

Dismissal cases

Transcript prepared for HR & Compliance Centre by Callisto Connect.

- Susie Munro:** There's going to be more scrutiny of how an employer has acted in the early stages of employment. And in preparation for that, it's a good idea for employers to make sure that their probationary procedures are tightened up.
- Robert Shore:** Hello, and welcome to the Brightmine podcast, formerly known as the XpertHR podcast. Brightmine is a leading provider of people data, analytics and insight, offering employment law expertise, comprehensive HR resources and reward data to meet every HR and organisational challenge and opportunity. You can find us any time of the day or night at <https://www.brightmine.com>.
- Hello everyone. My name is Robert Shore, and today we're going to be talking about some tribunal cases concerning probationary periods. To do this, I am joined by Susie Munro, senior legal editor at Brightmine. Susie, hello.
- Susie Munro:** Hello Robert.
- Robert Shore:** The Employment Rights Bill, as we all know, will potentially bring big changes to how probationary periods operate, with the proposed removal of the current two-year qualifying period for unfair dismissal slated to come into force in 2027.
- There remain plenty of unknowns when it comes to the Employment Rights Bill, of course. For instance, we don't yet know the detail of what the Government has planned for what it calls the 'initial period of employment'. That doesn't mean there's nothing employers can do to prepare in the interim, though. So in this podcast we're going to look at some recent cases and explore what lessons we can take from them that could help employers be ready for the removal of the qualifying period.
- Let's start by setting out the current position then. Susie, probationary periods don't actually have a special status in law, do they?
- Susie Munro:** They don't, no. There's no rights for employers or employees that attach specifically to the probationary period. The difference in the way that employers can treat employees during the probationary period is all about the fact that employees don't have the right to claim unfair dismissal in the first two years. So that means that

employers can dismiss without having to meet the standards of having a potentially fair reason, acting reasonably and following a fair procedure. They can do that and the employee can't bring an unfair dismissal claim.

You can have different contractual terms that apply during a probationary period, but in terms of statutory rights there's nothing special about the period that the employer defines as the probationary period.

So what these cases show is that there are still legal risks where an employer dismisses a probationer without a fair reason and without following a fair procedure. Because employees can still claim discrimination, victimisation, there might be a claim for automatically unfair dismissal. So it's not completely risk-free to dismiss someone at the beginning of their employment.

Robert Shore:

Now, as you said before, the Employment Rights Bill, there's quite a lot of detail still to be filled in. The situation is expected to change – what you described there – in 2027 with the removal of this two-year qualifying period. Could you say a little bit more about what we think we do know, though, about the Employment Rights Bill?

Susie Munro:

So, yeah. The Employment Rights Bill will remove the two-year qualifying period for unfair dismissal, and the Government has said that there will be a new initial period of employment. And to quote what they say about that, it'll be a 'lighter touch process for employers to follow to dismiss an employee who is not right for the job.' But we don't know much more than that. We don't know how long that initial period of employment is going to be. The Government has said that their preferred option is 9 months but that is yet to be confirmed.

Robert Shore:

Yeah. So actually, just trying to put those two ideas together, what does it mean then if it's 9 months and this is going to be in the Bill (or in the secondary legislation), but it's also a day one right. So is it day one or is it 9 months?

Susie Munro:

So that's just not clear at the moment. All we know is that the Government has committed to removing the two-year qualifying period and saying unfair dismissal is a day one right, presumably during the initial period.

Robert Shore:

And that initial period would be 9 months?

Susie Munro:

Well, we don't know.

Robert Shore:

That's where the 9 months is, if it's 9 months?

Susie Munro:

Yes. So the initial period of employment, we don't know how long that's going to be but yeah, let's say it's 9 months 'cause that's what the Government has suggested. During the initial period employees will be able to claim unfair dismissal but there will be this lighter touch approach, which presumably means that it'll be easier for employers to defend a claim of unfair dismissal. But we just don't know what it means yet.

Robert Shore:

Okay. But there is a day one right then that means you could potentially claim unfair dismissal. However, during this initial period of employment, which may be 9 months – that's what's been suggested at the moment – there would be a slightly different approach to that within employment tribunals?

Susie Munro:

Yeah. So it could be that there is the introduction of a minimum procedure to follow which is in some way less onerous than current requirements. Or there could be some kind of lower standard for employers to meet for a dismissal during the initial period to be seen to be fair. But whatever it is, there's going to be more scrutiny of how an employer has acted in the early stages of employment.

And in preparation for that, it's a good idea for employers to make sure that their probationary procedures are tightened up. So we're going to look at some cases today that show that it's already a good idea now to make sure you've got good probationary procedures in place, regardless of changes under the Employment Rights Bill.

