

# **Comprehensive Guide to Unfair Dismissal: Probation**

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## Comprehensive Guide to Unfair Dismissal: Probation

Workers on probation have rights. In particular, they have the rights not to have their probationary period unfairly extended, and not to be unfairly dismissed during or at the end of the probationary period.

If a probationer is dismissed during or at the end of the probationary period and the employer did not have a good reason and/or did not follow the proper process, the dismissal may be unfair.

It may also be unfair, and may be grounds for constructive dismissal, if the employer extends the probationary period, without having a good reason for doing so and without having followed the proper process.

To be clear, employers are not under an obligation to grant a probationer the permanent position, nor are employers obligated to allow a probationer to complete the entire probationary period. But employers have a duty to treat probationers fairly and to give them a reasonable opportunity to establish themselves and earn the permanent position.

*(Note: A probationer can be fairly dismissed for misconduct, redundancy, or any of the other legitimate reasons for dismissal, provided the proper process is followed. However, this Guide only focuses on dismissal of a probationer, and extension of a probationary period, on the basis of poor performance/incapability.)*

**TD 265 of 1986 Bank and General Workers Union v Colonial Life Insurance Company Limited**, the Court opined that: “it is a well-established principle of industrial relations that the services of a worker on probation cannot be dispensed with for tenuous or improper reasons, an employer is not entitled at his will to terminate the appointment of a worker merely because he is on probation”.

Her Honour Deborah Thomas –Felix, in her text **Labour Law in the Commonwealth Caribbean**, proffered at pg. 262 that “a probationer may have less security than a permanent worker but he/she is entitled to be treated fairly and not to be the object of arbitrariness nor capricious or whimsical behavior on the part of the employer”.

**TD No.386 of 1997 National Union of Government and Federated Workers Union Caribbean Bottlers (Trinidad and Tobago)** states – “... In fact the law requires that the dismissal of any worker, whether he is on probation or permanently employed, should be in conformity with the principles and practices of good industrial relations. In

practice, this means that a probationer must be given ample and adequate opportunities to prove himself to be qualified for permanent employment, and he should be subject to fair and adequate assessment and appraisal of his performance.”

**ESD No. 6 of 1981 between Trinidad and Tobago External Telecommunications Company Limited (telco) and the Communication Workers' Union (CWU)**, the Court affirmed that: “New workers are usually required to serve a period of probation which by its very name connotes testing. Testing both for the employer and the worker. It is a period required by the employer to judge the worker’s ability and capability for the job and by the worker to determine whether the job meets his expectations...During probation the worker is to establish himself and the employer is to give him a reasonable opportunity of so doing...”

A probationary employee must know that he is on trial, and must therefore establish his suitability for the post. The employer, however, must give the employee a proper opportunity to prove himself, and give a warning if the required standards are not being met (**Post Office v Mughal [1977] ICR 763**). A probationary employee is still an employee, and is therefore entitled to have appropriate guidance and advice (**Inner London Education Authority v Lloyd [1981] IRLR 394, CA**). However, in the face of continued underperformance by a worker there is nothing stopping management from dismissing him before the probationary period expires once he is given notice (**Dalgliesh v. Kew House Farm Ltd 1982 IRLR 251, CA**).

Many employers employ people on the basis of a probationary period in order to assess their capabilities properly. The employer also has an obligation to ensure that the employee is provided with an adequate job description, with objectives clearly mapped out, is provided with adequate facilities and support staff, and is properly trained and supervised where necessary. A failure by the employer to attend to these and similar matters may well mean that any shortcomings on the employee’s part may not be entirely his own fault and it could well be unfair to dismiss him in these circumstances (**Burrows v Ace Caravan Co (Hill) Ltd [1972] IRLR 4**).

It is a fact that, “the essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specified period, particularly on the grounds of capability” (**Selwyn’s Law of Employment Chap 2.100**). But the employer must comply with his obligations before he can fairly conclude that a probationer does not have the capability to perform the job.

As such, a worker can be legitimately dismissed during or at the end of his probation, or the probationary period can be legitimately extended, due to issues with the

probationer's performance/capabilities, but only if the employer complies with his obligations owed to the probationer. Otherwise the dismissal, or extension, may be unreasonable and unfair.

