

Employment under probation, unfair termination and escape way.

This article highlights in a nutshell what a probationary employee means, why probationary employee, rights of a probationary employee and disciplinary measures against a probationary employee.

The Court of Appeal of Tanzania in the case of Stella Temu vs Tanzania Revenue Authority [2005] TLR 178 defines probation as a practical interview of which an employee is given a ground to show his or her skills and also the employer is given an opportunity to see if the employee is a fit person for the job.

The court stated that probation period allows employee to see if they enjoy working with the employer and whether the employee matches the skills and abilities for the job before results of the interview are out.

Like other employees, probationary employees have their rights mostly found under Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007.

In a nutshell, these are rights to be provided with terms of probation just like how one is given a contract of employment. A probationary employee has the right to be given terms of his or her probation, right to discuss his or her own evaluation and guidelines on the probation, right to be informed of his or her performance during probation.

Others are all rights provided by the code on disciplinary or termination of a probationary employee and also right to have a representative by either fellow employee or the union representative among other rights.

In labour cases, one can sue for unfair termination. However, it should be noted that a probationary employee or employees with a period less than six months are not entitled to sue under unfair termination as per section 35 of the Employment and Labour Relations Act, 2004.

This has brought different positions on what is the procedure of dealing with disciplinary measures against a probationary employee if one is barred from instituting a case for unfair termination.

Despite section 35 of the Employment and Labour Relation Act excluding employees working for less than six month and probationary employees form instituting a case against unfair termination, the law does not bar such employees completely.



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Rule 10(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007 provides that for a probationary employee, termination shall be in accordance with the provided guidelines.

Further, rule 10 (8) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007 provided three procedures to be adhered to before termination of a probationary employee.

Firstly, the employee has to be informed of the employer's concerns; secondly, the employee has to be given an opportunity to respond to those concerns and lastly, the employee has to be given a reasonable time to improve performance or correct behaviour and fail to do so.

In the case of Rovvenpec Resort vs Edson Chita Nyondo, Revision No. 626 of 2018, the court held that there was no any evidence as to the adherence of the employer to the above mentioned three procedures thus the employer was found liable.

In the case of Sam Frost East Africa Ltd vs Laurian Waijah, Revision No. 01 of 2020, probationary employee was terminated for absenteeism and the court held inter alia that on record, the said termination was not in accordance with the law since the said concern was not communicated and the other procedures were not proved to have been undertaken by the employer.

This does not mean that section 35 of the Employment and Labour Relation Act, 2004 has been abandoned on the limits as to who can sue for unfair termination. That is not the case. Rather, it is our opinion that there are ways for a probationary employee to seek his or her rights without suing for unfair termination and still arrive at the same destination.

These ways have been tested in court several times. Firstly, a probationary employee can sue for breach of contract. It is known that the body that is vested to entertain labour dispute mostly at the lowest level is

the Commission for Mediation and Arbitration which has powers to entertain breach of contract and the same can also be found on the forms that one is required to file to institute his or her labour dispute.

Further, any employment arises from contract either impliedly or expressly, both are contract. Thus, if the terms are breached, then one can sue for the same. Also, it is a recognized fact that what is provided in the labour statutes are terms impliedly taken to form part and parcel of the contract entered.

Therefore, if the procedures in the code cited above are not adhered to, the same amounts to breach of contract even though they might not have been in place.

In the case of Good Samaritan vs Joseph Robert Savari Munthu, Revision No. 165 of 2011, the court upheld that despite an employee being a probationary employee, still he sued for breach of contract and not unfair termination under section 35, and thus he was entitled to sue.

Secondly is suing under claims of unfair labour practice, waiver of the procedures or not granting a probationary employee the right to be heard before adverse orders. One can sue with this course of action and not unfair termination. This was supported in the case of Agness B. Ruhere vs UTI Micro finance Plc, Revision No. 459 of 2015.

Even if one has been in office for sometimes and in his or her contract, the same was subject to probation and no any automatic employment clause, once the period of his or her probation ends, or her probation ends, employee, despite the number of years he or she has worked, counted as a probationary employee until confirmation is granted. Employers are strongly advised to use probationary period in accordance with the law so as not to destruct one from fulfilling their career plans and also employees should use the said period effectively to showcase their ability towards assisting the employer and in doing so add value to the employer's business.

Note: The material and information contained in this article are for general information purposes only. They only provide either elementary or basic legal knowledge on the above subject. Anyone considering legal action should consult an experienced lawyer to understand current laws and how they may affect a case in question.