

Concerns in HRM: Probationers' rights and status in the context of Malaysian employment relations

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Abstract

This paper analyses the rights and the status of probationers in the context of Malaysian employment relations. A probationer is someone who is on trial to give proof of certain qualifications for a place or status in employment. The term "probation" however, is not found in any of the employment legislation in Malaysia. This means a probationer is an employee in the context of Employment Act 1955 (EA 1955) and a workman in the context of Industrial Relations Act 1955 (IRA 1967). In the employment relations, the probationary period is also an opportunity for both employer and employee to decide whether they are suited for each other. The Industrial Court and the superior courts in Malaysia have over the years ruled that an employee (also refers to workman) on probation enjoys the same rights as a permanent employee. As a result the services of a probationer cannot be terminated without just cause or excuse (Section 20, IRA 1967). Although an employer retains the right to confirm or not to confirm an employee on probation, this prerogative must be exercised in a bona fide manner not arbitrarily or capriciously and there must also be grounds for the decision. In this paper, the authors analyses some of key issues on the rights and status of probationers which also include the employers right to confirm, extend or terminate the services of a probationer. The methodology employed in this paper is the analysis of industrial case laws on probation using criterion based sampling of Industrial Court and superior court awards. Findings from the analysis reveals that many termination awards on probation were made against the employers as the employers have failed or violated the principles of natural justice in the termination of probationers. The basic principle of industrial jurisprudence in Malaysia is that it is the employer who must prove the employee (probationer) guilty, and not the employee (probationer) who must prove himself (herself) not guilty. As such, the burden of prove is on the employer and not on the employee (probationer) for termination cases referred to the Industrial Court. In this paper the authors also provide some recommendation in the management probationers besides other guidelines to improve and create a harmonious employment relationship.

Key words: Probation, Termination, Employment Relations, Malaysian Industrial Law

INTRODUCTION

Probation in the Concise Oxford Dictionary has been explained to mean "testing of conduct or character of person" and a "probationer" as meaning a "person on probation". The term probation comes from a Latin word "probatio", meaning testing period. In the employment relations, it is a common practice by the employer to place an employee⁹⁷ (also workman)⁹⁸ on a probationary period prior to the confirmation. The

⁹⁷ Employee as defined in Employment Act 1955, Section 2(1) – any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed Ringgit Malaysia one thousand and five hundred (RM 1500.00).

⁹⁸ The term workman is different from term 'employee' as defined in the Employment Act (1955). In the Industrial Relations Act 1967 the term 'workman' is defined as 'any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes

probationary period is the time for both employer and also the employee to test each other for the job assigned. The employer will test the suitability of the employee for the job besides the employees' attitude, aptitude, ability or adaptability for the job. This has been aptly explained by the Industrial Court in the case of *Koperasi Serbaguna Pekerja Felda Bhd v. Zainal Arifin bin Mohd Noor*⁹⁹ as follows:

“As to the rights of a probationer, the Court prefers to adopt the principles laid down by the common law. It was necessary, first, to ascertain what is exactly meant by the word 'probation'. The dictionary meaning has been given as the 'testing of conduct or character of a person' and the probationer is one who 'is on trial or in a state to give proof of certain qualifications for a place or status.' The idea of probation in all cases of service contracts is, therefore, a testing of the character and capabilities of the servant on the employee's side and also a testing of the conditions of service on the employer's part.....”

In an English case, Justice J.S Rumbold, Chairman of the Industrial Tribunal in *J.M. Hambin v. London Borough of Ealing*,¹⁰⁰ observed the following:

“Probationary period is very much a trial period. The probationary employee knows that he is on trial and that he must put his right foot forward and establishes suitability for the post. The employer, on his side, must live the applicant a proper opportunity to prove - himself but he reserves to himself the right to determine the employ-merit on a month's notice provided he has reason for his action....”

In *Nada Pakar Sdn Bhd v. Radja Aritonang*¹⁰¹, the Industrial Court further amplified the legal position of probationers, as follows:

“The probationer is taken on to serve a period of trial employment as opposed to a confined employee who has proven himself to the satisfaction of his employer and has secured permanent employment thereby. . . .”