The test to determine if the dismissal of a probationer or the extension of the probationary period, on grounds of performance/capability, was fair is: *whether the employer complied with his obligations owed to the probationer and in so doing, whether he gave the probationer a fair opportunity to establish himself and earn the permanent position.*

### **Breakdown of Employer's Obligations / Requirements for a Probation to be Fair:**

#### **1. A Probationer must be provided with a proper Job Description at the start of his employment (and the employer must not make any unilateral alterations to the Probationer's Role/Job Description)**

**TD 47 of 2003 The Association of Technical, Administrative and Supervisory Staff and Grace Kennedy (Trinidad and Tobago) Limited**, the Court held:

"The worker was not given a job description at the time of his appointment...A Job Description inter alia identifies the objectives of a job, defines the duties and responsibilities and establishes performance standards (or at the very least sets the basis for them). How was a young, inexperienced worker expected to know his duties, responsibilities and performance standards in a newly created senior job when he was not given a Job Description and in the absence of a structured programme of induction and orientation? Was he to travel hopefully or hopelessly?..."

The worker was told to spend some time with [another employee] who at one time functioned as a marketing officer..but [she] had never functioned as a Marketing Manager [the position held by the Worker]...so her assistance would have been useful but limited.

The worker stated that he learnt about the job by following [the manager's] lead. Clearly, the worker was in a situation of ad hococracy. It raises the question of how the worker was to be monitored, guided, assisted and assessed. According to the worker, he thought that he was doing pretty well. He was traveling hopefully. But what was the basis for his personal assessment? In the same way, what measurement criteria did the employer use for its assessment of the worker?

The failure to give the worker a job description served to undermine the rationale for a probationary period."

In ***TD 402/2017 National Workers Union v Radisson Trinidad***, the worker was hired as Housekeeping Manager at the employer's hotel. The terms of the worker's employment provided for a probationary period of six (6) months. The Worker was not given a job description at the start of or at any time during her probation. During the course of her employment, the Worker received 3 letters from the General Manager expressing his dissatisfaction with her performance. The first letter came 8 weeks into her employment, the second (referred to as a "Final Warning Letter") came 10 days later, and the third one came 10 days after the second. The GM never held a meeting with the Worker to discuss the areas of concern. The third letter stated that as a result of being dissatisfied with the worker's performance as manager, she was being offered the role of Housekeeping Supervisor. The worker saw this as a demotion and she declined. The worker was dismissed 8 days after the third letter. The letter terminating the Worker's employment did not state clearly that the reason was unsatisfactory performance of her duties, but it was obvious from the letters issued to her by the General Manager in the lead up to her dismissal that that was the reason. The Company's dismissal of the Worker was tantamount to a summary dismissal, and it was harsh, oppressive and contrary to the principles and practices of good industrial relations.

The court held that:

1) An employer has an obligation to ensure that an employee is provided with an adequate job description, with objectives clearly mapped out, with adequate facilities and support staff and is properly trained and supervised where necessary. Where an employer fails to do so, it may mean that any shortcomings on the employee's part, may not be entirely his fault and it may be unfair to dismiss him in such circumstances.

The absence of a job description which clearly outlined the Worker's duties as well as the standards by which she would be appraised was a very poor management practice.

2) The General Manager's approach to correcting what he saw as the Worker's shortcomings in appraisal and warning letters combined, was not in keeping with good industrial relations practice, especially for a probationer.

3) The Worker was not given sufficient time in which to realise any improvement in her performance between the warning letters issued.

4) There was no credible evidence that the Worker received the necessary coaching and/or training and/or resources required to achieve the targets which the General Manager clearly had in mind but which he omitted to have reduced to writing.

5) The offer of an alternative position to the Worker may have been reasonable in circumstances where she was given a fair chance to succeed in the position of Manager, that is to say, that she was given at minimum a job description with clear duties, standards of performance and targets to be achieved in the period of her probation, along with mentoring and coaching and she failed. However, in the circumstances of this case, it was not reasonable.

In **Trade Dispute No. 101 of 1992 Communications Workers' Union vs Busy Business Systems and Equipment Ltd**, in referring to a previous authority, the Court said: In [the previous] case, a person was appointed to a position on a probationary basis for 3 months terminable during that period by either party without notice. After 2 months of the probationary period the person was transferred to another position and was dismissed from that position. Where a worker is required to serve a defined period in a stated position he should be given a fair opportunity to perform in the stated position for his performance to be properly assessed.

