

PROBATION, UNFAIR DISMISSAL AND THE INDUSTRIAL RELATIONS ACT, 1969

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INTRODUCTION:

The Unfair Dismissals Acts 1977-2001 are intended to provide employees with legal protection from being unfairly dismissed from their jobs, to lay down criteria by which dismissals are to be judged unfair, and to establish an adjudication system to provide redress for any employee who is found to be unfairly dismissed.

LEGISLATION:

Section 20(1) of the Industrial Relations Act, 1969 (as amended)

- **20.—(1)** *Where the workers concerned in a trade dispute or their trade union or trade unions request or requests the Court to investigate the dispute and undertake or undertakes before the investigation to accept the recommendation of the Court under section 68 of the Principal Act in relation thereto then, notwithstanding anything contained in the Principal Act or in this Act, the Court shall investigate the dispute and shall make a recommendation under the said section 68 in relation thereto.*

WHO DOES IT APPLY TO?

In general, the Acts apply to any person working under a contract of employment or apprenticeship; employed through an employment agency. For those employed through an agency, the third party (hirer or user) is deemed to be the employer for the purpose of the Acts.

AGE LIMIT:

The Acts do not apply to employees under 16 years of age at the time of their dismissal or who have reached 66 years of age or the normal retirement age for the employment.

SERVICE REQUIREMENT:

Employees should have a minimum of 12 months' continuous service. Continuous service is determined by the rules set out in the Minimum Notice and Terms of Employment Acts, 1973-2001.

SERVICE OF 1 YEAR:

An employee who does not have the required one year's service can make a complaint in relation to the manner of their dismissal under the **Industrial Relations legislation**.

There is no service qualification under this Act unlike the Unfair Dismissals Act 1977-2007 which requires a minimum period of one year.

RECOURSE:

Previously a Rights Commissioner would hear this complaint – this has now been amended to a Workplace Adjudicator.

There is a right of appeal to the Labour Court. However, there are some practical difficulties enforcing a decision under this Act.

EUROPEAN UNION (TRANSPARENT AND PREDICTABLE WORKING CONDITIONS) REGULATIONS 2022:

- Probationary period cannot exceed 6 months, except in limited circumstances where it is in the best interest of the employee.
- In those limited circumstances, the maximum probation period may not exceed 12 months.
- In a fixed-term contract of employment, the probationary period must be proportionate to the expected duration of the contract and the nature of the work.
- Where a fixed-term contract is renewed for the same functions, the contract may not be subject to a new probationary period.

BEST PRACTISE PROBATION PROCESS:

Please see below for best practice on how to manage the probation process and if you have any questions give us a call in the office 0667102887 to discuss.

Timeline:

- It is advised that probation is a continuous process.
- A common issue is leaving the management of the probation process too late i.e. month 5 when the probation outlined in the contract is 6 months.
- It would not be deemed fair to start the process at 5 months and finish up in advance of the 6 month mark.
- It is very hard to manage this and it is advised all employers are proactive in managing probation for all employees.

Contract:

- The employee must know in advance that their employment is subject to probation.
- This will be outlined in their individual contract of employment.
- A signed copy of the contract should be kept on the employee file.

Invitation:

- An employee must be invited to a meeting in advance via letter - *please contact the office for a copy of the most up to date invite letter – this is subject to change from time to time based on case law.*
- In advance of the meeting you will bullet point the issues to bring into the meeting with you so that the meeting does not run off course.
- You will point out any issues you or other managers have noticed that are not correct i.e.
 - Didn't follow absence procedure
 - Till was short on numerous occasions
 - Demeanour in speaking with customers isn't up to standard etc.
- The employee must have specific feedback and the feedback should follow the below formula:

INSERT WHAT PROBLEM IS WITH HIS/HER PERFORMANCE. INSERT WHAT YOU WANT HIM/HER TO DO

 - **Stacking Combis:** Currently it takes you approximately one hour to fill a combi. In comparison to the average employee this takes ½ an hour. Going forward I ask that you improve on this and you need to focus on the task at hand and not get distracted. This is a core element of your role and it is necessary you improve on this immediately.
 - **Supervision:** Currently you are not supervising the team in an effective manner. It has been noted on several occasions that you have been taking on duties which are not for you, for example, you have been seen mopping the floor on one occasion while staff stood by idly watching you. Although we appreciate your efforts in other tasks and setting an example for other staff members we ask that going forward you delegate tasks more effectively and to ensure that the staff complete it. If there are

any issues with a staff member's performance, you need to highlight it to the Manager so that it can be addressed.

