

Termination During Probation

Firstly, “Probation” is a legal term only in the Queensland jurisdiction for “Parents & Citizens’ Associations. In the Federal jurisdiction (for all other employers) we refer to the “Minimum Employment Period”. For all intents and purposes though they are the same thing. The “Probationary Period” and the “Minimum Employment Period” are both periods of time where in an employee is being assessed by the Employer to determine if they are a good fit for an organisation. If an employer determines that the employee is not a “good fit” for any *lawful* reason, the employee may be terminated without any right to pursue an Unfair Dismissal claim.

In the Queensland jurisdiction the “Probationary Period” is a period of 3 months from the commencement of employment. The period can only be longer (or shorter) if agreed prior to the commencement of employment. In other words it has to be specified in the contract of employment if it is going to be a period other than the stock standard 3 months. If you want to be able to extend this period of probation then that provision must also be put in the contract of employment. Furthermore any period of “Probation” longer than 3 months has to be “reasonable” in the circumstances. This means that you need a long period because for some objective and fair reason you cannot assess the employee’s suitability within the first 3 months.

The “Minimum Employment Period” in the Federal jurisdiction is a fixed period of 6 months for a large employer (employing 15 or more employees) or 12 months for a small employer (employing fewer than 15 employees). These periods cannot be extended under any circumstances.

Generally speaking, it is relatively easy to part ways with an employee who is not working out during this “trial period.”

However, a probationary employee still has certain rights.

There are a range of claims, other than unfair dismissal, that a former employee may be able to access, irrespective of their length of service.

Such claims include breaches of the general protections provisions of workplace legislation, unlawful termination, or discrimination. An employee is protected from unlawful action taken by an employer in relation to the exercise of workplace rights, engaging in industrial activities and discrimination in the workplace. As an employer, you need to be aware that termination even during the probationary period, may expose the organisation to significant risk.

Once an employee raises a general protections claim, the onus shifts onto the employer to prove that adverse action was not taken against the employee because of workplace rights, but rather that action was taken for a valid reason.

We strongly recommend that although an employee in the initial months of their employment is not entitled to bring an Unfair Dismissal Claim, all employers keep a diary note or other record of concerns regarding the employee's work or attitude to work as well as a record of any discussions relating to the performance of their work. It is also vitally important that all employers remember that an employee cannot be terminated for taking sick leave or taking leave to care for a family member at any time, even one day after commencing in a new role.

It is also wise to keep an employee advised as to how they are performing and where they are meeting, or not meeting, your expectations. This will mean that any subsequent termination will come as less of a "bolt from the blue" and something which must be contested.

Without taking these steps, if there are grounds, an employee can bring a general protections, unlawful dismissal, or allege you have discriminated against them for an unlawful reason.

Do you require support in this area? You aren't alone!

Contact the Employment Relations Team for advice - 07 3852 5177 or email
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