Dismissal during Probationary Period of Employment in South Africa: An International Perspective

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Abstract

It is a universally acceptable practice to employ newly hired employees on a probationary period. In general terms the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. This in itself seems to be an uncomplicated process; however, the scenario, especially in South Africa, becomes more complicated if an employer wants to terminate an employee's service during the probationary period of employment or terminate the services of an employee at the end of the probationary period. The right to a fair dismissal is well recognised in South African labour law; this right also extends to employees during their probationary period of employment. Convention 158 of the International Labour Organisation (ILO) provides guidelines in respect of the termination of employment, also during the probation period. In this article the ILO's standards with regard to the termination of employment during probation are considered. South Africa was a former colony of the Netherlands and the United Kingdom, in light of this the respective positions on dismissal during the probation period of employment in the Netherlands and the United Kingdom are also analysed. This provided the researcher with an opportunity to determine if South Africa's dismissal regime during the probationary period of employment is in line with some international perspectives and it appears that dismissal during the probationary period of employment in South Africa is out of step with international standards and developments.

Keywords: dismissal, international standards, probation, procedural fairness

It is a universally acceptable practice to employ newly hired employees on a probationary period. In general terms the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. This in itself seems to be an uncomplicated process; however, the scenario, especially in South Africa, becomes more complicated if an employer wants to terminate an employee's service during the probationary period of employment or terminate the services of an employee at the end of the probationary period. The right to a fair dismissal is well recognised in South African labour law; this right also extends to employees during their probationary period of employment. Convention 158 of the International Labour Organisation (ILO) provides guidelines in respect of the termination of employment, also during the probation period. In this paper the ILO's standards with regard to the termination of employment during probation are considered. South Africa was a former colony of the Netherlands and the United Kingdom, in light of this the respective positions on dismissal during the probation period of employment in the Netherlands and the United Kingdom are also analysed. This provided the researcher with an opportunity to determine if South Africa's dismissal regime during the probationary period of employment is in line with some international perspectives and it appears that dismissal during the probationary period of employment in South Africa is out of step with international standards and developments.

I. CONCEPTUALISING PROBATIONARY EMPLOYMENT

Probationary periods of employment refer to a trial period granted by the employer to newly appointed employees.[1] This probation period normally precedes the confirmation of permanent employment status in the form of a written or unwritten contract.[2] The probationary period is often viewed as a reasonable discretionary period during which the suitability of a candidate is furthermore determined, where the duration of probation is not determined by statute.[3]

There is substantial evidence to suggest that probationary periods increase the probability that new employees will succeed in their new roles. The purpose of a probationary period is to allow a specific time period for the employee and employer to assess suitability of the role after having first-hand experience.[4] On the one hand it gives the employer opportunity to assess objectively whether the new employee is suitable for the job taking into account their capability, skills, performance, attendance and general conduct. On the other hand it gives the new employee the opportunity to see whether they like their new job and surroundings.

The statutory dispute resolution body for labour disputes in South Africa, the Commission for Conciliation, Mediation and Arbitration (CCMA), described the purpose of a probationary period of employment, during a dispute 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.[5]

There thus seems to be general consensus that the purpose of probation is to provide employers with the opportunity to correct possible errors in employment decisions in order to provide some protection to them by ensuring that they employ the most competent workforce whil protecting employees against unfair arbitrary action.

II. INTERNATIONAL BACKGROUND

Given the scope of this research paper the researcher has elected to only view dismissal and probationary employees in relation to ILO standards, the situation in the Netherlands and the UK, and then compare these to the actual scenario in South Africa. The reasons for the selected scope of this research paper are set out here below.

The most important piece of labour legislation in South Africa is the Labour Relations Act (LRA).[6] One of the purposes of the LRA is to give effect to South Africa's obligations as a member of the ILO and as such the ILO plays an integral part in South African labour legislation. 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.[7]

The ILO was established 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, and South Africa was one of the founding members. At the demise of the League of Nations and in 1946 the ILO was the only major international organisation to survive and it became the first specialist agency of the United Nations.[8]

The ILO adopts Conventions and makes Recommendations to assist member states in their own national labour legislation formulation. 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.[9]

For the purposes of this research paper, Convention 158 is of particular importance. Convention 158 deals with the termination of employment at the initiative of the employer and includes the dismissal of probationary employees for poor work performance and incapacity. Convention 158 and its dismissal requirements, especially related to probation, is discussed later in this research paper. It should be noted at this stage that neither the Netherlands, the UK nor South Africa has ratified Convention 158.

