

## High level employees on probation

As a rule employers should give newly-appointed employees some time to settle in before deciding on their suitability for the job. But would it be fair to expect an employee appointed to a high level job to 'hit the ground running'?

The guidelines for dealing with probation (Item 8 of Schedule 8 to the Labour Relations Act) refer to the employer's obligation to give an employee reasonable evaluation, instruction, guidance, training, or counselling. The employee should also be given an opportunity to state his or her case before dismissal. The guidelines do not distinguish between different levels of employment. However, our case law has suggested that employees in high level jobs may be treated differently.

There is a recent case that illustrates the point quite well, namely ***Rheinmetall Denel Munitions (Pty) Ltd v National Bargaining Council for the Chemical Industry & others (C528/13) [2015] ZALCJHB 49 (24 February 2015)***. Ms Nombande had been appointed to the position of personal assistant to the general manager of HR. It was a probationary appointment. One of her first big tasks was to organise the year-end function before she went on leave. She failed hopelessly. She also said that she had asked two other staff members for assistance, which was a lie. Ms Nombande was dismissed. The arbitrator concluded that the company's approach had been to see if Nombande could 'swim without sinking' and had not given her any prior formal warning. The arbitrator found that the sanction of dismissal was too harsh and ordered reinstatement to a similar post, but not with the same manager.

On review, the Labour Court took a different view. The Judge pointed out that evidence had been led at the arbitration that Nombande had "considerable experience in an administrative capacity as PA, as well as arranging events such as mayoral functions, workshops, and farewell parties". There was also evidence that Nombande's "experience in the arrangement of functions" was a factor which influenced her appointment. The arbitrator had failed to take this into account. There was further evidence that her manager had regularly told Nombande to improve her performance, constantly had to remind her to do things and complained about her trying to do too many things at the same time. The specific tasks she had to perform as part of her duties as PA, were not complex in nature and hardly required specific training.

There were some other points on which the review application was based, such as the fact that the arbitrator had found Nombande not guilty on a charge of dishonesty, despite the fact that she had pleaded guilty during the disciplinary hearing. However, for the sake of brevity we deal in this article only with the issue of her work performance.



The judge remarked that a probationary appointment is often made in a junior level post in which it is anticipated that a considerable degree of on-the-job training will be conducted. This was clearly not the kind of post to which Nombande had been appointed. The judge proceeded to say that it was not unreasonable for the employer to point out the perceived shortcomings of the probationer and to emphasise the importance of improving her performance if she wanted to be permanently employed.

Importantly, the judge added that there was nothing to suggest that Nombande was asked to do tasks beyond the level of competence she professed to have. The essence of the company's complaint was that the manager could not depend on Nombande as she ought to have been able to. The arbitrator had failed to appreciate this. The award was set aside and substituted with a finding that the dismissal had been fair.

This case sounds a warning for employees who overinflate their competencies in their CVs. They must realize that they can be held accountable and cannot claim that the employer should have trained and assisted them. Employers are, nevertheless, cautioned against taking unnecessary shortcuts in dealing with poor work performance. But at least they know that they do not have to mollycoddle underperforming employees in high level positions.

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