

# Employment Security of Probationary Workers in Sri Lanka: A Comparative Legal Analysis

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**Abstract** - Employment security is one of the most important factors which help to create an efficient and satisfactory working environment. Probationary employment is one of the challenging employment types which indicates uncertain nature of job status in the labour relations. Although, the main objective of the probationary period is to assess the employee's suitability for the continuation of employment, some employers misuse probation employment by terminating probationers in mala fide. The underlying question is whether the employer has sole discretion to terminate a probationary employee without assessing him adequately or without giving proper reasons. In the Sri Lankan context, there is no proper legislative guidance to regulate probationary employment and therefore, a series of cases provide different interpretations with regard to the employer's discretion on deciding whether the employee's conduct is satisfactory or not. In contrast, the South African legal framework envisages clear statutory measures to safeguard the employment security of the probationary employees against the mala fide acts of employers. The South African Labour Relations Act in 1995 contains specific provisions in relating to the duration of probationary period and dismissal of probationary employees. Therefore, this research aims to analyse the Sri Lankan and South African jurisdictions comparatively and suggest possible recommendations for Sri Lankan law with regard to the employment security of the probationary employees. Qualitative research method has been utilized to achieve the aforementioned research objective.

**Keywords**— **Employment Security,**

**Probationary employees, contract of employment**

## I. INTRODUCTION

A contract of employment reflects the rights, duties and liabilities of the employer as well as the employee (Adikaram, 2009). However, based on the nature, terms and conditions of the contract, it can be categorized into different types of employment. Employees get different entitlements according to their employment categories. Though, in the legal sense, these categories or 'labels' may have significant consequences on employees rights and benefits because, employers use such categories to avoid and overcome certain statutory obligations (Egalaheewa, 2018).

Probationary employment is one of the controversial employment types which indicates uncertain nature of job status in the labour relations. Probationary period is considered as a trial period and therefore, it raises a question whether the employer has unlimited discretion to keep or dismiss a probationer (De Silva, 1998). This research investigates how Sri Lankan and South African legal frameworks address this issue and finally it suggests possible recommendations to enhance the employment security of probationary workers in Sri Lanka.

## II. METHODOLOGY

This Research is a normative research which consists of a literature review and a comparative analysis. As primary sources, relevant legislative enactments and decided case law have been used. Moreover, textbooks, journal articles, web resources and statistical analyses have been referred to as secondary

sources to enhance the research. The South African jurisdiction has been selected for the comparative analysis, considering their structural similarities to that of the Sri Lankan legal framework on industrial relations. Particularly, the Labour Relations (Amendment) Act No. 12 of 2002 in South Africa has been taken as the main legislative example for the comparative study.

### III. RESULTS AND DISCUSSION

#### A. The definition of a probation

The definition of a probation is,

“a fixed and limited period of time for which an organization employs a new employee in order to assess his attitudes, abilities and characteristics and the amount of interests he shows in his job so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment...” (De Silva, 1998)

Thus, generally, the period of probation is fixed and limited period of time which is subjected to the supervision of the employer. Also it is notable that, the employer has the right to terminate the probationers and the only exception of this rule is where the employee can prove mala fide of the employer. The status of probationers was recognized by the Indian Court in *Venkatacharya v. Mysore Sugar Co. Ltd* (1956, IILG 46) as “a probationer is not in the same position as others in service. He is in a state of suspense attended with the uncertainty of an inchoate arrangements.” As observed by the Sri Lankan court in *Richard Piris & Co. v. Jayathunga* (Sri Kantha Law Report, Vol. 1, P 17), the probationer should satisfy the employer before the employer decides to affirm him in his employment which would place the employer under various legal restraints and obligations, and any employer should have the right to discontinue a probationer if he does not come up to the expectations of the employer. Accordingly, it can be witnessed that, the court also distinguish the period of probation as an

uncertain period which is totally depend on the discretion of the employer.

However, Fernando J in *State Distilleries Corporation v Rupasinghe* (1994, 2 SLR 365) case stated that,

“The concept of probation is a period of trial, at the end of which the employer must judge the performance of the probationer; there can be no proper trial of probationer unless the employer has given him adequate information and instructions, both as to what is expected of him, and as to his shortcomings and how to overcome them...”

