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Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends

ABSTRACT

Probation is a trial period to test a new employee for a particular position. It is commonplace for many employers to stipulate that the contract begins with probation based on a mutual agreement with the employee. During the probationary period, more flexible standards are given to review unfair termination. Notwithstanding, a degree of protection insofar as it safeguards employees from the risk of unfair termination shall be granted. Article 37 in the Iraqi Labour Code No. 37 of 2015 permits the employer to test the employee for a maximum of three months if the latter has no professional certificate. The same article empowers the employer to terminate the contract if the employee has failed in the suitability test without setting any standards for such a test. In reviewing cases arising on the basis of unfair termination claims, the judiciary in some developed countries has come up with basic standards of the suitability test. This paper, therefore, attempts to examine Article 37 in the Iraqi Labour Code in light of the new judiciary trends and finally suggests redrafting the mentioned article to be more compatible with the rights of contractual parties.

Keywords: probation, suitability test, failure, unfair termination, judiciary trends, Iraq

ABSZTRAKT

A próbaidő célja, hogy az új alkalmazottakat a betölteni kívánt pozícióban alávessék egy teszt időszaknak. A próbaidő kikötésének általános gyakorlata a munkáltató és a munkavállaló közötti kölcsönös megállapodást feltételezi. A próbaidő alatti előírások rugalmassága lehetőséget biztosít a tisztességtelen felmondásra. A jogalkotásnak bizonyos fokú védelmet kell biztosítani, amellyel megvédi a munkavállalókat a tisztességtelen felmondás kockázatától. Az 2015. évi iraki munkaügyi törvénykönyv 37. cikke megengedi a munkáltatónak, hogy legfeljebb három hónap próbaidőt kössön ki, ha a munkavállaló nem rendelkezik szakmai képesítéssel. Ugyanez a cikk felhatalmazza a munkáltatót arra, hogy felmondja a szerződést, ha a munkavállaló sikertelen volt a megfelelőségi tesztben; teszi ezt anélkül, hogy az ilyen tesztre előírásokat fogalmazna meg. A tisztességtelen felmondási okok felülvizsgálata körében a fejlett országok bírósági gyakorlata kimunkálta a megfelelőségi teszt alapvető előírásait. A cikk kísérletet tesz arra, hogy megvizsgálja az iraki munka törvénykönyv 37. cikkét az ítélkezési gyakorlat fényében, és javaslatot tegyen az említett cikk újrafogalmazására, annak érdekében, hogy az összeegyeztethetőbbé váljon a szerződő felek jogaival.

Kulcsszavak: próbaidő, megfelelőségi teszt, tévedés, tisztességtelen felmondás, ítélkezési tendenciák, Irak

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An employment contract can be terminated in ordinary circumstances where both of the parties, the employer and the employee, are entitled to end the contract on the basis of provisions provided by the law. Nevertheless, a single party to the contract may unilaterally terminate the contract in a way which causes damage to another party. The possibility of the latter situation is more expected from employers when they initiate the termination of the employment contract. This assumption is due to the unbalanced position of the contractual parties that makes the termination of the contract to be more expected from the side of the employer. The unbalanced position comes from the fact that employers in the employment contract have more and better alternatives than workers. Particularly in case of termination, an employer is always being able to replace an employee, while the latter whose contract has been terminated may have difficulty finding a new job. For this reason, workers are mostly victims in the case of unfair termination at the initiative of the employer, and thereby they must be protected by the law from the arbitrariness of employers. In order to reduce the number of such situations, labour laws laid down a significant number of strict rules in which the power of employers to terminate the contract should be balanced. Such rules and regulations always protect employees from not being fired unfairly at work.

Even though the strict rules to protect employees are justified by a variety of reasons, they may negatively impact the managerial prerogatives belonging to the employer in an enterprise, especially when the employer seeks to hire expert workers that have qualified skills for a job. The ability of the employer to do so is not absolute after entering into the contract, and is rather restricted by a spectrum of legal rules concentrating on the right of workers. The strict rules, thus, minimize the ability of the employer to shortlist suitable employees after the contract comes into full effect due to strict termination rules applied to the contract.

Owing to the fact that the stringent protective rules operated when the contract entered into full effect minimizes the employer's prerogatives to fire ineligible workers, parties to an employment contract can stipulate a probationary period to test employees. This period begins with the commencement of the employment relationship up to three or six months pursuant to various labour laws. The aim, clearly, is to provide a chance for the contractual parties to withdraw themselves from the contract without being subject to strict rules. In particular, the employer during the probationary period is more empowered to practice their managerial prerogatives to test employees and get them fired if they are not fit without severe barriers, as it is after the expiration of the probation.

