Probation and probation related dismissals in the CCMA.

By Johanette Rheeder

Many employment contracts contain probation clauses as a general rule and during the course of those first, new months of employment, the new employee is finding her feet and trying to fit into the new work culture. However, at some stage the employee is expected to fit in, perform and become productive in his position. Employers tend to give attention to this clause only when the new employee is not performing and they are looking for avenues to correct behaviour or to terminate employment. The South African labour law relating to probation is led by Schedule 8 of the Labour Relations Act 66 of 1995 – guideline on probation: This does not form part of Legislation; however, it is binding on employers as the guideline is accepted as the basis for fair conduct.

In terms of clause 8 of Schedule 8 to the Labour Relations Act[1] (hereinafter referred to as "the LRA") an employer may require a newly hired employee to serve probation, before the employment of the employee is *confirmed**[2]*. The purpose of probation is to allow the employer an opportunity to evaluate the employee's performance before confirming the employment or dismissing the employee. Probation should not be used for purposes to deprive employees of permanent status of employment. Although the employer is allowed to confirm appointment or to dismiss an employee subsequent to probation, the status of the employee should not be seen as that of a "temporary" employee.

The period of probation should also be *reasonable*, the length of probation should be determined with reference to the nature of the job, and the time it takes to determine the employee's suitability for continued employment. There is no confirmed standard period for probation. It very much depends on factors such as level, seniority, complexity of the position, skill, qualification and operational needs, to name but a few. For example, a blanket probation of one year may appear excessive if there is no compelling reason for the probation to be so long. Although this, in itself is not necessarily unfair, it may result in a complaint from the employee that she is subjected to a lesser dismissal procedure and test whilst on probation, therefore at risk for a longer period of time than may be fair, compared to the standard set by the Schedule. Even more so in cases where the functions of the employee are not of such a technical or senior nature that it requires an assessment period of a year. The test in this regard is one of fairness, depending on the nature and complexity of the position and the skill and qualification of the employee.

Assessment:

During the probation period the employee's performance should be assessed on a regular, periodic basis. The main aim is to allow the employee to *improve* performance. The frequency and type of assessment will depend on the nature and complexity of the job, the skill, competence and seniority of the employee[3]. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling to allow an employee to render a satisfactory service. This will depend on the position, skill, qualification and seniority of the employee and may vary from employee to employee and position to position. In the *IBM* case, the Court confirmed that a distinction can be drawn between a probationary employee appointed to a responsible position and a junior employee on probation. For example, when dealing with a person on probation in a responsible position like a professional assistant, where the person claims to have the necessary experience to do the job, it is not unreasonable for the employer to simply point out the perceived shortcoming of the probationer and to emphasize the importance of improving her performance if she wants to be permanently employed. Such an experienced employee does not have to be treated similar to a probationer who was still in training[4].

As a *general guideline*, at least 2 to 3 assessments should take place during the first 3 months of probation. The aim of the Schedule is to indicate that the assessment should be done sooner than later. It should especially not be left to the last moment, just before the expiry of the probation period. Again, this is not fixed as the skill, qualification and seniority of the employee may result in the manager expecting the employee to fit into the position much quicker and easier than an employee who needs more training and guidance due to inexperience and lesser seniority. Very often, this is also dictated by the performance of the employee. The employee who fits in and performs soon after employment may not need any assessment for the simple reason that it is not required. Scheduling an assessment should however be considered as soon as it is clear to the manager that the employee is not fitting in or performing as expected.

Procedure to follow:

The format of the assessment is not prescribed in law. However, in any subsequent CCMA process, the employer bears the burden of proof and will have to prove to a commissioner that a fair process has been followed.

Assessments should preferably take the form of a pre-scheduled meeting with an agenda, to allow the employee to prepare for the meeting. This meeting need not take the form of a hearing or enquiry and will consist of a discussion on the requirements the employee is not complying with, the identification of the reasons or cause of non-compliance and the remedial steps with clear timelines. Where training is required, it should be agreed upon with set time lines. Subsequent assessments should consist of positive or negative feedback on the previous period. It is for the manager to decide how many assessment meetings are required to allow the employee to perform up to standard.

Should the employer determine that the employee's performance is below standard (subsequent of the assessments and feedback described above), the employee should be advised thereof in a final meeting. This need not take the form of a formal enquiry, therefore a formal enquiry with a complainant, representatives and chairperson and the presentation of evidence and calling of witnesses. This final meeting can take the same form as the interim assessments with a discussion between manager and employee. In this meeting, the manager need to inform the employee of the reasons why dismissal is considered appropriate and provide the employee with the opportunity to state why dismissal should not take place. Alternatives such as extending the probation can be considered at this meeting. Should the manager not be convinced of any prospects of compliance or improvement, the employee may be dismissed. The standard to be applied is a lighter standard than the one required when dismissing an employee not on probation.

The employer may either extend the probation or dismiss the employee after the probation period expires. This can only take place after the employee has been invited in a meeting to make representations as to why the employee should not be dismissed and had an opportunity to defend herself against representations made by the employer in the meeting.

What is the test that applies?

The law allows for reasons which may be *less compelling*[5] than would be applicable in dismissal cases after completion of probation, however the requirement of counselling and representation should be adhered to. Such an employee therefore need not be treated in accordance to the same standard as a non-probationer. *In the IBM case the court confirmed that* before the employee is established or entrenched in the workplace, the employer has the right to dismiss for lesser reasons than would be the case after probation. A distinction must be drawn between a permanent employee and one on probation. The employer need not treat the employee as a permanent employee when dismissing her. The concept of 'less compelling reasons' which is applicable to the dismissal of probationary employee, means that the work performance, compatibility to fit into the workplace plus general attitude and demeanour can result in dismissal, on al lesser test than the permanent employee. The employer has the right to 'test' the employee in different situations and determine whether he is capable of coping with the rigours of permanent employment. If a probationary employee is found to be wanting on key aspects of the job description the employer is at liberty to follow its instincts and not appoint the employee permanently. These important but often intangible considerations are inherent in the context of 'less compelling' reasons.

It is advisable for employers who frequently rely on probation clauses to develop a policy dealing with the procedures to be applied by managers when assessing performance of probationary employees. Guidelines should be included to assist managers with the recording of these probationary discussions and the outcomes thereof. This is important as probationary employees have the right to refer an unfair dismissal dispute to the CCMA for adjudication. The CCMA will schedule a con/arb and the parties may not split the process. Therefore, the arbitration will commence directly after the conciliation process. The employer bears the burden of proof which requires that the assessment and final discussion must be recorded, as the employer must show that the dismissal was for a fair reason and complies with a fair procedure. The more comprehensive the portfolio of evidence, the better! The employee only need to establish the existence of a dismissal, which is normally not in dispute. The remedies for such an unfair dismissal is reinstatement or compensation. The commissioner will prefer reinstatement.

1 Labour Relations Act 66 of 1995, as amended by Labour Relations Amendment Act 6 of 2014.

2 IBM South Africa (Pty) Ltd v CCMA and others JR64/14.

3 See IBM Case *supra*:

4 Rheinmetall Denel Munition (Pty)(Ltd) v National Bargaining Council for the Chemical Industry and others (2015) 36 ILJ 2117 (LC)

5 IBM Case *supra.*