TOWARDS FAIR HEARING THE RIGHT OF PROBATIONARY EMPLOYEES AGAINST UNFAIR DISMISSAL IN TANZANIA

Written by ***Salehe Nassoro***

2nd Year LLM Student, St. Augustine University of Tanzania, Mwanza, Tanzania

ABSTRACT

Employment security is the 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 the job status in the labour relations. Although the main objective of the probationary period is to assess the employee's suitability for the continuations of employment some employees misuse probation employment by terminating probationer's in mala fide. The underline question is whether the employer has a sole discretion to terminate a probationary employee without assessing him adequately and without giving proper reason or without affording him the right to be heard.

In the Tanzania context, there is no proper legislative guidance to regulate probationary employment and therefore, a series of cases provided a different interpretation with regards to the employer's discretion on deciding whether the employee's conduct is satisfactory or not. In contrast, the South African legal framework envisages a clear statutory measure to safeguard employment security of a probationary employees against the mala fide acts of employers. The South African Labour Relations Act,[i]contain specific provisions in regulating the duration of probationary period and dismissal of probationary employees.

Therefore, this article analyses the right to be heard towards fair hearing of probationary employees in Tanzania and suggest possible recommendation for Tanzania law with regard to the protection of probationary employees' rights while working under any type of the employment contract.

INTRODUCTION

An employer may require a newly hired employee to serve a reasonable period of probation to establish whether or not his or her performance is of an acceptable standard before permanently engaging the employee. Even so, the current provisions relating to termination of probationary employee under the Employment and Labour Relations Act, remain a source of concern. Currently, an employer may terminate the employment of a probationary employee at will and without affording such employee an opportunity to be heard. The status quo has received firm approval by the High Court Labour Division accentuating that employers are immune from claims of unfair termination of a probationary employee. This article argues that for termination to be considered procedurally fair whether during a probation period or not, it should be preceded by an opportunity for an employee to state a case in response to the charges levelled against him or her.

This is because all the laws in Tanzania, including the ELRA are subject to the Constitution, particularly Article 22(1) of the Constitution which guarantees the right to work. Equally Article, 13(1) and (2) of the Constitution states that every person is equal before the law and has a right to equal protection and benefit of the law. Allowing employers, the freedom to terminate employment without following due process certainly open up the floodgates for abuse of the primary purpose of probation. The mere fact that a contract of employment to have a probation period should not be used as a licence by employers to erode the constitutionally entrenched labour rights. The primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. This can only be achieved by protecting vulnerable and marginalised employees such as probationary employees who participate in unpredictable forms of employment.

This article maintains that prominence should be on the existence of an employment relationship and fair labour practice as opposed to the existence of a conditional contract of employment. The existence of an employment relationship should serve as the main "port of entry" through which all employees access the rights and protection guaranteed by labour legislation.

APPLICATION OF INTERNATIONAL LAW IN TANZANIA

ILO International Labour Standard

ILO International Labour Standards, are legal instruments, drawn up by ILO constituents these include Government, employers and workers that set out the basic principles and rights at work.[ii] They are either conventions which are legally-binding international treaties that may be ratified by ILO-Members States which lays down the basic principles to be implemented by ratifying countries, while recommendations, which serve non-binding guidelines can also be used autonomous, not linked to any Convention.[iii] These Conventions agreed upon by international actors, resulting from a series of value judgments, set forth to protect basic worker rights, enhance workers job security and improve their terms of employment on global scale.[iv]

Termination of Employment Convention No. 158 and Recommendation No. 166

Generally, this Convention was adopted by the governing body of the ILO to address developments in the field of labour relation that had occurred in many countries particularly relating to the termination of employment at the will of the employer for untested reasons.[v] The essence of the Convention is to codify the elementary principles of equity and law at the international level. The Convention articulates in compulsory terms that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.[vi]

Besides, the foregoing Convention provides that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.[vii]

The spirit of Article 7 is to rectify the common law position which disregarded the rules of natural justice, discussed below, in terminating an employee's contract of employment. In other words, Article 7 seeks to ensure that an employer provides an employee with an opportunity to exonerate himself regarding the allegations levelled against him.

