

The Used of Probationary Period in a Contract of Employment in Cameroon: A Legal Appraisal

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Abstract — A contract of employment is an agreement between an employer and an employee that the employee will render his/her services under the direction and control of the employer in return for remuneration. The 1992 Labour Code of Cameroon makes provision for the use of probationary period before engaging into a final contract of employment. This period is meant for the employer to judge the competence and aptitudes of the worker to hold the job so as to avoid early termination of the contract for reasons of incompetence of the employee. Unfortunately, it is commonplace to find parties to a contract of employment drifting apart before the expected termination of the contract even where they observed a probationary period. Using a doctrinal methodology, we seek to analyse the content of probationary period and the effectiveness of its use in employment relationships in Cameroon. Our findings reveal a lack of adequate knowledge by some employers and employees on the use of probationary period. We therefore recommend that both employers and employees should have a good mastery of the provisions of the Labour Law on probationary period in Cameroon before engaging in a contract of employment.

Keywords— Probationary Period, Contract of Employment, Employer, Employee, Cameroon.

INTRODUCTION

Probation periods are fixed-length monitoring and testing periods imposed on newly hired employees (1). These periods are now being required as a condition precedent to many types of employment contracts and strive to protect the employer's investment in their human capital (2). Probation agreements 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 (3). Employers sometimes use "probationary periods" when hiring new employees or promoting employees into a new position. Employers use the probationary period as a time to assess whether the new hire or newly promoted employee is a good fit for the position (4). It is believed that individuals have incentives to mimic

"good workers" during periods of employment probation (5).

Probationary periods originated in union environments (6). It was a way for employers, subject to a collective bargaining agreement to have a short period of time to evaluate employees where they would not be governed by the same termination requirements as during the regular employment period (7). Some non-union employers have since adopted the practice believing it is a way to assess a new hire's skills and qualifications without the burden of following certain requirements that come with the employment relationship (8).

In Cameroon, the use of probationary period is optional; however, when the parties agree to use it, they must comply with the provisions of the Law (9). The 1992 Labour Code of Cameroon makes provision for probation period in employment contracts (10) and Order No. 017/MTPS/SG/CJ sets the terms of probationary period in Cameroon (11). Section 28 of the Labour Code provides that: "there shall be probationary hiring where, prior to signing a final contract, the employer and the worker agree to appraise in particular, the worker's quality of services and his output, as concerns the employer and as concerns the worker, the working, living, safety and hygiene conditions as well as the climate under the employer" (12). Such probation period must be stipulated in writing and must be of a maximum duration of six months or exceptionally eight months with managerial staff (13). Meanwhile people hold a diverse opinion on the importance of probationary period in contracts of employment. All these are analysed seriatim.

CONDITIONS OF PROBATIONARY PERIOD

The common law provides employers with the ability to hire an employee on probation (14). This is only true if certain steps are taken by the employer to properly establish the probation period (15). To establish a formal probationary period, there is need to ensure that there is some difference between workers' status during the probationary period and after it (16). Typically, this is done by allowing employees to enjoy some benefit like accrued vacation or sick leave that they did not have

before completing the probationary period (17). Certain conditions therefore need to be present for the existences of a valid probationary period as analysed below.

The Requirement of Writing

An indispensable condition for the existence of a valid probationary period is that it has to be written (18). Any probation “policy” will not necessarily bind the employee if the policy is not made a binding element of the employment contract (19). It must not therefore be presumed (20). As a result, the employer and employee must agree, in writing, prior to the commencement of the employment, on the terms of a binding probationary period (21). The written agreement must mention the professional category and the remuneration of the worker (22).

Remuneration of the Worker

Probationary period are not gratuitous thus the work performed during the trial period must be remunerated at the rate of pay relating to the professional category in which the worker has been engaged (23). If the commitment to the test is the subject of an act separate from the back-to-back contract, it must include the indication of the category and step attributed to the worker (24). There is always a difference between the remuneration of a worker on probation and the actual remuneration upon full engagement of the contract of employment (25).

However, where the conditions of the probationary period with regards to remuneration are ignored and that of a formal contract of employment maintained, it is believed that the parties entered into effective contract from the date of the probationary period (26). This can be illustrated with the case of *Société Le Bus v Ngang Jolly Etengeneng* (27). The facts of the case are as follows: the respondent was employed as an accountant in the appellants company on or about 04/04/2010 in Yaounde. Later on, respondent was asked to present certain reports of the company within a specific period. The respondent was unable to present the accounts within the specific time. The appellant then summarily dismissed respondent for gross misconduct. The respondent reported the matter to the central regional delegation of labour and social security. Since the parties could not agree on conciliation, a statement of non-conciliation was drawn up and signed with which the worker seised the Tiko Court of First Instance on the matter. At the end of the trial, the Tiko Court of First Instance gave judgment in favour of the respondent (28).

