**CASELAW NO. 20/2018/AL**

*This case law was promulgated by the Judicial Council of the Supreme People’s Court on 17 October 2018 and promulgated under Decision No. 269/QD-CA dated 6 November 2018 by the Chief Justice of the Supreme People’s Court.*

## Source of the case law:

Cassation Decision No. 01/2017/LD-GDT dated 9 August 2017 of the Judicial Council of the Supreme People’s Court with regard to the commercial case concerning *“Dispute on unilateral termination of a labor contract”* in Binh Thuan Province between the Plaintiff being Mr. Tran Cong T and the Defendant being L Company Limited (the legal representative being Mr. H).

## Location of contents of the case law:

Paragraphs 2 and 3 of the section “*Findings of the Court*”.

## Overview of the case law:

### Background of the case law:

The employer sent an offer letter with the contents on determination of type of labor contract and probation period. The employee probated in accordance with the probationary period in the offer letter.

After expiration of the probationary period, the employee continued to work and the employer and the employee had no further agreement.

### Legal resolution:

In this case, the court must determine that the employer and the employee established the labor contract relationship.

## Applicable provisions of laws relating to the case law:

Articles 26, 27, 28, 29 of the Labor Code 2012.

## Key words of the case law:

*“Probation”, “Probationary period”, “Offer letter”, “Not signing the labor contract when the probationary period expires”, “Labor contract”.*

## CONTENTS OF THE CASE

Mr. Tran Cong T worked at L Company Limited – Supermarket L – Branch B from 09 September 2013 according to the Offer letter dated 20 August 2013 of L Company Limited. Pursuant to the contents of the offer letter, Mr. T worked as the Head of the Non-Food

Department, type of labor contract: Definite term labor contract (with 12 months or more), probation period: 02 months, the total salary of the probationary period is VND15,300,000, the primary monthly salary is VND12,600,000, the monthly allowance is VND5,400,000.

Mr. T started to work from 9 September 2013. Upon expiration of the probationary period of 02 months (from 9 September 2013 to 9 November 2013), Mr. T still continued working. On 19 December 2013, Mr. T sent a resignation letter the job. On 28 December 2013, the Department of Human Resources of L Company Limited sent an invitation to Mr. T for a meeting in the Company and made a *“Minutes on Agreement regarding the early termination of labor contract prior to expiry of its duration”*. Mr. T wrote his opinions in the meeting with the following contents: He did not agree on resolution on termination of labor contract. On 29 December 2013, L Company Limited issued Decision No. 15/QDKL-2013 on the content of unilateral termination of labor contract to Mr. Tran Cong T for the reasons that: He repeatedly failed to perform his tasks under the labor contract, the time for termination of labor contract is from 28 December 2013. On 6 January 2014, Mr. T received the Decision on termination of labor contract as above-mentioned.

On 24 February 2014, Mr. Tran Cong T submitted a Statement of Claims on the unilateral termination of labor contract for the following requests:

1. To set aside Decision No. 15/QDKL-2013 dated 29 December 2013 of L Company Limited on unilateral termination of labor contract with him.
2. To request L Company Limited to compensate the following payments:
	* To compensate for the violation of not sending a 45 day-advance notice in the compensation amount of VND27,000,000.
	* To compensate for 02 months’ salary for unlawful termination of labor contract in the amount of VND36,000,000. The Company has compensated VND19,466,000, and the Company must pay the remaining amount of VND16,534,000.
	* To pay the overtime salary during 45 days in the amount of VND48,150,000.
	* To pay salary for 11 days worked without taking annual leave in the amount of VND6,600,000.
	* To pay salary for 11 days worked without taking the compensatory leave, the compensation amount is VND6,600,000.
	* To pay the unpaid amount of the salary of November and December, at the monthly salary level of VND18,000,000/ month, the amount to be paid is VND5,400,000.
	* To pay the social insurance, health insurance, unemployment insurance in the total amount of VND24,696,000.
	* Compensation amount of VND18,000,000 each month for the unlawful unilateral termination of labor contract pursuant to Article 42 of the Labor Code, calculated

from January 2014 up to the date of hearing. Being temporarily calculated for 7 months, the compensation amount is VND126,000,000.

