

**RIGHTS OF EMPLOYEE UNDER PROBATION PERIOD: EXAMINATION
OF THE LAWS AND PRACTICE IN TANZANIA**

THADEUS I. MASSAWE

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M)**

**DEPARTMENT OF PRIVATE LAW
THE OPEN UNIVERSITY OF TANZANIA**

2024

CERTIFICATION

The undersigned certifies that he has read and at this moment recommends acceptance by the Open University of Tanzania a dissertation entitled, ***“Right of Employee under Probation Period: Examination of Laws and Practice”***, In partial fulfilment of the requirements for the award of Degree of Masters of Laws (LL.M).

.....

Dr. Rindstone Ezekiel

(Supervisor)

.....

Date

COPYRIGHT

No part of this Dissertation may be reproduced, stored in any retrieval system, or transmitted by any means, electronic, mechanical, photocopying, recording, or otherwise without the author's or The Open University of Tanzania's prior written permission.

DECLARATION

I, **Thadeus I Massawe**, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirement for the Degree of Master of Laws.

.....

Signature

.....

Date

DEDICATION

This research paper is dedicated to my parents, Mr and Mrs Isack Massawe who laid down my educational foundation. Without them, I would not be in this position. I will always value their contributions them forever. But not only to them but also to my lovely wife SOPHIA SEVURI for the support she endured with me towards the completion of this report. With due respect, I dedicate this research also to my lovely son Ethan Thadeus Massawe and lovely daughter Michelle Thadeus Massawe. to whom I sincerely say that they are the ones who made me struggle harder so that he could follow my path during his adulthood and live a better life as a child needs.

ACKNOWLEDGEMENTS

The successful completion of the dissertation has been enhanced by Almighty God. I give Him thanks for the life, wisdom, knowledge, and intelligence he granted me. I am also much indebted to supervisor Dr. Rindstone Ezekiel for his heartfelt comments, suggestions, and contribution. He has been very supportive towards the success of this dissertation. I am thankful for his most sincere supervision throughout the preparation of this work. His professional, sound encouraging comments, pieces of advice, and positive criticism were the ingredients for the improvement of the content, form, and shape of this work. Moreover, without forgetting my fellow Mr Eliud Kitime who supports me to a large extent towards to accomplishment of this academic research. Not only that but there are others my fellow I Sophia Sevuri, Antipas Lakam, Isaya Mwandri, Nixon Lema (Nick Lee), Luka Ngogo and Mery stationary who gave me moral and material support where necessary.

I am thankful to many individual persons and institutions that facilitated this study. I collectively express my sincere appreciation to them all for their valuable contribution and support.

ABSTRACT

This research study dealt with the rights of the employees under probation Period from the legal perspective through examination of laws and practice simply I can say it intends to make a review and analysis of the laws and practical frameworks, which govern the rights of the probationary employees in Tanzania. The researcher intends to know why employees under probation period are not covered under section 35 of the Employment and Labour Relation Act. The researcher used two research methodologies that are Doctrinal legal research comprises an in-depth analysis of the legal doctrine with its development process and legal reasoning, traditional research is concerned with documents rather than with people and society or experience and observations. It is found through this research study that there is no express provision in the Employment and Labour Relations Act 2004 about the probation period. Nonetheless, the law denies the right to claim unfair termination as per section 35. Hence, this empowers employers to abuse their employees. It is the interest of this research study to recommend the amendment of the laws to protect probationary employees, the grounds for terminating probation employees, the right to claim unfair termination, and the legal rights of employees under the probation period.

TABLE OF CONTENTS

CERTIFICATION	ii
COPYRIGHT	iii
DECLARATION.....	iv
DEDICATION.....	v
ACKNOWLEDGEMENTS.....	vi
ABSTRACT	vii
LIST OF STATUTES	xiii
LIST OF CASES	xv
ABBREVIATION	xvi
CHAPTER ONE	1
GENERAL INTRODUCTION.....	1
1.0 Introduction	1
1.1 Background to the Problem	2
1.2 Statement of the Problem	8
1.3 Research Question	11
1.4 Literature Review	12
1.5 Research Objectives	17
1.5.1 General Objective	17
1.5.2 Specific Objective.....	18
1.6 Research Significance.....	18
1.7 Research Methodology	19
1.7.1 Doctrinal Legal Research	20

1.7.2	Data collection methods	23
1.8	Scope and Limitation of the Study	24
1.9	Conclusion	24
CHAPTER TWO		25
CONCEPTUAL AND THEORETICAL ANALYSIS		25
2.0	Introduction	25
2.1	Historical Background of Labor Laws in Tanzania.....	25
2.2	Fundamental rights and protection for the employee under probation period.....	28
2.3	Employment standards for employees under probation period.....	29
2.4	Probation Period in labour laws	31
2.5	Types of Probation Period	32
2.6	Purposes of Probation Period	33
2.7	Probation Period in International Law	35
2.8	Strikes and lockouts for an employee under probation period.....	38
2.8.1	Dispute resolution in an employee under probation period.....	40
2.8.2	Finding employees or employment about the Probation period.....	42
2.8.3	Training and development of employees under probation period.....	44
2.8.4	Remuneration	46
2.8.5	Employee under probation period benefits.....	47
2.8.6	Legal Implications of the Probation Period.....	49
2.8.7	Limitation of a period of probation	52
2.8.8	Ending of Probation Period	53
2.9	Dismissal during the Probation Period	54

2.10	Expectations of Employee and Employer under Probation Period	56
2.10.1	Rights of Employees under Probation Period	59
2.10.2	General ground of employment termination in labour laws about employees under probation period	60
2.10.3	Whether Operational Requirements can be used for an employee under Probation Period	61
2.10.4	General Procedures for Termination of employment in Tanzania legal system	62
2.10.5	Provisions of the contract of employment relating to termination	62
2.10.6	Payment on Termination and Certificate of Employment (Section 44)	64
2.10.7	Jurisprudence of doctrine of hire and fire visa vis employee under probation period.....	67
CHAPTER THREE		71
LEGAL AND INSTITUTIONAL FRAMEWORKS		71
3.1	Introduction	71
3.2	Domestic Legal Frameworks in Tanzania.....	71
3.3	Legal Framework on the Employee under Public services/governmental sector.....	78
3.4	The aim of the probation Period for public Sectors.....	80
3.5	Resignation of employees under probation period as public servants as per the public sector standing orders.....	86
3.6	Institutional Frameworks	87
3.6.1	Commission for Mediation and Arbitration	88
3.6.2	Essential Services Committee	90

3.6.3	High Court Labour Division.....	91
3.6.4	The Court of Appeal of Tanzania.....	91
3.7	The legal practice of the employees under the Probation period and existing dilemma visa Vis court protection	92
3.8	Non-judicial protection on employees under probation period.....	94
3.9	Conclusion.....	101
CHAPTER FOUR.....		102
RESEARCH FINDINGS AND ANALYSIS		102
4.1	Introduction	102
4.2	Research Findings	102
4.2.1	What is the Legal Framework Governing the Rights of Probationary Employees in Tanzania's legal system?.....	103
4.2.1.1	Findings from Tanzanian Legal System,.....	103
4.2.2	What are the legal provisions that should be employed to mitigate the existing gap?.....	107
4.2.3	Are there any international instruments, model laws and best practices which guarantee the rights of probationary employees which can assist in improving the existing Tanzanian legal systems?....	108
4.3	Conclusion.....	110
CHAPTER FIVE.....		111
CONCLUSION AND RECOMMENDATION		111
5.0	Introductions.....	111
5.1	Conclusion.....	111
5.2	Recommendations	112

REFERENCES..... 116

LIST OF STATUTES

- The Constitution of the United Republic of Tanzania of 1977 (CAP 2)
- The Employment and Labour Relations Act, Act No. 6 of 2004,(Cap 366 R; E 2019)
- The Labour Institution Act, Act no 5 of 2004 (CAP 300 R; E 2019)
- Law of Contract Act (CAP 345 R; E 2019)
- The Public Service Act,(CAP 298 R; E 2019)
- Office of the Attorney General (Discharge of Duties) Act (CAP 268 R; E 2019)

LIST OF REGULATIONS

- The Public Services Regulations, 2022
- The Employment and Labour Relations (Code of Good Practice) Rules, of 2007 GN
No. 42 of 2007
- Office of the Attorney General (Restructure) order 2018
- Office of the Attorney General (Discharge of duties) regulations, 2006
- Employment and Labour Relations (General) Regulations 2017

LIST OF CONVENTIONS

- Freedom of Association and Protection of the Right to Organise Convention, 1948
(No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)

Equal Remuneration Convention, 1951 (No. 100)

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

LIST OF CASES

Bidco Oil and Soap Ltd v Robert Mantonya and 2 Others, Labour Revision No. 70 of 2009, High Court (Labour Division) at Dar es salaam.

Commercial Bank of Africa (T) Ltd v Nicodemus Mussa Igogo, Labour Revision No. 40 of 2011.

Macmillan Aidan Limited v Blandina Luca Mohamed, Labour Revision No. 292 of 2008, High Court of Tanzania (Labour Division) At Dar-es-salaam (Unreported)

Mtenga v University of Dar es salaam (1971) HCD no. 247

Patrick Tuni Kihenzile v Stanbic Bank Tanzania Limited, Labour Revision No. 47 2011 High Court (Labour Division) Dar es salaam Unreported.

Stella Temu v Tanzania Revenue Authority, Civil Appeal No. 1 Of 1999

ABBREVIATION

ADR	Alternative Dispute Resolution
CAP	Chapter
GN	Government Notice
HCD	High Court digests
Ibid	Ibidem
No.	Number
Pg.	Page
R.E.	Revised Edition
S.	Section
SS.	Sections
TLR	Tanzania law report

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE PROBLEM

1.0 Introduction

The probation is an established period at the commencement of employment during which the employee is assessed by the employer for his or her suitability for the job and the employee decides whether he/she wants to continue his/her employment in that particular job. It is a duration within which a new or existing employee receives extra supervision and coaching, either to learn a new job or to turn around a performance problem. The probationary period can be as short as a month or as long as a year, depending on the situation.¹

During probation, either party may terminate the employment without assigning any reason.² It allows a supervisor or other company manager to evaluate closely the progress and skills of the newly hired worker, determine appropriate assignments, and monitor different aspects of the employee such as honesty, reliability, and interactions with co-workers, supervisors or customers. Since the probationary period is important in the labour and employment sector, protection of the probationary employees during this period attracts many concerns as to the nature and limitation of the rights of the probationary employees. Hence, dealing with protection entails the legal surroundings to justify, recognize, protect, and enforce the rights and duties of the probationary employees and employers during the probationary period. Hence, this research study is pursued to examine the legal protection of the rights of

¹ Lewis, D, and Sergeant, M, Employment Law, 5th edition, Person Education Limited: England (2010)

² Dier , Probation period, <https://dier.gov.mt/en/Employment-Conditions/Starting%20a%20New%20Job/Pages/Probation-Period.aspx>. (accessed on 2nd October 2018)

employees under probation. This examination is due to the concerns of the legal nature of the existence, protection, and enforcement of the rights of the employees as compared to the rights of employers during the probation period.³

The research study has focused on the probationary period because a probationary period can be a useful management tool, but it can also cause legal trouble. This is because it touches the rights and interests of both employer and employee during the probation period. Since employers are probably in a much better position to defeat employees due to the economic capacity, influence, power and other factors, there is a need to examine and address some legal issues related to the rights of probationary employees.⁴

1.1 Background to the Problem

The probationary period is an initial period of employment during which a new, transferred, or promoted employee must show the ability to perform the required duties. It is a useful coaching tool. It gives an employee some extra time and supervision while learning a new job, and it gives a struggling employee more detailed guidance and a sense of urgency for improvement. However, it can also lead to legal concerns if it compromises employment and related interests and rights of the parties to the said employment.⁵

³ Ezekiel B. Terminating a probationary employee; debunking some myths about the Tanzania labour legislation. 17

⁴ Ibid page 19

⁵ Howard, A, Probation and Parole: Theory and Practice. 8th ed. Upper Saddle River, N.J.: Prentice Hall, 2003.

Probationary periods are designed to give managers and employees a way to terminate the arrangement more easily should the employment not work out as expected. From the manager's point of view, they can use the probationary period to evaluate the worker's performance, skills and abilities and also whether they engage with the existing organisational culture. The probation period is a period of employment during which a worker is not fully covered by employment protection legislation. Statutory provisions feature significant differences in defining exemptions from other employment termination rules that this period concerns. Under the International Labour Standards and in a lot of national law, it is, however, not the prohibitions that are contemplated when there is exclusion during probation.⁶

Several cases of exemptions during a probationary period can be distinguished such as protection against unfair dismissal does not apply, different valid grounds for dismissal, as compared to the general contractual regime, may apply, different notification or severance pay rules may apply and various combinations of these cases. Protection against unfair termination of probationary employees is not applicable in Tanzania within the ambit of six or below months of probation. Historically, the probationary period grew together with trade unionism and workers' rights movements during the Industrial Revolution. It was started as a way for employers to deal with trade unions and their rules governing new employees. It was

⁶ International Labour Office, Employment Protection Legislation: Summary Indicators, International Labour Organisation, Geneva, (2015)

established to allow the employer to terminate a union employee without concern for just cause and without having to fight the union over it.⁷

Employees under probation as other segments are governed by labour and employment law. Hence, regulations and protection of the employees under probation are part and parcel of the employment and labour law. Its growth is much more associated with the Industrial Revolution. The basic feature of labour law in almost every country is that the rights and obligations of the employee and employer are mediated through a contract of employment between the two. This has been the case since the collapse of feudalism. Many contract terms and conditions are covered by legislation or common law.

This no uniformity of the probationary period in the world. Each country has its formalities to construe the maximum duration for probation. National legislation may contain specific provisions for some other, specific, categories of employees or enterprises. However, in many cases, the probationary periods are determined by the employers. International law requires that workers serving a period of probation or a qualifying period of employment, be determined in advance and of reasonable duration.⁸

In some instances, Africans were expropriated from their lands to create a landless Class, which would thereafter depend on wage employment. Sometimes outright force was used. For example, in Tanganyika, Chiefs invoked the Native Authority

⁷ Baker and McKenzie Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws, (2009)

⁸ ILO Convention No. 158, article 2

Ordinance of 1923 to force their subjects to work. After independence, Tanganyika adopted most of the colonial laws. One of the laws was the employment ordinance which even though it abolished forced labour, and established contractual employment, created the summary dismissal under section 42 where the employer was at will to terminate the employment without giving grounds summarily.⁹ These lead to the reflection of the said Doctrine of Hire and Fire under section 35 of the Employment and Labour Relation Act¹⁰.

In African countries, the probationary period for covered employees spans six months from the hire date. Note that when a fixed-term employee becomes a non-fixed-term employee in a covered position, the time worked as a fixed-term employee is credited toward completing the probationary period. Also note that, upon transfer or promotion to a covered position, University employees who have already completed a probationary period need not complete an additional probationary period. The probationary period is a trial period during which time the covered employee's supervisor considers whether the employee is meeting the standards and expectations of the job and if the University should retain the employee as a "regular" employee.¹¹

If a covered employee's supervisor needs more time to evaluate the performance of the employee due to extraordinary circumstances, the supervisor may request to extend the employee's probationary period if the request is made at least one week in

⁹ Urio, A, and Urio, J, the Law on Employment and Labour Relations in Tanzania (1st Ed), Moshi Tanzania (2011) 25

¹⁰ (Cap 366 R;E 2019)

¹¹ Ibid 29

advance of the end of the probationary period and is approved There are by the Senior Director. Supervisors are expected to evaluate performance issues during the probationary period consistent with this policy. Supervisors should consult with the appropriate HR Officer/Business Partner for assistance in these matters. As applicable, probationary end date and alert reminders will be sent to the appropriate HR Officer/Business Partner at the 3 months and 5 months. Where the employee is not meeting the requirements of the job during the probationary period, the employee may be released at any time during the probationary period.¹²

The probationary period cannot be extended beyond the maximum period allowed by law. Where the employer and the employee agree for a shorter period, such period is binding by law and can only be extended up to the maximum limit contemplated by law if both parties agree to do so¹³. However, the content of section 35 is a reflection of the doctrine of hire and fire which seems as if it is already eradicated from our fundamental labour laws.

The doctrine of hire and fire was featured in the employment-at-will doctrine as the ultimate guarantor of the capitalist's authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the

¹² <https://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/probationary-period.html> accessed 06/07/2017

¹³ <https://dier.gov.mt/en/Employment-Conditions/Starting%20a%20New%20Job/Pages/Probation-Period.aspx> accessed 06/07/2017

product of their labour. The doctrine of hire and fire implied the dominion of the owners of capital over their employees and their enterprises a basic element of the capitalist system for colonialists to obtain raw materials for their mushrooming industries in their home country as well as cheap labour for maximisation of profit.

The hire and fire rule developed in Africa in response to cases presented by a particular group of workers especially the Africans who had little white during the colonial period. The overriding factor making the rule compelling was the position of these workers as an example of all workers in the developing modern capitalist economy. Seen thus, the rule is more than a particular response of the legal system to a particular economic problem; termination at will is the law's development of a fundamental principle of the Economy¹⁴.

After independence, Tanganyika adopted most of the colonial laws. One of the laws was the employment ordinance which even though it abolished forced labour, and established contractual employment, created the summary dismissal under section 42 where the employer was at will to terminate the employment without giving grounds summarily. In the 1960s, the sisal market dropped in the world market. This recession created a situation bad in the employees of sisal plantations in Tanzania.

