

**INTERNATIONAL PERSPECTIVES
ON THE TERMINATION OF EMPLOYMENT DURING THE
PROBATION PERIOD**

By

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Declaration

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Date: September 2018

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Abstract

The right to fair dismissal during the probation period in the employment contract is well recognised in South African labour law. Anecdotal evidence explored in this study suggested that South Africa may be over-regulated in this regard. The International Labour Organisations' (ILO) Convention C158 provides international standard setting guidelines in respect of the termination of any worker's employment during the probation period. The ILO's standards in this regard were considered and the respective positions on dismissal during the probation period of employment in the Netherlands, the United Kingdom and South Africa were compared to ILO Convention C158.

The researcher found the dismissal practices during the probationary period of employment in South Africa to be out of step with the international standards and the position in the selection of foreign jurisdictions. The researcher recommends that law makers and employers should incorporate a more flexible dismissal framework during the probation period, governed by an annual financial income threshold. This will simultaneously protect employees against unfair dismissals after a certain period and allow employers to utilise a skilled labour force which is aligned to the specific industry and organisational operating standards.

Key Words: Probation Period, Dismissal, ILO, Netherlands, United Kingdom, South Africa

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List of Abbreviations

LRA	- Labour Relations Act
CCMA	- Commission for Conciliation Mediation and Arbitration
ILO	- International Labour Organisation
ILJ	- Crawford and Grace hotel
UN	- United Nations
ACAS	- Advisory Conciliation and Arbitration Service
ERA	- Employment Relations Act
CC	- Civil Code
BBA	- Buitengewoon Besluit Arbeidverhoudingen
CWI	- Centrum voor Werk en Inkomen
EA	- Employment Act

INTERNATIONAL PERSPECTIVES ON THE TERMINATION OF EMPLOYMENT DURING THE PROBATION PERIOD

CHAPTER 1

1.1 Background

“After several months of probation work of standing on my feet some ten to twelve hours a day, I decided that as a nurse I was a pretty good entertainer”. These words expressed by Kate Smith question and capture the very crux of the probation period and if it is still relevant to our current labour legislation ("Kate Smith Quote", 2017).

Probation according to Z. Baloyi and A. Crafford (2006), refer to a trail period granted by the employer to newly appointed employees, before agreeing to permanent employment status in the form of a written or unwritten contract (Tesnar, 2017). The probationary period refers to a reasonable discretionary period during which the suitability of a candidate is furthermore determined (Ivan Israelstam, 2013).

The Code of Good Practice Dismissal (attached hereto as Annexure A), as contained in Schedule 8 of the Labour Relations Act (LRA), states that this period is determined by “the nature of the job and the time it takes to determine the employee’s suitability for continued employment” (Schedule 8, Item 8, 1(d)). This process is furthermore regarded as an essential phase in the induction process of an organisation (Elliott & Peaton, 1994) (Fowler, 1996).

The induction process according to Fowler (1996) and the University of West London can be described as the steps used by an employer to ease an employee into his or her new position, the organisation's culture, processes, policies and the performance standards expected from them (Anon, 2017). This process forms an integral part in determining if the employee will be successful in carrying out his or her future duties (Tesnar, 2017).

The Code of Good Practice recommends that an employee's performance should be monitored from day one. If the employee lacks the relevant skills, he or she must be provided with the necessary evaluation, counselling, instruction, training and guidance in order to achieve and maintain the required work performance standards as set out by the employer.

If an employer wishes to arrive successfully on the opposite bank of the probation river, he or she might have to acquire additional buoyancy facilitators. These facilitators can take the form of training supervisors in probationary policy and procedures, setting reasonable performance standards, make use of a standardised measure of the performance instrument and finally designing a probationary policy and procedure protocol parallel to the Code of Good Practice (Anon, 2011) (Ivan Israelstam, 2013).

The employer is furthermore in the case of possible dismissal, obligated to preserve all written records and minutes of previous performance meetings held, detailed records of what was decided upon to rectify the matter, what period of improvement was decided upon and what the result was of implementing the agreed rectification measures. This proof will be required should the employee refer the dispute to the CCMA (Tesnar, 2017).

1.2 Problem Statement

When reviewing the literature on the use of probation periods in organisations, there appears to be little theoretical analysis on the practice and few empirical studies on the topic have been undertaken (Loh, 1994). Elliot and Peaton (1994), highlighted a general lack of qualitative ground work regarding probation periods and state that further research in this area is required (Baloyi & Crafford, 2006).

What is the purpose of a probationary period of employment given the requirements of schedule 8, item 8 of the LRA 66 of 1995.

1.3 Purpose Statement

The purpose of this study is to do a comparative analysis regarding the dismissal of probationary employees, whether for poor work performance or misconduct in an international framework.

1.4 Research Question

Does the employment of employees on a probationary period ensure a more simplified termination of employment process of probationary employees?

1.5 Research Objectives

The researcher identified five sub-questions that were to be explored throughout the study.

They are:

- i. The nature and purpose of probationary periods in employment.
- ii. What are the probationary requirements in the Netherlands?

- iii. What are the probationary requirements in the United Kingdom?
- iv. What are the legislative requirements of Schedule 8, item 8 of the LRA 66 of 1995?
- v. Are there any benefits in employing employees on probation, given the dismissal requirements?

1.6 Academic Value and Intended Contribution of the Study

This study aimed to narrow the gap in complexity between the probation period and the termination of employment contracts. This was done by identifying a simpler and more streamlined approach to these phenomena. This study aimed to serve as an integrated analysis that can be used to determine the importance of the probationary period and if it was indeed still necessary and relevant in the current labour legislation. Finally the study aimed to act as a guide to future lawmakers when re-examining the probation period and its significance in the employment contract.

1.7 Literature Review

A literature review is an assessment of current literature and provides one with a summary, comparison and evaluation of the key concepts that will be explored in a study ("QUT cite|write - Writing a literature review", 2017). Machi and McEvoy (2009), comprehensively define a literature review as:

“a written document that presents a logically argued case founded on a comprehensive understanding of the current state of knowledge about a topic of study. This case establishes a convincing thesis to answer the study’s question.” (p. 4).

In this literature review the researcher examined the probation legislation requirements of South Africa by consulting all relevant labour legislation, in specific Schedule 8, item 8 of the LRA 66 of 1995, and this will be compared to those of the Netherlands and the United Kingdom.

These two countries were selected due to their prominent contributions to South African history and to their close relation to South African legislation formulation.

SOUTH AFRICA

The Concise Oxford English Dictionary (2011) defines probation as:

“A process of testing or observing the character or abilities of a person who is new to a role or job” (Stevenson & Waite, 2011).

This “process of testing” known as the probation period was incorporated into the newly formulated LRA after the first democratic elections held in 1994. The intention of this act was to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of this act (LRA, (1995).

These objectives are parallel to Section 23 of the Constitution of the Republic of South Africa and to the guidelines of the International Labour Organisation (ILO) of which South Africa is a member state. The LRA furthermore provides a framework to employers, employees and applicable trade unions concerning collective bargaining and formulating industry policy. The Act finally promotes employee participation in decision making and the effective resolution of all labour disputes.

To fully utilise the objectives mentioned above one would have to be a permanent employee in an organisation. A permanent employee according to the CCMA is defined as (CCMA Info Sheet: Employee v Independent Contractor attached here to as Annexure B):

“someone who is employed with the intention of there being an ongoing employment relationship, or in other words, for an indefinite period. This permanent, ongoing relationship may be full time or part time.”

An employee on probation on the other hand according to the LRA is not yet fully employed and is governed by a special subsection in the LRA known as Probation, found in Schedule 8, Item 8.

Item 8(1)(b) of Schedule 8 states that:

“The purpose of the probation is to give the employer an opportunity to evaluate the employee’s performance before confirming the appointment.”

In *Crawford v Grace Hotel* (2002) 21 ILJ2315, the CCMA explained the purpose of probation as follows:

Employment decisions may often turn out to have been imprudently made, which is not surprising considering the limited information and knowledge of the applicant available to the employer at the time of recruitment. Probation affords employers a reasonable opportunity to correct errors in recruitment and selection without having to incur the costs to the business, financially or otherwise.

Unfair terminations can result from the code that recognises an employer’s right to contract for a reasonable probationary period by assessing the truthfulness of the earlier decision. Such a right is inequitable to the employee, who by his or her agreement thereto must be aware that permanent employment is not being offered to them prior to the successful completion of the agreed period of probation.

Similarly in *Whitfield v Inyati Game Lodge* (1995) 1 BLLR 118, it was stated that:

“To protect the rights of the probationary employee, the Court must reconcile the conflicting interests of work security and protection against arbitrary action, on the one hand and the right to employ the competent and most compatible workforce on the other.”

It can therefore be said that the purpose of probation is to provide employers with the opportunity to correct errors in employment decisions in order to transfer protection to them

by ensuring that they employ the most competent workforce whilst protecting employees against unfair arbitrary action. Schedule 8 furthermore defines various additional employment guidelines that can be followed in the probation period employment contract.

These guidelines were furthermore explored in chapter 6 of this research study, titled, “the probationary requirements related to South Africa”.

THE INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO plays an integral part in South African labour legislation by enforcing international labour standards in all her member states, of which South Africa is a member. The ILO is a specialist agency of the United Nations (UN) governed by a mandate to protect all working people and to promote their human and labour rights (Niekerk & Christianson, 2008).

After the First World War a peace conference created this tripartite institution that consisted of participating governments, employer organisations and worker unions (Dunning, 1998). The ILO was set up in 1919 under the Treaty of Versailles to facilitate international agreements on labour protection through the adoption of Conventions and Recommendations by its member states. It was the only major international organisation to survive the demise of the League of Nations and in 1946 it became the first specialist agency of the UN (Swepston, 1998).

The ILO makes use of Conventions to guide member states in their own labour legislation formulations. These Conventions are codified into three categories. Category one protects basic human rights, category two entails those that support key instruments of social policy formation and category three establishes basic labour standards (Hughes, 2005).

The Governing Body consists of 28 government members, 14 employer and 14 worker members. Ten of the government seats are permanently held by states of chief industrial importance namely; Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States ("Governing Body", 2017). As of April

2016, the ILO has 187 member countries including South Africa, the Netherlands and the United Kingdom.

In relation to the purpose of this research study, Convention C158 (hereafter referred to as Annexure C), is of particular importance. Convention C158 is concerned with termination at the initiative of the employer and includes the dismissal of probationary employees for poor work performance and incapacity. Convention C158 was adopted by the ILO on 22 June 1982 following the 68th International Labour Conference held in Geneva, Switzerland on 2 June 1982 ("Convention C158 - Termination of Employment Convention, 1982 (No. 158)", 1982).

Of the 187 member countries, only 36 countries have ratified Convention C158 as of yet, with one denouncement. Neither South Africa nor the United Kingdom or the Netherlands have ratified convention C158 ("Ratifications of ILO conventions: Ratifications by Convention", 2018). Convention C158 and its dismissal requirements, especially related to probation, will be discussed in the third chapter of this research study.