- **Customer Service:** Your level of engagement with the customers leaves a lot to be desired. Going forward, you need to smile more, acknowledge them and to give them a great experience while engaging with the Company. You have the potential to deliver great customer service and you must ensure that you follow through on this. You received customer service training on the INSERT DATE and you should now implement your knowledge from this.
- Ask the employee for their feedback on how they think they are doing on each point as you go through them.
- You will take notes.
- At the end of the meeting you outline that you will send a follow up letter with all the points.
- In the case of a poor performer you will say – we will give you 4 weeks to improve on the above and we will meet again to discuss your performance.
- It is important to note in the meeting that should the employee's performance not improve we will have no option but to fail your probation.
- Please contact the office for a copy of the probation meeting guidelines – *these are subject to change from time to time based on case law.*

Follow Up Letter:

- The next step is to write a letter to the employee, everything that was stated in the meeting - *please contact the office for a copy of the most up to date letter – this is subject to change from time to time based on case law*
- At the end of the letter the standard template will include the below:
 - Outline that they will be met again in 4 weeks to improve on the above and we will meet again to discuss your performance.
 - Please note that should it not improve we will have no option but to fail your probation.

Repeat this meeting x 2 as a minimum - or more - as many times as necessary during the probation period - to give the employee sufficient enough time to improve.

Final Invitation:

- You will monitor performance and invite the employee to the final probation meeting - *please contact the office for a copy of the most up to date invite letter – this is subject to change from time to time based on case law*
- All issues will be discussed including issues outlined in the first meeting and whether items have been improved or disimproved
- In addition any new items following the above formula will be addressed.
- At this stage you will know whether they will be passing or failing probation
- You would outline that they have failed /passed in this meeting
- If the employee has failed probation it needs to be stated in this meeting.

Notice:

- The employee is entitled to one week of notice in the event that they are in their probation period.
- Either the employee works this notice or is paid in lieu of notice.
- The final date of termination is the day the notice ends either way.
- If the employee is paid in lieu of notice this must be agreed in the final meeting.

Failed Probation / Pass Probation:

- You will write a letter to the employee with all the issues – they were last discussed on **INSERT DATE** and **INSERT DATE** and these haven't been improved upon - *please contact the office for a copy of the most up to date letter – this is subject to change from time to time based on case law*
- You would outline final date, notice required, reference, and any accrual of annual leave will be paid etc.
- If an employee is passing then you outline the issues they have improved on and that they have successfully passed probation.

Extending Probation:

- Extending probation is only done in extenuating circumstances for example if the employee is sick and performance can't be monitored or the employee went on maternity leave – in this case it would be paused until after the maternity leave.
- If you have cause to believe the employee needs an extension of the probation period then please contact the office to discuss your process so far.

FAILED PROBATION – NO REASON

An important learning has emerged from the O'Donovan V Over- C- Technology case. Mr O'Donovan's contract contained a clause which allowed his employment to be terminated for no reason during his probation period. It would be important that employers adopt this clause in employment contracts going forward. It may look something like the below:

"Termination of this agreement within the probationary period shall be at the discretion of the Company and in the event of such a termination you will receive one week's notice. During a period of probation, both parties are free to terminate the contract of employment for no reason, or simply because one party forms the view that the intended employment is, for whatever reason, not something with which they wish to continue."

The Court of Appeal's decision restores our understanding of probationary processes, in that it confirms that:

- The employee can be terminated on probation on performance grounds without the need to afford fair procedures and natural justice
- The employee is entitled to fair procedures and natural justice if he/she is terminated for misconduct, even if the employee is still on probation

Termination of a contract is permitted for poor performance and fair procedures shall not apply. However, it would be vital that employers continue to adhere to good HR practices. This includes, meeting the employee regularly, providing constructive feedback, re-training and any other additional supports to ensure the employee has been given every opportunity to get to the standard expected by the Company.

RELEVANT CASE LAW:

IRISH POSTMASTERS UNION- AND -A WORKER

<https://www.workplacelrelations.ie/en/Cases/2011/January/AD115.html>

- Section 13(9) of the Industrial Relations Act, 1969 allows for an appeal from a decision of the Rights Commissioner.