The Netherlands and South Africa have a rich and long relationship dating back to the establishment of a trading post by the Dutch East India Company in South Africa in 1652. Dutch legal principles and Roman-Dutch law has had a major influence on the establishment of South African common law principles and the common law contract of employment, even to this day.[10]

Given the rich history that South Africa and the Netherlands share, the researchers deemed it appropriate to include Netherland's labour legislation and the role Convention 158 plays in the labour legislation of the Netherlands. Labour legislation in the Netherlands provides for a probationary period of employment. 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.[11] The particulars of dismissal during the probationary period of employment in the Netherlands are addressed below.

Since 1797 the history of South Africa and the United Kingdom became inextricably linked to each other when the Cape Colony was occupied by the British and eventually the whole of South Africa became a British colony after the Anglo-Boer War which ended in 1902.

This resulted in South African law reflecting English legal principles. The United Kingdom is the second country selected for comparison in this research paper, 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.[12]

British law does not contain an express requirement for a probationary period of employment to be agreed on between the parties in the contract of employment.[13] In the UK employers are provided with some protection for employment decisions that turn out to be erroneous; this is provided in terms of the length of the employee's tenure with the employer. This length of tenure is also referred to as the qualifying period. The intricacies of dismissal during the probationary period of employment in the UK are analysed later on in this research paper.

III. ILO CONVENTION 158

This convention deals with the termination of employment at the initiative of the employer. Convention 158 was adopted by the ILO on 22 June 1982 following the 68th International Labour Conference held in Geneva, Switzerland in June 1982. This convention covers topics such as categories of employees that can be excluded, justification for termination, dismissal procedures and appeal procedures.

In terms of exclusion, Article 2(2) of Convention 158 states:

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 the scope of this research paper Article 2(2)(b) is of importance as it states that employees serving a period of probation or qualifying period of employment may be excluded from the provisions of this convention. The impact of this article must be viewed in terms of the requirements of Articles 4–8.

Article 4 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.

It is thus clear that there must be a valid reason for the termination of the employment of an employee. The three broad valid reasons are related to the conduct of the employee, the capacity of the employee and also the operational requirements of the employer.

Article 5 contains factors that will not constitute a valid reason for termination, factors such as union membership, participation in union activity, reporting employer violations of laws, discrimination and absence from work during maternity leave. From a careful reading of the

complete Article 5 it becomes apparent that the factors listed are not exhaustive and that member countries may add to the list of factors.[14] Article 6 of the convention states that temporary absence from work due to illness or injury shall also not constitute a valid reason for termination.

The only pre-dismissal procedure required by Convention 158 are contained in Article 7 and reads as follows:

> 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.

It is apparent that Article 7 does not provide any details in respect of notification periods, the right to call witnesses or to cross-examine witnesses, or the right to legal representation. Article 7 is thus not prescriptive in terms of the requirements for neither an enquiry nor the process to be followed preceding an enquiry all that is required is that the employee must be provided with an opportunity to defend himself against the allegations before the employer terminates the services of the employee.

Article 8 deals with the procedures that an employee can follow if he or she wants to appeal against his or her dismissal. This appeal must be directed to an impartial body, such as a court, labour tribunal, arbitration committee or an arbitrator.[15]

Considering ILO Convention 158 as a whole, the following three core principles stand out with regard to dismissal:

1. There must be a fair and valid reason for dismissal or termination.
2. An employee must have an opportunity to defend him – or herself against the allegations made by the employer.
3. The employee should have the right to appeal to an impartial body against his or her dismissal.

It is, however, important to note that these three core principles of Convention 158 are not applicable to the termination of employment of an employee who is employed on a probationary period of employment. Article 2(2)(b) specifically states that employees who are employed on probation or trial period may be excluded from the provisions of Convention 158. Probationary employees, in terms of Convention 158, are thus provided with less protection in terms of pre-dismissal procedures as they may be excluded from the protections provided in Article 7.

The next section of this research paper deals with the dismissal of probationary employees in the Netherlands, the UK and South Africa and then compares them to the guidelines in Convention 158.

IV. DISMISSALS AND PROBATION IN THE NETHERLANDS

Probationary periods of employment in the Netherlands are governed by various forms of legislation, but the foremost piece of guidance is provided by the Dutch Civil Code of 1992.