THE NETHERLANDS

Relations between South Africa and the Netherlands date back to the creation of a trading post by the Dutch East India Company in Cape Town in 1652, of which the Cape later became a Dutch colony. The influence of the Dutch, specifically the Roman-Dutch law, still to this day plays a determining role in South African common law, with special reference to the contract of employment (Grogan, 2017).

Due to the rich history these two countries share, the researcher presumed to include Netherland's labour legislation and the role Convention C158 plays in the labour legislation of the Netherlands. Labour Legislation in the Netherlands provides for a probationary period of employment (Diebels, 2007). It is a prerequisite for the probationary period to be agreed upon before employment commences and for it to form part of the contract of employment.

There is no minimum period that is prescribed for probation, however there are prescribed guidelines for the maximum duration of a probationary period which is dependent on the type of employment contract and the length of service of the employee (Diebels, 2007). The guidelines for the length of the probationary period are depicted in Table 1.1 below.

Table 1: Probationary Periods: The Netherlands (Diebels, 2007)

Type of contract and length of employment	Maximum period of probation
No written agreement	No probationary period
Employment contract < 2 years	1 month
Employment contract > 2 years	2 months
Permanent employment	2 months
Employment contract for a project or to replace a sick employee	1 month

The probationary period commences on the date that the employee starts working for the employer, even if this date is earlier than the date that was agreed in the contract of employment (Diebels, 2007). The probationary period cannot form part of the contract of employment, should an employee's contract be extended in cases where the employee will fulfil a new function after the extension of the employment contract.

As an alternative to a probationary period, under circumstances where the maximum probationary period as contained in *Table 1* above is deemed to be insufficient time to evaluate an employees' performance, due to the nature and complexity of a job, the labour legislation in the Netherlands makes provision for the employer and employee to enter into a fixed term contract (Diebels, 2007).

If necessary the fixed term contract may be extended if the initial period agreed upon was not long enough to assess the employees' performance. This gives the employer the opportunity to properly assess an employee's performance without having to employ the

employee permanently and suffering the risk, financially and otherwise, of a poor performing employee who is employed permanently (Diebels, 2007).

The legislative requirements related to employees on probation in the Netherlands will furthermore be explored in chapter four.

THE UNITED KINGDOM

Relations between South Africa and the United Kingdom date back to 1797, when the Cape Colony was occupied by the British after the Netherlands were occupied by revolutionary France and as a result the Cape became a British Colony.

Grogan (2017), states that:

“As in many other areas of the law for which the English and Roman-Dutch legal systems provided inadequate authority or relied upon antiquated principles the colonial courts, tended by inclination and training, turned to English law and the writings of English authorities.”

This resulted in South African employment law reflecting English law principles. The United Kingdom is the second country selected for comparison in this research study, due to the large influence that the United Kingdom had on the development of South African society and the country’s legal framework as a whole (Smit, 2010).

There is no express requirement in British law for the probationary period to be agreed by the parties in the contract of employment (Mason, 2017). Statutory protection in terms of erroneous employment decisions are conferred to employers by virtue of the length of an employee’s tenure with the employer, which is referred to as a qualifying period.

A qualifying period according to British law, refers to a minimum period an employee had to work for an employer before qualifying for the right to claim unfair dismissal at a tribunal. If one were to be employed before 6 April 2012, this period would last for one year and after 6 April 2012, for two years (Fletcher and Rong, 2018).

If an employee were to be dismissed after 25 June 2013, such an employee would automatically qualify to query an employment tribunal without a qualifying period ("Dismissal: your rights - GOV.UK", 2017). Smit (2010), states that the following categories of employees on probation are not afforded protection against unfair dismissal:

- i. Employees over the normal retirement age of 65
- ii. Members of the armed forces and the police
- iii. Employees with less than one year of continuous service

According to the Advisory Conciliation and Arbitration Service (herein after referred to as ACAS) Code of Practice on Disciplinary and Grievance Procedures, employees therefore have no statutory protection against unfair dismissal during the first year of employment. In order for an employee to claim unfair dismissal, the employee has to prove that he or she has the minimum required length of two continuous years of service with an employer. In terms of the calculation of one continuous year of service, there is a differentiation between continuity within the contract and continuity outside the contract. Continuity within the contract is defined in section 212(1) of the Employment Rights Act (ERA) as:

“any week during the whole or part of which the employee’s relations with the employer are governed by a contract of employment”

Andrew Bell (2006), states that by implication that the employment continuity will be maintained even if the terms of the contract change. Bell furthermore argues with regard to continuity outside the contract that:

“Statute protects continuity in certain circumstances where no contract of employment is in force; these are for up to 26 weeks of sickness or injury, due to temporary cessation of work, or in circumstances whereby through custom or arrangement such absences are not regarded as breaking continuity”.

Regardless of the qualifying period, an employee can claim wrongful dismissal under common law for breach of contract. The researcher investigated the application of British labour law around the probation period, specifically relating to the dismissal of probationary employees for poor work performance in chapter five.

CHAPTER 2

METHODOLOGY

2.1 Data Collection

The researcher reflected on both qualitative and quantitative research methodologies and opted to chart a qualitative research approach. Qualitative research investigates the different views of individuals and groups and focuses on how these individuals perceive and interpret reality (Hancock, Ockleford & Windridge, 2009).

Qualitative research additionally refers to the natural setting as the source of data in which the researcher observes, describes and interprets the settings as they are, whilst maintaining an “emphatic neutrality” (Patton, 2002). This approach according to Smit (2010), is in addition more appropriate than its quantitative counterpart when conducting research in the field of Labour Relations.

In terms of answering the above research questions, a systematic literature review approach was adopted for the purpose of this study. This form of research falls under the umbrella of qualitative research and is described in the legal doctrine as an explanatory discipline (Van Quickenborne, 1975). The aim of such a discipline is to address and explain underlying problems by identifying, critically evaluating and integrating the findings of all relevant sources in addressing one or more of the research questions (Siddaway, 2014).

2.2 Keywords

By identifying keywords, accurate searches can be made on a research topic. Keywords enable the researchers to locate information relevant to their studies in a short period of time. The following keywords were applicable to this study and were used to find relevant sources:

probation period, employment contract, dismissal, duration and period.

These keywords were furthermore used in various combinations and in various sources.

2.3 Databases

An array of different databases and search engines were utilised to search the relevant keywords. The following was used:

- Google Scholar
- EBSCOhost/PsycINFO
- ABI-Inform
- HEINONLINE
- Laws of South Africa

2.4 Data Analysis

An empirical method of data integration was charted for this research study. The method selected for this specific research study is known as Document Analysis. Document analysis refers to a systematic technique that reviews and evaluates documents from various sources (Bowen, 2009).

According to Altheide (2016), it comprises of margining codes that focus on identifying relevant terms and topics from the data as well as theoretical sampling of relevant documents. These documents comprise of electronic information data bases, developing protocol for additional systematic analyses, and the constant comparison of themes, frames and discourse from an array of applicable sources (Altheide, 2000).

Document Analysis is often used in combination with additional qualitative research methods in a triangularly fashion. This according to Eisner (2017), allows the researcher to accumulate and compare evidence that “breeds credibility” and finally allows the researcher

to corroborate findings across data sets and in addition reduce the impact of potential biases evident in a single study (Bowen, 2009).

This form of analysis is known as the 'Comparative Approach' as mentioned above and was utilised in this study by referring to available cases, statutes and articles related to the research topic of probation periods and its relevance to the employment contract (Anon, 2017). This method guides the data analysis process, which was based on an inductive approach, by supporting the researcher in discovering relevant patterns and theoretical properties within the data (Glaser & Strauss, 2017).

The benefits associated with document analysis relate to efficiency in terms of the time spent on the study (Bowen, 2009), availability of data (Merriam, 1988), cost-effectiveness, lack of obtrusiveness and reactivity, document stability, exactness and coverage (Yin, 1994). For the purpose of this study the researcher at the outset consulted normative sources such as statutory texts, treaties, customary law and binding proceedings and secondly an array of authoritative sources such as case law and scholarly legal writings (Hoecke, 2013).

The data were collected from three countries namely South Africa, the Netherlands and the United Kingdom in a trilinear fashion. The information gathered was viewed from an ideological perspective, which will allow the researcher to approach the data from a nationalistic versus international perspective in relation to the information gathered about probation periods in the three countries mentioned above (Hoecke, 2013).

The study was furthermore narrowed by making use of an *Inclusion Criteria* and an *Exclusion Criteria*, which specified what research will be accepted or disregarded in this constricted field of study. These criteria acted as a conceptual framework which was parallel to the outcome of the research questions. This allowed the researcher to differentiate between relevant and irrelevant information available from the three countries.

2.5 Quality and Rigour

The triangulation of data was related to the construct and internal validity procedure, aimed to converge multiple sources of information in a systematic and reliable fashion. This permitted the researcher to formulate and configure possible correlations or differences between the collected information (Creswell, & Miller, 2000).

This was achieved by consulting the various data collection techniques mentioned above and below in relation to the specific research paradigm. To ensure external validity of the study the researcher made use of peer reviewed academic journal articles, current case law, approved legislation and a conceptual framework throughout the research process. These forms of information are of high academic value and contributed to the external validity and reliability of this study's' outcome.

2.6 Ethical Considerations

There were no ethical issues that had to be considered for the purpose of executing this study. Apart from simple professionalism in gaining access to the various locations for data gathering, no specific formal codes of conduct/ethics applied.

2.7 Delimitations

The researcher decided to only investigate the Netherlands and the United Kingdom's legal probationary requirements, due to the prominent role they both played in the development process of South African legislation which is still used to this very day.

2.8 Chapter Layout

Chapter 1 - Introduction to the Research Topic and Literature Review

Chapter 2 - Methodology

Chapter 3 - The Probationary Requirements Related to the ILO

- Chapter 4** - The Probationary Requirements Related to the Netherlands
- Chapter 5** - The Probationary Requirements Related to the United Kingdom
- Chapter 6** - The Probationary Requirements Related to South Africa
- Chapter 7** - Conclusion

CHAPTER 3

THE PROBATIONARY REQUIREMENTS RELATED TO THE ILO

3.1 Introduction

The third phase of this research study involved an overview of the literature regarding international practices of dismissal during the probationary period of employment, in particular the International Labour Organisations' (ILO) Convention C158, and how it is given effect in South Africa, the Netherlands and the United Kingdom.

3.2 The International Labour Organisation

The ILO was founded in 1919 in the wake of the First World War to pursue a vision based on the premise that universal lasting peace can be achieved only if it is based on decent treatment of working people (Swepston, 1998). The ILO is a global body responsible for constructing, inaugurating and overseeing international labour standards, known as conventions and recommendations that guarantee fair labour rights and improve working conditions of people by bringing together representatives of governments, employers and employees, commonly referred to as the tripartite labour conference (Niekerk & Christianson, 2008).

The ILO has since 1919 adopted more than a hundred and eighty ILO conventions and more than two hundred recommendations covering a vast variety of aspects that impact on people's working environments globally (Smit, 2010). The difference between recommendations and conventions are that the provisions of conventions are binding on member countries through ratification of member countries. Member countries are therefore obliged to implement the provisions whereas recommendations are non-binding instruments often dealing with the same subjects as conventions.

