last 12 months. Larger businesses were significantly more likely to have had an employee cashing up annual holiday entitlements (56 per cent) than were SMEs (33 per cent), (Table C5).

The 2012/13 NSE reported that 12 per cent of employers in businesses where staff had not cashed up any annual holidays entitlement had a policy disallowing employees to cash up annual holidays (Table C6). Employers interviewed said they would usually agree to a request to cash up but some had a policy of not allowing it because they believed it was important for staff to take breaks. Some employers thought strongly that their staff should be taking the full annual holidays entitlements, and a requirement to take all leave was sometimes built into employment agreements.

From the employees' perspective, the UMR results showed that only eight per cent of employees said that in the past 12 months they had asked employers if they could cash up annual holiday entitlements (Table C7).

The proportion of employees cashing up annual holidays is higher among those with middle to lower personal incomes (those earning $30,000 to $50,000 per annum), labourers, males, Māori and those in younger age groups (Table C7). Employers interviewed confirmed that generally the amount of requests for cashing up were small, and those that did request cashing up were likely to be their lower paid employees.

When asked how they thought cashing up annual holidays was working in practice among their members, three of the 37 unions surveyed said it was not working well, five said it seemed to work well and the rest (29) said it had a minimal effect, or had not been raised as an issue among members (Table 4). The reason one union (in the meat industry) gave for it not working well was that employees' annual holidays were being cashed up at the end of each seasonal employment spell, and they were unsure if this was voluntary or not.

Both survey and interview results showed a high awareness of the change among employers, and of the need for employees to initiate it. However, among employees interviewed, knowledge was limited and none had requested it. When told about it, some said it was something they would definitely want to investigate further with their employers. Others said they used all their annual holidays for family purposes already.

Transferring public holidays

Forty per cent of employers surveyed reported having employees who had transferred a public holiday to another working day in the last 12 months, although over half (56 per cent) said that none of their employees had done so (Table C10). This table also shows that SMEs were significantly more likely to report no employers had transferred a public holiday than larger employers (59 per cent versus 37 per cent). UMR results showed the effect on employees was relatively small, as only 11 per cent of employees surveyed said they had asked their employers to transfer a public holiday to another working day (Table C11). Of these, 79 per cent said their employers agreed, with the rest saying they did not or were unsure (Table C12). Younger employees and males were more likely to request transfers.

Alternative holidays

Qualitative results showed that most employers and employees seemed aware of their rights to an alternative holiday when they worked on a public holiday that was an otherwise working day, but not necessarily how or when it should be taken.

Some larger employers with formalised staff roster arrangements said they had made arrangements in their employment agreements to direct when an alternative holiday could be taken, and some unions also reported that they had built this into CEAs. Some other unions noted that they had built long standing arrangements about when to take alternative holidays in their CEAs.

"The union was actually quite sympathetic to our point about this because you're really supposed to take that day of leave as soon as practical. You're not supposed to bank it so that you've got 14 days and then you can take a big long holiday so that's not really the point. It's about compensating for a loss of a holiday soon afterwards."
Medium-size health care service, Hawke's Bay

Most (30 out of 37) union survey respondents said that the amendment had not had an effect on the ability to agree on when an alternative holiday occurred, and most employers agreed that the changes had made little difference, (Table C15).

Some employers interviewed had always taken a pragmatic approach to the provision of alternative holidays by paying them out in full at the time the public holiday was worked and none of these said that this practice had changed. A payroll provider covering several hundred smaller employers in the Wellington area said paying out the alternative holiday immediately was common among his clients (often smaller retail and hospitality employers), and an agricultural employer mentioned that they always offered this option. For example, they paid 20 hours' pay to their staff (who were permanent employees) working eight hours on Queen's Birthday.

The employers who took this approach said everyone seemed happy with this arrangement.

"If we have … public holidays we just pay them straight out. We just, I don't bother about having days in lieu. I find that the employee is more than happy to get, if they're a permanent employee and they work a public holiday, they'll get time and a half, plus they also get whatever they would've worked as a day in lieu and that's paid to them."
Medium-sized transport firm, Wellington

Some employees in retail and hospitality interviewed also reported that they were paid immediately and did not mind this arrangement.

Average Daily Pay and discretionary payments

Average Daily Pay (ADP) is a method for calculating payments for public holidays, alternative holidays, sick leave and bereavement leave, and was introduced for reasons including to reduce costs and simplify calculating entitlements for employees who have variable hours and variable rates of pay.

ADP was known and used by some employers interviewed. Most larger employers who had employees with irregular work arrangements interviewed were aware of the method. SMEs tended to have limited awareness or they left the calculation of payments to their payroll providers. Those who were aware of it said ADP was an easy concept to understand, but sometimes difficult to apply in practice. The information on when and how to apply it (available online or from labour inspectors) seemed unclear to some employers. It was not possible to determine from the interviews whether the approaches used by different employers to determine payments for different forms of irregular and/or shift workers were consistent with the law. Some employers said they were unsure if what they were doing was compliant as they received different information from different sources such as on-line or from Ministry sources. Some employers raised the quality and/or certification of New Zealand payroll systems as an issue. For example, a key commentator in a law firm said most payroll systems he saw were overseas systems based on accounting concepts, rather than based on the particular legislative provisions in New Zealand.

Once the formula was used, most larger employers interviewed stated that they still needed to monitor individual employee payments, which could be time consuming, depending on the size of the workforce and the degree of variability in their work patterns from pay period to pay period.

For SMEs, according to a payroll provider interviewed, the new calculation was difficult to apply because:

- employers don't always have a year's worth of records
- determining the annual hours or shifts and the number of days worked could be time-consuming to calculate and recalculate (particularly as a 'rolling average' is required)
- It could sometimes be inconvenient to use days rather than hours as the critical divisor needed for the calculation to work.

Few employers made use of the new guidelines on determining which payments were 'discretionary' for the purposes of gross earnings. One larger employer did refer to the guidelines and said it was still unclear for some payments. They were obtaining a technical legal opinion, which they believed could go either way, and had significant cost ramifications.

2.2.2 Impact on choice and flexibility

Cashing up one week of annual holidays

Employers were generally satisfied that cashing up gave more choice and flexibility to both parties. Some employers said that cashing up enabled them to help out staff struggling financially, especially those with lower pay, and survey data indicated that the lower paid use it more. A large majority (83 per cent) of employees said their request to cash up annual holidays had been accepted (Table C8).

Interviews showed that for some employees, the change did not affect the choices made, for two reasons. Some were not aware of the changes while others, for example two hospitality workers, believed they could already cash up their annual holidays when required. This view was shared by some employers. For example, a payroll provider interviewed said that cashing up more than a week of annual holidays was common among the many smaller employers they dealt with:

"And what normally happens is they say to their employer, look I'm going to be off for a couple of weeks because I've got to go over to Australia. Can I have a couple of grand of my holiday pay and the guy goes, yeah, no problem. And they're paid $2,000. They don't say, you're owed 2 weeks."

Small business services (payroll provider) Wellington

As this example shows, the practice appeared to be made easier by some employers (or their payroll systems) defining annual holidays as a percentage of accrued earnings rather than entitlements in weeks. This simplified the administration work for smaller employers who had permanent employees working intermittently and with variable hours.

A security firm in Auckland enabled permanent staff to cash up most annual holidays if they wanted to, partly for another reason – they believed their staff did not expect or want annual holidays.

"The next week they might go to 60 or 80 (hours) and the following week we get them down to 20. So they can get some time off to do things, bits and pieces, just by us being flexible about how we do our work, you know."

Some permanent employees interviewed on variable hours and shift work supported this saying that they had plenty of gaps in their work anyway, and preferred to cash up their annual holidays. However, others valued their holidays and would not want to cash any up.

The UMR survey results showed that 34 per cent of employees who had cashed up annual holidays had cashed up more than one week in the past 12 months (Table C9). The survey did not provide further information on the reasons for this, but it supports the comments made by employers and employees in interviews that the one week maximum is not always adhered to.

Finally, for one employer, this legislative change was found to have helped them comply with the law.

"I've had another staff member who in previous years had cashed out almost everything, and I was able to tell her – because I don't like doing that, people should have leave time – I told her that I can no longer do that because the law, thank God, no longer allows me to."
Agriculture SME, Auckland

Transferring public holidays

Some employers interviewed said they liked the extra certainty of being able to agree on a process to transfer public holidays. Both parties were usually happy to reach an agreement to transfer to another day.

A number of employees said they were comfortable working public holidays due to the extra pay, though some were unsure exactly what happened to their alternative holiday. One employee said he liked the ability to be flexible and was often comfortable about working on public holidays and then getting paid up in full, as he got time-and-a-half plus payment for the alternative holiday.

"I've always found it's more beneficial for us to work public holidays because we get more money doing that."
Male hospitality worker

He was not aware of any changes over the past few years while working with several different employers.

ADP and discretionary payments

Most employers interviewed who used this formula found it added little extra flexibility. It was seen by some as 'just another formula' to add to a sometimes complex existing mix. The decision of when to use ADP as opposed to 'Regular Daily Pay' was not always easy to determine, as employers considered they had to determine the correct formula 'employee by employee'. A health employer said they would like to use ADP to average out the amounts paid to shift workers as it would be simpler, but believed that they could not because *"we know what their last shifts were, so we wouldn't use the ADP"*.

Considering that they needed to provide equity between staff was a problem for some employers. They had some complaints from staff performing similar work to their colleagues and discovering they were being paid different amounts for a day off, or finding that their hourly payments on days off were below the minimum level specified in their employment agreements. Some employers said that the reasons could be hard to explain. Solutions to perceived underpayments in some cases were resolved by a manual 'top up' in the next pay period. Under ADP some employers took the view that 'gaming' could still occur, for example taking sick leave during periods of the year where hours worked per day were relatively low.

Applying ADP was sometimes restricted by the inflexibility of different payroll systems. Some employers said their payroll systems coped easily with the ADP formula, but others said that once formulas were 'embedded' in the system, anomalies could be hard to interpret and required time-consuming manual adjustment. Smaller employers either did not use ADP or left the determination of the correct formula to their payroll provider.

No employee interviewed could expand on any of these issues as none was aware of any change to the calculation of their payments. Some had limited knowledge about what they should be paid on public holidays or a sick day, and simply assumed their payslip information was correct.