ILO Employment Relations Recommendation 198 of 2006

In terms of this Recommendation, member states are duty-bound to adopt in their domestic law the scope of relevant laws and regulations, in order to guarantee effective protection for employees who perform work in the context of an employment relationship.[viii] The Recommendation aims to eradicate disguised employment. It emphasises that in determining the existence of an employment relationship, prominence should be on the facts relating to performance of work and remuneration of the workers irrespective of how the relationship is characterised or any contrary arrangement that may have been agreed between the parties.[ix]

The ILO Philadelphia Declaration, 1944

The Declaration of Philadelphia is an international instrument which guarantee people working under probationary employment the necessary protection that other ordinary employees enjoy from their employers. The declaration is a statement of aims adopted by the International Labour Organization in 1944 and embodies basic principles of economic justice. It declares the following: that labour is not a commodity, that freedom of expression and of association are essential to progress; that poverty anywhere constitutes a danger to prosperity everywhere, and that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity. The Declaration continues to provide a focus for campaigners for International Labour Standards.[x]

When one adheres to the above submission that labour is not and should not be made a commodity will automatically bear the legal obligation to treat employees under probationary period equal to the ordinary employees of the establishment. The same obligation will impliedly be vested into an employer to grant other working fundamental rights such as freedom of association and expression and other related workers social welfare rights to all employees including those employees who works under probation period.[xi]

The declaration recognizes further that, as "the solemn obligation of the ILO to further among the nations of the world" those principles which would achieve full employment and the raising of standards of living, the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their

greatest contribution to the common well-being, the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement, Policies in regard to wages and earnings, hours, and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection. The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency.[xii]

The declaration sets out a standard path of legal obligation all states in the world should follow when dealing with workers welfare. The rejected discrimination among workers is focused towards granting a broader utilization of the world productive resources which are necessary to the achievement of the objectives set forth in this declaration.[xiii] The international working standards which are declared by this declaration are made to be protected so as to protect weak employees such as those in probation who are also considered to be in lower bargaining power. This is in line with the fact that law always protect the weaker members of the society.[xiv]

The Universal Declaration of Human Rights, 1948

The declaration proclaims a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[xv]

The declaration (UDHR) further states clearly that, all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. It further declares that, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” [xvi]

The declaration (UDHR) has declared universally that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests."[xvii]

Even though the Universal Declaration of Human Rights of 1948 not formally by itself legally binding, the Declaration has been adopted in or influenced most national constitutions including Tanzania and South Africa, wherein in its governments commit themselves and their peoples to progressive measures to secure the universal and effective recognition and observance of the human rights set out in the Declaration.[xviii] Thus, the declaration is obviously a fundamental document of the United Nations and a powerful tool when applying diplomatic and moral pressure to governments that violates and of its provisions.[xix]

Discrimination (Employment and Occupation) Convention, 1958

The Discrimination (Employment and Occupation) Convention,[xx] defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and that, such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.[xxi]

This Convention has been ratified by Tanzania and South Africa.[xxii] Thus, the contents of this Convention are binding on both Tanzania and South African jurisdictions. Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.[xxiii]

The Convention requires member states for which this Convention is in force to undertake, appropriate methods to national conditions and practice to seek the co-operation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy, to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy, to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy to pursue the policy in respect of employment under the direct control of a national authority to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority, to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.[xxiv]

However, it should be noted that, the general protection given to workers by this convention is not absolute in general rather there are exceptions given on certain categories of employees. For example, it is stated that any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.[xxv]

The Convention further stipulate that, any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.[xxvi]

THE LEGAL POSITION OF PROBATIONARY EMPLOYEES IN TANZANIA

The Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania,[xxvii] provides protection of all persons and all of them are equal before the law and be entitled, without any discrimination, to protection and equality before the law.[xxviii] It is further providing that, no law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its

effect. That no person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.[xxix]

The expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.[xxx]

Employment rights and protection are incorporated as the object of the Constitution which is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self Reliance which emphasizes the application of socialist principles while considering the conditions prevailing in the United Republic. Therefore, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that every person who is able to work does work, and work means any legitimate activity by which a person earns a living.[xxxi]

The URT Constitution further provides that every person has the right to work and that every citizen is entitled to equal opportunity and right to equal terms to hold any office or discharge any function under the state authority.[xxxii] However, without discrimination of any kind, every citizen is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work. Every person who works is entitled to just remuneration.[xxxiii]

The Constitution further guarantees every person with the equality and non-discrimination to all human beings because they are born free, and are therefore all equal. Further that, every person is entitled to recognition and respect for his dignity.[xxxiv] That, no law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect. The civic rights, ties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under

the law. However, no person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.[xxxv]

The Constitution further provides that, every person in the United Republic has the right to enjoy fundamental human rights and to enjoy the benefits accruing from the fulfilment by every person of this duty to society, as stipulated under Article 12 to 28 of this Part of this Chapter of the Constitution. In order for this to happen every person has the duty to so conduct himself and his affairs in the manner that does not infringe upon the rights and freedoms of others or the public interest.[xxxvi] It is further provided that, the human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.[xxxvii]

The Employment and Labour Relations Act

The main labour law statutes in Tanzania which regulate the relationship between employer and employee under the contract of employment in private sectors are ELRA,[xxxviii] and the LIA[xxxix] for all employees and the Public Service Act,[xl]regulates the relationship between the employer and employee in the Public service.[xli]Both laws take care of contract of service and not the contract for service.