Nevertheless, both conventions and recommendations are intended to have a concrete impact on working conditions globally. As at April 2016, the ILO had 187 member countries, including South Africa, the Netherlands and the United Kingdom.

Convention C158, which is concerned with termination at the initiative of the employer, was of particular importance for this research study, namely dismissal of probationary employees for poor work performance. Convention C158 was adopted by the ILO on 22 June 1982 following the 68th International Labour Conference held in Geneva, Switzerland on 2 June 1982. Of the 187 member countries as at 21 September 2018, Convention C158 has only been ratified by 36 countries. Neither South Africa nor the United Kingdom or the Netherlands have ratified convention C158. Refer to table 1.1 ("Ratifications of ILO conventions: Ratifications by Convention", 1985).

Table 2: Ratification Table of Convention C158.

Country	Ratification Date	Status
Antigua and Barbuda	16:09:2002	Ratified
Australia	26:02:1993	Ratified
Bosnia and Herzegovina	02:06:1993	Ratified
Brazil	05:01:1995	Denounced on 20:11:1996
Cameroon	13:05:1988	Ratified
Central African Republic	05:06:2006	Ratified
Cyprus	05:07:1985	Ratified
Democratic Republic of the Congo	03:04:1987	Ratified
Ethiopia	28:01:1991	Ratified
Finland	30:06:1992	Ratified
France	16:03:1989	Ratified
Gabon	06:12:1988	Ratified
Latvia	25:08:1994	Ratified
Lesotho	14:06:2001	Ratified
Luxembourg	21:03:2001	Ratified
Malawi	01:10:1986	Ratified
Republic of Moldova	14:02:1997	Ratified
Montenegro	03:06:2006	Ratified
Morocco	07:10:1993	Ratified
Namibia	28:06:1996	Ratified
Niger	05:06:1985	Ratified
Papua New Guinea	02:06:2000	Ratified
Portugal	27:11:1995	Ratified
Saint Lucia	06:12:2000	Ratified
Serbia	24:11:2000	Ratified
Slovakia	22:02:2010	Ratified
Slovenia	29:05:1992	Ratified

Spain	26:04:1985	Ratified
Sweden	20:06:1983	Ratified
The former Yugoslav Republic of Macedonia	17:11:1991	Ratified
Turkey	04:01:1995	Ratified
Uganda	18:07:1990	Ratified
Ukraine	16:05:1994	Ratified
Bolivarian Republic of Venezuela	06:05:1985	Ratified
Yemen	13:03:1989	Ratified
Zambia	09:02:1990	Ratified

The first Article of this Convention merely sets out to establish that the provisions of C158 shall be allowed effect by laws and regulations, such as collective bargaining, arbitration awards, court decisions or any other method that is consistent with national practice ("Convention C158 - Termination of Employment Convention, 1982 (No. 158)", 1985).

Articles 4 to 8 deal directly with predissmissal requirements, including but not limited to the capacity of an employee. Article 2 is however of particular significance to this study as it excludes certain categories of employees from the predissmissal requirements contained in articles 4 to 8.

Article 2(2) (b) of Convention C158 states the following:

“A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;*
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;*
- (c) workers engaged on a casual basis for a short period.*

In terms of article 2, pre-dismissal requirements may therefore be disposed of for probationary employees. It is important to note that the use of the word “may” is indicative of not being compulsory for member countries to exclude probationary employees from convention C158. Articles 4 to 8 will be discussed in detail below, which is concerned with both probationary and tenured employees.

Article 4 of Convention C158 states the following:

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

The ILO therefore recognises misconduct, capacity and the operational requirements of an undertaking as the three broad categories to which an employees’ employment may be terminated. The employees’ capacity was thus central to this research study.

Article 5 of Convention C158 states the following:

“The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;*
- (b) seeking office as, or acting or having acted in the capacity of, a workers’ representative;*
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
- (e) absence from work during maternity leave.”*

The words ‘inter alia’ is a clear reference that the above list is not exhaustive and that member countries may add to the list as they wish (Smit, 2010).

Article 6 of Convention C158 states the following:

- “1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.*
- 2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.”*

Article 7 of Convention C158 states the following:

“The employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

Article 7 is concerned with giving an employee the opportunity to state his or her case before a decision is made to terminate the employee’s services. Article 7 and the rest of convention C158, is not prescriptive in terms of the requirements for neither an enquiry nor the process to be followed preceding an enquiry.

Article 8 of Convention C158 states the following:

*“1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.”*

Article 8 is concerned with affording the employee the opportunity to appeal to an impartial body should the employee feel that the termination was unfair.

Article 9 of Convention C158 states that:

“1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.”

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.”

Article 10 furthermore supports Article 9 by stating that, if the bodies referred to in Article 8 discover that termination were indeed “unjustified” or impracticable in accord with national law and practice, only then may the worker may be reinstated or receive an “empowerment payment” of sufficient compensation or any other relief that may be deemed appropriate.

According to Article 11 of Convention C158, a worker whose employment is to be terminated, is entitled to a reasonable period of notice or compensation. This is not the case if he is guilty of grave misconduct of such a nature that it seems unreasonable to oblige the employer to continue his employment during the notice period.

Article 12 of Convention C158 states that:

“1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers’ contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.”

Article 13 of Convention C158 states that:

“1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term the workers’ representatives concerned means the workers’ representatives recognised as such by national law or practice, in conformity with the Workers’ Representatives Convention, 1971.”

The final applicable article of this Convention C158, is Article 14 and it states that:

“1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant **notice to** categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.”

In conclusion, Smit (2010) furthermore states that the following three principles are core to the ILO's Convention C158:

- i. There must be a fair and valid reason for dismissal.
- ii. An employee must have an opportunity to defend him- or herself against the allegations made by the employer.
- iii. The employee should have the right to appeal to an impartial body.

However, Article 2 states that member states may exclude probationary employees from the above principles. By implication there are no prescribed pre-dismissal requirements for probationary employees in terms of Convention C158.

In the chapters to follow an analysis was done of the unique probationary requirements of both the Netherlands and the United Kingdom respectively and how it uniquely moulds both these countries' labour standards and laws.

CHAPTER 4

THE PROBATIONARY REQUIREMENTS RELATED TO THE NETHERLANDS

As noted before, the Netherlands provides for a probationary period of employment, and its standards are quite different to the two other countries examined in this research study. The Netherlands probationary period of employment is governed by various forms of legislation, but the foremost piece of guidance is provided by the Netherlands' Dutch Civil Code of 1992.

It is evident in the Netherlands' Civil Code (CC), that if an employment contract did include a probationary period, otherwise known as a (trial clause), both the employee and employer were entitled to give notice with immediate effect, up until the conclusion of such a period (Article 7:676 CC). It is of utmost importance to note for the purpose of this research study, that the ordinary rules which will normally apply to governing dismissals, do not apply and that relevant parties only have minimal rights associated with dismissals (Article 7:669(7) CC). No notice periods are required, no number applications of the prohibited forms of dismissal are obligatory (Article 7:670 CC) (Article 7:670(2) CC) and no *ex ante* (the act of basing facts on forecast and not on concrete results) dismissal control are mandatory (Article 7:669(7) CC).

The employee may however, if he or she wishes, request the employer to provide him or her with a written statement of the real reason for termination and in certain cases will the employee be protected against dismissal during the probation period based on the principle of *bona fides* (Article 7:676 CC) (Article 7:670a(2) CC), a principle that governs fair and honest behaviour and "the lack of bad faith between parties" (Ikonomi, E., & Zyberaj, J., 2013). According to Civil Code, these statements must be in writing and fair to both parties (Smith, B., & Varzi, A.C., 2000).

The Civil Code stipulates a number of periodical standards that both employees and employers must adhere to in relation to probationary employment requirements which are listed in Table 3 explored in the literature review above.

Table 3: Probationary Periods: The Netherlands (Diebels, 2007)

Type of contract and length of employment	Maximum period of probation
No written agreement	No probationary period
Employment contract < 2 years	1 month
Employment contract > 2 years	2 months
Permanent employment	2 months
Employment contract for a project or to replace a sick employee	1 month

All trial clauses in contrast to the above guidelines are void, as well as any trial clauses that form part of a “successive contract of employment” with the same employer, unless if the newfangled contract requires distinctly new abilities and responsibilities from the employee than those in the previous contract or employer (Jacobs, A.T., 2004). It is furthermore ruled that if an employee has not performed work during (parts of) the probation period, due to a sickness for example, the period of probation may not be extended (Dutch Supreme Court, December 1983, NJ 1984, 332).

The maximum two month probation period as stipulated in Table 1, is claimed not to allow employers appropriate time to screen new employees to minimise ‘firing risks’. This according to Antoine Jacobs (2004), has deliberately been held in reserve by Dutch legislators due to the weak status of employees during this period. Employers that require an extended period to screen new employees must utilise a fixed term contract, and as a matter of fact the guidelines on a chain of fixed term contracts do permit Dutch employers a duration of up to two years to test a worker (Jacobs, A.T., 2004).

This gives the employer the opportunity to properly assess an employee's performance without having to employ the employee permanently and incurring the risk, financially and otherwise, of a poor performing employee who is employed permanently (Diebels, 2007).

Article 6 of the Buitengewoon Besluit Arbeidsverhoudingen of 1945 (herein after referred to as the BBA), determines that an employer needs prior authorisation from the Centrum voor Werk en Inkomen (herein after referred to as the CWI) to dismiss an employee against his will (Van Arkel, 2007). Furthermore, specifically relating to dismissal for incapacity, Van Arkel states that article 5:1.1 of the Dismissal Decree stipulates that the CWI may only give permission to an employer to dismiss an employee if the employer is able to substantiate:

- i. The employee's incapacity
- ii. The employees' incapacity is not due to disease or handicap
- iii. The employer has made serious attempts to improve the employee's incapacity
- iv. The employee's incapacity is not due to a violation of the employer's duty of care.

Van Arkel furthermore states that in determining whether or not incapacity exists the CWI will take case law into account. In this regard the CWI will consider the following:

- i. Whether performance interviews have taken place
- ii. Whether the performance targets are reasonable
- iii. Whether the employer is able to substantiate unsatisfactory performance based on objective criteria
- iv. Whether the employer has allowed the employee to react
- v. Whether the employer has allowed the employee to improve his conduct
- vi. Whether the employee has made efforts to improve himself or has neglected reasonable instructions in this regard
- vii. Whether the employer has taken into account the employees' years of service and his chance of re-employment in the labour market.

There are however exceptions in which case an employer is not required to obtain prior authorisation from the CWI to terminate the services of an employee. The exceptions follow:

- i. A summary of dismissal
- ii. Dismissal during the probationary period of employment
- iii. When parties mutually agree upon termination of employment
- iv. When the employment agreement has expired automatically
- v. When the employment agreement has been dissolved by court.

An employee may therefore be dismissed during the probationary period for incapacity relating to poor performance without prior permission from the CWI. In fact none of the pre-dismissal requirements relating to dismissal for incapacity referred to above, have to be implemented if an employee is dismissed during the probationary period of employment. In this regard Diebels (2007), states that the normal pre-dismissal requirements are not applicable to terminations during the probationary period of employment.