2.2.3 Impacts on direct and compliance costs

Cashing up one week of annual holidays

Some employers said that giving the opportunity for their staff to cash up helped reduce costs of annual holiday liabilities. Reducing liabilities was not only of help to the business, but was sometimes required by parent companies.

"It is often a battle to try and reduce the leave liability and this works well."
Medium-sized tourism firm, Auckland

A few employers mentioned that it gave them more scope to manage staffing issues, although it was also pointed out that their ability to reduce liabilities was limited by cashing up being at the employee's request.

Again, because the cashing up requirement is in 'weeks or part of a week' rather than hours, there was some administrative cost to smaller employers with staff working irregular hours per day in calculating the correct amounts, which added to the incentive to adopt more informal cashing up arrangements, like using the percentage of accrued earnings.

Transferring public holidays

This change had little effect on most employers interviewed, some of whom did not work on public holidays, but was viewed positively by some. One employer said the new rule reduced costs by making it easy to agree on a flexible arrangement to transfer a project team to another day when a public holiday fell on a Thursday.

"The staff and everybody was just like, 'Can we work the Thursday and have the Friday off, because we're on a project that it would be really difficult to stop and start again?', and … it was easy to do that."
Medium-sized construction firm, Hawke's Bay

Average Daily Pay and discretionary payments

The introduction of ADP simplified calculations for some employers but for most made no real difference to compliance costs, which as noted earlier were still considerable in monitoring and occasionally correcting daily entitlements for larger employers with staff working variable shifts and hours. A payroll provider for SMEs noted:

"Cafes, little Chinese restaurants, panel beaters, day care – it's such a large range of businesses and … the vast majority of them have employees who have varying hours. They don't work eight hours a day, five days a week. They might work two hours on a Monday and six hours on a Tuesday and all these different hours. So when they take a day off, of annual leave, how much do you pay them for that particular day that they're taking off? And employers don't really understand what that pay should be."

Correctly determining what constituted discretionary payments was seen as important to the costs of some employers, but it was still difficult for some employers to make the correct interpretation , despite the guidelines now available.

Proof of sickness requirements

Finally, the changes that make it easier for employers to request proof of sickness was not seen to have had an impact on compliance costs, or any other impacts, among employers and key commentators interviewed. While some employers occasionally asked for proof of sickness for some employees, none said they operated differently now than in the past. One union key commentator in the meat industry had concerns that the changes were being used selectively and unfairly towards some employees in some cases, although no employees interviewed (none of whom worked in this industry) were aware of employers challenging or requesting more evidence when they were sick.

2.3 Union access to workplaces and communication during collective bargaining

The amendments evaluated in this section are listed in Appendix A. The relevant research questions relating to these amendments that are addressed in this section are:

- Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
- Are the amendments helping resolve employment relationship problems faster?

2.3.1 Use and understanding

Survey results showed the changes requiring unions to request access to workplaces generally had little overall impact on workplaces and arrangements between employers, unions and employees. Table 3 shows that just four per cent of businesses surveyed had been asked by a union for access to the workplace during the previous 12 months (although bearing in mind that many workplaces do not have any union members).[21] Requests for union access were more likely in larger workplaces, with 27 per cent of businesses with 20 plus employees having been asked by a union for access to their workplace, compared with just one per cent of businesses with 1 to 19 employees.

When queried as to whether any union requests for access had been denied, two per cent of the sub-sample that had received requests said they had denied access to their workplace, which indicates the relatively small impact on workplaces this change has had overall.

Table 3: Percentage of employers asked by a union for access to their workplace in the past 12 months

	All employers (%)	1–19 employees (%)	20+ employees (%)
No	95	98	70
Yes	4	1	27

Source: NSE, 2012/13

Four unions (Table 4) said they had negotiated new clauses in their CEA about union access. Others had longstanding clauses on access in their agreements that did not require changes to be made.

2.3.2 Impacts on resolving employment relationship problems

Unions were asked how much of a difference the law change on union access had made to employment relations at workplaces. Most said this had a minimal impact (Table 4). None said it had a positive impact, while seven noted a negative impact because they found it harder to make regular contact with staff.

Table 4: Summary of the effect of changes to union access on unions

	Number of unions reporting			
Relevant amendment	No or minimal effect on employment relations	Negative effect on employment relations	Positive effect on employment relations	New clauses in CEA negotiated as a result of changes
Requiring unions to seek approval for workplace access	30	7	0	4

Source: MBIE 2013 survey of unions

[21] The survey did not separate employers with union membership from those without, while the overall proportion of businesses containing union members is unknown. However, total union membership amounts to only 17% of the total employed labour force reported in the March 2013 Household Labour Force Survey according to the Union Membership Return Report 2013.

Employers in workplaces with a union presence interviewed about the effect of the changes to union access noted little impact as well. Some stressed the importance of strong interpersonal relationships with union representatives, and as a medium-sized employer in the health sector said:

"I mean it's fine to have the legislation but I think it's more about having a working relationship with them and being straight with each other."

Most employers with a union presence in their workplace noted that they already had a good constructive working relationship with unions, who had tended to contact employers before visiting workplaces as a 'common courtesy'. As a medium-sized manufacturer said:

"I don't think we had an issue in the past anyway because we had a good relationship with those unions, so in terms of access, it was operating that way previously."

However, some union responses noted that the changes meant it took longer and made it more difficult for them to contact staff as they had to go through further channels.

In terms of the law change affecting communications with employees during collective bargaining processes, few employers or key commentators noticed any changes and considered the change was unnecessary if the personal contact worked well.

The employees interviewed had no comment. All but one did not belong to a union.

2.4 Changes to problem resolution institutions and processes

The amendments to problem resolution institutions and processes evaluated in this section are listed in Appendix A. The relevant research questions relating to these amendments that are addressed in turn in this section are:

- Have the amendments improved choice and flexibility for employers and employees?
- Have the amendments improved the balance of fairness for employers and employees?
- Have the amendments reduced direct and compliance costs for employers and parties?
- Are the amendments helping resolving employment relationship problems faster?

2.4.1 Impact on choice and flexibility

This evaluation question is linked with the question about the speed of resolution of problems, and the two sections should be considered together.

The amendments provided additional options for parties, specifically early assistance from mediators without representation and recommendations. The research revealed that there is a range of views about the usefulness of early assistance: mediators and academic commentators viewed early assistance as a useful addition.

"Generally speaking if you can get in quickly you can often get actually a much better result. (Academic)

There's a greater range of outcomes available often [with early assistance compared to later mediation]." (Mediator)

One mediator commented that early assistance "most probably" lengthened the process of mediation, as the mediator helps the parties to articulate their views and collect information.

Practicing lawyers and union organisers pointed to a lack of awareness amongst employees and small employers that the option of early assistance was available and noting that unless you were able to directly contact a mediator it was difficult to access mediation services: their perception is that often parties rely on their lawyer to access mediation services. There was dissatisfaction with the 0800 number service for mediation services; a number of interviewees noted that the effectiveness of calling this number was variable with a response not always forthcoming.

It is not known how many people have accessed early assistance, or what effect it has on the duration of problems. Two mediators commented that parties have always been able to access mediation without representation:

"Early assistance we've always done it but we might maybe do a few more now." Mediators

They also perceived that it is valued by employers:

"We've had some real expressions of satisfaction with it from employers, and particularly organisations – when we might give them a little bit more input." Mediators

Likewise, it is not known how many mediation cases involve recommendations as no records are kept. There was consensus that the practice is uneven, for example Auckland and Hamilton based mediators are more likely to use formal (written) recommendations than the South Island mediators. Mediators in one office estimated that they had issued a hundred recommendations, with a 70-75 per cent rate of acceptance (the time period of these figures is not clear). Another mediator estimated that there were fewer than 80 recommendations nationwide each year. It is clear that some mediators offered informal recommendations prior to the amendment, and that this practice continues, and may have become more widespread in part to avoid the additional workload of written recommendations. Informal recommendations are also sometimes sought by lawyers who are trying to get their client to settle.

There appear to have been no instances of formal recommendations being asked for at the Authority.

2.4.2 Impact on the balance of fairness

Taken as a whole it is unclear how the amendments have affected the balance of fairness between the parties. One interviewee commented that the balance overall depends on the size of the employer and whether the employee is unionised (for example small employers were perceived to be at a disadvantage to a large union, whereas a large employer is perceived to be at an advantage over an individual employee).

Test of justification

Two union organisers commented that the change (to 'could') in the test of justification was seen to favour the employer and they believed that it caused unions to encourage earlier settlement by employees than previously. However, they acknowledged that the difference was not dramatic. An Authority member noted that "it really only affects at the margins, there might be one case or two out of a hundred where you have a different decision". This view was echoed by a practicing lawyer who also noted that the lack of appeals and debate on the point suggest that it works well.

"To me what is happening is a bit more leeway in recognition of prerogative in the employer to make a decision necessary for the business, but you must get your process right and that's where the energy is going". Mediator

Of greater perceived significance to most interviewees was the specification of process tests, which was considered to place a higher burden on the employer, particularly larger employers. However, one Authority member noted that "that's not changed the law one jot, but it has codified it into the statute". The key benefit of the codification of these tests was thought to be the transparency to the disputants, although there was some concern among some key commentators such as lawyers that smaller employers may lack knowledge of their legal obligations in this regard and/or the resources to meet them.

Authority members did not report favourably on the right to cross-examine a party in the Authority, with one commenting that while it may allow the Authority to gather more information their role was investigative and the change has introduced a more inquisitorial style to their proceedings. Another Authority member commented that they preferred not having this obligation. Cross-examination could produce unnecessarily protracted proceedings.

The changes to the remedy of reinstatement were seen by a mediator as improving the balance of fairness with the employee being obliged "to show reasonableness and practicality". It was thought that both parties needed to provide cogent evidence to support their positions on reinstatement and a case stood a good chance of failure if it was poorly argued.

Authority determinations were seen to be fairly balanced overall, with a slight favour to employees. One academic commentator pointed out though that this should be expected as personal grievances are taken by employees (i.e. employers are the respondent) and employees' representatives (lawyers and unions) should only encourage cases with a reasonable chance of success.