In terms of the Civil Code (CC), where a contract of employment includes a probationary period, also known as the trial clause, either the employer or the employee are entitled to give notice with immediate effect of termination, up until the conclusion of such a period (Article 7:676 CC). The ordinary rules that normally regulate dismissals are not applicable during the probationary period of employment and the relevant parties to the relationship will only have minimal rights associated with dismissals (Article 7:669(7) CC). No notice periods of termination are applicable.[16] It would appear that the probation period in the Netherlands is seen as a period during which an employee has no protection from dismissal. In this regard Genderen et al. (2006) comment as follows:

> … daarom spreekt men wel van een voor de werknemer rechtelose periode gedurende de proeftijd.[17]

This scenario could have possible serious consequences for employees who might be exploited during their probation periods. To provide some form of protection for employees the Dutch parliament has limited the use of trial clauses as from 2014. Article 7:652 of CC states that trial clauses must be in writing and equal for both the employer and employee. Trial clauses are now limited to a maximum period of two months and no trial clause can be included in a contract of employment with a maximum duration of six months.[18]

Dutch law recognises various grounds on which a contract of employment can be terminated; these include the end of a contract of employment on legal grounds, termination by mutual agreement, unilateral cancellation of the employment contract with permission from the CWI (Central Organisation for Work and Income) or the UWV (Employees' Social Security Administration) and summary dismissal.[19] For all these grounds for termination there are prescribed procedures to follow, none of which is applicable when it comes to the termination of an employee on probation. These procedures can first include written permission from either the CWI or the UWV, there must be a valid reason for dismissal, the employer must inform the employee of such reason and the employee can dispute the lawfulness of his/her dismissal in the District Court.

It is clear that the dismissal procedures in the Netherlands for an employee who is on probation are almost non-existent and is a very simple process compared to the dismissal procedures that must be followed for an employee who are not on probation.

V. DISMISSAL AND PROBATION IN THE UNITED KINGDOM

The most important pieces of labour legislation in the UK is the Employment Relations Act (ERA) of 1996 and the ERA of 2004. The ERA of 2004 deals with topics like union recognition, industrial action, the rights of trade union members and employees, and the enforcement of minimum wage legislation. The ERA of 1996 deals with, among other matters, topics like basic conditions of employment, the termination of employment and unfair dismissals. The ERA of 1996 in Part X section 94(1) stipulates that employees have the right not to be unfairly dismissed and section 98A describes the procedures that must be followed by an employer to ensure procedural fairness.[20]

In terms of the scope of this research paper the most important section of the ERA of 1996 is section 108. This section deals with the so-called 'qualifying period of employment', also known as a probationary period of employment. As stated above in terms of section 94(1) employees in the UK have the right not to be unfairly dismissed, and in terms of section 108 the right to not be unfairly dismissed is not applicable to employees serving a qualifying period of employment.[21] It would thus seem that only after two years of service do UK employees obtain the right not to be unfairly dismissed. Section 108 states the following:

> (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
> (2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words there were substituted the words 'one month'.

Section 64(2) deals with the suspension from work of an employee due to medical reasons. Probationary period employees in the UK who are dismissed due to medical reasons will obtain the right to not be unfairly dismissed after one month of service.

Probationary periods in the UK are not stipulated in legislation and are normally specified in the contract of employment and it seems that the typical probationary period ranges from three to six months. Probationary periods can be extended by the employer but not without the prior agreement of the employee.[22] Probationary period employees in the UK will have the following statutory rights: national minimum wage, rest breaks and paid holidays, sick pay, right not to be discriminated against and the right to reasonable adjustments if they are disabled. Probationary employees will not have the right to bonuses, share schemes or private medical care and in general they will also have a much shorter notice period than full-time employees. The most important right, for the purposes of this research paper, is that probationary employees do not have the right to claim unfair dismissal, unless the claim falls within the ambit of an automatic unfair dismissal.[23]

The Advisory, Conciliation and Arbitration Service (ACAS) in the UK contains a Code of Practice (the Code) that employers have to follow to ensure that a dismissal is procedurally and substantively fair. The Code contains a step-by-step process that employment tribunals will take into consideration when determining if a dismissal was fair.[24] This Code is not applicable to the dismissal of probationary employees, which in actual fact means that an employer can dismiss a probationary employee without following any of the pre-dismissal procedures described in the Code by ACAS as long as the employer sticks to the notice period contained in the contract of employment. As stated earlier a probationary employee will still be able to claim unfair dismissal if the employee can establish that the reason for dismissal is due to discrimination, a protected disclosure or for any reason falling under the ambit of an automatically unfair dismissal.[25]

The standard statutory dismissal and disciplinary procedures (expanded on the Code of ACAS) 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:

1. 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.