Most of the workers were terminated from their employment due to the economic downfall of the sisal market. This caused most of the workers to lose their important rights. This necessitated the enactment of the Security of the Employment Act which came to restrict the termination of employment in various sectors for the security of

¹⁴ <https://dier.gov.mt/en/Employment-Conditions/Starting%20a%20New%20Job/Pages/Probation-Period.aspx> accessed 06/07/2017

the tenure of the workers. The law prohibited summary dismissal by creating procedures of how to terminate in that manner.¹⁵ Section 37 of the Security of Employment Act established the procedures to follow before employing summary dismissal. However, the Act did not cure entirely the doctrine of hire and fire under Section 39 states that statutory compensation is not payable by the employer in the event such employer terminates the employment.¹⁶

In the 1960s, the sisal market dropped in the world market. This recession created situations bad for the employees of sisal plantations in Tanzania. Most of the workers were terminated from their employment due to the economic downfall of the sisal market. This caused most of the workers to lose their important rights. This necessitated the enactment of the Security of the Employment Act, which came to restrict the termination of employment in various sectors for the security of the tenure of the workers. The law prohibited summary dismissal by creating procedures of how to terminate in that manner.¹⁷

1.2 Statement of the Problem

The probationary period in the labour and employment industry is very important. It is during this period whereby the probationary employees are trained through an induction course, prepared and accustomed to work ethics and conduct rules of the

¹⁵ Ezekiel B. Terminating a probationary employee; debunking some myths about the Tanzania labour legislation page 14

¹⁶ <https://dier.gov.tz/en/Employment-Conditions/Starting%20a%20New%20Job/Pages/Probation-Period.aspx> accessed 06/07/2017

¹⁷ Kijo, H. B, and Maina P. C, Justice and Rule of Law in Tanzania Selected Judgment and Writings of Justice James Mwalusanya. (2005)

organisation and their performance is assessed to determine whether they are capable of employment. The probationary period varies from organisation to organisation. It ranges from different times depending on the laws, which deal with the labour and employment industry. Since the laws for employment and labour industry between nations do differ, there is no uniformity in the probation period.¹⁸

In Tanzania, there is no law, which caters for the probationary period in uniformity. Neither the Employment and Labour Relations Act nor the Public Service Act specified the probationary period. This lacuna has brought variation and disparities in the probationary period in the employment and labour industry. Henceforth, it gives the employer the power to decide the probationary period. This makes them utilise the employees on a probationary basis without giving them rights if they have been when confirmed.¹⁹

On the other hand, the use of the words probation and probationary period are only found in the Employment and Labour Relations (Code of Good Practice) Rules. Rule 10(1) provides that for all employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines.²⁰ Probationary employees perform the work during the probationary period and are entitled to remuneration due to the work executed. Probationary employees are

¹⁸ Ibid page 24

Helen Bisimba Kijo and Chris Maina (2005) *Justice and Rule of Law in Tanzania* Selected Judgment and Writings of Justice James Mwalusanya at page 22¹⁹

²⁰ Ackson, T.(2009) *Regulating working conditions in the Globalizing World: Recent Trends in Tanzania*, Faculty of Law, University of Dar es Salaam page 54

treated with a speciality for the sake of the organisation's interests. Since they are in an evaluation period; they are supposed to prove before their employers that they are capable of doing what they are hired for. However, it is at will of the employer to confirm the probationary employee after the period of probation has ended. Neither the Employment and Labour Relations Act nor its subsidiary legislation obliges the employer to confirm or repudiate the probationary employee.

The probationary period has legal implications for the probationary employees. The probationary period waives certain rights in the eyes of the law. For instance, a probationary employee of less than six months may not claim unfair termination. This means the law justifies termination even if it is unfair to the probationary employee. Being a probationary employee does not cast away some of the entitlements. The law indicates that it is their right to work and remuneration. Since they are employed; they should be given work to do. For their work, they should be given their fair remuneration. Right to work and remuneration are stipulated by the constitution of the United Republic of Tanzania.

However, section 35 of the Employment and Labour Relations Act derogate some rights of the probationary employees such as the right to claim unfair termination for a probationary period below six months. This contention was also cemented in the case of Patrick Tuni Kihenzile v Stanbic Bank Tanzania Limited²¹ where the court reiterated the principle that an employee under probation with less than 6 months is not covered by section 35 of the Employment and Labour Relations Act. It was held

²¹ Labour Court Revision No. 47 of 2011 High Court (Labour Division) Dar es salaam (Unreported)

that a probationary employee may challenge termination only under certain circumstances other than unfair termination. Certainly, the plain interpretation of section 35 of the Employment and Labour Relations Act leads to the conclusion that there is no protection for an employee with less than 6 months' employment. This is because these provisions do not apply to such category of employee.

Hence it is from this contention and uncertainty that the research study is undertaken to explore the rights of probationary employees, how the said rights are effectively protected in the laws and practices and the determination of the effectiveness of the said legal and practical protection. Therefore, this research study undertakes a legal exploration of the nature, recognition, protection and enforcement of the rights of probationary employees in Tanzania's legal system.

1.3 Research Question

The research study focuses on the legal protection of the rights of probationary employees in Tanzania. To align with that focus, the study is pursued under the guidance of the following research questions: -

- i. What is the Legal Framework Governing Rights of Probationary Employees in Tanzania's legal system?
- ii. What are the legal provisions that should be employed to mitigate the existing gap?
- iii. Are there any international instruments, model laws and best practices which guarantee the rights of probationary employees which can assist in improving the existing Tanzanian legal systems?

1.4 Literature Review

Ezekiel, B.,²² explains that a probationary employee as is the case with other employees is governed by the Employment and Labour Relations Act and its regulations. Yet this law is constantly changing through legislative amendments or judge-made principles. There has been a general assumption that section 35 of the ELRA governs probationary employees only. However, this is not necessarily the case. This section provides that ‘the provisions of this subpart shall not apply to an employee with less than 6 months’ employment with the same employer, whether under one or more contracts. The author contends that section 35 of ELRA refers to Sub-Part ‘E’ of the Act covering unfair termination of employment. Essentially, it does not mention probationary employees and the principal legislation as a whole does not mention the words ‘probation or probationary employee’ anywhere throughout the Act. However, the writer did not address the solution of the problems although the writer will pass for other literature to know and evaluate them accordingly.

Sikulamba, J²³, elucidates about contractual obligation available between employers vis-a-vis employees and also explains and entails types of employment as it is provided under section 14 of the Employment and Labour Relations Act. However, the said writer did not provide specifically on employees under probation period, which is why this research is undertaken to cover the said gap.

²² Terminating a probationary employee; debunking some myths about the Tanzania labour legislation

²³ Legal aspects of employment contracts and dispute settlement schemes in Tanzania

Urio A and Urio J²⁴, argue that the Employment and Labour Relations Act requires workers should be provided written employment contract at the start of employment except for those who work less than 6 days in a month for an employer. The employment contract may be of a definite or indefinite period or for a specific task. The employment contract must be in writing if it provides that the worker is to work outside the United Republic of Tanzania.

Nevertheless, the writer is not compressive in explaining the worker under probation period, rather states that there is no explicit provision in the Employment and Labour Relations Act 2004 about the probation period. However, this act implicitly requires a probationary period of 6 months by saying that a worker with less than 6 months of employment may not bring an unfair termination claim against the employer.

Hopkins, J²⁵, describes an employee under probation period rather than portraying that the probation period is six months but the employer may extend it depending on the nature of the job, company policies, and performance evaluation form, the writer was not deeply describing the term as a reason for probation period or whether employee work under probation period deserves the right or not, all in all, the writer put us in dilemma for failure to describe the said content, but this research study goes further to correct the gap by the writer especially the right of employee under probation period and whether can claim for unfair termination.

²⁴ The Law on Employment and Labour Relations in Tanzania, 1st Edition, Moshi Tanzania, (2011)

²⁵ Tanzania Personal Policies and Procedure, Manual University Centre for Communication Programs Tanzania at page 5

Ackson T, Kalula E and, Rutinwa B²⁶, in their books named *Employment and Labour Law Relations in Tanzania*. They have tried to cover 'This book consisting of the new labour law in Tanzania'. It contains interesting contributions drawing together a wide range of labour law pedigree influenced by two major sets of colonial legacy, German and British.

It is an analysis of labour legislation in Tanzania in context', focusing on historical and contemporary developments in labour law. It offers comprehensive coverage of the entire spectrum of the new employment and labour relations law in Tanzania. Entails among other core labour rights, establishing basic employment standards, providing a framework for collective bargaining, providing for the prevention and settlement of disputes, and providing for related matters. The book covers more essential employment standards as set out in Tanzania statute relating to, hours of work, termination of employment or minimal severance pay requirements, overtime pay, and leave, statutory holidays, and pregnancy leave.²⁷

Probationary employees are those who are in a trial period of employment. In Tanzania, probationary employees are governed by the Employment and Labor Relations Act of 2004, which outlines the rights and responsibilities of both the employer and the employee during this trial period. The writer portrays the purposes of the probation period as it is in the Employment and Labor Relations (Code of Good Practice) G.N No. 42 under Rule 10 (3) provides for probation where it

²⁶Employment and Labour Law Relations in Tanzania. (2011). Tanzania: Law Africa Publishing (T) Limited Law Africa Publishing (T) Limited 2011

stipulates that, the purpose is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.

The writer goes further to describe The Employment and Labor Relations (Code of Good Practice) G.N No. 42 under Rule 10 (4) provides that the probation should not exceed a period of twelve (12) months, during which the employer can evaluate their performance and determine if they are a suitable fit for the company having regard to factors such as the nature of the Job, the standards required, the custom and practice in the sector. The Employment and Labor Relations (Code of Good Practice) G.N No. 42 under Rule 10 (5) provides that an employer may after consultation with the employee extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment.

The writer goes further distinction of benefits between probationary employees from permanent employees. During probation, employees are not entitled to the same benefits and protections as permanent employees. For example, they may not be eligible for paid leave, bonuses, or other benefits and protections as permanent employees. For example, they may not be eligible for paid leave, bonuses, or other benefits. However, they are still protected by the laws against discrimination and are entitled to fair treatment and safe working conditions. The writer of the book provides termination of the probationary employee the employer has the right to terminate the employment of a probationary period, with or without cause. The employee, on the other hand, has the right to terminate the employment during the

probation period without notice. Eventually, the writers said that Employers need to have clear and fair evaluation criteria in place during the probationary period and to provide regular feedback to the employee. This will ensure that the employee has a clear understanding of their performance, and what they need to do to improve and secure a permanent position. The Gap the writer does not address why an employee cannot sue for unfair termination, they did not deep dive into the rights of the employees under the probation period.

Hivos Tanzania,²⁸ in its policy, has put a mandatorily three months as a probationary period. Therefore, every new employee during the first three months shall be considered to be on probation. Soon after the lapse of three mandatory months, the Director will inform the employee in writing as to whether he/she is confirmed to work or not. A lapse of three months without confirmation of the post in writing does not constitute automatic confirmation. They proceed to say that, during the period of probation the employee shall accrue but not be entitled to take annual leave except for genuine emergencies. During the period of probation, either party to the contract may terminate the contract by providing seven (7) days notice in writing or payment of seven days' salary and allowances instead of notice, unless specified otherwise in the employment contract. A gap in the need to reform the existing laws in Tanzania. The author of this work has covered this need for law reform.

²⁸ Unfair dismissal during probationary period-the options open to the employee, 2013, retrieved from <https://employmentrightsireland.com> on 25th day of January 2018, at 1:00 PM

Dale and Lessmann, in their article,²⁹ have stated generally that, in the employment context, a probationary period is widely understood to mean the initial period of an employee's employment during which time certain special terms may apply. They have added that, concerning termination, there is no common law exemption to provide reasonable notice on termination, regardless if the termination occurs in the first few months of employment or thereafter. So according to them, the probationary employees have the right to get a notice before the termination of his or her.³⁰ Employment. The same protection is granted in Tanzania, but the author has touched only on termination and did not mention other employment rights probationary employees are supposed to enjoy. This holds the justification of the study.

1.5 Research Objectives

This research study undertakes the examination of the rights of probationary employees and their protection in the laws and practices. Therefore, it is pursued to meet the following objectives: -

1.5.1 General Objective

This research study aims to examine the rights of the employees under probation period together with the effectiveness of their legal and practical protection in Tanzania.

²⁹ Perspective on the probationary period and termination rights in Ontario, February 14, 2017

³⁰ Perspective on the probationary period and termination rights in Ontario, February 14, 2017

1.5.2 Specific Objective

This research study specifically focuses on meeting the following: -

- i) To examine the Legal Framework Governing the Rights of Probationary Employees in Tanzania's legal system.
- ii) To examine legal provisions that should be employed to mitigate the existing gap
- iii) To examine international instruments, model laws and best practices which guarantee the rights of probationary employees which can assist in improving the existing Tanzanian legal systems.

1.6 Research Significance

This research study is undertaken as an academic study however once it is accomplished it shall serve not only academicians but also law and policy makers in the country.

First, this research study shall be useful for academic purposes. It provides conceptual, theoretical and underlying bases for understanding the rights of employees under probation period. It provides an understanding of the concept of employees under probation period and its legal opportunities as well as challenges.

In addition, the research study is the yardstick for further research. It is a stepping stone to the furtherance of research on the employee under probation period in the country since it is a challenging phenomenon. Since, this research covers mostly the recognition, protection and enforcement of the rights of employees under the

probation period, other scholars may develop and inquire beyond this baseline and come up with more astonishing results and recommendations towards employee rights under the probation period.

Moreover, the research study can serve the policy and lawmakers of this country to broaden the rights of employees under probation period. The research provided for the need to have the right of employees under probation period being justifiable right to every Tanzania, the researcher also will recommend among other codifications and legal protection of employees under probation period.

1.7 Research Methodology

The researcher used two research methodologies that are;

The researcher employed the doctrinal research approach. , the researcher reviewed the already research conducted on the employees under probation period. The researcher consulted several documents including journals, reports, presentation papers, articles, newspapers, media comments, website reports, circulars, etc. On the other side, the employment of the doctrinal approach was relevant since this study dealt with the interpretation and analysis of the legal texts in the form of statutes, regulations, policies, guidelines, etc., this is because the research analysed the legal framework on corporate governance practices in Tanzania as to trace the challenges facing its implementations.

1.7.1 Doctrinal Legal Research

Is a legal doctrine that Comprises an in-depth analysis of the legal doctrine with its development process and legal reasoning, traditional research is concerned with documents rather than concerned with people and society or experience and observations.³¹

Doctrinal legal research is therefore established as the traditional genre of research in the legal field. Also known as, theory-testing or knowledge-building research in the legal academia, it deals with studying existing laws, related cases and authoritative materials analytically on some specific matter. With its jurisprudential base on positivism, doctrinal legal research is ‘research in law’ rather than ‘research about law’. Distinguished from literature review, content analysis or historical legal research, doctrinal legal research studies legal propositions based on secondary data of authorities such as conventional legal theories, laws, statutory materials, and court decisions, among others. This research intends to bring to light and analyse doctrinal legal research, its purpose, distinctive characteristics and ongoing debate on methodological usage. The research underscores the need for convergence rather than rivalry between doctrinal and non-doctrinal socio-legal research to address the problems in the legal field.³² Dr S.R. Myneni has defined, “A doctrinal research means research that has been carried out on a legal proposition or propositions by

³¹ WRpt2rjoBmsJ:<https://papers.ssrn.com/sol3/Deliv> accessed 23/03/2020

³² Author is an advocate practicing at Supreme Court of Nepal especially in the area of corporate law. He holds an LL.M. degree in Commercial Law and International Law from Tribhuvan University, Nepal Doctrinal Legal Research

way of analysing the existing statutory provisions and cases by applying the reasoning power.³³

Paul Chynoweth states that doctrinal legal research is concerned with the formulation of legal “doctrines” through the analysis of legal rules. He ascertains, legal doctrines clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules. Deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines (for example, the doctrine of consideration within the law of contract). He further describes, “Within the common law jurisdictions legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.”³⁴

Doctrinal legal research is the legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning. Thus it emphasizes the analysis of legal rules, principles or doctrines.³⁵ The authors duo compare and contrast doctrinal legal research with non-doctrinal one as follows, “doctrinal legal research endeavours to develop theories, and non-doctrinal legal research endeavours to see as

³³ .R. MYNENI, LEGAL RESEARCH METHODOLOGY, Allahabad Law Agency, India, 16 (1st ed. 4th page (2006).

³⁴Paul Chynoweth, Legal Research in the Built Environment: A Methodological Framework, in ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT, Wiley-Blackwell, UK, (Andrew Knight & Les Ruddock eds., 2008).

³⁵ KHUSHAL VIBHUTE & FILIPOS AYNALAM, LEGAL RESEARCH METHODS, Teaching Material, Justice and Legal System Research Institute, Ethiopia, 70 (2009).

to whether the theories, the doctrines, that we have assumed are appropriate to apply in society at a given time, are still valid and relevant.”³⁶ Doctrinal legal research is, therefore, ‘research in law’ while non-doctrinal

Legal research is ‘research about law’³⁷ Based on the definitions provided by the scholars, it is found that doctrinal legal research is an analytical study of existing laws, related cases and authoritative materials as a whole, on some specific matter. It can be considered as relatively a theory-testing research which endeavours to seek whether the theory involved within the subject is so far valid or not. Doctrinal legal research deals with verifying existing knowledge on legal issues. Since society itself is of changing nature as per human needs, technological innovations and economic transformations, knowledge on some particular areas of law is also required to be replaced by newer findings. While people keep following the same thing in society for long, many issues, and above all, the efficacy of knowledge in some particular area of law may be below par at the moment. While society is changing day by day, a proper and systematic review of the existing knowledge of law is essential. Therefore, doctrinal legal research works as knowledge-building research in the legal field. Doctrinal research usually begins with developing a legal proposition and the entire analysis of the data from primary and secondary authorities is focused on testing the proposition. Say, for example, while initiating doctrinal legal research on the issues of precedents, a legal researcher can construct a proposition that more than

³⁶ Ibid page 71

³⁷ Paul Chynoweth, Legal Research in the Built Environment: A Methodological Framework, in *ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT*, Wiley-Blackwell, UK, (Andrew Knight & Les Ruddock eds., 2008).

two-thirds of the precedents set by the Supreme Court lack convincing legal reasoning behind them.

The researcher needs to study the bulk of data generated from primary and secondary authorities related to case laws or the contents of the precedents set by the Supreme Court within a certain timeframe, prior studies on such precedents, related authoritative books and academic writings, etc. Researchers must analyse the case laws and legal reasoning factor given in the Supreme Court's judgments to supplement something new knowledge. As characterized by the study of legal texts, case laws, authoritative materials, researchers often used the terms like 'traditional legal research', 'theoretical legal research', and 'library-based legal research', 'basic legal research', 'arm-chair legal research' and even 'black-letter law research' interchangeably to denote doctrinal legal research.

1.7.2 Data collection methods

Since the study doctrinal research approach the only method where the research relied on for the collection of data was the secondary data collection method which is a documentary review, the researcher consulted different documents such as articles, newspapers, presentation papers, journals, thesis, reports, dissertations, websites, media comments, books etc. and since the study was also doctrinal the researcher also consulted legal text for analysing including statutes, circulars, guidelines, decides cases, regulations etc. all these literature were consulted about the subject of the study concerning the right of employee under probation period in the legal framework and practices in Tanzania. The researcher consulted the library of the

Open University of Tanzania of Dar es Salaam as a source of some documents and websites as another source for the documents and legal texts.