*In short, if an employer fails to provide the probationer with an adequate job description at the start of the employment (or if the employer unilaterally changes the probationer's job description/role), the employer will bear some (or most) of the fault if there are any shortcomings in the probationer's performance. And if the probationer is subsequently dismissed or has his probation extended, this may be unfair.*

**2. A Probationer must be given Training, Guidance, Mentorship and Supervision, especially if the employer is not satisfied with the Probationer's performance.**

**TD No. 76 of 1995 Communication Workers' Union v Tye Manufacturing Company Limited**, it was stated that probation is a period of "guidance and training when the employer was expected to provide support and encouragement to the worker as may be necessary..."

**TD 386/97 NUGFW v Caribbean Bottlers**, it was stated: "The employer therefore has a duty to ensure that such a worker is properly and adequately supervised and that he is given ample opportunity to correct any shortcomings which the employer may detect. Failure on the part of an employer to do this is a failure to observe the principles and practices of good industrial relations."

From the authorities referenced in **TD No. 47 of 2003**, the following principles were extracted:

- Probation is a period of testing for the new employee;
- The probationer must be continuously monitored, assessed, guided and assisted

**TD 74 of 2013 BIGWU v FCB**

The employee was employed as a CSR in September 2009 on 5 months' probation. He performed the duties of a teller. He was dismissed in March 2010, after his probation

was extended by one month. The Worker received on the job training for 2 days and then was put to perform his duties independently with periodic checks from another officer. He did not receive a written assessment after his first three months of probation and received a job description in March.

The Court concluded that the Worker never had a fair opportunity during his probationary period. There were gaps in his training. He did not have the benefit of coaching, even after he was given an unfavourable assessment.

The Court was disappointed with the conduct of such an established bank in terms of its human resource and industrial relations practices as displayed in this case. This matter involves a young man in a fairly close knit society. He lost a fair opportunity to be confirmed as a permanent worker and had difficulty for quite some time after to gain employment. The Worker's dismissal was harsh and oppressive.

*If an employer fails to provide adequate training, guidance, mentorship and supervision, any shortcomings in the probationer's performance will, to some degree, be the fault of the employer. As such, it would be unfair for the employer to dismiss the probationer or extend the probationary period.*

### **3. The Probationer must be provided with the proper tools, support and facilities to perform his job adequately**

As stated above, the primary purpose of a probationary period, from the perspective of the employer, is to assess the capability of the probationer. In order for an employer to fairly assess a worker's capabilities, the employer must first provide the proper tools, support and facilities to enable the worker to adequately perform the job.

**Selwyn's Law of Employment Chap 17.81** states: To dismiss an employee who is not capable of performing his job properly will be fair provided the employer acts reasonably in the circumstances. When dealing with an incompetent worker, the reasonable employer will enquire into the matter to find out why the employee cannot do the job adequately...Does he have proper equipment, sufficient support staff and facilities?...In other words, the employer's first task is to find out the reason for the alleged incompetence, and, so far as it is possible, do something about it from the employer's point of view.

**TD 402 of 2017** also states that an employer has an obligation to ensure that an employee is provided with adequate facilities and support staff.

*Therefore if a probationer is not provided with the proper tools, support and facilities, and the employer dismisses him during or at the end of the probation, or extends the probation, this may be unfair.*

**4. The Employer must conduct performance evaluations/appraisals of the Probationer. And the Employer must continuously communicate with the Probationer and keep the Probationer abreast of how well he is performing or if there are areas that need to be improved.**

In *White v London Transport Executive (1981) IRLR*, it was stated that failure to maintain appraisals, guide, assist or warn a probationer constituted a breach of the employer's duty to act in good faith.

**TD 80 of 2000 Bank and General Workers Union v Aero Services Credit Union Co-operative Company Limited**

The Worker was employed as the General Manager of the Company on September 1 1998. Her employment began with a 3 month probation period. At the end of her initial 3 month probation, a performance appraisal was conducted by Mr. Aqui who had direct responsibility over the office of General Manager. He rated her performance as very good and recommended her for permanent appointment to the post of General manager. However, the Board informed her that they were extending the probation another 3 months. The Court heard evidence that the Board did not concur with the views of Mr. Aqui on his findings of the Worker's performance. However, it was the Court's view that since he was the Worker's immediate supervisor, his evaluation of her performance would have been the most pragmatic and objective. At the end of the 3 months, the worker received correspondence from the board advising of its assessment of her performance, though there was no performance appraisal for that period. The Company further extended the probation by 6 months. No written appraisal was conducted during or after the extended 6-month probation. At the end of the probation, she was offered a one-year renewable contract which she did not accept, and she was then terminated.