“The probationer enters into the agreement for probationary service on the understanding that his appointment is tentative in nature and certainly not on the secured and permanent basis, which is the case for a confined employee. Probationary employment is the precursor to permanent employment....”

The idea of probation in all cases of the service contracts is, therefore, a testing of the character and capabilities of the servant on the employer's side and also a testing of the conditions of service on the employee's part. An employer has the prerogative to terminate the services of an employee who is on probation if the former is genuinely satisfied that the latter is unsuitable for permanent employment. The correlative right vested in the probationer is his legitimate expectation that he will be confirmed in his appointment if he proves to the satisfaction of his employer to be a fit and proper person for the appointment. The process by which the suitability for regular employment is assessed by the employer must be fair, i.e. not capricious, arbitrary or tainted by unfair labor practice¹⁰².

of any proceedings in relation to a trade dispute’. In this paper both the term “employee” and also “workman” are used interchangeably depending on the context of Employment Act 1955 and also the Industrial Relations Act 1967.

⁹⁹ [1994] 2 ILR 862

¹⁰⁰ For details see <http://www.xperthr.co.uk/employmentlaw/caselawarticle.aspx?caseid=1779>

¹⁰¹ Industrial Court Award No. 662/2001,

¹⁰² D’Cruz, M.N. 1999, *A Comprehensive Guide to Current Malaysian Labour Laws*, Leeds Publications, Kuala Lumpur, p. 47

In *Syarikat Shell Refinery Co. Bhd v. Fakir Abdul Jalil bin Pakir Mohd*, the Industrial Court observed¹⁰³:

“The period of probation in a service contract can, therefore, be taken as communication by the employer that in case the employee proves himself within the period of probation, to the satisfaction of the employer, that he, the probationer is a fit and proper person to perform the duties for which he has offered his service, the probationer would be entitled to be confirmed or taken in on a permanent basis. The appointment of a person on probation is therefore, tentative and depends on the employer's satisfaction. But this satisfaction must be a reasonable satisfaction and not an arbitrary or capricious one”

Employees serving the probationary period will be under close and critical assessment and the permanent employment will be assured only if the employer's standards are met. The employer must therefore set out the standards he expects from the probationer. The standards are not just related to the quality or quantity but may include consideration of an employee's character, ability to work in harmony with others, potentiality for advancement and general suitability as an employee of the company concerned¹⁰⁴.

The probationary period is determined by the employer and is usually a period, which the employer feels is required for him to assess the suitability of the newly appointed or promoted employee in the job for which he has been appointed. The length of the probationary period is dependent of the organization, management policy and also the complexity of the task. As previously mentioned, the probation is also a period for the workman to test the conditions of service in the place of employment to see for himself whether he wishes to continue working for the employer. An initial period of probation is intended to allow the employer to test the character and capabilities of the probationer and to allow the probationer to test the conditions of service.

In *Diggle v. Ogton Motors Co.* (1915) 84 LJM¹⁰⁵, it was held that the services of a probationer can be terminated by the employer for poor standard of performance just before the probationary period ends. However, the standard expected by the employer should not be unreasonable i.e. the dissatisfaction must be bona fide (in good faith) and, if so, the employee can have no grievances to challenge the termination. In the employment relations, it has come to be recognized that, even during the probationary period, if the employee is terminated for breach of conduct on complaints made against his standard of performance, he has the right to challenge such termination in industrial adjudication¹⁰⁶.

LITERATURE REVIEW

In the context of Malaysia employment relations, studies on the legal aspect of probation and probationers rights are indeed limited. Hardly any studies were found to be done over the last ten years. In fact the academic studies in the area of employment laws in Malaysia are also limited. Over the years some of the authors who have written about Malaysian employment and industrial laws are Muniapan (2006; 2007), Ramasamy (2006), Pathmanathan et al (2003), Thavarajah and Low (2003), Parasuraman (2004), Amminudin (2003), Ayadurai (1996), Anantaraman (1996; 2000), C'ruz (1999), Idid (1993), Gomez (1997), Farheen (1996) and Wu (1995). However, except for Farheen (1996), none of the studies have specifically dealt with the management of probationers in depth. As there has not been any specific studies done in the area of employment probation in Malaysia, over the one decade, this paper hopes to fill the existing gap in the literature and also to increase the literature in the area of Malaysian employment relations and employment law.

