EMPLOYEES ON PROBATION: CAN YOU DISMISS FOR POOR PERFORMANCE?

“… arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves” (extract from judgment below)

Our laws allow employers to hire new employees on a probationary basis, and doing so can give both parties time to assess how good the “fit” actually is and whether the employee should become a permanent one.

Employers must however avoid falling into the trap of thinking that they can dismiss a probationary employee at will; on the contrary they must ensure both “substantive” and “procedural” fairness at all stages of the process.

But how do you ensure fairness?

The Labour Relations Act’s “Code of Good Practice: Dismissal” provides important guidelines in this regard (note that what is set out below is of necessity only a summary so be sure to take full legal advice on how the Code’s detailed requirements will apply to your specific case) –

* It entitles employers to require new employees to serve a probationary period “before the appointment of the employee is confirmed”. It must be for a “reasonable duration”.

* The employer must use the period of probation to assess performance. What does that mean? Per the Labour Appeal Court (LAC) in the recent decision discussed below “…the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of “fit” – aspects of demeanour, diligence, compatibility and character”.

* The employer must give the employee reasonable assistance, training and guidance.

* An employer is entitled to extend the probationary period in order to complete any performance appraisal.

* Importantly, a lower standard of substantive fairness applies during the probation period than would be the case with permanent employment: “Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.”

That provision, held the LAC, “is a clear indicator that arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves”.

Let’s have a look at that LAC decision as it provides a good example of these principles in action…

Dismissed for poor work performance

* A non-profit organisation employed a supply chain coordinator under an employment contract which required a 6 month probationary period to give the employer time to assess the employee for suitability for permanent employment.

* Concerns over the employee’s performance arose during her probationary period, she was consistently made aware (in eight performance meetings and appraisals over a three month period) that her performance was not up to standard, and eventually a hearing concluded that she “lacked the understanding and ability to carry out her assigned tasks despite having been given assistance and a reasonable opportunity to improve”.

* When she was dismissed for poor work performance she referred her dismissal to the CCMA (Commission for Conciliation, Mediation and Arbitration). The commissioner held her dismissal to have been unfair and ordered her reinstatement retrospectively to the date of dismissal. The Labour Court declined to reverse this decision.

* Importantly, the commissioner had concluded that the employee automatically became a permanent employee when her probation ended (her actual dismissal took place only after expiry of the probationary period) and that this indicated that her employer was satisfied with her performance and that she had satisfactorily completed her probation period. Moreover, held the commissioner, the employer had not properly considered sanctions or remedies other than dismissal and the employee should have been retrained and her responsibilities adjusted.

* Not so, held the LAC on appeal. When the probation period came to an end the employer was engaged in an ongoing review and evaluation process and by inference intended to extend the probation period until the review and evaluation process was completed. The lower standard of fairness accordingly applied and the evidence revealed “a performance problem that sufficiently justified the [employer]’s decision, after extensive evaluation, counselling and guidance, not to confirm [the employee]’s suitability for permanent appointment.” As an NPO with limited resources, the employer had no obligation to re-write the employee’s job description.

* The dismissal was accordingly fair and the CCMA’s reinstatement award set aside.

A final thought - as always, our labour laws being so complex and the penalties for getting them wrong so severe, take specific legal advice on your particular matter!