



What rights do you have as an employee on probation?

Author: [Margaret Kaukas](#)

Email: enquiry@andersons.com.au

Phone: 08 8238 6636

Date: Tuesday April 4, 2017

Many contracts of employment make provision for a probationary period of employment. This is usually between three and six months and is designed to provide the employer with the opportunity to assess the employees' suitability for the role.

Most commonly, a probationary period is seen as a term or condition of a continuing contract of employment. This means that a new contract is not required at the end of the probation period.

Generally, such a contract will provide that, at any stage during the probationary period the employer can dismiss the employee with one weeks' notice or payment in lieu of that notice.

Can I be sacked during the probationary period?

If the employer wishes to dismiss the employee during the probation period, technically it would be required to have a valid reason for the dismissal and follow the correct procedure before dismissing the employee.

However, while that is *technically* the case, the reality is that regardless of whether a contract of employment contains a probationary period, an employee cannot bring an [unfair dismissal claim](#) if they are dismissed, unless they have been employed for a minimum of six months (or one year in the case of a person employed by a "small business employer", defined as an employer who employs less than 15 staff).

The effect of this is that if an employee is dismissed during the probation period and the employer does not have a valid reason and/or does not follow an appropriate procedure, there is little that can – realistically – be done. The most an employee in that situation may be able to do is to bring a claim for breach of contract or underpayment of wages if, and only if, the employer failed to provide one week's notice, or payment in lieu.

If I'm sacked during the probationary period and I think something's not right, do I have any options?

While an employee who has been engaged for less than six months (or 12 months if employed by a "small business employer") cannot bring an unfair dismissal claim, the "[general protections](#)" provisions of the *Fair Work Act 2009* are still available.

The "general protections" provisions effectively provide that an employer cannot dismiss an employee because that employee has:

- made a complaint;
- attempted to exercise a workplace right (for example, by claiming payment of award rates, or making a [workers compensation claim](#));
- or on [discriminatory](#) grounds (for example, because of the employee's sex, race, religion, pregnancy, disability, family responsibilities etc).

If you have been dismissed during a probationary period and you believe that you were dismissed because of one of the above factors, you may be able to bring a claim against your employer for compensation.

Can my initial probation period be extended?

Some contracts of employment will provide that a probationary period can be extended. For example, it is not uncommon to see contracts that state that if an employee takes time off during the probationary period, the probationary period can be extended by the length of the time off.

Unless the contract of employment contains such a term, probationary periods can only be extended if the employee agrees.

If a probationary period is extended and the period of employment passes the six month mark (or one year if employed by a "small business employer") then, regardless of the fact that the employee is still on probation, that employee will be able to bring an unfair dismissal claim if they are dismissed.

Ultimately, although the existence of a probationary period may make an employee feel somewhat insecure, the fact is that every employee is in an insecure position in the first six months of their employment (or the first 12 months if they are employed by a "small business employer") as they have no access to the unfair dismissal laws. That is the case regardless of whether or not the contract of employment contains a probationary period.

At Andersons we generally advise employees that in the first six months of their employment, whether they have a probationary period or not (or, in the first 12 months for those employed by "small business" employers), they should attempt to be "putting their

best foot forward” and demonstrating to the employer that they are a willing and enthusiastic employee, because if the employer elects to dismiss them, there will be little recourse under the law unless the employee has access to the “general protections” provisions of the *Fair Work Act 2009* as detailed above.

If you have any concerns about the way you are being treated in the workplace, feel free to seek legal advice or assistance from today’s blog writer, Special Counsel in Employment Law, [Margaret Kaukas](#).

Please note, this Blog is posted in Adelaide, South Australia by Andersons Solicitors. It relates to Australian Federal legislation. Andersons Solicitors is a medium sized law firm servicing metropolitan Adelaide and regional South Australia across all areas of law for individuals and businesses.