Prohibiting settlements below minimum entitlements

All parties who commented were in favour of the principle behind the change to prevent mediators signing off agreements that breach minimum entitlements; however a number commented that in practice it has not necessarily improved outcomes. This has changed practice for mediators, and both mediators and Authority members commented that it does not deal with a situation where the employer does not have enough money to pay minimum entitlements. As a result, mediators will sometimes not agree to mediate where minimum entitlements are threatened (such as in disputes about annual holiday pay). As one mediator noted, they are not able to *determine* whether a party's minimum entitlements are being foregone, they can only ask the parties. The Authority reported that some Labour Inspectors will not go to mediation to even look at a settlement because of this provision.

"We do encourage them to reach agreement, we just don't sign it off. " Mediator

2.4.3 Impact on parties' costs

None of the interviewees gave examples of reductions in legal costs as a result of these amendments. There were some comments that there is a costly emphasis on process and the lawyer "getting it right"; both employer and employee representatives commented that early settlement to avoid the costs of the process was not uncommon.

As already noted "early assistance" was seen by mediators as very resource intensive for mediators with their focus changing from "after employment" matters to dealing with more live on-going employment matters.

The amendment to allow the Authority to dismiss vexatious and frivolous cases was seen as ineffectual:

"There's some substance to most of the cases that come here. It's just a completely irrelevant, ineffectual provision." Authority member

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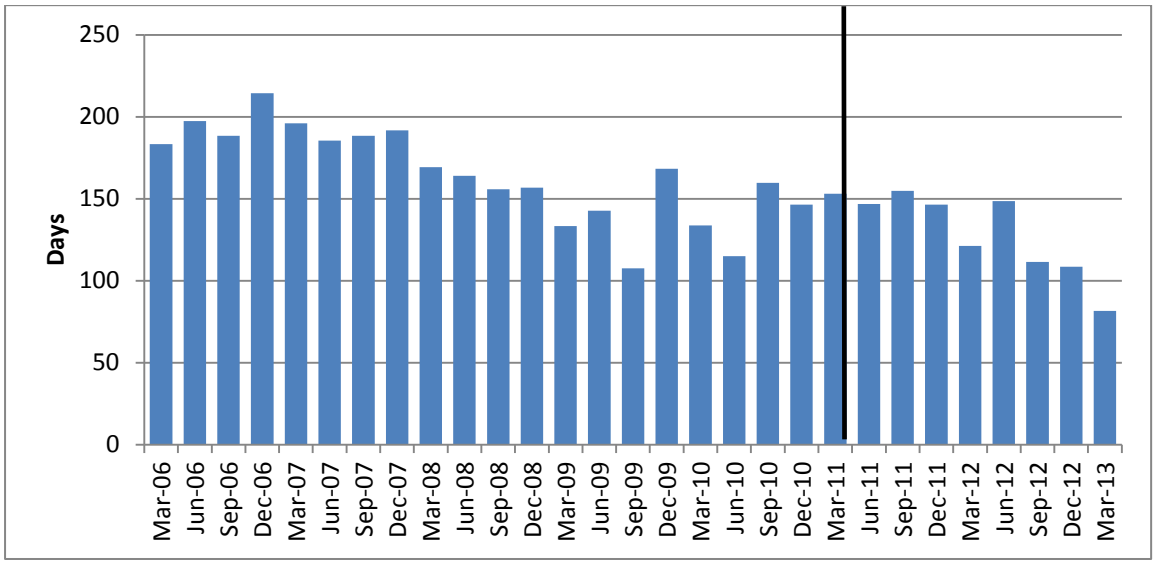
"It's a very high threshold." Authority member

2.4.4 Impact on speed of problem resolution

Interviewees stated that the amendments to the Employment Relations Act in 2010 on the efficiency and effectiveness of the Authority appear to have been hampered by the concurrent restructuring of the Authority and appointment of a number of new members. Practitioners commented that the Authority remained very accessible and broadly respected by all sides in a dispute.

Chart 6 shows that since the second quarter of 2011, there has been no reduction in the average duration of cases starting in each quarter.[22] Although recent quarters appear to indicate a slight shortening in the average time to resolution, this could be because not all cases have yet been resolved (in some cases this might take two or more years). There has been a slight tailing off in the number of cases settled in the same period, which would support this conclusion.

Chart 6: Average duration of cases with the Employment Relations Authority



Source: MBIE administrative data. The black bar shows when the amendment came into effect.

There has been a significant increase reported in cases being filed at the Authority prior to mediation. In some cases key commentators suggested that filing improves the chances of their case being taken seriously. This appears to be increasing the workload of support staff, who get the parties to agree to go to mediation. The direction for the Authority to prioritise cases that have been

[22] The average time shown is from the investigation process starting to the investigation process ending

to mediation is not perceived to make a significant difference with Authority members reluctant to do this for reasons of procedural fairness.

The Authority perceives their new ability to remove cases to the Employment Court on their own volition to be both efficient and effective.

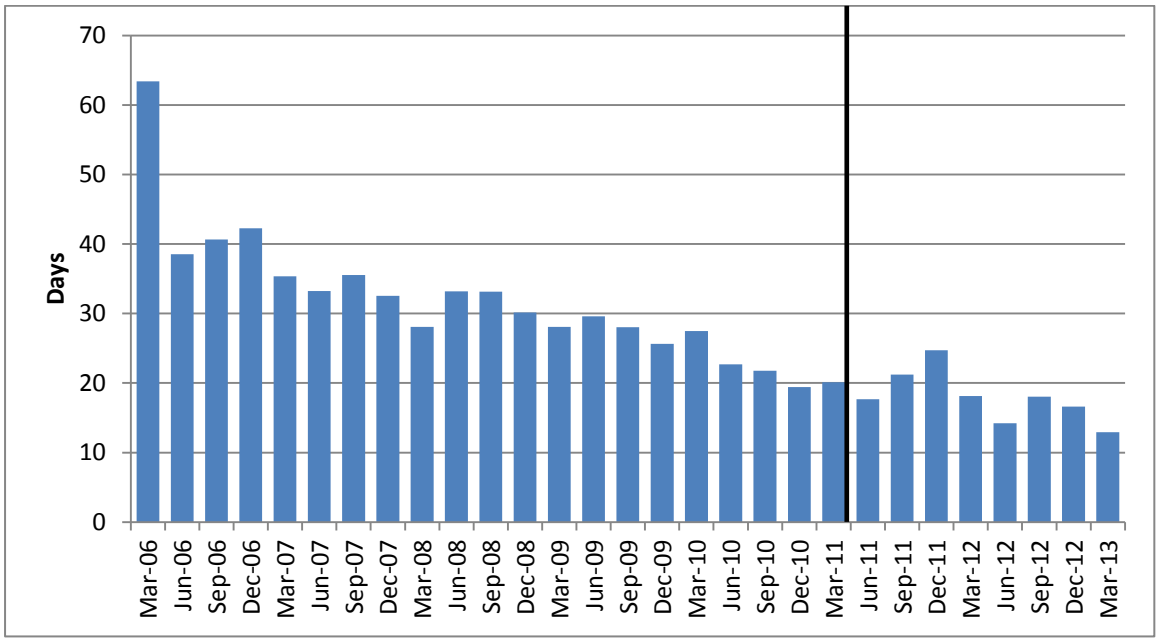
Mediators noted that there has been a significant increase in the number of recorded settlements. It is not apparent what has caused this. The change occurred at the time of the amendments with an increase from 78 in the first quarter of 2011, to 141 in the second quarter. These have continued to average 150 a quarter since, compared to just 50 per quarter in the three years prior to the amendments. The data suggest that this has largely been matched by a slight decrease in the number of settled mediations.

There has been no significant change in the average number of mediation applications received overall since the amendments came into force. The average quarterly number of applications is steady at approximately 2,250.

It is not clear what effect the availability of recommendations by mediators has had on the duration of problems. Chart 7 shows that nationally there appears to have been a decline in the average duration of the investigation process in mediation since about 2006, before the amendments came into effect. It is difficult to attribute this wholly to the recent change that occurred in 2011 due to other factors like restructuring which, in the views of some key commentators, had made a considerable impact. There are also varying trends in the different regions: Auckland and Wellington have had a fairly stable mediation duration since early 2010, there were clear disruptions in Christchurch in 2011 as a result of the earthquakes, Hamilton mirrors the national trend, and the smaller centres have more volatile duration statistics.

As a general comment the consensus of the interviews was that the mediation service was working as well as it ever had and the amendments that related to mediation had made little difference for most operations of the service.

Chart 7: Average duration of cases in Mediation



Source: MBIE administrative data. The black bar shows when the amendment came into effect.

Implementation issues have largely been covered in other sections and are summarised here. For the Authority there do not appear to have been issues, although there is a perception that the appointment of a large number of new members may have caused a loss of efficiency and consistency in the short term. The minimum entitlements change has meant that some cases are now not being mediated, or an agreement is not being signed off. One mediator suggested that it would have been preferable to deal with the philosophical point as a principle rather than a bright line. There is also a perception that there is a regional difference due to different types of clients involved in mediation.

No comment is provided on the effect of the amendments at the Employment Court. The judges declined to be interviewed due to concerns relating to commenting on amendments that were relevant to cases underway at the Court.

3 Unintended consequences of the amendments

A few employers, employees, unions and employment experts said the introduction of trial periods encouraged some employers to more safely adopt short-term 'hire and fire' employment patterns. Any increase in such behaviour is difficult to verify from quantitative data sources, as reasons for exits from work are not easily determined.

A positive unintended effect of trial periods mentioned by an employee was that trial periods had replaced a common practice (in his experience) of staff doing casual, unpaid work in bars and restaurants when they first started. Trial periods meant that new staff were paid from their first hour on the job.

One employer with many people working irregular, on-call hours, said that applying the new ADP formula was advantageous for some employees, such as those who had only worked limited hours or overtime in recent periods, who were being paid more for taking leave on a particular day than they would have received if they had worked.

"So we put the formula in and then we started going through it and checking it and going, surely that's not what this is supposed to mean, that people are going to be advantaged by being off sick or being off on a public holiday. Surely that's not what the intention is, so we took it out."
Large technical service provider, nationwide

This company took expert advice from labour inspectors, among others. However, labour inspectors had been unable to identify a way that this payment could be lawfully reduced to what the employer considered better represented what the employee's leave payment entitlement should be. The response of this employer had been to continue to make manual adjustments to their pay system.