So, it is evident that, the court has emphasized not only the probationer’s duty, but also employer’s obligation to give particular instructions to the employee during this period of time.

#### B. Sri Lankan Legal Approach on the Employment Security of Probationary Workers

In the Sri Lankan context, there is no legislative provision or guidelines for regulating the status of probationary employments. Also, there is no clear provision of the labour laws on the duration of probationary period in Sri Lanka. The Employment of Trainees (Private sector) Act No. 8 of 1978 provides that employers and workers may enter a contract of training for up to maximum one year (Adhikaram, 2009). This provision is not directly relevant for the probationary employment.

Therefore, a question arises as to whether a probationer’s services could be terminated before the expiry of the probationary period in Sri Lanka? Usually, a period of probation is set out in the contract of employment for the purpose of enabling the employer to assess the capacity and capability of the workman. So, during this ‘period of testing’, except where the contract provides, the probationer should have a right to demonstrate his performance and skills to satisfy the employer without a risk of termination (De Silva, 1998; Egalahewa, 2018). However, a series of cases provide evidence for

accepting the dismissal of a probationary during the contractual period.

This traditional view has been clearly stressed in *Richard Piris & Co. v. Jayathunga* case. The Court of Appeal held that “if the employer could have terminated the services of the workman at the end of the term without showing good cause, I see no reason why the same provision should not apply he terminated his services during the period of probation.”. According to this decision it can be observed that, the court considered that the probationer is almost at the mercy of the employers’ whims and he has no remedies where he is terminated either before or at the end of his period of probation (Arulanatham and Dissananyaka, 2010)

*Moosajees Ltd. v. Rasiah*(1986, 1 S.L.R. 365)also shadowed the *Jayathunga* case and held that, “the employer is the sole judge to decide whether the services of a probationer are satisfactory or not. The employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation, or even before the expiry of that period.” Therefore, in summary, *Rasih* case emphasizes that, the court can only intervene the termination of a probationer, if there was mala fides. Where there is no allegation of mala fide the court could not intervene the employer’s decision at all. In *CeylonCeramicsCorporationV.Premadasa* (1986,1S.L.R. 287 the courthas demonstrated the same view as “the services of the probationer can be terminated using the period of his probation if his services are not considered satisfactory. Such termination is not unlawful or unjustifiable provided it is bona fide”.

The case *University of Sri Lanka v. Ginige* (1993,1 SLR 362) decided in 1993 re-emphasizes the dicta in *Richard Piris&Co. v. Jayathunga* above (Arulanatham and Dissananyaka, 2010) . Accordingly, the court has upheld the traditional approach and states that “during the period of probation the employer has the right to terminate the services

of the employee if he is not satisfied with the employee’s work and conduct. If the employer act mala fide, he will be liable for unfair termination”. Thus, as expressed in the *Jayathunga* case the only remedy entitled by the probationer is compensation.

However, in *State Distilleries Corporation v Rupasinghe*casethecourthastakena progressive approach towards the probationary employees (Egalahewa,2018). As per the Fernando J pointed out,

“If the employer is found wanting in respect of his work, conduct, temperament, compatibility with the organization and his fellow employees, or any other matter relevant to his employment, the employer is entitled to dismiss him. However, that right is not absolute, unfettered or unreviewable.Whiletheemployeris undoubtedly the sole judge as to whether the probationerhasprovedhimself,yethis subjective decision is liable to limited scrutiny and review.”

Accordingly, it is noteworthy that, After ten years from *Jayathunga* case, the *Rupasinghe* decision has challenged the traditional viewpoint of the court and emphasized that even though the common law recognizes an absolute right to terminate a probationary employee, under the Industrial Dispute Act of 1957 the legislature has restricted the powers of employerconsiderably.Therefore,the probationary employee now has a right to challengeanunreasonableterminationand demandre-instatement(Arulanathamand Dissananyaka, 2010).

Continuation of a probationer after the expiry of the period of probation is another question which arises in relating to probationary employment (De Silva, 1998). In *Hettiarachchi V. Vidyalkara University*(76 N.L.R. 47)it was held that, a person appointed to a post on probation cannot claim automatic confirmation on the expiry of the period of probation, unless the letter of appointment provides that the appointee shall stand confirmed in the absence of an order to the contrary. If a probationer is

allowed to continue on probation after the period has expired, he continues in service as a probationer. However, in *Rupasinghe* decision again challenged this traditional approach. As per the dicta of Fernando J, there is no inflexible rule providing for the automatic renewal of probation and that an inference of renewal can only be drawn in those cases in which the circumstances justify it.

