

# technical factsheet 148

## The probationary employee

It is common for employers to include a probationary period as an express term of the contract for new employees. This is a contractual provision, not a statutory requirement, and it is open to the employer to set whatever period it chooses; most commonly this period is either three or six months. During this time, the employer should keep an employee's progress under review to decide whether s/he has a future in the business. The term should also provide a power for the employer to extend the probationary period.

The fact that an employee works a probationary period makes no difference to his/her continuity of employment and continuity of service starts to accumulate for the purpose of employment rights from the first day working for the employer.

### What makes probationary employees different?

There is often a difference in the terms offered to probationers compared with those they will enjoy on successful completion of this period. There are no binding rules about this, but commonly employment contracts provide that

- during probation, the contract can be terminated with one week's notice on either side,
- no contractual sick pay is payable during the probationary period, even if it is provided afterwards.
- pensions will not commence until after the probationary period
- probationers will not be entitled to a full disciplinary or performance management procedure if such issues arise during that period

### What happens during the probationary period?

It is good practice to ensure that the probationary employee is given proper feedback and support during this period, when s/he is fitting in to a new job. The employer should programme in regular reviews during which the employee can raise any concerns and during which the employer can let the employee know how s/he is doing.

### The probationary meeting

The employer should hold this meeting at or around the time when the contractual probationary period runs out. Recent case law has established that, if this is not done punctually, the employee is entitled to assume that the probation has been successfully completed.

Assuming the meeting is held at the due time, there are three possible outcomes:

1. the employee may be told that s/he has 'passed' probation
2. the employer may extend probation for a period of time
3. the employer may dismiss the employee

### The successful probationer

Once past the probationary period, the employee will usually now enjoy greater benefits, with most salaried employees moving to one month's notice. In many contracts, benefits like sick pay and pensions may now be payable.

### Extending probation

If the employer retains some doubts or reservations about aspects of the employee's work, then the probationary period may be extended. During the meeting, the employer should ensure that the employee is clear about the objectives that need to be achieved during the extended period, and how long that period is. It would be rare to extend any probationary period by more than three months. Progress will then be reviewed once the extension expires, and the employer will decide to 'pass' the employee or to dismiss.

### The unsuccessful probationer

The employer may decide that the probation has not been successful, usually because the employee's performance or conduct has not been satisfactory. In this case the decision will be taken to dismiss the employee. Even though the employee is still in the probationary period, any dismissal should be accompanied by a proper procedure. Please see Factsheet 153 for details of the minimum procedure.

### **The 'statutory probation period'**

As stated above, the employer is free to set any length of time for the probation period, as this is a matter of contract. Employment legislation provides that the employee is not able to make a claim for unfair dismissal other than in exceptional circumstances, unless s/he has completed one year of continuous service. Therefore regardless of the contractual probationary period, the employer has one year to make up his mind about the employee's future with the business. Bear in mind that any decision will need to be made in good time as any notice period that the employee would have to serve will be added to his period of service and if the total service is one year or more, the employee will gain the right to challenge the dismissal. Some employers include payment in lieu of notice clauses, allowing them to terminate employment forthwith, however even in this case, a tribunal will add one week's statutory notice, so anyone who has been working for 51 weeks or more, will in practice be qualified to claim unfair dismissal.

### **Is any claim possible against the employer?**

If an employer dismisses in the first year, there are a limited number of claims which may be made. If the employee suspects that his dismissal may be unfavourable treatment on unlawful grounds eg race, sex, sexual orientation etc, then a discrimination claim can be made as no qualifying period is required for such a claim. Further information on this is included in Factsheet 154. There are also some groups of people who have protection from unfair dismissal regardless of the length of time they have worked (eg health and safety representatives or those performing that role), and the employer must be careful to ensure that there is a fully justifiable reason for the dismissal which is completely separate from their position (eg is not because their health and safety activities have annoyed the employer). The protected groups are outlined in Factsheet 154. If the employer has not paid the appropriate notice to the employee, then a claim could also be made in respect of this.

### **Probation for new positions**

Where an employee is moving to a new role, but has been with the employer for some time, s/he is likely to have accumulated sufficient service to claim unfair dismissal. However, an employer is always right to be careful about promotion. Sometimes an employee who is excellent in an operational role does not succeed when moved to a management position. The problem is that, once an employee has been promoted, forced demotion will usually constitute a breach of contract and will amount to constructive dismissal. Where it is possible, it is therefore always advisable to have a probationary period in the role, or place the employee in an 'acting' role, before formally confirming the promotion. An 'acting' role usually involves the employee taking on the duties of the new position for a trial period before being formally promoted. Often the employer will not announce any change so that, if this proves unsuccessful, the employee can resume his previous duties without any comment from colleagues. This enables the employer to test whether or not the promotion is wise, and to move the employee back into his original role if the promotion does not work. It should be noted, however, that the onus is very much on the employer to support a new promotion and provide the employee with all the support and training s/he needs for success.