The ELRA does not explicitly provides as who is a probationary employee or talks about probation period.[xlii] However, the Act implicitly provides that a probationary employee with a period of less than 6 months of employment may not bring a claim for unfair termination against the employer. The Act also is does not provide specifically as to which claims that the probationary employee with more than six months may bring against the employer.[xliii] Therefore, the protection of the rights of probationary employees, will depend on the discretion of the court. This situation presents probationary employees into probable situation compared to the other ordinary employees. Since it takes away an employee's usual rights, a probationary period must be expressly agreed to by the employee.

The Employment and Labour Relations (Code of Good Practice), Rules

In 2007, the Employment and Labour Relations (Code of Good Practice) Rules,[xliv] came into force. This Code of Good Practice was adopted under Section 99 (1) ELRA[xlv] which provides

that the Minister, after consulting the Council, may issue codes of good practice. This Code of Good Practice shall be considered by any person, interpreting or applying the ELRA and where that person departs from the code or guideline, he or she shall justify the grounds for departure

This code in some extent tries to analyse different procedure for employer that he should adhered before terminating the employee generally and some of its provisions govern the procedure on how to terminate the probationary employee with more than six months.[xlvi]

The principles of equity thus compel employers to clearly indicate what will happen if the relationship ends before the probation terminates the employment and Labour Relations (Code of Good Practice) provides some guidelines through which termination of probationary employees of not less than six months must be followed.[xlvii] Since probation periods are used by employers as a 'trial period' to make sure that the employee appears to be a good fit in the organization, the terms of probation must be made known to the employees before the employee commences employment. This provision is geared toward compelling employers to be bound to the terms of service during probation period because the probationary period does not in fact affect an employee' statutory rights. The provision also protects employees under probation from the colonial perception of employers of hire and fire.

The code further stipulates the purpose of probation period being to enable the employer to make an informed assessment of whether the employee is competent to do the work and suitable for employment.[xlviii] In order for the employer complete his assessment successfully and fairly he must subject the probationary employee into full swing of all rights same to those enjoyed by other employees. Although the employer may have the right to withhold certain rights to a probationary employee taking into consideration the duration of the probation itself, the employee is normally subjected to all necessary rights enjoyable by employees of the organizations.[xlix]

The code further stipulates that, the period of probation should be of reasonable length of not more than twelve months, having regard to the factors such as the nature of the job, the standards required, the custom and practice in the sector.[l] This requirement grants a candid protection to probationary employees to demonstrate their skills and standards that are eagerly waited to be seen by the employer. During probationary period the employee may have a chance to attend further in-house training which will add up his value and chances of being taken by the employer.[li]This provision also gives fair treatment to probationary employees as

they get exempted from being utilized for unknown period by the employer in the name of evaluating, testing employee's suitability of the job.[lii] However, the practice shows that a less skilled or more junior job may only require a short period of time 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.[liii]

The employer, may after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not been able to properly assess whether the employee is competent to do the job or suitable for employment.[liv]This provision protects employees who have been on probation where there were many employees and the employer may not be careful enough to establish each employers' suitability and capacity. By been given another probationary period it is a positive chance for an employee on probation to work even more to convince the employer rather than being terminated.[lv]

Employers should clearly set out what terms do and do not apply at this time. It is common for employees not be enrolled in benefits schemes until completion of the probationary period. Employers should be careful that such exclusions are not discriminatory.[lvi] On the other hand, during probation period, the employer shall monitor and evaluate the employee's performance and suitability from time to time. The employer shall meet with the employee at regular intervals in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counselling to the employee during probation.[lvii]This provision protects employees under probation period to allow them sail smoothly on the work they have been subjected for testing.[lviii]

The code further provides that, where at any stage during the probation period the employer is concerned that the employee is not performing to the 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.[lix]Thus, the probationary employee in Tanzania cannot easily be terminated just at the will of the employer, fair procedures must be followed including be granted the right to be heard. Termination of a probationary employee is also under protection under Tanzanian laws. Employment of the probationary employee shall be terminated if the employee has been informed of the employer's concern and also the employee has been given an opportunity to respond to those concerns and further that, the employee has been given a reasonable time to improve performance or correct behaviour and

has failed to do so.[lx] It further allows probationary employees to be represented by members of union representatives.[lxi]

The above provisions clearly demonstrate how probationary employees are protected in Tanzania. Although the Act has not clearly stated how they should be protected, the Code of Good Practice has expressly listed the protection of probationary employees. However, the stipulated protection in the code targets generally probationary employees who are beginning their job carriers. Employees who are on probationary period due to promotion of new position or for poor performance enjoys all rights enjoyed by other ordinary employees.