*B .South African Legal Approach on the Employment Security of Probationary Workers*

The significant feature of the South African legal framework is, it has given statutory security for the probationary employees under the Labour Relations (Amendment) Act No. 12 of 2002 (Baloyi & Crafford, 2006) . According to the Section 186 of the definition of the term ‘unfair labour practices include “unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee”.

Moreover, Code of Good Practice – Dismissal, contained in Schedule 8 to the Labour Relations Act specifically provides a comprehensive guidelines for the employment and dismissal of probationers. Accordingly, the Act gives discretion on the employer to determine the length of the probationary period with reference to the nature of the job and the time it takes to determine the employee’s suitability for continued employment. Further, during the probationary period an employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service (Baloyi & Crafford, 2006).

Most importantly, the Act provides very clear guidelines for the dismissal of probationers. As per the Guideline 8 (2) of the Schedule 8 of the Act,

After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

This innovative provision of the South African Labour Relation Act is evident that, the employees of probation are still employees and the employer is not the sole judge to determine dismissal of probationers (The South African Labour Guide, n d). In *Palace Engineering (Pvt) Ltd vs Thulani Ngcobo and Others* case the South African Labour Appeal Court upheld the status of the guidelines enshrines under the schedule 8 as follows;

“Reasons for dismissing probationary employees less onerous but the dismissal must still be for a fair reason that passes muster against the entire provisions of the item 8 (1) of the Code of Good Practice”

The Act further emphasises that “the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter. Also, in the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.”

*C. Comparison of Sri Lankan and South African Approaches.*

After considering the legal background of both Sri Lankan and South African jurisdictions in relating to the job security of probationary employees, the researcher has summarised all the findings in to the following comparative table.

**Table 1. Comparison of Sri Lankan and South African Approaches**

Key Factors	Sri Lanka	South Africa
Legislative Protection	No legislative protection	Regulate the dismissal of



	for probationers	probationary employees through the Labour relation Act
Duration of Probationary Period	No specific provision	Schedule 8 of the Labour Relations Act gives discretion on the employer to determine the length of the probationary period
Dismissal (right to give reason)	Depends on the Court interpretations. <b>Rupasinghe</b> decision has taken some progressive approach	Statutorily make an obligation on employers to carry an appropriate evaluation and give reasons (Guideline 8 (2) of the Schedule 8 of the Act)
Right to be heard and assisted by a trade union representative	No specific provision or court decision	Statutorily provides that right (Guideline 8 (4) of the Schedule 8 of the Act)

#### IV. CONCLUSION AND RECOMMENDATIONS

According to the findings of the comparative analysis between Sri Lankan and South African legal frameworks it is evident that lack of proper statutory protection against the arbitrary conduct of the employers is the major drawback with regard to the employment security of probationary workers in Sri Lanka. Judicial decisions and interpretations regarding

the employers' discretion of terminating probationary employees has been changed by time to time and as a result of this uncertain nature, employers are tending to misuse the probationary employment. In contrast, South African approach can be illustrated as a progressive way forward because it clearly makes an obligation on employers to conduct proper evaluation and give reasons before termination of the probationers.

Therefore, in order to enhance the employment security of the probationary workers in Sri Lanka, this paper suggests that the misuse of probationary employment should be prevented through a statutory intervention in Sri Lanka similar to the South African approach. Therefore, as a statutory intervention, the dismissal of probationary employees without proper evaluation and without giving reasons can be identified as an unfair labour practice. Hence, this paper recommends an amendment to the Section 32 A of the Industrial Dispute Act No 43 of 1950 in order to include the unfair dismissal of probationary workers as an unfair labour practice. Then it will be a good move for employment security of the probationary workers in Sri Lanka.

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I'm an attorney-at-Law and a lecturer in law attached to the Department of Legal Studies, The Open University of Sri Lanka. I have done my LL.B Degree in the Faculty of Law, University of Colombo in year 2012. Then I completed LL.M in 2017 with a merit pass in the same university. Currently, I'm teaching labour law for the LL.B students and doing several researches i relating to the various aspects of labour law.