If an employer however entered into a fixed term contract due to the maximum period for probation as contained in Table 1, not being adequate to evaluate the employees' performance, the normal pre-dismissal requirements will be applicable should the employer wish to terminate the employment contract (Diebels, 2007). The employer and employee may agree to incorporate a probationary period in the fixed term contract, provided that it complies with the guidelines in terms of the length of the probationary period as depicted in Table 1, in which case pre-dismissal requirements do not have to be followed to terminate the employment relationship in this period (Diebels, 2007).

The probationary period is considered as a period during which the employee has no protection from dismissal (Smit, 2010). This gives employers the power to terminate the employment relationship without any predissmissal requirements which result in some employers abusing this power by terminating employment relationships for reasons relating to unfair discrimination. A requirement was therefore implemented for either party wishing to terminate the employment relationship during the probationary period of employment to give reasons for doing so in writing to the other party (Diebels, 2007).

Should the employee feel that the employment relationship was terminated for reasons relating to unfair discrimination the onus will be on the employer to prove the contrary. Further to this, employers who promise the prospect of permanent employment following a fixed term contract to assess the employees' performance, but who do not offer permanent employment without due cause following the expiry of the fixed term contract, can be held liable and ordered to compensate the employee (Diebels, 2007). It is thus concluded that the Netherlands length of duration during the probation period prescribed by law depend on the length of the employment. No procurement reasons to dismiss an employee during the probation is necessary, only a just reason for the dismissal is required.

CHAPTER 5

THE PROBATIONARY REQUIREMENTS RELATED TO THE UNITED KINGDOM

Similar to the Netherlands the United Kingdom defines a probationary period, otherwise known as a trial period, as a selected period at the beginning of a new recruit's employment journey as to where both the employee and employer can evaluate if the employment marriage works well ("Guide to Probationary Periods", 2018).

In the United Kingdom an employee is allowed a probation period if agreed upon prior to employment, of a maximum of six weeks and a minimum of three weeks (Mason, 2017). If the employee proves to be satisfactory for the role at the end of such a period he or she will be employed, but if not, the probationary period may be extended. If the probationary period is to be extended the employer ought to inform the employee of:

1. The reasons for the extended period;
2. The required improvements the employee must abide to and
3. The length of the new probationary period.

It is essential to note that the last mentioned point related to the new length of the probation period must take into account previous service, and should be a week less than two years of continuous service. If a probationary period, including an extension, exceeds two years the employee will gain the right not to be unfairly dismissed ("Guide to Probationary Periods", 2018).

It is furthermore required of the employer to constantly inform the employee during the probationary period of ("Guide to Probationary Periods", 2018):

1. The expectations required of the employee during the period in order to monitor progress and resolve any problems as they arise,
2. when and how feedback will be provided to employees on probation, and

3. what form the outcome of the probationary period will take, either in a written contract and/or a probationary review.

If the employer however wishes to dismiss an employee on probation, he or she can make use of five potentially fair reasons which are stated in Section 98(2) (a-d) of the Employment Rights Act (herein after referred to as the ERA). These reasons are:

- i. Capability or qualifications
- ii. Conduct
- iii. Redundancy
- iv. Contravention of a statute
- v. Some other substantial reason

Capability and qualifications are defined by Section 98(3) of the ERA as:

- i. Capability: Skill, aptitude, health or any other physical or mental quality.
- ii. Qualifications: Any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held.

In order for a dismissal based on capability and qualifications to be reasonable, Pitt (2000) and Mackay & Simon (2001), state that it might be relevant to consider the following:

- i. Training provided to the employee
- ii. Warnings issued to the employee
- iii. Time afforded to the employee to improve his performance
- iv. Alternatives to dismissal

In this regard Pitt argues that if an employer employs an employee with a particular skill that is required to perform a job, the employer would not be required to provide additional training to the employee. In addition, if the nature of the job transfigures, an employee can be expected to adapt to the change and dismissal would be appropriate if the employee fails to adapt, provided that the employee was given reasonable time to adapt (Pitt, 2000). Although Pitt acknowledges that no amount of warning will increase someone's competence, warning is required in order for dismissal to be reasonable, as the employee may genuinely not be aware that his or her performance is not parallel to the predetermined standard.

According to Pitt, the requirement for an employee to be warned, a single error if serious enough, may be sufficient to justify dismissal.

The standard statutory dismissal and disciplinary procedures are set out in Schedule 2 of the Employment Act of 2008 (herein after referred to as the EA) and consist of the following three steps:

- i. The employer must set out in writing the issues which have caused the employer to contemplate taking action, and send a copy of this statement to the employee inviting him to attend a meeting.
- ii. The meeting should take place before action is taken, and the employee should take all steps to attend. After the meeting the employer should inform the employee of the decision and of his right of appeal.
- iii. If the employee wishes to appeal, a further meeting should be arranged which the parties should attend, after which the employee should be notified of the outcome. The dismissal or other disciplinary action decided upon in step 2 may be instigated prior to the second (appeal) meeting taking place.

In order for the employee to claim wrongful dismissal the employee therefore has to prove that the employer terminated the employment contract without notice or with inadequate notice and that the employer was not justified in doing so (Pitt, 2000). Substantive and procedural fairness is therefore irrelevant in wrongful dismissal claims as these claims are dependent on the terms of the contract rather than the statutory concept of reasonableness.

Regardless of the employees' period of employment, an employee can moreover claim unfair dismissal if the reason for dismissal relates to one of the categories of dismissal which are automatically unfair (Pitt, 2000).

Unfair dismissal disputes are, at the lower level, referred to the Advisory, Conciliation and Arbitration Service (ACAS) for conciliation. The ACAS is an impartial body that endeavours to resolve disputes through conciliation, however if the parties agree ACAS may appoint an arbitrator to arbitrate the matter. If settlement cannot be achieved during the conciliation phase at ACAS, the matter may be referred to the Employment Tribunal for a full hearing and thereafter to the Employment Appeal Tribunal. Provision is also made for further appeal processes on issues of law only and would go from the Employment Appeal Tribunal to the

Court of Appeal (Civil Division) and thereafter to the House of Lords and ultimately to the European Court of Justice (Meeran, G., 2006).

It is thus concluded that an employee in the United Kingdom is allowed a probationary period, if agreed upon prior to employment, of a maximum of six weeks and a minimum of three weeks (Mason, 2017). If the employee proves to be satisfactory for the role at the end of such a period he or she will be employed, but if not, the probationary period may be extended. If the probationary period is to be extended the employer ought to inform the employee of the reasons for the extended period, the required improvements the employee must abide to and the length of the new probationary period.

The new length of the probation period must take into account previous service, which should be a week less than two years of continuous service. If a probationary period, including an extension, exceeds the two years mark, the employee will naturally gain the right not to be unfairly dismissed.

CHAPTER 6

THE PROBATIONARY REQUIREMENTS RELATED TO

SOUTH AFRICA

6.1 Introduction

One of the most basic universal labour rights of any employee in most areas of the modern world is to be treated fairly and to have one's legal rights adhered to. This concept is also endorsed and enshrined in the manifesto of the International Labour Organisation of which South Africa is a member. Under the LRA employers have the right to terminate the services of employees during their probationary period of employment, if an employee fails to meet the performance standards of a job or if the employee is not able to adapt to the work environment, provided that it is for a fair reason and that a fair process is followed.

In terms of Section 23(1) of the Constitution everyone in South Africa has the right to fair labour practices. In addition every employee covered by the LRA has the right not to be unfairly dismissed in terms of section 185(a) of the LRA.

Dismissal, including dismissal during the probationary period of employment, is deemed unfair if the employer fails to prove that the employee was dismissed for a valid reason and that a fair procedure was followed (Smit, 2010). Substantive fairness refers to the reason for the dismissal of an employee and procedural fairness refers to the procedure that was followed in dismissing an employee. In this regard the LRA gives specific guidance in that it states in Section 188(2) that:

“Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”

Therefore, insofar as procedural and substantive fairness for the dismissal of employees for poor work performance during the probationary period of employment is concerned, employers have to follow the guidelines that are prescribed by the Code of Good Practice:

Dismissal and in particular, Schedule 8 item 8(1) and 9. These items will be analysed in depth in this chapter to determine the exact procedural and substantive requirements for a dismissal for poor work performance to be fair during the probationary period of employment.

It is important to note that Schedule 8 only deals with “some key aspects” of dismissals and is not intended to be comprehensive on all aspects relating to dismissals (Smit, 2010). It was accepted that the same substantive and procedural requirements were valid for the dismissal of probationary and tenured employees for misconduct, incapacity based on ill health and the operational requirements of an employer’s business (Grogan, 2017). Dismissal for misconduct, incapacity based on ill health and the operational requirements of an employer’s business fall outside the scope and delimitations of this research project and will therefore not be addressed.

6.2 Analysis: Item 8(1) and 9

6.2.1 Introduction

Schedule 8 item 2(2) recognises an employee’s incapacity as a legitimate ground on which employment can be terminated, however section 188(1)(a)(i) states that:

“a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity.”

Furthermore Schedule 8 item 2(1) states that:

“a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason it is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below. “

In this regard Schedule 8 item 8(1) and item 9 prescribe the guidelines relating to the dismissal of employees during the probationary period of employment and dismissal for poor

performance respectively and are therefore central to this research project. It is therefore appropriate to quote these items verbatim and analyse each sub-item in detail.

6.2.2 Analysis: Item 8(1)(a)

Item 8(1)(a) states that:

“An employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed.”

It is significant that the sentence starts with “An employer may.” This indicates that item 8(1)(a) is not prescriptive in nature. The probationary period is therefore not compulsory and would ordinarily form part of the contract of employment. It would appear that the wording of item 8(1)(a) supports the flexibility approach on which Schedule 8 is based. Protection conferred on probationary employees in terms of the LRA is not of universal application. In this regard, ILO Convention C158 at 2(2)(b) is not prescriptive and stipulates that:

“a member state may exclude workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration.”

In *Msomi v Protea Security Services* [2006] 20 ILJ 1711 (LC), it was held that item 8(1)(a) applies only to newly hired employees and not to an existing employee who had been promoted. Item 8(1) (a) is also not prescriptive in terms of the duration of the period of probation. It refers to a period without defining the length of the period. The period of probation will be discussed in detail under item 8(1)(d) below.

The Concise Oxford Dictionary (1995) defines probation as:

“a process or period of testing the character or abilities of a person in a certain role, especially of a new employee.”

Item 8(1)(a) states that the appointment of an employee will only be confirmed after the probationary period is completed. If read in isolation, this can be interpreted that an employer may dispose of all pre-dismissal requirements upon the expiry of the probationary period if the employer chooses not to confirm employment, however as discussed in paragraph 6.2.1

the dismissal of probationary employees must be effected in accordance with a fair procedure and a fair reason.

6.2.3 Analysis: Item 8(1)(b)

Item 8(1)(b) states that:

“The purpose of the probation is to give the employer an opportunity to evaluate the employee’s performance before confirming the appointment.”