1. The importance and relevance of this study

Since the purpose of the probationary period is to provide more leeway to the employer in dealing with, evaluating and terminating workers before being subject to stringent rules, the stipulation of this period in the employment contracts, nowadays, has been increased by the firms. With an increase in the number of probationary employees, the importance of this issue arises that requires a degree of protection

for such employees. The scope of protective rules, therefore, shall be expanded to encompass probationary employees as a vulnerable group. Simultaneously, the level of protection granted to probationary employees must be lower than the level granted to employees after the expiration of this period. The actual need with regards to this topic, then, is a balance between the right of a probationary employee to not be arbitrarily terminated from their job on one hand, and on the other hand the right of the employer to not be restricted by stringent rules during this period.

1.1. Questions of this study

The questions that come to mind in this study are frequently related to the termination of employment. Here are some of those questions: which rules and regulations shall apply to terminate a probationary employee? Is there possibility for unfair termination during the probationary period? To what extent must employees be protected by statutory law during the probationary period? Are there any limitations on employer's managerial prerogatives in cases of termination? What are the standards to test employee's suitability?

From the point of view that the probationary period mostly aims to serve the employer, termination rules during probationary periods must be more flexible compared to what shall be enforceable after the expiration of that period. The flexible rules during probationary period are necessary to ease the process of monitoring employees' performance and to assess their capabilities by the employer. This means that stringent termination rules are not compatible with the objective points that the probationary period aims to achieve. In other words, the probation period is often used as grounds to realize whether the employee should be settled in the job or their employment be terminated due to the weak performance. From this perspective, the probationary period may serve the employer as a last chance to terminate the worker before finalizing the contract in which the employer is restricted by a spectrum of legal procedures. The discretion of employers is quite broad, nevertheless, there must be guarantees for employees to not be terminated arbitrarily during probationary periods.

1.2. Methodology

A comparative analysis approach is used in this study. To analyze the outlook of Iraqi labour law in regards to the probationary period, two aspects have been considered: international standards on this matter that can be derived from International Labour Organization (ILO) treaties, and the new judiciary trends. An examination of ILO standards is extremely significant since it is the most relevant international body to set international standards on decent work and termination rules. The examination of ILO standards, thereby, aims to investigate whether there are international standards that member states have to abide by, including Iraq to regulate the provisions of terminating probationary employees.

The second aspect is the new judiciary trends under which the provision of Iraqi labour law to deal with the probationary period and the way to terminate probationary employees can be analyzed in a comparative way. For that purpose, the new Canadian and the UK judiciary trends have been selected to reach a conclusion on that matter. The reason for this selection refers to the fact that Canada and the UK are the two countries where the common law system permits relevant courts to establish new trends, dealing with contemporary issues. As regards the unfair termination review during the probationary period, the UK and Canadian courts have derived notable results and conclusions that seem to be unique in that field compared to the other jurisdictions. Since the Iraqi judiciary attitude is not a good example to deal with this subject, the UK and Canadian judiciary trends can be referred to as good examples for redrafting probationary period provisions in Iraqi labour law.

2. Probationary period provisions at international level (ILO)

The International Labour Organization (ILO) belonging to the U.N. is the only international agency that works with the governments, employers and employees' representatives together in 187 states, to develop labour standards and to establish decent work for all employees throughout the world.¹ The basic aim of the ILO is to ensure employees' right at work, and thereby to enhance legal and social protections that guarantee workers not be abused by employers.² Since the establishment of the ILO in 1919, it has become a special agency of the U.N. to conclude many international conventions on the rights of workers, especially, the right of workers to retain their jobs and not being terminated without fair procedures.

The most relevant conventions that have been adopted in this regard are the Termination of Employment Convention No. 158, and the Termination of Employment Recommendation No. 166. It is worth mentioning that convention No. 158 adopted in 1982 provides strict rules with regards to terminating an employment contract at the initiative of the employer. Particularly, the convention requires a valid reason in connection with the employee's capacity or behavior to terminate the contract, otherwise, the termination shall be deemed null and void.³ Such rules set in the convention may inhibit the possibilities of unfair termination to a reasonable extent. Nevertheless, the convention provides nothing to protect employees whose contract begins with a probationary period. It rather empowers member states to exclude probationary employees from protections granted to regular employees and to have their own regulations for such employees. In Article 2 Section 2, the convention states: "A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

¹ Attard, David Joseph (ed.): *The IMLI Treatise on Global Ocean Governance: Volume II: UN Specialized Agencies and Global Ocean Governance*. Oxford University Press, Oxford, 2018, 102.

