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Can employers extend the probation period of their employees because of the COVID-19 outbreak?

Broadly speaking, do Chinese laws and regulations allow the extension or postponement of the probation period of employees?

Case presentation:

Mr Zhang was hired by company X (Hereafter «**his Employer**») as of 6th September 2017 under a fixed-term contract of 3 years with a planned three-month probation period.

During a performance review of Mr Zhang carried out on 18th November 2017, his Employer:

- Criticised the quality of his work, as well as his inability to work as part of a team and his lack of initiative;
- His motivation was called into question following his request for several days off and when he arrived late.

Accordingly, his Employer decided to extend Mr Zhang's probation period for an additional three-month period ending until 4th March 2018, a decision validated and signed by Mr Zhang.

His Employer conducted a new performance review of Mr Zhang on 18th January 2018, and then established an evaluation form counter-signed by the latter. On 31st January 2018, his Employer finally terminated Mr Zhang's contract on the basis of his incompetence for the proposed position.

Mr Zhang took legal action against his Employer¹, including asking judges (i) to rule on the legality of his extended probation period and (ii) to award him financial compensation during the illegal probation period according to the Labour Contract Law of the People's Republic of China (Hereafter «**the Law** »).²

The judge's ruling:

¹ In China, disputes must be submitted firstly to the commission of arbitration in labour law, then usually if one of the parties is not satisfied with the decision, it can make an application before the People's Court, given that the ruling of the Court of First Instance can be subject to appeal.

² Article 83 of Labour Contract Law stipulates that, when in breach of Law, if an employer reaches an agreement with an employee about a probation period and that this one is applied, the employer shall give the employee an indemnity equal to the rate of his monthly wages, for the period of work beyond the legal probation period.

The Courts of First and Second Instances ruled that the extended probation period of Mr Zhang was legal, since the following four conditions were respected. (Hereafter the « **Four Conditions** »):

- (i) According to the Law, a probation period cannot exceed 6 months for a work contract of three years or more. In this case, the initial trial period was 3 months and the total 6-month probation period did not exceed the legal duration.
- (ii) The reasons for this extended period were the professional inadequacy of Mr Zhang and the need for a more thorough evaluation of the employee's abilities.
- (iii) Mr Zhang agreed to the extension of his probation period in writing.
- (iv) Mr Zhang's rights were not breached by his Employer.

Comments from DS Avocats:

The Law stipulates that employers and employees can agree on a probation period, in order to assess the abilities of employees and to mutually test their contractual relationship.

During this period, employers are allowed to (i) pay their employees a reduced³ salary and to (ii) terminate unilaterally employees' work contracts more easily. (Please see short note [« How to terminate an employee's work contract during a probation period? »](#)).

In order to protect employees during a probation period, the Law strictly regulates this period:

- 1) Employers can only agree a single probation period with the same employee;
- 2) A probation period must not last longer than the maximum duration provided by the law.⁴

Otherwise, employers must pay a financial compensation to employees.

The Law does not stipulate clearly the possibility of extending the probation period of employees. However, on 21st July 2019, the Zhejiang province became the first to provide for the possibility of doing so. The Zhejiang Provincial Higher People's Court thus published an Advice of interpretation about several issues regarding labour law disputes (V), in particular, stipulating in its article 6: « *In the event of a probation period concluded between employers and employees, if both parties have reached a written agreement providing for an extension of this period, and the total probation period does not exceed the legal duration, in this case their agreement is valid. This situation shall not be equated in the event that employers cannot conclude several probation periods with the same employee.* »

In practice, two types of decisions from Chinese courts are worth noting:

- A majority of courts (particularly in Beijing) strictly apply article 19 of Labour Contract Law stipulating: « *Employers can only conclude a single probation period with the same employee* » and thus deny the possibility of extending the probation period.
- In contrast, some courts (particularly in Shanghai), at times agree to the extension of the probation period, under certain conditions, and this is the case for the decision mentioned

³ Article 20 of Labour Contract Law: "Employees' wages during their probation period cannot amount to less than the lowest salary provided for the same position in the company, or 80 % of the wages agreed in their labour contracts, and either way cannot be lower than the local minimum wage."

⁴ Article 19 of Labour Contract Law: "If the duration of a work contract is longer than three months but shorter than one year, the probation period cannot exceed a month; if the duration of a work contract is longer than a year but shorter than three years, the probation period cannot exceed two months; and if the duration is fixed to three years or more or if it is an open-ended contract, the probation period cannot exceed six months. "

above. However, if the extension is provided for a few days only (while the probation period is long, for example 5 months), the judge will deny the extension of the probation period, to the extent that a short duration does not impact objectively the assessment on the employee. It is interesting to note that regulations from the provinces of Jiangsu and Zhejiang as well as from the Tianjin municipality allow for the possibility of suspending labour contracts if employees fall sick during their probation period, but under specific conditions.

In either way, as the law generally does not support the extension of probation periods, we recommend to systematically include into work contracts a probation period which should be as long as possible and to carry out mandatory assessments of employees before its expiration.

Any possibility of extending probation periods because of the COVID-19 outbreak?

During the COVID-19 outbreak, many companies found it impossible to assess properly the abilities of their new employees. Indeed, (i) some of their employees were placed in isolation, on observation or required medical treatment (following pneumonia, or because they were considered part of the at-risk group, or had been in close contact with someone infected by the virus); (ii) others were under quarantine or other emergency measures, (iii) and finally some could not work normally in view of the suspension or delay of their employers' activities.

Accordingly, some companies now wish to extend the probation periods of some employees.

However, in practice, as explained above, such an extension is likely to be considered illegal by many courts.

Companies registered in Shanghai or in the Zhejiang province can consider such possibility provided that the Four Conditions described above are completely met.

For other ones, a case-by-case analysis must be carried out to establish if a suspension of the probation period, when employees were unable to work for reasons linked to the occurrence of the COVID-19 outbreak, can be considered.

The analysis should take into account the following points:

- The actual time period when employees were unable to work in view of the COVID-19 outbreak, this should be relatively long in order to justify the inability of employers to assess their employees;
- The content of the labour contract and the company internal regulations: are there any clauses stipulating the possibility of suspending/extending the probation period upon the occurrence of particular circumstances such as, 1) an event of force majeure (such as an outbreak); 2) continuous sick leave of employees; 3) closure or suspension of employers' activities, etc.
- The possibility of reaching an express agreement with employees regarding the suspension of the probation period: failing such agreement with employees, then there are significant risks for employers.

In the event that companies should decide to extend or suspend the probation period, it is essential to sign a written agreement with employees stipulating the terms of this extension/suspension, and in particular:

- The exact duration of the suspension/extension of the probation period, being reminded that in case of an extension, the total duration of the probation period must not exceed the maximum duration provided by law.
- The specific reasons which can be used to justify this suspension/extension.
- A reminder of the objectives that employees should reach, according to their job descriptions.

DING Yu

Legal Advisor-Shanghai Office

dingyu@dsavocats.com

Aude FERTE

Counsel –Shanghai Office

ferte@dsavocats.com

Sylvie SAVOIE

Counsel-Beijing Office

Savoie@dsavocats.com

LES BRÈVES

www.ds-savoirfaire.com

DS | SAVOIR,
FAIRE

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