In these cases we're going to see that there are legal risks that could have been avoided if the people involved had followed some stronger probationary processes.

Robert Shore:

Right. Susie then, let's start with a case where the employee was actually able to claim unfair dismissal.

Susie Munro:

Yes. So this is a set of circumstances that hopefully won't occur very often. There were some extraordinary delays, which meant that when the employer tried to apply its probation rules to an employee, they had actually already gained the right to claim unfair dismissal. So it's an unfortunate situation for the employer but it's helpful for us to highlight the difference in how employers can deal with dismissals during the first two years compared to dismissing employees once they have got the right to claim unfair dismissal.

So, the employer in this case is the Metropolitan Police. It's Bastin and the Commissioner of the Police of the Metropolis. So, Mr Bastin worked in the National Counter Terrorism Security Office as a delivery support officer. And there was a structure to follow for his probationary period. So, they held 3-month and 6-month review meetings, and he was told that there were concerns about his

progress. So weekly review meetings were then held and there was a training plan put in place.

Robert Shore:

Okay. So far, so good. That sounds like an appropriate way to deal with performance concerns.

Susie Munro:

Yeah. So they were following a reasonable procedure at that stage. The performance concerns continued and Mr Bastin's probationary period was extended twice. So that meant, because of the extension, it actually got to 17 months after he'd started when a meeting was held at the end of the probationary period. And the outcome of that meeting was that the manager said that she was going to recommend dismissal. So she was going to submit paperwork to HR and seek their views on whether there was a case for recommending dismissal. So they needed to hold another dismissal meeting for the final decision to be made.

So it was already a long probationary period with the two extensions, but for reasons that aren't clear from the judgement, there was then a further 15-month delay before the dismissal meeting took place. And during that time Mr Bastin carried on working without any more performance review meetings being held. So he'd started work in September 2021 and the dismissal meeting wasn't held until May 2024, when he already had well over two years' service.

Robert Shore:

Right. So he's obviously already qualified for protection from unfair dismissal.

Susie Munro:

That's right. So then the dismissal meeting was held. At the meeting the dismissal manager apologized for the delay but said that the hearing was only going to be considering his performance up to the end of the extended probationary period. So they weren't going to take into account any evidence of his more recent performance and whether he had made an improvement in the time since the probationary period. And on that basis, the decision was made to dismiss him.

Robert Shore:

Whereupon Mr Bastin brought an unfair dismissal claim and, not surprisingly perhaps, that was successful.

Susie Munro:

Yes. So, while Mr Bastin's performance was a potentially fair reason for his dismissal, the tribunal held that the police force should have considered his recent performance and whether that was a sufficient reason to dismiss him. So it should have informed him of any ongoing issues and given him the opportunity to respond and the opportunity to improve if there were still issues.

So, in an unfair dismissal case the employer has to show that they've acted reasonable in dismissing the employee for that

potentially fair reason, and in this case it just wasn't reasonable just to look at his performance from his probationary period, which had obviously ended 15 months earlier.

And then for the procedure to be fair, the tribunal found that the Met Police should have considered whether there were any alternative roles that might have been suitable for Mr Bastin. So that's not something you'd need to do for a dismissal during the first two years when the employee can't challenge the procedure, but the Met Police is obviously a large organisation and that was a relevant factor when looking at whether they'd carried out a fair procedure.

Robert Shore:

Yes. So this really illustrates the different approach an employer can take if they are addressing performance issues in the first two years of employment. Once those two years have passed, they then have to show that they have a fair reason for dismissal, that it is reasonable to dismiss for that reason, and that they have followed a fair procedure. Have I got that right?

Susie Munro:

Yes. The tribunal in this case actually set out what the purpose of a probationary period is, explaining that employers have more flexibility before unfair dismissal protection kicks in. So I'll just read out some of what they said. They said, 'The point of a probationary period is to see how the employee performs and whether they show improvement after training and guidance.' And they went on to say, 'An employer can decide that the employment is not working out and terminate the contract without having to follow the procedures that would be required for an employee with employment protection rights.' So in delaying the decision for so long, the Met had lost the opportunity to do that.

Robert Shore:

Right. Now, obviously what you've just described there will change with the passage of the Employment Rights Bill, although as we've said, we don't know exactly how. But there will be this lighter touch process, whatever that's going to be.

Right. I think we've said as much as we can about that one. So our next case is about someone who did not have the right to claim unfair dismissal but who brought claims for discrimination and victimisation.