² Summers, Clyde W.: The contract of employment and the rights of individual employees: Fair representation and employment at will. *Fordham Law Review*, 1984/6, 1082.

³ International Labour Organization (ILO), Convention Concerning Termination of Employment at the Initiative of the Employer, 22 June 1982, C158, Art. 4. <https://www.refworld.org/docid/5c6fc0e74.html> (10. 10. 2019.).

- a) workers engaged under a contract of employment for a specified period of time or a specified task;
- b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- c) workers engaged on a casual basis for a short period.”⁴

It is noted that the above article entitles member states to exclude some categories of employees from partial or entire coverage by protective provisions in this convention, including probationary employees. This means the strict provisions, such as having a justification for termination, may not be applied to such employees. The convention, thus, does not bind states with any regulations set forth in this convention with respect to probationary employees. Meanwhile, the word “may” as used in the above-cited article indicates that there is no commitment on the part of member states to exclude such employees from protective provisions.⁵ Rather, it provides them a range of freedom to deal with this issue.

The reason beyond this international attitude, perhaps, mainly refers to the debate that took place between member states at the time of the ratification process about the need for flexibility in the labour market.⁶ Furthermore, the need for inherent flexibility in basic rules about severance allowance is another reason for such an international attitude.⁷ Since severance allowance essentially depends on the different social policies of different states, a unified international standard cannot be provided for different forms of employment.⁸ The ILO standards thus objectively reflect a balance between the worker protections and the need to ensure flexibility in the labour market, as explicitly provided for in Article 2.

2.1. *Employment termination during probationary period in Iraqi labour law*

As indicated earlier, the international convention related to termination of employment contracts does not compel states to commit to any international standard for probationary employees. States, consequently, are free to deal with this subject based on their own rules and standards. In doing so, most states do not require stringent rules to terminate an employee who has been employed according to a contract which includes a probation clause.⁹ The stringent rules can be seen in the statutory laws for regular employees, such as, strict justification of termination, giving notice,

⁴ *Ibid.*, Art. 2, Sec. 2.

⁵ Grobler, Joaquin Thomas: *International perspectives on the termination of employment during the probation period*. Master’s thesis, University of Pretoria, 2018, https://repository.up.ac.za/bitstream/handle/2263/70104/Grobler_International_2018.pdf?sequence=1&isAllowed=y (10. 10. 2019.).

⁶ Vaughan-Whitehead, Daniel: *The European Social Model in Crisis: Is Europe Losing Its Soul?* Edward Elgar, Cheltenham, 2015, 136.

⁷ Xie, Zengyi: *Labor law in China: Progress and challenges*. Springer, Berlin–Heidelberg, 2015, 101.

⁸ *Ibid.*

⁹ *Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy*. OECD Publishing, Paris, 2018. (doi: 10.1787/9789264308817-en)

and severance payment.¹⁰ Such rules, which mostly do not exist for probationary employees, would be a guarantee for regular workers, especially when the case of unfair dismissal arises from the termination. This fact makes the possibility of claiming unfair termination by probationary employees too low. Similarly to many jurisdictions, Iraqi labour law does not require either strict justifications or severance payment to terminate an employee during probation periods. Rather, it requires giving notice seven days prior to termination.¹¹ Iraqi Labour Law No. 37 of 2015 provides only one article including two sections on probationary periods. Sections 2 and 3 in Article 37 are devoted to dealing with probationary employees that can be analyzed as follow.

2.2. Scope of probationary period

The probationary period is not a mandatory requirement under the law; meanwhile, it is the right of the employer to stipulate a trial period.¹² However, the employer's right to set such a period is not absolute. Section 2 provides that "The contract of employment can be started with the probationary period upon an agreement between parties if the worker does not possess any professional certificate that proves his/her qualification or capabilities for the job entrusted to them. The probationary period must not exceed 3 months from the date of commencement of the job, and it is not permissible to put the worker under a probationary period more than one time with the same employer."¹³

It is noted that Iraqi labour law has restricted the right of employers to stipulate the probationary period for testing workers in terms of time frame and the type of employees who can be put under a probationary period. Accordingly, the time frame of probation shall not exceed three months to test an employee. An extension for the determined time is not allowed under any circumstances for the same employer who previously tested an employee for the three months agreed in the contract. In addition, the time period for the purpose of probation shall be mentioned in a written contract, the employer otherwise cannot benefit from the probationary period. Considering the position of employees in the employment contract, particularly in case of termination, the logic of Iraqi lawmakers related to the time frame of probationary period with the stipulation that it must be written in the contract being quite strong. This is because the probationary period is not assigned to benefit employees, it rather serves employers in which they can expel unskilled or unqualified employees for a job.¹⁴ Therefore, this power of employers should be restricted as to not be used in an abusive way against employees.

