WERKSMANS
ATTORNEYS

EMPLOYMENT

The Failure To Communicate An Extension Of Probation Does Not Always Amount To A Confirmation Of Permanent Employment

10 September 2019 *8 min read*

By Andre van Heerden, Senior Associate and Chelsea Roux, Candidate Attorney

Reviewed by Jacques van Wyk, Director

ISSUE

Whether an employee is a permanent employee at the end of the agreed probationary period where the employer does not explicitly confirm permanent employment and the employee's contract of employment requires such a confirmation and the employee is still subject to performance management.

SUMMARY

The Labour Court found that an employee's dismissal for poor work performance was substantively unfair because the employee's probation period had ended and the employee had successfully completed her probation period. On appeal the Labour Court held, *on the evidence presented*, that the probation period **had implicitly been extended** and that the employee had been underperforming. Her dismissal was found to be fair.

FACTS

In *Ubuntu Education Fund v Paulsen N.O. and Others* [2019] ZALAC 56 (15 August 2019) ("**Ubuntu**"), the Labour Appeal Court ("**LAC**") dealt with the above issue.

The employer, Ubuntu Education Fund ("**employer**") is a non-profit organisation which conducts various programs aimed at assisting children in vulnerable circumstances. Zandile Sonyaya ("**Sonyaya**") was employed by the employer as a supply chain coordinator from 18 August 2014. She was tasked with managing the procurement function.

Sonyaya's employment contract, which commenced on 4 July 2014, made provision for a six month probationary period. The contract provided:

"The first six (6) months of your appointment will be a probationary period. Upon the successful completion of your probationary period, you will receive confirmation of your appointment as a permanent staff. Performance appraisals will be conducted during this 6 month period by your supervisor."

The probation period was to end 15 February 2015.

Sonyaya was given four primary Key Performance Areas ("**KPA's**"). She was unable to achieve the four KPA's and it was agreed that her KPA's would be reduced to one administrative task with effect of 8 August 2014. The employer then hired a temporary administrator to assist with Sonyaya's other KPA's while she familiarised herself with the administration systems. This was intended to be a temporary arrangement to give Sonyaya an opportunity to adjust to her tasks.

The employer's quality assurance manager was assigned as Sonyaya's supervisor and the financial accountant provided her with technical support.

A performance meeting was held on 5 December 2014 during which Sonyaya was informed of the concerns about her performance. It was agreed that her four former KPA's would be reassigned to her with effect from 11 December 2014. She was told that she would need to perform at the required level as there were only two months remaining of her probationary period.

A follow up meeting was held on 16 January 2015 during which the same performance concerns were highlighted. Sonyaya was still having difficulty reporting and it was agreed that her supervisor would conduct weekly performance reviews to evaluate her performance.

Five performance appraisals were conducted between 27 January 2015 and 3 March 2015. Sonyaya scored 33%, 33%, 43%, 47% and 40% respectively. Performance appraisals were conducted for all employees over the same period. A comparative analysis showed that Sonyaya was the worst performer scoring an average of 43.3%.

The employer decided to convene a Poor Work Performance ("**PWP**") hearing on 6 March 2015. A notice was sent to Sonyana informing her of the hearing.

At the hearing, her supervisor and the financial accountant testified on behalf of the employer and concluded that Sonyaya lacked the understanding and ability to carry out her assigned KPA's despite all the assistance offered to her by the employer.

Sonyaya was dismissed for poor work performance on 13 March 2015.

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA")

Sonyaya referred an unfair dismissal dispute to the CCMA. The supervisor testified at the CCMA and stated that despite the employer's efforts to accommodate Sonyaya with a temporary aid, she failed to follow the correct procedures when she received all four KPA's again. She testified that subsequent to her dismissal, her replacement achieved the required performance standards within two weeks. The financial accountant also stated that her failure to provide complete financial reports and to capture data timeously affected his own performance.

