



Cessation of Probation - A Best Practice Guide

How can I terminate an employee on probation is a question the Employee Relations team call a "frequent flyer question".

On face value ceasing an employee's probation is a simple process, however if not done correctly it may lead to a dispute in the Fair Work Commission.

This article will advise you on a best practice approach to ceasing an employee's probation.

Policies, Procedures and Paperwork – Establishment of Employment Relationship

a) Employment Contract:

It is a requirement of the Fair Work Act 2009 that you provide your employees, at the commencement of their employment an employment contract that provides all the necessary conditions of employment. The employer may include a period of "Probation" for the employee. This period is a contractual term and in practice may vary between three (3) to six (6) months.

If probation is not mentioned in the documents provided to the employee, then no probation period exists.

b) Policies and Procedures:

At the same time the employee should be provided with the Fair Work Commission Employee Fact Sheets and the businesses policies and procedures. This is to ensure that the employee is fully aware of business expectations in relation to how they conduct themselves during work hours when representing the business and their performance during any probation period. . Employers should avoid including the policies and procedures into the Employment Contract. These documents sit outside the contract of employment.

Feedback and Assessment during any Probation Period..

Whilst business policies and procedures provide employees a certain amount of information, they do not replace verbal feedback. Typically, performance and conduct are the most common reasons for the cessation of probation. However, an employee cannot improve either unless they are made aware they are not meeting the expectations of the business. Therefore, regular conversation, within the probationary employee are important to both give and receive feedback. .As best practice, an Employer should set a probation review meeting at least half way through the probation period. This meeting allows the Employer to manage an employee during the Probation Period and terminate if necessary for performance or conduct issues.

Disputation following Termination of Employment during a Probation Period.

An employee who has not met the minimum employment period cannot, under the provision of the Fair Work Act 2009 lodge an Unfair Dismissal. This period is six (6) months for large employers and twelve (12) months for small employers. Small Employers are those with fifteen (15) or less employees. However, irrespective of whether an employee has passed the minimum employment period, an employee does accrue rights under which they may wish to lodge a General Protections claim with the Fair Work Commission. A General Protections claim may be lodged for two reasons:

- **Adverse Action:**

This occurs when an employer terminates an employee - including a probationary employee - because the employee has exercised a workplace right.

- **Discrimination:**

This occurs when an employer treated an employee less favourably than other employees due to their colour, culture, religion, sexual preference, marital status, the sport team they support. "Collectively they are called "Protected Attributes.

The difficulty of a General Protections claim is that of "reverse onus". This means the employer must convince the Fair Work Commission member that they did not cease the employee's probation because the employee exercised a workplace right or due to their protected attributes. The termination of an employee on probation due to performance or breach of policy and procedures permits the Employer to argue against any General protections Claim.

In Summary:

1. An employer may cease an employee's probation at any time with notice as per the contract of employment.
2. An employee who has had their employment cease during a probation period cannot successfully argue an Unfair Dismissal claim.
3. An employee may under certain criteria lodge a General Protections claim for the cessation of their probation.
4. Ensure your business has up to date policies and procedures in place to employees are aware of business expectations.
5. Take the opportunity to give and receive feedback from your probationary employees so they are of their progress.

6. Using a best practice approach does not guarantee an employee will not lodge a dispute however it does place the business in a much stronger position to have the dispute dismissed.

As always, if in doubt reach out – The MTA Employment Relations Team is here to help.

In the meantime, if you require any specific assistance as a result any new legislation or Fair Work Act our team is available to assist. Please do not hesitate to contact us at eradvice@mtansw.com.au for tailored advice and support.