¹⁰³ Industrial Court Award No. 20/74

¹⁰⁴ Farheen, S. Baig, (1996), *Probationers Status and Rights in Employment*, Industrial Law Reports, p. ix – xxi

¹⁰⁵ Cited in Industrial Court Award No. 36/76

¹⁰⁶ Industrial Court Award No. 40/77

METHODOLOGY

Research in employment relations and employment law is qualitative in nature and involves analysis of both statutes and case laws. The statutes are primary while the case laws are secondary. Thus, this paper is based on the analysis of the Employment Act 1955, Industrial Relations Act 1967 and the Industrial Court awards¹⁰⁷. The Industrial Court analysis is done based on criterion based sampling, which means only cases related to termination and dismissal of probationers were analyzed. The authors are also familiar and have been involved in the field of employment relations in Malaysia as lecturers and consultants, and also familiar with the employment laws in Malaysia such as the Employment Act 1955 and the Industrial Relations Act 1967.

Probationer's Right in Employment

The probationary employee has no substantive right in the post. He is liable to be terminated from the employment at any time by notice if his performance is unsatisfactory or summarily for misconduct. In *Equatorial Timber Moulding Sdn Bhd v. John Michael Croskey, Kuching*,¹⁰⁸ the Industrial Court observed:

“Being a probationer, he has no substantive right to hold the post. He holds no lien on the post. He is on trial to prove his fitness for the post for which he offers his service. His character, suitability and capacity as an employee is to be tested during the probationary period and his employment on probation comes to an end if during or at the end of the probationary period he is found to be unsuitable and his employer can terminate his probation by virtue or otherwise as provided in the term of appointment”

Completion of the probationary period will not per se entitle the probationary employee to be placed on permanent employment. The head of the department where the employee is attached to will evaluate and assess the employee's performance and suitability, and will decide whether they would recommend such employee for permanent employment or allow the employee to serve a further probationary period. And if the employer decides the probationary employee is not suitable to the post he reserves the right to dismiss him either within or at the end of the probationary period. Thus the probationary status has traditionally carried less security of tenure than the non-probationary status. Further findings the Industrial Court in *Equatorial Timber Moulding Sdn. Bhd. Kuching v. John Michael Sdn. Bhd*¹⁰⁹, the Industrial Court are as follows:

“There is an abundance of authorities to support the view that an employer has a contractual right to terminate the service of a probationer without notice and without assigning any reasons whatsoever. And no inquiry need to be held for such a purpose, for termination of service of the probationer during probationary period is not a punishment or dismissal but simply that of termination ... However, when the validity of such a termination is challenged, the Court must be satisfied that such termination was a bone fide exercise of the power conferred by the contract. And where there is suspicion of unfair labor practice, then the Court will not hesitate to interfere with the termination and the employee should be afforded proper relief ...”

The probationer who is new to the organization should be offered correction, guidance and advice so that he can respond to the needs and expectations of the employer. In *White v. London Transport Executive*,¹¹⁰

¹⁰⁷ The data for this paper is derived from case laws as none of the term probation or probationer is not found in any of the Malaysian employment statutes. A probationer is an employment in the context of the Employment Act and workman in the context of the Industrial Relations Act.

¹⁰⁸ [1987] 1 ILR 486

¹⁰⁹ *ibid*

¹¹⁰ See [http://www.ipsufactoj.com/archive/1987/Part3/arc1987\(3\)-001.htm](http://www.ipsufactoj.com/archive/1987/Part3/arc1987(3)-001.htm)

the Employment Appeal Tribunal stressed that it is the employer's duty to supervise and train the probationary employee. Similarly in *Inner London Education Authority v. Lloyd*,¹¹¹ the probationary teacher was found to be unfairly dismissed because although incompetent he did not receive the support, advice and guidance appropriate for a probationary teacher. The Court observed that the probationary employee is the employee of the company and is therefore entitled to have appropriate guidance and advice¹¹².

In *Inner Pacific Development Sdn, Bhd v. Mat Juhari bin Hussein*¹¹³ the Industrial Court said:

“The employer probationer’s superior officer cannot stand aloof and allow the probationer to muddle through without the benefit of his mistakes or shortcomings being pointed out to him. The object of informing the probationer is not so much to allow him the opportunity to defend himself (which is the case where he is being charged for misconduct), as to enable him to strive to meet the standards expected of him by the organization ...”