Dissatisfied with the judgment of the trial court, the appellant filed a five grounds appeal to the Buea Court of Appeal (29). Ground two of the appeal was that the learned trial magistrate erred at law in holding that the respondent was employed on 4th April 2006 when in fact he signed his probation contract on the 1st day of October 2006. Counsel for the appellant contended that the respondent started work as head accountant on the 01/10/2006 and not on the 04/04/2006 when he was put on probation. In reply, counsel for the respondent submitted that as per exhibit B, C, and D, the respondent was employed on the 04/04/2006 (30). Exhibit B captioned “engagement letter”, states in paragraph three that the respondent was to be entitled to a stipend of 350.000frs for his services during the probationary period. On the other hand, exhibit D was an endorsement written in ink and it stated: “ NIF agreed to pay 1.000.000CFA. For initial audit, Please invoice accordingly”. That endorsement was signed by the same person who signed the engagement letter (the acting managing director). Again in exhibit C which was the respondent first salary voucher, dated the 21/04/2006 the salary appearing on it issued by Union Bank of Cameroon, was 1.000.000CFA. This salary continued in his subsequent salary statement in CCC bank where respondent transferred his salary (31).

It appeared from exhibit B that the appellants originally intended to employ the respondent on a trial bases on a salary of 350.000frs but latter changed their minds and engaged him fully on a salary of 1.000.000frs (32). This is so because the respondent from the time of his engagement on the 4th April 2006 never received a salary less than 1.000.000frs. As a result of this, the Court of Appeal Buea held that the respondent was employed or engaged by the appellants on the 04th April 2006 and not the 01st October 2006 since the conditions of the final contract were rather implemented during the so-called probation period (33).

Duration of Probationary Period

The length of probationary period is also a condition for its existence. The 1992 Labour Code of Cameroon is very clear on the duration of probationary period. The Code provides that: “under no circumstances shall probationary hiring exceed six months, including any renewal, save in the case of managerial staff for whom the period may be extended to eight months” (34). From this provision it is clear that the duration for probation period in Cameroon for any ordinary employment can be up to six months including any extension. Meanwhile the length can go up to eight months in case of workers engaged with managerial duties. However, the time

required for recruitment, travelling and training is not included in the maximum duration of the probationary period (35).

More specifically, each category of workers has a fixed duration of probationary period as follows:

- Categories one and two 15 days,
- Categories three and four 01 month,
- Categories five and six 02 months,
- Categories seven to nine 03 months,
- Categories ten to twelve 04 months (36).

The above durations are fixed from date to date. They must be expressly stipulated in writing at the time of initiation of the trial period (37). Meanwhile, each probation agreement must clearly identify the length of the period and provide the employer with an additional period of time, after the expiry of the probation, to review the employee's performance and make a decision (38). This protects the employer against a finding that the employee has reverted to regular status and can no longer be dismissed using the lower standard (39).

Another important fact is that probationary period can be renewed only once in Cameroon (40). The renewal must be notified in writing by the employer to the worker before the expiration of the initial trial period. In the absence of such a stipulation, the trial period is deemed to be conclusive and the worker is considered to be permanently engaged; the termination of the employment contract can therefore only take place under the formal conditions provided for in Section 37 to 45 of the Labour Code (41). The duration of the trial period, including renewal is taken into account for the determination of the rights and benefits of the worker attached to seniority in the company (42).

An interesting provision with the duration of probationary period is Section 28 (5) of the Labour Code. This Section provides as follows: "where the worker's employment is maintained beyond expiry of a probationary hiring contract and here no new contract is made, the parties shall be deemed to have entered into a final contract taking effect from the beginning of the trial period" (43). As such if at the end of the supposed probationary period no new contract of employment is signed, it is concluded that the parties entered into a binding contract of employment at the beginning of the probationary period. Any violation of the conditions of probationary period is punishable by the Penal code (44).

