

Managing Probationary Periods: An Employer's guide to dismissing Employees during the probationary period

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INTRODUCTION

An employee's probationary period serves as a crucial phase in an employment relationship for both the employer and the employee. It allows the employer to assess the suitability of new hires while granting employees an opportunity to showcase their skills and competency. However, in certain instances it is necessary to dismiss an employee during her probationary period. In such cases, employers are under the mistaken impression that an employer may dismiss an employee without following the correct procedure purely because the employee is in her probationary period. This article seeks to lay down the correct procedure to follow when dismissing a probationary employee.

SOUTH AFRICAN LEGISLATION

Item 8 in Schedule 8 of the Labour Relations Act: The Code of Good Practice: Dismissal ("the Code") contemplates the dismissal of probationary employees due to their performance (the Code does not deal with dismissal of a probationary employee by reason of other, non-capacity related issues, such as misconduct or operational requirements). The procedure for such dismissal is handled differently to a dismissal for an employee that is not in her probationary period to protect the probationary employee from being treated unfairly while still allowing the employer the discretion to employ who they deem suitable. The Code sets out the following guidelines that must be followed when dismissing a probationary employee to ensure procedural and substantive fairness is adhered to:-

1. Probation Period

The probation period must be reasonable and should be determined in advance. It is not a requirement that the period be stipulated in writing, however it is highly recommended. The probationary period should be determined by taking into consideration the nature of the job and the time it will take to

determine the employee's suitability for the position. A position that is of a higher risk, such as a Chief Executive Officer, might have a longer probation period than for example a sales clerk.

The probation period can only be extended for a reason that relates to assessing the employee and not for any other reason such as to deprive the employee of the status of a permanent employee. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

2. Setting standards and assessment

During a probation period, it is necessary that an employee be made aware of what is expected from the employee and what standard it is expected of her.

Thereafter, the employee's performance must be continuously assessed. If the employer determines that the employee's performance is not meeting the required standard that was given to the employee, the employer should advise the employee of any aspects in which the employer considers the employee to be lacking and give the employee reasonable instruction, training, guidance or counselling to allow the employee to perform satisfactorily.

3. Incapacity hearing

Before a probationary employee may be dismissed or the probationary period may be extended, the employee has the right to make representations on the reasons why the employee has failed to perform properly.

The procedure leading to dismissal must include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider alternatives to dismissal to remedy the shortcomings of the employee.

The employee has the right to make representations on why the employee's performance has not been

up to standard. After the employee has made her representations and the representations are properly considered, the employer can either dismiss the employee or, if applicable and suitable, extend the probationary period of the employee.

The employee, if dismissed, should be notified that she has the right to refer a dispute to the CCMA.

4. Threshold for dismissal

In any dismissal, whether during a probationary period or not, substantive fairness is a requirement i.e., there must be fair substantive reason why the employee is dismissed. However, the Code sets out that the person who decides the fairness of a dismissal, such as a commissioner, ought to accept reasons that are less compelling than in the case of dismissals where the employee is not serving probation.

This means that an Employer's reasons for dismissing an employee during their probationary period does not have to be as strong as dismissing an employee that is not on probation. The concept of 'less compelling reasons' which is applicable to the dismissal of probationary employee, means that the employee's performance, compatibility to fit into the workplace plus general attitude and demeanour can result in dismissal.

DISMISSAL ON GROUNDS OTHER THAN PERFORMANCE

In the event that an employer wants to dismiss an employee on probation for any other valid reason other than performance, such as misconduct or operational requirements, the normal procedures for such dismissals must be followed and the probationary period cannot be relied on to dismiss the employee.

CONCLUSION

Dismissing an employee during her probationary period requires adherence to both substantive and procedural fairness. By providing employees with a reasonable opportunity to improve, maintaining transparent communication and following a structured dismissal process, employers can avoid unfair dismissal claims.

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