1.8 Scope and Limitation of the Study

The researcher covers the labour laws in Tanzania's legal system, Limitations are constraints and incidences that arise in a study which are largely beyond the researcher's control. They normally limit the extensity to which the study can go and in most cases, they also affect the study outcome and the conclusions that are going to be drawn. The researcher is expecting to encounter some limitations while conducting this study, one of them being time constraints. This is because the researcher will be continuing with employment at the same time conducting the study. The second limitation is limited funding for conducting the study documents from different libraries read, access to them was limited to some extent.

1.9 Conclusion

The effectiveness of the legal protection of employees under probation is an intricate matter in the employment and labour sectors. The nature of the rights of employees under probation is limited to the extent, that employers may use the limbo to meet their interests at the expense of the probationary employees. This concern has provoked the undertaking of the study to explore the recognition, protection and enforcement of the rights of probationary employees in Tanzania.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL ANALYSIS

2.0 Introduction

This chapter encompasses the conceptual analysis of the employees under probation. It deals with an analysis of the jurisprudential growth and theories of the employment probation and probationary employees. It aims at imparting a conceptual and theoretical understanding of the employees under probation. It sets the foundations and limits of the conceptualisation of employment probation and probationary employees.

2.1 Historical Background of Labor Laws in Tanzania.

Tanzania overhauled its employment and labour laws in 2004 when it enacted the Employment and Labour Relations Act, Act No. 6 of 2004³⁸ (“the Employment Act”) and the Labour Institutions Act, Act No. 7 of 2004 (“Labour Institutions Act”).³⁹ Whereas the Employment Act provides for labour standards, rights and duties, the Labour Institutions Act constitutes the governmental organs charged with the task of administering the labour laws. Subsequently, in 2007 several pieces of subsidiary legislation were promulgated to facilitate the enforcement of labour rights and standards stipulated in the Employment Act. One of the most significant of these is the Employment and Labour Relations (Code of Good Practice) Rules;⁴⁰ it is noteworthy that the new labour laws enumerated above borrow heavily from the

³⁸ Employment and Labour Relations Act, Act No. 6 of 2004 (“the Employment Act”)

³⁹ Labour Institutions Act, Act No. 7 of 2004

⁴⁰ G.N. No. 42 of 2007.

employment and labour laws which are currently in force in the Republic of South Africa. Indeed, the new laws further enact employment and labour standards, which, by and large, conform to the labour standards set by the International Labour Organization.

In general, there are two major laws governing labour those are Employment and Labour Relations Act and the Labour Institutions Act⁴¹. But for the matter of probation it is critically explained by section 35 of the Employment and Labour relation Act, It regulates in particular termination of employment, retrenchment, severance pay, workplace discrimination, and disciplinary and grievance policy procedure⁴². This Code of Good Practice was adopted under section 99 (1) ELRA which provides that the Minister, after consulting the Council, may issue codes of good practice this rule tried a lot to analyse different rules and principles which employers should adhere before terminating employees from employment. Apart from that there is a major law which tends to provide for where the claim should be handled which Labour Institution Act⁴³ Tanzanian labour Law requires that workers should be provided with a written employment contract at the start of employment except those who work less than 6 days in a month for an employer. The employment contract may be of definite or indefinite period or for a specific task. The employment contract must be in writing if it provides that the worker is to work outside the United Republic of Tanzania.

⁴¹ Act no 7 2004

⁴² Ibid

⁴³ Ibid Act no 7

An employment contract must state the following information: name, age, permanent address and sex of the worker; place of recruitment; job description; date of commencement; form and duration of the contract; place of work; hours of work; remuneration, the method of its calculation, and details of any benefits or payments in kind, and any other prescribed matter. However, if these particulars have already been provided in the employment contract, the employer may not furnish the written state of employment particulars.⁴⁴

The employer must ensure that all the written particulars are clearly explained to the worker in a manner understandable. If there is a change in any of the written particulars, the employer is required to revise the written particulars in consultation with the worker to reflect the changes. The employer must notify the worker about the change in writing.⁴⁵ The employer is obliged to keep the written particulars for five years after the termination of employment. If an employer fails to produce a written contract in any legal proceedings, the burden of proving or disproving an alleged term of employment is on the employer. Every employer has to display a statement of employee's rights in a conspicuous place.⁴⁶

⁴⁴ Mtaki, K The New Labour Laws in Tanzania: Implication for employees and Economy Paper presented at a policy Dialogue Seminar on New Labour Laws in Tanzania at the Conference Hall of the Economic and Social Research Foundation, Faculty of Law University of Dar es Salaam 12th Sept (2005)

⁴⁵ Robert Upex, Richard Benny and Stephen Havety (2005) Labour Laws (2005) 5th Published in United State by Oxford University Press Inc, New York

⁴⁶ <http://www.mywage.org/tanzania/home/in-the-workplace/employment-security>

2.2 Fundamental Rights and Protection for the Employee Under Probation Period

As a rule, the law prohibits the employment of children who are under the age of 18 years. When the employer entertains doubt as to whether a potential employee is of majority age, the law requires the employer to investigate the issue of age before hiring. An employer commits a criminal offence where the employer recruits a minor. The only exception to the above prohibition of children.

Labour is where there are special circumstances that require a child of the age not below 14 years to work to earn a livelihood. In these circumstances, the child should be assigned light work which shall not prejudice the child's education or vocational training. The Employment Act further prohibits forced labour. Indeed, a criminal offence is committed when an employer exacts forced labour from a person. Nevertheless, the Act provides five exceptions where a person may be compelled to work despite his unwillingness, for instance, providing compulsory labour under the National Defence Act, 1966 for work of a military character. The new labour laws further prohibit discrimination in the workplace, of any kind, by the employer, trade union or employers' association. The breach of this prohibition amounts to a criminal offence.

It is instructive that where discrimination is alleged in any proceedings, the Respondent employer, trade union or employers' association is legally required to disprove the same. Under the new labour regime, every employee has the right to form or join a trade union and participate in its lawful activities. However, a senior

management employee is barred from joining a trade union that represents non-senior management employees of the employer. On another note, every employer is entitled to form or join an employers' association and participate in its lawful activities.

2.3. Employment Standards for Employees Under Probation Period

The Employment Act comprehensively regulates the hours of work of an employee. The ordinary days of work are set at six days a week. Further, the ordinary hours of work are set at 45 hours in a week, and 9 hours in a work day, inclusive of a 1-hour meal break per work day. An employee can Tanzania be required to work overtime hours only where the parties have agreed to that effect. In any event, the law provides a ceiling of 12 working hours per day inclusive of ordinary and Overtime working hours. The Employment Act further enacts detailed guidelines for the calculation of wages of an employee.

Who is entitled to hourly, daily, weekly and monthly wage rates? The payment of remuneration to an employee must be in the form of money; not in kind. As a general rule, an employer is not entitled to make any deductions from an employee's remuneration.

The exception thereto is where the deduction is permitted by written law, collective agreement, wage determination, court order or arbitration award. Where the deduction is not based on any of the above grounds, the employee must agree in writing to such deductions from his remuneration. Indeed, legal restriction on

deductions from remuneration has been contentious, especially where the employer unilaterally deducts from the remuneration a sum of money to recover loans and advance payments made to an employee. The labour tribunals and the courts of law have been consistent that in the absence of a written agreement between the parties or court order sanctioning the deduction, such deduction is unlawful.

An employee is entitled to annual leave of not less than 28 consecutive days during one leave cycle. One leave cycle is constituted by a period of 12 months of consecutive employment. The 28 days' leave is inclusive of any public holiday which may fall within the period of the leave. During the annual leave, the employee is entitled to payment of his full remuneration despite his absence from work. In Tanzania, an employee is entitled to sick leave for at least 126 days during one leave cycle. The employee is entitled to full wages during the first 63 days of the sick leave. For the second 63 days, the ailing employee is entitled to half wages. An employer is not obliged to pay employee wages during sick leave if the employee does not produce a medical certificate issued by a medical practitioner. It is further noted that no wages are payable to an ailing employee if the employee is entitled to paid sick leave under any other law, fund or collective agreement. It is further noted that a female employee is entitled to pay maternity leave of not less than 84 days during one leave cycle. The maternity leave period would be 100 days if the employee gave birth to more than one child. Most curiously, the employee is entitled to an additional 84 days' paid maternity leave within the same leave cycle if the child dies within a year of birth. The law further puts a ceiling of 4 maternity leave terms which an employee is entitled to take. Where the employee is breastfeeding, the

employer is obliged to allow her time off, not exceeding two hours, to feed the child during working hours.⁴⁷ The labour reforms have factored in the concerns of working male parents as well. During each leave cycle, a male employee is entitled to 3 days of paid paternity leave. The only conditions stipulated are

The employee must be the father of the newly born child and the leave must be taken within the first seven days of the birth of the child. The Employment Act further provides for what we may refer to as “compassionate leave”. An employee is entitled to 4 days’ paid leave in the event of death or sickness of the employee’s child. Upon the death of the employee’s spouse, parent, grandparent, grandchild or sibling, the employee is nevertheless entitled to 4 days’ paid leave.

2.4 Probation Period in labor laws

There are several definitions of the concept of probation period. These definitions vary. They vary because of where the term probation period is applicable as well as the philosophical standpoint. A probationary period is a period whereby the new employee is being tested to enable the employer to ascertain the suitability of the employee for its purposes. This implies that is duration when the employer evaluates the competence of the new employee about the work the new employee has been employed for. This duration allows the employer to assess and make a decision on the suitability of the new employee.

⁴⁷ https://www.mkono.com/pdf/GLI-Employment_1st-Ed_Tanzania.pdf

Moreover, probation is a period when the employee may prove that he is suitable for regular employment as a permanent employee and will meet the standards set by the employer.⁴⁸

Hence, the probation period is an opportunity for the new employee to prove himself or herself before the employer that he or she is competent to perform the work assigned.

Furthermore, probation period can be defined to mean period of time that employees are exempt from certain contractual items, most importantly the notice period required for termination. In fact, this definition focuses on exemption and limitation of rights of the employees under probation. It elucidates the exempt of contractual relations between the employer and probationary employee.

2.5 Types of Probation Period

There are two common types of probationary periods of employment. These types are formed due to the subjects of the probation period and purpose of the probation period. Probation can be broadly defined as a trial period for newly recruited workers. Probation periods commonly last for three months, six months, or a year. It is usually a fixed period at the beginning of the employment relationship, during which the new employee is exempt from some contractual items. Most significantly, employees on probation can be let go without the standard notice period. Employees usually have the right to notice of between one and 12 weeks.

⁴⁸ *Mitchell v. R.* (1979), 23 OR 2d 65

Employees on a probationary period won't have worked for you long enough to qualify for unfair dismissal protection. However, they are still protected against harassment and dismissal for 'protected reasons' such as gender, age, ethnicity, disability, religion and cultural background. Protection is also provided against wrongful dismissal, which can occur during probation when an employer fails to follow the contractual dismissal process.⁴⁹ The first type is typically entered into when a person takes a new job. Many employers implement a period where the employee and employer can determine if the job is a good fit for the new staff member.⁵⁰

The second type of probationary period is usually a result of an employee not meeting the expectations of the position or having done something that breaks company policy. A period is determined, in which the employee will be required to work on performance issues in an attempt to avoid being terminated.⁵¹

2.6 Purposes of Probation Period

The purpose of a probationary period is to provide a trial period for the employee to learn the job and for the supervisor to observe and evaluate the employee's

⁴⁹ <https://www.brighthr.com/articles/hiring/probation-periods/the-importance-of-employee-probation-periods/> accessed 06.10.2021 at 12:06PM

⁵⁰ Schofield, T, Probationary Period of Employment: Policy and Termination, <https://study.com/academy/lesson/probationary-period-of-employment-policy-termination.html>. (accessed on 4th October 2018)

⁵¹ Ibid

performance.⁵²The probationary period also is to allow an employer to terminate an employee who is not doing well at their job or is otherwise deemed not suitable for a particular position or any position. In addition, probationary period is there to see if they enjoy working for the employers and whether the employee is a suitable match for their skills and abilities. Hence, it is a time for the employee to improve their performance, in the case of misconduct, for an investigation to take place.

Furthermore, probation periods allow both employers and employees to find out whether the match of the worker to the job is suitable, before committing to the binding rules of a formal employment relationship. Probationary period imposes obligations on the employer to define new employees' roles fully and provide recent recruits with feedback and support. This is beneficial to both the employer and the new employee. During probation periods employers learn about worker quality without committing to the binding rules of a formal employment contract. If the employer finds the worker unsatisfactory, he or she will not offer a formal employment contract, otherwise an employment relationship commences.⁵³Probation period is sometimes used as a way to protect themselves from legal issues and unqualified employees, companies often institute a probationary period to analyse the performance of a new employee.⁵⁴

⁵² US Legal, Probationary Employee Law and Legal Definition, <https://definitions.uslegal.com/p/probationary-employee/>. (accessed on 2nd October 2018)

⁵³ Riphahn, R. T, and Thalmaeir, A, Behavioural Effects of Probation Periods: An Analysis of Worker Absenteeism, Institute for the Study of Labour, Discussion Paper No. 67, (October 1999), at page 15

⁵⁴ Schofield, T, op-cit

2.7 Probation Period In international law

Under international level the most and demanding instrument is international Labour organisation(ILO), Only tripartite U.N. agency, since 1919 the ILO brings together governments, employers and workers representatives of 186-member State, to set labour standards, develop policies and devise programme promoting decent work for all women and men. The unique tripartite structure of the ILO gives an equal voice to workers, employers and governments to ensure that the views of the social partners are closely reflected in labour standards and in shaping policies and programmes⁵⁵

The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues. The ILO was founded in 1919, in the wake of a destructive war, to pursue a vision based on the premise that universal, lasting peace can be established only if it is based on social justice. The ILO became the first specialized agency of the UN in 1946. Conventions and Recommendations are the instruments used by the International Labour Conference to set international labour standards.

The Conference also adopts other types of texts, including declarations. Declarations are resolutions of the International Labour Conference used to make a formal and authoritative statement and reaffirm the importance which the constituents attach to certain principles and values. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States. The primary Conference declarations are set out below. In 1977, the Governing Body of the International Labour Office also decided

⁵⁵<http://www.hrzone.com/hr-glossa/what-is-a-probationary-period> accessed 03/04/2016

to issue a declaration reflecting guidance on how to apply international labour standards in the context of multinational enterprise operations; this declaration has been updated periodically since that time. International Labour Conference Declarations The statement of principles and policies adopted by the International Labour Conference in 2008 builds on principles recognized in the Constitution of the International Labour Organization, including the Declaration concerning the Aims and Purposes of the ILO of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998⁵⁶.

Specific convention provide for the matter is convention 158 and recommendation 166⁵⁷ on termination of employment although this convection is not rectified in Tanzania the country has availed itself of opportunity to renounce it and I not employment and labour relation Act gives effect of the provisions of the convention the relevant practice under the convention discussed in the report on the general observation adopted by ILO Committee of experts in its 79th session 2008 page 16 its noted that under article 2 of the convention categories of workers and exclude from coverage by fair termination provision include ,include probation employees along casual and fixed term employee from strict protection.⁵⁸ Judging from above it is reasonable to assume the said practice under the convention is similar to the position of Tanzania as represented by different case laws cited in this paper. Employers need to demonstrate good faith during probation periods when they're

⁵⁶ Summers, C. W. The contract of employment and the rights of individual employees "fair representation and employment at will" at page 20

⁵⁷ International labour organization (ILO) Convention no 153

⁵⁸ Alex J. Sikalumba Legal Aspects of Employment Contracts and Dispute Settlement scheme in Tanzania, Published by Institute of Development Studies Mzumbe University(2003) page 22

assessing whether a relationship with a new employee. Although we often take probationary periods and clauses in employment contracts for granted, a recent British Columbia case provides some lessons for employees and employers alike, says Anbar, an associate with Rodney Employment Law.

“The purpose of a probationary clause is to enforce an assessment period, to evaluate the suitability between a new employee and the employer. While the test for a dismissal in a probationary employment period is suitability and is generally treated as a low threshold to meet, the assessment needs to be a genuine one,” says Anbar. If the employer finds the employee is not appropriate for the position and the relationship is not a good fit, they can legally terminate with no notice and no pay in lieu of notice.

However, says Anbar, the employer must act in good faith. “What was highlighted in this case was that the employee was not given an opportunity to demonstrate his suitability for the role. This is an example where the employer failed to carry out the probationary assessment in good faith,” she says. The B.C. court’s decision to award three months’ pay in lieu of reasonable notice for an employee who spent about two months on the job was a surprise because suitability is considered a relatively easy threshold to meet, Anbar adds. The case highlighted examples of the employer not acting in good faith and not being fair to the employee. “It is a clear reminder that a duty of fairness needs to exist during the period of assessing suitability,” Anbar says. “We advise our clients to use the probationary period wisely and take advantage of those first three months,” Anbar says. “It is a period of time for both

parties to evaluate the fit between the employee and the employer. “The optics (of this decision) are quite surprising. But at the same time, it highlights probationary employees’ rights, which are sometimes overlooked. There is a notion that during their probationary period an employee doesn’t really have any rights. So this case kind of spun that theory on its head.”

But probationary periods can be implemented properly, she adds, and they exist in employment agreements from entry level to executive positions. Employers are reminded to use these clauses properly and be fair to the worker. Anbar suggests employers set out proper employment obligations when offering a position and clearly outline the expectations and the terms and conditions of the job during the probationary period. Employees, meanwhile, should be given a fair chance to demonstrate their suitability prior to termination.

For employees, it is prudent to have an employment contract vetted prior to signing and make sure they understand the terms and conditions of the probationary period.

“In this case the fact that the companies displayed conduct that was not in good faith really worked against them. Typically, you would see an employer have more discretion during the probationary period,” she says. “The terms and the conditions must be clarified from the onset of the employment relationship.”

2.8 Strikes and Lockouts for an Employee Under Probation Period

The major question to be asked is whether the employee under probation period can exercise the right of strike and lockout, Under the Employment Act, every employee

has the right to strike in respect of a dispute of interest. Equally, every employer is entitled to lockout in respect of a dispute of interest. A dispute of interest refers to a labour dispute, which does not arise, from the application, interpretation or implementation of an agreement with an employee, collective agreement, the Employment Act or any other written law administered by the Minister responsible for labour. It follows that for labour rights, which are already provided for in a written agreement or labour laws, the right to strike or lockout is unavailable. An important note to me is that employees under probation period cannot strike or lockouts although this is not expressed in the statute of the labour laws.