¹⁰ Philip M. Berkowitz–Thomas Miller-Bonanni: *International Labor and Employment Law: A Partial Guide*. American Bar Association, Chicago-Illinois, 2016, 161.

¹¹ Giving notice in Iraqi labour law articulated in Art. 37 Sec. 3 that will be discussed later.

¹² Kasassbeh, Firas Y.: Compliance with Philosophy of Exemption from Notification at Termination of Contract: Study in Light of Jordanian Labour Law. *Arab Law Quarterly*, 2012/1, 1–45.

¹³ Iraqi Labour Code No. (37) of 2015, Art. 37 Sec. 2.

¹⁴ Ichino, Andrea–Riphahn, Regina T.: The effect of employment protection on worker effort: Absenteeism during and after probation. *Journal of the European Economic Association*, 2005/1, 134.

On the other side, the probationary period can merely be stipulated in the contract if the worker does not possess any professional certificate. The articulation of the provided section above basically means that with having such a certificate there is no justification for a probationary period. This is the most critical point to discuss in this regard, which may not exist in any other labour codes. The logic of Iraqi labour law is absolutely inconsistent with the basic aim of the presence of a probationary period. Since the stated aim of the probationary period is to ensure the worker's capability to undertake a particular job or to meet the recruitment conditions,¹⁵ it cannot be measured only by the presence of a certificate. The practice for a period of time, then, must be taken into consideration as a sole measurement for evaluating worker's qualifications regardless of the certificate. An educated person with a specific certificate still can fail during the probationary period due to either a bad performance or not being successful in general for any other number of reasons. By contrast, an employee who did not have a chance to gain an academic level of education may fulfill the required conditions of a job, and convince the employer because of having outstanding experience from a similar previous job. Further flaws in the provided section can also be seen because the notion of a professional certificate is somewhat broad and arguable in nature, while the section does not provide any characteristics of such a certificate. Moreover, it does not determine which level of certificate is required, and from which agencies –public or private- the certificate should be issued. For how long does the validity of certificate last and thereby cannot be rejected due to expiry issues. All of those questions remain such controversial issues, this section, otherwise, can be interpreted that employee's professional certificate at any level and from any kind of agencies will inhibit the employer from stipulating a probation period in the contract. Those reasonable questions inspire us to believe that it was better for Iraqi lawmakers to not make such a connection between workers' capabilities and certificates, especially seeing that the requirements of jobs nowadays depend on private circumstances. No standard, hence, is better than testing an employee within a special job vested to them regardless of their possessing a certificate.¹⁶

2.3. Standards of termination during probationary period

The right of the employer to terminate employment during a probationary period is also not absolute according to the Iraqi Labour Code. Section 3 Article 37 states "The employer may terminate the contract within the probationary period if it appears that the worker is not qualified for performing the job, the employer in this case must give a notice to the worker at least seven days before the date of termination."

Based on the above provision, the employer has no absolute right to terminate the contract of probationary employees. But, this right is limited for a reason that must be

¹⁵ Ichino–Riphahn: *op. cit.*, 123.

¹⁶ Smith, Jessica L.–Lypson, Monica–Silverberg, Mark–Weizberg, Moshe–Murano, Tiffany–Lukela, Michael–Santen, Sally A.: Defining uniform processes for remediation, probation and termination in residency training. *Western Journal of Emergency Medicine*, 2017/1, 110.

given for termination and the reason must be connected with the worker's capacity which is not quite enough for the job.¹⁷ The possibilities for unfair termination then exist in cases where employers abuse their right to terminate probationary employees' contracts. An employee, whose contract has been terminated, can allege unfair termination and bring a lawsuit to the court if the employer has no reason or if the reason is not related to the bad performance of the job.¹⁸ Another possibility for unfair termination cases refers to a situation in which the worker may deny the employer's allegation of the worker's bad performance, meaning that the worker refuses the employer's evaluation, thinking that they abuse the right to terminate the contract. This is what makes the case complicated and demands more investigation to evaluate the reason of termination in the court. In order to address this issue, many significant questions arise that must be answered by the court. The basic question is whether the employer has an absolute right to evaluate the worker's performance and capacity for the job. If the employer has such a right, that means their power to terminate the contract is not subject to the court's supervision, and then any allegation for unfair termination by the worker will be dismissed. The right of employers to evaluate workers' performance at work shall not be absolute; otherwise, they may abuse probationary workers and terminate their contract for any reason as the result of an allegation of bad performance. Hence, the right of an absolute evaluation of employers is completely contradicted with the central notion of labour law that concentrates on providing enough protection to workers.¹⁹