The commissioner held that her dismissal was substantively unfair. He found that Sonyaya had become a permanent employee when her probation ended on 18 February 2015. This indicated that the employer was satisfied with her performance and that she had successfully completed her probation period. The commissioner rejected the evidence pertaining to the performance appraisals on the basis that no evidence was presented as to how the scores were arrived at by the employer.

The commissioner questioned why Sonyaya was made permanent if the employer had been dissatisfied with her performance and held that the employer had not properly considered alternative sanctions to dismissal. He ordered that Sonyaya be reinstated with retrospective effect.

LABOUR COURT

The employer applied to the Labour Court for the review of the award. The Labour Court refused to set aside the award on the grounds of unreasonableness. The Labour Court accepted that Sonyaya had become a permanent employee and was no longer on probation.

The employer then appealed to the LAC contending that the commissioner and the Labour Court had erred in finding that Sonyaya had successfully completed her probation period.

LABOUR APPEAL COURT

The LAC held that the purpose of the probationary period was to provide the employer time to evaluate whether Sonyaya was a suitable candidate for permanent employment. The original employment contract intended that the contract would terminate on 18 February 2015, being six months after the commencement of employment. The LAC stated that although this was the case, it is clear from the evidence that when the probation period came to an end, the employer was still engaged in an ongoing review and evaluation process. The minutes of the meeting held on 16 January 2015 stated that Sonyaya would undergo "informal weekly review" by her supervisor. By 15 February 2015, this review process had not been completed and continued until 6 March 2015. The LAC held that it may therefore reasonably be inferred that the employer intended to extend the probation period until the review and evaluation process was completed. It would have been unfair to Sonyaya not to have extended the probation period as she was only assigned all four KPAs from 11 December 2014.

The LAC referred to item 8 of the Code of Good Conduct: Dismissal ("**the Code**") which entitles employers to require a newly-hired employee to serve a probationary period *"before the appointment of the employee is confirmed"* (emphasis added). Item 8(1)(e) provides that the probationary period must be used to assess the employee's performance and that the employer should give the employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render satisfactory service. Items 8(1)(f) – (h) provide that an employer is

entitled to extend the probationary period in order to complete any performance appraisal. In addition to this, the LAC highlighted that clause 1.2 of the employment contract provided that the employee will be appointed on a probationary period during which the employee "will be assessed for confirmation of his suitability of employment".

The conclusion reached by the LAC was therefore that in light of the ongoing review and evaluation process, an inference that the employer impliedly confirmed Sonyaya's permanent employment was neither plausible nor consistent with the facts. The LAC agreed with the employer that the commissioner and the Labour Court had erred in concluding that Sonyaya automatically became a permanent employee simply because her employment extended beyond the termination of the probation period of 18 February 2015.

Additionally, the LAC held that it was irrational for the commissioner to have concluded that Sonyaya's continued employment indicated that her performance was satisfactory as it disregarded the continued difficulties Sonyaya had in meeting her KPA's. The purpose of the probation period is not only to assess whether an employee has the ability to do the job required but also serves the purpose of ascertaining whether the employee is a suitable candidate for the employer in the wider sense. Although this is the case, an employee completing a probation period is still entitled to substantive and procedural fairness. However, the LAC noted that item 8(1)(j) of the Code lowers the standard of substantive fairness and provides as follows:

"Any person making a decision about the fairness of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period."

The LAC warned that arbitrators should be hesitant to interfere with the employer's decision regarding the required performance standard of a probationary employee.

The LAC held that the evidence sufficiently justified the employer's decision not to confirm Sonyaya's permanent employment.

The LAC set aside the Labour Court's decision and concluded that Sonyaya's dismissal was substantively and procedurally fair.

IMPORTANCE OF THE CASE

It can be inferred from the facts in *Ubuntu* that the probation period can be impliedly extended, **in certain instances**, if the employer continues the review and evaluation process. It is however, advisable that **express confirmation be communicated to the employee that the probationary period is extended**. This is also important because item 8(h) expressly provides that "an employer may only...extend the probationary period after the employer has invited the employee to make representations and has considered representations made..."



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile

Keep us close