PURPOSE OF PROBATIONARY PERIOD

The purpose of probationary period is to determine whether the employee is suitable for the job, before entering into a formal employment relationship (45). Section 28 of the 1992 Labour Code clearly outlines the purpose of probationary period. Based on Section 28 (1) of the Code, probationary period is a period during which both the employer and the employee can appraise the employee's quality of service and output (46). During the probationary period, the worker can also appraise the working, living, wage, safety and hygiene conditions as well as the climate under the employer (47).

One of the main purposes of probationary period is to give the parties to the contract a time, during which the barriers to exiting the contract are lower both in terms of requirements and time of notice, in order to provide flexibility to both negotiations over the employment contract and the beginning of the actual employment relationship (48). As such, an important part and implication of the purpose of the trial period is that it can only be applied at the beginning of the employment relationship, when either the parties or the content of that relationship is unknown (49). Hence it is a period during which the employer judges the competence and aptitudes of the worker to hold the job and the latter of his possibilities of adaptation to the working conditions (50).

Unfortunately, it has been noticed that some employers and employees often get confused with the purpose of probationary period (51). In *Ndifor Helga Ngegha v National Cooperative College* (52), the defendant-employer recruited the plaintiff-employee as a secretary and placed her on a probation period on 30/11/2015. The employee presented herself as a G. C. E. Advanced Level Holder who had done nine months of computer studies. Few weeks later, it was discovered that plaintiff couldn't type on the computer. The defendant decided to give her two weeks to go and study computer again. When she returned, there was no difference. But the employer kept her because there were no students in 2015/2016 academic year hence no work for a secretary. When students were finally admitted for 2016/2017 academic year, the defendant called the plaintiff and told her she saw no change in her work (53).

On October 20th 2016, the plaintiff was given a sample of September financial document for AFOR programmed to prepare for the month of October. Plaintiff couldn't do it till 26th October 2016. The defendant served the plaintiff with an observation letter asking her to apply for the job of a cleaner since she was not a good secretary. She replied to the observation letter

and accepted that she was unfit to work as a secretary. The defendant then decided with the other staff that plaintiff needed to reinforce her capacity as a secretary. The plaintiff was thus served with a suspension letter which she received and acknowledged receipt accepting to empower herself for one month. However, the plaintiff rather stayed away for three months then turned around and sued the defendant for wrongful termination. The court dismissed the case for lack of proof (54). This case clearly shows that the defendant had no mastery of probation period.

More still, the purpose of the trial period is to allow both parties of the contract to find out how well the reality of the contract corresponds to their expectations before entering into the contract (55). However, employers at times turn to ignore the poor performance of workers during probationary period by going further to employ them. This more often than not, turn to work against the employer (56). A clear example of this can be seen in the case of MC2 Fundong v Ndi Kenneth Ndi (57). A synopsis of the facts leading to the case flows as follows: The appellant is a category one micro finance institution while the respondent is an accountant by profession. The employer employed the employee on a contract of specified duration for two years and placed him under a probationary period of three months. It was agreed that upon the expiration of the two years contract, a permanent contract of employment would be entered into depending on the performance of the employee.

In other to beef up the managerial skills of the employee, the employer embarked upon a systematic training of the employee during the probationary period. At the end of the training and probation period, the performance of the employee was mediocre. His poor performance notwithstanding, he was nevertheless retained as the manager on a contract of specified duration from 5th May 2012 to 5th May 2014. The employers in the court below maintained that when the employee took over office, it did not take long to discover his inability to perform his duties as the manager (58). He was unable to appraise the loan situation. He could not manage the loan portfolio and could not give technical advice to the credit community. He could not make entries of accounting data in the software and as the manager he had to control accounting entries and give a fine validation at the end of every day.

Furthermore, he was unable to respond to correspondences and to make declarations at the level of taxation (59). The employer maintained that the gross professional deficiency of the employee led to the sealing of their office and payment of penalties of

900.000frs at a given moment. Again, between the years 2012 and 2013, they suffered a drastic drop in their profit margin. So during the fiscal year 2014, the Board of Directors held an evaluation meeting in which it was observed that the overall performance of the respondent was below average and as per their Internal Regulations, this warranted his termination. He was accordingly served with a letter of termination on the 27th of March 2015. The employer rather turned around and claimed the sum of 35.255.418frs from the employer being special and general damages for wrongful dismissal (60). The Bamenda Court of Appeal dismissed the claim for lack of proof. However, the lost suffered by the employer because of the employee incompetence is as a result of the employer's carelessness in employing the employee despite the fact that he proved incompetent after probation period and systematic training.