The law provides an elaborate procedure to be followed before an employee engages in a lawful strike. As already noted above, the dispute must be a dispute of interest. The first step is that the dispute must first be referred to the Labour Commission for Mediation and Arbitration (“CMA”) mediation. The CMA is a quasi-judicial organ which undertakes mediation and arbitration of disputes in labour dispute proceedings. During mediation proceedings, decisions are arrived at by mutual consent of both parties. If the CMA mediation fails and the strike has been called by a trade union, the second step is that the trade union must conduct a ballot. For the strike to be sustainable, a majority of the trade union members who voted must support the strike. Finally, the employees are required to issue to the employer a 48-hour notice of their intention to strike before commencing lawful strike.

It is significant to underscore that the Employment Act further stipulates the procedure for lawful lockouts. Firstly, an employer who intends to engage in

lockouts is required to refer the dispute to the CMA for mediation. If the dispute remains unresolved at the conclusion of mediation proceedings, the next step is for the employer or employer's association to issue to the employees or trade union a 48 hours' notice of intention to lockout before commencing lockout

We believe that the staggered procedure, not to mention the intervening mediation proceedings, for lawful lockouts and strike action, allows the parties to resolve their differences amicably. The stepped procedure further allows the employer to take remedial measures with a view to mitigating his losses when the intended strike commences. The labour laws is silence on whether employee under probation period can exercise right to strike out this mean that by implication the employee under probation employee are not covered and cannot exercise such right.

2.8.1 Dispute resolution in employee under probation period.

All labour disputes must first be referred to the CMA for mediation. The mediator is required to resolve the dispute through mediation inside 30 days unless the parties agree to a longer period. If mediation fails, either party may further refer the labour complaint to a CMA arbitrator; or in the case of a dispute of interest, to the High Court, Labour Division (hereinafter "the Labour Court").

The Labour Court has been consistent in enforcing the rule that all labour disputes must first be referred to the CMA for arbitration. In the case of Hector Sequeiraa v. Serengeti Breweries Ltd, High Court of Tanzania, Labour Division, Labour Complaint No. 20 of 2009, the Labour Court dismissed as "incompetent" a labour

complaint, which was filed directly in the Court without first pursuing mandatory CMA mediation. Indeed, the significance of mediation cannot be ignored. There is an increasing trend by employers to settle labour disputes during CMA mediation especially where the employer's case is apparently weaker. Where the award of the CMA arbitrator aggrieves a party, he is entitled to apply to the Labour Court for revision of the award. Such an application is sustainable only where the revision application reveals issues relating to jurisdiction, material irregularity, error material to the merits of the case. Further appeal against the decision of the Labour Court lies in the Court of Appeal of Tanzania.

In sum, we are of the view that the new labour regime obtaining in Tanzania is commendable for introducing mediation proceedings to resolve disputes. Where the parties are acting in good faith, mediation has proved to be a valuable tool in amicable settlement of disputes, thereby saving time and resources of the parties. The employment standards are further useful in setting the minimum labour rights, which both the employer and employee cannot downgrade by contract. Nevertheless, the Stopped procedure for engaging in strikes and lockouts is meant to weed out surprise industrial action, which may be detrimental to the employer's investment and the livelihood of employees⁵⁹

Employment is a relationship between two parties, usually based on a contract where work is paid for, where one party, which may be a corporation, for profit, not-for-profit organization, co-operative or other entity is the employer and the other is the

⁵⁹ https://www.mkono.com/pdf/GLI-Employment_1st-Ed_Tanzania.pdf

employee. Employees work in return for payment, which may be in the form of an hourly wage, by piecework or an annual salary, depending on the type of work an employee does or which sector she or he is working in. Employees in some fields or sectors may receive gratuities, bonus payment or stock options. In some types of employment, employees may receive benefits in addition to payment. Benefits can include health insurance, housing, disability insurance or use of a gym. Employment laws, regulations, or legal contracts typically govern employment.⁶⁰for employee under probation period can sue for unfair termination rather can sue for the breach of contract which evolves some difficulties.

2.8.2 Finding employees or employment in relation to Probation period

Employers and job seekers often find each other via professional recruitment consultants, which receive a commission from the employer to find, screen and select suitable candidates. However, a study has shown that such consultants may not be reliable when they fail to use established principles in selecting employees. A more traditional approach is with a "Help Wanted" sign in the establishment (usually hung on a window or door or placed on a store counter). Evaluating different employees can be quite laborious but setting up different techniques to analyse their skill to measure their talents within the field can be best through assessments. Employer and potential employee commonly take the additional step of getting to know each other through the process of job interview.

⁶⁰ <https://en.wikipedia.org/wiki/Employment> accessed 16/01/2017

Tanzania employment compliance laws apply to all the work employees do with your company. For example, employees cannot work more than nine hours a day or 45 hours a week. They must receive a one-hour unpaid lunch break after working five continuous hours. If an employee works over their regular allotted time, they should get overtime pay. No employee can work more than 12 hours in a day, and overtime cannot exceed 50 hours in a four-week cycle. Normal overtime pay is 1.5 times their regular rate, while overtime on a public holiday or rest day is two times their normal pay.⁶¹

For companies that do not have the time to recruit and hire, Globalization Partners provides all benefits required through Tanzania hiring outsourcing. We have a team of Tanzania employment compliance experts who take on the stress of compliance as the Employer of Record. We will recruit the perfect team members, so you can succeed without wasting any time. Choosing an employer of record such as Globalization Partners is the only way to form a team without worrying about the risks of compliance. Once you find people who fit your job description, you will want to think of the job's legal side. Consider factors such as compensation and benefits as people will ask about these during interviews and base their hiring decisions on them.

The minimum wage varies according to sector and can be anywhere from 40,000 to 400,000 shillings per month. Your benefits package should also include required

⁶¹ <https://www.globalization-partners.com/globalpedia/tanzania-employer-of-record/hiring/#gref> accessed 10.06.2021 12:45pm

time off, including sick days and national holidays. You can make your position sound even more appealing with benefits beyond what the law requires. In conjunction with your cultural understanding of the country, your recruitment plan will help you find the right talent for your international expansion.

2.8.3 Training and Development of Employee Under Probation Period

Training and development refers to the employer's effort to equip a newly hired employee with necessary skills to perform at the job, and to help the employee grow within the organization. An appropriate level of training and development helps to improve employee's job satisfaction. In many countries in Southern and Eastern Africa, governments have relied on dedicated levies to finance the skills development sector (the Skills Development Levy (SDL) in Tanzania). The governance of these schemes is made particularly difficult by the fact that private organizations hardly see the results of their financial contribution on the ground. In some cases, this is because skills development takes time and is sector-specific, in other cases it is because firms themselves do not develop the organizational capabilities needed for them to be able to benefit from the improved skills.⁶² As a result – and despite the fact that both governments and companies have a strong joint interest in developing skills – more often the sector is affected by conflicting dynamics and allegations of resource misallocations and tax avoidance.

⁶²DR, ANDREONI A.2018, improving financing, governance and output of the skills development sector page 5

In Tanzania, vocational education and training (VET) activities and services are run by around 520 providers and promoted under more than thirty programs and public-private partnership (PPP) schemes (e.g. Integrated Mining Technical Training (IMTT) in the mining sector). The existing VET centers are extremely heterogeneous with respect to their capacity and training quality, but also with respect to the proportion of long and short courses they are able to provide. VET providers include public VET centers, some of which are owned by the VET Authority (VETA).

The latter are funded through the SDL, which is set at 4.5% of firms' monthly payroll. The SDL in Tanzania is significantly higher than in Kenya and South Africa and there are worries that this can create a competitive disadvantage and discourage formal employment. Moreover, business organizations and associations have lamented the fact that the levy is not used entirely for VET programs, and that accountability of the financing and allocation model needs improvements.

In order to ensure more constructive engagement between the public and private sector, the transparency and accountability of the fund flows seem to be an important preliminary condition. This implies: (i) a gradual move away from a centralized system where the SDL is used to fund general government expenditures; (ii) a less ambiguous legal framework which allows tracking of SDL collection and allocation; (iii) a more direct link between sectoral-level collection and allocation, while guaranteeing that cross-sectoral needs are met; (iv) increased voice and accountability in the curriculum and determination of whether existing Skilling Tanzania: improving financing, governance and outputs of the skills development sector 6 training models are fit for purpose. Reform opportunities also exist in terms

of restructuring incentives to take into account differences across sectors and firm types, as well as different governance levels. Another important area for reform relates to the design and delivery of skills training itself.

There is a significant need for greater differentiation between skills training to meet the needs of current employers, and skills training to enable trainees to establish new economic activities (i.e. self-employment). Finally, promoting the involvement of the private sector in on-the-job training through industrial placements, dual apprenticeships and internships is critical to improve the overall supply of quality VET and a skilled workforce. The introduction of rebate or grant models such as those adopted in South Africa and Kenya could potentially improve the link between VETA and VET providers and private companies.⁶³

2.8.4 Remuneration

There are many ways that employees are paid, including by hourly wages, by piecework, by yearly salary, or by gratuities (with the latter often being combined with another form of payment). In sales jobs and real estate positions, the employee may be paid a commission, a percentage of the value of the goods or services that they have sold. In some fields and professions (e.g., executive jobs), employees may be eligible for a bonus if they meet certain targets. Some executives and employees may be paid in stocks or stock options, a compensation approach that has the added benefit, from the company's point of view, of helping to align the interests of the compensated individual with the performance of the company. Employment relationships in Tanzania must start with a written or oral employment contract.

⁶³ DR, ANDREONI A.2018, improving financing, governance and output of the skills development sector.

However, we recommend creating a written employment contract in Swahili to help you avoid miscommunication. Your contract can include any vital employment information, but it is best to outline compensation, working hours, benefits, termination requirements, and more. Make sure all salary and compensation amounts are in Tanzanian Shillings instead of another currency. Keep in mind that the process can change depending on the type of employee you are hiring. If you decide to hire foreign employees, you will need to go through the visa and work permit application process first. In countries with strong collective bargaining organizations, you may have separate laws and regulations to follow.⁶⁴

2.8.5 Employee Under Probation Period Benefits

Employee benefits are various non-wage compensation provided to employee in addition to their wages or salaries. The benefits can include: housing (employer-provided or employer-paid), group insurance (health, dental, life etc.), disability income protection, retirement benefits, daycare, tuition reimbursement, sick leave, vacation (paid and non-paid), social security, profit sharing, funding of education, and other specialized benefits. In some cases, such as with workers employed in remote or isolated regions, the benefits may include meals. Employee benefits can improve the relationship between employee, employer, and lowers staff turnover.⁶⁵ An employer is a person or institution that hires employees. Employers offer wages or a salary to the workers in exchange for the worker's work or labor.

⁶⁴ DR, ANDREONI A.2018, improving financing, governance and output of the skills development sector

⁶⁵ <https://en.wikipedia.org/wiki/Employment>

One speaks of wages if the employee is paid by the hour and of salary if he is paid a set rate per pay period. Wages are paid for all hours worked, including overtime, but a salary is typically not paid more for more hours worked than the minimum. Employers include everything from individuals hiring a babysitter to governments and businesses, which may hire many thousands of employees. In most western societies, governments are the largest single employers, but most of the work force is employed in small and medium businesses in the private sector⁶⁶Employment benefits are defined to mean non-salary considerations such as bonuses, hardship allowance or transport allowance availed to potential and current employees (“employees”). The benefits are usually offered in addition to salary to create a competitive package for the employees.

Employment benefits are usually classified as cash benefits and non-cash benefits alias benefits in kind. Cash benefits include non-salary considerations availed on cash basis such as bonuses, gratuity and payment in lieu of leave while benefits in kind include non-salary considerations availed on a non-cash basis such as the use of motor vehicles or use of residential premises.

Section 7 of the Income Tax Act (ITA), 2004 provides for items to be included in the computation of gains or profits from an individual’s employment. It stipulates that both cash benefits and non-cash benefits should be included in calculating the gains or profits from an individual’s employment. In that regard, the entitled benefits will

⁶⁶ <https://simple.wikipedia.org/wiki/Employer>

be included in the computation of gross salaries, which will then be subjected to employment taxes as per the relevant provisions of the Law.

2.8.6 Legal Implications of the Probation Period

There is a common misconception among both employers and employees that probationary periods are a legal concept.

There is a common misconception among both managers and employees that probationary periods are a legal concept. Probationary periods have no meaning in law at all. There is no legal requirement to use them, and passing a defined probationary period does not gain the employee any additional legal rights. Qualification for many statutory employment rights is based purely on the length of service, and the length of service used for the accumulation of various legal rights will count from the employee's original start date, and not from the date that marks the end of the probationary period. This is to say that no employee must pass for probation period this is not a mandatory procedure.

As the qualifying period to bring a claim for unfair dismissal (other than in specific exceptions) is two years, this means that not only will an employee not be able to claim unfair dismissal if they are advised they have not passed their probationary period because of poor performance, but the same will apply after their probationary period has been passed (assuming it is shorter than two years). So although of course if you are going to have a probationary period at all, and make a decision at the end

of it, if you find you have made the wrong decision, and need to let the employee go, you should be able to do so without additional legal complications.

All of this means that the legal implications of a probationary period are purely contractual. In many cases employees' notice periods increase after passing probation, which means of course if you do decide after probation has been passed that you want to dismiss a poor-performing employee, you'll have to give them more notice than previously. Also, for many employees, they become entitled to certain contractual benefits after probation is passed.

Because of these implications, it's important that what counts as the end of probation and the process that is followed is clear. Although probationary periods are (or should be) for a set period, and ideally managers will conduct a review, make a decision and notify the employee just before that period is up, in reality, it is all too common for timescales to slip, and for this to take place a bit later than the specific three/six-month date.

Because this happens, it is worth double-checking the wording in your contract or policy relating to probationary periods to ensure you are not caught out. If there is an increased notice period, is this specifically linked to passing probation or simply linked to the length of service? How does an employee know they have passed probation do they need to be specifically told, or is the wording vague enough that it could be interpreted as they have passed it unless told otherwise? To avoid getting caught out, having wording that makes it clear that employees are not considered to

have passed probation unless specifically told they have, even if the timescale drifts, might be useful⁶⁷.

The probationary period has no meaning in law at all. There is no legal requirement to use them, and passing a defined probationary period does not gain the employee any additional legal rights.⁶⁸ In factual circumstances, probation periods of one and three months exist for blue-collar workers, the typical duration for white-collar workers in the public and private sector is six months to one year.⁶⁹ With no legal stipulations governing probation periods, this type of labour contract has been regulated in numerous agreements between unions and employers. The stipulations on probation duration generally differ for blue and white-collar workers and can vary across industries and regions.⁷⁰ There is no statutory requirement to include a probationary period in a contract of employment. However, it is a useful tool to manage new or newly promoted employees. There is no automatic or implied term in a contract for a probationary period so it must be stated as an express term.

Nevertheless, it has been determined in the case of *White v London Transport Executive*⁷¹ that where there is a probationary clause in a contract it implies a promise of positive help and guidance to help an employee achieve the expected standard. In addition, it is observed in the case of *Post Office v employees* must be

⁶⁷ <https://face2facehr.com/legal-implications-of-probationary-periods/> accessed 10.06.2021

⁶⁸ Deem, E, Legal Implications of Probationary Periods, <http://face2facehr.com/probation-induction/legal-implications-of-probationary-periods/>. (accessed on 2nd October 2018)

⁶⁹ Riphahn, R. T, and Thalmaeir, A, Behavioural Effects of Probation Periods: An Analysis of Worker Absenteeism, Institute for the Study of Labour, Discussion Paper No. 67, (October 1999), at page 3

⁷⁰ Ibid

⁷¹ [1981] IRLR 261, EAT

able to show that they took reasonable steps to appraise the employee on probation and that they made honest efforts to determine his suitability.

2.8.7 Limitation of a Period of Probation

There is no set period for a probationary period. A less skilled or more junior job may only require a short period for the employer to assess competence for work whereas a senior role may require the employee to fit in culturally and show leadership, both of which may take much longer. Consistency should be applied across similar roles. There is no explicit provision in the Employment and Labour Relations Act⁷² about the probation period. However, this Act implicitly requires a probationary period of 6 months by saying that a worker with less than 6 months of employment may not bring an unfair termination claim against the employer.⁷³ Significantly, employees on probation can be let go without the standard notice period. Employees usually have the right to notice of between one and 12 weeks. Other benefits, such as pension schemes, are often off-limits during probation too. A common reason for using probation periods is that the standard recruitment process, which usually ends with a job interview or practical assessment, is not perfect. However thorough your process might be, you can still end up someone who underperforms or does not fit your organization. Probation periods allow you to assess recruits on the job, for three months or more.

⁷² Act No. 6 of 2004

⁷³ The Employment and Labour Relations Act, s 35

2.8.8 Ending of Probation Period

Probation periods typically precede regular employment contracts and are commonly interpreted as a screening device for employers. The probation period is followed either by layoff or by a regular employment contract. The terms of subsequent employment contracts are frequently determined based on worker performance during the probation period.⁷⁴ A probationary period can only be used for new employees as a clause at the start of the employment relationship. At the end of the probation period, you should; confirm the employee's employment, extend the probationary period or terminate their employment.

An organisation can only extend a probationary period, to allow more time to assess the new employee's suitability, if it forms part of the employment contract. Should it be deemed as the necessary action, then it should be set out in writing stating the reasons for the extension, the areas which need to be addressed and setting targets, with a revised probationary review date. A report from People Management highlights that 1 in 5 new employees leave an organisation during their probationary period, and after all the time spent searching and recruiting for the right candidate, it's increasingly important for organisations to understand probationary periods and how to make them work for their organisation.

It is important to remember that although probation allows you to terminate recruits more easily, the real aim of probation is to bring an effective employee on board. Make sure you support new employees to know what is expected from

⁷⁴ Riphahn, R. T, and Thalmaeir, A, op-cit

them during the probation period and after. Develop the knowledge and skills needed to fulfil their new role, through training and support. Address problems with their performance before the probation period is over. Probation periods usually end with a review meeting between the employee and their manager. At this meeting, you can assess how well your new employee is performing, what his or her training needs are, and whether they are a good fit for your company. Probation makes this possible and you have the option to develop the employee or dismiss them.⁷⁵

2.9 Dismissal During the Probation Period

Ordinarily, a probationary employee may be dismissed for incapacity / poor work performance. If that is indeed the case, then no less than one week's notice of termination has to be given to the employee. If, however, the employee has misconducted him/herself, and is found guilty of serious misconduct, summary termination is permissible. Such dismissal will, however, have nothing to do with the probationary nature of the employment then.

