

# PROBATION

## GENERAL

An employer may require a newly hired employee to serve a period of probation before confirming the employee's appointment. The purpose of probation is to establish whether or not the appointee's performance is of an acceptable standard

Probation does not automatically form part of an employment contract and must be part of the employment conditions at the time that the employment relationship commences.

A probationary period should be reasonable. The nature of the job will determine the length of time it will take to establish the employee's suitability for continued employment.

As a general guideline, the more complex the job, the longer the probationary period may be. For example, a shorter period may be sufficient to evaluate performance for a receptionist as opposed to a managerial position with more responsibilities.

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 understood by the employee at the commencement of the employment and not during the course of employment.

The probationary period may be extended for a reason linked to the purpose of the probation, such as when

the employer is not yet convinced that the employee is performing to the required standard. If the period is extended, it should be for a reasonable time and preferably recorded in writing to provide certainty for both sides. The purpose of the extension is to give such an 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, if an employee on probation is accused of theft, a disciplinary hearing should be held.

A probationary employee cannot be dismissed for reasons that are automatically unfair, e.g. participation in a lawful strike or pregnancy. A probationary clause cannot be relied upon for dismissing a probationary employee for operational requirements. Where retrenchment has become necessary, a consultation process should be followed prior to the retrenchment.

An employer may dismiss a probationary employee for reasons related to conduct, provided that there are fair reasons for the dismissal and that a fair procedure is followed.

Probation identifies performance problems before permanent employment is confirmed and reasonably addresses these problems in various ways, as discussed below.

## POOR PERFORMANCE PROCEDURES

During the probationary period, the employee's performance should be assessed. If the employee fails to meet the required standards or displays behaviour that is incompatible with the workplace's ethos, 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 or a trade union representative, where applicable).

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Only after considering all representations may the employer decide whether dismissal is warranted. 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 dismissing an employee based on poor performance as would be the case with an employee who is not on probation.

## 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. The LRA 7.11 referral form can be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>).

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 the CCMA information sheet on con-arb hearings.

## RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended.
- Item 8 of the Code of Good Practice: Dismissal.

