

PROBATION

WHAT IS PROBATION AND WHAT PURPOSE DOES IT SERVE?

The meaning of “probation” is “testing” the employee’s work performance and it can be a very useful tool for the employer, as it allows them to be certain that the person is right for the job. It is a conditional employment contract (written or unwritten), that is, the continuation of the contract is conditional on whether the employee’s work performance is satisfactory. The employee’s suitability may also depend on their ability to fit in with their colleagues and the company ethos. However, this aspect must be approached with caution, as this can be subjective and difficult to prove.

The employer may also promote an employee into a higher position subject to a probation period, and it is also possible to employ someone without a stipulated probationary period.



HOW LONG SHOULD A PROBATION PERIOD BE?

If it is used, the length of the probation period should be determined by the complexity of the position, for example a:

- Cleaner or general worker may be required to work a probation period of 4 weeks
- Filing clerk 6 weeks
- Credit controller 3 months
- Bookkeeper or manager a probation period of 6 months

Labour legislation does not prescribe the length of the probation period but allows employers freedom to select a probation period that is fair and sufficient to assess the employee’s abilities and competence; ideally it should be mutually agreed upon by the employer and employee.

(A fixed term contract cannot take the place of a probation period, as FTC can only be used if the work is not expected to continue beyond that specified period of time.)

WHAT DOES A TYPICAL PROBATION CLAUSE LOOK LIKE?

A typical probation clause in an employment contract could be something like this:

“The employee shall serve a probation period of 3 months from the commencement of his/her employment. During this period the company shall assess the employee’s suitability for permanent employment. This shall depend on the employee’s ability and competence to perform his/her duties. If necessary the employer shall evaluate, instruct, train and offer guidance or counselling in order for the employee to render satisfactory performance.

In the event that the employee’s performance is unsatisfactory the employer reserves the right to dismiss the employee after all procedures have been followed. Should the employee successfully complete the probation period, the employee shall be appointed to the permanent staff.”

WHAT DO EMPLOYERS NEED TO DO BEFORE THEY IMPLEMENT PROBATION PERIODS?

Before implementing a probation period as part of employment contracts, the employer should first:

- Design a probationary policy and procedure
- Set realistic performance standards
- Design measures for monitoring and evaluating work performance
- Training management in probation law and in the implementation of the probation policy and procedure

WHAT IF THINGS DON'T WORK OUT WITH THE EMPLOYEE ON PROBATION?

It is possible to dismiss the person before the probation period has expired, but in this case and where the employee has served the full probation period, due process has to be followed, and the employee should not be dismissed for unsatisfactory performance unless:

- The employee has been given appropriate evaluation, instruction, training, guidance and counselling
- After a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.
- The procedure leading to dismissal includes an investigation to establish the reasons for the unsatisfactory performance and the employer has considered other ways, short of dismissal, to remedy the matter.
- In the process, the employee has been given the opportunity to exercise the right to be heard and to be assisted by a trade union representative or a fellow employee.



Employers should consider:

- Whether or not the employee failed to meet a performance standard
- If the employee did not meet a required performance standard whether or not the employee was aware, or could reasonably be expected to have been aware, of the required performance standard
- If the employee was given a fair opportunity to meet the required performance standard
- Whether dismissal is an appropriate sanction for not meeting the required performance standard.
- If written records and minutes of the various meetings with the employee, where detailed records were kept of what was decided upon between the parties to rectify the matter, what period of improvement was decided upon by agreement between the parties, and what the result was of the implementation of the agreed rectification measures.

Employers can extend the initial probation period if the employee shows promise but has made some errors, however, before extending the probation period, the employer needs to:

- Make it clear that the employee is on probation
- Clarify the length of the probation period
- Set reasonable performance standards

WHAT COULD HAPPEN IF DUE PROCESS ISN'T FOLLOWED BEFORE DISMISSAL?

If due process is not followed when dismissing someone, during or after the probation period, the consequences for the employer could be expensive, for example:

- In the case of *Fraser vs Caxton Publishers* (2005, 3 BALR 323) the employee was fired for falsifying her CV and for incompatibility. She took the matter to the CCMA where the arbitrator agreed that she was indeed guilty of the conduct for which she had been fired. The arbitrator also agreed that this misconduct was serious enough to merit dismissal. Despite this the arbitrator found the dismissal to be unfair because the employer had not given the employee a chance to defend herself against the charges. The employer was therefore ordered to pay the employee compensation equal to four months' remuneration.
- In the case of *Tharratt vs Volume Injection Products (Pty) Ltd* (2005, 6 BALR 652) the employee was dismissed during his probation period for poor performance. As the employer had failed to investigate the cause of the poor performance the CCMA found the dismissal to be unfair. The employer was therefore ordered to pay the employee compensation equal to three months' remuneration.

A USEFUL TOOL IF USED WISELY

So, implementing a probation period is very useful and protects the employer and the business by ensuring the right person for the job is permanently employed, however, it is important to follow due process in order for it to be completely successful.