Susie Munro:

That's right. This is Benassi and Maximus UK Services Ltd. So, Ms Benassi was an employment advisor for Maximus UK Services Ltd. Basically, her relationship with her manager didn't get off to a good start. So, Ms Benassi was 18 years old at the time, and she was the youngest person in the team. She felt a bit self-conscious about this and specifically asked her manager not to tell the rest of the team how old she was. The team were told, and then she made a complaint to the manager, as a result of which her line manager was

changed. Then there were a number of other incidents. She felt that she was being targeted by the former manager, and she raised a grievance.

So, the grievance specifically included a reference to her age. She said she believed that the manager would not have treated her like that had she been older. So she's made an allegation of age discrimination there.

Robert Shore:

Right. And presumably that wasn't the end of it? Things didn't improve?

Susie Munro:

No. Following the grievance, things got worse. She was subjected to what you might call micro-management. So she had daily meeting with both her new manager and the former manager, and she was singled out for criticism. For example, she was criticised or told that she shouldn't be wearing trainers when other people were wearing trainers who weren't being spoken to. Things like she was emailed by her formed manager to say that she'd been spotted swinging on her chair. Just very minor things.

The normal probation period was 6 months but at a probation meeting after less than 3 months it was decided to terminate her employment, and this was said to be due to her performance. And the outcome letter mentioned a number of things, a number of specific issues, like she had had breakfast after the start of her shift, and she had breached the dress code (and that was the reference to her wearing trainers once).

So interestingly, the company did engage an external HR company who advised on the situation. And the HR advisor said she had some concerns over the decision to dismiss. She pointed out that the incidents referred to didn't seem serious enough for a dismissal. For example, Ms Benassi had only worn trainers once. She hadn't eaten breakfast again during her shift after she'd been spoken to about that. But regardless of this advice, the company went ahead with the dismissal against the advice of the HR advisor.

Robert Shore:

Right. But it's only a few months into employment, so she's well under the two years required to claim unfair dismissal. But she was still able to challenge her dismissal. Can you tell us why?

Susie Munro:

Yeah. So, Ms Benassi claimed harassment on grounds of age, and victimisation. So the harassment claim failed. The tribunal said that while there was a hostile working environment, there was no evidence that this was because of her age. But her victimisation claim was successful. So, victimisation is where someone is subjected to a detriment because they've complained about

discrimination. In this case, she was dismissed because she'd raised a grievance alleging harassment because of her age.

Robert Shore:

Okay. And so it's irrelevant that that harassment claim failed. She doesn't have to show that she was discriminated against, just that she complained about it?

Susie Munro:

Yes. And that she was dismissed because of that complaint. So, the tribunal accepted that she was treated differently after bringing the grievance. So there were daily meetings and the critical emails and so on. And the tribunal found that the dismissal was based on minor or one-off incidents. There had been a clear alternative to dismissing Ms Benassi, and that would have been to just follow the normal procedures, continue with the probation periods to the normal six-month stage. And the most obvious reason, they thought, for how the company had treated Ms Benassi was because she had raised that grievance.

Robert Shore:

So it's a good illustration of why you need to act reasonably and fairly even before the two years are up.

Susie Munro:

Yes. So if the company had had evidence of genuine performance or conduct issues, if they'd followed a procedure that allowed her to improve, they would have been in a stronger position to defend a victimisation claim, 'cause they might have been able to show that the dismissal was because of her performance or conduct and not because she had raised a grievance.

Robert Shore:

So, we have one further case, and this is another discrimination case, I think?

Susie Munro:

Yes. So this is Stanley and The Village Bakery. Mr Stanley was taken on as a production operative for a large bakery. So this is a large-scale production line packing break for retail, rather than a small village bakery as the name would suggest.

So, Mr Stanley is visually impaired. So he has some peripheral vision but he's registered blind. When he started, he informed the employer that he had a central vision problem. And because of that, he found it difficult to keep up with the pace of the production. So, his role involved moving hot bread to a cooling area, moving bread around on trolleys, putting bread onto a conveyor belt. And he was having trouble keeping up with the pace of the fast production line. He was finding it difficult to kind of learn from other people how to do things in the most efficient way 'cause he wasn't really able to watch how other people were doing things.

So there were some complaints. So, a supervisor reported to Mr Stanley's manager that there'd been some kind of near misses with

trolleys. He had crashed trolleys into machinery, things like bread falling off trolleys. But importantly, nobody actually raised this with Mr Stanley himself. So it seems that he had very little supervision, very little support. He was making mistakes but nothing was really being done about it.

So there weren't any discussions with him about what issues he might be having because of his visual impairment. So, after 6 weeks at a probationary review meeting, he was basically dismissed. He was told that he was dismissed for not meeting the required standard.

