

THE LEGAL STATUS OF THE PUBLIC EMPLOYEE DURING THE PROBATION PERIOD IN THE JORDANIAN LEGISLATION: LEGAL ISSUES AND LEGAL RECOMMENDATIONS

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ABSTRACT

The public administration has a duty to ensure that the public service is provided to people in the best way without interruption which requires the public employees to be effective and capable of carrying out their duties. However, the employee who is appointed for the first time must undergo a period of probation, in order to enable the administration to evaluate his ability to perform his tasks and the speed of his adaptation to the requirements of the job in which he was assigned to, or whether he needs to be dismissed before the expiry of the probation period. The probation period in the Jordanian Civil Service Regulation raises many issues regarding the legal guarantees for the public employee as the public administration has an absolute authority which can be abused in the decisions of termination especially there is no judicial control over such decisions. This paper therefore will examine the legislative issues of probation period for the public employee, and provide some legal recommendation in this regard.

Keywords: Probation Period, Public Employee, Public Employment.

INTRODUCTION

The civil code is considered one of the oldest branches of law, where it deals with those who are subject to its provisions on an equal basis, respects, and devotes the will of individuals to establish a set of their rights and obligations. In contrast, the administrative law always grants the administration rights that differ from those enjoyed by individuals, making its legal status more powerful than individuals' in order to achieve the public interest and keep ongoing the functioning of the public utilities regularly and steadily.

Organizing the public employment in Jordan is carried out in accordance with a regulation issued by the Executive Power based on Article 120 of the Jordanian Constitution, which stipulates that:

"The administrative divisions of the Hashemite Kingdom of Jordan, the structures of government departments, their grades, designations, method of administration, and the manner of the appointment of civil servants, their dismissal, their supervision and the limits of their authorities and competences shall be specified by regulations issued by the Council of Ministers with the approval of the King."

The first legislation for the public employment in Jordan was issued in 1926 and was subject to several amendments with the aim of developing the regulation and ensuring the existence of an administrative framework that is capable of accommodating changes in the

society in all fields. The latest occupational legislation in this regard is the current Civil Service regulation No. 82 of the year 2013 and its amendments (Al-Sarayra, 2000; Law & Regulation, 2013).

The Jordanian Civil Service Regulation stipulates that a person who is appointed in the civil service must meet certain conditions¹ and educational qualifications. However, meeting these requirements doesn't mean that he has the competences to exercise the duties of this position and this regulation therefore stipulated that the employees must undergo a period of probation where they are evaluated for their efficiency, good conduct in dealing with their colleagues and subordinates, treatment of the public, and respect for the occupational legislation. As a result, if the probation period has passed successfully and the employees have proved their worthiness, a fixation to their employment will occur.

The main goal of legislator from adopting the probation period for the public employees is to provide the public administration with the discretion to assess the suitability of the public employee to perform the work, since the public administration has a duty to ensure that the public service is provided to people in the best way which requires an employee who is efficient, effective, capable of carrying out his duties as required.

It should be noted that the public employee under probation enjoys all the rights and privileges of staff members, who are permanent in the service, where he earns a salary against the work he performs, earn all the bonuses and benefits that the permanent employees earn, as well as being entitled to annual leaves. However, the employee may not be transferred, mandated or seconded until his employment is fixed (Kanaan, 1996; Al-Tahrawi, 2011) in order to enable the administration to supervise and monitor the employee during the probation period and to evaluate him fairly and according to clear criteria.

The probation period in the Jordanian Civil Service Regulation raises many issues regarding the legal guarantees for the public employee during the probation period as the public administration has an absolute authority which can be abused in termination decisions without justification, and may also no judicial control over such decisions.

Accordingly, this research is divided into three main sections in which all the legal rules of the probation period topic will be discussed including: The concept of probation period for the public employee; the legal nature of the employee relationship with the administration; and the legislative issues of public employee probation period.

The Concept of Probation Period for the Public Employee

The Jordanian Civil Service Regulation has set a period of time for the public employee to go through, in order to receive a confirmation of an employment fixation in the civil service, conditional to proving his worthiness and being fit to carry out the job.