In view of the foregoing the purpose of probationary period is increasing labour market flexibility, lowering information costs and protecting the contract entered into by the employer and the employee (61). The goals are thus to avoid inefficient employment contracts, promote employment and employability. As such, parties to the contract are not expected to cancel the contract for any or no reason (62).

ARGUMENTS FOR AND AGAINST PROBATIONARY PERIOD

People hold diverse opinions on the existence and use of probationary period. While some authors encourage the use of probation period in contracts of employment, others see no need for the use of probation periods. Even Order No. 017/MTPS/SG/CJ makes it clear that the use of probationary period is optional in labour contracts (63).

Arguments for Probationary Period

It is difficult to predict how well a candidate is likely to integrate into a business. While some job seekers tell lies during interview, others are noted for giving fraudulent references (64). Simply put, employers do not get the "full picture" until an employee has actually started working for them and the interview veneer has worn off. In the absence of a probationary period clause in the employment contract, the employer will have to rely on the usual notice provisions to terminate the employment contract of an incompetent employee (65). This means it will be more expensive and potentially take longer to exit the unsuitable employee from the business, which effectively compounds an already negative experience for the employer (66). As such it is better to include

probationary period in a contract of employment since the employer can terminate the relationship at the end of the probationary period if he/she is not satisfied with the employee's performance (67).

Also, in the opinion of one author, the best weapon in an employer's arsenal to screen applicants is the probation period (68). The probation period can be viewed, if used correctly, as one long audition for a job (69). In revealing an individual's true skills and attitude, it far surpasses any interviewing technique, new or old. There is no substitute for viewing an individual on the job in real work situations (70). Furthermore, proponents of probationary period hold that probationary period amounts to a reduced standard of just cause for summary dismissal (71). It allows the employer, temporarily, to take advantage of a much more forgiving just cause threshold when deciding to summarily dismiss an employee (72). As such employers are encouraged to use probationary period in hiring employees. More still, probationary period can provide both parties with an immediate, intense period in which they can evaluate the success of the relationship (73). Employees whose employment is subject to a probationary period are more likely to feel the pressure to succeed and, consequently, are likely to perform better than those employers whose employment are not subjected to probationary period (74). Meanwhile, the probationary period can help manage expectations. Both parties go into the relationship mindful of the fact that if the relationship is not successful, either party can terminate it on short notice (75). Essentially, it gives both parties the opportunity to get out of the relationship quicker than with an employee who is not subject to a probationary period.

Arguments Against Probationary Period

Some Labour Law experts discourage the use of probationary periods for employees who are either newly hired by a company or newly transferred into another position (76). Their logic stems from the fact that some courts have ruled that the mere completion of such an initial evaluation period suggests express or implied contract obligations that make it more difficult for companies to dismiss the employees at will (77). Also specifically, the completion of a probationary period could be construed to mean that the company can no longer dismiss the employee without good cause (78). Proponents of doing away with probationary periods argue that employees are subject to the same standards of performance and conduct throughout their employment; consequently, no probationary period is necessary, and no implications of job security will arise

for employees once their probationary periods are over (79). Meanwhile, some authors recommend the use of terms like introductory, evaluation, training, initiation, eligibility, or orientation periods (80). These designations may help avoid the undesired implications and assurances that the term probation has historically carried with it (81). Additionally, the term "probationary period" may have a negative connotation for new employees (82). New hires may misinterpret "probationary" to mean that they are immediately placed on a disciplinary action plan at the start of their employment. This could negatively impact the employee's perception of the company (83).

CONCLUSION

The common law and the Labour Code provide employers with the ability to hire an employee on probation. This is only true however, if certain steps are taken by the employer to properly establish the probation period. The probation period does not, contrary to what seems to be a widely held belief arise, unless it is properly brought into effect by the party who will later seek to obtain the benefit of its use. Probation periods function as worker screening devices (84). Each employer has to choose whether to use probationary period or not. Where employers choose to use probationary period, they are expected to respect the provisions of the Labour Code and the 1993 Order on probationary period. A few recommendations are made from the findings of this research. It is recommended that both workers and employers should have a good mastery of the provisions of the Labour Code and the 1993 Order on probationary period. It is also recommended that nothing should be presumed during the trial period, all necessary information should be documented and records of the employees performance kept. Meanwhile, employers should be careful to appraise the performance of the worker after the probationary period before engaging into a contract of employment. Finally, all the conditions of the probationary period should be respected.

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