Probationer Status in Employment

As stated earlier the employer reserves the right to determine the ability of the probationary employee within the probationary period or at the end thereof. In *Dalglish v. Kew House Farm Ltd*,¹¹⁴ the plaintiff was appointed as maintenance fitter and his contract of employment stated:

“Your position will be probationary for a period of three months at the end of which time your performance will be reviewed and if satisfactory you will be made permanent....”

However, after three weeks of employment, he was dismissed with one week's pay in lieu of notice on the ground of unsatisfactory work performance. The plaintiff maintained that the early termination of the contract of employment amounted to breach of contract and sued for damages. The issue before the Court was the construction of the term in the contract of employment. The Court of Appeal held that the proper construction of the term at the end of which time your performance will be reviewed was that the employer was entitled to dismiss the appellant at any time during the three months without cause. There was not any express or implied promise that the appellant's probationary status would be one which would in any event continue for three months.

There must be sufficient grounds for an early termination of the probationer's contract of employment such as unsatisfactory work performance, misconduct, re-organization, retrenchment or redundancy. In *Pasaraya Warta (Segamat) Sdn. Bhd. v. Tuah b. Hassan* the Industrial Court observed:

“The company also contended that it was entitled to terminate the service of the claimant based on his contract of employment which inter alia provided that during his probation his service may be terminated by either party giving to the other written notice of 24 hours. Such a proposition should not be heard anymore in an Industrial Court. There must be just cause before an employer terminates the employment of the employee even if he is on probation.....”

¹¹¹ See

http://www.legal500.com/index.php?option=com_content&task=view&id=1136&country_code=ov&directory=1500&Itemid=548

¹¹² Farheen, S. Baig, (1996), opcit

¹¹³ Industrial Court Award 266/1995

¹¹⁴ See <http://oxcheps.new.ox.ac.uk/new/casebook/indexofcases.php>

The Federal Court and the Industrial Court have in many cases ruled that an employee appointed on probation continues as a probationer if at the end of the probationary period he has neither been confirmed nor terminated. However, it should be noted that the above ruling will not be applicable in cases where the contract of service (letter of appointment) or Collective Agreement contains a clause which provides for deeming confirmation if the employee is still in the Company's employment at the end of the probationary period. The Court held that if an employee continues employment after the probationary period, he is still a probationer. If an employer grants an increment to the employee on probation, that should imply satisfaction with his work¹¹⁵

Termination of a Probationer

From the above it is submitted that the employer may terminate the probationary employee within the probationary period if the employer is dissatisfied with the probationer's poor performance or other similar reasons such as misconduct. When the employer seeks to rely on unsatisfactory work performance or inefficiency or misconduct on the part of the employee, the employer must adduce convincing evidence to justify them and not mere allegation. In *Stamford Executive Centre v. Puan Dharsini Ganesan*¹¹⁶, the Industrial Court observed:

“In a dismissal case the employer must produce convincing evidence that the workman committed the offence or offence of the workman is alleged to have been committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this Court in ignorance of it...”

Whether or not the standard of performance of the employee justifies a dismissal is a finding made by the Court. It has been frequently stated that the Courts must not interfere with the employer's general prerogative to run its business as it sees best including the right to dismiss staff. The Court however, has full jurisdiction to inquire into substance and jurisdiction of the decision making process in each case. The Court will not interfere with the employer's decision to terminate the service of the probationer if the Court is satisfied that the termination was made bona fide.

A probationer, whose performance is not to the standard expected of him by the employer, should be warned to that effect and afforded reasonable period of time for him or her to improve, failure of which empowers the employer to terminate his or her service. A warning is a step fairly taken to enable a dismissal to be averted. This step is also morally encouraged as everyone is to be given a second chance to improve. People learn by the mistakes that they make and that is where experience is sought. Furthermore the purpose of a warning is that the employee shall know that if his performance does not improve his employment might have to be terminated.