This legally set period is also found in employment contracts,² where employer can verify the efficiency of the employee and his potential to carry out the required work, as well as for the employee to verify the working conditions and the suitability of the wage for the effort exerted. If the probation period passes without either party using the right to terminate the contract, it indicates a successful probation and a confirmation of employment fixation

The employment legislation that organizes the probation period for the public employee did not provide a comprehensive definition to this period; it only stipulated the category of employees who are subject to the period, its duration, its mechanism, and the authority of the administration to judge the competences of the public employee (Bin-Omair, 2015).

The probation period was defined by the jurisprudence as

"The period of time determined by the legislator for the first-time employee and for the re-appointed employee in some cases, where he remains under the direct supervision and monitoring of the management to verify his ability to perform the tasks assigned to him, conditional on passing the probation period successfully"(Al-Qabilat, 2013).

The Jordanian High Court of Justice referred to the purpose of the probation period in a ruling stating that:

"...The legislator has given the administration the right to monitor the employee who is appointed for the first time under probation, in order to identify his ability to perform his tasks and the speed of his adaptation to the requirements of the job in which he was assigned to, and discover his ability to continue in the service or whether he needs to be dismissed before the expiry of the probation period." (Law & Regulation, 1983).

In this regard, the Jordanian Civil Service Regulation stipulated on a probation period for the public employee in Article (62) stating that:

1. The employee assigned in the Civil Service is *subject to* two years, to probation, that starts from the date of commencing work and the employee will be fixed or dismissed according to the results of his performance evaluation during probation by a decision from the concerned reference.
2. For purposes of Clause (a) of this Article, the service period of the contract employee on his work and assigned on permanent job is considered a constant service.
3. If any person is reassigned in the Civil Service then he/she shall be under probation for the period indicated in Clause (a) of this Article.
4. Each department shall qualify the employee under probation and introduce him to the status of the department, its work, goals, tasks and its administrative organization and the legislations concerning it, it shall also train him on the work methods including him the new employee guidance program.

Accordingly, this provision is compulsory and not permissive, since it stated that the employee "*is subject to*" where the word indicates that it is compulsory and the public administration therefore is obliged to subject the public employee to a probation period before making a decision of fixing or terminating his services, and cannot exclude any public employee from this condition.

The probation period shall be also calculated from the date of the commencement of the work and not from the date of the appointment decision because the employee's rights and obligations start from the date of starting the work.

It is noted that the Jordanian legislator committed a mistake when he increased the probation period to two years rather than one year as in the previous Jordanian Civil Service Regulation. For the purpose of stabilizing the legal positions of the public employees and keep ongoing the functions of public utilities steadily and regulatory, one year is considered sufficient from our point of view for administrative bodies to evaluate their employees and their efficiencies to carry out their duties. The duration of one year also reduces the costs to the public administration to qualify and train an employee, and if he proved to be competent, their employment gets fixed, and can take specialized training courses after.

The main aims of this study, is to examine the possibility of developing the legal status of public employee during the probation period by showing the legal issues and the legal suggestions in this regard. Therefore, it is first important to examine the legal nature of the

relationship between the public employee and the administration as will be done in the following section.

The Legal Nature of the Relationship between the Public Employee and the Administration

The jurisprudence had different opinions on forming the legal relationship that links the public employee with the public administration; whether it's a contractual relationship governed by the provisions of the civil code, based on the idea that the contract is considered the law of the contracting parties, or whether it's a contractual relationship regulated by the public law given that the public service contract is an administrative contract? Under this requirement, all theories discussing the nature of the relationship between the public employee and the administration will be reviewed, then briefly a description on which of these theories the Jordanian legal system has adopted will be outlined as follows:

Civil Contractual Theory

Part of the jurisprudence has tried to define this relationship as a legal contractual association that is derived from the private law, where this contract varies depending on the type work required from the public employee. The contract can be considered as a leasing services contract if physical effort is assigned to the employee, whereas the contract is considered a contract of mandate if the public employee was entrusted with legal acts. Accordingly, this contract can be adapted to any type of civil contracts, depending on the nature of the tasks performed by the public employee (Shatanaoui, 2009).