4 Discussion: are the objectives of the changes being achieved?

Overall, many of the changes introduced have been incremental, building on existing provisions, rather than substantial new approaches. They were not expected to dramatically reduce costs, improve employment relations and employment trends, but were designed to steadily improve the ability of employers to meet regulatory obligations. The qualitative and quantitative findings in this short-term evaluation were generally consistent with each other, and triangulation of data helped to enhance the findings.

4.1 Are the changes easy to understand and apply?

4.1.1 Trial periods

The main features of trial periods are generally understood by employers and employees, but there is some lack of understanding about how to properly apply them. Some employees interviewed noted that they obtained limited information from their employers. Survey results also suggested that employees more often relied on the internet than their employer for information. However, most employees appeared to be well informed about trial periods, and employment relationship problems related to trial periods generally appear to have diminished. Employee understanding of trial periods might be strengthened if employers gave them more information about how trial periods operate in the workplace. In some cases this may require employers to develop greater knowledge themselves in order to properly advise their potential employees.

Larger employers are using trial periods as much as smaller employers. This suggests that larger employers have found it equally useful and no harder to apply than smaller employers. What appears to make it work is that it is easy to introduce, usually via inserting a new clause in existing employment agreement templates – often for all new staff.

There were examples of different views among employers about how they should be applying trial periods, including:

- a belief among some employers that staff could start trial periods before the employment agreement had been signed (despite case law clarifying this could not happen)
- a view by some employers that trial periods should last for the full maximum 90 days allowed for in the legislation
- some comments from both employers and employees that employment could be ended voluntarily during a trial period by an employee without giving the notice period that applied in their employment agreements.

For those employers interviewed who did not use trial periods, it was not due to a lack of knowledge or difficulty in implementation. They had made deliberate, considered decisions for non-use, including that existing systems (for example, those agreed in CEAs) already dealt effectively with probation and performance matters.

Some employers found trial periods were beneficial as a way to clarify and tighten up performance management processes for new staff. However, no employees interviewed said they experienced any formal review and monitoring process while on a trial period, and did not feel they were treated

differently to other staff. Generally it seemed that existing employment practices with regard to new staff have not changed.

The data showing the increase in the proportion of all employers who had dismissed staff while on a trial period between 2011/12 and 2012/13 (19 to 27 per cent) was not statistically significant. While there was an increase in the proportion of large employers using trial periods to dismiss staff, this is likely to reflect that the first survey was conducted only about six months after trial periods were introduced for larger employers.

4.1.2 Holidays Act

A considerable number of employers are using the changes, and most said that cashing up of annual holidays and the transfer of public holidays provisions were fairly easy to implement. However, their understanding overall is varied and they have found some changes, such as ADP in particular, difficult to apply.

While there was some enthusiasm among both employers and employees for the provision to cash up annual holidays, the way it was applied appeared loose in some cases, partly because of less formal arrangements already in place. There is some evidence that lower income workers are the ones making the most use of the cashing up provisions, which suggests financial pressure was an important factor in making this choice. Given cashing up must be initiated by the employees, it was significant that some were unaware they could cash up, or that it was limited to one week per entitlement year. This may explain the modest overall take-up across all groups of cashing up annual holidays, with only 8 per cent saying they had requested this in the past 12 months. It also may explain why about a third of employees cashed up more than a week. Generally it seemed easy for employers to respond to requests on a case-by-case basis although some had put formal arrangements in place.

Those employers interviewed that were able to use ADP found it did not achieve its intention of being simple to use and to reduce transaction costs. This is not because it is complex to understand, but in practice it was hard to apply to some payroll systems, particularly if regular review of the method of calculating payments was needed. It did not remove financial incentives for some employees who some employers believed could (at least potentially) 'game' the system. In some cases it may have created new anomalies, with some employers reporting their employees appeared to get lower daily pay rates than they expected. Along with the clarification of a legislative definition of discretionary payments, the intent was understood and appreciated, but in practice some employers still struggled to determine when and to whom these calculations apply.

From the examples given, it was also unclear if ADP difficulties were due to misinterpretation or the software being used. Some employers and payroll providers had made strong efforts to adapt their systems but it was clear from the interviews that this was an onerous task, possibly beyond the resources of some employers, and some seemed unsure about where they could get the best advice.

The consideration of whether the payroll software used by employers is 'fit for purpose' is beyond the scope of this evaluation, but it is a factor that affects the success of new formulae such as ADP, and possibly other leave calculations as well.

Finally, a further barrier to calculating payments was that some employers determined entitlements on a dollar value or a per hour basis, which created complications in interpreting the per day or per week provisions in the Holidays Act.

4.2 Are the changes more flexible and more applicable to work arrangements?

4.2.1 Trial periods

The evidence suggests that trial periods are a flexible tool in the sense that a wide variety of employers find them easy to apply to a range of employment situations. This ease of use means that over time trial periods could become standard practice in employment agreements where it was not intended that they be so.

Interviews with employees showed that it was not apparent to most of those who had experienced trial periods that they were a negotiable part of the employment agreement.

4.2.2 Holidays Act

The cashing up of annual holidays and transfer of public holidays provisions were generally found to have slightly increased choice and flexibility among employers. This was limited though, for example, by the need for employees to make the request, and further by the lack of awareness among employees that they could do this. Both employers and employees, and some unions, noted informal and flexible arrangements in place to deal with issues like cashing up; these have lessened the impact of this change. Smaller employers in particular seemed more often to have informal methods of cashing up.

The ability to transfer public holidays was welcomed by some employers as it increased flexibility and lowered costs, and there was evidence that it works well in workplaces where both employer and employee wanted to meet a deadline.

A general lack of awareness among employees working irregular hours about how much they should be paid for public holidays and other entitlements, means that there is potential for them to be misinformed about the new provisions. For instance, whether they can choose to cash up annual holidays or be paid in cash for their alternative holiday when working on a public holiday. This lack of clarity would have existed before the latest amendments, but the latest changes have not made employees any more aware of their entitlements regarding determining leave and holidays.

4.2.3 Problem resolution institutions and processes

The legislative provision for early assistance from a mediator without representation has not made a significant change to practice at the mediation service, but has possibly increased the use of this service marginally.

The provision for formal recommendations by the mediator has increased the choices available to the parties. However, it is not clear how often this is taken up, or how often recommendations are accepted as there are no records kept. This provision also appears to have increased the use of informal recommendations by mediators.

4.3 Have the changes lowered costs?

4.3.1 Trial periods

The research found that cost savings to employers were related to the reduced risk of potential problems with personal grievances, as well as administrative savings in dismissal processes.

Employers that used dismissal found the dismissal process easy to apply, and reported no staff raised concerns about the process. Those who had dismissed staff within the trial period said the process was faster and more efficient than before.

There was no evidence of increased costs such as more cases going to mediation, and both employers and key commentators reported a 'settling down' in employment relations issues arising from trial periods.

In addition, the simplicity of introducing trial provisions in employment agreements (whether individual or collective), did not add to costs in the view of most large as well as smaller employers with less HR resources.

4.3.2 Holidays Act

Overall, no group of employers or employees appears to have incurred further costs from the changes, and most seemed to accept that administrative costs in areas like determining leave entitlements for a workforce working variable hours would continue. However, the objective of reducing compliance costs for leave provisions largely does not seem to have been achieved. There are signs that for some employers, smaller ones in particular, compliance costs are generally kept down by not following the law, such as allowing employees to cash up more than one week of their four week holiday entitlement. This disadvantages those employers who are putting further investment into making the new requirements of the Act work.

4.3.3 Problem resolution institutions and processes

The amendments have not reduced costs and in some cases may have increased compliance costs, for example the increased emphasis on parties getting the process "right".

4.4 Have the changes improved the balance of fairness?

4.4.1 Problem resolution institutions and processes

Overall, fairness appears to be relatively well balanced between employees and employers. The balance does not appear to have significantly changed as a result of the amendments. The changes to the test of justification have not resulted in any practical changes, although codifying the tests may have increased the transparency of the process for those involved.

The amendment relating to preventing mediation settlements being agreed for less than minimum entitlements was recognised as an important principle, but unhelpful in situations where the employer did not have enough funds to pay the employee's full entitlement. It means that agreement is not reached, or is not signed off or enforced in some cases. There were no examples given of improved outcomes for employees, although it was suggested that some negotiated settlements occurred without the knowledge of mediators.

4.5 Have the changes created faster problem resolution?

4.5.1 Trial periods

Generally, employers and employees stated that trial periods were not creating extra employment relationship issues, and had speeded up the resolution of some employment problems in some

cases. The *Stokes Valley Pharmacy* decision had clarified the process employers needed to follow and the good faith provisions that apply during a trial period.

4.5.2 Problem resolution institutions and processes

No clear link can be drawn between the amendments to problem resolution processes in the 2010 amendments and the length of time problems take to be resolved. Other factors (like restructuring at some institutions) are likely to have had a more significant effect on the duration of problems. A trebling of the number of recorded settlements has been offset by a slight decline in the number of settled mediations.

4.6 Have the changes given employers more confidence to take on new staff?

4.6.1 Trial periods

It is difficult to determine if there has been an increase in employment resulting from trial periods in the absence of control group evidence. Qualitative findings, however, showed that most employers interviewed still hired on the basis of changes in demand for their goods and services. Employers remained selective about who they hired; some SMEs made use of trial periods to give opportunities to a wider range of people.

Around one third of employers surveyed said they hired some people they would not have otherwise hired, according to the NSE 2012/13 results. This reinforced the results of the previous evaluation that some employers seemed more confident about taking the risk of hiring someone they might not ordinarily hire.[23]

Employee survey results indicated a broad range of people were starting on trial periods, rather than groups that could be seen to be at a labour market disadvantage. Qualitative results showed that this wide range could be due to employers applying trial periods as a standard practice for new employees, or for trying out people who were skilled and experienced but not a perfect 'fit' for a job. Groups at risk of unemployment are generally more likely to be on more casual, temporary contracts and this group was significantly less likely to be employed using trial periods.

Finally, it seems that in the longer-term, more examination of job tenure and flows into and out of work before and after trial periods were introduced seems important, given that international evidence, as noted in the first trial period evaluation, suggests that initiatives like trial periods can lead to more 'churn' by increasing both hiring and firing.[24] Some employers said that other employers were doing this, although they themselves were not more likely to dismiss a staff member. In New Zealand, there is limited statistical data available about the reason for people leaving the labour market to see if changes in dismissals have occurred.