The warning must be clear and must be actually communicated to the employee as such. No formal warning however, is required if the probationary employee holds a managerial post. In *James v. Waltham Holy Cross UDC*,¹¹⁷ Sir John Donaldson J said:

“Those employed in senior management may by nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving^s that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less....

And in *Inter Pacific Development Sdn. Bhd. v. Mat Juhari bin Hussein*¹¹⁸, the Industrial Court observed:

¹¹⁵ Industrial Court Award 352/86 & 39/87

¹¹⁶ Industrial Court Award 263 of 1985

¹¹⁷ [1973] IRLR 202

“In dealing with the case of a probationer aspiring to a management position or of a professional man who is expected to render his professional service professionally, the giving of advice, the guidance and occasionally correction would suffice. There is no justification for the Court to impose the super added duty of issuing oral or written warning at the prospect of dismissal...”

There must be sufficient written communication to the employee in order to establish inefficiency or poor performance before the employer can rely on it to justify dismissal. It is quite improper and unfair to blindly terminate the employee's service without giving any warning before hand about alleged poor performance in the company. In *Syarikat Sweden Air Condition Electrical Work (Bintulu) v. Ho Chian Hua*, the Industrial Court observed that the unsatisfactory performance must be viewed with caution, and could not be accepted on its face value as reliable and the truth¹¹⁹.

The employer, in particular those with a large workforce, should have a system in place whereby the performance of the probationer is monitored. This is an implied term of the contract of a probationer that to be tested during the period of probation and given guidance. The employer is to warn the employee of his failings so that he could take steps to correct them, during the period of probation. The employer should also provide guidance, training and counseling sessions or other training to help the worker improve on his performance. If for example, the counseling sessions indicate that the poor performance is owing to the fact that the probationer has no or limited access to the office computers/software or some other tools and has to await his turn, then a remedy would be to correct the defect. Care must be taken in setting performance measurements and targets for their employees during the probationary period. If the targets are exacting and beyond achievement they would be deemed inequitable and the employee would be relieved of the burden of satisfying the target set.

Reasonableness of the Dismissal

The probationary employee has a legitimate expectation to be confirmed as a permanent employee of the organization if the trial period was satisfactory. The employer must have sufficient reason before terminating the probationer's service within the probationary period.

At the end of the probationary period if the employer finds the employee whose work performance is not satisfactory or who is not suitable to the organization the employee may be terminated from the employment. In *TL Management Centre v. James Tan Boon Khim*¹²⁰ the Industrial Court stated:

“It is settled law that a probationer's employment may be terminated pursuant to the terms of the contract if he is found by the employer to be unsuitable. It is also equally settled that where a probationer's termination is challenged before the Court. It is for the Court to satisfy that the employer's decision was based on genuine grounds as to the unsuitability of the claimant. Where there is evidence of unfair labor practice then the Court's intervention may be warranted „ Where representations are made and are referred to this Court for hearing, it is the duty of this Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give reasons for the dismissal of the claimant, the duty of the Industrial Court will be to inquire whether the excuse or reason has been made out...”

The employment of a person on probation does not give the employer absolute discretion to terminate his or her service. The employer should be reasonably satisfied that the employee is not suitable to the

¹¹⁸ See 18

¹¹⁹ Farheen, S. Baig, (1996), opcit

¹²⁰ Industrial Court Award No 114/1995

employment. In *Graham Miller (M) Sdn. Bhd v. Cik Wong Wan Chi*¹²¹, the Industrial Court held that the decision to terminate or confirm a probationer's service must be based on reasonable satisfaction and not an arbitrary or capricious one. There must be grounds for the decision and the test to be applied is an objective not a subjective one. In *Edaran Otomobil Nasional Bhd. v. Sofri Jaukarani Tiguat*¹²², the Chairman of the Industrial Tribunal Mr. Tan Kim Siong observed:

“It is well established that the employer has a contractual right to terminate the service of a probationer without notice and without assigning any reason when his employment on probation comes to an end, provided, of course, the termination was bona fide exercise of the power conferred by the corm-act. It is also well established in Industrial Law that an employee under probation is just as entitled to natural justice as a confirmed employee....”

The probationer whose contract of employment is terminated without good cause may question the decision by invoking Section 20 of the Industrial Relations Act 1967. If the matter is referred to the Court for a decision, the Court will require the termination to be a bona fide exercise of power and not an arbitrary or capricious one.

