

# **Judgement Criteria for Dismissal during a Probationary Period**

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## **I. Principle**

**Even though an employee is hired under a probationary period, his dismissal shall be for a 'justifiable reason' in accordance with Article 27 of the Labor Standards Act. (Feb. 12, 1999, Seoul district court 98 gu 15558)**

Even though an employee is hired under a probationary period, his dismissal shall be for a 'justifiable reason' in accordance with Article 27 of the Labor Standards Act, because his labor contract was established just like that of a non-probationary employee. Provided, that the probationary system is designed to set a probationary period in order to judge whether or not the probationary employee shows competence for the job before confirming regular employment. The employer does not have to apply the identical requirements of the regular employee's dismissal for the decision of whether he may accept or cancel the regular contract at the time of completing his probationary period or during a probationary period. Accordingly, it is possible to refuse to hire him because of negative evaluations relating to job eligibility. It is also possible to dismiss him or to refuse regular employment when there is a justifiable reason for dismissal. Under this view, the probationary period plays a role in easing restrictions for dismissal. (Jan. 11, 1994, Supreme Court 92 da 44695; Sep. 8, 1987, Supreme Court 87 daka 555)

**Justification for dismissal of the probationary employee during a probationary period** (Aug. 4, 2006, Labor Standards Team-4040)

The employer shall not dismiss the employee without a justifiable reason in accordance with Article 30 of the Labor Standards Act. Whether or not there is a justifiable reason for dismissal shall be estimated on a case by case basis according to whether there is a special reason why the employer cannot continue to maintain employment of the employee. However, the probationary period shall be the period for deciding whether

or not to offer formal employment for the new employee by evaluating his ability to be able to fulfill his duties. Accordingly, the scope of justifiable reasons for the new employee's dismissal is wider than that for a regular employee.

**The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason, however, the range of justifications is wider compared to the regular employee.** (Nov. 12, 1990, Kungi 01254-15636)

The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason; however, the range of justifications is wider compared to the regular employee. Provided, that the probationary period shall be a reasonable period in consideration of the job characteristics. If the period is extended unfairly, its extended probationary period is not effective in the view of social rationality: in cases where the probationary period exceeds 3 months, the advance notice of dismissal stipulated in Article 27 (2) of the LSA shall apply.

## **II. Justifiable Dismissal**

**It is justifiable to refuse formal employment of an employee under a probationary period on account of poor performance, negligence of duty, non-cooperative relationships with other coworkers, etc.** (May 22, 2005, Seoul District Court 2004 guhap 30122)

The employee joined the company as a probationary employee with a six-month probationary period. Since the probationary employee showed remarkably poor performance compared to other probationary employees, was insincere at work, and could not get along with coworkers, superiors or other workers of related companies, the team leader gave him low evaluation rating. The employer made a decision to refuse to hire the probationary employee because of the low evaluation rating. Based on circumstances, the refusal of regular employment cannot be seen as an unfair dismissal.

**It is justifiable to refuse to hire a probationary employee.** (Jul. 2, 2001, NLRC 2001 Buhae 199)

The company estimated that continuous employment was unsuitable and refused to hire an employee applying the probationary period stipulated in the Rules of Employment. The reason was that the hotel manager (a probationary employee) on duty spoke violently to and threatened the managing director who was checking attendance. In the view of the purpose of a probationary period, the dismissal shall be objective, reasonable and justifiable according to the socially accepted idea.

**It is justifiable to refuse to hire a probationary employee who did not describe his key role in a district labor union in his resume.** (Jun 8, 2001, NLRC 2001 Buhae 144)

The probationary employee did not describe in his resume his experience as a vice-training/PR chief of Metal Workers Union in Seoul - East Area when he submitted a job application, and so the company could not evaluate his character comprehensively. It was considered justifiable for the company to refuse to hire him because of the omission of his previous union career in his resume and negligence of duty.

**It is justifiable to dismiss a probationary employee on account of negligence of duty.** (Aug. 11, 2000, NLRC 2000 Buhae 282)

The probationary employee received complains from customers because there were more dishes or less dishes available due to his miscalculation for the necessary amount of dishes. Furthermore, he resisted his supervisor's warnings and disturbed the company's order. Therefore, the company dismissed him because of negligence of duty, which can be seen as justifiable fulfillment of the employer's personnel right.

**It is justifiable fulfillment of the personnel right when the employer dismissed a probationary employee on account of negligence of duty.** (Jan. 21, 2000, NLRC 99 Buhae 626)

It is justifiable fulfillment of the personnel right for the employer to dismiss a probationary taxi driver in the probationary period because of indulgence of duty when he quarreled over the superior's directions and was late for work.

**Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result.**

(Apr. 8, 1999, NLRC 99 Buhae 64)

Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result. **Because the** employee cannot verify that the company manipulated the evaluation result afterwards, his dismissal is a justifiable dismissal.

**It is justifiable to dismiss a probationary employee without disciplinary process on account of negligence of duty in accordance with the Rules of Employment.**

(Mar. 16, 1998, NLRC 97 Buhae 329)

For the employee in the middle of a three month probation period, it is justifiable to dismiss him without disciplinary process for his negligence of duty shown during the period.

### **III. Unfair Dismissal**

**Despite the employee being under a probationary period, it is unfair to dismiss him on account of the lack of job eligibility when he did not receive any customer orders within a short period of time (i.e., only two months).** (Jan. 16, 2004, Seoul District Court 2003 Kahap 54613)

According to the company's personnel regulations, newly hired employees shall have a two-month probationary period and the company can cancel the employment for the probationary employees because of job ability, qualifications, and other job eligibility issues during a probationary period.