The idea of a civil contract is based on the principle of negotiations between the contracting parties, and the determination of the rights and obligations by agreement amongst them. The rights and duties of the public employee are defined in accordance with the provisions of the legislation, where the legislator has the sole say in determining these provisions without the need to obtain the approval of the other parties of the contract. In addition, this concept contradicts with the functioning of the public utilities to be continues without interruption, where it's regular and steady, and the principle of its ability to be changed and amended to achieve the public interest does not conform to the idea of the civil contract which is characterized by steadiness and stability; and where adjustments to its clauses only occur with the consent of both contract parties. As a result of these criticisms, the jurisprudence has backed on this description of the nature of the relationship between the public employee and the administration.

Organizational Relationship

In view of the criticisms that have been directed against the contractual theory, as it has proved to be invalid in practice to determine the nature of the relationship between the employee and the administration, jurisprudence has adopted a new theory to describe this relationship.

The sense of this theory is to only refer to legal text, whether it emerged in laws or regulation, as it determines the nature and the rules of this relationship. The employee must commit to the provisions of these regulations, including the right/duties and the employee is therefore in an organizational, non-contractual position in this case, and the decision of appointing the employee does not create a special self-centered position for the public employee, given that the position already exists prior to the existence of the public employee. However, it

only assigns the occupational legal status to the employee, including the rights and duties, regardless of the status of the occupant of the job.

Accordingly, the administration can amend the rules governing the work in the public service any time it feels that the amendment is urgently needed to achieve the public interest, under the interest of the regular and steady public service management principle, without a regard to the interest of public employees in the public services (Batikh, 2005).

The recognition of the right of amendment and development to the administration has led to the conclusion that the relationship between the administration and the public employee is organizational, where the employee is positioned under an organizational structure governed by the rules that organize the public service. Therefore, the employee appointment decision is only a mean to assign the post to the employee, and the employee's acceptance of this decision is only a matter of accepting the provisions of the document, and shall assume his duties and responsibilities in accordance with the laws and regulations in that regard (Al-Helou, 2008).

The Attitude of Jordanian Legislator and Judiciary

The organizational theory is one of the administrative law theories that has been adopted by most of the legislations in the public services,³ assuming that the public employee is positioned under an organizational structure, therefore, he is subject to what is stipulated by the laws and regulations. The Jordanian legislator did not explicitly stipulate on the nature of the relationship that governs the public employee with the administration, however, after the review of the current Civil Service Regulation, it was found that it has indirectly adopted the organizational theory, where article (2) has defined the public service as:

"A set of departments and its employees and the basis and rules which regulate its affairs according to the provisions of this regulation."

The Jordanian administrative judiciary has dealt with this issue represented by the Court of High Justice, when it ruled that:

"The government's relationship with its employees is not a contractual relationship, rather an organizational relationship governed by laws and regulations and the government is always entitled to amend this relationship by enacting legislations as required by the public interest." (Law & Regulation, 1952).

The Jordanian Court of Cassation also ruled that:

"The relationship between an individual hired at administration (the Ministry of Public Works) against a monthly lump-sum salary from the projects allocations, is a governmental organizational relationship and not contractual. Therefore, his acceptance to be employed for a monthly salary; is an acceptance to change this relationship from contractual to organizational relationship subject to the provisions of the staff regulations." (Law & Regulation, 1967)

Since the relationship between the administration and public employee is organizational which grants the administration authorities to evaluate the efficiency of public employee during the probation period, there are some legal issues may arise regarding abusing the administration its authority in some cases which will be discussed in the following section.

The Legislative Issues of Public Employee Probation Period

It's found that the Jordanian legislator in the current Civil Service Regulation has specified, in an explicit provision, which administrative authority can make the decision on fixing or terminating the service of the public employee during the probation, stating that:

"...The employee will be fixed or dismissed according to the results of his performance evaluation during probation by a decision from the concerned administrative reference."

According to this text, the term of concerned administrative reference' means that the competent authority to issue the decision of the fixation or termination is the same authority competent with the appointment.