[23] Department of Labour, (2012)
[24] Department of Labour, (2011)

5 Conclusions

The overall purpose of this evaluation was to assess how the key amendments introduced to the Employment Relations Act and the Holidays Act are contributing to the policy objectives of reduced costs, faster problem resolution, and greater flexibility, clarity and efficiency of work arrangements.

Overall, the objectives of the amendments have been successful in some areas and had little impact in others.

5.1.1 Trial periods

Overall, employers using trial periods interviewed expressed considerable satisfaction with outcomes achieved across a variety of industries. Smaller employers seemed most satisfied with the outcomes achieved because they faced relatively greater risks and costs when recruiting people.

For larger employers the benefits appear to have been less, mainly because they had more robust recruitment processes and more resources to manage risk. However, this does not mean they did not find trial periods useful, and the survey results showed that the share of larger employers using trial periods was as great as it was for smaller employers – despite larger employers being only more recently able to use it.

5.1.2 Holidays Act

The changes to the Holidays Act have partially met the aims. The ability to allow cashing up to occur and to transfer public holidays was seen as sensible by employers, and many unions saw these as minor improvements as well. Some employers who used ADP and the clarification of the definition of discretionary payments did not report an increase in satisfaction, for a variety of reasons mainly to do with uncertainty about how the changes could be applied, or in some cases opting not to comply to keep costs down.

Employees could only provide a limited range of views about the changes, mainly because they were only partly aware of them.

5.1.3 Union access and communications during collective bargaining

While the changes had not made much difference among employers interviewed, they may not have been a fully representative group in this respect as most had no union presence in the workplace or if they did, already had cordial relations with their union. Around a fifth of unions surveyed reported increased difficulty in some cases in gaining access to employees, which could disadvantage some workers. Key commentators (who generally would only have been aware of cases if they had escalated to a higher level), generally considered the change had limited impact. Overall, it seems likely that at those worksites where the employer – union relationship was already in difficulty, the changes have increased tensions, particularly during the collective bargaining process.

5.1.4 Problem resolution institutions and processes

Amendments to problem resolution processes have generally not affected costs or changed the balance of fairness. They may have increased choices for some participants, while their effect on the speed of problem resolution is still unclear.

5.1.5 Final comment

Overall, the evaluation shows that the success of changes to employment laws depends both on the quality of the actual amendments and the way that the changes are applied and interpreted in practice. For example, trial periods were successful for many employers as they were easy to introduce in an existing agreement template rather than significantly changing their employment system. In contrast, the impacts of Holidays Act changes were diluted by barriers such as existing informal practices (either due to lack of understanding or deliberate misinterpretation), the limitations of payroll systems, and difficulties implementing the calculation methods. The findings reinforce the need for communication about legislative amendments to be clear, consistent and accessible to both employers and employees.

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7 Appendices

Appendix A: Overview of the main amendments to the Employment Relations Act and Holidays Act

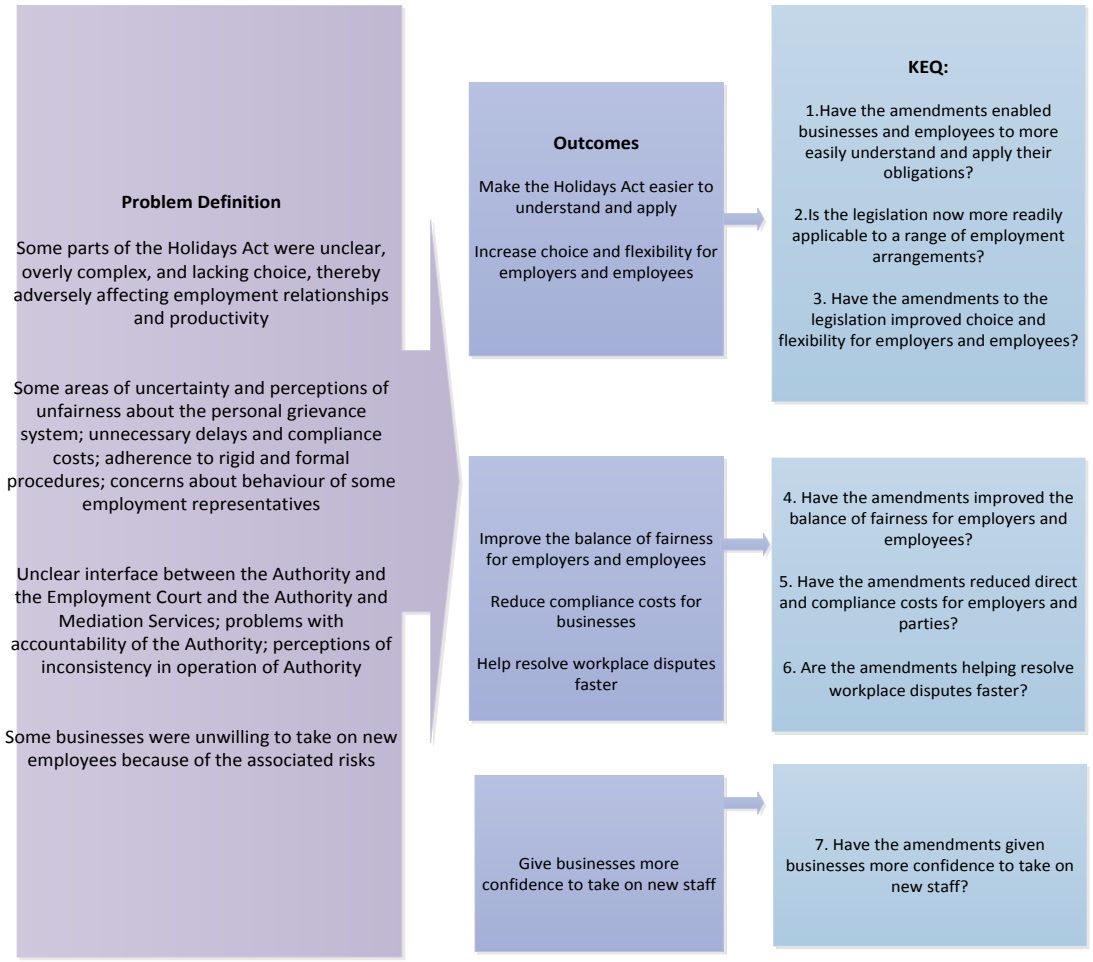
Initiative	Details of changes
Trial periods extended to all employers	• Under the amendment, an employee who is dismissed within the trial period cannot raise a personal grievance for reasons of unjustified dismissal. They are still able to raise a personal grievance on the grounds of discrimination, harassment, duress or unjustified action by the employer. Employees can still access mediation, and good faith still applies to the relationship.
Holidays Act changes	The main amendments covered by this evaluation include the following, introduced in 2010 and 2011: • Employees are able to cash up to one week of annual holidays. • Employers and employees are able to agree to transfer the observance of public holidays to another working day. • The amendment to calculation of payments for some types of leave and holidays, called Average Daily Pay or ADP, based on the gross earnings over the previous 52 weeks divided by the total number of days worked over the previous 52 weeks. • Employers are able to ask for proof of sickness or injury within three consecutive days of an employee taking a day or more of sick leave without first having reasonable grounds to suspect that the sick leave is not genuine –but will have to cover the employee's costs in obtaining proof.
Union access changes and communication during collective bargaining	• Rules on union access to workplaces were changed so that any access would require the consent of the employer. Consent cannot be unreasonably withheld. • In addition, the case law that communications between employer and employee are permitted while collective bargaining is underway was codified.

Problem resolution amendments	• The main changes to problem resolution covered by this evaluation are:
	  ○ Mediators are able to assist parties to resolve problems at an early stage without representation
	  ○ The parties may agree to ask the mediator or Authority member to make a recommendation
	  ○ The 'test of justification' in s.103A was changed from what a fair and reasonable employer "would" do, to what that employer "could" do. Four factors (codified from case law) were specified for the Authority or court to consider in terms of the process that employers must follow prior to taking action against an employee. Broadly these are whether the employer: sufficiently investigated the concerns (taking account of the employer's resources), raised them with the employee, gave a reasonable opportunity for the employee to respond, and genuinely considered the explanation.
	  ○ Mediators must not sign agreements in which an employee agrees to forego their minimum entitlements.

Appendix B: Evaluation objectives

Chart 8 shows, at a high level, the expected short-term outcomes of the changes and an outline of the problem definition. This logical structure identifies the high-level thinking around what outcomes the amendments were expected to achieve, and from this, seven key evaluation questions were established.

Chart 8: Expected outcomes and problem definition



Appendix C: Detailed tables of results

Table C1: Demographic characteristics of employees using trial periods[25]

Employee characteristics	Started current main job less than 1 year ago (%)[6]		
	Started on trial period	Did not start on trial period	Total [1]
All	35.8	59.7	100.0
Male	38.8	57.1	100.0
Female	33.2	62.0	100.0
15–19	33.8	59.3	100.0
20–24	39.5	56.3	100.0
25–34	35.8	58.6	100.0
35–44	38.0	59.5	100.0
45–54	34.3	62.0	100.0
55–64	29.7	66.8	100.0
65+[5]	s	s	100.0
European	34.5	61.3	100.0
Māori	31.0	65.2	100.0
Pacific peoples	41.9	49.7	100.0
Asian	40.0	53.6	100.0
Other ethnicity[3]	51.5	48.5	100.0
NZ born	34.2	61.6	100.0
Overseas born, less than 5 years in NZ	51.5	42.9	100.0
Highest qualification			
No qualification	36.1	60.1	100.0
School Certificate/NCEA Level 1	38.4	55.6	100.0
Sixth form qualification/NCEA Level 2	39.3	54.7	100.0
Higher school qual/NCEA Level 3[4]	30.2	64.9	100.0
Other school qualification	s	35.9	100.0
Vocational or trade qualification	40.8	55.5	100.0

25

Employee characteristics	Started current main job less than 1 year ago (%)[6]		
	Started on trial period	Did not start on trial period	Total [1]
Bachelor's degree	25.5	70.4	100.0
Postgraduate qualification	25.9	70.7	100.0
Other post-school qualification	48.7	51.3	100.0

Source: SoWL

Notes for Table C1:

1. 'Not specified' responses are included in the table totals only.
2. Ethnic groups in this table are created using the total response output method. More than one ethnic group can be nominated. Please refer to Statistics New Zealand for more information.
3. The 'Other ethnicity' category includes people who identified as 'New Zealander'.
4. This includes New Zealand Bursary, Higher School Certificate and New Zealand Scholarship.
5. S means number too small to be statistically significant.
6. Only those who started their current main job less than 1 year ago are shown, as not all employers could use trial periods over a longer time period.