In *Crawford v Grace Hotel* [2002] 21 ILJ 2315, the CCMA explained the purpose of probation as follows:

“Employment decisions may and, with hindsight, often do turn out to have been imprudently made, which is not surprising considering the limited information and knowledge of the applicant...available to the employer at the time of recruitment...It is to afford employers a reasonable opportunity to correct such errors in recruitment and selection without having to incur the costs to the business, financial and otherwise, which can result from unfair terminations that the code recognises an employer’s right to contract for a reasonable probationary period in which to assess the correctness of the earlier decision...nor is such a right inequitable to the employee who, by her agreement thereto, must be aware that permanent employment is not being offered to her prior to the successful completion of her agreed period of probation.”

Similarly in *Whitfield v Inyati Game Lodge*, [1995] 1 BLLR 118 (IC), it was held that:

“To protect the rights of the probationary employee, the Court must reconcile the conflicting interests of work security and protection against arbitrary action, on the one hand, and the right to employ the competent and most compatible workforce, on the other.”

It can therefore be said that the purpose of probation is to afford employers the opportunity to correct errors in employment decisions in order to confer protection to them to ensure that they employ the most competent workforce whilst protecting employees against unfair arbitrary action.

As in item 8(1)(a) reference is also made to confirmation of employment following the probationary period. As discussed this must not be interpreted in isolation as dismissal of probationary employees must be effected in accordance with a fair procedure and a fair reason.

6.2.4 Analysis: Item 8(1)(c)

Item 8(1)(c) states that:

“Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.”

A permanent employee is defined by the CCMA as:

“someone who is employed with the intention of there being an ongoing employment relationship, or in other words, for an indefinite period. This permanent, ongoing relationship may be full time or part time.” (CCMA Info Sheet, attached hereto as Annexure A)

It is evident that when item 8(1)(c) was drafted the legislators wanted to specifically prevent employers from abusing the probationary period to deprive employees from the status of permanent employment. There is a common misperception that employers may employ employees on a fixed term contract to determine their suitability for a job before offering employees a permanent position and in doing so bypassing the procedural and substantive requirements to dismiss a probationary employee fairly. This practice constitutes an unfair dismissal.

6.2.5 Analysis: Item 8(1)(d)

Item 8(1)(d) states that:

“The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period 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 currently no judicial guidance to determine the reasonability of the duration of a probationary period (Grogan, 2017). In *Yeni vs South African Broadcasting Corporation* [1997] 11 BLLR 1531 (CCMA), the CCMA noted that:

“The duration of the probationary period depends on the circumstances of the job. The circumstances of the job relate to the nature of the job and the time it takes to evaluate the employee’s suitability. A simple job with very little required skills will need a far shorter period than a high-powered job with special required skills to establish the employee’s suitability to the job. A reasonable period could therefore be days or months depending on the circumstances.”

Grogan (2017), similarly noted that the reasonability of the duration of the probationary period of employment will differ from case to case and will probably be longer in the case of more skilled and complex work (Grogan, 2009, p. 259).

6.2.6 Analysis: Item 8(1) (e)

Item 8(1)(e) states that:

“During the probationary period, the employee’s performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.”

Item 8(1)(e) puts the onus on the employer to assess whether or not an employee is performing to the standards required of the job and if not, to take corrective action in assisting the employee to achieve the performance standards of the job.

The Concise Oxford English Dictionary defines the actions referred to in item 8(1)(e) as follow:

- i. **Evaluate:** “Assess, appraise.”
- ii. **Instruction:** “A direction or an order; an order (gave him his instructions)” or “teaching; education (took a course of instruction).”
- iii. **Training:** “The act or process of teaching or learning a skill, discipline, etc.”
- iv. **Guidance:** “Advice or information aimed at resolving a problem, difficulty, etc.”
- v. **Counsel:** “Advice, especially formally given” or “consultation especially to seek or give advice” or “a plan of action.”

With reference to Item 8(1)(e) the CCMA states in its information sheet that “this means that the employer should evaluate an employee during the probationary period and should provide regular feedback” (CCMA Info Sheet, Probation attached hereto as annexure D).

In *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* [1993], 14 ILJ 171, the former Industrial Court held that:

“during a careful appraisal of the employee’s performance the employer must discuss its criticism with the employee, warn him or her of the consequences of there being no improvement and give a reasonable opportunity to improve. Such an appraisal will or at least should show whether the employee’s performance can be improved by advice, guidance and additional training. It may also highlight weaknesses in the support management has provided. The employer must, after all, create the conditions which enable the employee to carry out his or her duties satisfactorily. A failure to provide adequate and suitably trained staff may render a dismissal for inadequate performance unfair”

It is therefore evident that the employer must do everything reasonably possible to assist the employee to render a satisfactory service. It was however held in *South African Transport & Allied Workers Union v Spoornet, Orex, Saldanha* [2001] 22 ILJ 2120, that the employer is entitled to assume that a qualified artisan does not require the same level of counselling and guidance as an employee who has to be trained into this complex job but that the employer must still provide clear and regular analysis of the alleged incapacity or guidance towards achievable goals and that dismissal in the absence of such guidance would be unfair.

Furthermore in *Buthlezi v Amalgamated Beverage Industries* [1999] 20 ILJ 2316, the Labour Court held that:

“When an employer appoints someone to a position whom it acknowledges may not meet all the requirements for that position, it is under an even greater obligation to adhere to its remedial plans for that employee. While employers should not be unduly prejudiced for taking a chance on an employee who may have key attributes for a position but not all the key competencies, there is a greater obligation on that employer to devise a remedial plan and stick to it before taking action against the employee because he/she has not succeeded.”

In addition to the above, the principle of *estoppel* dictates that the employer would waive his right to dismiss an employee if he had tolerated poor performance without taking any action. It is therefore evident that the onus is on the employer to identify deficiencies in employees' performance as soon as he becomes aware of the deficiencies and to take reasonable remedial action, the nature of which will depend on the employees' competence in relation to the job at the time that the employee is employed, before dismissing an employee.

6.2.7 Analysis: Item 8(1)(f)

Item 8(1)(f) states that:

“If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with sub items (g) or (h), as the case may be.”

Item 8(1)(f) implies that performance standards must exist as an employee cannot be informed of the areas in which the employee is deemed to be incompetent in the absence of performance standards.

The CCMA held in *SACCAWU v Pep Stores* [1998] ZALAC, that Schedule 8 does not require performance standards to be written into a contract of employment and that the duty to protect the interests of the employer and to display reasonable efficiency is an implied term of the contract. In *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC), the Labour Appeal Court endorsed the view that an employer is entitled to set performance standards and that the court will not intervene unless the standards are grossly unreasonable.

In order to determine if an employee is achieving the performance standards of a job there is a requirement for the employer to assess the employee's performance. The manner in which these assessments are conducted is the prerogative of the employer. The Labour Court supported this view in the *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC), matter by stating that the Court will not interfere with an employer's assessment unless the assessment is grossly unreasonable.

Once the employer has determined that an employee is not achieving the performance standards of the job the employer must advise the employee of his/her deficient performance. The wording of 8(1)(f) suggest that the employer should be specific in terms of the areas of non-performance as opposed to informing the employee in general that he or she is not achieving the performance standards.

6.2.8 Analysis: Item 8(1)(G)

Item 8(1)(g) states that:

“The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.”

The employer may therefore only extend the probationary period for a period that it would take to properly assess the employee's suitability for the position in which the employee is employed. This notion is supported by Grogan (2017), where he states that:

“if there is no improvement, the employee's probationary period may be extended, or the employee may be dismissed. The former option may be chosen only for a reason 'that relates to the purpose of probation'- i.e. to give the employer a further opportunity to assess the employee's work performance and not, for example, as a penalty”.

Furthermore, item 9(b)(ii) states that in order for a dismissal for poor work performance to be fair, the employee must be given a fair opportunity to meet the required performance standard. Therefore, if the employee has not had a fair opportunity to meet the required performance standards during the probationary period of employment the employee must be afforded an extended opportunity, which may result in an extension of the probationary period.

If however, the employee had a fair opportunity to meet the performance standard and the probationary period has not lapsed the employee may be dismissed prior to the expiry of the probationary period.

6.2.9 Analysis: Item 8(1)(H)

Item 8(1)(h) states that:

“An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee.”

It is implied by item 8(1)(h) that a formal enquiry, that complies with the rules of natural justice, must be convened before a probationary employee can be dismissed for poor work performance. This assumption is supported by common law principles as well as the literature on pre-dismissal procedures. It was for example held in *Camhee v Parkmore Travel* [1997] 2 BLLR 180 (CCMA), that an enquiry is required before a probationary employee may be dismissed on grounds of incapacity.

Grogan (2017) also states that the rules of natural justice should be followed in an enquiry. Smit (2010), supports this view and states that, in practice, the following rules of natural justice will apply to enquiries:

- i. An investigation should be conducted in the allegations of poor performance
- ii. The employee should be given notice of the allegations;
- iii. The employee should be given an opportunity to state a case in response to the allegations;
- iv. The employee should be given a reasonable time to prepare a response;
- v. The employee must be afforded the right to be assisted by a trade union representative or a fellow employee, and;
- vi. A decision should be communicated after the enquiry.

Smit (2010), defines an investigation as the process that leads to the employer reaching a decision regarding whether or not to proceed with an enquiry. An investigation can therefore be considered as all the actions taken by the employer prior to the point where the employer decides to proceed with an enquiry. With specific reference to dismissal for poor work performance, Grogan (2017) states that the investigation is important as an employee's poor performance can in some cases be attributed to inadequate equipment, resources or organisational support.

Smit (2010, p. 120) states that:

“it is generally accepted that any person accused of any wrong-doing of any nature has the right to know the nature of the accusations against him or her.”

Furthermore, in *Num & another v Kloof Gold Mining Co* [1986] 7 ILJ 375, the former Industrial Court stated that:

“If justice is to be done, it is essential that the employee should be informed before the holding of the enquiry of all relevant allegations and charges.”

Furthermore, Smit (2010, p. 123) states that:

“one of the most basic and significant rights of an employee is the right to state his or her case in response to allegations made by the employer and that this right is found

in the Latin maxim audi alteram partem which basically means that both sides of the story must be considered before making a decision.”

The opportunity to state a case in response to allegations does not necessarily have to be in the form of a formal enquiry. In *Avril Elizabeth Home for the Handicapped v CCMA* [2006] 9 BLLR 883, the right to state a case was summarised by the Labour Court as follows:

“it means no more than there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”

Smit (2010) noted that the judgment in the *Avril Elizabeth* case is in contradiction to the checklist approach recommended by Grogan which is founded in the *Mahlangu v CIM Deltak* [1986] 7 ILJ 357 case, which is commonly construed to be a requirement in terms of procedural fairness. Smit further states that the manner in which the opportunity to state a case in response to allegations is afforded to an employee is dependent on factors such as the nature of the allegations and the size and the nature of the employer’s business.

Grogan (2017) states that the employee should be given adequate notice to prepare for the enquiry. In line with this, Smit (2010) noted that it has become common practice amongst employers to allow a minimum period of 48 hours for an employee to prepare for an enquiry, although it is not a requirement in law and the time to prepare will also be determined by the employer’s own codes and procedures.

