

LOBBYING FOR CONFIRMATORY RIGHTS OF AN PROBATIONER

1. INTRODUCTION

A job seeker searching a job normally hopes for a living in a society. Searching a job might be easy but getting a secured job, all hailing and firing puzzles could emerge out of the employment especially a probationer albeit new or experienced. Puzzling problems like a contractual terms with or without a clause for confirmation or extending confirmation period also following up problems where employers could not identify or neglect actual terms of employment or giving notices of non-performance or poor performance ending with employees being unfairly dismissed/terminated.

When hiring new employees, employers will usually put them on a “probation”. The purpose of the probationary period is to allow employers to assess whether the new employee is suitable for the role and whether they will be a good fit for the company. The probationary period is meant to provide employers with sufficient time to evaluate and review their new employees’ performance before confirming them as permanent staff. Although going through a probationary period is fairly common, there are many things about probationers which are frequently misunderstood by employees and employers alike.

At the outset of confirming a probationer, suitability test is the gist of variant issues such as the behaviours or health conditions of the employee. In relation to the job performed, satisfactory test could be the relevant issue but for the test of “good faith” which would be applicable in the event that the performance of a probationer is unsatisfactory and the probationary period has to be extended. These 3 tests of satisfactory, suitability and good faith could be the woes’ cries of both an employee and an employer. On either hand, employee would tend to be unaware of the rights to seek confirmation in the tenure of service and employers would exercise discretionary power tainted with mala fide or with elements of victimisation or discrimination rendering a lump sum to be paid off.

2. ISSUES AND CHALLENGES

Concerning clear terms of employment, employers tend to ignore actual specification of the job such as job scope or duties and responsibilities. In the case of Yeo Teck Seng (KL) Sdn Bhd V Foong Seong Hor Industrial Court, Kuala Lumpur (2004) 1ILR 106, a Marketing manager with a probationary period of 3 months was not confirmed on the court’s decision that of the employer’s improper description of job scope, ie. Marketing strategy differs from sales’ target. Here the probationer had performed his duties for setting up marketing

strategies but evaluated for not achieving sales target. Also, a case where the employer misidentified the job title where in fact the employee had proceeded on the actual designation of his job as per Uob-Osk Asset Management Sdn Bhd V Leong Oi Choi Industrial Court, Kuala Lumpur (2004) 1 ILR 307 where there was misdescription of job title, I e, finance and operation manager differs from operation and settlement officer where the probationer was wrongfully alleged of proceeding his job designation. Here the employee had the job done but evaluated on the ground of different job title. Another case showed that an employer was reckless towards confirming a probationer for his performance which met an average expectation required under the terms of employment as observed in the case of Chan Weng Sze V Osk Securities Berhad. Industrial Court, Kuala Lumpur 2007 2 ILR 121, Where An Analyst Programmer Working On A Probationary Period Of 6 Months With An Appraisal Showing An Average Expectation Achieved In Line With Job requirement, was not confirmed for the reason that the employer had evaluated on a higher standard.

Dealing with the extension of probationary clause and on the arbitrary exercise of prerogative, the employer might mistakenly thought of the same approach taken upon the evaluation process, which, if not clearly agreed upon, might end up in a targeting at different achievement. In the case of Affin Finance Bhd V Sim Gim Poh industrial Court, Sabah (2005) 1 ILR 442, A branch manager working for 6 months eventually extended for another 3 months was Awarded a good appraisal for his team management but no proper evaluation for his own performance. Thus, it was Held that bona fide discretion was exercised arbitrarily. Likewise, a probationer working for 3 months, though not extended, was evaluated against, amongst other permanent employees, UNSATISFACTORY group sales' target. Had the employer exercised his decision capriciously by taking into account individual target achieved, a probationer could be confirmed for its tenure of service in a company.

Problems of an unwritten or verbal assertion of probationary clause under the terms of employment could give rise to uncertain incidents which might be against the rights of a probationer or a confirmed employee, presumably an employer would be tended not to evaluate for the job done and upon an incident of satisfaction, a probationer might be dismissed or probationary period being extended. Nevertheless an adverse inference could be drawn against perogative exercise thereafter a period of long trial, the court might decide in favour of the claimant as per the case of Sam-Anna Engineers (M) Sdn Bhd V Cheong Chee Choong. Industrial Court, Pulau Pinang (2004) 1 ILR 469, a project coordinator working 10 months without written probationary clause showed that the court would make an inference, based on the circumstantial facts, to treat the employee to be confirmed which would be detrimental to the employers. With the proposed statutory clause below and for

the employers' concerned, employers would not be left behind to be aware of the significant of the probationary clause. Without the probationary clause, the court could draw an inference that a probationer would be presumed to be a confirmed employee. Numerous cases affecting the rights of a probationer were dealt with concerning the applications of the "three tests" mentioned above and/or issues arising out of contractual terms not being expressly written deviating the rights to be confirmed. It could also be due to the norm recognized by the court that "once a probationer always a probationer" and the exercise of discretionary power of an employer to confirm an employee SEEMINGLY ENUNCIATED as per *Vikay Technology Sdn Bhd V Ang Eng Sew* [1993] 1 ILR 90 where the learned Chairman referred to *Ms Time Sdn Bhd V Mahiruddin Ahmad Khairuddin* [2004] 3 ILR, Zura Yahya 201 passage in Malhotra's book "The Law of Industrial Disputes" (11th. Edn.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.*

3. CONCLUSION

There is no statutory definition of what is a "probationer". However, case law does distinguish between a confirmed employee and a probationer. Broadly speaking, a probationer is a new employee who is going through a 'trial' period in an employment to prove his/her fitness for the position which was offered by the employer. There is no legal requirement to put an employee on probation before they are hired, although this is recommended as a best practice. There is also no legal "minimum" or "maximum" probationary period that needs to be imposed although a probationary period in the range of 3 – 6 months is common. In the interest of clarify of the thought, it recommend that under the law of legislative intent to cater for a standard test rest on all hassles.for the person wiho place under probation.

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