It could be argued that the principles of the administrative law based on the legal logic gives the authority the right of issuing the decision of the fixation or termination to the same authority that issue the decision of appointment, being the most able to evaluate the work of the employee during the probation period, more than any other administrative party, as the employee operates under its supervision and monitoring. It could be said therefore that the Jordanian legislator did well when he provided for this legal provision in the body of the Jordanian Civil Service Regulation. On the other hand, it is noted that this provision did not provide sufficient guarantees for the public employee during the probation period that the public administration will not abuse its authority in some cases. From analysing this text, it could be found that there are no guarantees, or at least requiring a justification for the termination decision during the probation, rather settled for the assessment of the employee from the competent authority for appointment.

It should be mentioned that the stand of administrative judiciary is unclear in this regard since the administrative courts considered the administration has a full/absolute power in the probation period and there is no judicial control over such decision, while the administrative courts in other cases mentioned that it has competence to control the termination decision during the probation period. For example, the administrative court decided in one of its awards that the termination decision comes under the judicial control, stating:

"...The decision of termination during the probation period should be reasoned and the court has power to control such decisions in this regard. However, the administration has not provided evidences proved that the employee is unqualified such matter makes the court convinced that the termination decision is wrong and should be deleted..." (Law & Regulation, 2002).

On the other hand, the High Court decided in one of its awards that it has no authority to control the decision of termination stating:

"...The employee in his career goes through two different stages: a) a phase free of guarantees during which he will be under probation b) a stage in which he enjoys sufficient guarantees which is following the probation period. The authority of the management in the first stage differs in essence from its authority in the second stage, as in the first stage, it's an absolute authority with no restrictions or judicial control, whereas in the latter it's a restricted authority which can only be exercised by taking certain measures and verifying the existence of specific conditions..." (Law & Regulation, 1959 & Law & Regulation, 2003).

In another example, the court decided that:

"...The Civil Service Regulation grants the administration authority to issue any decision during the probation period according to the circumstances and evidences it has, and there is no control over what the administration has reached and the decision issued in this regard..." (Law & Regulation, 1983).

The author believes that the authority of the public administration to determine the competency of the public employee is not absolute, but rather a discretionary authority based on evidence, facts, legal, and factual reasons that justify its decision. Since the decision to terminate the public employee during the probation period is a similar to dismissing him from the job and the authority must explain the reason for this dismissal, as the administration may sometimes misuse its authority and terminate the services of the employee despite his efficiency and competency to perform the duties assigned to him (Al-Helou, 1996).

It is found that some occupational legislation clearly referred to this guarantee of justifying the decision to terminate the service during the probation period. The Executive Regulations of Bahrain Law Decree No 48/2010 (Law & Regulation, 2010) Promulgating Civil Service Law in Article (12/5) stipulates that:

"The service of the employee during the probation period may be terminated by reasoned decision of the competent authority if he violates his duties in accordance with the provisions of the law."

However, the employee during the probation period might face certain circumstances make him unable to work for a period of time. Another question that may arise in this regard is what reasons can be considered legitimate excuses in case of an employee absence under probation and still be counted within the probation period? Or whether this absenteeism interrupts the probation period for the public employee?

The Jordanian legislator did not mention to the above question such matter requires examining the stand of jurisprudence in this regard. One aspect of jurisprudence believes that the absence of a public employee during the probation period shall not be considered as an actual service for the purposes of the probation period whatever the reason of absence either due to sick leave, maternity leave or unpaid leave, and it is better not to calculate the probation period during these leaves (Kamel, 1996; Ismail, 1993).

Another aspect is that the above mentioned is too conservative in an unjustified manner because the employee during the probation period might face certain circumstances in which he would have to be absent from work for a short period, such as the death of parents, wife, husband, or a sibling. It is important therefore to distinguish between ordinary and extraordinary reasons (Al-Tahrawi, 2010; Al-Qabilat, 2013).

The author supports the second aspect where it is needed to distinguish between ordinary and extraordinary reasons for employee absence. For example, the suspension of an employee from work makes the suspension of the probation period necessary as the suspension is a decision of the related authority and in certain cases requires a verification to ensure whether or not a disciplinary offense was committed which may take a long period of time. Also, if a public employee takes an involuntary leave that forces him to go off duty, the public administration must understand this and suspend the probation period during these circumstances. Otherwise, the probation period should be counted.