It was the Court's view that the Company's failure to complete the Worker's appraisal, during or after the extended 6-month probation, amounted to gross negligence and was contrary to good industrial relations practices. The Worker was placed on probation for an extended period of nine (9) months, and given the Company's opinion of her performance it was crucial to both the Worker and the Company that other written appraisals should have been conducted.

Although the Company claimed that it frequently met with the Worker and made a proper assessment of her performance during the extended probationary period, the



Court found that the manner in which the Company conducted its evaluation of the Worker, particularly over the probationary period for such a critical position in the organization, left much to be desired and certainly fell short of proper industrial relations practices and procedures.

The Company claimed they had issue with the worker's performance but the Court noted that the Company's willingness to offer her a contract clearly showed that the Company saw potential in the Worker. [The Court found the other issues raised by the Company to be minor & easily rectifiable, or unsubstantiated.] The Court finds that since the Company detected areas of weakness in the Worker's performance, there was an obligation on the part of the employer to ensure that the Worker was properly supervised and evaluated over the extended periods of her probation.

While the Company did communicate its dissatisfaction with certain areas of her performance, the Court was of the view that *the Company failed to observe the principles of good industrial relations practice when it extended her probationary period for a further 6 months without properly assessing the Worker's performance during that period.*

The Court stated that it agreed that "...workers on probation should at all times be safeguarded against employers who unduly prolong the period of probation so as to be accorded the benefit of the workers' output while keeping them dangling on a string holding their confirmation in abeyance."

The Court held that the Worker was treated unfairly by being placed on unduly prolonged periods of probation. Her confirmation of employment was held in abeyance while the Company benefited from her services as General Manager...The Company cannot vary the agreement by extending a probationary period and subsequently enter into a new agreement unilaterally. In accordance with the original employment agreement, either party had the option to terminate the Worker's original employment by 3 days' notice. At the end of the extended 6-month probation, neither party had exercised that option.

It is this Court's view that if an appraisal had been carried out within the 6-month extended probationary period, there might have been a basis for the Company to terminate the Worker's employment if it found that her performance was unsatisfactory.

The dismissal of an employee, whether he is on probation or permanently employed, must conform to the principles and practices of good industrial relations. The worker's dismissal was harsh.

**TD No. 47 of 2003**, the Court stated: "The worker's performance was first assessed on 15th November 2001, five and a half months into his probation. The supervisor brought certain shortcomings to his attention for the first time. There was no evidence that the worker was spoken to about his performance before 15th November 2001. The worker's claim that there was no discussion of performance prior to 15th November was more

credible. It is an undisputed fact that on 15th November 2001 there was a performance related discussion between the Manager and the worker. Such an event took place for the first time five and a half months after the worker started his probationary period and 2 weeks before his probationary period was due to end. The Company's behaviour in this regard flies in the face of all the Court has previously said about probationary periods- continuous interaction between employer and employee in terms of monitoring, assessing, guiding, assisting, warning. Little wonder, therefore, that the manager admitted that she did not know what the worker was doing."

*This is one of the more important obligations, especially in larger businesses with more human resource capabilities. If the employer fails to conduct appraisals, not only will it deprive the probationer of the opportunity to become aware of his shortcomings and take corrective action, but the employer may have a very difficult time arguing that the probationer was given a fair opportunity. If the employer fails to conduct an adequate amount of appraisals/assessments and if he fails to continuously interact, monitor, assess, guide, assist or warn the probationer, this will significantly hinder the probationer's opportunity to establish himself and earn the permanent position. And any subsequent decision to dismiss or extend the probation, may be unfair.*

**5. If performance is unsatisfactory, the Employer must raise the concerns with the Probationer and, if necessary, issue warnings to the Probationer (the warnings must indicate that the probation is likely to be unsuccessful unless there is improvement). After raising the concerns/issuing the warning, the Employer must provide the Probationer with a fair amount of time and opportunities to improve.**

In **Trade Dispute No. 101 of 1992 Communications Workers' Union vs Busy Business Systems and Equipment Ltd**, the court stated:

"It is well known that in industrial relations practices there are varying degrees of dissatisfaction with a worker's services. For summary dismissal there must be dissatisfaction of a very serious nature and the Company must have taken steps to bring the dissatisfaction to the worker's notice and allow a worker an opportunity to correct any deficiencies.

