

HR Update 2018: Managing probation, absences and longer working



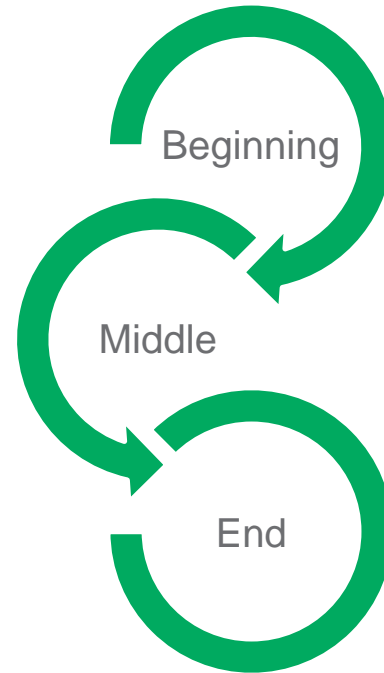
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Agenda

- Managing probation
- Managing absence
- Guidance for longer working
- Questions



Managing probation



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The function of probation

Is a period of time that allows the employer to:

- Evaluate the performance, conduct and capability of employee
- To ensure that both parties are a good fit
- To provide the employee with adequate training so that they can successfully perform their role

Key recommendation:

Evaluation time period for probation should ideally be six months but less than 11 months

Managing probation – Part 1



Good training

Regular meetings

Keep records

Regular reviews

Managing probation – Part 2

What to do when there is an ongoing problem with an employee's:

- Performance
- Conduct
- Attendance
- They are not a good fit

Key recommendation:

Be fair and follow your own disciplinary procedures or refer to S.I. No. 146/2000 - Code of Practice on Grievance and Disciplinary Procedures

Managing probation – Part 3

Problem employees - keep it fair



Managing probation – Stage 1

The need to improve stage:

- Invite employee to formal probationary meeting
- Outline areas of concern – attendance, performance etc
- Set a timeline to improve – ideally one month
- Keep records of meeting and follow up in writing with employee
- Consider if you need to extend the probation period

Key recommendation:

Include an option to extend probationary periods in the contract of employment

Managing probation – Stage 2

The at risk stage – when there is no improvement:

- Invite employee for second formal probationary meeting
- Outline concerns
- Make it **very clear that they are at risk** of not passing probation
- Set a new timeline to improve – ideally one month
- Extend probation or issue formal warning

Key recommendation:

Issue follow up e-mail detailing concerns raised, the timeline to improve and that failure to improve may put their role **at risk**

Managing probation – Stage 3

The final stage:

- Invite employee for third formal probationary meeting
- Offer employee right to representation (colleague or union official)
- Consider all evidence, get employee's view
- After meeting make decision - further warning, extend probation or terminate employment

Key recommendation:

Consider all facts first before making a decision to terminate employment

Risk of terminating probation without notice

- It is procedurally unfair
- Could risk a claim under the Industrial Relations Act
- Reputational risk – word of mouth or online employer review sites



Managing probation – case study 1

Microsoft Ireland v A Worker (LCR 18383)

- Employee dismissed for performance issues
- Court accepted company was within its rights to terminate employment but -
- **Company did not follow procedural fairness**
- Former employee awarded €6,000

Managing probation – case study 2

Embankment Plastics Limited vs A Worker (CD/15/267)

- Employee was dismissed for poor performance, lateness and refusal to work extra hours
- Company failed to do the following:
 - Poor communication
 - Did not follow any procedure
 - Contract of employment stated that “disciplinary procedure would not apply during probation or any extension of it”
- Former employee awarded €33,419.38

Managing probation checklist

- Did the employee receive full and proper training?
- Did they receive an opportunity to improve?
- Did you maintain good communications with employee?
- Did you review and assess them on a regular basis?
- Did you document meetings and issue follow up e-mails?
- Did you maintain a fair and proper process for problem probations?

Problem probations - checklist

- Was the employee made **fully aware** of the formal allegation made against them?
- Were they offered the **right to reply** to the formal allegation made against them?
- Were they offered the **right to representation**?
- Did they receive a **full and objective investigation** of the allegation?
- Were they given the **right to appeal** at the final stage?

Managing absence

Managing absence

Managing sick leave queries is the **number 1** issue that affects SFA members.



Types of sick leave

- Sporadic – a day here, a day there
- Prolonged sick leave



Managing sick related absence



Step 1. create a sick leave policy

What to consider in your sick leave policy:

- How should employees notify the company when calling in sick
- Who should they notify when calling in sick
- What time should they notify the company by
- When is a medical certificate required?
- Return to work interviews
- Referring employees to the company doctor
- Conditions for sick pay scheme (if applicable)

Key recommendation:

Be consistent in applying your sick leave policy

Step 2. measure and record

What to consider when measuring and recording absence:

- Determine what is the average number of days lost per employee in your business as a whole
- Determine how frequent the sick leave is – sporadic or in blocks of sick leave
- Is there a pattern? For example are they sick on a Monday or Friday or before a shift they want to avoid
- Is the sick leave sporadic or prolonged?

