

> Understanding Minimum Employment Periods and Probation

The *Fair Work Act 2010* excludes employees from bringing an application for unfair dismissal within the minimum employment period; most employers are familiar with the term 'probation period' and some still use the term 'qualifying period'. This newsletter will assist employers to understand the meaning of these terms and provide guidance and cases illustrating the nature of these provisions.

Probation

A 'probation period' is usually a three month period (based on calendar months) from the date of commencement of employment where the employer assesses the suitability of the employee for the role and the employee has an opportunity to determine if the role meets their needs.

The probation period must be 'reasonable' taking into account the nature of the position. For example, it would be hard to justify a probation period longer than three months for an administrative position, whereas a probation period of six months may be reasonable where a new sales person is being employed to gain sales in a new district, or a CEO is being employed to change an organisation.

The minimum employment period affects all employment arrangements covered by the *Fair Work Act 2009* and an employee is excluded from bringing an application for unfair dismissal during this period. The length of the minimum employment period is six months from the date of commencement of employment or if the employer is a 'small business', i.e. less than 15 employees by head count and including associated entities (see s.383 of the Act), the period is increased to twelve months.

Minimum Employment Period

Justin Bartle v GBF Underground Mining Company (U2006/5324) provides a clear interpretation, and while based on the previous WorkChoices legislation, nevertheless illustrates the relevant points in relation to minimum employment periods. The qualifying period as discussed in the following case is now referred to as the minimum employment period in the Fair Work Act:

In *Justin Bartle v GBF Underground Mining Company*, the Australian Industrial Relations Commission ('AIRC') considered whether there was a difference between probationary periods and qualifying periods. In this case, Mr Bartle, who was employed on a 3 month probationary period, claimed unfair dismissal when his employment was terminated without notice after 3½ months. It was ruled that there

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was no jurisdiction for the claim since the *WorkChoices Act* stated that an employee may not make a claim for unfair dismissal unless the 6 month qualifying period is complete.

The AIRC found that the Explanatory Memorandum supported that probationary periods and qualifying periods serve different purposes. They said that a 'probationary period' is based on the performance of the probationary employee and is a period whereby an employer can assess suitability of employment. The 'qualifying period' stipulates the length of an employee's employment before the employee is able to make an application for unfair dismissal. That is, it's a period of time the employee has to serve before they "qualify" to commence these proceedings.

The AIRC said "because of the different purposes of the two terms, it follows that the length of an employee's period of probation does not automatically directly affect the default period of the qualifying period of employment". The AIRC went on to say that the Act is to be interpreted to mean that an employee whose employment is terminated while they are serving a probationary period cannot make an application for unfair dismissal until the completion of their qualifying period of employment (i.e. standard of 6 months); or the expiration of their probationary period, whichever is the later.

Guidance for Employers

- The *Fair Work Act* came into effect from 1 July 2009 and provides protection for employees from unfair dismissal where they have completed a minimum employment period of 6 months from the commencement of the employment if the employer is not a small business, or 12 months if the employer is a small business.
- If an employee is terminated after the minimum employment period by a small business and it can demonstrate to have followed the Fair Dismissal Code, the dismissal will not be considered unfair.
- Probationary periods apply where they are included in a written contract of employment which should detail the beginning and end date of the probation period. They are usually for a period of 3 months but can be for longer periods where necessary due to the type of position.
- It is important to note that you cannot extend a probationary period unless it is contemplated in writing at the commencement of employment. If this condition is not provided in writing prior to the commencement of employment and you extend the probationary period beyond the initial term, it will not provide you with protection from unfair dismissal proceedings. (It is recommended that you seek assistance from the Office for Employment Relations if you are considering these last two points).
- An employee is exempt from commencing unfair dismissal proceedings if their employment is terminated during the probationary period or the minimum employment period, whichever is the longer. It is important to clearly understand the beginning and end date of the minimum employment period, even to within a matter of hours. See an explanation in the recent case of *Mr Brian Prigge v Manheim Fowles Pty Ltd [2010] FWA 28*

<http://www.fwa.gov.au/FWAISYS/isysquery/904c2f44-1732-4003-923f-6caaa098f85e/1/doc/>

- Employers in Western Australia should note that the WA legislation considers the manner of termination during the probation period and an application for unfair dismissal may be heard by the WA industrial relations body. Employees within the State industrial relations system may be able to bring an unfair dismissal application during probation if the dismissal is not for a valid reason, or the manner of the dismissal is harsh, unjust or unreasonable.
- It is important to note that although an employee may be exempt from commencing unfair dismissal proceedings, they are not excluded from making claims for unlawful termination. Unlawful

termination is where an employee's employment is terminated for a prohibited reason contained in discrimination legislation or as a consequence of adverse action under the Fair Work Act see s.342

Further References:

Fair Work Act 2009 (Cwlth)

National Employment Standards

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