Section 20 of the *Industrial Relations Act 1967* provides security in tenure for employees from being unjustly dismissed. The position today is that probationers are equally entitled to similar protection, notwithstanding their probationary status. This legal position has been clarified in the significant case of *Khaliah binti Abbas v. Pesaka Capital Corp Sdn Bhd*, wherein the Court of Appeal, in holding that a probationer comes within the ambit of the aforesaid Section 20, held as follows:

“It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his services cannot be terminated without just cause and excuse...”

End of the Probationary Period

The employer must fairly assess the suitability of the probationer in terms of his or her work, ability, efficiency sincerity and competency. The decision must be bona fide and not arbitrary or capricious. In *Inter Pacific Development Sdn. Bhd. v. Mat Juhari bin Hussin*¹²³ the Industrial Court observed:

“The probationer's entitlement to fair process in the assessment of his suitability is a right which cannot be taken for granted. A probationer invests his time and energy during the probationary period to prove to his employer that he has the capacity to be an asset to him. It would be to the highest degree unjust, if having invested such time and energy and forgone the opportunity to establish himself elsewhere, an employer can at his own pleasure and will terminate the probationer's employment without any genuine consideration being given to the latter's suitability for regular employment with the former...”

The employee serving the probationary period has a reasonable expectation to be confirmed in the organization. The employer should therefore ensure the probationer is being offered guidance, assistance, advice or correction. However, if his performance is not to the standard expected of the employee despite warnings to that effect or if the employee serving the probation had committed gross misconduct the employer reserves the right to terminate the service of the probationer within the probationary period. In the absence of poor work performance or gross misconduct, the employer must fairly assess the employee's

¹²¹ Industrial Court Award No 11/1989

¹²² Industrial Court Award No 422/1994

¹²³ See 18 & 23

suitability and not base its decision arbitrarily or capriciously. As the Industrial Court observed in Inter Pacific Development's case:

“It would be to the highest degree unjust, if having invested such time and energy and forgone the opportunity to establish himself elsewhere, an employer can at his own pleasure and will terminate the probationer's employment without genuine consideration being given to the Latter's suitability for regular employment with the former ...”

Once a workman is due for confirmation an assessment of his performance needs to be made. The assessment should focus on his work, skills, competencies, attitude to work, efficiency, and sincerity etc. The assessment should be made before the date of confirmation. It must be done fairly with no malice or bias. Managers in charge of workers on probation should take stock that the worker is investing his time and energy to prove his worth to the company. The company is equally spending time and money to train the probationer to perform to its expectations. Merely criticizing the worker for shoddy work is not going to help the probationer or the employer.

If the employer wants to be rid of a probationer for personal reasons then he should not have taken him on in the first place. If a good performance appraisal system is in place in the organization it can be a powerful tool in shaping the probationer to be a motivated worker capable of producing good quality work. It would point out weaknesses and enable managers to counsel and encourage the probationer to work to his full capacity. The courts cannot fault an employer if he dismisses a probationer who has failed to respond to guidance and advice and after a reasonable assessment is made at the end of the probation.

Probationer and a Confirmed Employee

Thavarajah & Low¹²⁴ argued that probationers may be given statutory protection under Section 20, Industrial Relations Act 1967. The awards of the Industrial Court strongly indicate that there is still a distinction between the legal position of a probationer and a confirmed employee, notwithstanding the decision in *Khaliyah binti Abbas v. Pesaka Capital Corp Sdn Bhd*¹²⁵. In *Koperasi Serbaguna Pekerja Felda Bhd v. Zainal Arijin bin Mohd Noor*¹²⁶, the Industrial Court made the following observations:

“The period of probation in a service contract case, therefore, may be taken as a communication by the employer that in case the employee proves himself, within the period of probation, to the satisfaction of the employer, that he, the probationer, is a fit and proper person to perform the duties for which he has offered his services, the probationer would be entitled to be confirmed or taken in on a permanent basis. The appointment of a person on probation is 'therefore, tentative and dependent on the employer's satisfaction as to his 'suitability. But this satisfaction must be a reasonable satisfaction and not an arbitrary or capricious one....”