The case of *Stella Temu v Tanzania Revenue Authority*⁷⁶ describes the position of probation and the rights entitled to the person under probation. The court thought that the appellant's secondment to the respondent was like probation and probation is a practical interview; the right to be heard and to be given reasons for a decision do not extend to include a person who is told that he has failed an interview. If you've

⁷⁵ <https://www.brighthr.com/articles/hiring/probation-periods/the-importance-of-employee-probation-periods/> accessed 10.06.2021

⁷⁶ [2005] TLR 178

decided to dismiss an employee, perhaps for poor work performance or bad conduct, you can do so at any time – either during, or at the end of, their probationary period. You don't have to follow a procedure, give them a warning or even provide notice. However, it is considered good practice to do so. Following a fair procedure will not only reduce the risk of any claims against you at a tribunal; it will also help build your reputation as a fair employer. With that in mind, you will ideally have a procedure in place, which can be followed in the event you need to dismiss someone, whatever the length of service. It should be somewhat like the process outlined including. Meeting with the employee As mentioned above, it is a good idea to invite the employee to a meeting to discuss concerns and try and agree on a solution. If dismissal is deemed to be unavoidable, invite them to a meeting to discuss this action. Again, let them know that this is what the meeting is about in advance. If at that meeting the employee asks you to reconsider, make sure you take a little time to do so. If necessary, adjourn the meeting for a short time and then reconvene to let them know your decision. Provide a copy of your decision in writing in the next few days and let them know they have a right to appeal.

As part of your dismissal procedure, you may also provide an opportunity for the employee to raise an appeal. However, if your contract of employment does not require this, you may only wish to offer the opportunity to appeal where the case is particularly difficult or rancorous. The appeal stage can be kept simple, but the key is to give your employee the chance to raise objections, and for you to give due consideration to the matters which they may raise. Remember: while you do have a measure of freedom to dismiss someone during their probationary period, you should

always ensure you treat all employees in the same manner and have a consistent approach to dismissal from work. Looking for more assistance or guidance in creating your dismissal procedure? Are you considering the need to dismiss an employee, who lacks the experience or staff equipped to handle this type of procedure? At Springhouse, our team of employment law solicitors have the knowledge and experience to provide you with legally sound advice and direction. Feel free to get in touch with us today to discuss your impending need.

2.10 Expectations of Employee and Employer Under Probation Period

There is a good number of meanings, which have been explicated by the different jurists depending on the philosophical bases, criteria and application. The differentiation is because the term employee is not a word of art. It takes colour from its surroundings and frequently is carefully defined by the statute where it appears. A person who has agreed by contract to perform specified services for another, the employer, in exchange for payment. The status of an employee is often determinative of tax status as employment income is generally taken as straight income paid to the individual. Those who wish to represent to the tax authority that their services were not those of an employee but, rather, of an independent contractor, would benefit from a different treatment of their income for tax purposes, generally able to reduce their taxable income by any business-related expenses. The term employee means an individual who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, whether such contract is expressed or implied, oral or in writing.

In the case of *United Brotherhood of Carpenters v Citation Industries Ltd.*⁷⁷, the court observed that employee means an individual employed to do work who receives or is entitled to wages. The word may be more extensive than clerk or officer, and may signify any one in place, or having charge or using a function, as well as one in office. Employee may designate someone who at the time in question is actually performing services for the employer. However, its natural meaning goes beyond that.

Section 61 of the Labour Institutions Act⁷⁸ recognises the circumstances under which a person may be termed as an employee. It provides that a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present;

The manner in which the person works is subject to the control or direction of another person;

- i. The person's hours of work are subject to the control or direction of another person;
- ii. In case of a person who works for an organisation, the person is a part of that organization';
- iii. The person has worked for that other person for an average of at least 45 hours per month over the last three months;

⁷⁷ 46 BCLR 129

⁷⁸ Act No. 7 of 2018

- iv. The person is economically dependent on the other person for whom that person works or renders services;
- v. 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.

An employee who has the status of being on probation clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee, and the other has satisfactorily met the test.⁷⁹The standards set by the employer are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention by the employer.⁸⁰

Although it is apparent that any employee covered by the agreement can be discharged for cause at any time, the employment of a probationer may be terminated if, in the judgment of the company prior to the completion of the probationary period, the probationer has failed to meet the standards set by the company and is considered to be not satisfactory.⁸¹The probationary employee may be dismissed at any time during the probationary period, for good cause or without cause or reason, depending on the employer's policy.

⁷⁹ *U.E. v. Square D. Co.* (1955), 6 LAC 289

⁸⁰ US Legal, op-cit

⁸¹ Ibid

2.10.1 Rights of Employees under Probation Period

Qualification for many statutory employment rights is based purely on length of service; the length of service used for the accumulation of various legal rights will count from the employee's original start date, and not from the date, that marks the end of the probationary period. Legal implications of a probationary period are purely contractual. For many employees they become entitled to certain contractual benefits after probation is passed. Although probationary periods are for a set period, and ideally, employers will conduct a review, make a decision and notify the employee just before that period is up, in reality it is all too common for timescales to slip, and for this to actually take place a bit later than the specific three / six-month date.

In Tanzania, employees under probation period below six months cannot claim unfair termination. Right to claim unfair termination under section 35 of the Employment and Labour Relations Act. This is cemented in the case of Patrick Tuni Kihenzile v Stanbic Bank Tanzania Limited⁸² where the court reiterated the principle that employee under probation with less than 6 months not covered by section 35 of the Employment and Labour Relations Act. It was held that a probationary employee may challenge termination only under certain circumstance other than unfair termination.

Also, in the case of Commercial Bank of Africa (T) Ltd v Nicodemus Mussa Igogo⁸³ where the major issue raised is whether an employee on probation is protected under

⁸² Labour Court Revision No 47 of 2011 High Court (Labour Division) Dar es salaam Unreported

⁸³ (1971) HCD 247

unfair termination. In response to the issue, the court observed that the employee working under a probation period is not protected under unfair termination and the fair termination principle does not apply to employees working under a probation period.

In addition, the case of *Stella Temu v Tanzania Revenue Authority*⁸⁴ describes the position of probation and the rights entitled to the person under probation. The court thought that the appellant's secondment to the respondent was like probation and probation is a practical interview; the right to be heard and to be given reasons for a decision do not extend to include a person who is told that he has failed an interview. This means decisions made by the employer during the probation should not entitle the person right to be heard and to give reasons for the decision because probation is like a practical interview.

2.10.2 General Ground of Employment Termination in Labour Laws in Relation to Employees Under Probation Period

Misconduct, the employer may terminate the employee when the employee conducts himself/herself contrary to the law and or disciplinary policies and procedures as well as contrary to codes of conduct as per Rule 11(1) Employment and Labour Relations (Code of Good Practice) Rules, 2007. The following are some of the acts which may justify termination, namely: gross dishonest; willful property damage; wilful endangering the safety of others; gross negligence; assault on a co-employee, supplier, customer, or member of the family of, and any person associated with, the

⁸⁴ [2005] TLR 178

employer, and gross insubordination. Incapacity The employer may also terminate the employee on the grounds of incapacity due to ill health, injury or poor work performance. Incapacity may be defined as a situation where the employee becomes unfit or unable to perform and render his duties as ordinarily required or expected or is unable to produce expected services and results in the due course of the employment. Incompatibility also constitutes a fair reason for termination. Incompatibility means the unsuitability of the employee to his work due to his character or disposition. Further, it includes incompatibility of the employee in his work environment in that he relates badly with fellow employees, clients, or other persons who are important to the business. (Rule 22(1), Employment and Labour Relations (Code of Good Practice) Rules, 2007)

2.10.3 Whether Operational Requirements Can be Used for Employee Under Probation Period

This is also known as retrenchment. This is a ground for termination arising from the operational requirement of the business. It highly based on the economic, technological, structural or similar needs of the employer. (Rule 23(1).The law lay down the circumstances that might legitimately form the basis of a termination of employee based on operational requirements. These are: Economic needs that relate to the financial management of the enterprises; Technological needs that refer to the introduction of new technology which affects work relationship either by making existing jobs redundant or by requiring employee to adapt to the new technology or a consequential restructuring of the workplace, Structural needs that arise from restructuring of the business as a result of a number of business related causes such

as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.

2.10.4 General Procedures for Termination of Employment in Tanzania Legal System

The law provides for legal procedures to be followed in terminating the employee depending on the nature and or ground for such termination. Each ground attracts some pecuniary procedures to be followed thus each reason needs to be dealt with on its merits and a fair procedure applied in each case. Generally the law states under Rule 8(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 that an employer may terminate the employment of an employee if he Complies with the provisions of the contract relating to termination Complies with the provisions of section 41 to 44 of the Employment and Labour Relations Act, 2004 concerning notice, severance pay, transport to the place of the recruitment and payment Follows a fair procedure before terminating the contract; and Has a fair reason to do so as defined in Section 37(2) of the Employment and Labor Relations Act, 2004. Thus, in consideration of the above-cited rule; the employer is obliged to consider these procedures when terminating an employee as we hereunder explain each procedure in detail

2.10.5 Provisions of the Contract of Employment Relating to Termination

The employer has to comply with the provisions of the contract of employment with the said employee which provide for the procedures to be followed in terminating. So the employer has to read the said provisions between lines and act upon accordingly.

The contract of employment contains no provisions relating to termination of employment; the employer has to read and act according to legal provisions on termination provided under the Labor Legislation. However, any provisions in the contract of employment on termination that contravenes with the law may be challenged in the Commission for Mediation and Arbitration (CMA) or the Court of law. Having complied with the provisions of the contract of employment; the employer is also required to observe the provisions of the law, among others, sections 42 to 44 dealing with termination of employment. These provisions deal with the issue of notice of termination, severance pay, and transport to the place of recruitment and payment on termination and certificate of employment.

Let now examine each procedure and ascertain the circumstances in which each procedure should be complied with the employment may be terminated on notice, but the period of notice should not be less than seven days, if notice is given in the first month of employment. If the notice is given after the first month of employment, then the notice should not be less than four days if the employee is employed on a daily weekly basis; or 28 days if the employee is employed on a monthly basis.

The employer and the employee may agree for a notice period that is longer the stated one provided the agreed period is of equal duration for both the employer and the employee. Further, the notice must be in writing stating the reasons for termination and the date on which the notice is given. Such notice should be given during any period of leave taken under the Act; or to run concurrently with any such period of leave. The law allows the employer to pay the employee the

remuneration that the employee would have received if the employee had worked during the notice period instead of giving an employee notice of termination. If the employee refuses to work during the notice period, then the employer may deduct, from any money due to that employee on termination. The law requires the employer to pay the employee severance pay which is the amount at least equal to 7days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years severance pay shall be paid to the employee who has completed 12 months continuous service with an employer but shall not be paid to an employee whose termination is fairly done on grounds of misconduct; or to an employee who is terminated on grounds of capacity, compatibility or operational requirements of the employer but who unreasonably refuses to accept alternative employment with that employer or any other employer.

Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either transport the employees and his personal effects to the place of recruitment; or pay for transportation of the employee to the place of recruitment; or pay the allowance for transport to the place of recruitment and daily subsistence expenses during the period, if any, between the date of termination and the date of transport. The allowance paid shall be equal to at least a bus fare to the bus station nearest to the place of recruitment.

2.10.6 Payment on Termination and Certificate of Employment (Section 44)

Up on termination of employment, then the employer shall pay the employee the following entitlements: any remuneration for work done before the termination; any

annual leave paid due to an employee for leave that the employee has not taken; any annual leave pay accrued during any incomplete leave cycle; severance pay and transport allowances. Further, on termination, the employer will issue to an employee a prescribed certificate of service. The employer shall follow a fair procedure before terminating an employee's employment, which may depend to some extent on the kind of reasons given for such termination.

Doctrine of hire and fire and whether it is featured in our legislation visa Vis right of employee under probation period. At-will employment is a term used in U.S. labor law for contractual relationships in which an employee can be dismissed by an employer for any reason (that is, without having to establish "just cause" for termination), and without warning. When an employee is acknowledged as being hired "at will," courts deny the employee any claim for loss resulting from the dismissal. The rule is justified by its proponents on the basis that an employee may be similarly entitled to leave his or her job without reason or warning.^[2] In contrast, the practice is seen as unjust by those who view the employment relationship as characterized by inequality of bargaining power.⁸⁵ At-will employment gradually became the default rule under the common law of the employment contract in most states during the late 19th century, and was endorsed by the U.S. Supreme Court during the Lochner era, when members of the U.S. judiciary consciously sought to prevent government regulation of labor markets.⁸⁶

⁸⁵ https://en.wikipedia.org/wiki/At-will_employment#cite_note-3

⁸⁶ https://en.wikipedia.org/wiki/At-will_employment#cite_note-4

Over the 20th century, many states modified the rule by adding an increasing number of exceptions, or by changing the default expectations in the employment contract altogether. In workplaces with a trade union recognized for purposes of collective bargaining, and in many public sector jobs, the normal standard for dismissal is that the employer must have a "just cause." Otherwise, subject to statutory rights (particularly the discrimination prohibitions under the Civil Rights Act), most states adhere to the general principle that employer and employee may contract for the dismissal protection they choose.^[5] At-will employment remains controversial, and remains a central topic of debate in the study of law and economics, especially with regard to the macroeconomic efficiency of allowing employers to summarily and arbitrarily terminate employees.⁸⁷

The doctrine of hire and fire has been developed in common law especially during the growth of industries in European countries. The doctrine was applied for the different reasons to the industrial owners and workers. The concept later on spread to other parts of the world. This doctrine creates a presumption that employers and employees are not bound to the employment relationship by anything more than their voluntary desire to continue the relationship. Either one may end the employment at any time, with or without cause. Under the hire and fire doctrine, employers have the right to terminate employees without these types of contracts at any time and for any legally permissible reason. Employees also have a similar right to resign whenever they want. In other words, it is a cold, somewhat harsh, legal concept that says both parties can terminate the relationship at any time. The courts generally have upheld

⁸⁷ https://en.wikipedia.org/wiki/At-will_employmen

the right to terminate under the hire and fire doctrine, but this right does not mean that employers should blithely terminate without giving a reason or without following normal policies and procedures.⁸⁸

In fact, if you try to fire an employee by invoking the at-will clause, you could find yourself defending against a discrimination or wrongful termination claim. This possibility does not mean that the at-will clause is useless.

2.10.7 Jurisprudence of Doctrine of Hire and Fire Visa Vis Employee Under Probation Period

The real reason most lawyers recommend including an at-will clause in personnel policies is to give the employer flexibility in applying its policies so that they will not become rigid contractual obligations that must be followed uniformly. Therefore, to help avoid discrimination claims, you should first follow your discipline and termination procedures, whenever possible. The doctrine of hire and fire should really only be thought of as a legal defence to keep you from being forced to follow policies arbitrarily. The doctrine of hire and fire was featured in the employment at-will doctrine as the ultimate guarantor of the capitalist's authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labour.

⁸⁸ Kitime E . 2014 ,the doctrine of hire and fire in Tanzania available at http://www.academia.edu/7786878/the_doctrine_of_hire_and_fire_in_tanzania_labour_law

The doctrine of hire and fire implied the dominion of the owners of capital over their employees and their enterprises a basic element of the capitalist system for the purpose of colonialists to obtain raw materials for their mushrooming industries in their home country as well as cheap labour for maximisation of profit. The hire and fire rule developed in Africa in response to cases presented by a particular group of workers especially the Africans who had few white-collar jobs during colonial period. The overriding factor making the rule compelling was the position of these workers as an example of all workers in the developing modern capitalist economy. Seen thus, the rule is more than a particular response of the legal system to a particular economic problem; termination at will is the law's development of a fundamental principle of the economy.⁸⁹ In some instances Africans were expropriated of their lands in order to create landless class, which would thereafter depend on wage employment. Sometimes outright force was used. For example, in Tanganyika, Chiefs invoked the Native Authority Ordinance of 1923 to force their subjects to work on public works for pay or for free. In other instances, the introduction of tax to be paid in cash made African work in European owned plantations.

Section 42 of the Master Native Servant ordinance protected much the interest and will of the masters at the expense of the servants who were native Africans. The provision provided that employer can dismiss the worker as he wishes without following procedures. Since there are always changing needs of capitalists, which was brought about by industrialization, was the causative factor leading the colonial

⁸⁹ 7AMANDA Bents', *The Death of the Organization Man* 67 (1990) (discussing how factories increased the need for middle level managers)

judiciary to adopt the employment at will principle which incorporated doctrine of hire and fire. The Master and Native Servants (Recruitment) Ordinance:

This Ordinance made provisions for licensing of recruiters who were divided into two categories: private recruiters and professional recruiters. Section 2 defined recruiting as: any operations undertaken with the object of obtaining or supplying the labour of natives who do not spontaneously offer their services at the places of employment, or at an office established by Government, or by an employer's organization with the approval of the Labour Commissioner for the purpose of receiving applications for employment, and recruit, recruiter and recruitment have corresponding meanings.⁹⁰

The distinguishing features of the above pieces of legislation were the element of involuntariness on the part of the native servant. Thus the notion of freedom of contract was jettisoned and in its place, a quasi-penal regime was introduced. Section 37 of the employment ordinance which operated since 1957 but was enacted in 1955 provided for summary dismissal which gave power to the employer to dismiss the employee summarily without giving reasons. Hence this section featured the doctrine of hire and fire under the hands of the colonialists were trying to maximise their profits for their economy and social welfare. A system of doctrine of hire and fire that subjects a person's livelihood and status to the whims of an employer is unfair and fosters societal instability. Thus, the legal systems and international

⁹⁰ Section 2 of the Master and Native Servant (Recruitment) Ordinance 1946 Cap 80 which came into force on 15/3/1946

organizations such as ILO that initiated and continue to support this system must remedy the inherent Unfairness of the hire and fire doctrine.⁹¹ This necessitated the enactment of the Security of the Employment Act which came to restrict the termination of employment in various sectors for the purpose of the security of the tenure of the workers.

The law prohibited summary dismissal by creating procedures of how to terminate in that manner. Section 37 of the security of employment Act established the procedures to be followed before employing summary dismissal. However, the Act did not cure entirely the doctrine of hire and fire under Section 39 states that statutory compensation is not payable by the employer in the event such employer terminates the employment on account of the redundancy of such employee without does not define the concept of redundancy.⁹²

⁹¹ Peter Stone Partee, Reversing the Presumption of Employment at Will, 44 VAND. L. REV. 689 (1991) and Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment at Will, 92 MICH. L. REV. 8(1993).

