



CHINA

How to terminate an employment contract of an employee during probation period?

Case presentation

Mrs. Han joined her previous employer (the "Employer") on December 1st 2015 as a Human Resource Director. The probation period was 3 months until February 29th 2016. The Employee Handbook of the Employer stipulates that "the employee will not be considered having met the criteria of employment (the "Employment Criteria") in case he/she cheats, conceals or in case of low work capacity..."

The Employer terminated the employment contract of Mrs. Han on February 29th 2016 on the basis of article 39 (1) of *Labor Contract Law of the People's Republic of China*, due to the reason that she has not passed the probation period evaluation.

Then, Mrs. Han filed a lawsuit (1) against the Employer and claimed that the termination of her employment contract was illegal and requested for performance of the labor contract to be continued.

In the process of the arbitration and the subsequent trial, the Employer mainly presented the evidence as follows:

- Evidence to prove that it has explicitly informed Mrs. Han of its Employment Criteria, such as a copy of Letter of Commitment upon Boarding, the Employee Handbook, description of duties and responsibilities, phone records during job interview, etc. But there is no Mrs. Han's signature on the said evidence.
- Evidence to prove that Mrs. Han had made a false statement on her education information and working experience (cheating) thus she did not meet the Employment Criteria, such as the Boarding Registration Form, copy of personal resume, copy of diploma, etc.
- Evidence to prove that Mrs. Han has not accomplished her work in most cases during probation period, such as emails on weekly work report sent by Mrs. Han, internal documents, and the work attendance policy.

Judgment

The court of second instance (the "Court") finally confirmed that the termination of Mrs. Han's employment contract by the Employer was illegal because:

- (i) the evidence submitted by the Employer is not sufficient to prove that the Employer has informed Mrs. Han of the Employment Criteria (without her signature);
- (ii) the evidence presented cannot prove that the Employer has completed a probation period evaluation for Mrs. Han; and
- (iii) the existing evidence was unable to prove that Mrs. Han did not meet the Employment Criteria.

However, the Court did not support Mrs. Han's claim that she should be reinstated based on the following considerations:

- Human Resource Director is an important managerial officer. On the occurrence of a vacancy, the company needs to immediately appoint another one to fill the vacancy. In this case, a new Human Resource Director has been nominated by the Employer after the departure of Mrs. Han.
- From the existing evidence, the Court considered that Mrs. Han and the Employer has lost the trust in each other so that it is impossible for them to continue to perform their employment contract.
- Mrs. Han agreed with an adjustment of working position but refused the adjustment of salary amount.

Case Analysis

This is a typical case on termination of an employment contract of an employee during probation period. Pursuant to the *Labor Contract Law of the People's Republic of China*, during probation period, the employer may unilaterally terminate the employee's employment contract, without prior notice or severance, provided that the employee does not meet the employment criteria during the probation period. The employer has to explain the reason to the employee when terminating the employment contract.

In practice, it is not that simple to apply the above law. We could know from the above case that it is an important issue that the employer performs its obligation to INFORM. That means when a new employee starts the work, the employer shall clarify what its employment criteria is and how his/her performance during the probation period will be evaluated. Otherwise, it doesn't make sense to draw a conclusion that the employee does not satisfy the employment criteria of the employer.

Employment criteria represents for example job description and duties and responsibilities for the employee's work position, specific objectives during probation period, one clause in employment contract, or internal rules on specifying the conditions which will not be considered as satisfying the employment criteria.

In this topic, another important issue is how to inform the employee of the employment criteria. The Court in this case considered that Mrs. Han has not signed the Employee Handbook and duties and responsibilities. Thus, the Court cannot adopt the defense that the Employer has informed Mrs. Han of the Employment Criteria. Consequently, an effective notification requires that the employee sign the written employment criteria.

The signature of the employee could be interpreted as he/she has read the employment criteria and accepted that the employer is entitled to evaluate his/her performance during the probation period according to its evaluation policy. Or, the employer could use alternative means to prove that the employee has been aware of the employment criteria, for example the employer has sent the employment criteria by email, or the employment criteria has been published on the recruitment website. Whereas in any case, the most appropriate method is to ask the employee to sign the employment criteria.

Tips for DS clients

In order to avoid the occurrence of problems when terminating the employment contract during probation period, we advise you to consider the following points at recruitment of employee:

In order to avoid the occurrence of problems when terminating the employment contract during probation period, we advise you to consider the following points at recruitment of employee:

- formulate probation performance evaluation policy in the internal rules or employment contract for the employees during the probation period, including the components, process, evaluator, standards of the evaluation;
- require any new employee to sign the acknowledgement of receipt of employment criteria and the probation performance evaluation policy, i.e. signing the description of duties and responsibilities, and internal rules/employment contract;

- collect and keep the written records of the employee's faults at work, weakness in communication skills or misconducts during the probation period, etc;
- evaluate his/her performance by several evaluators in order to gain more probative value on the evaluation document, and make sure that the employee has signed the evaluation document;
- evaluate the employee's performance of probation period periodically if possible;
- it is desirable to propose him/her to resign before terminating his/her employment contract as it is better for his/her career. In case of refusal by the employee, send the termination notice of employment contract (sealed by the employer) by hand or by EMS at latest on the last day of probation period.

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(1) In China, we implement "One arbitration, Two trials" and "Labor arbitration should be firstly lodged" system for labor disputes.

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