

Probation defined

Unfair Dismissal contained in schedule 8 of the LRA regulates the respective rights of an employer and employee in a probationary context. The amendment provides that an employer may require a newly hired employee to serve a period of probation before the appointment of the employee is confirmed. Probation is for newly appointed employees only.

The purpose of probation is to establish whether or not the appointee's performance is of an acceptable standard before permanently employing the employee. The amendment confirms that the purpose of probation is to give the employer an opportunity to evaluate an employee's performance before confirming an appointment. It is made clear that probation should not be used for other purposes, for example, to deprive employees of the status of permanent employment.

Probation periods 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, the longer the probation period eg only a month may be needed to evaluate the performance of a cleaner, but four months may be appropriate for an accountant.

Probation periods may be extended, within reason, where the employer is not convinced that the employee is performing to the required standard.

It is advisable that the probationary period be stated in writing (eg as part of the employment contract or letter of appointment) and that the company's expectation during the probation period be communicated clearly and are understood by the employee. Should the probation be extended, it should once again be done in writing.

Reason less compelling and substantive fairness

Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on the expiry of a probationary period ought to accept reasons for dismissal that may be "less compelling" than would be the case had the dismissal been effected after the completion of the probationary period. This establishes a lower hurdle of substantive fairness that the employer must jump to prove the fair dismissal of a probationer.

Dismissal for poor performance during probation:

Schedule 8 of the Code of Good Practice: Dismissal, deals with probation.

An employer has the right to require a newly hired employee to serve a period of probation before confirmation of permanent appointment. This period is determined in advance and should be for a reasonable period.

Steps:

1. The employer must determine if the employee failed to meet the work standard.
2. If the employee did not meet the standard:
 - a. did the employee know; or
 - b. could he/she have been reasonably expected to know the standard.
3. The employer should give the employee instruction, training, guidance and/or counselling to assist the employee to meet the required standard of work.
4. This means that the employer should evaluate an employee during the probationary period and should provide regular feedback.
5. After completing the above, the employer should consider other ways short of dismissal eg extending the probationary period in instances where the employee still does not meet the required standard.

6. The employer may only decide to dismiss/ extend the probationary period only after the employee has had an opportunity to make representations. A trade union representative or a fellow employee may assist the employee.
7. Although it is not necessary to hold a formal enquiry, the employer must still comply with substantive and procedural fairness.

Note: It is suggested that employer who decide to dismiss or extend the probation period of an employee, do so in writing. This should include advising the employee of the right to refer the matter to a council or the CCMA.

A probationary employee cannot be dismissed for reasons that are automatically unfair eg participation in a lawful strike. The probationary clause cannot be relied upon for dismissing for these reasons.

Probation and dismissal on grounds other than performance:

Should it become necessary to dismiss an employee during the probation period for reasons other than poor performance, the normal procedural and substantive requirements are valid and need to be applied. This includes dismissal for misconduct, incapacity (ill health/ injury) or retrenchments. For example, if a probationary employee is accused of theft, a disciplinary hearing must be held.

CCMA procedure:

The procedure to be followed at the CCMA for any reason relating to dismissal of an employee or any unfair labour practice relating to probation will be a con-arb process.

DISPUTES

Disputes over a dismissal over dismissals during probation must be referred immediately to the CCMA/ Bargaining Council.