⁹² Kitime E . 2014 ,the doctrine of hire and fire in Tanzania available at http://www.academia.edu/7786878/the_doctrine_of_hire_and_fire_in_tanzania_labour_

CHAPTER THREE

**LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE PROTECTION
OF THE RIGHTS OF A PROBATIONARY EMPLOYEE**

3.1 Introduction

Laws and institutions are very important for realization of the rights and justice in any legal system. Their effectiveness connotes stability in access to justice. Their weaknesses and deficiencies harmfully affect the effectiveness of the administration of justice. This chapter gives a critical analysis of the laws and institutions, which are responsible for the regulation of the rights of employees under probation periods.

3.2 Domestic Legal Frameworks in Tanzania

This includes laws provided for employees under probation period, there are many laws which are made within that regulate various subject matter in the country. The laws made by parliament are called principal legislation, statutes or Acts of the Parliament. However, there are laws made by other bodies than the parliament. These laws are called delegated legislation. They are in the form of regulations, rules, guidelines, circulars and orders to mention but a few. Constitution of the United Republic of Tanzania⁹³, This is the mother law because it is the most supreme law of the land and all other laws derive their validity from there. When other laws do contradict the Constitution, they may be declared invalid. ⁹⁴Primarily, the constitution defines the concept of work, which is most applicable in the employment and labour sectors. It provides that every person who is able to work does work. However, the term work means any legitimate activity by which a person earns a

⁹³ Cap. 2 R.E. 2002

⁹⁴ The Constitution, article 64(5)

living.⁹⁵ Hence, work must be a legitimate activity. Illegitimate activities do not amount to work. Work enables a person to earn a living.

The constitution recognises and protects rights and duties, which are applicable in the employment and labour industry. It recognises that every person has the right to work.⁹⁶ This extends to probationary employees. The employees under probation have the right and duty to work. Henceforth, the constitution recognises the duty to work. Hence, to work is not only right but also a duty in Tanzania. This is because work alone creates the material wealth in society, and is the source of the well-being of the people and the measure of human dignity.⁹⁷

Therefore, every person including employees under probation has the duty to participate responsibly and honestly in lawful and productive work observe work discipline and strive to attain the individual and collective production targets desired or set by law.⁹⁸ The constitution recognises and protects the right to just remuneration. It recognises that when a person works legitimately deserves remuneration. The remuneration must be just. It provides that every person, including a probationary employee, who works is entitled to just remuneration.⁹⁹ This implies that every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to

⁹⁵ Ibid, article 9(e)

⁹⁶ Ibid, article 22(1)

⁹⁷ Ibid, article 25(1)

⁹⁸ The Constitution, article 25(1)

⁹⁹ Ibid, article 23(2)

their ability shall be remunerated according to the measure and qualification for the work.¹⁰⁰

The second legislation is The Employment and Labour Relations Act, which is the principal legislation. It is enacted to make provisions for core labour rights, to establish basic employment standards, to provide a framework for collective bargaining, to provide for the prevention and settlement of disputes, and to provide for related matters. It provides for the fundamental rights in the employment and labour industry. These are the prohibition of discrimination, abolition of child labour and forced labour. They are fundamental. They are enforceable as human rights applicable in the labour sector. They are all provided under the part of fundamental rights and protection.¹⁰¹ This segment of the law applies to the probationary employees. They are not supposed to be discriminated against, forced or employed under age.

However, section 35¹⁰² describes that employees under a period below six months cannot claim unfair termination. It provides that the provisions of this Sub-Part (unfair termination) shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts. This denotes employee with less than 6 months of employment may not bring an unfair termination claim against the employer so under that point of view the law appears to be unjust since it hinders the employee's right to claim where the employer did or

¹⁰⁰ Ibid, article 23(1)

¹⁰¹ The Employment and Labour Relations Act, part II

¹⁰² Ibid

violates the principle of natural justice. So the law should be amended to cover employees who are below six months old in order to adhere to international principles.

Moreover, this law defines the term employee. An employee is an individual who has entered into a contract of employment. Employee is defined also as an individual who has entered into any other contract under which the individual undertakes to work personally for the other party to the contract; and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual. Moreover, an employee is an individual who is deemed to be an employee by the Minister under section 98(3).¹⁰³ Throughout these definitions, the probationary employees are not thereby expressly included however under implied construction of the statute they may be included because they are the employees. The law should make it clear that the term employee includes probationary employees so as to have entitlements therein.

The Act also has the rules made under section 99 of the Act which is The Employment and Labour Relations (Code of Conduct) Rules¹⁰⁴; it is the subsidiary legislation which provides for the rules that define conduct rules at the workplace and in employment and labour relations. It is applicable to all employees, employers, trade unions, Application employer organizations, mediators, arbitrators, assessors, and judges and shall include Government officials.¹⁰⁵ This is only law, which

¹⁰³ The Employment and Labour Relations Act, s 4

¹⁰⁴ G.N. No. 42 of 2007

¹⁰⁵ The Employment and Labour Relations (Code of Conduct) Rules, r 2

provides for some of the details of the probation periods and their arrangements. It describes the purpose of probation periods. The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.¹⁰⁶ It also deals with the maximum duration of the probation period. The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standards required, and the customs and practices in the sector.¹⁰⁷

Moreover, it recognises the extension of the probationary period. An employer may, after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment.¹⁰⁸ It vests the responsibility of the employer to ensure the terms of the probation are known to the employee. It provides that terms of probation shall be made known to the employee before the employee commences employment.¹⁰⁹ The employer has the power to notify the probationary employee on the performance and the employee has the right to defend. Where at any stage during the probation period the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.¹¹⁰

¹⁰⁶ Ibid, r 10(3)

¹⁰⁷ The Employment and Labour Relations (Code of Conduct) Rules, r 10(4)

¹⁰⁸ Ibid, r 10(5)

¹⁰⁹ Ibid, r 10(2)

¹¹⁰ Ibid, r 10(7)

The employer has the right to terminate the employment of a probationary employee under the conditions. These conditions are the employee has been informed of the employer's concerns, the employee has been given an opportunity to respond to those concerns, and the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so.¹¹¹

However, the law does not allow the representation in response to the allegation of the employer on a performance basis. This curtails the very principle of justice of being represented. It provides that a probationary employee shall be entitled to be represented in the process of opportunity to respond by a fellow employee or union representative.¹¹² Moreover, the law has stipulated that the procedures for the termination of the probationary employees of less than six months will be provided in the guidelines.¹¹³ Nonetheless, there are none of those guidelines which have been promulgated up to now hence leaving the loophole to the employer's benefits.

The third law is The Labour Institutions Act is the principal legislation, which deals with the establishment of Labour Institutions to provide for their functions, powers and duties, and to provide for other matters related to them.¹¹⁴

In addition, this law provides for the circumstances which create presumption as to who is an employee. This may include the probationary employees. It provides that a person who works for or renders services to, any other person is presumed, until the

¹¹¹ The Employment and Labour Relations (Code of Conduct) Rules, r 10(8)

¹¹² Ibid, r 10(9)

¹¹³ Ibid, r 10(1)

¹¹⁴ The Labour Institutions Act, long title

contrary is proved, to be an employee, regardless of the form of the contract. However, this presumption is created when there is the existence of various factors.

¹¹⁵First, if the manner in which the person works is subject to the control or direction of another person, the person working under the control of another person is deemed to be an employee of that person. Second, if the person's hours of work are subject to the control or direction of another person, such person is presumed to be an employee of the person who directs and controls hours of work. Third, in the case of a person who works for an organisation, the person is a part of that organization even though the person is not subjected to control, such person is deemed to be an employee of the organisation.

Fourth, if the person has worked for that other person for an average of at least 45 hours per month over the last three months, the person who has worked for the other person is deemed to be an employee of that other person. Fifth, if the person is economically dependent on the other person for whom that person works or renders services, the person is economically dependent on the other person at work and is deemed to be an employee of that person. Sixth, when the person is provided with tools of trade or work equipment by the other person, the person who is provided with the tools of work is presumed to be an employee despite the absence of control. Seventh, if the person only works for or renders services to one person, the one who is rendering services or works for another person becomes an employee of that other person.

¹¹⁵ The Labour Institutions Act, s 61

3.3 Legal Framework on the Employee Under Public Services/Governmental Sector

The major law is The Public Service Act is a statute that focuses on the employees of the government. It deals with public sector employment and labour relations. It is enacted to constitute public service of the United Republic of Tanzania. It is made also to provide functions and obligations of the public service. Moreover, it is enacted to establish a public service commission and related matters.¹¹⁶

It defines the concept of public servant. A public servant is a person that holds or acts a public service office. A public service office is paid public office charged with formulation of the government policies and delivery of public services. This does not include parliamentary office, office established by the law, office at term contract or whose payments are at hour or daily rates, judicial or police or prison office.¹¹⁷

It is controversial whether said definition entails the probationary employees since There is no indication of the public servants that are under probation period. However, it may include despite the fact no express provision therein. Public services Act also has its regulation of 2003 which is called Public services regulation clarify more on employee and employer relationship include punishment procedure the regulation entails under regulation 14 which confer that, where any person is first appointed to an office in the public services on pensionable terms he shall serve a probationary period shall depend on the scheme of service and shall not exceed twelve months. Immediate supervisor or an authorised public servant shall not later than three months before the expiration of any probationary period consider whether

¹¹⁶ The Public Service Act, long title.

¹¹⁷ Ibid, section 3

(a) The public servant should be confirmed in his office (b) the probationary period should be extended to afford the Public servant van opportunity of improving in any respect in which his work or conduct have been adversely reported on. (c) The public servant appointment should be terminated. Sub 3 of regulation 14 of public service regulation provide that where the immediate supervisor or authorised public servant is of the probationary period should be extended under paragraph (b) of this regulation he shall before extending such probation or terminating such appointment inform public servant in writing on his intention.¹¹⁸

Another Act is the attorney General (discharge of duties) Act¹¹⁹ also provide for how public officers especially lawyers the disciplinary authority deal with conduct of lawyers is Deputy attorney General and disciplinary procedure are governed by section 28(3) of the office attorney General (discharge of duties) Act of 2005 power of disciplinary include reduction in rank, suspension, dismissal from office and reduction of salary.

Also Standing Orders For The Public Service 2009, Pursuant to S.35 (5) of the Public Service Act,¹²⁰ In most of these Standing Orders the term "public servants" has been used and where the term is unqualified, the Standing Orders shall be interpreted as applying to all those categories of employees who fall within the definitions given in Standing Order A.1.

¹¹⁸ Public services regulation G.NO 168 OF 2003

¹¹⁹ Office of the attorney general (discharge of duties) Act 2005

¹²⁰ Cap.298

According to the standing order provides that Period of probation: (1) where any person is first appointed to an office in the public service on pensionable terms, he shall serve a probationary period of twelve months. (2) In the case of a public servant undergoing a course of instruction of six months or more in duration, the question of his confirmation shall be considered after the completion of the course i.e. the period of his probation shall be extended to cover the period of the course.

3.4 The Aim of the Probation Period for Public Sectors

The period is to ensure good performance and good conduct of a public servant. The first consideration concerning public servants on probation shall be regarded as being on trial to learn their work and being tested as to their suitability for it. They shall, therefore, not only be given every facility for acquiring experience of their duties, but also be kept under continuous observation, and may be posted where such observation is possible. If during the first few months of service, a public servant shows failures, which make it doubtful whether he shall become suitable for permanent appointment; he shall at once be warned and be given all possible assistance to correct his faults.

Performance Review of public Servants especially on those probationary employee, Immediate Supervisor shall review the progress of all probationary public servants in their organisations after the public servants have completed six and nine months; and shall conduct open performance appraisal using OPRAS Form TFN 832. Subject to the provisions of Standing Order D.68, the reports shall be retained by the organisations concerned. Where a report is of such a nature that it is desirable that

warning be given to a public servant, the Immediate Supervisor shall warn the public servant concerned accordingly and shall record on the report the fact that he has done so. Such warnings shall be either, by letter addressed to the public servant who shall acknowledge thereof or/if given orally, shall be confirmed in writing

Action due on completion of normal probationary period: It is not a responsibility of a public servant to apply for confirmation but it shall be the duty of the Immediate Supervisor concerned to initiate necessary action, not later than three months before the expiration of the probationary period with view to enabling the appropriate appointing authority to consider whether:

(a) The public servant shall be confirmed in his post; (b) The probationary period shall be extended to afford the public servant further opportunity to pass any examination, the passing of which is a condition of the appointment, his service otherwise being satisfactory; (c) the probationary period shall be extended to afford the public servant the opportunity of improvement in any respect in which his work or conduct is unsatisfactory; or (d) the public servant "s appointment shall be terminated. In this connection, it should be borne in mind that it is desirable particularly if the action proposed is adverse to the public servant concerned, that this matter shall be finally settled before the period of probation ends. In forwarding their recommendations to the appropriate appointing authority, Chief Executive Officers shall include a copy of the final report (at the end of 9 months) referred to in Standing Order D.42.

- (2) Where the appointing authority is of the opinion that the probationary period should be extended or that the probationary appointment should be terminated, the appointing authority shall, before extending such period or terminating such appointment: (a) inform the public servant in writing of his intention to do so; (b) Advising the public servant, if he so wishes, to make representations in the matter within the specified time limit.
- (3) The public servant concerned shall be required to acknowledge receipt of the communication in writing within the time limit specified, provided that extension of probationary period should not be extended for more than six months.

D.44 Certificate of Service on termination of probationary appointment: Where termination is due to a public servant's unsuitability for a particular appointment and reflects no discredit upon him, he may be given a plain statement of the facts, which may be of considerable use to him from the point of view of satisfying a prospective employer. A public servant whose probationary appointment is terminated shall be asked if he desires to be given a certificate of service; in the preparation of the certificate, the particular reasons for the termination of the appointment shall, if necessary, be indicated, provided that care is taken to give the public servant credit for any good qualities he may have shown.

D.45 Confirmation on first appointment: (1) a public servant shall be eligible to be confirmed in his office at the end of the probationary period subject to satisfactory performance and conduct. (2) On confirmation, a public servant shall cease to be on probation and become a permanent and pensionable public servant subject to the provisions of the pension laws. (3) All confirmations shall be published in the official Gazette. D.46 Transfer

to a pensionable post after being confirmed in another pensionable post: When a public servant who has been confirmed in a pensionable post is transferred to another similar pensionable post, it may not be necessary for him to serve any probationary period and he may be considered as confirmed in his new post.D.47 Consequences of delay in confirmation or in passing prescribed departmental examinations or tests:

(1) Where confirmation is deferred and the probationary period is extended, the public servant "s pensionable service shall, on eventual confirmations, be effective from the date of his probationary appointment. The salary and seniority of the public servant may, however, be affected as follows:

(a) if a public servant fails to pass the prescribed departmental examinations or other tests within the normal probationary period through causes which are judged at the time to be beyond his control, and if he succeeds in passing such examinations or tests after a further reasonable period, and is considered suitable for confirmation in his appointment, the circumstances of his case shall be examined by the appointing authority with a view to deciding whether he shall be treated as though he had been confirmed at the normal date;

(b) If the delay in passing the departmental examinations or tests is due to the public servant "'s neglect or incapability, or confirmation is delayed on the grounds of unsatisfactory performance or conduct, he shall not be treated as though he had been confirmed at the normal date. The question of restoring to him the salary which he would have attained if his confirmation had not been delayed will, however, be considered by the Permanent Secretary (Establishments) on representations being

received from the Chief Executive Officer concerned. Save in very exceptional circumstances, retrospective adjustment of salary shall not be made nor shall a public servant be restored to his original seniority. (2) Delay in confirmation shall entail loss of seniority. (3) Where a public servant under probation is not confirmed within a prescribed period, that public servant shall have the right to enquire in writing from his appointing authority on his confirmation status after the expiry of three months from the due date of his confirmation; and where the appointing authority has not responded on the public servant's request within three months, the public servant shall write a complaint to the Permanent Secretary (Establishments) copy to the appointing authority. Upon receipt of a complaint, the Permanent Secretary (Establishments) shall require the appointing authority to confirm that public servant; and where no response, the Permanent Secretary (Establishments) shall write a letter of confirmation to the public servant concerned and a copy to the appointing authority. The effective date of confirmation shall be the first day after the expiry of the probationary period. Probation Period following Promotion: (1) Where a public servant is promoted to any post in the public service, that public servant shall for six months (exclusive of any period of leave) from the date upon which the promotion became effective, be deemed to be on probation. (2) Where the immediate supervisor believes that the public servant has failed to perform satisfactorily all the duties of the post to which he was promoted, he shall give the public servant a notice in writing calling upon him to show cause, in writing, why his promotion should not be withdrawn. (3) Where a notice is given to a public servant under paragraph (2), the immediate supervisor shall: -

(a) if the public servant has made any representations in writing under the notice, forward such representations together with his report upon the public servant "s conduct, ability, diligence, aptitude, and any other relevant factor to the appointing authority; (b) If the public servant fails to make any representation, report such failure to the appointing authority and also furnish the appointing authority with a report on the public servant "s conduct, ability, diligence, aptitude, and any other relevant factor. (4) After considering the report and representations, forwarded under paragraph (3) if any, the appointing authority may direct that: (a) the public servant "s promotion not be interfered with; (b) a decision in the matter be deferred for such further period as the appointing authority may direct to allow the public servant further opportunity to prove his suitability for the post to which he was promoted; or (c) The public servant "s promotion be withdrawn. (5) Where no notice has been given under paragraph (2) within the period of six months (exclusive of any period of leave), the public servant shall be deemed to have completed his trial period satisfactorily and he shall be served with a letter of confirmation within one month after expiration of the trial period.

(6) Subject to the provision of paragraph (5), where a public servant is not confirmed within the prescribed period, he shall have the right to enquire on his confirmation status. (7) Where a public servant who is a presidential appointee fails to complete his probation period successfully he shall be referred to the bar in his scheme of service. (8) During probation period, the public servant shall do.

3.5 Resignation of Employees Under Probation Period as Public Servants as Per the Public Sector Standing Orders

(1) A public servant including a public servant on probation may resign his appointment by giving notice of not less than three months of his intention to do so. Such notice may include earned leave. Alternatively, he may pay a month's gross salary instead of such notice. (2) A public servant serving on contract or agreement terms may resign his appointment by the relevant provisions of his contract, agreement or letter of appointment. Where no such specific provision has been made, the provisions of paragraph (1) shall apply.

(3) A public servant serving on temporary terms shall be required to give one month's notice of resignation and a member of the Operational Service shall be required to give three months' notice of resignation. In either case, a month's gross salary must be paid in lieu of such notice.

