

Short notes on:

Probation

Introduction

When an Employer considers hiring a new Employee, the Employer will always be concerned if the said Employee will be the right fit for the business. To help gain peace of mind, a period of Probation can be utilised to legally 'test the waters.' Probation can be best described as a trial period during which a new Employee's performance can be evaluated. During this period, the Employer and the Employee are responsible for making a genuine attempt to determine the suitability of the Employee for permanent employment. Suitability relates not only to the Employee's performance but also as to whether the Employee fits in at the workplace.

The Labour Relations Act 66 of 1995

Schedule 8 to the Labour Relations Act (hereinafter the LRA) addresses the practice of Probation. As an Employer, dismissing employees who have completed their Probation without following the guidelines contained in Schedule 8, may constitute an unfair labour practice. By using Probation as a means of hiring and firing to avoid appointing Employees permanently, you would not be utilising Probation for its intended purpose. This may have dire consequences for an Employer.

As per Section 8(1)(d) of Schedule 8 of the LRA, when making use of a Probation period, the duration should always be fully discussed before entering into such a Contract. There are no explicit mentions of the length of Probation in the LRA. The length of the Probation could differ depending on many factors and would thus differ from Employee to Employee. It is important that a fair and transparent discussion between the potential Employer and Employee must be held prior to the commencement of employment. Factors to consider would be the industry and complexities that the job would entail, the job description, the job title and also the speciality of the skill needed. For example, in the corporate environment, junior level employees are often given three-month probationary periods, yet if a hospital were looking to employ a new resident Cardiologist, a period of one year would not be unreasonable given the nature of the job.

Evaluating the Employee's performance during Probation

Section 8(1)(e) – (f) of Schedule 8 of the LRA further lays out the process to follow in terms of evaluating an Employees' performance during Probation. The LRA at Section 8(1)(e) states that:

'an employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.'

It would therefore not be enough for an Employer to provide a desk and a target for Employees. The Employee must be granted a reasonable opportunity to perform and to improve his/her performance by ensuring that he/she has been given adequate training and guidance.

If an Employer is of the opinion that the Employee is underperforming, the Employer is duty bound to inform the Employee of the underperformance. The Employee should be informed of exactly how or in what manner their performance is considered to be sub-standard. This may be conducted in the form of a regularly scheduled meeting whereby the Employee's performance is assessed. It must be emphasised that these scheduled assessment meetings must be properly recorded and documented. The Employee must also be given time frames within which he/she is expected to have improved his/her performance by. Both the Employee and Employer must provide input as to how the underperformance can be addressed and rectified. Should the Employee's performance not be improved by the set time frames, then the Employer must consider providing the Employee with additional training, guidance and counselling. Communicating properly with the Employee during the Probation period is crucial to ensure that the performance and the suitability of the Employee can be properly determined. Therefore, the Employer cannot just take decisions regarding performance without allowing the Employee to provide feedback and/or input as well.

As per Section 8(1)(g) of Schedule 8, any extension of the Probation period may only be done if it relates to the 'purpose of probation.' This would mean that if after the predetermined duration initially planned for, it is reasonably agreed upon that the Employee would require more time to reach the required standard of performance, then such an extension can occur.

What must the Employer do when the Probationary Period has lapsed?

Once the Probationary period has lapsed, and no further extension is negotiated, the Employer has one of two options. Firstly, the Employer could decide that the Employee fits in well and can perform

the job required and thus uplifts the probation. Alternatively, the Employer may decide to terminate the Employee's Contract. Where an Employer decides not to uplift the Probation based on unsatisfactory performance, as per Section 8(2), such dismissal may only occur provided that Employer has been given the proper training, guidance, counselling to the said Employee and allowed a reasonable period of time for the Employee to improve his/her performance.

Through all of these processes, the Employee would have the right to make representations or with the assistance of a Trade Union Representative or Fellow Employee.

Conclusion

Considering the employment landscape looking the way it does in this country, businesses and entrepreneurs need to be reminded that their success can translate into employment for others. The concern would always relate to issues of transparency and Probation periods are a great way of legally and practically ensuring that the potential permanent Employee is capable of handling not only the workload but the environment as well. It is of paramount importance that the guidelines as per the LRA and Schedule 8 to the LRA should be strictly adhered to by the Employer. The Employer may not take any shortcuts while the Employee is still on Probation.

Navigating the assessment, training, counselling and guidance of an underperforming Employee can be quite daunting, it is, therefore, advisable that you contact an expert for assistance and guidance to ensure that you comply with the provisions contained in the LRA and Schedule 8 to the LRA. Contact SchoemanLaw for expert assistance and guidance on Employment Contracts, Probation and all other employment-related needs.