Robert Shore:

Right. So this sounds like a clear case where there should at least have been a discussion with him about reasonable adjustments.

Susie Munro:

Yes. It was clear that he had a disability. He'd informed them of his visual impairment when he started the job, and it should have been clear, obviously, that it was having an impact on him being able to learn the job and carry out the required tasks.

But there was no discussion with him about the impact of his disability and whether any support was needed, what that support might be. So yeah, a clear case of failure to make reasonable adjustments.

Robert Shore:

So, did the tribunal go into what kind of adjustments should have been considered?

Susie Munro:

It did, yes. So it identified some. One of the reasonable adjustments it identified was that he should have had a longer probation period. So, they'd noted that he had previously worked in a similar role in a different factory setting, and there was nothing to say that he wouldn't have actually been able to perform the work given additional time to familiarize himself with the processes and the environment. Things like being more familiar with the layout could have avoided collisions. So yeah, it wasn't just the case that his visual impairment meant that he was never going to be able to do this job. But rather than giving him extra time, the company had actually cut short his probationary period.

The tribunal also said that informing his colleagues kind of officially of his visual impairment and his particular needs, and also giving him a high-visibility jacket, would have potentially helped because colleagues would have been more aware of him. They would have been reminded of his disability so could have just been more aware about where he was and what he was doing. That could have prevented some issues.

And also the tribunal said it would have been a reasonable adjustment to provide him with a support worker to work alongside him, perhaps on a temporary basis, correcting him when necessary, showing him better ways of doing things, just while he learnt the role.

Robert Shore:

And so Mr Stanley, I think, also succeeded with a claim for discrimination arising from his disability?

Susie Munro:

Yes. So this is a separate type of disability discrimination claim. The tribunal found that dismissing him after six weeks without providing any reasonable adjustments was not proportionate. So if there's no discussion or consideration even of reasonable adjustments, an employer is always going to struggle to argue that they're justified in dismissing someone where that is something that's arising from their disability.

So in this case they weren't able to rely on health and safety risks as a justification for dismissing him, 'cause they hadn't actually carried out any risk assessments.

Robert Shore:

So, this is another example of where it's risky to dismiss during the probation period, even though the employee won't be able to claim unfair dismissal.

Susie Munro:

Yeah. If the employer had considered the reasons behind Mr Stanley's performance issues and put some effort into thinking about how to support him, they could have avoided a claim. And aside from that, aside from the risks of a legal claim, there are efficiency and cost implications of having that high turnover that you might have if you're too quick to dismiss new employees without giving them proper support and a proper chance to actually prove themselves in the role.

So it's just general good practice to avoid legal issues, and also that kind of thing is going to help with being prepared for the changes under the Employment Rights Bill. So, if you are always clear about the reason for the dismissal, make sure that you can explain and evidence the reason that you're dismissing someone, obviously make sure that that reason isn't discriminatory and that it's not victimisation. So that's often going to be about training and support for line managers.

Robert Shore:

Yes. So there again you've mentioned the Employment Rights Bill, which is a topic that's coming up quite a lot at the moment, isn't it? So perhaps, Susie, you could just sum up again what employers can do to prepare – you've mentioned some things there – for the expected changes around probationary periods?

Susie Munro:

Yes. So, the key things is that employees are going to have more opportunity to challenge a dismissal if they're dismissed in the early stages of their employment. So they won't have to be able to show that they've been discriminated against, for example, or that it was victimisation or an automatic unfair reason for their dismissal.

So, what employers can do now in preparation is make sure that they have got really robust procedures in place for the probationary period. So that means making sure that they've got supervision and support for employees during that period, make sure that the processes are in place for monitoring employees' progress. And importantly, are the managers actually following these procedures? Are they asking for HR advice before dismissing somebody? And if they have asked for HR advice, are they actually following that advice?

So having those kind of strong procedures in place will help to be able to show that you've identified a fair reason for dismissal and that you have acted reasonably and fairly.

Having said all that, we don't know what the new procedures are going to be, but that is just good practice that I think will put employers in a strong position for any changes that are going to come.

We should probably also say that employers might want to focus a bit on their recruitment procedures. So are you doing enough to make sure that you're hiring the right people in the first place to reduce the likelihood of needing to dismiss somebody at an early stage in their employment?

Robert Shore:

That all sounds like very good advice. Thank you so much, Susie.

Susie Munro:

Thank you.

Robert Shore:

As ever, we have lots of supporting materials on the Brightmine website, and I'll put links to some of those in the show notes. And we will of course continue to track the Employment Rights Bill as it completes its passage through Parliament. Check our *On Your Radar* feature for news on that.

All that remains to be said is, until next time.

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