ANALYSIS OF THE ABOVE LEGAL POSITION ON TERMINATION OF PROBATIONARY EMPLOYEES

The Constitution of the United Republic of Tanzania has given authority the Courts and other quasi-judicial bodies or any other state agencies established by or under law to ensure that they protect and uphold civic rights, duties and interest of every person and community in accordance with the law of the land. In Tanzania, the Commission for Mediation and Arbitration (CMA),[lxii] High Court Labour Division and the Court of Appeal of Tanzania,[lxiii] have the primary to resolve and interpret the provision of the ELRA as well as to solve the employment disputes which will be arise between employer and employee.

Justice Mruke,[lxiv] in the case of Ngeleki Amlimi Ngeleki vs Dimension Data Tanzania Ltd,[lxv]the judge held that, that the applicant was employed in a one-year fixed term contract, commencing with a three months' probation period. The applicant continued to work for the respondent even after the lapse of a probation period. It is crystal clear that, the applicant was not issued with a confirmation letter hence he was still a probationary employee. It is a principle of law that there is no automatic confirmation of employment.

Justice Rweyemamu,[lxvi]in the case of Commercial Bank of Africa (T) Ltd v. Nicodemus Mussa Igogo[lxvii] stated that fair termination principles are not applicable to employees on probation. Expiry of a specific period of probation of an employee renders such an employee eligible for termination. The position remains same even where an employee continues to work after expiration of the probation period, is given salary increment or further training. A probationary employee remains with that status until confirmed by the appointing authority.

Justice Rweyemamu further provided that an employee on probation is entitled to fair labour practices. Under the Code of Good Practice,[lxviii]a probationary employee is entitled to be represented in the process referred to in sub-rule7by a fellow employee or union representative. It reads that: "Where at any stage during the probation period, the employer is concerned that the employee is not performing according to the standard or may not be suitable for the intended position the employer shall notify the employee on that concern and give the employee an opportunity to respond or an opportunity to improve."[lxix]

In another instance Justice Rweyemamu in National Microfinance Bank v. David Nzaligo,[lxx]observed that whether or not an employee on probation is protected and covered by section 36(a)(ii) of the Employment and Labour Relations Act (ELRA).[lxxi] That, an employee on probation does not assume employment status on expiry of period of probation as expiry of the specific period of probation render such an employee eligible for confirmation. He further pointed out that being kept on after expiry of probation period does not amount to confirmation.[lxxii]

However, in Sella Temu v. Tanzania Railways Authority,[lxxiii] wherein the Court of Appeal was dealing with an appeal from the Hight Court decision considered whether an employee on probation had a right to be heard before termination. It was held by the court that there was no right of hearing because there was no termination of employment contract but rather merely a non- confirmation while the appellant remained in the employment. The court declared that probation is a practical interview.

In the National Microfinance bank case above the court also determined whether an employee on probation is entitled to fair labour practices, which includes fair treatment from the employer. The court held that, fair treatment is a labour right of every employee, during the various employment processes including during job selection and interviews. Since probation is a practical interview, and that, an employee under probation is not protected under Part E of the Employment and Labour relations Act (ELRA), such employee cannot be compensated for in a manner employee are entitled to by the Act.[lxxiv]

In Mwita Magani and Another v. Mganga Mkuu Hospitali Teule Biharamulo,[lxxv] the court was required to determine whether or not under the Tanzanian law, an employee on probation automatically assumes employment status where the stipulated period of probation has expired,

without the employer deciding to confirm or not to confirm the employee. Justice Rweyemamu observed that being kept on after expiry of probation period does not amount to confirmation

Justice Mipawa in the Case of USAID Wajibika Project v. Joseph Mandago and Edwin Nkwanga,[lxxvi]stated that the purpose of a probationary period is to provide the parties with an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment. He was attempting to ascertain whether a probationary employee is protected under the provision of Section 37 of the Employment and Labour Relations Act on unfair termination.

He further stated that in order for the probationary employee to benefit with the provision of section 37 of the Employment and Labour Relations Act,[lxxvii] on issue of unfair termination, and since section 35 of the Act exempt the employer from observing the mandatory provision of section 37, the Employment and labour Relations Act must be interpreted conjunctively with Rule 7, 8 and 9 of the Code of Good Practice.[lxxviii]This was justified by the fact that section 99 of the Employment and Labour Relations Act provides that the Employment and Labour Relations Act (ELRA) has to be interpreted in accordance with the Code of Good Practice and shall take into account any Code of Good Practice of Guideline. The court then declared that interpreting protection given under section 37 of the employment and Labour Relations Act (ELRA) without relating it with the Code of Good Practice was an error of law.

Justice Mipawa further stated in the above case that the probationary employees are beneficiaries of the fair termination and protected under the umbrella of unfair termination as per the Code of Good Practice quoted above through the International Labour Organization Conventions (ILO) on Termination of Employment Convention.108 The fair labour practice entailed in the Code of Good Practice Rule 10(7) and 8 as regard to fair termination is by and large a big trek in the labour jurisprudence in Tanzania especially when it comes to the question of probationary employees or employees who are still in the engagement or probation.