However, the probation period may expire without a decision by the competent authority considered a fixation or termination of services. Another issue may arise in this regard is: does

the absence of a decision to terminate the services of the public employee consider an implicit decision to fix the employment without the need for an explicit decision?

The Jordanian law text did not provide a clear and comprehensive answer to this question, where it only showed the case of termination in light of the results of the evaluation; where a decision to terminate or fix the employment is issued, without indicating the case in the absence of a decision to fix or terminate, which leads us to research on comparative occupational legislation and whether it dealt with such a hypothesis. It was found that the Kuwaiti legislator included this provision in its legislation stating that:

"Appointment to certain posts may be for a probation period, if the appointee proves to be unfit, he shall be dismissed, or have his contract terminated. If the appointee successfully completes his probation he shall be deemed fixed in his post and that period shall be calculated as part of his service." (Law & Regulation, 1979, article No. 17).

The Executive Regulations of Bahrain Law as another example stipulate that:

"If the probation period expires without informing the employee of the decision, his employment is considered fixed" (Law & Regulation, 2010, article No. 12).

In the absence of an answer for this legal provision under the current Jordanian Civil Service Regulation, the author believes that the employee is considered fixed in the service in the absence of a decision to terminate his services during the probation period in order to keep the functions of public utilities regularly and steadily without interruption. Otherwise, it would disrupt the functioning of public utilities as a result of the termination of employee services without the explicit will of the public administration to terminate the services of such personnel (Arrowsmith, 2014).

The existence of legal text therefore resolves the jurisprudential and judicial debate, and it is recommended that the Jordanian legislator would follow the example of the comparative occupational legislation that explicitly stated the effect of the end of the probation period without a decision to fix or terminate. It is recommended that the legislator modifies the article to be:

"A public employee who has been employed for the first time is to be under probation for two years, starting from the date of commencing his job, and his service is considered fixed at the end of that period, unless a decision by the appointing authority was made to terminate it, provided that the service may be terminated during the probation period by the said authority etc."

CONCLUSION

This paper has reached that satisfying the general requirements by the public employee and passing the tests and the competitive exams does not necessarily mean that the public employee has reached a high degree of efficiency and competency to achieve the goals and objectives of the civil service, as it can only be demonstrated by exercising his duties. Therefore, the administration can ascertain the extent to which he can carry out their duties, how they behave, their relations with their colleagues, and how they deal with administrative supervisors as well as the auditors. The Jordanian Civil Service Regulation stipulated that the employee is subject to a period of time under the supervision of the public administration to assess and indicate the extent to which he can carry out the duties of the job and whether he can continue to

perform those duties after the expiry of the probation period, otherwise, his service will be terminated before the expiry of the period (Al-Khalayleh, 2012).

The administrative jurisprudence and judiciary nearly agreed on the right of the public administration to terminate the service of the public employee during the probationary period upon expiry if it is proved to the administrative authority that the employee is not qualified to carry out the duties entrusted to him.

The Jordanian legislator in this regard has set the probation period for the public employee as two years, during which the public administration has to make a decision regarding the employment. The period is calculated starting from the date the employee commenced his work, and not from the date when the appointment decision was issued, since the employee's rights and duties start from the date of the employment.⁴

It is clear that the Jordanian legislator has granted the administrative authority the right to determine whether the public employee services are to be fixed or terminated during the probation period, since carrying out the duties of the public service is the basis for the public employee to maintain his job. If the administration finds that there is no real and permanent desire for the public employee to work, such as refusing to carry out the work assigned to him, being absent from work, committing offenses prohibited by the occupational legislation, and disobeying his subordinates, then the administration can terminate his services (Bin-Omar, 2015). Although the Jordanian legislator has clearly defined the authority that can fix or terminate employees services, the legal text still raises some legal problems regarding the guarantees given to the public employee to do the work while being reassured that the administration will not abuse its authority to terminate his services unlawfully.

