

# PROBATION

## GENERAL

Item 8 of the Code of Good Practice: Dismissal, deals with probation. An employer may require a newly hired employee to serve a period of probation before the confirmation of the employee's appointment. The purpose of probation is to establish whether or not the appointee's performance is of an acceptable standard before permanently employing the employee. Probation is for newly appointed employees only.

A probationary period should be reasonable. This will depend on the nature of the job, which in turn will determine how long it will take to establish whether the employee is performing satisfactorily or not.

As a general guideline, the more complex the nature of the job, a probationary period of e.g. a shorter period of time may be sufficient to evaluate the performance of a Receptionist, whereas a longer period may be appropriate for e.g. an Accountant.

It is advisable that the probationary period be stated in writing (e.g. as part of the employment contract or letter of appointment) and that the company's expectations during the probationary period be communicated clearly and are understood by the employee at the commencement of the employment and not during the course of employment.

The probationary period may be extended, within reason, where the employer is not convinced that the employee is performing to the required standard. If the period is extended, it should once again be done in writing. The purpose of the extension is to give such employee an opportunity to improve on the identified shortcomings.

## PROBATION AND DISMISSAL ON GROUNDS OTHER THAN PERFORMANCE

Should it become necessary to dismiss an employee during the probation period for a reason other than poor performance, the normal procedural and substantive requirements are valid and need to be applied. Examples of such dismissals would include

misconduct, incapacity due to ill health / injury or retrenchment. Therefore, in brief should an employee on probation be accused of theft, a disciplinary hearing should be held. Where retrenchment has become necessary, a consultation process should be followed prior to the retrenchment.

A probationary employee cannot be dismissed for reasons that are automatically unfair e.g. participation in a lawful strike. A probationary clause cannot be relied upon for dismissing a probationary employee on operational requirements.

Probation serves to identify performance problems before permanent employment is confirmed and to reasonably address these problems in various ways as discussed below.

## POOR PERFORMANCE PROCEDURES

During the probationary period, performance of the employee should be assessed. If the employee fails to meet the required standards or displays behaviour that is incompatible with the ethos of the workplace, the employee should be advised of these shortcomings.

This means that the employer should evaluate an employee during the probationary period and should provide regular feedback to him or her.

An employer should give an employee on probation, reasonable evaluation, instruction, training, guidance or counselling as required by him/her in order to render satisfactory work.

Where performance problems continue despite such intervention, the employer may follow incapacity procedures.

It is not necessary to hold a formal inquiry. The rules of natural justice will apply (e.g. when making representations the employee may be assisted by a fellow employee).

Only after considering all representations may the employee be dismissed or the probation period be extended. The finding should be made in writing. Where the probation period is extended, the

employer needs to set out clear performance standards that the employee should meet during the specified period of time.

## SUBSTANTIVE FAIRNESS

There must also be substantive fairness – in that there must be fair reasons as to why the employee is dismissed or the probation period extended.

It should be noted though that the employer is *not required to have as compelling reasons for the dismissal as would be the case with an employee who is not on probation* (i.e. with employees who are permanently employed).

The Code of Good Practice for Poor Performance: Incapacity, does not apply to probationary employees.

## DISPUTE RESOLUTION

An employee may refer an unfair labour practice dispute concerning an act or omission relating to probation to the CCMA or a Bargaining Council within 90 days of the act or omission.

Where a probationary employee has been dismissed, such a dispute may be referred to the CCMA or a Bargaining Council within 30 days of the date of dismissal or date of outcome of an appeal hearing (where applicable).

Unfair labour practice or unfair dismissal disputes relating to probation are scheduled for compulsory con-arb hearings.

See CCMA information sheet on con-arb hearings.

## RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended, section 188 and Item 8 of Schedule: Code of Good Practice: Dismissal.