There is also the matter of progressive disciplinary action. Summary dismissal is rarely justified where a worker has not been told beforehand of his shortcomings in performance and given an opportunity to improve his performance."

**TD 76 of 1995 Communication Workers' Union v Tye Manufacturing Company Limited**

The Worker was employed as a shift engineer. She was then promoted to Production Engineer/Plant Engineer, and placed on probation for the new position.

In her new position, the Worker began to receive memoranda [complaining about her performance] from the operations managers, sometimes as many as 3 in one day, which gave her the impression that he was trying to make it look as though she was guilty of poor performance. She claimed that she replied to the various memoranda in most cases seeking clarification as to what the problems were. In turn she received more memoranda although no verbal counselling or advice was offered to her by the operations manager. Thereafter, the Operations Manager called the Worker and told her that because of the poor quality of her performance, her inability to motivate her supervisory staff and her lack of proper communication skills in dealing with the managers of the Company, her services were being terminated with immediate effect.

The Worker claimed that she never had any problem communicating with her managers and that none of them had ever spoken to her about her ability to communicate. Her first indication of such a problem was by way of the dismissal letter.

In ESD No 6 of 1981 between Trinidad and Tobago External Telecommunications Company Limited and Communication Workers Union, the Court said: "Inherent in the purpose of probation therefore is that discharge is not subject to the usual restrictions. The employer has the right to discharge a worker on probation whom he finds unsatisfactory and the worker has the corresponding right to terminate his employment should he find it unsatisfactory. An employer's exercise of this right could be questioned only if malice express or implied is evident for example, if it could be shown that he acted capriciously or did not give the worker a reasonable opportunity to establish himself."

In the present case the Worker was a young graduate engineer with very little management experience. She was catapulted into a position of responsibility for an entire factory of about five seasoned supervisors and one hundred workers, and given a probationary period of 6 months in which to become "one hundred percent competent". It seems to us that a probationary period of 6 months would be reasonable provided that close attention was devoted to the training of the Worker for her new managerial responsibilities. Although the Operations Manager testified that he made efforts to speak to the Worker and to offer her advice we cannot help feeling that a series of memoranda, in one case as many as 3 in one day, was an inappropriate way of preparing the Worker for the permanent assumption of those responsibilities. The Worker naturally became apprehensive as to the motive behind the Operation Manager's memoranda, *none of which alerted her to the fact that her probationary appointment was likely to be terminated unless her performance improved.*

The Worker was employed by the Company for just over one year. She had been promoted from the position of Shift Engineer, in which she seems to have performed with credit, to the position of Production Engineer where, within one month, she began

to receive a plethora of critical memoranda from the Production Director, followed soon after by her summary dismissal in what can only be described as humiliating circumstances. The dismissal was harsh and oppressive.

**ESD No 4 of 1996 Aviation Communications Allied Workers' Union v BWIA International Airways Limited**

The worker took up employment in July 1992. The employment began with an 18 month probation period. She became pregnant late in 1992 and was transferred to another department and assigned different duties as she would have been at risk of exposure to radiation in her original position. During this period her performance was assessed twice. The first assessment for July-December 1992, she received a rating of 53.8%. Her second appraisal for Jan-June 1993, she received a rating of 60.5%. She proceeded on maternity leave in July 1993 followed by vacation leave then resumed duties in January 1994. Another performance rating was carried out in December 1993, during her leave, and she received a 'satisfactory' rating. This assessment stated that classroom training is recommended as well as continued close monitoring by supervisors. The result of this assessment was that the worker's probationary period was extended for a period of 6 months [15 January-July 1994] and she was required to pass certain exams; she was so informed when she returned to work. The worker took the examinations and passed during this period. No appraisal was conducted after the extended 6 month period, which ended July 1994. The worker got pregnant again and proceeded on maternity leave in September 1994 followed by vacation leave, and returned to work in January 1995. There was no year-end appraisal at the end of 1994. On her return to work in January 1995, the Worker requested to take another examination but this was rejected on the ground that an appraisal needed to be done first. The worker received an assessment on 2nd June 1995, which gave her a rating of 49.5% and stated that she needed more training and a renewed approach. On 6th June 1995, the worker was dismissed. The dismissal letter stated that her recent performance appraisal reflected a decline in performance, and her past appraisals never improved beyond average. The letter stated that the worker had deficiencies so she was not in a position to be regarded from Trainee to Technician 1, and as a result her services were terminated with immediate effect. The last appraisal was done by someone who appears to have been the section head but not the person with whom the worker interacted daily.