2. 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.
3. 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.

As mentioned earlier the statutory disciplinary process is not applicable to the dismissal of employees during their probation period. It is clear that in the UK the process to dismiss a probationary employee is much more simplified than for permanent employees.

VI. DISMISSAL AND PROBATION IN SOUTH AFRICA

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.[26] 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.

In the Code of Good Practice: Dismissal and in particular Schedule 8 items 8(1) and 9, very detailed rules and guidelines are provided regarding probationary employment and the termination of employees on probation.

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.

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 the *Msomi* v. *Protea Security Services*[27] judgment the Labour Court ruled 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.

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

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 the *Crawford* v. *Grace Hotel*[28] arbitration case, 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*[29] the former Industrial Court of South Africa 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.

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.

It is evident that in item 8(1)(c) the legislator wanted to 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.

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.

The duration of a probationary period is thus not specified in legislation in South Africa but will be contained in the contract of employment. In the matter between *Yeni* v. *South African Broadcasting Corporation*[30] 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.

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.

In *Gostelow v. Datakor Holdings (Pty) Ltd t/a Corporate Copilith*,[31] 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 clear that legislative requirements in South Africa place an obligation on the employer to 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*[32] 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.

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.

The Labour Appeal Court in *Eskom* v. *Mokoena*[33] 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 wording of 8(1)(f) suggests 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.

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.

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. This dismissal must, however, be done in terms of procedural fairness as stipulated in Schedule 8 item 4 of the Code of Good Practice: Dismissal in the LRA.

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. This was confirmed in *Camhee* v. *Parkmore Travel*[34] when the CCMA ruled that an enquiry is required before a probationary employee may be dismissed on grounds of incapacity.

In practice, the following rules of natural justice will apply to disciplinary enquiries; this is also in line with the pre-dismissal procedures that have to be followed as stated in Schedule 8 item 4 of the Code of Practice: Dismissal in the LRA:

1. An investigation should be conducted into the allegations of poor performance.
2. The employee should be given notice of the allegations.
3. The employee should be given an opportunity to state a case in response to the allegations.
4. The employee should be given a reasonable time to prepare a response.
5. The employee must be afforded the right to be assisted by a trade union representative or a fellow employee.
6. A decision should be communicated after the enquiry.[35]

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. This was confirmed in *Num & another* v. *Kloof Gold Mining Co*.[36] when the former Industrial Court stated:

> 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.

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. 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.[37]

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.

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.

Should the employer extend the employee's probationary period for a reason or period contrary to item 8(1)(g) as 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 combined conciliation-arbitration process.

There is a statutory obligation on the employer, in South Africa's dismissal law, 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.

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.

This would indicate that the substantive reasons for a dismissal during the probationary period of employment may be less compelling than for the dismissal of an employee who is not on probation. Similarly in *Crawford* v. *Grace Hotel*[38] 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.

South African courts have drawn a distinction between the requirements for the substantive fairness of a dismissal of senior managerial employees and normal employees during the probationary period of employment. In *Brereton* v. *Bateman Industrial Corporation Ltd & others*,[39] 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.

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.

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. The specific 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. 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.

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, as is the case in South African dismissal law, comprises of the following:

1. The employee must be informed that he/she is performing below the standard expected.
2. The employee must be warned that continuous poor performance may result in dismissal.
3. The employee must be given reasonable evaluation, instruction, training, guidance or counselling.
4. The employee must be given a reasonable opportunity to improve.
5. 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 in terms of South African legislation is that probationary employees may be dismissed for reasons less compelling than tenured employees. There is, however, no difference in the procedural requirements to dismiss an employee who is serving a probationary period of employment than the procedural requirements to dismiss a permanent employee.

VII. CONCLUSION AND RECOMMENDATIONS

The focus of this research paper 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 setting.

The international framework set out by the researcher started with analysing Convention 158 of the ILO and its use as a universal benchmark. The researchers then evaluated the dismissal procedures related to probationary employees in the Netherlands, the United Kingdom. The Netherlands and the United Kingdom were of particular importance to South Africa due to their irrefutable impact on South African legislation. After evaluating the ILO standards set in Convention 158 and reviewing the processes in the Netherlands and the UK, the dismissal processes during the probation period in South Africa were analysed. This was done in order to determine if South Africa's dismissal requirements during the probationary period of employment are out of step with some international trends or not.

