

## Member's Quarterly

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## Ask the Expert

## Worst Mistakes Made with Probation

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*What are the biggest mistakes made by employers in dealing with probation?*



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**1) Assuming that because an employee is employed less than three (3) months, they are probationary.**

They are not. Probation has to be contracted for. The ESA may not require termination pay under ninety (90) days but the courts do. In the *Shtabsky v Dubeta Interiors* decision, a two-week employee was awarded wrongful dismissal damages. There are cases awarding as much as six (6) months to employees who were fired because the employer changed its mind before even hiring them. There is no reason that a court might not award even more on the right facts. Ironically, it is safer to fire employees within the probationary period than before they even commence employment. The probationary term does not commence until they start work.

**2) Sending them the contract to sign after the agreement to employ them has already been made, such as on their first day of work.**

After all, if they have shown up, they must have had an agreement as to the job, including starting date. That is called a lack of consideration and an agreement signed after an oral agreement was already made is unenforceable.

**3) Having an agreement that they can be fired without cause or notice for a period of more than ninety (90) days or more than the ESA maximum in the province in question.**

That will invalidate not only the probationary clause, but the entire termination provision, as the courts have said that if one portion of a termination provision is unenforceable, it voids the balance.

**4) Not having a contract providing for the absolute right to terminate employees during the probationary term without cause at any time without payment of termination pay.**

Simply stating that there is a 90-day probationary period is insufficient. The courts have held that to fire someone during probation, the employer must still establish that the employee's performance is inadequate, although the test is not as stringent as just cause.

**5) Forgetting that probation is not a defence to statutory violations. The most common example is discrimination pursuant to human rights legislation, including not continuing employment past probation, for example, because the employee became ill etc.** Similarly, you cannot terminate an employee as a reprisal for an employment standards or occupational health and safety complaint. The fact they were probationary is of no assistance.

**Ask the Expert** continued

**6) Not firing employees during the probationary period.** In the *Cornell v Rogers Cable* case, I successfully argued that Rogers had waited until the day after probation ended and then evaluated and terminated Cornell, so had effectively terminated him as a probationary employee. However, I would not recommend taking that chance. Do it during the probation period, not after. Too many employers do not monitor their probationary periods. Employees can generally “white knuckle” it for ninety (90) days before their deficiencies become evident. But if those deficiencies appear within the ninety (90) days, they likely won't improve and you should use your probationary period.

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