Step 3. Manage absence – part 1

Steps to managing **sporadic absence**:

- Interview employees who exceed the average amount of sick leave
- Assess if there is an underlying issue, hear their side
- Highlight concerns and impact on business
- Directly address patterns of sick leave
- Directly address breaches of sick leave policy
- Offer opportunity to improve, set a timeline, clearly inform them of risks if no improvement occurs
- In the case of no improvement, invoke company disciplinary process

Step 3. Manage absence – part 2

Steps to managing **prolonged absence**:

- Maintain regular written contact with employee
- Show support in your dealings with the employee
- Ensure sick certs are issued according to sick leave policy
- Ask employee for indication of a return to work date
- Be mindful of any equality issues under the grounds of disability
- Do not diagnosis employees, refer them to a company doctor
- Consider a phrased return to work if needed / certify they are fit to return to work

Step 3. Manage absence – part 3

Consider the following first before dismissing on the grounds of incapability:

- Is there a disability issue?
- If yes, what reasonable accommodations could be made – lighter duties, modifications to working environment
- If no reasonable accommodation cannot be made – document objective reasons why these cannot be made
- Base decision on latest medical report
- Ensure fair procedures are followed

Managing absence – case study 1

A Maintenance Technician vs a Road Maintenance Company (ADJ-00005550)

- Employee dismissed due to excessive and frequent absenteeism as well as repeated lateness
- The company was supportive of the employee's issue
- The company had a clear procedure in place for managing absence
- Adjudicator found that the dismissal was fair and said that the company had **“acted with considerable patience and its procedures were fair”**

Managing absence – case study 2

A Worker vs Donegal Meat Processors Ltd (UD428 2013)

- Employee was dismissed due to poor attendance and unexplained absences
- Employee said it was not made clear that they would be dismissed if they took one more unauthorized absence. Put in a claim for €27,000
- Company did not properly implement its disciplinary procedure in this case
- Employee was awarded €6,000 but advised they contributed to their own dismissal

Managing absence – case study 3

A Worker vs Keeling's Logistics Solution

- Over 10 years the employee had missed 316 days. Was dismissed due to “deliberate manipulation” of sick pay scheme
- Employee said they were not made aware that their level of absence was at risk of a dismissal
- The dismissal was deemed fair by the adjudicator as the company had operated in a “**fair manner**” as employee was offered full rules of natural justice
- The employee was dismissed due to manipulation of sick pay scheme and adjudicator recognised that it was based on this factor

Managing absence checklist

- Do you have a sick leave policy?
- Do you measure and record absence?
- Do you manage absences on a consistent basis?
- Do you hold return to work interviews for excessive sporadic absences or prolonged absences?
- Are you confident that there is no disability issues?
- In managing dismissal on the grounds of capability did you follow fair procedures?

Longer working



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The case for longer working

- Number of over 65's increasing by 20,000 each year (DoH 2016)
- Greater expectation to remain working beyond retirement age
- State pension age is 66 now and will increase to:
 - 67 years in 2021
 - 68 years in 2028



WRC code of practice on longer working

Published in December 2017 as a:

- Response to the rising number of older workers
- Facilitate workers who would like to continue working beyond traditional retirement age of 65
- For those who cannot afford to retire until they are eligible for the state pension

WRC code of practice on longer working

Skills and experience of older workers

Objective justification of retirement

Standard retirement arrangements

Requests to work longer

Skills and experience of older workers

The code suggests that businesses could consider:

- Training management on age diversity in the workplace
- Avail of skills and experience of all workers
- Explore flexible working patterns
- Proof policies and procedures for age bias
- Create a work culture that embraces training and development of all age groups

Objective justification of retirement – part 1

There is no legal retirement age in the private sector. It is usually set out in the following:

- Contracts of employment (written or implied)
- Staff handbook
- Custom and practice usually arising from date stated in occupational pension scheme

Objective justification of retirement – part 2

Warning ! Terminating an employee on the grounds of age could be viewed as discrimination.

An objective justification must be used to impose retirement as follows:

- Intergenerational fairness (allowing younger workers to progress)
- Health and safety
- A balanced age structure in workforce
- Personal and professional dignity
- Succession planning

Standard retirement arrangements

The code suggests that businesses could consider:

- Ask employee what are their retirement plans so that you can plan ahead
- Provide information or supports such as part time working, pre-retirement courses
- If stated in the contract of employment give employee 6-12 months notice that they will be retired – in writing and face to face

Requests to work longer

The code suggests that businesses could consider the following questions in response to longer working?

- Do you have a strong, objective reason to refuse or accept the request to remain working?
- What are the objective reasons for accepting or refusing the request?
- What arrangement will be used? Length of time, use of fixed term contracts?
- Could a transition from full time to part time be used if employee agrees?
- Are there any pension implications

SFA HR and employment law advisory service

Do you want to discuss your HR issues in more detail?

Contact Helen Quinn for further advice on:

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Thank you



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