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5 Important facts about probation that every employer should know



With the upward trend of companies appointing new employees subject to a probationary period, there are some instances where these companies have very little understanding of the legal interpretation of probation.

Some employers are under the incorrect assumption that, by appointing a new employee under probation, it entitles them to use probation as an excuse to fire the employee if he/she does not fit in (as example only), without having to meet formal legal obligations.

This article specifically covers the important factors that employers have to consider with regard to probation as well as the purpose thereof.



What is the purpose of probation?

The purpose of a probationary period is to evaluate an employee's work performance over a reasonable, mutually agreed-upon period of time during which the employer can ascertain the employee's suitability for the position in which he/she had been appointed before confirming permanent appointment.



The Labour Relations Act (LRA) and probation

Probation is dealt with in the Labour Relations Act (LRA) under the 'Code of Good Practice - Dismissal', Schedule 8.

The probationary status of an employee is only applicable to matters concerning work performance or competency, and therefore has no relevance to misconduct on the part of the employee during probation, nor can it be an easy way out for the employer on the basis of an arbitrary matter concerning the employee. All other matters or issues that arise besides work performance should be dealt with in the same way as in the case of any permanent employee. During the probation period the employee is still entitled to the full protection of labour laws.

With probation, the intention is not for the employer to dismiss the probationer "at will" if not entirely satisfied with his/her performance. There is a process to follow and legal requirements to be met and the dismissal must be substantively and procedurally fair.



What process must be followed for dismissal due to poor work performance?

The guidelines for dismissal for poor work performance (in general) are set out in the Code as follows:

“Any person determining whether a dismissal for poor work performance is unfair should consider-

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not-
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.”

A probationer’s performance must be monitored and assessed continuously as from commencement of employment with the above guidelines in mind. Although reasons for dismissal related to probation may be less compelling than those required for dismissal of a permanent employee due to poor performance (or incapacity) where such employee had already completed probation or had been working for the employer for some time.

A decision taken at the end of the probationary period not to appoint an employee amounts to dismissal. The employer must therefore be able to prove that all of the requirements in the Schedule have been met in order to succeed against a challenge of unfair dismissal relating to probation. The decision to dismiss an employee for unsuccessful probation must be supported by adequate records in order for the employer to justify its decision. The employer is also obliged to consider other ways, short of dismissal, to remedy the matter.



How should you manage the probationary period?

Managers or supervisors must therefore actively manage the probationary period in line with the contract of employment and address performance complications during probation by way of continuous evaluation, counselling, instruction, training and guidance – and pointing out to the employee in which areas he/she is not competent. The employee must also be allowed an opportunity to state his/her case is and how this could be addressed going forward.

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What records should be kept during the probationary period?

In practice, the employer must ensure that managers or supervisors are aware of these requirements and that they keep detailed written minutes and records of–

- meetings with the employee (where the employee may have the assistance of a co-worker), or even informal mentoring sessions or on-the-job training and coaching;
- solutions decided upon between the parties to address mistakes / performance;
- reasonable deadlines given for improvement; and
- the result of the measures taken for the employee to attain performance at the required standard.

In conclusion

Probation can be valuable to employers but must only be applied after the employer has become fully aware of the legal obligations and implications that go along with it. The employer should not be looking for some improvement in the employee's performance, but rather determine whether the employee has indeed been able to reach the required standard of performance during, or by the end of, the probation period.

Employers should ensure that they have a documented probationary policy, have set realistic performance standards and have clearly outlined the measures for evaluating and monitoring the work performance of employees.

SERR Synergy's labour services assist employers in drafting of probationary policies, disciplinary codes, poor performance procedures, etc.

About our Author: Henri Klopper joined SERR Synergy in 2014 and is the Gauteng Labour Manager. He completed his LLB degree at the University of Pretoria in 2010 and attended Law School. He also completed the Advanced Course in Labour Law at the University of Pretoria and was admitted as an advocate of the High Court of South Africa.

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