The dismissal procedures in Convention 158 plainly state that:

1. There must be a fair and valid reason for dismissal.
2. An employee must have an opportunity to defend him- or herself against the allegation made by the employer.
3. The employee should have the right to appeal to an impartial body.[40]

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 158.

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. The result of this is that an employee has no protection from claiming an unlawful or unfair dismissal during the probation period. This means that employers have the the power to terminate the employment relationship, during the probationary period of employment, without any pre-dismissal requirements which results 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.[41]

Should the employee on probation be of the 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.[42]

Labour and employment legislation in the UK makes provision for a probationary period, if agreed upon in the contract of employment. The duration of probation periods are not determined by law but in general ranges from three to six months. 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. During the probationary period of employment an employee in the UK cannot claim unfair dismissal as the right to claim unfair dismissal is only extended to employees who have at least two years of service. The pre-dismissal procedures that employers have to follow to dismiss a tenured employee is not applicable to employees on probation.

Probationary employees in the UK can, however, claim unfair dismissal if it is established that the dismissal was automatically unfair and the reason for dismissal relates to discrimination, pregnancy, union activity or any other prohibited ground.

The South African Labour Relations Act 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. This also includes dismissal due to misconduct by the employee or the operational requirements of the employer. Such dismissal must be done in terms of a fair reason and that a fair procedure has been followed.

The pre-dismissal procedures that an employer must follow to dismiss an employee during probation in South Africa for poor work performance are no different – in fact they are more stringent[43] – than those for a tenured employee as follow:

1. The employee must be informed that he/she is performing below the standard expected.
2. The employee must be warned that continuous poor performance may result in dismissal.
3. The employee must be given reasonable evaluation, instruction, training, guidance or counselling.
4. The employee must be given a reasonable opportunity to improve
5. The employee may be dismissed after an enquiry has been convened. The enquiry must comply with the rules of natural justice.[44]

The only distinction in terms of the pre-dismissal requirements between probationary and tenured employees is 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 pre-dismissal procedures of a probationary employee in South Africa for reasons based on the misconduct of the employee or the operational requirements of the employer are also no different than those for tenured employees.

In light of the guidelines provided by ILO Convention 158 and after reviewing the processes in the Netherlands and the United Kingdom regarding the dismissal of employees during the probationary period, it would seem that labour legislation in South Africa is out of step. There is no real benefit for employers in South Africa to employ employees on probation as the termination processes prescribed are the same as those for permanent employees.

South African labour legislation is often viewed as being inflexible and the pre-dismissal requirements for probationary employees only strengthen this perception. Labour legislations should not only provide protection for employees but should also be conducive to the business environment. The researchers do not suggest under any circumstances that probationary employees should be exposed to exploitation by employers and be placed in a vulnerable position. Given the current legislative requirements in South Africa for the dismissal of probationary employees it serves no real purpose to include these requirements in the legislation as there is no real difference in the pre-dismissal requirements of permanent employees. In order to create a balance between the protection of probationary employees and the creation of a business friendly labour environment the researchers suggest that, as in the UK, probationary employees should be protected from day one of employment against automatically unfair dismissals and the length of the probation period should be a maximum of six months. In order to provide protection against arbitrary decisions by the employer, probationary employees should at least be entitled to a substantive fair dismissal and the employer should at least be required to prove that the reason for the dismissal of a probationary employee is for a substantively fair reason by informing the employee in writing with the reasons for dismissal.

CASES

Brereton v. *Bateman Industrial Corporation Ltd & others* [2000] 21 ILJ 442.

Camhee v. *Parkmore Travel* [1997] 2 BLLR 180 (CCMA).

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.

Msomi v. *Protea Security Services* [2006] 20 ILJ 1711 (LC).

Num & another v. *Kloof Gold Mining Co.* [1986] 7 ILJ 375.

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 v. *South African Broadcasting Corporation* [1997] 11 BLLR 1531 (CCMA).

STATUTES AND CONVENTIONS

ILO Convention 158

Netherlands: Buitengewoon Besluit Arbeideverhoudingen of 1945

Netherlands: Dutch Civil Code of 1992

South Africa: Constitution of the Republic of South Africa, Act 108 of 1996

South Africa: Labour Relations Act 66 of 1995

United Kingdom: Employment Act of 2008

United Kingdom: Employment Relations Act of 1999

United Kingdom: Employment Rights Act of 1996

Notes

1 Z. Baloyi and A. Crafford (2006) 'Problems Surrounding Probation in the South African Public Service', *SA Journal of Human Resource Management*, 4(1).