THE RIGHT TO FAIR LABOUR PRACTICE PRIOR TO THE TERMINATION OF EMPLOYEE

Worth noting is that the underpinning principle of a sound employment relationship is that it should be fair, equitable and beneficial to both the employer and the employee in the workplace. Articles 13 (1), (2) and 22 (1) of the Constitution entrenches various labour rights, key amongst them the right to fair labour practices guaranteed to "every person".[lxxix] This right remains probably the most significant labour right under the Constitution because of its all-encompassing nature. Although the Constitution does not contain a precise definition of the concept "fair labour practice", the converse of a fair labour practice is an unfair labour practice and this is what is prohibited.

A legal analogy could be drawn the decision of the Constitutional Court of South Africa in the case of NEHAWU v University of Cape Town,[lxxx] where the court held that "Our Constitution is unique in Constitution aliasing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.

The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to Section 23(1).[lxxxi]

In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course, other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance." Therefore, an insightful understanding of this right is imperative because

the subject of the sentence, namely "every person" must be interpreted with reference to the object of the sentence, namely "labour practices."

Generally, any interpretation of Article 22(1) must be conducted, bearing in mind the importance of ensuring fairness in the working environment is recognised and upheld. In the process, courts must recognise that all laws and regulations, including labour legislation, are always subject to constitutional scrutiny.[lxxxii] If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee should have a right to seek a remedy under the ELRA. If he or she finds no remedy under that Act, the ELRA must come under constitutional scrutiny for not providing adequate protection to a constitutional right. Similarly, if a labour practice permitted by the ELRA is not fair, a court might be persuaded to strike down the questioned provision.

The fundamental rights of the employees are specifically stipulated in the Constitution of the Republic of South Africa in Section 27 as follows: (1) Every person shall have the right to fair labour practice, (2) Workers shall have the right to form and join trade unions, employers shall have the right to form and join employer's organisation, (3) Workers and employers shall have the right to organise and bargain collectively, (4) Workers shall have the right to strike for the purpose of collective bargaining, and (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).[lxxxiii]

THE PRINCIPLE OF NATURAL JUSTICE AGAINST ARBITRARY TERMINATION OF PROBATIONARY EMPLOYEES

The principles of natural justice as it is understood in its broader sense, refer to procedural fairness. The principles intend to ensure that a fair outcome is reached by an impartial decision-maker. These principles are invariably common to all known legal jurisprudence and are rooted in the minds of all fair-minded persons.

One of the two cardinal principles of natural justice is *audi alteram partem* which literally translates to mean "hear the other party" or the rule that no one should be condemned unheard and without having the opportunity of making his defence.[lxxxiv] This means according to the fundamentals of fair play, any person who decides any matter without hearing both sides,

though that person may have rightly decided, has not done justice.[lxxxv] Hearing would enable a probationary employee to disprove the charge levelled against him or her, or at least to plead something in mitigation. It also affords them the opportunity to urge the employer to consider alternatives to dismissal or sometimes all they ask of the courts is to assuage their sense of injustice at not having been given a fair opportunity to defend themselves against allegations which gravely impeach their future prospects. The *audi alteram partem* principle noted above imposes a duty upon an employer to act fairly by giving the employee an opportunity to explain him or herself before taking any decision which may extremely affect an employees' career.[lxxxvi]

So why then did the legislature choose to enact Section 35 in disregard of the law of natural justice and fair labour practice in depriving employees on probation unduly of rights they might otherwise have flowing from an employment relationship? A duty to act fairly is implied in employment relationships, and the duty connotes that the employer must give an accused probationary employee a right to be heard. Therefore, it is imperious for employers to respect the fundamental principles of procedural fairness for all employees in the workplace. And when the employer unreasonably fails to observe those principles, then the Employment and Labour Relations Court, if approached, should bravely apply the aforesaid principles in order to defeat the imbalance in the exercise of power. As one professor of comparative law says:

> "The quality of the law can be determined by ... the qualities of the judge ... [A] bad statute with a clever judge is a hundred times better that a good statute with a bad judge ... Let us pray for well-drawn statutes but ... let us pray also for judges [who are] clever man with an independent spirit and can stand the weight of honours.[lxxxvii]

With this in mind, this article encourages the Employment and Labour Relations Court judges to shun away from its own unfortunate practice and that of the ERLA of categorisation of employees and different rights ascribed to each category. Surely, this does not only infringe the Constitution, it is also a practice passed by time and should not be used in the workplace as a shield against compliance with procedural fairness before termination. Equally, the mere fact that a contract of employment is phrased as "probationary contract" or expressly states that the contract is for a probationary period should not be used as an easy getaway to erode the entrenched constitutional right to fair labour practice guaranteed to every person, which include

probationary employees.[lxxxviii] This article emphasises that the relationship between a probationary employee and his or her employer is akin to an employment relationship and not on the mere existence of a conditional contract of employment. In fact, this article submits that reliance on this traditional contract of employment will render labour law less relevant.