(4) Notwithstanding the terms of the foregoing paragraphs, a public servant who resigns his appointment at short notice and becomes liable to pay a month's gross salary in lieu of adequate notice, shall be eligible to have the month's salary due from him reduced proportionately based on the proportion the actual period of notice in complete months bears to the three months' notice required. For example, if he gives not less than one but less than two months' notice, he shall be required to pay two-thirds of a month's gross salary. If he gives not less than two months but less than three months' notice, he will be required to pay one-third of a month's gross salary.

(5) A public servant "'s resignation may be accepted only when the Chief Executive Officer is satisfied that satisfactory arrangements have been made by the public

servant to refund any outstanding liabilities to the Government. Any amount due to a public servant may be withheld and applied towards any sums due by him.

3.6 Institutional Frameworks

Institutions are very important in the enforcement of rights and duties. They are avenues where people may present their claims and justice can be administered through different means and according to the procedural laws in existence. In Tanzania (mainland) the MoLEYD unit with specific responsibility over labour inspection is the Labour Administration and Inspection Section. This Section is headed by an Assistant Labour Commissioner and includes six labour officers. Even though its name includes a reference to labour administration, this Section deals only with the labour inspection system and thus functions as a central labour inspectorate. Its main functions include overall coordination of labour inspections carried out by the area offices; preparing, reviewing and recommending guidelines on the labour inspection services and compliance with labour legislation in general, providing legal guidance upon request (in this capacity, the inspectorate may consult other governmental legal units including the Attorney General's office), ensuring dissemination of information to employers and employees on their rights and obligations; and where such need arises, assisting the area offices in conducting labour inspections.¹²¹

¹²¹ https://www.ilo.org/global/topics/safety-and-health-at-work/country-profiles/africa/tanzania/WCMS_122481/lang--en/index.htm accessed 23/11/2023

Responsibility for labour inspection is split between labour officers working in (i.e. monitoring employment contracts, wages, working time etc.) and occupational safety and health inspectors who are part of the semi-autonomous Occupational Safety and Health Agency (OSHA). Other government institutions such as the National Social Security Fund also carry out autonomous inspections but with little coordination with MoLEYD or OSHA. Labour officers in the regions carry out inspections in addition to other labour administration tasks. In Zanzibar, the Labour Commission, which is part of the Ministry, has direct responsibility for labour inspection matters. Also in Zanzibar, the OSH function is carried out by the Occupational Safety and Health Directorate. The OSH Directorate is formally a part of the Labour Commission, but its offices are located in the Ministry of Education and Vocational Training.¹²²

3.6.1 Commission for Mediation and Arbitration

The Commission for Mediation and Arbitration (CMA) is the principle organ for resolving labour disputes. The CMA is an independent department of the Government as per section 13 of LIA. In performing its duties, the CMA is absolutely independent, as no organ or authority has control over its daily activities. It is further independent of any political party, trade union, employers' associations, federations or confederation. The commission is established under section 12 of the Labour Institutions Act.¹²³ The conduct of mediation and arbitration is governed by the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and Labour Institutions (Mediation and Arbitration Guidelines) Rules GN No. 67 of 2007

¹²² https://www.ilo.org/global/topics/safety-and-health-at-work/country-profiles/africa/tanzania/WCMS_122481/lang--en/index.htm accessed 23.11.2023

¹²³ Act No. 7 of 2004

while the conduct of mediators and arbitrators is regulated by Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules GN. No. 66 of 2007.

CMA has many functions. One, to mediate any dispute referred to it in terms of any labour law. Two, to facilitate the establishment of a forum for workers' participation. Three when requested the CMA may assist employees, employers, registered organization, and federations with advice and training on prevention and settlement of dispute. Four, may conduct or scrutinize any election or ballot of a registered trade union or employers; or association if required to do so by the Labour Court or at the request of the union or association concerned.¹²⁴

The CMA is vested with jurisdiction of mediation and arbitration of the labour matters.¹²⁵ Mediation is the procedure whereby a third party provides assistance to the parties in the course of negotiations, or when negotiations have reached an impasse, with a view to helping them to reach an agreement. Arbitration is the procedure whereby a third party whether an individual arbitrator, a board of arbitrators or an arbitration court, not acting as a court of law, is empowered to take a decision which disposes of the dispute.

Hence the probationary employees may refer their concerns against the employer to the commission for mediation and arbitration for mediation and arbitration purposes.

¹²⁴ The Labour Institutions Act, s 14

¹²⁵ The Employment and Labor Relations Act, Section 88(1)(b)(ii) and 94(1)(d)

3.6.2 Essential Services Committee

It is a department of CMA whereby the CMA acts as the secretariat for the Essential Services Committee (ESC). It deals with the designation of essential services and the determination of disputes about whether or not an employee or employer is engaged in a designated essential service.¹²⁶

The ESC consists of five persons appointed by the Minister of Labour. These appointees must possess knowledge and experience of Tanzanian labour laws and industrial relations.¹²⁷

The ESC members were appointed in 2007. Following the appointment of the ESC members in 2007, the ESC held its first meeting in 2008. It met four times in 2008 and has met twice so far in 2009. The ESC has yet to receive a case since being constituted and does not yet have any rules or procedures in place.

The CMA hopes to establish appropriate rules and procedures in 2010 and in September 2009 undertook a study tour funded by the Government of Tanzania to South Africa and Swaziland to learn how those countries address the issue of dispute resolution in essential services.

The probationary employees of the essential services may use the committee for their matters in the designation of essential services and concerns arising from the essential services.

¹²⁶ The Labour Institutions Act, s 30

¹²⁷ The Labour Institutions Act, s 31(1)

3.6.3 High Court Labour Division

The Labour Division is established under section 50 of the Labour Institutions where a judge may or may not sit with assessors and is vested with exclusive jurisdiction over labour matters.¹²⁸

It has the power to determine appeals from the decision of the registrar of trade unions, employers' associations, and federations. It can deal with review and revisions of the arbitrator's awards and decisions of the essential service committee. It has the power to determine reviews of decisions, codes, guidelines or regulations made by the Minister.¹²⁹ It can handle complaints other than those that are to be decided by arbitration. It can determine any dispute reserved for the decision of the Labour Court and applications including for declaratory orders in respect of any provision of the Employment and Labour Relations Act or an injunction.¹³⁰ The labour division is also generally vested with all the powers of the high court.¹³¹ The labour division is also generally vested with all the powers to execute the awards and decisions of the Commission for Mediation and Arbitration as if were decrees.¹³²

3.6.4 The Court of Appeal of Tanzania

The Court of Appeal of Tanzania can receive revisions and appeals from decisions of the labour Court by aggrieved parties or the labour commissioner may make reference on points of law in case of conflicting decisions and where parties have not

¹²⁸ The Labour Institutions Act, s 51

¹²⁹ The Employment and Labour Relations Act, s 94

¹³⁰ The Employment and Labour Relations Act, s 94

¹³¹ The Labour Institutions Act, s 52(1)

¹³² The Labour Court Rules, r 49t

appealed. From the labour court, appeals and revisions go to the Court of Appeal of Tanzania with leave for matters originating from the Commission for Mediation and Arbitration and without leave for matters determined by the labour court exercising original jurisdiction.

Leave to appeal to the Court of Appeal of Tanzania has to be sought under section 57 of the LIA in addition to the enabling provision in the Appellate Jurisdiction Act and the Tanzania Court of Appeal Rules of 2009.

3.7 The Legal Practice on the Employees Under Probation Period and Existing Dilemma Visa Vis Court Protection

In these various cases, laws providing employees under a probationary employee are also in dilemma because there are variations of different judgments of superior courts, the following are some judicial protection for an employee under probation period as in the case of *MacMillan Aidan limited v Blandina Luca Mohamed*¹³³ Labour court put clear that right to hire and fire is not part of Tanzania labour laws. The court is of the view that conceptual and legal framework limitations against termination at will contain in the Employment and Labour relation Act read together with the code of good practice furthermore labour court interprets section 3f of the Act demand that termination must be complied by constitutional provision and international labour convention .thus the labour court held this policy shift has translated into more statutory regulation of the principle of the freedom of the contract limiting contractual powers of the employers ‘to hire and fire at will by

¹³³ Revision no 292 of 2008, High court of Tanzania (labour division) at Dar-es Salaam (unreported) page 8-9

mandating observance of fair labour practice which include observance of basic rights among them the presumption of innocence right not condemned unheard and the right to security of tenure.

*Bidco Oil And Soap Ltd V Robert Mantonya And 2 Others*¹³⁴ the Labour Court decided that fair labour practices incorporate observance of basic human rights principles, among them are the presumption of innocence and the right not to be punished unheard. The court held that without his requirement there would be nothing to prevent employers from terminating an employee even on grounds that are inherently unfair as spelt out under section 37 of the ELRA In essence, the court was addressing the policy objective of the current labour laws that legislature had made and it's an emphasize on the prohibition of employers right to hire and fire.

*Aekyung Construction Company Limited V Hussein Sheshe Juma*¹³⁵ the high court had this to say ow what remains is whether given the fact that the respondent worked for seven months and twenty days, was it fair for the CMA to award the respondent the compensation for 12 months? I think the respondent was entitled to fair, just and equitable compensation which does not operate as punitive to the employer, section 40(1) (c) confers the discretion to the arbitrator to order compensation as the use of may signifies that the arbitrator has discretion. In the case of *Sodetra SPRL Ltd v Njellu Meza and Another*, Revision No. 207 of 2008, in which my senior sister once again held inter alia that;

¹³⁴ Revision no 70 of 2009 ,high court (labour division)at dar es salaam

¹³⁵ Labour revision no 123 of 2020,

"The arbitrator who has found unfair termination has the discretion to award an appropriate amount of compensation found fair and Just to both parties in the case and therefore section 40(1(c) does not mandate the arbitrator to order "51Ez- e compensation of 12 months' pay in all cases of unfair termination." Given the fact that, in the case of USAID Wajibika Project vs Joseph Mandago and Edwin Nkwanga, applying discretion, the court revised the decision of the arbitrator who awarded the employee who had worked for 181 days a compensation of twelve months, and having realized that the compensation was not fair, just and equitable, to both parties but punitive to the employer, he instead awarded a three months' salaries. In the same spirit and zeal, I find the arbitrator to have failed to properly exercise the discretion bestowed to him judiciously, fair, just and equitable in the circumstances of the case as an employee who has worked for seven months and was on probation. It is not fair, just and equitable to award him compensation for 12 months, in my opinion, four months is appropriate and would suffice justice. I thus substitute the award of twelve months with four months only.

3.8 Non-Judicial Protection on Employees Under Probation Period

In the new labour laws, there are a lot of dilemmas and controversy when it comes to the interpretation of section 35 of the employment and labour relation Act as in the following case below this case prescribes how the employees under probation period are not protected.

In the case of Patrick Tuni Kihenzile V Stanbic Bank Tanzania Limited' the labour court excluded employees under probation for less than 6 months not covered by

section 35 of the Employment and Labour Relations Act. It was held that a probationary employee may challenge termination only under certain circumstances other than unfair termination.

The above labour court's decision raises controversy. More often employers in Tanzania include the following clauses in the letter of first appointments; "You will undergo a probation period of three months from the date you resume this position during this period your performance and general conduct will be assessed to confirm your suitability for employment. Should you be found suitable you will be confirmed in your position otherwise your probation period may be extended"¹³⁶

One of the dilemmas is that if indeed an employee is put on a probation period of three months and then his employment is confirmed but later terminated before the expiration of six months from the first appointment will such an employee not be entitled to challenge the fairness of termination? Alternatively, unfair termination.

In the contract of Tanzania Union of Industrial and Commercial Workers, both bottlers and Afri bottlers limited the contract provided that a probationary period of between three months to six months. The employee could be confirmed after three to six months. The employee could be confirmed after three months .understandable, rule 10(4) of the code of good practice also provides for variation of probationary periods and that should be of reasonable time of no more than twelve months the

¹³⁶ Quoted from the letter of appointment into employment issued by Tanzania breweries limited reference No pf.1426/648/08/vpm given to project manager assistant

question is what will be the rights of an aggrieved employee who is terminated but had already been confirmed after completing let us three months' probation period?

Arguably, the prohibition contained in section 35 cover also an employee who was already confirmed but their contractual obligation is below six months. It means that this employee cannot allege unfair termination or seek remedies stipulated under sections 35 to 40. This dilemma is because the distinction between a confirmed and probationary employee is consequently blurred.

Stella Temu V Tanzania Revenue Authority appellant, Stella Temu, is a lawyer by training and was employed by the Ministry of Finance (hereinafter referred to in short as MOF) in the taxation department. Sometime in 1996 the Tanzania Revenue Authority (TRA) became fully operational and was charged with the collection of taxes. Stella, like others, was taken to TRA from MOF the major issue raised by the court is whether there termination of employment. Was Stella given a hearing before she was terminated? The learned judge found that Stella had a right to be heard but that she was not given such right in explaining the context the court made a finding that she was entitled to know the reasons for the non-confirmation which again she was not given. Was the learned judge right? These two matters could not be subject to the appeal, and there was also no cross-appeal. However, we intend to use section 4 (2) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993, and revise the proceedings.

That section provides as follows: For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the Court from which the appeal is brought.

The learned judge followed several authorities in arriving at those two holdings. The main authority relied upon is the High Court of Australia in *Rourke v. Miller*¹³⁷ unfortunately it has not been possible for us to lay our hands on that law report in Arusha. However, that decision, in turn, relied on *Chief Constable of Northern Wales Police V. Evans*¹³⁸, which we have been able to obtain. In both of these cases, a police constable was employed but was placed under probation during which time the constable was dismissed without being heard and without being given reasons.

Finally, the court concluded that in the case of *Stella Temu V Tanzania Railways Authority*¹³⁹ Was that in the present case however, we think that there was no right of hearing because there was no but it was non-confirmation it's our opinion that probation is a practical interview. We do not think that the right to be heard and to give reason extends even where a person has failed an interview. So from that point of view, we can observe how the laws did not protect employees under probation period. Since it curtails even the principle of natural justice.

¹³⁷ [1980] LRC (Const.) 654.

¹³⁸ [1982] UKHL 10; [1982] 3 All ER 141

¹³⁹ Civil appeal no 72 of 2002

Also in the case of Commercial Bank Of Africa (T) Ltd V Nicodemus Mussa Igogo¹⁴⁰ (The major issue raised is whether an employee on probation is protected under the unfair termination under provision f section 37 of the Employment and Labour Relation Act. among other thing court said that the employee work under probation period does not protect under unfair termination and also fair termination principle does not apply under employee working under probation period.

Another crucial issue raised by the court is whether o employment not employee on probation period automatically assumes employment status where the stipulated period of probation has expired without the employer making decision to confirm or not confirmed. In deciding the matter the court also referred to the case of Mtenga V University of Dar Es Salaam¹⁴¹. The relevant facts in that case were that the applicant was employed on probation he was kept on continued working after the expiration of the probation period but he was also given a salary increment the argument of automatic termination was raised in the high court of Tanzania but dismissed by the late bron j holding that being kept on after expiry of probation period does not amount to confirmation. These case laws tried to verify how laws did not provide full protection for employees under the probation period.¹⁴²

¹⁴⁰ Revision no 40 of 2011

¹⁴¹ 1971HCD 247

¹⁴² <http://www.peoplepower.co.tz/aspire/article/?id> accessed 20/04/2016

Another recent case is the case of David Nzaligo V National Microfinance Bank Plc¹⁴³ since an employee on probation is not covered under the unfair termination provisions Part E of the ELRA, and I am not aware of any decision interpreting the position under the ELRA differently; I concluded that fair termination principles; which as demonstrated above, extends to employees who have been forced to resign (constructive termination) do not apply to employees on probation. “From the above case laws, there is an argument that an employee with less than six months can be hired and fired without observance of some basic principles of natural justice including the right to legal representation and the right to be heard¹⁴⁴

Gulf Badr Group (T) Lt V Fredrick Massawe¹⁴⁵ in this case the court said that I have considered the party's submission on the Arbitrator's application of part E of the Act. Section 35, which forms part E, of the Act provides as follows: 'Section 35. The provision of this subpart shall not apply to an employee with less than 6 months of employment with the same employer, whether under one or more contracts. 15 From the wording of the provision above it is clear that the relevant part does not apply to the employee at hand. Firstly, because his employment contract was for three months, and secondly because he was a probationary employee and the principles of unfair termination do not apply to him. This is also the position in the case of Agness B. Buhere (supra) where it was held that: - 'Section 35 of our Employment and

¹⁴³civil appeal no. 61 of 2016 appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam

¹⁴⁴ Revision no 47 of 2011

¹⁴⁵ REVISION NO. 481 OF 2019

Labour Relations Act 2004 precludes also employees who are under probation from the scope of the relevant provision concerning unfair termination.

In the case of **Sam Frost East Africa Ltd vs Laurian Waijah**, Revision No. 01 of 2020, the 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 disputes 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 a contract either impliedly or expressly, both are contracts. 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 a breach of contract even though they might not have been in place. In the case of *Good Samaritan vs Joseph*

Robert Savari Munthu, ¹⁴⁶the 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 Microfinance Plc**, Even if one has been in office for some time and in his or her contract, the same was subject to probation and no 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 a probationary period by the law so as not to prevent one from fulfilling their career plans 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.

3.9 Conclusion

The importance of the laws and institutions cannot be underrated in ensuring the effectiveness of the probation period and the protection of the rights of the employees under probation. This chapter enlightened on the legal and institutional framework as to regard to the rights of the employees under the probation period

¹⁴⁶ Revision No. 165 of 2011

CHAPTER FOUR
DATA PRESENTATION, DATA ANALYSIS AND DISCUSSION OF
FINDINGS

4.1 Introduction

This chapter presents and analyses the findings of the research study, particularly on the effectiveness of the law and practices on the protection of the rights of employees under probation. It reviews and discusses the findings from Secondary sources such as articles, journals, textbooks, precedent/decided cases, legislature/principal legislation, regulation and others of the like.

4.2 Research Findings

The findings from various literature involved in this study suggest that an employee may be subjected to a probationary period when he/she is about to engage in a new job as a new employee. Similarly, an ordinary employee may be subjected to a probation period when his employer is of the view that he needs some evaluation, training and guidance to stabilize his declining performance. On the other hand, an employee may be subjected to a probation period when he is about to assume a new job title after promotion. This is the practical interview an employee is subjected to before being confirmed into his new post or former post. An attempt to respond to the above research question which was raised in chapter one has been made hereunder.