Since the right of employers is not absolute to evaluate the worker's capacity for a job, there must be standards to rely on for evaluation purposes. Another question which arises now is based on which standards does the employer evaluate the workers' performance and their ability to do the job. Does the law provide any standards for such evaluation? This question remains unanswered in the Iraqi Labour Code because it does not include any standards for the evaluation process during the probationary period. Notwithstanding the fact that termination shall occur for a reason related to worker's performance at work, Section 3 adopts a lenient approach towards the standards of the evaluation process to determine whether the worker is qualified for the job during the probationary period. As long as the standards for evaluating recruitment conditions are not set forth in the law, it remains in the hands of the employer. This is what causes fear of unfair termination of employment during probationary periods without the ability of workers to win the case. The employer may easily win the case whenever they allege that the worker has failed to meet the recruitment conditions during the probation period, since there is no standard to assess such conditions.

¹⁷ Ewing, Bradley T.–North, Charles M.–Taylor, Back A.: The employment effects of a "good cause" discharge standard in Montana. *Industrial and Labor Relations Review*, 2005/1, 17–33.

¹⁸ Summers, C. W.: Individual protection against unjust dismissal: Time for a statute. *Virginia Law Review*, 1976/3, 481–532.

¹⁹ Bonvin, Jean-Michel–Farvaque, Nicolas: Promoting Capability for Work: The Role of Local Actors. In: Deneulin, Séverine–Nebel, Mathias–Sagovsky, Nicholas (eds.): *Transforming Unjust Structures: The Capability Approach*. Springer, Dordrecht, 2006, 121–142. (doi: 10.1007/1-4020-4432-1_7)

With regards to “recruitment conditions” during the probation period, the regulations also do not have clear standards to be bound for employers when they decide that the employee does not meet recruitment conditions. This is the question that always could be asked during the probation period: what makes the worker fail in meeting recruitment conditions or enough capability for the job? Since a direct answer is not provided in the law, the court must come out with standards and provisions during the examination of the facts in the case.

2.4. Giving notification during probationary period

Notification is a formal declaration given to another party explaining that you plan to repeal the contract.²⁰ The purpose of giving notice is to prevent employees from being shocked or confused about losing their jobs suddenly, and to give the chance to search for a new job before being unemployed.²¹ In usual circumstances, employers must provide employees notice for terminating the contract based on what is stated in the contract, and shall not be less than the legal minimum notice period, or otherwise based on the legal minimum notice period in national law. The Iraqi Labour Code compels employers to give notice of at least 1 month prior to the date of termination, and if they do not so, they must pay an indemnity to the employee whose contract has been terminated without notice.²²

The previous rule applies to a contract that is in full effect without a probationary period. For employees under a probationary period, however, different provisions shall apply for giving notice. Generally speaking, there are different tendencies with regards to whether the employer needs to give a notice period to the worker during the probationary period. Some jurisdictions do not require giving notice to terminate the contract during the probationary period at all, such as Italy, the Netherlands,²³ and Jordan.²⁴ In some other jurisdictions, giving a notice period is restricted, such as the UK where the law does not give the right to a minimum notice period to employees who have been serving an employer for less than 1 month.²⁵ In Iraq, giving notice was not required during the probation according to the previous Iraqi Labour Code No. 71 of 1987,²⁶ meaning that employers could terminate the contract, in which the probation is stipulated, without giving notice. But, the lawmaker’s position

²⁰ Tonin, Mirco: Employment protection legislation in central and east European countries. *South-East Europe Review for Labour and Social Affairs*, 2009/4, 477–491.

²¹ Eger, Thomas: Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA. *International Review of Law and Economics*, 2003/4, 381–403.

²² Iraqi Labour Code No. 37 of 2015, Art. 44.

²³ *Termination of employment relationships: Legal situation in the Member States of the European Union*. European Commission Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, 2006, 120. <https://ec.europa.eu/social/BlobServlet?docId=4623&langId=en> (10. 10. 2019.).

²⁴ Jordanian Labour Code No. 8 of 1996, Art. 35.