This article stresses that a visionary court inclined to the principles of natural justice in particular *audi alteram partem*, must promote the spirit of articles 13(6),(a) of the Constitution which provides for commitment to nurture and protect the well-being of all employees in an employment relationship. Further, the article argues that courts that have moulded the law over the ages are those with a deep passion for fairness, equity and social justice that frequently require a departure from stringent inflexible common law rules. The provisions of the ELRA in question are a point in reference.

Failure by the ELRA to protect or provide probationary employees with a right to be heard is arbitrary. Equally, it is unjust, unfair and unreasonably infringes and destroys the spirit of the Constitution. In fact, this article observes that like in all disputes there are always two sides to the story and one cannot get to the truth of the matter without hearing both sides. So not only is it a legal requirement but also as a matter of logic and for the feasibility of the end result of a disciplinary hearing, the accused's version must be known to the person deciding his fate. As noted earlier, this requirement is derived from the *audi alterem partem*. It should also be noted that even biblically, procedural fairness and in particular the right to be heard is acclaimed as a principle of divine justice with its roots in the Garden of Eden. To point out, God gave Adam and Eve an opportunity to make their defence before they were condemned. Indeed the principle is so catholic that no one has questioned its pedigree.

Also, employers must always act in good faith in the assessment of the probationary employee's suitability for a permanent position. But in the current law regulating probationary employees, this may be defeated. At the same time, it may lead to abuse of the primary purpose of probation as alluded earlier. For instance, a common abuse is when employers dismiss an employee who completes their probationary period and replaces them with newly-hired probationary employees. Under such circumstances, it means not only a loss of a particular position or post by the probationary employee, but also loss or denial of the opportunity to pursue his or her profession or career. Such practice unduly deprives a probationary employee

permanent employment. The court has stressed that the right to security of employment is a core value of the ERLA.

In terms of the Constitution, every person is guaranteed an inherent right to dignity and the right to have that dignity respected and protected.[lxxxix] Phillips, a great European author, expresses most forcibly what reputation means if not backed up by the solid foundation of character built on right thinking and right living. He asked:

"Who shall estimate the cost of priceless reputation – that impress which gives his human dross its currency, without which we stand despised, debased, depreciated? Who shall repair it injured? Who can redeem it lost?" Why should this verity be limited to employment with statutory flavour and not to all employees? Who says that only public employees have reputation that may forever be tarnished? What is the rationale for excluding private employees?

In light of this, where a probationary employee is stigmatised at the workplace as a thief for example, and he or she seeks to do nothing else other than having his or her name vindicated of that stigmatisation, there is everything wrong with the judicial system when the court and the legislation tell him or her that the employer can dismiss him or her and all he or she is entitled to is a seven days' notice alternatively pay in lieu of notice before termination of his or her employment. This article submits that the ELRA should not be applied in piecemeal fashion to grant probationary employees only the right to receive seven days' notice but not to be heard. Employers should be driven away from the judgment seat, and courts should assume this seat, especially where the employer attempts to deprive his probationary employee the right to be heard before termination.

CONCLUSION AND RECOMMENDATION

It is apparent from the foregoing analysis that Tanzanian employment law is still developing but perhaps in reverse. From the wordings of Sections 35 and 99(3) of the ELRA,[xc] it is clear that probationary employees have fewer rights and protection when compared to permanent employees in relations to the right to be heard prior to termination of employment. The said provisions not only remain harsh in their imposition by employers exercising their superior

economic strength to dismiss but even harsher in their application by the Employment and Labour Relations Court acquiescing to the same. This is evident from court judgments discussed above where probationary employees seeking relief from the court for unfair termination have been turned away. The court remains resolute that in the event that the employer is not satisfied with the performance of an employee on probation, the employer retains a free hand to terminate his or her services without due process. Even worse is that the *status quo* still continues, with little or no hope for radical improvements, so necessary for a changing society and a developing economy. In fact, the absence of an employers' willingness to adopt well-known rules of natural justice along with the norm of fairness co-exists with the lack of Employment and Labour Relations Court's will to enforce the same. This acute unfairness against probationary employees is a practice that the law should not tolerate.

Also, from the analysis of Article 22(1) of the Constitution it seems safe to conclude that "every person" is determined with reference to being involved in an employment relationship.[xci] As a result, "every person" participating in an employment relationship is entitled to fair labour practices irrespective of the contractual condition or the nature of the contract. For this reason, employment contracts (conditional or unconditional) or terms of an employment contract that are contrary to the spirit of the Constitution or limit unreasonably fundamental rights guaranteed in the Constitution should be set aside by the courts. Therefore, decisions arrived at by courts in analysing and interpreting the provisions of ELRA in question must be sound and guided by the principles of fairness and the Constitution.