In *Molope v Mbha NO & others* [2005] 3 BLLR 267, the court confirmed that an accused employee has the right to be represented by a fellow employee, trade union official or a lawyer, however Smit (2010) cited that it was held in *Lamprecht v Macneillie* [1994] 15 ILJ 998, that common law principles dictate that the right to representation does not automatically extend to representation by legal practitioners. Smit (2010) further submitted that assistance means more than the mere presence of a representative and that the role of a representative can, *inter alia*, include the following:

- i. Obtaining witnesses for the employee;
- ii. Obtaining documentary evidence;
- iii. Preparing a defence;
- iv. Interpreting or translation; and

v. Gathering background information.

Finally the enquiry would serve no purpose if the employee is not informed about the outcome of the enquiry. Smit (2010), states that it is not obligatory for the employee to be informed in writing but it is preferred if the employee is literate. Illiterate employees can also be given the outcome of the enquiry in writing with the assistance of an interpreter. Grogan (2017), furthermore states that it is not a requirement for an employer to provide reasons for the outcome of the enquiry, but that in the absence of reasons the outcome will lack credibility and acceptability.

6.2.10 Analysis: Item 8(1)(I)

Item 8(1)(i) states that:

“If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.”

Item 8(1)(i) is silent on an internal appeal procedure. Grogan (2017), states that the reason for this is that the CCMA serves as an adequate substitute for an internal appeal procedure. Employees therefore have the right to refer their appeal against the sanction of an enquiry to a higher authority, in this case a council having jurisdiction or the CCMA. Smit (2010), states that there are contradicting judgments on whether or not an employer may deviate from its disciplinary code if the disciplinary code makes provision for an appeal procedure.

The determining factor for procedural fairness in such cases is that the employee should not have been prejudiced by the employer declining an appeal hearing. However, in general an employee should be afforded an appeal hearing if the employer's disciplinary code makes provision for it (Lewis, D. & Uys, T., 2007).

If an employee's probationary period is extended for a reason or period contrary to item 8(1)(g) as discussed in paragraph 6.2.8 above, the employee may refer the matter as an unfair labour practice to a council having jurisdiction or the CCMA, alternatively if the employee is dismissed the employee may refer the matter as an unfair dismissal dispute.

Furthermore, in terms of Section 191 5(A)(a) and (b) all disputes relating to probation, unfair labour practices and unfair dismissal disputes, must be resolved through the con-arb process.

There is an obligation on the employer to remind the employee of his or her right to refer a dispute to a higher authority. This obligation stems from the fact that employees are not necessarily aware of their right to refer disputes to higher authorities, which may cause employees to be prejudiced.

6.2.11 Analysis: Item 8(1)(J)

Item 8(1)(j) states that:

“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 reason for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.”

Grogan (2017) states that item 8(1)(j) indicates that:

“arbitrators should exercise caution before interfering with employers' decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.”

Similarly in *Crawford v Grace Hotel* [2002] 21 ILJ 2315, a case that was concerned with the dismissal of a probationary employee for poor work performance, the commissioner stated that:

“provided the employer's assessment of an employee is genuine, made in good faith and founded on objectively ascertainable criteria, the area for interference by an arbitrator with the merits of such assessment should be substantially limited.”

Despite the above views on substantive fairness, in practice, item 8(1)(j) has proved to have a minimal impact on reducing employers' obligations in terms of proving substantive fairness (Van Niekerk & Le Roux, 2001), due to the view that commissioners and judges should make a value judgment on the fairness of a dismissal. In *National Union of Metalworkers of*

SA v Vetsak Co-operative Ltd & others [1996] 17 ILJ 455, Smalberger, J.A. came to a similar conclusion by stating that:

“fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness a court applies a moral or value judgment to established facts and circumstances and in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.”

Nienaber, J.A., giving the majority judgement, added that:

“there is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair...the ultimate determinant is therefore fairness and not the lawfulness of ... the dismissal.”

It is however evident that the courts draw a distinction between the requirements for substantive fairness for the dismissal of senior managerial employees and normal employees during the probationary period of employment. In *Brereton v Bateman Industrial Corporation Ltd & others* [2000] 21 ILJ 442, it was noted that:

“senior managerial employees occupy a completely different position to that of ordinary employees” and that “aspects such as personality conflicts, management style, and simple lack of confidence in the ability or willingness of the manager to do the job in the way the owners or senior colleagues desire could justify dismissal.”

6.2.12 Analysis: Item 9

Item 9 states that:

“Any person determining whether a dismissal for poor work performance is unfair should consider:

- (a) Whether or not the employee failed to meet a performance standard; and*
- (b) If the employee did not meet a required performance standard whether or not:*

- (i) *the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;*
- (ii) *the employee was given a fair opportunity to meet the required performance standard; and*
- (iii) *dismissal was an appropriate sanction for not meeting the required performance standard.”*

As stated previously, for it to be determined if an employee met a performance standard the performance standard must exist to begin with. In order to determine if an employee is achieving the performance standards of a job there is a requirement for the employer to assess the employee's performance. The manner in which these assessments are conducted is the prerogative of the employer and the Court will not interfere with an employer's assessment unless the assessment is grossly unreasonable.

Grogan (2017), states that employees' problems regarding poor performance should be discussed with them during the investigation process and the employer and employee should consider ways of overcoming the problems. Grogan (2017), also states that the basic principle in cases relating to poor performance is that employees should be informed timeously of specific areas of poor performance. As discussed previously performance standards do not have to be written into a contract of employment as reasonable efficiency is an implied term of the contract. An employer is entitled to set performance standards and the court will not intervene unless the standards are grossly unreasonable.

As discussed above, the reasonability of the duration of the period afforded to an employee to achieve the performance standards will differ from case to case and will probably be longer in the case of more skilled and complex work.

In determining whether or not dismissal was the appropriate sanction for poor work performance the Labour Court, in *Chesteron Industries (Pty) Ltd v CCMA & others* [2009] 30 ILJ 888, applied the principles established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097. These principles are the following:

- i. The totality of circumstances
- ii. The importance of the rule that had been breached
- iii. The reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal
- iv. The harm caused by the employee's conduct
- v. Whether additional training and instruction may result in the employee not repeating the misconduct
- vi. The effect of dismissal on the employee
- vii. The employee's service record

Dismissal should be a last resort after all alternatives have been exhausted and the employer cannot reasonably be expected to keep the employee in its employ.

6.3 Conclusion

It is not compulsory for employers to appoint newly hired employees on a probationary period before confirming permanent employment. The LRA do however make provision for a probationary period and it is the prerogative of the employer and employee to agree on a probationary period in the contract of employment, the period of which must be reasonable.

The purpose of probation is to afford employers a reasonable opportunity to correct errors in recruitment and selection without having to incur the costs to the business, financial and otherwise, which can result from unfair terminations. From a common law perspective the procedure for the dismissal of both probationary and tenured employees comprises of the following:

- i. The employee must be informed that he/she is performing below the standard expected.
- ii. The employee must be warned that continuous poor performance may result in dismissal.
- iii. The employee must be given reasonable evaluation, instruction, training, guidance or counselling.
- iv. The employee must be given a reasonable opportunity to improve.
- v. The employee may be dismissed after an enquiry was convened. The enquiry must comply with the rules of natural justice.

The only distinction in terms of the pre-dismissal requirements between probationary and tenured employees was that probationary employees may be dismissed for reasons less compelling than tenured employees. In practice the probationary period of employment has proven to have little effect.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

The purpose of this research study, due to a lack of theoretical analysis, was to explore the dismissal processes and their simplicities related to an employee on probation, whether for poor work performance or misconduct in an international framework and if there are indeed any benefits in employing employees on probation given the dismissal requirements.

The international framework set out by the researcher included countries such as the Netherlands, the United Kingdom and South Africa. The Netherlands and the United Kingdom were of particular importance to South Africa due to their irrefutable impact on South African legislation and historical regulatory influences.

The researcher explored the impactful nature of the International Labour Organisation (ILO) on a country's labour law and in particular Convention C158 which was concerned with the termination of an employee on probation at the initiative of the employer of which the Netherlands, the United Kingdom and South Africa are member states. Convention C158, which are ratified by 36 countries of which the Netherlands, the United Kingdom and South Africa are not, plainly states that (Smit, 2010):

- i. There must be a fair and valid reason for dismissal.
- ii. An employee must have an opportunity to defend him- or herself against the allegation made by the employer.
- iii. The employee should have the right to appeal to an impartial body.

However, Article 2 states that member states may exclude probationary employees from the above principles. By implication there are no prescribed pre-dismissal requirements for probationary employees in terms of Convention C158.

The probationary period in the Netherlands, otherwise known as a trial clause, was found to be a period during which the employee and employer were entitled to give notice with immediate effect, up until the conclusion of such a period.

This leads to the core understanding that an employee has no protection from dismissal during the probation period. No notice periods are required, no number applications of the prohibited forms of dismissal are required and no *ex ante* (the act of basing facts on forecast and not on concrete results) dismissal control is mandatory.

This provides employers with the power to terminate the employment relationship without any pre-dismissal requirements which resulted in some employers abusing this power by terminating employment relationships for reasons relating to unfair discrimination. A requirement was therefore implemented for either party wishing to terminate the employment relationship during the probationary period of employment, to give reasons for doing so in writing to the other party (Diebels, 2007).

Should the employee on probation be of opinion that the employment relationship was terminated for reasons relating to unfair discrimination the onus will rest on the employer to prove the contrary. Further to this, employers in the Netherlands who promise the prospect of permanent employment following a fixed term contract to assess the employees' performance, but do not offer permanent employment without due cause following the expiry of the fixed term contract, can be held liable and ordered to compensate the employee (Diebels, 2007).

In the United Kingdom an employee was similarly allowed a probationary period, if agreed upon prior to employment, of a maximum of six weeks and a minimum of three weeks (Mason, 2017). If the employee proves to be satisfactory for the role at the end of such a period he or she will be employed, but if not, the probationary period may be extended. If the probationary period is to be extended the employer ought to inform the employee of the reasons for the extended period, the required improvements the employee must abide to and the length of the new probationary period.

It is essential to note that the last mentioned point related to the new length of the probation period must take into account previous service, a week less than two years of continuous service. If a probationary period, including an extension, exceeds two years the employee will gain the right not to be unfairly dismissed ("Guide to Probationary Periods", 2018).

South African labour law, governed by the Labour Relations Act 66 of 1995, allows employers the right to terminate the services of employees during their probationary period of employment, if an employee fails to meet the performance standards of a job or if the employee is not able to adapt to the work environment, provided that it is for a fair reason and that a fair process is followed. Dismissal during the probationary period of employment, is however deemed unfair if the employer fails to prove that the employee was dismissed for a valid reason and that a fair procedure was followed (Smit, 2010).

From a common law perspective the procedure for the dismissal of both probationary and tenured employees comprises of the following:

- i. The employee must be informed that he/she is performing below the standard expected
- ii. The employee must be warned that continuous poor performance may result in dismissal
- iii. The employee must be given reasonable evaluation, instruction, training, guidance or counselling.
- iv. The employee must be given a reasonable opportunity to improve
- v. The employee may be dismissed after an enquiry was convened. The enquiry must comply with the rules of natural justice.