* + Compensation amount for mental loss caused by the unlawful unilateral termination of labor contract.

The authorized legal representative of L Company Limited asserted that: The reason that L Company Limited terminated the labor contract with Mr. T was Mr. T failed to perform the work under the contract, particularly: After the probationary period of 2 months, pursuant to the Plan and Assessment of Achievement dated 10 November 2013, realizing that Mr. T has not satisfied the job requirements in the position of the Head of the Non-Food Department, the Director of Supermarket L – Branch B decided to extend the probationary period by 1 month to help Mr. T complete his tasks and to have more time for assessment of Mr. T’s ability. The extension of the probationary period was due to the reason that: Supermarket L – Branch B was officially opened on 5 December 2013. However, through the extended one-month probationary period, on 12 December 2013, the Head of the Department of Sale Supervision of Supermarket L – Branch B assessed that Mr. T did not meet the requirements and requested for replacement of Mr. T.

On 24 December 2013, in the Meeting Minutes No. 10 on assessment of the performance of Mr. T in the non-food business, the Director of Supermarket L – Branch B *“requested the Board of Director to replace Mr. T by an experienced manager for management of the non- food business”*.

On 28 December 2013, the Company invited Mr. T to attend the meeting to discuss termination of labor contract. In the Meeting Minutes on early termination of labor contract, the Company assessed Mr. T as follows: Considering the performance of Mr. T in the period from 9 September 2013 to 19 December 2013 (including the 02-month probationary period), the Company assessed that Mr. T is not suitable for his current position (attached with the assessment table of the Director of Supermarket L – Branch B), the Company agreed on the termination of labor contract and shall pay for working days, leave if any, and compensate for 1 month salary for the period of advance notice. Mr. T did not agree with such assessment of the Company.

On the same date of 28 December 2013, L Company Limited made a meeting minutes on termination of labor contract prior to expiry of its duration with Mr. T. The Company noticed that Mr. T shall terminate his job in the Company from 28 December 2013; the Company shall make payments to all salary payments, the annual leave payments and make one month’s salary payment replacing the time limit of advance notice. Mr. T did not agree on termination of labor contract before expiry of its duration.

The Company asserted that the decision on termination of labor contract with respect to Mr. T is compliant with the Labor Code. The Company made payment to Mr. T 01 month of salary for the time period of advance notice for terminating the labor contract. For the request for compensation of Mr. T, the Company agreed to pay Mr. T the social insurance, health insurance, unemployment insurance that the must contribute within the 02 months (after the expiration of probationary period), an amount of VND5,292,000 and 11 days that

Mr. T had not taken his leave being VND6,600,000. The Company did not agree on other requests for compensation of Mr. T.

In First-instance Labor Judgment No. 01/2014/LD-ST dated 12 August 2014, the People’s Court of Binh Thuan Province ruled that:

*To reject the requests for claims of the plaintiff – Mr. Tran Cong T as to the request for cancellation of Decision No. 15/QDKL-2013 dated 29 December 2013 of the General Director of L Company Limited on unilateral termination of labor contract with Mr. T.*

*To reject the request for claims of the plaintiff – Mr. Tran Cong T as to the request of L Company Limited for compensation and payments of the salary amounts; the social insurance, health insurance during the period of time that Mr. T was not allowed to work at Supermarket L - Branch B.*

*Recognizing the voluntariness of L Company Limited on: L Company Limited shall pay and assist Mr. T the social insurance, health insurance, unemployment insurance within the 02 months (November and December), in the amount of VND5,292,000, the amount for 11 working days that Mr. T worked without taking compensatory leave is VND6,600,000. The total of the 02 above amounts that L Company Limited is required to pay to Mr. T is VND11,892,000.*

In addition, the first-instance court determined the court fees and the right to appeal of the concerned party.