Table C2: Work arrangements of employees using trial periods

Employees only[2][3]	Started current main job less than 1 year ago		
	Started on trial period	Did not start on trial period	Total [1]
Managers	42.6	51.6	100.0
Professionals	**22.4***	**74.4***	**100.0**
Technicians and trades workers	46.4	50.2	100.0
Community and personal service workers	36.0	56.5	100.0
Clerical and administrative workers	29.9	64.4	100.0
Sales workers	43.9	51.2	100.0
Machinery operators and drivers	40.5	55.5	100.0
Labourers	37.4	59.9	100.0
0–19 hours per week	25.8	67.3	100.0
20–29 hours per week	31.2	63.1	100.0
30–39 hours per week	36.9	58.4	100.0
40 hours per week	40.3	55.7	100.0

Employees only[2][3]	Started current main job less than 1 year ago		
	Started on trial period	Did not start on trial period	Total[1]
41–44 hours per week	44.3	51.9	100.0
45–49 hours per week	39.1	59.8	100.0
50–59 hours per week	41.7	55.7	100.0
60+ hours per week	43.3	56.0	100.0
On collective agreement	24.1	74.1	100.0
On individual employment agreement	40.8	55.2	100.0
Not aware of being on any agreement	22.2	74.9	100.0
Permanent	**43.3***	**52.1***	**100.0**
Temporary	**15.8***	**79.9***	**100.0**

Source: SoWL

Notes for Table C2:

1. 'Not specified' responses and 'residual categories' are included in the table totals only.
2. ANZSCO: Australian and New Zealand Standard Classification of Occupations.
3. Note that the relative sampling error (the upper and lower bounds) for the proportions show most of the percentages in these results are within the sampling error. Where the difference is statistically significant, the result is shown with a star**.**

Table C3: Percentage of people using trial periods by demographic and work characteristics in the past two years

	Number of respondents	Employed on a trial period	No/unsure
All	349	35%	65%
Male	178	43%	57%
Female	171	27%	73%
18–29 year olds	149	38%	62%
30–44 year olds	118	34%	66%
45–59 year olds	67	36%	64%
60+ year olds	15	6%	94%
Māori	53	36%	64%
Pacific peoples	19	39%	61%
Asian	47	15%	85%
Managers	43	31%	69%
Professionals	77	27%	73%
Technicians and trades workers	34	54%	46%
Community and personal service	32	58%	42%

workers			
Clerical and administrative workers	32	25%	75%
Sales workers	13	56%	44%
Machinery operators and drivers	17	52%	48%
Labourers	31	59%	41%

Source: UMR Insight

Table C4: Outcomes for employees from their last job on trial periods

		Number of respondents	A	B	C	D	E	F
	All	122	22%	51%	7%	13%	*	7%
Sex	Male	76	25%	49%	9%	13%	*	4%
	Female	46	16%	55%	4%	13%	*	12%
Age group	18–29	56	15%	52%	8%	20%	*	4%
	30–44	41	19%	60%	6%	7%	*	9%
	45–59	24	42%	34%	6%	7%	*	11%
	60+	1	0%	100%	0%	0%	*	0%

Source: UMR Insight

Key:
A – I am still in that job and still within the trial period.
B – I am still in that job and have finished the trial period.
C – I chose to leave that job either during or at the end of the trial period.
D – I chose to leave that job well after the end of the trial period.
E – My employer ended my employment using the provisions of the trial period (0%).
F – My employer ended my employment after the trial period for other reasons, such as the business closing down.

Table C5: Frequency of employees cashing up annual holidays reported by employers

	All (%)	1–19 employees (%)	20+ employees (%)
No	61	64	39
Yes	36	33	56

Source: NSE, 2012/13

Table C6: Employers' policy on cashing up annual holidays, for those employers with staff who hadn't cashed up annual holiday entitlements

	Employers with staff who hadn't cashed up annual holiday entitlements (%)	1–19 employees (%)	20+ employees (%)
Did not have policy not allowing cashing up	81	83	66
Had policy not allowing cashing up	12	11	26
Don't know	7	7	8

Source: NSE, 2012/13

Table C7: Characteristics of employees who request cashing up annual holidays

Characteristics	Number of respondents	Made a request	No request
All	690	8%	92%
Male	320	10%	90%
Female	370	6%	94%
18–29 year olds	150	10%	90%
30–44 year olds	246	8%	92%
45–59 year olds	224	7%	93%
60+ year olds	70	4%	96%
Personal annual income $15,000 or less	41	9%	91%
$15,001–30,000	97	3%	97%
$30,001–50,000	170	14%	86%
$50,001–70,000	159	6%	94%
$70,000–100,000	110	4%	96%
More than $100,000	61	3%	97%
Māori	70	12%	88%
Pacific Island	33	2%	98%
Asian	75	6%	94%
Managers	110	12%	88%
Professionals	220	3%	97%
Technicians and Trades Workers	75	9%	91%
Community and Personal Service Workers	64	7%	93%
Clerical and Administrative Workers	88	5%	95%
Sales Workers	28	11%	89%
Machinery Operators and Drivers	29	13%	87%
Labourers	44	20%	80%

Source: UMR Insight

Table C8: Employees who gained agreement to cash up some annual holidays

		Number of respondents who requested	Employer agreed	Employer did not/unsure
	All	53	83%	17%
Sex	Male	32	75%	25%
	Female	21	96%	4%
Age group	18–29	15	100%	0%
	30–44	21	76%	24%
	45–59	15	78%	22%
	60+	3	75%	25%

Source: UMR Insight

Table C9: Amount of annual holidays cashed up

		Number of respondents[1]	Less than a week	One full week	More than a week	Total
	All	58	29%	36%	34%	100%
Sex	Male	31	33%	38%	29%	100%
	Female	27	26%	34%	40%	100%
Age group	18–29	21	37%	37%	26%	100%
	30–44	19	18%	49%	33%	100%
	45–59	16	37%	12%	51%	100%
	60+	2	*	*	*	*

Source: UMR Insight

Notes for Table C 9:

1. Includes small number who said they were required to cash up by employer.

Table C10: Incidence of transferring public holidays reported by employers

Percentage of employees who transferred one or more public holidays	All (%)	1–19 employees (%)	20+ employees (%)
Less than 10%	27	26	39
10% to 20%	4	3	8
21% to 50%	4	4	5
More than 50%	5	4	6
None	56	59	37
Total	100	100	100

Source: NSE 2012/13

Table C11: Requests by employees to transfer a public holiday to another working day

	Number of respondents	Made a request	Made no request
All	690	11%	89%
Male	320	15%	85%

Female	370	7%	93%
18-29 year olds	150	14%	86%
30-44 year olds	246	13%	87%
45-59 year olds	224	8%	92%
60+ year olds	70	5%	95%

Source: UMR Insight

Table C12: Employees who gained agreement to transfer a public holiday

Demographics		Number of respondents who requested	Employers agreed to request	Employers did not/unsure
	All	74	79%	21%
Sex	Male	48	84%	16%
	Female	27	71%	29%
Age group	18–29	20	69%	31%
	30–44	32	82%	18%
	45–59	19	88%	12%
	60+	3	76%	24%

Source: UMR Insight

Table C13: Sources of information for employers on employment law

	Total	1–19 employees	20+ employees
Ministry of Business, Innovation and Employment (formerly the Department of Labour)	57%	56%	64%
Other government organisations	21%	21%	26%
Unions	6%	5%	20%
Professional bodies or industry and trade associations, for example, the EMA or Master Builders	43%	40%	64%
Lawyers or accountants	55%	55%	61%
Colleagues, friends or family	37%	38%	29%
General media	22%	22%	23%
In-house (HR, management)	6%	5%	15%
Websites/internet (general)	4%	4%	4%
HR/business consultants	6%	6%	4%
Other source	4%	3%	4%
None	3%	4%	0%
Don't know/would rather not say	1%	1%	1%

Source: NSE, 2012/13 (more than one response permitted)

Table C14: Sources of information for the general public on employment law

Demographics		Number of respondents	MBIE/DoL	Other government organisations	Unions	Citizens Advice Bureau & community law	Lawyers or accountants	Colleagues, friends or family	General media	My employer	The internet in general	Unsure	Other
	All	1,500	17%	9%	11%	10%	16%	10%	1%	7%	38%	12%	6%
Sex	Male	718	18%	10%	10%	9%	19%	10%	1%	7%	36%	11%	7%
	Female	782	16%	9%	12%	11%	13%	9%	2%	8%	40%	13%	6%
Age group	18–29	313	15%	12%	7%	9%	10%	16%	0%	10%	48%	13%	4%
	30–44	450	20%	11%	11%	13%	17%	10%	1%	7%	42%	6%	6%
	45–59	392	18%	9%	16%	11%	18%	4%	2%	11%	39%	7%	7%
	60+	344	13%	6%	10%	7%	20%	10%	3%	2%	22%	25%	8%

Source: UMR Insight (more than one response permitted)

Table C15: Union responses to changes to trial periods and Holidays Act amendments

	Number of unions reporting			
Relevant amendment	No or minimal effect on employment relations	Negative effect on employment relations	Positive effect on employment relations	New clauses in CEA negotiated as a result of changes
Introduction of trial periods	na	na	na	14
Cashing up annual holidays	29	3	5	na
Taking alternative holidays	29	5	3	3

Source: MBIE 2013 survey of unions ('na' means no question on this topic was included)

Appendix D: List of Research Questions

The seven key evaluation questions, sub-questions and relevant sources of information are shown below. In practice, there were limits to gathering information for each question from all sources (for example, some interviews ran out of time).