The employee was hired with an expectation to receive orders from 000 company and its subsidiary, but he did not have any customer orders and even did not make an effort

to attract any sales order. Therefore, the company cancelled its probationary employment due to the poor job performance in accordance with its regulations. Despite the employee working in a probationary period, it is hard to conclude his job eligibility by the fact that he did not receive any sales orders within a short period of time (i.e., about two months). And there is no verification evidence to justify his dismissal. Accordingly, this dismissal is null and void because it was implemented without a justifiable reason.

**As long as the result of probationary evaluation did not have an objective or reasonable reason as much as to refuse the regular employment, the refusal of employment is an unfair dismissal that abused the right of reserved cancellation.**

(Aug. 27, 2002, Administrative Court 2002 guhap 7210)

The company has not cancelled the employment of any probationary employees since its foundation. The probationary employees had not been informed regarding the criteria and methods for evaluating their work. Furthermore, the probationary evaluation system measured by the evaluation table was not yet introduced until the last month of the probationary period (i.e., June 7, 2001), and so it is difficult to judge whether the probationary employees had been evaluated continuously during a probationary period. In considering all those aforementioned conditions, even though they received the grade 'C', low enough to cancel employment, this was not judged objective and reasonable enough to refuse regular employment on account of a negative evaluation for their occupational ability and job eligibility according to the socially accepted idea. Therefore, the employer's refusal of regular employment was unfair dismissal that abused the right of reserved cancellation.

**As long as the labor contract did not contain a clear article that applied a probationary period, the employee shall be regarded as a regularly employed, and cancellation of his labor contract is not termination of the contract, but dismissal of the employee.** (Nov. 12, 1999, Supreme Court 99 da 30473)

Unless there was a clear article to apply a probationary period in the labor contract between the employer and employee, the employer shall be regarded as a regularly employed employee and not a probationary employee. The dismissal of the employee concerned shall be evaluated by whether or not there is a justifiable reason for dismissal of the regular employee.

**It is unjustifiable to cancel employment immediately because of errors in the employment application document without giving an opportunity to rectify the errors and without an evaluation of job ability and attitude during a probationary period.** (Aug. 22, 2002, LRC 2002 Buhae 104)

The probationary work system is to set a probationary period for the purpose of estimating the employee's vocational ability in the process of regular employment before making a confirmative labor contract. Therefore, because this is a system to reserve a certain period of time for whether or not to make a confirmative labor contract, it plays a role to ease dismissal restrictions. However, despite the probationary employee whose contract period is fixed for a certain period of time, the employee was hired just like the regular employees and his dismissal shall require a 'justifiable reason' in accordance with Article 30 of the Labor Standards Act.

**Where there is no probationary period stipulated, it is to an abuse of the right of personnel to dismiss an employee for an abstract reason.** (Jul 25, 2002, NLRC 2002 Buhae 288)

The employer hired an experienced employee through an internet advertisement. Although the employer informed the employee of the three-month probationary period verbally in the job interview, there was no evidence to verify it. The employer said that the employee was dismissed due to the lack of foreign language ability and interpretation skill and the low adaptation of human relationship at work and in the organization based on the employer's subjective judgment. In the disciplinary process,

it is an abuse of the right of personnel to dismiss an employee for an abstract reason where the existence of a probationary period is in doubt.

**Despite the justifiable reason for dismissal, it is unfair to cancel employment unilaterally without a disciplinary process for the employee who passed a probationary period.** (Aug. 14, 2001, LRC 2001 Buhae 73)

Under the company's Collective Bargaining Agreement (CBA), the employee's probationary period shall expire in six months despite the absence of a company regulation regarding same unless there is special agreement between the mutual parties. As a temporary probationary driver, the company argued that the employee did not fall under the CBA and was dismissed due to a car accident occurring after the probationary period and unexcused absences from work. At the company, a majority of employees with the same kind of job fall under the CBA, and so an employee who has already passed a probationary period shall follow the disciplinary process stipulated by the CBA.

**Justification of refusing regular employment for a contracted employee under a probationary period.** (May 14, 2001, NLRC 2001 Buhae 32, 33)

The educational foundation, Chun Hae School, refused regular employment with probationary employees due to their negligence of duty, violation of directions, and evaluation as disqualified persons based on their personnel ratings. However, the employer did not provide concrete data showing that probationary employees did not follow the superiors' directions. Despite whether or not the personnel ratings were reasonable, the employer did not have relevant regulations in place and also there was no evidence that personnel ratings had been taken objectively and fairly. In an identical university, probationary employees have continued to work after an expiry of the probationary period, which gave them an expectation to be hired continuously. It is unfair dismissal for the employer to terminate the labor contract due to the expiry of a contract period for probationary employees without objective and justifiable reasons.

**Justification of refusing regular employment for a probationary employee.** (Mar. 21, 2001, NLRC 2000 Buhae 574)

The employer dismissed (refused to grant regular employment) probationary employees (tour bus drivers) on the reason that they fought with other colleagues after drinking and caused a violent incident. However, the violent incident occurred outside the workplace and after work. After this incident, both parties involved in the incident reconciled amicably. Accordingly, the employer's refusal to grant regular employment to the probationary employees was an abuse of the right of personnel and was considered an unfair dismissal.

**The company confirmed a position, salary table and announced the personnel order for a newly hired employee. However, if the company did not describe a probationary period in the labor contract, he/she shall be admitted as a regular employee.** (Nov. 2, 1998, NLRC 98 Buhae 427)

When hiring a new employee on January 26, 1998, the employer confirmed a position and salary table (4<sup>th</sup> level – 2 ho), and then assigned him to the department (general affairs team) in the personnel order, which means he was hired as a regular employee. Then, the employer dismissed him on account of the lack of job ability, but in consideration of his first experience at work after graduation, this dismissal is so serious that it is unfair dismissal that abused the employer's personnel right.