On 26 August 2014, Mr. Tran Cong T submitted an appeal of the first-instance judgment in its entirety.

In Appellate Labor Judgment No. 01/2015/LD-PT dated 13 April 2015, the Appellate Court of the Supreme People’s Court in Ho Chi Minh City ruled as follow:

*Not accepting the appeal, upholding the ruling of the first-instance judgment.*

In addition, the appellate court determined the court fees.

On 7 April 2016, Mr. Tran Cong T submitted a request for review of the appellate judgment in accordance to the cassation procedures.

In Decision No. 04/2016/KN-LD dated 26 December 2016, the Chief Justice of the Supreme People’s Court protested against Appellate Labor Judgment No. 01/2015/LD-PT dated 13 April 2015 of the Appellate Court of the Supreme People’s Court in Ho Chi Minh City and requested the Judicial Council of the Supreme People’s Court to review the case under the cassation procedures to set aside Appellate Labor Judgment No. 01/2015/LD-PT dated 13 April 2015 of the Appellate Court of the Supreme People’s Court in Ho Chi Minh City and First-instance Labor Judgment No. 01/2014/LD-ST dated 12 August 2014 of the People’s Court of Binh Thuan Province.

In the cassation hearing, the representative the Supreme People’s Procuracy requested the Judicial Council of the Supreme People’s Court to accept the protest of the Chief Justice of the Supreme People’s Court

## FINDINGS OF THE COURT

*On the jurisdiction to resolve the case:*

1. Pursuant to Articles 34, 35, and 36 of the Civil Procedure Code, the People’s Court of Phan Thiet City, Binh Thuan Province has jurisdiction to hear the dispute over unilateral termination of labor contract between the plaintiff being Mr. Tran Cong T and the defendant being L Company Limited under the first-instance procedures. Therefore, the People’s Court of Binh Thuan Province accepting jurisdiction to resolve the case under the first-instance procedures is not correct with provisions of the laws.

*On determination of labor relationship:*

1. Mr. Tran Cong T worked in L Company Limited in accordance with the Offer Letter dated 20 August 2013 with the following content: “Type of contract: Definite term contract (12 months or more). Probationary period: 2 months. Upon expiration of the probationary period (from 9 September 2013 to 9 November 2013), Mr. T did not receive any probationary result, Mr. T did not meet the above job requirements, therefore, the Company decided to extend 1 more month to facilitate Mr. T in completing his tasks and to have more time for assessment of Mr. T’s capacity. However, there is no document evidencing that Mr. T and L Company had an agreement on extension of probationary period.
2. Article 27.1 of the Labor Code provided that the probationary *period “shall not exceed 60 days for working in a position requiring college level or higher specialized, technical expertise”.* In the Self-Declaration dated 14 June 2014, the representative of L Company Limited presented the following: “The Company understands that after expiration of 60 days of the probationary period, the employee shall officially work according to the definite term labor contract of 12 months. Therefore, the representative of L Company Limited acknowledged that after expiration of the probationary period, Mr. T became an official employee under a definite term labor contract of 12 months. In fact, L Company Limited negotiated with Mr. T on termination of labor contract on 28 December 2013. After a negotiation without result, on 29 December 2013, the General Director of L Company Limited issued Decision No. 15/QDKL-2013 on unilateral termination of labor contract with Mr. T. Therefore, there is sufficient basis to determine the relation between Mr. T and L Company Limited after expiration of the probationary period is a labor relationship.