The only distinction in terms of the pre-dismissal requirements between probationary and tenured employees was that probationary employees may be dismissed for reasons less compelling than tenured employees. In practice, the probationary period of employment has proven to have little effect on the future employment prospects of those on probation.

The researcher thus concluded, based on the international and the legislative standards in the Netherlands and the United Kingdom that the dismissal of employees on probation during the probationary period in South Africa seems to be out of step. The current South African situation seems to be tedious in relation to the Netherlands and the United Kingdom with easier processes and shorter probation time frames.

The researcher recommends that South African labour legislation rather determines the duration, nature and processes related to the probation period, if needed, to an annual financial threshold. Employees on probation that earn under the financial threshold, as currently stipulated in the BCEA, may be dismissed for poor work or incapacity, with reason from the employer, without any additional measures. This can be done within a certain time frame such as six months as per the Netherlands' standards, after which the employee is protected against normal South African unfair dismissal requirements.

This will allow employers to fit relevant employees into their work environments and make way with high employee turnover and the financial implications related to this and pay discrimination, whilst maintaining the constitutional rights of employees against unfair discrimination after a certain period.

A win-win situation for both employee and employer.

LIST OF REFERENCES

- Altheide, DL. (1996). *Qualitative media analysis* (1st ed.). Thousand Oaks [u.a.]: Sage.
- Altheide, D. (2000). Tracking discourse and qualitative document analysis. *Poetics*, 27(4), 287-299.
- Anon (2011) & (2017) Code of Good Practice.
- Baloyi, Z. & Crafford, A. (2006). Problems Surrounding Probation In The South African Public Service. *SA Journal of Human Resource Management*, 4(1).
- Bell, A. C. 2006. *Employment Law*. 2nd ed. London: Sweet & Maxwell.
- Bowen, G. (2009). Document Analysis as a Qualitative Research Method. *Qualitative Research Journal*, 9(2), 27-40.
- Creswell, J., & Miller, D. (2000). Determining Validity in Qualitative Inquiry. *Theory into Practice*, 39(3), 124-130.
- Convention C158 - Termination of Employment Convention, 1982 (No. 158)*. (1982). *Ilo.org*.
- Dismissal: your rights - GOV.UK*. (2017). *Gov.uk*. Retrieved from: <https://www.gov.uk/dismissal/what-to-do-if-youre-dismissed>
- Dunning, H. (1998). The origins of Convention No. 87 on freedom of association and the right to organize. *Int'l Lab. Rev.*, 137, 149.
- Diebels, M. (2007). *De kleine gids voor het Nederlandse arbeidsrecht*. Den Haag: Kluwer Law International.
- Eisner, E. W. (2017). *The enlightened eye: Qualitative inquiry and the enhancement of educational practice*. Teachers College Press.

- Elliott, R. & Peaton, A. (1994). The Probationary Period in the Selection Process: A Survey of its Use at the State Level. *Public Personnel Management*, 23(1), 47-59.
- Fletcher, A. and Rong, L. (2018). *An introduction to UK employment law - part one* | Lexology. [online] Lexology.com. Available at:
<https://www.lexology.com/library/detail.aspx?g=c3129b47-04f7-4374-8dcb-a948a00b91e1>
- Glaser, B. G., & Strauss, A. L. (2017). *Discovery of grounded theory: Strategies for qualitative research*. Routledge.
- Guide to Probationary Periods. (2018). Retrieved from
<https://www.aig.co.uk/content/dam/aig/emea/united-kingdom/documents/Financial-lines/PrivateEdge/epl/guide-to-probationary-periods.pdf>
- Hancock, B., Ockleford, E., & Windridge, K. (2009). *An Introduction to Qualitative Research* (pp. 4&6). National Institute for Health Research. Retrieved from:
https://www.rds-yh.nihr.ac.uk/wp-content/uploads/2013/05/5_Introduction-to-qualitative-research-2009.pdf
- Hughes, S. (2005). The International Labour Organisation. *New Political Economy*, 10(3), 413-425.
- Hoecke, M. (2013). *Methodologies of legal research* (1st ed.). Oxford and Portland: Hart.
- Fowler, A. (1996). *Employee induction* (1st ed., p. 1). London: Institute of Personnel Management.
- Grogan, J. (2009). *Workplace Law*. 10th ed. Cape Town.
- Grogan, J. (2017). *Workplace Law*. 12th ed. Cape Town.
- Ikonomi, E., & Zyberaj, J. (2013). "Bona Fides" Principle's Value in Pre-Contractual Liability. *Academic Journal of Interdisciplinary Studies*, 2(9), 481.

- Induction Guide.* (2017) (1st ed., p. 2). Retrieved from:
https://www.uwl.ac.uk/sites/default/files/Departments/About-us/Web/PDF/policies/induction_guide.pdf
- International Labour Organization.* (2017). *Ilo.org.* Retrieved from:
<http://www.ilo.org/global/lang--en/index.htm>
- Israelstam, I. (2013). *Probation is Not the Easy Way out for Employers.* *Labourguide.co.za.* Retrieved 3 March 2017, from: <http://www.labourguide.co.za/most-recent/872-probation-is-not-the-easy-way-out-for-employers>
- Jacobs, A. T. (2004). *Labour law in the Netherlands.* Kluwer Law International.
- Kate Smith Quote.* (2017). *A-Z Quotes.* Retrieved 2 March 2017, from:
<http://www.azquotes.com/quote/1169892?ref=probation>
- Lewis, D., & Uys, T. (2007). Protecting whistleblowers at work: A comparison of the impact of British and South African legislation. *Managerial Law*, 49(3), 76-92.
- Loh, E. (1994). Employment Probation as a Sorting Mechanism. *Industrial and Labor Relations Review*, 47(3), 471.
- Machi, L. A., & McEvoy, B. T. (2016). *The literature review: Six steps to success.* Corwin Press.
- Mackay, M. R. and Simon, S. M. W., 2001. *Employment Law.* 2nd ed. Edinburgh: Sweet & Maxwell.
- Mason, M. (2017). *Dismissal during probationary period* | Mark Mason Law - Blog. Retrieved from: <https://www.markmasonlaw.co.uk/blog/?p=317>
- Meeran, G. (2006). The employment tribunals. *The Changing Institutional Face of British Employment Relations*, 31, 129.
- Merriam, S. (1988). *Case study research in education: A Qualitative approach.* San Francisco: Jossey-Bass.

- Patton, M. (2002). *Qualitative Evaluation and Research Methods*. Sage.
- Pearsall, J., & Pearsall, J. (Eds.). (2002). *The Concise Oxford English Dictionary* (p. 1707). Oxford: Oxford University Press.
- Pitt, G. 2000. *Employment Law*. 4th ed. London: Sweet & Maxwell.
- Probation and poor performance*. (2005). *Labourprotect.co.za*. Retrieved 4 March 2017, from: <http://www.labourprotect.co.za/Newslettersept05a.htm>
- Probation periods*. (2011). *Polity.org.za*. Retrieved 3 March 2017, from: <http://www.polity.org.za/article/probation-periods-2011-06-28>
- QUT cite|write - Writing a literature review*. (2017). *Citewrite.qut.edu.au*. Retrieved from: <http://www.citewrite.qut.edu.au/write/litreview.jsp>
- Ratifications of ILO conventions: *Ratifications by Convention*. (1985). Retrieved from: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312303
- Smith, B., & Varzi, A. C. (2000). Fiat and bona fide boundaries. *Philosophical and phenomenological research*, 401-420.
- Smit, P. A. (2010). *Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995*. (Unpublished doctoral thesis). Faculty of Economic and Management Sciences, University of Pretoria, Pretoria, South Africa.
- Stevenson, A., & Waite, M. (2011). *Concise Oxford English Dictionary* (1st ed.). Oxford: Oxford University Press.
- Siddaway, A. (2014). What is a systematic literature review and how do I do one. *University of Stirling*, (1), 1.
- Swepton, L. (1998). Human rights law and freedom of association: Development through ILO supervision (1st ed.). *International Labour Review*, Vol. 137, No. 2.

- Tesnar, N. (2017). *The Employer's Guide to Probation - SEESA*. SEESA. Retrieved 2 March 2017, from: <http://www.seesa.co.za/the-employers-guide-to-probation>
- Van Arkel, E. (2007). *A Just Cause for Dismissal in the United States and the Netherlands*.
- Van Niekerk, A., & Christianson, M., (2008). *Law@work*. Durban: LexisNexis.
- Van Quickenborne, M. (1975). Rechtsstudie als Wetenschap. In W. Kluwer, *Actori Incumbit Probatio* (1st ed., p. 223). Antwerp.
- Writing A Law Dissertation Methodology | Law Teacher*. (2017). *Lawteacher.net*. Retrieved from: <https://www.lawteacher.net/law-help/dissertation/writing-law-dissertation-methodology.php>
- Yin, R. K. (1994). Discovering the future of the case study. Method in evaluation research. *Evaluation practice*, 15(3), 283-290.

TABLE OF STATUTES

SOUTH AFRICAN STATUTES

- 1.1 Code of Good Practice: Dismissal Schedule 8
- 1.2 Labour Relations Act 66 of 1995.
- 1.3 Constitution of South Africa 108 of 1996.

NETHERLANDS STATUTES

- 2.1 Buitengewoon Besluit Arbeidverhoudingen of 1945
- 2.2 Dutch Civil Code 1992

UNITED KINGDOM STATUTES

- 3.1 Advisory Conciliation and Arbitration Service Code of Practice on Disciplinary and
- 3.2 Grievance Procedures of 2005
- 3.3 Employment Act of 2008
- 3.4 Employment Relations Act of 1999.
- 3.5 Employment Rights Act of 1996.

CONVENTIONS

- 4.1 ILO Convention C158.

TABLE OF CASES

SOUTH AFRICA

- Avril Elizabeth Home for the Handicapped v CCMA* [2006] 9 BLLR 883
- Brereton v Bateman Industrial Corporation Ltd & others* [2000] 21 ILJ 442
- Buthelezi v Amalgamated Beverage Industries* [1999] 20 ILJ 2316
- Camhee v Parkmore Travel* [1997] 2 BLLR 180 (CCMA)
- Chesteron Industries (Pty) Ltd v CCMA & others* [2009] 30 ILJ 888
- Crawford v Grace Hotel* [2002] 21 ILJ 2315
- Eskom v Mokoena* [1997] 8 BLLR 965 (LAC)
- Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* [1993], 14 ILJ 171
- Lamprecht v Macneillie* [1994] 15 ILJ 998
- Mahlangu v CIM Deltak* [1986] 7 ILJ 357
- Molope v Mbha NO & others* [2005] 3 BLLR 267
- Msomi v Protea Security Services* [2006] 20 ILJ 1711 (LC),
- National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* [1996] 17 ILJ 455
- Num & another v Kloof Gold Mining Co* [1986] 7 ILJ 375
- SACCAWU v Pep Stores* [1998] ZALAC 5
- Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097
- South African Transport & Allied Workers Union v Spoornet, Orex, Saldanha* [2001] 22 ILJ 2120
- Whitfield v Inyati Game Lodge*, [1995] 1 BLLR 118 (IC).
- Yeni vs South African Broadcasting Corporation* [1997] 11 BLLR 1531 (CCMA)

NETHERLANDS

Dutch Supreme Court, December 1983, NJ 1984, 332

ANNEXURE A

THE CODE OF GOOD PRACTICE DISMISSAL

THE CODE OF GOOD PRACTICE: DISMISSAL

SCHEDULE 8 – LABOUR RELATIONS ACT.