1. Have the amendments enabled businesses and employees to more easily understand and apply their obligations?

Research question	Data sources
What main information sources did employers, employees and representatives use about the legislative changes?	Employer survey and interviews Employee survey and interviews
Do employers and employees feel that they adequately understand the legislative changes?	Employer interviews Employee interviews
What awareness, knowledge and myths are there among employers and employees about the legislative changes (excluding the problem resolution system)?	Employer interviews Employee survey and interviews
What are their views of the timeliness of the Department's/MBIE's information?	Employer interviews Employee survey and interviews
Why and when do employers and employees make use of trial periods? Or choose not to use them?	Employer survey and interviews Employee survey and interviews
How satisfied are employers and employees with the process of using trial periods? When does the use of trial periods come up during the recruitment process? How do employers and employees negotiate its use? Is it written into employment agreements?	Employer interviews Employee interviews Key commentator interviews
Does the amendment about discretionary payments clarify what types of payments are included in discretionary payments?	Employer interviews Key commentator interviews
How many times have employers been asked permission by unions to access the workplace?	Employer survey Union survey
How many times have employers accepted and denied access? Why do they deny access?	Employer survey Employer interviews Union survey Key commentator interviews

Research question	Data sources
What process do employers and unions use in unions gaining access to workplaces?	Employer interviews Key commentator interviews
Do employers feel clearer about being able to communicate with employees during collective bargaining?	Employer interviews Key commentator interviews Mediation Services practice leader
What is employees' understanding of employer communication during collective bargaining?	Key commentator interviews Employee interviews
What awareness is there among employers and employees about their rights and obligations (about the problem resolution system), and problem resolution processes?	Key commentator interviews

2. Is the legislation now more readily applicable to a range of working arrangements?

Research question	Data sources
Which employers and employees make use of/request the new Holidays Act provisions of cashing up, transferring public holidays, directing when an alternative holiday is taken, requesting proof of sickness and taking on new employees on a trial period?	Employer survey Employee survey Employer interviews Employee interviews
Which employers have a cashing up policy? And a policy on transferring observance of public holidays? Why?	Employer survey (for cashing up policy) Employer interviews Employee interviews Key commentator interviews

Research question	Data sources
How often do employers decline employee requests for cashing up and transferring public holidays? Why?	Employer survey Employer interviews Employee interviews Key commentator interviews
How often do employees request cashing up? How many days at a time? Over an entitlement year?	Employer interviews Employee interviews Employee survey
What are employers' and employees' experiences of the new Holidays Act provisions (e.g. previously some employers had trouble covering for staff on annual holidays)? In what circumstances do they make use of them?	Employer interviews Employee interviews Key commentator interviews
What has worked well and what has not worked so well about accessing the new Holidays Act provisions?	Employer interviews Employee interviews Key commentator interviews
How satisfied are employers and employees with the outcomes of the new Holidays Act provisions?	Employer interviews Employee interviews Key commentator interviews
What problems did employers and employees experience as a result of implementing the new Holidays Act provisions (e.g. staff management, payroll, clarity of calculations)? How did they resolve them or attempt to resolve them?	Employer interviews Employee interviews Key commentator interviews
What types of employees are taken on a trial period? Are any particular types of employees benefitting in gaining employment through the use of trial periods?	Employer interviews Employee interviews Employee surveys

3. Have the amendments improved choice and flexibility for employers and employees?

Research question	Data sources
Do parties to a dispute now have access to additional problem resolution mechanisms (e.g. early problem resolution without representation, a mediator and Authority recommendations)? With what results?	Key commentator interviews

4. Have the amendments improved the balance of fairness for employers and employees?

Research question	Data sources
How do employers and employees reach agreement about uptake/use of the Holidays Act provisions? How do they resolve disputes between them?	Employer interviews Employee interviews Key commentator interviews
What difference has it made now that employers can always direct when an employee takes an alternative holiday?	Employer interviews Union survey
What has worked well and not so well for parties and as a result of changes to employment problem resolution?	Key commentator interviews Authority related interviews
How satisfied are parties with the process and outcomes of using the changed provisions (e.g. the process and outcomes related to using Authority or mediator recommendations)?	Key commentator interviews Authority related interviews
What are the views of employers about the changed 'test of justification' in relation to fairness/bias/emphasis on process rather than substance?[26]	Key commentator interviews Authority related interviews Case law analysis
How much litigation has resulted from the union access and communications during collective bargaining changes? How have these been interpreted by the employment institutions? How many cases of access denial are found to be unreasonable?	Interviews with key commentators, employers Case law analysis
What is the impact of the union access and communications during collective bargaining changes on employees? On employers? On the employment relationship – improved, worsened, no change?	Key commentator interviews employer interviews Union survey
What is the effect of the inability of mediators to sign away minimum entitlements? Is the change helping to reinforce the integrity of the minimum code?	Key commentator interviews

[26] The 'test of justification' requires the Employment Court or the Authority to evaluate an employer's actions were what a fair and reasonable employer 'could do' rather than 'would do'. The Court and Authority must continue to assess the conduct of a fair and reasonable employer in the circumstances of the case. However, there may be more than one fair and reasonable response or outcome that might be justifiably applied by a fair and reasonable employer in these circumstances.

5. Have the amendments reduced direct and compliance costs for employers and parties?

Research question	Data sources
What, if any, direct and compliance costs have employers using ADP incurred?	Employer interviews Key commentator interviews
Have employers changed the way they calculate gross earnings (because of the inclusion of the definition of discretionary payments)? What are the impacts on the business and on employee pay?	Employer interviews Key commentator interviews
What, if any, types of bonuses do employers pay to different types of employees? Is the payment of these bonuses included in employment agreements? Why or why not? Has the practice of including or not including the bonuses in employment agreements changed since the amendment?	Employer interviews Employee interviews Key commentator interviews
Does the use of trial periods save employers any costs (e.g. effort, recruitment, training, dismissal, etc.)? How?	Employer interviews Key commentator interviews
What has changed for parties as a result of using the changed provisions for employment relationship problem resolution (e.g. duration, cost, resolution outcomes, representation, Authority processes, pathway of cases)?	Key commentator interviews Authority related interviews Administrative data and case law analysis

6. Are the amendments helping resolve employment relationship problems faster?

Research question	Data sources
Has the ability to take on new employees on trial periods reduced the incidence of employment relationship problems?	Employer interviews Key commentators interviews
How many (employment relationship problems) cases are the changed provisions being applied to? What proportion of cases is this? How often are the changed provisions being used? How does this compare with prior to 1 April 2011 (for provisions that are not new)? How does this align with Authority members' expectations?	Key commentator interviews Authority related interviews Administrative information Case law analysis
How have Authority determinations reflected the new provisions?	Key commentator interviews Authority related interviews

Research question	Data sources
	Analysis of Authority determinations
What has changed for the Authority as a result of the changed provisions?	Authority related interviews
Now that the Authority is to consider the appropriateness of referring labour inspector cases to mediation, what is it doing? Has this made a difference to the way the Authority operates?	Authority related interviews
What are the resulting changes for Mediation Services?	Key commentator interviews Authority related interviews
How soon in the problem resolution process do parties approach mediation and have a form of mediation? What impact does this have on the outcome of the resolution?	Key commentator interviews Authority related interviews
How often are recommendations and early problem resolution without representation being used? How effective are these considered to be? Why?	Key commentator interviews Authority related interviews
What, if any, are the resulting changes for the Employment Court?	Case law analysis
Are the changes helping resolve employment relationship problems faster (e.g. before the dispute escalates)?	Authority related interviews
In the case of recommendations, which party tends to initiate a request for recommendations? Why? What is the trigger for initiating a request?	Key commentator interviews Authority related interviews
Do parties tend to accept or reject recommendations? Why? What path does the case take in case of rejection? How does it differ from the recommendation?	PGs related interviews Authority related interviews
What problems did the Authority and Mediation Services experience as a result of implementing the new provisions? How did they resolve them or attempt to resolve them?	Key commentator interviews Authority related interviews
How has the behaviour of employment representatives changed as a result of parties being able to use early problem resolution without representation?	Key commentator interviews Authority related interviews

Research question	Data sources
In the case of removing cases to the Employment Court, what is the nature of cases sent to the Employment Court? How many and what sort of cases does the Employment Court send back?	Case law analysis

7. Have the amendments given businesses more confidence to take on new staff?

Research question	Data sources
How many employers use trial periods? Does it have an effect on their selection, recruitment and employment practices?	Employer survey Employee survey Employer and employee interviews
What are the outcomes for employees taken on a trial period (e.g. are they retained, dismissed)? And for the employers (e.g. reduced cost of dismissal, better match of employee to their business)?	Employer survey Employer and employee interviews Employee survey

Appendix E: List of Data sources and methods

Trial periods

The evaluation of the extension of trial periods was obtained from a synthesis of NSE 2012/13 survey, SoWL and UMR survey information, a question in the union survey, and semi-structured interviews with employers, employees and key commentators.

Holidays Act

The evaluation of amendments to the Holidays Act is based on a synthesis of NSE and UMR survey information and semi-structured interviews with employers, employees and key commentators for the four main amendments, further details of which are contained in Appendix A.

Union access and communications during collective bargaining

Information for the evaluation of changes to union access and communications during collective bargaining was based on a synthesis of the union survey; employer, employee and key commentator information; and a question in the NSE.

Problem resolution institutions and processes

Information was obtained from interviews with key commentators as well as by examining administrative information and reviewing case law.

Description of data sources and caveats

Survey of Working Life (SoWL)

- This survey was used to collect information from employees about trial periods. It was administered to 14,335 employed individuals in households who responded to the Household Labour Force Survey (HLFS). All persons aged 15 and over were eligible to complete this survey if employed in the reference period.
- The SoWL is an official Statistics New Zealand survey. It achieved an 84 per cent response rate, which was above the target response rate of 80 per cent. Non-response was partly due to the increased burden of the survey being a supplement to the Household Labour Force Survey (HLFS), and partly because proxy responses were not accepted in most situations (even though they are accepted for the HLFS).
- There are sampling errors associated with any survey results. For example, while a higher proportion of males (38.8 per cent) started on trial periods than females (33.2 per cent), once you add the sampling errors to each of these estimates, the confidence intervals overlap (e.g. the estimate of 66,700 males who started on a trial period is subject to a sampling error of approximately +/- 7,200, and this confidence interval overlaps with the estimate for females who started on a trial period, which is subject to a similar sampling error).

National Survey of Employers (NSE)

- The NSE collected information from employers about the use trial periods and the impacts of Holidays Act changes. The NSE was a hybrid online self-completion and telephone survey based on a stratified random sample of businesses with at least one employee besides the owner. Coverage was national in 2012/13, but it excluded Christchurch in 2011/12.