2 N. Tesnar (2017) *The Employer's Guide to Probation – SEESA*. Retrieved 1 March 2019, from <http://www.seesa.co.za/the-employers-guide-to-probation>.

3 I. Israelstam (2013) *Probation Is Not the Easy Way Out for Employers*. *Labourguide.co.za*. Retrieved 27 February 2019, from <http://www.labourguide.co.za/most-recent/872-probation-is-not-the-easy-way-out-for-employers>.

4 <http://www.firstpracticemanagement.co.uk/blog/posts/probationary-periods-a-guidance-to-probationary-periods/>. Retrieved 2 April 2019.

5 *Crawford* v. *Grace Hotel* (2002) 21 ILJ 2315.

6 Act 66 of 1995.

7 A. Van Niekerk, M. Christianson, M. McGregor, N. Smit and B. P. S. Van Eck (2018) *Law@work*. Durban: LexisNexis.

8 L. Swepston (1998) 'Human rights law and freedom of association: development through ILO supervision' (1st edn). *International Labour Review*, 137 (2).

9 S. Hughes (2005) 'The International Labour Organisation', *New Political Economy*, 10(3): 413–25.

10 J. Grogan (2017) *Workplace Law*, 12th edn. Cape Town: Juta.

11 A. Jacobs (2015) *Labour Law in the Netherlands*. Netherlands: Kluwer Law.

12 P. A. Smit (2010) 'Disciplinary Enquiries in Terms of Schedule 8 of the Labour Relations Act 66 of 1995'. Unpublished PhD thesis, University of Pretoria, South Africa.

13 M. Mason (2017) *Dismissal during Probationary Period*, Mark Mason Law blog. Retrieved 28 March 2019 from <https://www.markmasonlaw.co.uk/blog/?p=317>.

14 Smit (2010): 44. So, for example, has South Africa included in its list employees who participate in protected strike action.

15 See ILO (1995) *Protection against Unjustified Dismissal*, paras 149–51; Heerma van Voss (1992) *Ontslagrecht in Nederland en Japan.* Den Haag: Kluwer Law International, p. 290; E. Simms (1995) 'Judicial Decisions Concerning Dismissals: Some Recent Cases', *International Labour Review*, 134 (6); 698–700.

16 Jacobs (2015): 185–6.

17 D. M. van Genderen, H. Dragstra, P. S. Fluit, M. E. Stefels, E. Steverink, W. Witte and D. J. B. de Wolff (2006) *Arbeidsrecht in de Praktijk*. Den Haag: SDU, p. 221.

18 Jacobs (2015): 186.

19 M. Diebels (2007) *De Kleine Gids Voor her Nederlandsche Arbeidsrecht*. Den Haag: Kluwer Law International, pp. 109–34.

20 <https://www.legislation.gov.uk/ukpga/1996/18/contents> accessed on 9 April 2019.

21 This does not mean that probationary period employees have no protection at all.

22 <https://www.landaulaw.co.uk/dismissal/> accessed on 9 April 2019.

23 <https://www.landaulaw.co.uk/dismissal/> accessed on 9 April 2019.

24 In this regard see <http://www.acas.org.uk/index.aspx?articleid=2174> accessed on 9 April 2019.

25 This can also include dismissal due to union membership, pregnancy or child birth, jury duty, any statutory right the employee might have in this regard. See <https://worksmart.org.uk/work-rights/losing-your-job/dismissal/what-automatically-unfair-dismissal> accessed on 9 April 2019.

26 Smit (2010): 105. Also see section 185(a) of the LRA.

27 [2006] 20 ILJ 1711 (LC).

28 [2002] 21 ILJ 2315.

29 [1995] 1 BLLR 118 (IC).

30 [1997] 11 BLLR 1531 (CCMA).

31 [1993]14 ILJ 171.

32 [2001] 22 ILJ 2120.

33 [1997] 8 BLLR 965 (LAC).

34 [1997] 2 BLLR 180 (CCMA).

35 Smit (2010): 143.

36 [1986] 7 ILJ 375.

37 Smit (2010): 122.

38 [2002] 21 ILJ 2315.

39 [2000] 21 ILJ 442.

40 Smit (2010): 148.

41 Jacobs (2015): 186.

42 Jacobs (2015): 186.

43 This was confirmed in the judgment in *Brereton* v. *Bateman Industrial Corporation Ltd & others* [2000] 21 ILJ 442.

44 Schedule 8 item 9 of LRA 66 of 1995.