As shown above, Article 9 (e) and (f) of the Constitution of the United Republic of Tanzania recognises international law as one of the sources of law in Tanzania.[xcii] For that reason, Convention No.158 forms an important and influential point of reference in the interpretation and application of the provisions of ELRA in question.[xciii] The Convention envisages that an employee can only be fairly dismissed if the employer follows a fair procedure in doing so. This study emphasises strongly that although an employee may be employed on probation, and that it is within the right and prerogative of an employer to hire employees, it does not mean that employers can simply terminate employment without following due process. Therefore, the amendment will certainly bring the provisions of the ELRA in line with the international law discussed above.

This study recommends that the Tanzanian legislature should seriously consider amending the condemned provisions of Section 35 of the ELRA,[xciv] in order to reflect and protect a probationary employee's right to fair labour practices guaranteed by the Constitution, in particular and the right to be heard prior to termination of probationary employees. In the same way, this study accentuates that the ELRA should use Article 22 (1) of the Constitution as a starting point of reference in interpreting the condemned provisions of the ELRA, that is Sections 35 of ELRA.[xcv]

Section 35 of the ELRA,[xcvi] requires that only employees with not less than six months can be protected by all provision of the Act which concerns termination of employment contract. This means that employees who are employed with a less than six months' probation period engagement are not protected by the Act.[xcvii] Amendment should be made so that a minimum period of probation period should not be set instead a maximum period but should also consider the minimum probation period that is below six months. This will give chance of protection of probationary employees engaged in less than six months period, a period mostly given to employees with job positions that require little skills and expertise.

There is need to incorporate provisions, which protects probationary employees in Tanzania into the ELRA so as to give 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 ELRA which allows abandoning citing the Code of Good Practice provisions when reading the ELRA.[xcviii] The provision should provide expressly that when reading the ELRA should be read together with the provision of the Code of Good Practice.[xcix]

ENDNOTES

[i] Act No. 66 of 1995.
[ii] www.ioe-emp.org accessed on 29/07/2022.
[iii] Ibid.
[iv] By the end of June 2018, the ILO had adopted 189 Conventions, 205 Recommendation and 6 Protocols covering a broad range of work issues.
[v] Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection Against Unjustified Dismissal* (1995) par 76. See also ILO "Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment from https://www.ilo.org/wcmsp5/goups/public/@ed_norm@normes/documents/meetingdocument/wcms pdf accessed on 20/07/2022.
[vi] Article 4 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment.

[vii] Article 7 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment (1982).
[viii] Article 2 of the ILO Employment Relations Recommendation 198 of 2006.
[ix] Article 9 of the ILO Employment Relations Recommendation 198 of 2006.
[x] Principle I & II of the Philadelphia Declaration, 1944
[xi] Ibid.
[xii] Principle III of the Philadelphia Declaration, 1944
[xiii] Ibid.
[xiv] Ibid.
[xv] The Preamble of the Universal Declaration of Human Rights (UDHR), 1948
[xvi] Article 1 & 2 of the Universal Declaration of Human Rights (UDHR), 1948
[xvii] Article 23 of the Universal Declaration of Human Rights (UHDR), 1948.
[xviii] Article 7 of the Universal Declaration of Human Rights (UDHR), 1948.
[xix] Ibid.
[xx]The International Labour Organization having considered the declaration of Philadelphia and the discriminations prohibited by the Universal Declaration of Human Rights, convened at Geneva by the ILO Governing Body in 1958, passed a Convention on Discrimination (Employment and Occupation.
[xxi]Article 1 of the Discrimination (Employment and Occupation) Convention, 1958.
[xxii] The Discrimination (Employment and Occupation) Convention of 1958 has been ratified by Tanzania on 26th February, 2002 and by South Africa on 13thMarch, 1997.
[xxiii] Article 2 of the Discrimination (Employment and Occupation) Convention, 1958.
[xxiv] Article 3 of the Discrimination (Employment and Occupation) Convention, 1958.
[xxv] Article 4 of the Discrimination (Employment and Occupation) Convention, 1958.
[xxvi] Article 5 of the Discrimination (Employment and Occupation) Convention, 1958.
[xxvii] The Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxviii] Article 13(1) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxix] Article 13(2), (4) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxx] Article 13(5) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxi] Article 9(a), (e),(f) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxii] Article 22 of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxiii] Article 23(2) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxiv] Article 12 (2) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxv] Article 13(4) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxvi] Article 29 (5) of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxvii] Article 30 of the Constitution of the United Republic of Tanzania, of 1977, [Cap 2, Laws of Tanzania]
[xxxviii] The Employment and Labour Relations Act, N0. 6 of 2004, [Cap 366, R.E 2019]
[xxxix] The Labour Institutions Act, No 7 of 2004, [R.E 2019]
[xl] Act No 8 of 2002, [Cap 298 R.E 2002]
[xli] The legal framework governing the rights of employees in Tanzania differentiate between those employees who are employed under the Private sectors with those who works in the Public sector.
[xlii] The Employment and Labour Relations Act, N0. 6 of 2004, [Cap 366, R.E 2019]
[xliii] Section 35 of the Employment and Labour Relations Act, N0. 6 of 2004, [Cap 366, R.E 2019]
[xliv] G.N. 42 of 2007.
[xlv] The Employment and Labour Relations Act, [Cap 366, R.E 2019]
[xlvi] Rule 10 (8) of the Employment and Labour Relations, (Code of Good Practice), Rules, G.N No. 42 of 2007.
[xlvii] Rule 10(2) of Employment and Labour Relations (Code of Good Practice), G.N No. 42 of 2007.
[xlviii] Ibid.
[xlix] Rule 10(2) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[l] Rule 10(4) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[li] Rule 10(5) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lii] Ibid.
[liii] Ibid.
[liv] Rule 10(5) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lv] Rule 10(6),(a) and (b) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lvi] Ibid.