The decision of the Industrial Court in *Azmi & Company Sdn Bhd v. Firdaus Musa*¹²⁷ merits attention in respect of its clarification on the status of probationers in light of *Khaliyah binti Abbas's* case. In this case, it is interesting to note that the Industrial Court drew a sharp distinction between a probationer and a confirmed employee, as follows:

¹²⁴ Thavarajah, T., & Low, T.C., 2001, *Employment Termination Law & Practice in Malaysia*, CCH Asia Pte Limited, Singapore

¹²⁵ [1997] 1 MLJ 376

¹²⁶ [1994] 2 ILR 862

¹²⁷ [2000] 2 ILR 510

"Employees on probation come within the purview of Section 20(1) of the Act and the Industrial Court has threshold jurisdiction to determine the issue whether their dismissal was without just cause or excuse because they being on probation were still workmen¹²⁸.

However, *Khaliah's* case does not expound the substantive law pertaining to a probationer but relates to the specific question that if a probationer is to be terminated, it should be within the general purview of Section 20(3) of the Act in that it should not be without just cause or excuse. Nevertheless, this Court must be mindful that there is an intrinsic and material distinction between employees under probation and confirmed permanent employees.

In the case of *Vikay Technology Sdn Bhd v. Ang Eng Sew*¹²⁹, the learned Chairman referred to a passage in Malhotra's book *The Law of Industrial Disputes* (11th edition, at p. 224) which reads as follows:

"It is well settled law that at the end of the probationary period, it is open to the employer to continue the employee in his service or not in his discretion; otherwise the distinction between probationary employment and permanent employment will be wiped out. Even if on the expiry of the probationary period the work of the employee is satisfactory, it does not confer any right on them to be confirmed. What is more important is that he then went on to say that the above statement of law clearly envisages the need for a clear distinction between probationary employment, and permanent employment and for; this reason an employee on probation cannot expect to be accorded with the same status, rights or privileges as a permanent employee. So long as the employer is reasonably satisfied that the employee is not suitable for the job he may be removed. Suitability is not just based on the performance of the employee but also on his conduct, behaviour, aptitude, and attitude in relation to the job he is employed....."

Based on the cases, it is imperative to note that in instances of non-confirmation of probationers, the approach taken by the Industrial Court is that as long as the company exercises its discretion not to confirm a probationer in *bona fide* manner, it will, generally not interfere, unless there is evidence of victimization and *mala fide* on the part of the employer. This is of course; subject to the requirement of warnings should the employee be dismissed on grounds of poor performance and unsuitability of employment.

In the landmark case of *Hartalega Sdn Bhd v Shamsul Hisham*¹³⁰, the High Court ruled that the test to dismiss an employee for poor performance was not the same for probationers and confirmed employees. Probationers are considered as employees on trial and there is no necessity to provide them with written or oral warnings prior to dismissal.

Employer's Right on Job Confirmation

The courts has held that as a general rule, it is not the office of the Industrial Court to step into the shoes of the employer and make a determination of the probationer's suitability for permanent employment in the employer's establishment if it can be shown that the employer has treated the employee with sufficient fairness during the probationary period. The exception to this rule would be in a case of perverse management decision or acts of victimization or capriciousness. In such cases, the Industrial Court may be prepared to treat the probationer as a confirmed employee in devising its compensation for the dismissed probationer.

¹²⁸ See *Khaliah binti Abbas v. Pesaka Capital Corp Sdn Bhd* [1997]3 CLJ 827

¹²⁹ [1993] 1 ILR 90 at p. 95

¹³⁰ [2004] 3 CLJ 257

In a case where, at the expiry of the probationary period, the probationer is neither confirmed nor discharged from employment and is allowed to continue to remain in employment, the Federal Court in *V Subramaniam & Ors v. Craigielea Estate*¹³¹ had ruled that such probationer continues as a probationer.

In another decision of the Federal Court, *KC Mathews v. Kumpulan Guthrie Sdn Bhd*¹³², the same principle was applied. *Raja Azlan Shah* CJ (as he then was) cited with approval the following passage enunciated in the Indian case of *Express Newspapers Ltd v. Labour Court & Anor* (AIR 1964SC 806):

"There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confined. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired - except on the ground of misconduct or other sufficient reasons, in which case even the services of a permanent employee, could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer."