The Court held that the worker was not afforded a fair opportunity.

During her pregnancy for safety reasons, she was assigned elsewhere and her training was accordingly interrupted. The worker then went on 6 months maternity leave after 12 months on the job. Therefore for 6 of the 18 months of probation [July-Dec 1993], she was not undergoing training. After the appraisal at the end of the 18 months [Dec 1993], she could not improve on the shortcomings pointed out because she was on leave.

Her probation was extended. No appraisal was conducted after the extended 6 month period. Therefore, if there were any shortcomings, none were pointed out to her and she had no opportunity to correct herself. The worker took the examinations and passed during this period as well.

Thereafter, the worker proceeded on leave again. When she went on leave, she would have been aware that she had passed 3 examinations and no adverse reports on her performance had been notified to her. She would have also been aware that no letter of confirmation had been given, but would have had no reason to believe that her performance was unsatisfactory. The worker was not afforded a reasonable opportunity to complete the probation/training course and her dismissal was harsh.

From the authorities referenced in **TD No. 47 of 2003**, the following principles were extracted:

- Shortcomings must be brought to the attention of the probationer and
- Where necessary the probationer should be warned about the consequences of failure to improve and to meet the required standards of performance

**Trade Dispute No. 726 Of 2018 Seamen and Waterfront Workers Trade Union v IBC Express Limited**

The Worker was subject to three (3) months of probation. The Worker successfully completed this probationary period and continued working without any complaints or counselling. During the course of the Worker's probationary period, the Company never conducted any performance assessment and/or appraisal. About 6 months after the stipulated end date of the probation, the Worker was given a letter which outlined concerns about the Worker's performance, alluded to the fact that such concerns had been raised with him before, and which stated that he was on an extended probationary period. The letter also gave the worker until the end of the month during which time the Managing Director would monitor his performance, however, his employment was terminated the next day. The Court accepted the evidence of the worker that during his probation, he was not written to or spoken to about any concerns with his performance, and that the first time any such issues were raised was in the letter he received the day before his termination. Furthermore, the Court noted that the Company's handbook placed a restriction on the Company from extending the Worker's probation beyond six months from its initial commencement.

The Court stated that: A probationer may have less security of tenure than a permanent worker but he is entitled to be treated fairly and not to be the object of arbitrariness, nor capricious or whimsical behaviour on the part of an employer. The Court found it unreasonable that the Worker's probationary period was arbitrarily varied beyond the stipulated maximum period and that such decision was made without the worker being informed in writing at the start of the proposed extended probation period. Further, the

Company breached the undertaking to give the Worker until the end of the month to monitor his performance, when they dismissed him the day after issuing the letter.

The Court found that the Worker was not treated fairly during his probationary period as they did not accept that he was spoken to and informed that his performance was unsatisfactory prior to receiving the letter 6 months after the end of the stated probationary period. And to dismiss him one day after being put on notice that his performance was being monitored was unreasonable. The Court also found that the probationary period was unreasonably and unfairly extended. It was unreasonable and unfair for the Company to extend the Worker's probation beyond the stipulated six-month limit, in the manner they did, where the Worker was only informed after the six-month period had ended.