- The Labour Court awarded the appellant €30,000 and overturned the decision of the Rights Commissioner's decision that the employer was not in breach of contract when terminating employment while the probationary period was still in place.
- The finding of the Labour Court in this case is instructive and the principal finding was that the employer's decision not to adhere to either its own disciplinary procedures or be bound by the provisions of the Code of Practice on Grievance and Disciplinary Procedures S.I. No 146 of 2000 because he was on probation, was misconceived.
- The matter before the Court concerned an appeal of a Rights Commissioner's Recommendation, which found against the Worker's claim that his Employer unfairly dismissed him.
- The Appellant submitted that the dismissal which occurred during his probationary period was unfair and was conducted without due regard for fair procedures.
- He held that he was not given a right to reply, he was denied the right to be represented and he was not afforded the opportunity of an appeal against the termination decision.
- In its defence the Employer submitted that the Appellant was treated in accordance with his contract of employment, which provided for an ongoing review of his performance and included a clause, which stated, *"Either party may terminate employment during the probation or at the end of the probation period."*
- The Employer submitted that while there were no disciplinary issues with the Appellant, concerns did emerge about his overall suitability for the position and it was decided to extend his probation.
- When he objected to such an extension, it was decided to terminate his employment, and pay him three months' salary in lieu of notice, as per his contract of employment.
- The Court carefully considered the written and oral submissions of both parties.
- It is clear to the Court that the rationale behind the termination of employment was the Employer's error in appointing the Appellant to the position in the first place and it consequently sought to extricate itself from that contract.
- In all the circumstances of this case, the Court finds that the Employer's decision not to adhere to either its own disciplinary procedures or be bound by the provisions of the Code of Practice on Grievance and Disciplinary Procedures S.I. No 146 Of 2000 because he was on probation, was misconceived.
- Consequently, the Court finds that the dismissal of the Appellant was unfair.
- The Court finds in favour of the appeal and overturns the Rights Commissioner's Recommendation.
- The Court recommends that the Appellant should be compensated by the payment of €30,000 in full and final settlement of the claim before the Court.
- For the avoidance of any doubt this recommended payment is in addition to the three months' pay in lieu of notice already paid.

HERBERT PARK HOTEL AND A WORKER (CD/05/527)

<https://www.workplacerelations.ie/en/Cases/2005/September/LCR18331.html>

- The worker was employed as restaurant supervisor in Brasserie na Mara in Dun Laoghaire and was promoted to Assistant Manager in May, 2004.
- As she wished to gain more experience in the hotel industry she applied for and was successful in obtaining the position of Conference and Banqueting Co-ordinator in the Herbert Park Hotel, although it meant she was paid less than her previous job.
- She commenced her new job on the 11th of April, 2005, and received two days basic training while on the job.

- The worker claims that in the first week she was approached about changing her appearance, e.g. wearing more make-up and high heels, and she complied with this request.
- The worker maintains that apart from finding her line manager both difficult and unapproachable she had no problems with the job.
- On the 28th of April, 2005, she was asked to attend a meeting and was told that she was being dismissed with immediate effect.
- When she asked why, the reason given was cut-backs in the Hotel. She eventually received wages due to her and her P.45.
- The worker referred her case to the Labour Court on the 9th of June, 2005, in accordance with Section 20(1) of the Industrial Relations Act, 1969.
- The Company did not attend the Labour Court hearing on the 15th of September, 2005.
- The worker agreed to be bound by the Labour Court's Recommendation.
- The worker had extensive experience working in the hotel industry, including time spent in America and Canada. She left a much better-paid job to gain more experience.
- She received little training, certainly not the "comprehensive induction training programme" promised in the Induction booklet, but was expected to perform her job to a high standard after two days.
- The worker was given no indication that she was to be dismissed.
- There had been no complaints regarding her work and when she asked for a reason was told that it was not performance related or personal.
- Shortly after she was dismissed (because of cut-backs) the worker noticed a number of jobs being advertised in the Hotel through the internet and newspapers, including one in the Sales and Marketing Department where she worked.
- The Court finds it regrettable that the employer declined to attend the hearing or otherwise address the worker's claim.
- On the basis of the evidence before it, the Court is satisfied that by any reasonable standard the worker's treatment was grossly unfair.
- She left another employment by the offer of a job with her new employer, and was dismissed after two weeks without any adequate explanation of the reason for her dismissal.
- Her contract of employment provided for a six-month probation period and, in the Court's view, the claimant was entitled to expect that she would have had the benefit of that period to establish her suitability for continued employment.
- In all the circumstances of the case, the Court recommends that the employer should pay the claimant compensation in the amount of €15,000 in settlement of her claim.

Park Rite v. A Worker (LCR 20619) 2013

<https://www.workplacereleations.ie/en/Cases/2013/October/LCR20619.html>

Matthews Coach Hire v. A Worker (20688) 2014

<https://www.workplacereleations.ie/en/Cases/2014/January/LCR20688.html>

Catholic Primary School Management Association v. A Worker (LCR 20612) 2013 case.

<https://www.workplacereleations.ie/en/Cases/2013/October/LCR20612.html>

O'Donovan v Over-C Technology Limited and Over-C Limited [2021] IECA 37 case.

<https://employmentrightsireland.com/court-of-appeal-overturms-high-court-decision-in-dismissal-of-employee-on-probation-case/>

CONTACT THE HR SUITE:

THE SUITE

FOR PEOPLE AND BUSINESS

If you have any queries please do not hesitate to contact our office on 066-7102887 and we would be happy to deal with your query.

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