Effective Management of Probationers

The complexity of the legal aspects of probation and probationer requires a careful management of HRM. It is evident from those recent past cases that the probationers cannot be terminated at will without proper justifications and proofs. Therefore, to avoid costly and time-consuming litigations, it is pertinent that employers must firstly critically review their selection process and in the management of probationers and their performance, lest the employers will face the wrath of the court, though the dismissed employees would have to endure the trauma of job loss and financial difficulties. In the selection of employees for jobs, it must not be taken lightly that the employees are to prove trial on their suitability and that if they are not up to expectation, they are expendable

Ramasamy¹³³ argues that in some places of employment probationers are treated as employees on transit and given differential treatment when it comes to discipline. Faults by the new employee are amplified and he is condemned even before he can set about learning his new job. It must be appreciated that employees who commence employment on probation may need some time settling into their jobs, especially if the employee has not got the skills or the experience expected by the employer. A change in employment can be stressful for the employee too as he would have to cope with new problems like relocation, or trying to patch bruises he suffered in his last job. If the relocation involves his family members too there will be the added burden of seeing that they are settled in. In some cases existing employees resent the intrusion of a new employee and it will take some time for the new employee to feel welcome. In such case a lot of patience is needed on the part of supervisors and managers' greater leeway should be afforded the new employee to allow him to settle in.

A good induction program where the employee is taken round the various units of the organization and exposed to the culture of the company and rules and regulations would speed up the process of learning for the probationer in his new surroundings. Besides this description and a work flow chart would certainly assist the probationer. The probationer is undergoing a period of trial and he has to supervise adequately and appropriately. The employer is required to arrange for suitable supervision under which the probationer informed of the nature of the duties he has to perform as well standards expected of him. As a new

¹³¹ [1982] 1 MLJ 317

¹³² [1981] 2 MLJ 320

¹³³ Ramasamy, G. (2006), *Discipline at Work: A Guide for Managers*, Industrial Relations Network, Kuala Lumpur

employee it is of particular importance that the probationer is given such guidance, advice and correction as will enable him to respond to the needs and expectations his employer.

It is not uncommon to hear employers giving very little thought to why a probationer is not performing and whether the reports the employer is getting are objective or are provided by other employees who have no interest in developing others who may turn out to be their competitors eventually.

If a probationer is found wanting in skills or is a poor performer he should be hauled up for counseling in the first instance. The manager should inform him of the areas he is found wanting. He should be provided with guidance to meet with the standards expected.

If the skills shortage can be improved with an in-house course, he should be provided the training. The employee should be kept under observation. If there is still reluctance or an inability to improve, the probationer should be given a letter drawing attention to the areas he is lacking, and advised to improve on his performance. Many employers usually have no qualms in terminating the contract of employment of the probationer on the first signs of unsuitability as they feel the probationer has no right to employment. Industrial law has now changed this perception - and employers need to recognize the new trends. A probationer has every right to tenure of employment and he cannot be dismissed without valid reason for which even a permanent employee can be dismissed. If an employee misconducts himself during his probation period or traineeship, he should be accorded the same opportunity to explain himself for his misdeed and a decision taken after weighing the facts.

CONCLUSION

The management of probationers is one of important concerns in HRM. The following procedural requirements should be complied with in managing employees who are on probation. Firstly the standards should first be established, each category of employee should have a job description and the parameters of the employer's requirements and there must be constant supervision and regular performance management. Written directives should be issued that action will be taken against disregard of standards and failure to achieve targets. Performance management and appraisals should be conducted by the immediate superior and after the appraisal has been verified, the immediate superior should meet with the employee concerned and discuss the appraisal. Where performance is poor or good, reasons must be given for the views expressed; areas of shortcomings must be listed out, discussed with the employee and acknowledged by the employee. Short, medium and long term goals must be set for remedial measures. If the employee fails to reform after these measures, the employee's services may be dispensed with. The termination of service must be in accordance with the provisions in the contract of employment and not summary dismissal without notice. The employees on probation must be managed effectively to avoid a situation that termination becomes necessary. The employer should consider termination as a last resort and not a first option. Remember, law is not a substitute for good HRM.

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