*On the legality of the termination of labor contract:*

1. L Company Limited unilaterally terminated the labor contract with Mr. Tran Cong T dated 29 December 2013; the reason for termination of labor contract is *“Repeatedly failing to perform the work in accordance with the labor contract”*, as provided under Article 38.1(a) of the Labor Code 2012. At the time L Company Limited unilaterally terminated the labor contract with Mr. T, the labor laws do not have regulations to be applied as a legal basis for assessment of the completeness of working performance of the employees.
2. Before the Labor Code 2012 took effect, the legal basis to assess whether an employee repeatedly failed to perform the work in accordance with the terms of labor contract was provided under Article 12.1 of Decree No. 44/2003/ND-CP dated 9 May 2003 of the Government on detailed regulations and implementation a number of Articles of the Labor Code as follows:

*“1. The employee repeatedly failed to perform the work in accordance with the labor contract meaning they failed to fulfill the labor norms or given tasks due to subjective reasons and are recorded or warned in writing at least twice in a month, but later still failed to overcome their shortcomings.*

*The extent of failure to fulfill the work shall be recorded in the labor contract, the collective labor agreement or the internal labor regulations of the unit*”.

Decree No. 44/2003/ND-CP dated 9 May 2003 of the Government was no longer effective from 1 July 2013. However, Article 12.1 as above stated is not contrary with the fundamental principles of the Labor Code, therefore, Article 12.1 should be applied as basis for resolution of the case.

1. L Company Limited presented the Job Description, Warning Notice on Violation dated 6 December 2013 and Warning Notice on Violation dated 16 December 2013, the Achievement Assessment and Plan dated 12 December 2013 and based on these documents to conclude that Mr. T did not complete his work pursuant to the labor contract. Mr. T asserted that he was not given the job description and did not receive the 02 warning notices of the company. L Company Limited could not provide evidence to prove that Mr. T was provided with the job description and warning notices. Therefore, the evidence provided by L Company Limited is not sufficient basis to determine Mr. Tran Cong T repeatedly failed to perform the work pursuant to the labor contract as provided under Article 12.1 of Decree 44/2003/ND-CP dated 9 May 2003 of the Government.
2. After expiration of the probationary period, L Company Limited did not sign the labor contract with Mr. Tran Cong T, the Company does not have collective labor agreement and labor regulation. Therefore, there is no basis to determine the failure to perform the work of the employee. The first-instance court and the appellate court concluding that Mr. Tran Cong T repeatedly failed to perform the job pursuant to the labor contract and rejecting the requests of Mr. T have no basis.

In light of the aforementioned reasons:

## RULES

Pursuant to Article 343.3, Article 345.1, and Article 345.2 of the Civil Procedure Code;

To accept the Protest against cassation No. 04/2914/KN-LD dated 26 December 2016 of the Chief Justice of the Supreme People’s Court; to set aside in its entirety Appellate Labor Judgment No. 01/2015/LD-PT dated 13 April 2015 of the Appellate Court of the Supreme People’s Court in Ho Chi Minh City and First-instance Labor Judgment No. 01/2014/LD-ST dated 12 August 2014 of the People’s Court of Binh Thuan Province on the dispute on

unilateral termination of labor contract between Mr. Tran Cong T and the defendant being L Company Limited.

To transfer the case to the People’s Court of Phan Thiet city, Binh Thuan Province to re- conduct first-instance procedures in accordance with the laws.

## CONTENTS OF THE CASE

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2. *Article 27.1 of the Labor Code provided that the probationary period “shall not exceed 60 days for working in a position requiring college level or higher specialized, technical expertise”. In the Self-Declaration dated 14 June 2014, the representative of L Company Limited presented the following: “The Company understands that after expiration of 60 days of the probationary period, the employee shall officially work according to the definite term labor contract of 12 months. Therefore, the representative of L Company Limited acknowledged that after expiration of the probationary period, Mr. T became an official employee under a definite term labor contract of 12 months. In fact, L Company Limited negotiated with Mr. T on termination of labor contract on 28 December 2013. After a negotiation without result, on 29 December 2013, the General Director of L Company Limited issued Decision No. 15/QDKL-2013 on unilateral termination of labor contract with Mr. T. Therefore, there is sufficient basis to determine the relation between Mr. T and L Company Limited after expiration of the probationary period is a labor relationship.*