*The case of **Tye** (and even **IBC Express**, to a lesser extent) provides an example of the malicious use of "memos"/letters being sent to the probationer allegedly raising issues with his performance. In particular, in **Tye**, the memos were coming too quickly for the probationer to bring about the alleged desired improvement; the probationer had to respond to the memos asking for clarity; and the memos also failed to provide a proper warning that the probation was likely to be unsuccessful if the alleged desired improvement was not seen.*

*It is important for an employer to provide genuine notices/warnings to a probationer if there are shortcomings in the probationer's performance. Without this, a probationer will not know that his performance is below par and as such, he will not have a fair opportunity to improve his performance and establish himself. If the employer fails to provide such notices/warnings, it is highly likely that any subsequent dismissal or extension may be deemed unfair.*

**6. The Employer should conduct a final performance assessment/appraisal. If there has been continued underperformance, the employer should issue a final warning. And in the event that the probation is unsuccessful and the Employer is going to terminate the Probationer or extend the probation, the Employer should provide the Probationer with reasonable notice of such decision.**

In keeping with the obligations of conducting appraisals/assessments and issuing warnings if the probationer's performance is not up to standard, an employer should conduct a final performance assessment before the end of the probation period and where there is continued underperformance, the employer should issue a final warning to the probationer that the probation may be unsuccessful unless there is improvement in the highlighted areas.

And in the event of an unsuccessful probation, the employer should give the probationer notice, in advance of the end of the probation period, informing him that the probation has been unsuccessful and that he is not being given permanent employment. Such notice should be in accordance with the terms of the contract and if the contract does not provide for such notice, the notice period should be a reasonable one relative to the length of the probationary period.

If the employer fails to conduct a final assessment/appraisal, fails to issue a final warning, and fails to give notice of unsuccessful probation and subsequent termination (or extension of probation), the dismissal (or extension) may be unfair.

**7. If the Employer extends the probationary period, without having discharged his obligations owed to the Probationer during the probationary period, or if the extension exceeds the period stipulated in the contract, the extension may be unfair and it may be grounds for constructive dismissal.**

As stated above in *TD 80 of 2000*, “While the Company did communicate its dissatisfaction with certain areas of her performance, we are of the view that it failed to observe the principles of good industrial relations practice when it extended her probationary period for a further 6 months without properly assessing the Worker’s performance during that period...The Court stated that it agreed that “...workers on probation should at all times be safeguarded against employers who unduly prolong the period of probation so as to be accorded the benefit of the workers’ output while keeping them dangling on a string holding their confirmation in abeyance.”...The Worker was treated unfairly by being placed on unduly prolonged periods of probation. Her confirmation of employment was held in abeyance while the Company benefited from her services...The Company cannot vary the agreement by extending a probationary period and subsequently enter into a new agreement unilaterally.”

***TD No. 47 of 2003 The Association of Technical, Administrative and Supervisory Staff and Grace Kennedy (Trinidad and Tobago) Limited***, the Court stated: “Was the Company’s action of extending the worker’s probationary period a breach of the principles and practices of good industrial relations? The Company continued to extend the worker’s probation on a unilateral basis. Confirmation hung like a sword of Damocles over the head of the worker.

There was no specific nor unequivocal provision in the appointment/employment letters for the extension of the probationary period. The language of the letter served to create a legitimate expectation on the part of the worker that he would be confirmed after 6

months and receive a salary increase. The issue is whether the Company can unilaterally vary the terms in the contract of employment. The terms of the contract of employment may only be varied with the consent of both parties unless otherwise provided for in the contract.

A probationer may have less security than a permanent worker, but he is entitled to be treated fairly and not be the object of arbitrariness nor capricious or whimsical behaviour on the part of an employer.

The Company did not show that it had taken the necessary steps to maintain appraisal of the worker during his initial period of probation through guidance, assistance, advice, assessment and warning. The action of the Company to extend the worker's probationary period was a unilateral variation of the employment contract and not in accordance with the principles and practices of good industrial relations."

Also, in ***TD 726 Of 2018***, the Company's handbook placed a restriction on the Company from extending the Worker's probation beyond six months from its initial commencement... The Court held that it was unreasonable and unfair for the Company to extend the Worker's probation beyond the stipulated six-month limit, in the manner they did, where the Worker was only informed after the six-month period had ended.

*Employers must discharge their obligations and remain within the bounds of the contract. Some contracts may place a limit on the extension of the probationary period; contracts may also provide for monthly written assessments, or specific notice periods if the probation is unsuccessful. Whatever obligations are placed on the employer by the terms of the contract, it is necessary that they abide by all. Failure to do so may deprive the probationer of a fair opportunity, and it may also result in a finding that the probationer was treated unfairly.*

### **Remedy:**

The probationer may be entitled to compensation, if it is found that he was unfairly dismissed during or at the end of the probation, or that he was constructively dismissed by virtue of his probation being unfairly extended (*note: the requirements for establishing a constructive dismissal claim will still apply here- refer to our "Comprehensive Guide to Unfair Dismissal: Constructive Dismissal" for more info*).

