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Probationary periods under the Fair Work Act

The purpose of a probation period is to entitle an employer to dismiss an employee without the risk of an unfair dismissal claim if he/she is found to be unsuitable. The Fair Work Act (**Act**) has replaced the reference to "probation": with the need for an employee to serve a "minimum employment period" (**MEP**) before the employee can lodge an unfair dismissal claim.

What is the MEP?

The MEP is generally 6 months continuous service but it increases to 12 months for small business employers (i.e. employers with less than 15 employees). When assessing the number of employees engaged by an employer it is necessary to include all workers, such as:

- part time and full time employees;
- casual workers (subject to further comments below);
- the employee claiming unfair dismissal (if any); and
- any employees who work for associated entities of the employer (as defined in the Corporations Act).

Continuous service

An employee's period of employment is determined by their "continuous service", which excludes certain periods of unpaid leave but includes absences on workers compensation. This was confirmed in the recent decision of *WorkPac v Bambach* [2012].

As a general rule, employees maintain continuity of service (and the MEP does not re-start) when they change jobs with related employers or when they are employed following a transfer of business. The only exception to this is where the new employer advises the employee in writing before the transfer that previous service will not be recognised, providing the new employer is not an associated entity of the old employer.

Casual employees

A period of service by an employee as a casual does not count towards the employee's period of employment unless:

- the employment was on a regular and systematic basis; and
- the employee had an expectation of continuing employment with the employer.

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It is important to be aware that employment can be regular and systematic even if it is seasonal or where the times and dates of work are quite irregular or are not rostered. In *Ponce v DJT Staff Management Services* [2010] it was held that a key factor is whether a casual worker is regularly offered work when it is available and therefore comes to expect it.

Termination of employment within the MEP

The unfair dismissal provisions of the Act do not apply to employees serving a MEP. In addition, it is not necessary for an employer to give reasons for termination if the employment is ended during the MEP. However, the employer must provide the employee with one week's notice of termination (or payment in lieu).

In the case of *Prigge v Manheim Fowles* (2010) the employee commenced employment at 9.00am on 26 February 2009 and was terminated by notice at the same time on 25 August 2009. A MEP of six months applied. The employee lodged an unfair dismissal claim and the employer defended it on the basis that the MEP had not been completed.

Fair Work Australia stated that the MEP must be completed *'immediately before the beginning of the corresponding day of the sixth month following the date on which the [employee's] employment commenced'* – i.e. immediately before the beginning of 26 August 2009. As such, the employee's claim was dismissed.

However, an employee terminated during a MEP can still take action for unlawful dismissal or breach of workplace protections if they can show that the employer terminated the employment for a prohibited reason. This includes temporary absence from work due to illness or injury.

Key lessons for employers

In order to take advantage of the practical impact of the MEP it is important to:

- diarise the expiry date of each employee's MEP;
- terminate employment within the MEP (if termination is necessary); and
- ensure that any alternative causes of action that an employee may have are considered prior to termination.

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