²⁵ Millington, Philip–Holland, James–Burnett, Stuart: *Employment Law 2015*. Oxford University Press, Oxford, 2015, 209.

²⁶ This code still remained in force in the north of Iraq, where the legislative body in the Kurdistan Region has never issued an enforcement order to replace this law by the new Iraqi Labour Code.

on this issue has been switched in the current Iraqi Labour Code and attributed to the necessity of a notice period even during probation. The new Iraqi Labour Code requires a notice period during the probation at least (7) seven days before the date of termination.²⁷

The different tendencies of lawmakers in various countries to consider or not consider notification during probation perhaps points to the diversity of lawmakers' outlooks with regards to the nature of the contract involved during probationary periods. One point of view may argue that the purpose of a notice period is to protect employees from being suddenly unemployed; in such a situation they may be disappointed and lose the chance to search for a new job prior to being fired from the previous one.²⁸ Such a purpose does not exist during the probation, since the employee realizes, in advance, that the contract begins with the trial period and it is not in full effect, but rather it depends on the negative or positive outcome of the trial period.²⁹ The employer, thus, will not be surprised by terminating the contract whenever they failed in the process of testing an employee's capacity to do a job.³⁰ Though this presumption can help to explain the logic of lawmakers who pretend giving notice of the trial period is unnecessary, this argument is still controversial and problematic. This is simply because the employee often prepares themselves to do what is expected, and assumes they successfully pass through the trial period. For that reason, termination of the contract in the probationary period, of course, brings a surprise or unexpected outcome to the employee. On the other hand, one may argue that the major objective point of notification is to give the worker a chance to search for a new job. And this objective point is still meaningful for an employee that expects to be terminated from the job due to the negative outcome of the probationary period.

Another argumentation arises to explain the logic of lawmakers that deprive employees of being notified in case of termination during the probationary period. This argumentation depends on a different assumption, alleging that lawmakers intended to deny employees the right to be notified as long as the termination resulted from a deficiency or the failure of employees during the trial period.³¹ On the basis of this argumentation, the failure of the employee to prove expected capabilities is a good presumption that the employer did not abuse their right to terminate the contract, and the possibility of arbitrary termination does not exist.³² Therefore, an employee who has failed during the trial period deserves to be dismissed and reap no benefits during the probationary period.

An impartial and neutral analysis of this assumption may also lead to the belief that this argumentation is not quite evident. There are two counter argument that may defeat the logic of the above presumption. The first counter-argumentation

²⁷ Iraqi Labour Code No. 37 of 2015, Art. 37 Sec. 3.

²⁸ Cazes, Sandrine–Nesporova, Alena: *Employment protection legislation (EPL) and its effects on labour market performance*. International Labour Office, High-Level Tripartite Conference on Social Dialogue Malta, Valetta, 28 February–1 March 2003, 2003. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.544.8906&rep=rep1&type=pdf> (10. 10. 2019.).

²⁹ Kasassbeh: *op. cit.*

³⁰ *Ibid.*

³¹ Karam, Azza: *Labour Law*. Amman, Dar al-Thaqafa, 1998, 75, 76.

³² *Ibid.*

relies on the fact that the lawmakers, who deprive employees of being notified, did not separate the case of terminating the contract due to the failure of the worker in the probation from a case in which the contract was arbitrarily terminated by the employer.³³ The second counter-argument depends on the non-relationship between giving notice and the validity of dismissal.³⁴ Neither the validity of dismissal nor the failure or success of the worker related to giving notice. To support this, the law requires a notice period of one month before the date of termination for the regular contracts in which the probationary period is not stipulated without considering the legality of termination. Such a notice period for termination is required even in the case that the validity of the dismissal has been proven.³⁵

With the above in mind, we can understand the logic of the Iraqi Labour Code with regards to Article 37 Section 3 which stipulates a notice period of at least seven days before the date of termination during the trial period, while the same article critically analyzed from the perspective of the scope and standards of termination during a probationary period as discussed before.

3. New trends in the judiciary: standards and provisions

Case law or judiciary trends in general have gradually developed the way to treat employees during the probationary period.³⁶ The most significant questions arose in cases of termination during the trial period and have been answered by the judiciary in better way than what can be found in the statutory laws themselves. Unfortunately, the Iraqi judicial system lacks such decent trends in which employees still enjoy protective systems during the trial period. The lack of protective standards in Iraqi courts with respect to the position of employees during a trial period is further combined with employers' capacity to terminate the probationary contract quite easily. For such a reason, the trend followed by the Iraqi judiciary is not an adequate example for the purpose of finding a suitable course in which a balance is achieved between the contractual parties. In such a balance, the right of the employee to not be abused and the right of the employer to be able to test the employee and terminate the contract due to the inefficiency of the latter shall be considered.