- The 2012/13 survey covered a total of 1,529 employers, and had a response rate of 44 per cent. Data from the earlier 2011/12 NSE was also used in this evaluation. The 2011/12 survey interviewed 1,957 employers, and had a 36 per cent response rate. Caution should be used when comparing the 2011/2012 NSE with the 2012/13 NSE, as different sample frames were used for the two surveys.

UMR omnibus survey

- This omnibus survey run by UMR Research is a national telephone survey adapted to collect information from employees about recent changes to employment law, in particular trial periods, the ability to cash up annual holidays, and the ability for employees to transfer a public holiday to another working day. In some cases the information supplemented other survey sources like SoWL, and in other cases (like the employee uptake of some Holidays Act amendments) it added new information. Two consecutive telephone surveys were combined to achieve a nationally representative sample size of 1,500, of whom 802 were currently employees. This omnibus survey used a much smaller sample than the SoWL.
- The sample of error for the employee sample at the 95 per cent confidence level was +/- 3.5 per cent. Those under 18 years were excluded so the survey does not provide a complete picture of the youth population.
- Note that the ethnic and age group classifications used in this survey were not identical to those used in the SoWL.

Union survey

- A self-administered questionnaire was sent to all unions participating in the annual Ministry of Business, Innovation and Employment (MBIE) union membership survey. The purpose of this survey was to collect information about the impact of changes to union access and communications during collective bargaining and observations of change arising from the Holidays Act and some aspects of the Employment Relations Act amendments.
- The union survey questionnaire was sent to all 138 unions required to provide membership details to MBIE, including both private and public sector unions, and 37 responded to the questionnaire giving a response rate of about 27 per cent. The response rate was low, and the margin of error is difficult to reliably calculate. Many of the larger unions participated and total membership covered by the questionnaires was estimated to be about 140,000, or 38 per cent of registered union membership.[27]

Qualitative sources – employers and employees

Interviews were conducted to explore the impact of the amendments on employers and employees. The information was coded, synthesised thematically, and then analysed and triangulated with survey results for evaluation conclusions and implications.

[27] As at 1 March 2013 there were 138 registered unions eligible for the survey with a total membership of 371,613. Refer to the Union Membership Return Report 2013.

The qualitative samples were purposive – selecting employers and employees in relevant categories collecting a range of viewpoints on their experiences of the changes. Both employers and employees who have used the new provisions, and those who have chosen not to use them, were selected. The selection including sectors, types of businesses and employees that previous research had shown had most difficulty with the legislation.

The employer interviewees were selected from both large and small employers in three regions – Wellington, Auckland and Hawke's Bay. Tables 5 and 6 provide a breakdown of some of the characteristics of those interviewed.

Employer and employee interviewees will not necessarily represent a complete sample of those affected by the employment law changes. However, while the sample used for interviews was not large[28], it was enough to reach saturation on most common themes.

The selection of employers included:

- A main focus on medium/larger businesses more recently able to use trial periods
- a focus on those with variable working arrangements (e.g. manufacturing, hospitality, agriculture)
- sectors with more variable pay rates (e.g. agriculture, retail and labour hire).

The selection of employees included:

- a focus on employees considered to be more disadvantaged in the labour market (e.g. the lower skilled, women, youth and temporary workers)
- inclusion of employees working in both urban and rural areas.

A variety of methods was used to recruit employers and employees, including key commentator contacts, NZPPA (New Zealand Payroll Providers Association), contact centre callers, Student Job Search, a commercial business database and personal contacts.

Qualitative sources – key commentators

The key commentators were selected based on those with deep theoretical and practical knowledge of the legislative changes, and those interviewed included:

- key employment institutions (e.g. Employment Relations Authority) (3)
- academics and lawyers (12)
- unions (4)
- employer associations (1)
- industry or sector associations (8).

The main focus of the key commentator interviews was on their perceptions of the impacts of the changes to employment institutions and problem resolution processes.

As noted in the report, it was not possible to interview any judges for this work.

Approach taken for the interviews

All interviews were conducted by the authors, in person and by phone. All interviewees were asked to sign an informed consent form before the interview began. The interviews were semi-structured and took from 15 to 60 minutes.

Table 5: Breakdown of employers interviewed

	Agriculture	Transport	Manufacturing	Retail	Health services	Business services	Construction
Small (SME) <20 employees	1			1		3	
Medium-sized 20–49 employees		1	1	1		1	1
Large 50+ employees	2	3	1		3		

Table 6: Breakdown of employees interviewed

	Retail/ hospitality	Accounts/ admin/ marketing	Cleaner/ carer/ manual	Professional
Now or previously on a trial period	3	5	2	2
Never on a trial period	3	1	3	1
Female	4	3	3	3
Male	2	3	2	0
Total[29]	6	6	5	3

[29] Note that the gender and trial categories overlap

Appendix F: Interview guides

Employer interview guides

KE 1: Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
1. Moving to the law changes, what was your reaction to the law changes introduced in 2011 to The Holidays Act and the Employment Relations Act? In particular, do you think the changes were easy for you to understand?
2. Where did you learn about these changes? Did you use any information from DoL? Was it useful and how could it be improved?
KE 2: Are the amendments readily applicable to a range of working arrangements? (Talking about HA changes.)
3. Thinking about the changes to The Holidays Act, what are your views on them? (If needed, prompt cashing up one week of annual holidays, transfer of public holidays to another working day.) Has your organisation made use of them? Was it easy to apply?
4. What, in your experience, has worked well and not so well with the new HA provisions?
5. Do you usually agree if an employee requests to cash up annual holidays or to transfer a public holiday to another day? Why or why not?
6. What are your views about directing when an employee can take an alternative holiday? **7.** When an employee is taking sick leave, have you ever requested to show evidence of sickness? Is this different from in the past?
KE 5: Have the amendments reduced direct and compliance costs for employers? (Talking about The Holidays Act and any other amendments – this question applies to the whole employment law package, including interest in whether trial periods have reduced costs.)
8. There have been some changes to how employers can calculate entitlements for employees; are you aware of these? (Prompt ADP and discretionary payments.) Do you use them? Why or why not? **9.** Do you find it easier to calculate entitlements? If not, why not? **10.** Have you found The Holidays Act amendments increased or reduced costs for you? If costs increased, how would you try to fix problems?

KE 7: Have the amendments given businesses more confidence to take on new staff? (Talking about trial periods.)
11. The trial period periods now cover everyone who starts a new job. Have you ever recruited staff using a trial period?
12. How is the process working for you? • In what situations do you use it? • Do you use it all the time? • Can appointees negotiate whether it is in their employment agreement? • What ways have you found trial periods useful or not useful? • How does it affect your costs (fixed/time) as an employer?
13. As a consequence of a trial period, have you: • Taken on more people than you would have otherwise? • Tried out different types of people you may not have otherwise tried out? If yes, what type of person and how did it work out? • Have you dismissed anyone during the duration of the trial period? Why?

KE 1 and 4: Overall understanding and improving the balance of fairness (Talking about union access).
14. How much unionisation is there at your workplace? Please give your views about the rule change where unions must request access before entering a workplace. **15.** Have you been approached by a union making a request for access to your workplace? **16.** If yes, how do you now arrange access with unions? (Prompt: how has it changed? If no change, why not?) • Has the change affected your relationship with unions and employees?
17. What is your opinion about the changes allowing communication with staff during collective bargaining? *(if they know about this area)* • Have the changes made it easier to communicate during the bargaining process?
KE3: Have the Amendments improved choice and flexibility for employers and employees? And faster dispute resolution.
18. What do you know about various dispute resolution mechanisms , like the employment relations authority, • do you feel you've more or less flexibility around resolving disputes? • do you think changes are resolving disputes any faster recently and why?

Employee interview guides

KE 1: Have the amendments enabled businesses and employees to more easily understand and apply their obligations?
1. Moving to the law changes, are you familiar with any of the law changes introduced in 2011 to The Holidays Act and the Employment Relations Act, in particular cashing up one week of annual holidays, transfer of public holidays to another working day, requesting proof of sickness and the trial period? Do you think the changes were easy for you to understand?
2. Did you use any info from DoL and other sources about these changes? Was it useful and how could it be improved?
KE 2: Are the amendments readily applicable to a range of working arrangements? (Talking about HA changes.)
3. Thinking about the changes to The Holidays Act, what are your views on how the changes affect your situation? (If needed, prompt cashing up one week of annual holidays, transfer of public holidays to another working day.) Have you used/requested use of them? Would you request them in future? When taking sick leave, has your employer ever requested to show evidence of sickness? Different from in the past?

4. In your experience, have the changes affected the way you plan your living and work arrangements in any ways – both HA provisions and trial periods?
5. Do you ever, or know of others who, request to cash up some of your annual holidays? Did your employer agree to it? Do you find it needs negotiating? Did your employer ever ask you to cash some up?
6. Have you ever asked to take an alternative holiday (day in lieu)? If so, is your request treated differently to in the past?
KE 5: Have amendments reduced direct and compliance costs for employees? (Talking about HA and any other amendments – this question applies to the whole employment law package, including interest in whether trial periods have reduced costs.)
7. There have been some changes to how your leave and other entitlements get worked out; are you aware of these? (prompt Average Daily Pay) **8.** Have you noticed if your pay changed for your days off or sick leave in the past couple of years (not because of pay change)? **9.** If yes, do you know why? Did your employer tell you they'd changed the way they calculate it?
KE 7: Have the amendments given businesses more confidence to take on new staff? (Talking about trial periods.)
10. The trial periods are now available to all employers. Have you ever been employed or asked to be employed using a trial period?
11. How did the process work for you? • How was it communicated? Interview, at the time of the job offer, signing employment agreement? • If you have used a trial period, do you think you could have said yes to the job without the trial period? • Did you have the trial period put into your employment agreement? • Did you find the process straightforward? • How did you feel you understood your rights about it? • Do you feel it's fair? • Were you dismissed during the trial period? Why?
• Do you feel you would have been given the same job opportunity without a trial period? • In your view, has it made employers consider a wider range of job candidates for the job?
KE 1 and 4: Overall understanding and improving the balance of fairness (Talking about union access).
12. Do you belong to a union?
13. Are you aware of a union making a request for access to your workplace? **14.** Is it different to before? In what way?
• Have you notice any change in the union's relationships with employees and employers? • Why do you think this has happened?

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