4.2.1 What is the Legal Framework Governing the Rights of Probationary Employees in Tanzania's Legal System?

4.2.1.1 Findings from Tanzanian Legal System

It has been found that there is no direct provision of the Act of Parliament in Tanzania which openly guarantees the rights of employees serving their probation period. The Employment and Labour Relations Act of 2004 does not explicitly possess a provision regarding probationary employees. However, probationary employees have been mentioned under section 35 of the Act, which requires a probationary period of six months. It provides that a worker with less than six months of employment may not bring an unfair termination claim against the employer. The above finding impliedly suggests that a probationary employee whose probation period is beyond six months may exercise the rights provided under subpart E of the Employment and Labour Relations Act of 2004. However, the said protection is not expressly provided and interpretation of this provision it will depend on the discretion of the court. Most of the rights and protection of probationary employees are found in the Code of Good Practice of 2007; The Constitution of the United Republic of Tanzania, as discussed in chapter three of this study. It has been found also that, most of the rights and protection of employees under probation in Tanzania are available under the Standing Orders for the Public Service for public servants.¹⁴⁷

It has been found that the term “Probation Period” means the terms relating to training applicable to a public servant who is serving in the Public Service on

¹⁴⁷ Standing Orders for the Public Service, 2009, Made Pursuant to S.35 (5) of the Public Service Act, Cap.298

permanent and pensionable terms (whether on probation or confirmed in his appointment) or on an agreement or contract or in the Operational Service. This is a training applicable to a candidate for entry into the public service who has not yet been appointed to the service on permanent, probationary or operational service terms. Such a candidate shall be appointed to the service after he has completed his training course.

It has been found that the purpose of the probation period is to ensure good performance and good conduct of a public servant. The first consideration about public servants on probation shall be regarded as being on trial to learn their work and being tested as to their suitability for it. They shall, therefore, not only be given every facility for acquiring experience of their duties, but also be kept under continuous observation, and may be posted where such observation is possible. If during the first few months of service a public servant shows failures, which make it doubtful whether he shall become suitable for permanent appointment, he shall at once be warned and be given all possible assistance to correct his faults.¹⁴⁸ It is further found that it is not the responsibility of a public servant to apply for confirmation but it shall be the duty of the Immediate Supervisor concerned to initiate necessary action, not later than three months before the expiration of the probationary period to enable the appropriate appointing authority to consider whether: the public servant shall be confirmed in his post; the probationary period shall be extended to afford the public servant further opportunity to pass any

¹⁴⁸ *ibid*

examination, the passing of which is a condition of the appointment, his service otherwise being satisfactory.¹⁴⁹

It has been found that the probationary period shall be extended to afford the public servant the opportunity of improvement in any respect in which his work or conduct is unsatisfactory, or the public servant's appointment shall be terminated. In this connection, it should be borne in mind that it is desirable particularly if the action proposed is adverse to the public servant concerned, that this matter shall be finally settled before the period of probation ends. In forwarding their recommendations to the appropriate appointing authority, Chief Executive Officers shall include a copy of the final report (at the end of 9 months) referred to in the Standing Order.

Where the appointing authority thinks that the probationary period should be extended or that the probationary appointment should be terminated, the appointing authority shall, before extending such period or terminating such appointment: inform the public servant in writing of his intention to do so; advising the public servant, if he so wishes, to make representations in the matter within the specified time-limit. The public servant concerned shall be required to acknowledge receipt of the communication in writing within the time limit specified, provided that extension of probationary period should not be extended for more than six months.

It has been found that the public servants under probation when promoted to any post in the public service, that public servant shall for six months (exclusive of any period

¹⁴⁹ Helen Bisimba Kijo and Chris Maina (2005) *Justice and Rule of Law in Tanzania Selected Judgment and Writings of Justice James Mwalusanya* at page 27

of leave) from the date upon which the promotion became effective, be deemed to be on probation. Where the immediate supervisor thinks that the public servant has failed to perform satisfactorily all the duties of the post to which he was promoted, he shall give the public servant a notice in writing calling upon him to show cause, in writing, why his promotion should not be withdrawn. Where a notice is given to a public servant under paragraph (2), the immediate supervisor shall: if the public servant has made any representations in writing according to the notice, forward such representations together with his report upon the public servant's conduct, ability, diligence, aptitude and any other relevant factor to the appointing authority; if the public servant fails to make any representation, report such failure to the appointing authority and also furnish the appointing authority with a report on the public servant's conduct, ability, diligence, aptitude and any other relevant factor.

Further, after considering the report and representations, forwarded under paragraph (3) if any, the appointing authority may direct that: (a) the public servant's promotion not be interfered with; (b) a decision in the matter be deferred for such further period as the appointing authority may direct to allow the public servant further opportunity to prove his suitability for the post to which he was promoted; or the public servant's promotion be withdrawn. A public servant including a public servant on probation may resign his appointment by giving notice of not less than three months of his intention to do so. Such notice may include earned leave. Alternatively, he may pay a month's gross salary instead of such notice.¹⁵⁰

¹⁵⁰ *ibid*

4.2.2 What are the legal provisions that should be employed to mitigate the existing gap?

The study has found that Tanzania has no clear statutory provision in the Employment and Labour Relations Act of 2004 R; E 2019, Regarding To Employee Under Probation Period It has been found in Tanzanian jurisdiction there is no prescribed probation period and the only requirement is that it must be “reasonable” and it depends on the nature of the job. Again, great discretion is left to be exercised by the employer who also happens to be stronger in bargaining power. The possibility of abusing this discretion is high as the employer will always use this chance to gain profit from the labour force offered by the probationary employee during the probation period. The law is less effective in this aspect as well.

It has been found also that the probationary status of an employee is only applicable to issues of work performance (competence) – it has no relevance to misconduct perpetrated by the employee during probation, nor can it be an easy way out for the employer based on an arbitrary issue concerning the employee. All issues other than work performance (competence) must be dealt with in the same way as with any permanent employee. A probationary employee is still entitled to protection by labour law¹⁵¹.¹²⁷ Probation also does however not mean that the employer can fire the probationer “at will” if it is not satisfied with his/her performance. There is a process to follow and legal requirements to be met. The dismissal must be substantively and procedurally fair. This position is the same as Tanzanian

¹⁵¹ Helen Bisimba Kijo and Chris Maina (2005) *Justice and Rule of Law in Tanzania Selected Judgment and Writings of Justice James Mwalusanya* at page 22

jurisprudence. A probationer's performance must be monitored continuously from the commencement of employment with these guidelines in mind, although reasons for dismissal related to probation may be less compelling than would be required for the poor performance (incapacity) dismissal of a permanent employee who had already completed probation or who had been working for the employer for some time. It is found that both in Tanzania and South African jurisprudence a decision at the end of the probationary period not to appoint an employee, amounts to a dismissal. The employer must therefore be able to prove that all of the requirements in the Schedule have been met to succeed against a challenge of unfair dismissal relating to probation. The decision to dismiss an employee for unsuccessful probation must be supported by records so that the employer can justify its decision. The employer is also obliged to consider other ways, short of dismissal, to remedy the matter. The probationary period could be extended to further assess the employee's performance, but this should only be done in exceptional circumstances, and only for reasons relating to probation, such as when the employee has potential but the employer is not yet sure if the employee has resolved all his/her performance issues. It should not be done because the line manager has failed to properly manage the probation in the first place.

4.2.3 Are There any International Instruments, Model Laws and Best Practices which Guarantee the Rights of Probationary Employees which Can Assist in Improving the Existing Tanzanian Legal Systems?

A probationary period in an employment setting is a set period wherein an employee's performance is monitored closely to assess their capabilities.

Probationary periods are often applied to new employees as a means of determining their capabilities in a new job. In the spirit of the ILO Conventions and Recommendations, governments should take initiatives to ensure that probationary employees and employees are afforded full protection as provided by the ILO Conventions, including providing a copy of the revised Labour Law as soon as it is adopted. ILO through its systems has provided various judgements and recommendations on the status of probationary employees. ILO has revealed that the reason for probation is to enable an organization to assess the probationer's suitability for a position. For this reason, it has been recognized that a high degree of deference ought to be accorded to an organization's exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment, the extensions of a probationary term, and the identification of its interests and requirements.

The ILO Tribunal has consistently found that an organization which employs staff members on a probationary basis must not only provide guidance, instructions and advice on carrying out duties; it must also set objectives for such staff members so that they know what criteria will be used to appraise their performance. It must, in good time and clear language, inform a staff member of any aspects of her or his performance that are deemed unsatisfactory and warn her or him of the risk of dismissal after the probationary period so that both parties can take appropriate steps to remedy the situation sufficiently early. These requirements flow from the general principles applicable in international civil service law, in particular the principle of good faith, the duty of care and the employer's duty to respect the dignity of its

employees. For further reading, the researcher has discussed various international instruments which should be used by Tanzania to fill the existing gap between the two jurisdictions.

During library research, I found that some African countries have express provisions for the employee under probation Period including South Africa under the Labour Relations Act 66 of 1995 and Ghana under the Employment Act of 2003 and the same laws allow any employee can sue for unfair termination regardless of the tenure or time for the employment.

4.3 Conclusion

The above findings indicate that the rights of probationary employees in Tanzania are not directly provided in the Acts of Parliament. This is because jurisprudence and provisions governing probationary employees have been given impliedly in the sense that one may opt to abandon using the provisions of the code by giving some reasons. Enjoyment of these rights depends on the interpretation of courts and tribunals when they refer to the constitutions and other related regulations and policies on employment. The next chapter is about the Conclusion and recommendations.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Introductions

This chapter presents the concluding remarks on the effectiveness of the legal protection of the rights of employees under the probation period. It summarises the main findings and discusses the major implications as well as points out what and how the recommendations are to cure the existing mischiefs as regards the employment of the probationary employee.

5.1 Conclusion

New employee recruitment is a high-risk investment. It is very difficult to predict how well a new employee will perform in a job, particularly one recruited externally. Interviews are notoriously unreliable and the use of psychometric tests and other extended selection techniques cannot guarantee success.

That's why probation was introduced to cure the mischief of the interviews and reduce the risk of unfit employees for the effectiveness of the employers' business. As of now, probationary periods are widely used by employers and are often included in new employees' contracts of employment.

Nonetheless, the establishment of the probation period is unclear because there is no law which mandates its existence but it can be farfetched from some of the provisions. The absence of clear provisions of the law has been detrimental to the

rights of the employees under probation period since the employers have been using probation periods in practice to suit their needs. Employers may terminate the probationary employees without being held accountable by the law. The current unregulated probation period is a loophole in the law which attracts cries of the probationary employees.

The terms and conditions of the probationary period and probationary employees are at the will of the employer. Hence, probationary employees have nowhere to seek refuge when they are handled with no justice and fairness. No law is set out in probationary contracts. Employers are unregulated and free to determine their instincts in making and setting out the terms and conditions in the probationary period that consequently affect the rights of the probationary employees and their welfare.

5.2 Recommendations

i) Right to Claim Unfair Termination

The law should stipulate the grounds through which the employer may dismiss a probationary employee and if the employee is dismissed for one of a list of prohibited reasons, the law should allow them to bring a claim for automatically unfair dismissal irrespective of their length of service at the time.

The law has to state clearly that employees under probation period should not be summarily dismissed unless they have committed reasons already stipulated by the

law itself. AS section 35¹⁵² has covered employees who work for at least six months so those below six months have no room to go when there is termination.

ii) Adapt a consistent and broader interpretation of another incident of termination especially on probationary employee

I recommend that CMA and labour courts adopt a consistent and broader interpretation of another incident of termination especially on probationary employees to avoid absurd interpretations of the laws and formulate uniform principles instead of having variations of different legal principles in the same matter. As we have observed above.

iii). There is a serious need to incorporate specific provisions, which protect probationary employees in Tanzania into the Employment and Labour Relations Act of 2004 to grant effective interpretation of the law. Such a provision should go hand in hand with removing the current discretion provided under section 99(3) of the Employment and Labour Relations Act (ELRA) which allows abandoning citing the Code of Good Practice provisions when reading the ELRA. The provision should provide expressly that when reading the Employment and Labour Relations Act (ELRA should go hand in hand with reading the provision of the Code of Good Practice of 2007).

iii) Policy Recommendations This issue of employee rights is very sensitive **to** make sure that the employer relationship has been maintained currently there is no policy provided specifically on employees under probation period, especially for

¹⁵² Employment and labour relation Act

those in the private sector at least for the public sector there is public services standing order¹⁵³ and public services regulation of 2003 from regulation 14¹⁵⁴ provide n how employee under public services can work especially during probation period. But the challenge has been occurring for those in private sector where by the employer has been guided by their internal policy and not statutory law which lead the variation of decision from one employer to another basing on the employee under probation period.

iv) Incorporate observance of basic human right principles especially right to be heard for employee under probation period, this is also emphasized in the case of Bidco Oil And Soap Ltd V Robert Mantonya And 2 Others¹⁵⁵ the labour court decided that fair labour practices incorporate observance of basic human right principles, among them are presumption of innocence and right not to be punished unheard. the court held that without his requirement there would be nothing to prevent employers to terminate employee even on grounds which are inherently unfair as spelt out under section 37 of the ELRA .in essence, the court was addressing the policy objective of the current labour laws that legislature had made and it's an emphasize on prohibition of employers right to hire and fire.

v) Although the employee under probation period can sue for the Breach of the contract, there is no express provision in the law provide the same, this was the

¹⁵³ Public services standing order 2009

¹⁵⁴ Public services regulation 2003

¹⁵⁵ Revision no 70 of 2009 ,high court (labour division)at dar es salaam

impact of court of appeal decision, 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.

vi) Express provision in the employment and labour relation Act, on the time frame for doing probation period.

Tanzanian jurisprudence requires that the probation period is of a reasonable period of not more than twelve months depending on the nature of the job, the standard required and the custom and practice of that sector. To remove any degree of doubt and varying employment standards Rule 10(4) of the Code of Good Practice of Tanzania must be amended so that the provision clearly and expressly states the exact period of probation. This will remove the doubt of what is reasonable period stated in the provision.

REFERENCES

A. List of Text Books

Sikalumba J 2003 *Legal Aspects of Employment Contracts and Dispute Settlement Schemes in Tanzania* Research and Publications Department, Mzumbe University.

B Urio A &Urio J. (2011). *The Law on Employment and Labour Relations in Tanzania*. (1st Ed), Moshi Tanzania.

Baker & McKenzie, (2009). *Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws*, published in the Official Gazette dated March 18, 2005

Baker and McKenzie (2009). *Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws*, published in the Official Gazette dated March 18, 2005

Bone, A. *Essential Employment Law*, (1999) 2nd Ed, Cavendish Publishing Limited: London.

Deem, E, Legal Implications of Probationary Periods.

Helen Bisimba Kijo and Chris Maina, (2005). *Justice and Rule of Law in Tanzania Selected Judgment and Writings of Justice James Mwalusanya*.

Howard, A., Probation and Parole: Theory and Practice. 8th ed. Upper Saddle River, N.J.: Prentice Hall, 2003.

HR Zone 2018 What is Probationary Period, <https://www.hrzone.com/hr-glossary/what-is-A-probationary-period>. (Accessed on 2nd October 2018)

Kijo, H. B., and Maina P. C. ((2005) *Justice and Rule of Law in Tanzania Selected Judgment and Writings of Justice James Mwalusanya*.

Lewis, D. & Sergeant, M. (2010). (5TH Ed). *Employment Law*, Person Education Limited: England.

Lewis, D, and Sergeant, M, (2010). *Employment Law*, 5th edition, Person Education Limited: England.

Sweets and Maxwell) Readouts *Principles of Labour Law* 4th edition Published at London

Sikalumba, A. J. (1983). *Legal Aspects of Employment Contracts and Dispute Settlement* Research and Publications Dept., Mzumbe University.

Riphahn, R. T, and Thalmaeir, A, (1999) *Behavioural Effects of Probation Periods: An Analysis of Worker Absenteeism*, Institute for the Study of Labour

Evert Q,2003 *Settlement scheme in Tanzania*, Published by Institute of Development Studies Mzumbe University.

Schofield, T, (2018). *Probationary Period of Employment: Policy and Termination*, <https://study.com/academy/lesson/probationary-period-of-employment>

Robert Upex, Richard Benny and Stephen Havety (2005) *Labour Laws* 5th Scheme in Tanzania, Institute of Development Studies-Mzumbe University policy-retrieved from termination.html. Accessed on 4th October 2018

Helen Bisimba Kijo and Chris Maina (2005) *Justice and Rule of Law in Tanzania* Selected Judgment and Writings of Justice James Mwalusanya.

Delpo, A. &Guerin, L., Dealing 8th Ed, 2015. *With Problem Employees: How to Manage Performance & Personal Issues in the Workplace*.

Atty, E. B. (2006) *Labour Law Sample Forms*, volume 1. LVS Publications Inc.,

Dr.Kapinga, W. (2001) *Employment and Labour Law*, Global Legal Insights, 1st

Coallier, J. (2007) - *Month Probationary Employee Performance Evaluation: Forms*
Book, Create Space Independent Publishing Platform.

B. List of Articles

Ezekiel B.(2010) *Terminating a probationary employee; debunking some myths*
about the Tanzania labour legislation.

Ackson, T.(2009) *Regulating working conditions in the Globalizing World: Recent*
Trends in Tanzania, Faculty of Law, University of Dar ere Salaam

Summers, C. W. (1984) *the contract of employment and the rights of individual*
employees “fair representation and employment at will”

Mtaki, K. (2005). *The New Labour Laws in Tanzania: Implication for employees and*
Economy Paper presented at a policy Dialogue Seminar on New Labour
Laws in Tanzania at the Conference Hall of the Economic and Social
Research Foundation, 12th Sept 2005 Faculty of Law University of Dar as
Salaam.

C. List of Journals, Reports and Unpublished Materials

CLYDE & CO LL(2017), *Employment law overview*, London, L&E Global,
JHU.CCP TZ,

Tanzania Personnel Policies and Procedures Manual, (2010) *Perspective on the*
probationary period and termination rights in Ontario, 2

Hopkins J. *Tanzania personal policies and procedure manual* university center for
communication programs Tanzania

D. Electronic Sources

<http://www.mywage.org/tanzania/home/in-the-workplace/employment-security>

<http://www.duhaime.org/LegalDictionary/P/ProbationaryEmployee>.

accessed 03/04/2016

<http://www.hrzone.com/hr-glossary/what-is-a-probationary-period>

<http://definitions.uslegal.com/p/probationary-employee/> accessed 3/04/2016