[lvii] Ibid.
[lviii] Ibid.
[lix] Rule 10(7) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lx] Rule 10(8),(a) (b) and (c) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lxi] Rule 10(9) of the Employment and Labour Relations (code of Good Practice), G.N No. 42 of 2007.
[lxii] Section 12 of the Labour Institutions Act, [Cap 300, R.E 2019]
[lxiii] Section 50 and 57 of the Labour Institutions Act, [Cap 300, R.E 2019]
[lxiv] The Judge of the High Court of Tanzania.
[lxv] Revision No. 890 of 2019, HCLD at Dar es Salaam.
[lxvi] The Late Judge of the High Court of Tanzania.
[lxvii] Revision No. 40 of 2012, HCLD at Mwanza.
[lxviii] Rule 10(7) and (9) of G.N. No 42 of 2007.
[lxix] Ibid.
[lxx] Revision No. 347 of 2013, HCLD at Dar es Salaam.
[lxxi] [Cap 366, R.E 2019]
[lxxii] This was cited in the Case of Mtenga vs University of Dar Salaam, (1971) HCD 247.
[lxxiii] Civil Appeal No 72 of 2002.
[lxxiv] [Cap 366, R.E 2019]
[lxxv] Revision No. 09 of 2013, at HCLD at Bukoba.
[lxxvi] Revision No 208 of 2014, at HCLD at Dar es Salaam.
[lxxvii] [Cap 366, R.E 2019]
[lxxviii] Employment and Labour Relations Act, (Code of Good Practice), G.N. No. 42 of 2007.
[lxxix] The Constitution of the United Republic of Tanzania of 1977[Cap 2, Laws of Tanzania]
[lxxx] 2003 (2) BCLR 154 (CC) par 33–34
[lxxxi] The Constitution of the Republic of South Africa of 1996.
[lxxxii] The Constitution of the United Republic of Tanzania, [Cap 2, Laws of Tanzania]
[lxxxiii] The Constitution of the United Republic of Tanzania, [Cap 2, Laws of Tanzania]
[lxxxiv] Article 13(6),(a) of Constitution of the United of Republic of Tanzania
[lxxxv] The other one is *Nemo judex in causa sua* which means no one should be made a judge in his own cause or the rule against bias. The rule of natural justice provides an opportunity for persons whose rights or interests may be affected by decisions to deny the allegations put forward and provide arguments in their favour, to demonstrate and give reasons why proposed d should not be taken, to call evidence to rebut allegations or claims, to explain allegations or present an innocent explanation, and/ or to provide mitigating circumstances.

[lxxxvii] Meijers "Case Law and Codified Systems of Private Law" 1950 33 *Journal of Comparative Legislation and International Law* 8.
[lxxxviii] Article 13 (1) of the Constitution of the United Republic of Tanzania, [Cap 2, Laws of Tanzania]
[lxxxix] Article 13(1) and (2) of the Constitution of the United Republic of Tanzania, [Cap 2, Laws of Tanzania]
[xc] Act No. 6 of 2004, [Cap 366, R.E 2019]
[xci] The Constitution of the United Republic of Tanzania of 1977, [Cap 2, Laws of Tanzania]
[xcii] Ibid.
[xciii] ILO "Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment from https://www.ilo.org/wcmsp5/goups/public/@ed_norm@normes/documents/meetingdocument/wcms/pdf accessed on 20/07/2022.
[xciv] Act No. 6 of 2004, [Cap 366, R.E 2019]
[xcv] Ibid.
[xcvi] Ibid.
[xcvii] Ibid.
[xcviii] Ibid.
[xcix] G.N. No. 42 of 2007.