In the course of this research, and trying to cover the provisions and controls that govern the probation period for the public employees, there are some recommendations that might be necessary to complete the provisions relating to the probation period in the Jordanian legislation, as follows:

1. The decision to terminate the services of a public employee from the public service during the probation period should be justified so that the public administration does not abuse its authority to terminate the services of a public employee without a legitimate reason. It is necessary therefore to amend the Civil Service Regulation by adding a provision obliges the administration to justify such decisions.
2. Although the Administrative Judiciary Act 2014 granted the Administrative Court the jurisdiction to hear all challenges concerning final administrative decisions (The Administrative Judiciary Act 2014, article No. 5) which implicitly includes the decisions of termination services for the public employee during the probation period, there was a clear contradiction between the judgments of Administrative judiciary since the court sometimes considers that the administration has a full/absolute power in the probation period and there is no judicial control over such decisions, while the administrative court in other cases mentioned that it has competence to control the termination decisions during the probation period.
To avoid any argument in this regard, it is recommended that the Jordanian administrative judiciary supervise the decision of the public administration to terminate the services of the public employee from the public service so that the administration does not exercise its powers unlawfully. This could be done by stipulating for a provision that assigns this task to the Jordanian administrative judiciary in the Act of Administrative Judiciary which determines the competences of administrative courts.
3. The Jordanian legislator should amend the text of Article 62 of the current Jordanian Civil Service Regulation by stipulating explicitly and clearly that the end of the probation period without a decision of the administration to terminate the services of the employee is a decision to fix his employment under the rules of the law.
4. The probation period varies from occupational legislation to another; it also varies within the boundaries of one country, and even between comparative legal systems in multiple countries. In order to solve any dispute that can arise regarding the probation period of public employee, it is more appropriate for the

legislator to state such a case explicitly and clearly in the Regulation and taking the experiences of other countries is necessary which was mentioned previously.

ENDNOTES

1. Article (43) of the Jordanian Civil Service Bylaw No. 82 of the year 2013 stipulates that: Appointee in any job must be:
 1. A Jordanian nationality.
 2. Completed eighteen years old confirmed according to the ID card issued by the Department of Civil Status and Passports; in case that his/her birthday is unknown, he/she shall be considered of the first of January births of the year in which he/she was born.
 3. Free of any diseases, physical and mental disabilities that may restrain him/her from carrying out the duties of the job in which he/she shall be appointed in accordance with the decision of the competent medical authority, yet its permissible to appoint individual with special needs if the disability thereof does not restrain him/her from carrying out the job's duties confirmed by a certificate issued by the competent medical authority.
 4. Not convicted for any crime (except for crimes of political character), or misdemeanour in default of honor, integrity and public morals.
 5. The appointee must meet the requirements and conditions of occupying the vacancy.
2. The usual method for appointing the public employees is issuing a decision from the competent administrative authority. However, there are some situations in which an administration may not be able to provide suitable employees for certain positions because of the need for quite specific experience. In this case, the administration may resort to concluding public employment contracts with qualified people (whether Jordanian or foreign nationals) in order to fill vacant positions.
3. This theory was adopted in France by the French legislator in the employees' laws since the promulgation of the civil service under the reign of Prime Minister Vichy. Where article 4 states that the status of the public employee is a position under the organizational structure. The later laws of 1949 and 1959 adopted this theory subsequently, with the support of the French Council of State who stopped defining this relationship between the employee and the state as a contractual relationship. The Egyptian legislator has also adopted this theory in the civil service bylaws starting with the 1951 law, through the Civil Servants System No. 47 of the year 1978, up until the current Civil Service Bylaw No. 18 of the year 2015 which referred to the organizational relationship indirectly, where article 1 stipulated that "*Public services are assignments to the appointees to serve the people ...*" as supported by the Egyptian State Council since its establishment in 1946. The Egyptian Administrative Court of Justice ruled that "*the public service is a general legal status that is established and regulated by its own laws and regulations*" The decision of the Administrative Court of Justice dated June 9, 1949, The set of principles decided by the Administrative Court of Egypt. For more details, see Bin Tarif (2016).
4. The Civil Service Regulation 2003 mentioned in article (62) that: "*The employee assigned in the Civil Service is subject for two years, to probation, that starts from the date of commencing work.....*"

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