Since the Iraqi courts do not provide us with a convincing trend to follow in answering questions arising in cases of termination of a contract during probationary periods, we can search for other judicial trends in different countries. During a review of decisions held by the various courts, we can definitely believe that our questions arose during the examination of Iraqi Labour Code have been answered soon by the courts outside Iraq in the last three or four decades. Some of the other questions, nowadays, also can be solved by the new judicial trends, as we see in the following points.

³³ Kasassbeh: *op. cit.*, 45.

³⁴ *Ibid.*

³⁵ Jakhelln, Henning–Moen, Kristine Fremstad–Faret, Maarten Brandsnes: *Labour Law in Norway*. Kluwer Law International, The Netherlands, 2017.

³⁶ Antoine, Rose-Marie Belle: *Termination of Employment Digest*. International Labour Office, Geneva, 2000, 191–192.

3.1. Employer's power to terminate probationary contract is not absolute and unlimited

Cases dealing with the legality of employment termination during probationary period are numerous. In finding a sensible answer to that question asks whether the implied notion of the probationary period gives an absolute power to the employer in terminating the contract during probation, it is interesting to point out the judgment of the Spanish Constitutional Court of 16 October 1984 and 16 September 1988. The Constitutional Court recognized that: “[T]he reasons for terminating the contract of employment during the probationary period will be of little importance in so far as they are confined to the freedom recognized by the Legal Order, which obviously does not lead to unconstitutional results.”³⁷

According to its judgment, the court asserts the limitation of an employer's power to terminate the probationary employee in a way that cannot be approved for reasons irrelevant to the work, it rather related to violating a basic right.³⁸ This case, indeed, confirms that the possibilities for unfair termination during probationary periods still exist, and thereby the worker shall be able to request immediate reinstatement in such a case. More specifically, the termination of a probationary employee shall be deemed null and unfair if it is proven that it has occurred on the basis of discriminatory reasons banned in the constitution or prohibited by law such as race, religion, age, social status, sex, or political belief. The same rule shall apply for such a case in which the termination has been decided in a trial period on the grounds of violating the employee's basic rights and freedoms including the right of dignity, “physical and moral well-being”, freedom of speech, the right of privacy, being a member of a trade union, and the right to strike within the law.³⁹

Despite the acknowledgment of Spain's highest court on providing lenient standards of termination during the probationary period, the judgment in this case is really effective in curbing the employer's power and in establishing a protective approach for workers during the trial period. Hence, the limitation provided in the context of the court's decision entitles the worker to challenge the employer whenever the latter abuse their right in terminating a contract during a probationary period.

3.2. Suitability test standards

As stated before, a probationary employee can be fired if he is distinctly found not to be appropriate for the job. It is also agreed upon that standards of reviewing unfair termination during the probation period should be more lenient than severe after the expiration of the probationary period.⁴⁰ Nevertheless, a serious question arises here,

³⁷ Termination of employment relationships: Legal situation in the Member States of the European Union: *op. cit.*, 120.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Reitz, Anders Etgen (ed.): *Labor and employment law in the new EU member and candidate states*. American Bar Association, 2007.

looking for standards that can be taken into consideration to decide the suitability of the worker during probationary periods by employers. Are there standards to test employees? Or is the test subject to the employers' evaluation without prior standards? Since the statutory laws have not answered these questions, a proper answer might be found in cases dealing with this matter.

The answer to the questions presented above is often controversial due to the different outcomes of cases where the courts handed down verdict decisions in accordance with different paths. Primarily, the common law afforded little rights for employees whose contracts have been terminated and basically upheld that employers may do so without giving reasons during a probationary period.⁴¹ However, the case law in dealing with probationary employees has been modified and shifted in some manner.

In a unique decision, the Supreme Court of Canada redefined standards and the way to test the suitability of probationary employees in its judgment in *Nicholson v Haldimand-Norfolk Regional Police Commissioners*.⁴² While examining Nicholson's claim whose job has been terminated during the probationary period without any reason given, the Canadian Supreme Court established "reasonable opportunity", the principle in which the suitability of probationary employees should be demonstrated.⁴³ The "reasonable opportunity" impliedly confers the right of employees to be treated fairly and be informed of the reasons for their termination.⁴⁴ Consequently, the decision of the Board of Commissioners of Police was repealed by the court as being an unfair termination, and Nicholson was awarded costs.⁴⁵ The summary of the case, therefore, established the notion that the standards of the employer must be reasonable and the employer must inform the employee of the acceptable standards for testing suitability. Otherwise, the employer will not be immune from an employee taking civil procedures to reinstate the position during probation.

