

EMPLOYEE PROBATIONARY PERIODS INFORMATION SHEET

Most employment relationships commence with a 'probationary period' whether by default due to Federal or State legislation or applicable Awards or due to terms specified in the employment contract.

A probationary period is accepted as a period of time within which an employer is entitled to assess an employee's suitability for that employment. Generally probationary periods only become a necessary consideration when an employer wishes to terminate the employment relationship. This is because an employee completing a probationary period is excluded from the dismissal requirements set out in both the Federal and State legislation.

An employer may not, even during the probationary period, terminate an employee unlawfully. Examples of unlawful termination include refusing to negotiate or sign an Australian Workplace Agreement (AWA), discrimination, temporary illness or trade union membership.

An employer may, however, terminate an employee without notice during the probationary period for any reason which is not unlawful including poor performance or conduct or just personality differences. This type of dismissal would be otherwise known as unfair dismissal or dismissal which is harsh, unjust or unreasonable.

In this case an employee may be legally dismissed:

- at any stage during the probationary period either orally or in writing (although in writing is always recommended); or
- at the expiry of that probationary period, if the employer chooses not to continue the employee's employment.

In Queensland, regulation of probationary periods of employment may occur due to the operation of the:

- *Workplace Relations Act 1996 (Cth)*;
- *Industrial Relations Act 1999 (Qld)*;
- applicable State or Federal Award; or

where an individual is excluded from the operation of either Act or an Award does not apply,

- common law.

WORKPLACE AND EMPLOYMENT LAW ALERT

SEPTEMBER 2006

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FEDERAL - *Workplace Relations Act 1996 (Cth)*

Pursuant to s.638 of the *Workplace Relations Act 1996* ("the WRA") a person is excluded from bringing a claim for unfair dismissal **and** from claiming insufficient notice of dismissal if they are employed during a probationary period of 3 months or less or for a longer period if such period is reasonable having regard to the nature and circumstances of the employment. Such longer period should be agreed upon in writing by the parties either at the commencement of employment or during the initial 3 month probationary period.

The WRA goes further however and also prohibits a person from bringing a claim for unfair dismissal unless the employee has completed a "qualifying period" of employment with the employer. A "qualifying period" is either:

- (a) 6 months;
- (b) a shorter period or no period at all if agreed in writing between the parties prior to commencement of employment;
- (c) a longer period if agreed in writing between the parties before the commencement of employment, such period being reasonable having regard to the nature and circumstances of the employment.

This six month qualifying period applies only to those employees who commenced their employment after the 'Work Choice' amendments to the WRA came into effect on 27 March 2006.

In both circumstances of either probationary employment or during the 'qualifying period' a person remains entitled to bring a claim for unlawful dismissal as mentioned above.

In reality employees covered by the new Federal Work Choices system have a six month qualifying period. Employers really do not need to concern themselves with the words or use of a probationary period unless they wish to enter into arrangements of a longer probationary period than six months. This has recently been confirmed by the Australian Industrial Relations Commission in cases such as *Barnden (PR973425)* and *Kafizas (PR973529)*.

QUEENSLAND - *Industrial Relations Act 1999 (Qld)*

An employee not covered by the federal WRA, will be regulated by the state provisions of the *Industrial Relations Act 1999 (Qld)* ("the IRA").

Section 72 of the IRA prevents an employee bringing a claim for unfair dismissal during their first 3 months of employment (default probationary period). The duration of that default probationary period

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The parties may agree in writing:

- the probationary period be shorter;
- the probationary period be extended and that extension is reasonable having regard to the nature and circumstances of the employment; or
- there be no probationary period at all.

What is a 'reasonable extension'?

Whether a stipulated period is reasonable is determined objectively, having consideration to:

- the nature of the job;
- type of duties;
- level of supervision available;
- the size, location and mode of operation of the employer;
- personal characteristics and circumstances of the employee.

For example, where a job is repetitive and carried out under close supervision, a probation of only a week or two may be appropriate. However, where the person is employed in a marketing or managerial capacity with little or no supervision and quality of performance cannot be immediately determined a probationary period of a matter of months may be more appropriate (*Nicholson v Heaven and Earth Gallery 57 IR 50*). Generally, however, a probationary period should not extend for more than 6 months.

Claims for unlawful dismissal still permitted

As with the Federal WRA an employee remains entitled, during the probationary period, to bring a claim for unlawful dismissal due to an 'invalid reason'.

An 'invalid reason' includes, but is not limited to:

- discrimination
- a temporary absence due to illness or injury
- membership or non-membership with an employee organisation
- filing a complaint against an employer
- refusing to negotiate for or sign a certified agreement or QWA; or
- absence due to pregnancy or parental leave.

If an employee is still within the probationary period and is dismissed for an 'invalid reason' the employer will be liable for sanctions which may include either reinstatement of the employee, compensation or a penalty of up to 135 penalty units.

COMMON LAW

In circumstances where the employee is excluded from the Federal or State Act standard contract principles apply. As a result the operation of the probationary period is determined by looking at the intention of the parties and assessing the terms of their agreement as a whole.

Contractually it is advantageous for an employer to specifically state in the employment contract the terms of employment are subject to a probationary period and the duration of that period. From the perspective of an employee it is an advantage not to have a specific period of probation included in the contract. In this way an employee may be able to argue there was no intention for a probationary period to apply.

Depending on the intention of the parties, the probationary period may essentially be a fixed term contract, so the employment comes to an end at the expiry of the term. In this situation an employer may 'dismiss' the employee at the end of the period without any legal redress by the employee. Where the employment continues past the expiry of the probationary period, a new contract of employment is deemed to have commenced (*Airline Hostesses Association v Qantas Airways Ltd* (1974) AILR ¶785).

In contrast, the terms of the agreement may be construed as a continuing or indefinite engagement, where the contract may be terminated only if certain procedures are followed (*Northern Land Council v Hansen* [2000] NTCA 1). In the *Northern Land Council* case there were guidelines for supervisors to follow in their assessment and appraisal of probationary employees which indicated the nature and purpose of the probationary period and certain procedures were to be followed should the employee's performance prove to be unsatisfactory.

In circumstances where procedures are in place for the employee to be reviewed prior to the end of the probationary period, the employer may be under a duty to provide a fair duration of scrutiny and feedback over the entire period of the probation to enable the employee sufficient time to address any areas of concern (*Alamzeb v Department of Education* [2001] QIRComm 118 (26 July 2001)).

Where contractual terms exist providing for specific procedures to be followed during the probationary period, an employee may have legal entitlement to sue for breach of contract if such procedures or obligations are not met.

Where the probationary period passes without notice of termination, that employee's contract continues and full rights of the employment relationship will be available thereafter (ie the employee may bring an

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action against the employer for wrongful dismissal if such an occasion arises).

SUMMARY

Probationary periods can present a complicated issue for employers and employees alike when termination of employment arises. Due consideration must be given to the period of probation which applies in the particular employment relationship, which statutory and/or contractual instrument governs the employment (if any) and the reasons for termination.

Employers are encouraged to seek legal advice prior to actioning any termination of employment where a probationary period might apply or has already expired.

Likewise employees should obtain legal advice where their employment has been terminated either within or outside a probationary period to ensure such termination was legally authorised, irrespective of that probationary period.

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