1 Introduction

(1) This code of good practice deals with some of the key aspects of dismissals for reasons related to conduct and capacity.

It is intentionally general.

Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances.

For example, the number of employees employed in an establishment may warrant a different (comment : *less formal or less onerous*) approach.

(2) This Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a workplace forum.

(3) The key principle in this Code is that employers and employees should treat one another with mutual respect.

A premium is placed on both employment justice and the efficient operation of business.

While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.

2 Fair reasons for dismissal

(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. (Comment : *this means that even if the employment contract contains wording like 'this contract may be terminated by either party for any reason recognized in law as being sufficient', the employee may still not be dismissed until proper and fair procedure has been followed.*)

Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty.

Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate.

These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.

(3) This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187 (*of the Labour Relations Act.*).

The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.

(4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business.

If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

3 Misconduct

Disciplinary procedures prior to dismissal :

(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees.

The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

In general, a larger business will require a more formal approach to discipline.

An employer's rules must create certainty and consistency in the application of discipline.

This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood.

Some rules or standards maybe so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline.

This approach regards the purpose of discipline as a means for employees to know and understand what standards (*of behaviour*) are required of them.

Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met.

Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline.

Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity.

More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal.

Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilfully endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

Comment : Section 188 states : a dismissal that is not automatically unfair (in terms of section 187) is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the misconduct or incapacity of the employee, or is based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure period. Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant Code of Good Practice issued in terms of this act.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

4 Fair procedure

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal.

This does not need to be a formal enquiry.

The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.

The employee should be allowed the opportunity to state a case in response to the allegations.

The employee should be entitled to a reasonable time (*minimum 2 clear working days*) to prepare the response and to the assistance of a trade union representative or fellow employee.

After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5 Disciplinary records

Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6 Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal.

The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

- (a) the seriousness of the contravention of this Act;
- (b) attempts made to comply with this Act; and
- (c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.

The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum.

The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.

If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7 Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8 Incapacity: Poor work performance

(1) A newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. (*the employer decides on the duration of the probation period.*)

The period should be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment.

When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counseling the employee requires (but obviously within reason) to render satisfactory service.

Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.

(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

- (a) given the employee appropriate evaluation, instruction, training, guidance or counseling; and
 - (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.
- (3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.
- (4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

9 Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider-

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not-
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.

10 Incapacity: Ill health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent.

If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury.

If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal.

When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee.

In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider.
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to
-

accommodate the incapacity of the employee is more onerous in these circumstances.

11 Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

ANNEXURE B

CCMA INFO SHEET: EMPLOYEE V INDEPENDENT CONTRACTOR



EMPLOYEE v INDEPENDENT CONTRACTOR

THE IMPORTANCE OF AN EMPLOYMENT CONTRACT

The employment contract serves as the foundation for the relationship between an employee and that employee's employer. It is also the starting point for the entire system of labour law rules. All rules of labour law depend, at least initially, on there being a contract of employment which links the individual employee to the employer. It is only when one looks at the contract that one can determine whether there is a relationship between two parties. One factor may also be to determine what the nature of that contractually based relationship is.

By carefully evaluating a given set of contractual terms, one may be able to ascertain whether or not a certain contractual relationship is based on a contract of employment or, for example, a contract of partnership or even of agency. The essential elements of the employment contract can be summarised as being:

- A voluntary agreement;
- Between two parties (employer and employee);
- In terms of which the employee places labour potential at the disposal of and under the control of the employer; and
- In exchange for some form of remuneration by the employer.

CATEGORIES OF EMPLOYEES

Not all employees are the same. An employment relationship may be on a casual, temporary or permanent basis.

A **casual employee** is someone who is employed to do a once-off job – once the work has been completed and the employee has been paid, the employment relationship ends.

A **temporary employee** is someone who is employed for a fixed time period or for a specific task only – once that task is completed, the employment relationship ends.

A **permanent employee** is someone who is employed with the intention of there being an ongoing employment relationship, or in other words, for an indefinite period. This permanent, ongoing relationship may be full time or part time.

There are also non-standards forms of employment such as dependent contractors, piece-workers and employees of contractors. It is these

three groups of employees that are vulnerable and have been abused the most. The next section addresses their concerns.

PROTECTION OF VULNERABLE WORKERS

Attempts by employers to evade the provisions of the Labour Relations Act, 1995 and the Basic Conditions of Employment by trying to structure the relationship between themselves and the people who do work for them as something *other* than an employment relationship, has led to the expansion of the definition of an employee in both pieces of legislation (LRA and BCEA).

The definition itself has not been amended, but a new section, s200A, has been introduced which establishes a series of criteria that would form the basis for a rebuttable presumption as to whether or not an employment relationship exists. They are as follows:

- The manner in which the person works is subject to the control or direction of another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person has worked for that other person for an average of at least 40 hours per month over the last three months;
- The person is economically dependent on the other person for whom he or she renders services;
- The person is provided with tools of trade or work equipment by the other person; or
- The person only works for or renders services to one person.

The effect of the abovementioned criteria is to provide that, where a particular factor exists, the worker is presumed to be an employee unless the contrary is proved.

HOWEVER - The above provisions do not apply to a person who earns in excess of the amount referred to in s6(3) of the BCEA (R89499)(Where the Minister can make a determination that excludes the application of that chapter or any provision of it to any category of employees earning in excess of an amount in that determination). If such a person earns below the amount referred to in the above section,

any of the parties to the relationship may approach the CCMA for an advisory award on whether or not there is an employment relationship in existence. NEDLAC must also prepare and issue a code of good practice that sets out guidelines for determining whether persons are employees or not.

THE EMPLOYEE AND CONTRACTOR DEBATE

The contract of the independent contractor on the other hand, is characterised by the fact that one person hires another person to do a specific job or a specific piece of work. The following can be said about the independent contractor:

The person letting out the work is seen as the *principal* and the person doing the work is seen as the *agent*. The contractual relationship is totally different – it is not a contract of employment, but a contract relating to the performance of a certain piece of work.

Another feature of the contract of an independent contractor is that there is *far less control* by the principal over the agent (contractor) than an employer has over the worker.

As such, the Labour Relations Act and the Basic Conditions of Employment do not cover independent contractors.

RELEVANT LEGISLATION

Labour Relations Act, 1995, as amended, s213 & 200A
Basic Conditions of Employment, 1997, as amended, ss1, 6 and 83A

ACKNOWLEDGMENTS

Basson, A *et al.* 1999. **Essential Labour Law. Volume 1. Individual Labour Law.** Labour Law Publications, Groenkloof.
Employment contract – Definition, identification and formation
The meaning of employee – The first basic concept

ANNEXURE C

CONVENTION C158

ILO Convention 158
Termination of Employment Convention, 1982

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART I.
METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

1. The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

2. (1) This Convention applies to all branches of economic activity and to all employed persons.

2. (2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

2. (3) Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

2. (4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

2. (5) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

2. (6) Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

3. For the purpose of this Convention the terms *termination* and *termination of employment* mean termination of employment at the initiative of the employer.

PART II.
GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

4. The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

5. The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave.

Article 6

6. (1) Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

6. (2) The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

7. The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

8. (1) A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

8. (2) Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

8. (3) A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

9. (1) The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

9. (2) In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

9. (3) In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

10. If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

11. A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

12. (1) A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

12. (2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

12. (3) Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III.

SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

13. (1) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

13. (2) The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

13. (3) For the purposes of this Article the term *the workers' representatives concerned* means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

14. (1) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

14. (2) National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

14. (3) The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

Article 15

15. The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

16. (1) This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

16. (2) It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

16. (3) Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

17. (1) A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

17. (2) Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 18

18. (1) The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

18. (2) When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

19. The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

20. At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

21. (1) Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

21. (2) This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 22

22. The English and French versions of the text of this Convention are equally authoritative.

ANNEXURE D

CCMA INFO SHEET: PROBATION

PROBATION



GENERAL

Probation is for newly appointed employees only. The purpose of probation is to establish whether or not the appointee's performance is of an acceptable standard before permanently employing the employee.

Probation periods should be reasonable. This will depend on the nature of the job, which in turn will determine how long it will take to establish whether the employee is performing satisfactorily or not.

As a general guideline, the more complex the nature of the job, the longer the probation period e.g. only a month may be needed to evaluate the performance of a cleaner, but four months may be appropriate for an accountant.

Probation periods may be extended, within reason, where the employer is not convinced that the employee is performing to the required standard.

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 are understood by the employee. Should the probation be extended, it should once again be done in writing.

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, should an employee on probation be accused of theft, a disciplinary hearing should be held. Where retrenchment has become necessary, a consultation process should be followed prior to the retrenchment.

The reason why probation does not have an impact on poor performance dismissals is due to the fact that probation is aimed at

sorting out performance issues *before* a person is permanently employed.

DISMISSAL FOR POOR PERFORMANCE DURING PROBATION

An employer should give an employee on probation, evaluation, instruction, training, guidance or counselling as required by him/her in order to render satisfactory work.

Schedule 8 of the Code of Good Practice: Dismissal, deals with probation. An employer has the right to require a newly hired employee to serve a period of probation before confirmation of the employee's appointment, which period should be determined in advance and should be of a reasonable duration.

During the probation, performance of the employee should be assessed. If the employee fails to meet the required standards or is incompatible, the employee should be advised of these shortcomings.

PROCEDURE

The employer should give an employee evaluation, instruction, training, guidance or counselling as required for the employee to render satisfactory work.

This means that the employer should evaluate an employee during the probationary period and should provide regular feedback.

An employer may dismiss an employee or extend the probationary period after the employee is invited to make representations. Only after considering those representations may the employee be dismissed or the probation period be extended.

There must be procedural fairness in dealing with this dismissal

There must also be substantive fairness – in that there must be fair reasons as to why the employee is dismissed or the period extended.

It is not necessary to hold a formal enquiry

The rules of natural justice will apply (e.g. when making representations the employee may be assisted by a fellow employee)

It should be noted though that the employer does not require to have as compelling reasons for the dismissal as would be the case with an employee who is not on probation (i.e. with employees who are permanently employed)

The Code of Good Practice for Poor Performance: Incapacity, does not apply to probationary employees.

A probationary employee cannot be dismissed for reasons that are automatically unfair e.g. participation in a lawful strike. A probationary clause cannot be relied upon for dismissing a probationary employee on operational requirements.

RELEVANT LEGISLATION

Labour Relations Act, Schedule 8: Code of Good Practice: Dismissal
Section 188
(need to confirm once amendments passed)