In *Ritchie v Intercontinental Packers Ltd*, the Court of Queen's Bench for Saskatchewan also asserted a fair and "reasonable opportunity" as standards for satisfying the employer's obligation to test whether an employee is fit.⁴⁶ Such a reasonable opportunity includes the employee's potential to work in cooperation with others and "such other factors as the employer deems essential to the viable performance of the position."⁴⁷

The most updated judgment approaches almost the same result with better expression in the case of *Ly v Interior Health Authority*. This case was initiated by Mr. Ly's claim for wrongful dismissal from his position during probationary period. In the final judgment, The British Columbia Supreme Court concluded that: "[T]he employer had not sufficiently communicated to Mr. Ly the standards by which he would be

⁴¹ Leonard, Arthur S.: A New Common Law of Employment Termination. *North Carolina Law Review*, 1987-1988, 631.

⁴² [1979] 1 S.C.R. 311.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ [1982] 14 Sask. R. 206, at p. 212.

⁴⁷ *Ibid.*

assessed, had not given him a reasonable opportunity to demonstrate his suitability, and had not met the required standard of good faith in assessing him. Consequently, the Court found that the employer wrongfully dismissed Mr. Ly. The Court awarded Mr. Ly pay in lieu of three months' reasonable notice because his contract did not specify a specific notice period."⁴⁸

The standards by which the suitability of probationary employees should be tested are genuinely clear in the provided judgment. According to the cited decision, the employer must set suitability requirements in advance, and prove that the employee was aware of such requirements. It also requires the employer to act pursuant to good faith with the responsibility to provide a reasonable opportunity for the employee to demonstrate their suitability.

4. Conclusion

From what has been discussed in this study, the provisions and the way to deal with employees during the probationary period shall be formulated again in Iraq. Article 37 in Iraqi labour law has formulated some steps in dealing with probationary employees, particularly in requiring a notice period of at least seven days before the date of termination. Nevertheless, the article is still in need of being redrafted for balancing the right of both contractual parties.

While the International Labour Organization (ILO) as the most relevant international body for this subject has not set any international binding standards for member states in dealing with probationary employees, the new trends deriving from case law mandate accurate provisions to regulate probationary period and the way to terminate probationary employees. Such new trends guarantee the rights of both sides. On one hand, the employer has the right to dictate probationary periods based on his agreement with the employee regardless of the latter being a holder of a professional certificate or not, since suitability should be tested pursuant to the specific job requirements, rather than a presumption of required suitability pursuant to a certificate. On the other hand, the power of the employer to terminate a probationary employee is limited with regards to termination relying on the employee's non-suitability. Moreover, the employer must prove the employee's non-suitability on the basis of suitability requirements. From the cited cases where the legality of termination in the trial period has been reviewed, we may conclude the basic requirements to test the suitability of an employee according to the following points:

1. Explicit recruitment conditions. This is to prevent the employer from abusing their right in testing the suitability of employees;
2. Clear statement of recruitment conditions to the employee. It is suggested to require employees signing an acknowledgment that shows their awareness of recruitment conditions;
3. Providing a reasonable opportunity in which the employee shall be treated fairly and be notified of the reason for their termination.

⁴⁸ [2017] BCSC 42, paragraph 58.

Consequently, the employer must provide evidence to prove the legality of termination during probationary periods in accordance with the provided requirements. For that reason, a documentary assessment is suggested for the employer during a probationary period including a recruitment conditions paper, signed acknowledgment from the employee for being notified with such conditions, and recorded facts of the failure to the employee. Such an assessment, of course, makes the court more persuasive with regards to the legality of termination during probationary periods.

Taking the new trends into account, we suggest Iraqi lawmakers redraft Article 37 of the Iraqi Labour Code to make it more compatible with the position of both the employer and the employee during probationary periods through the following amendments:

1. Pulling out the term “professional certificate” as a barrier to test employees in Article 37, this makes the article to be more accurate due to not having a necessary connection between required suitability in a specific job and possessing a certificate.
2. Limit the power of the employer to terminate the contract during the probationary period by establishing standards to test the employee’s suitability of the job, as has been seen recently in case law. For that purpose, Article 37 should be restated in a way that establishes suitability standards or requires the court to derive such standards while reviewing individual cases.