Given the fact that the employer is not obligated to grant permanent employment to a probationer, it is unlikely that the Court would award reinstatement or re-employment in such a case.



## Summary:

*Overarching Principle: Probation is primarily a testing period to determine an employee's capability to perform the job. An employer is not under any obligation to grant a probationer the permanent position at the end of the probationary period, nor is the employer obligated to allow a probationer to complete the entire probationary period. But the employer is under an obligation to give the probationer a fair opportunity to establish himself and earn the permanent position. If the employer fails to do so, and then dismisses the probationer or extends the probation, on the grounds of poor performance/incapability, this may be unfair.*

To fulfill his obligations, the employer must:

1. Provide the probationer with an accurate job description at the start of the employment (and not make any unilateral changes to the probationer's role or job description thereafter).
2. Provide the probationer with training, mentorship, guidance and supervision.
3. Provide the proper tools, support and facilities for the probationer to perform the job adequately.
4. Regularly communicate, interact, monitor, assess, guide, assist and warn the probationer.
5. Conduct regular performance assessments/appraisals. Evaluations must be conducted with a good degree of regularity. There must be enough evaluations to properly track the probationer's progress throughout the probationary period. The evaluations cannot be so little that the probationer is left in the dark as to how his performance is being rated, but they also cannot be so frequent that the probationer is not given an opportunity to improve between evaluations.
6. Raise any concerns/issues with the probationer's performance, and issue written warnings if underperformance continues. The probationer should be warned that there are specific concerns with his performance and that he needs to improve, otherwise the probation will be unsuccessful. This ought to be done in writing.
7. Provide further training, support and assistance to help the probationer correct any identified deficiencies.
8. Give the probationer time and opportunities to improve. If the probationer is warned that his performance is being monitored or that his performance needs to improve, he must be given adequate time and opportunities to improve after the warning is made.
9. Conduct a final assessment; and if necessary, issuing a final warning if underperformance has continued.
10. Give notice that the probation was unsuccessful and either that the probation is being extended or the employment is being terminated.

If the employer fails to discharge these obligations, it may be unfair for him to extend the probationary period or to dismiss the worker, during or at the end of the probation.

Also, if the employment contract states that the probationary period must not exceed a certain number of months, it would be unfair for the employer to extend the probation beyond that timeframe.

And if the probationer is unfairly dismissed, or has his probation unfairly extended, he may be entitled to compensation.

**Questions to ask your client to determine if his dismissal, during or at the end of his probation (on the basis of poor performance/incapability), or the extension of his probationary period may have been unfair:**

1. Did you get a job description? Did the employer make any unilateral changes to your role/job description after you started working (in other words, did they ask you to perform additional or different responsibilities than those outlined in your job description?)
2. Did they give you training and supervision when you started? Did they make sure that you knew how to perform your job?
3. Did they provide you with the proper tools and facilities required to perform your job?
4. Did they conduct regular performance assessments? How often? How did you score?
5. Did they regularly communicate, interact, monitor, assess, guide, and assist you to help you improve your performance?
6. Did they raise any issues with your performance? Did they have any meetings with you or send you any letters/emails informing you that your performance was below par? Did they highlight areas that you needed to improve? Were there any actual issues with your performance?
7. Did they give you additional training, guidance, mentorship and support to improve in the highlighted areas?
8. Did they give you any (written) warnings that your performance needed to improve or your probation would be unsuccessful?
9. After giving you a warning, how much time and opportunities did they give you to improve your performance, before your probation came to an end / before you were dismissed (if you were dismissed before the end of the probation)?

10. Did they give you a final warning that your probation was likely to be unsuccessful unless there was immediate or significant improvement?
11. Did they notify you at all that your probation was unsuccessful? Did they give you notice, before the end of the probationary period, that your probation was going to be unsuccessful and that you would not be given the permanent position at the end of the probation?
12. Did your contract state that your probationary period could be extended? Did the contract place a limit on how much the probation could be extended? Did they extend your probation beyond the time permitted by the contract?

**Sources:**

**1. Case Law**

**2. Texts:**

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Roper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir