

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 3/4-1299/06

BETWEEN

HARI BALA R PARASURAMAN

AND

JOHNSON CONTROLS (M) SDN BHD

AWARD NO: 1390 OF 2009

Before : **TUAN FRANKLIN GOONTING - *Chairman***
(Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 30.12.2005

Dates of Mention : 1.8.2006, 1.9.2006, 12.10.2006, 9.11.2006, 28.11.2006,
15.1.2007, 27.2.2007, 24.8.2007, 30.11.2007, 14.12.2007,
17.1.2008, 18.2.2008, 6.3.2008, 19.3.2008, 27.3.2008,
4.12.2008, 28.4.2008, 5.6.2008, 14.4.2009, 14.5.2009,
17.7.2009, 4.9.2009, 16.9.2009, 8.10.2009

Dates of Hearing : 8 & 9.1.2009, 13.5.2009, 14.7.2009, 5.6.2009, 23.7.2009

Representation : *For the Claimant - David Peter and Suzalena Salleh; M/s
Jerald Gomez & Associates*

*For the Respondent - Cynthia Junavence; M/s Zaid Ibrahim
& Co*

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Hari Bala a/l R. Parasuraman** (hereinafter referred to as “the Claimant”) by **Johnson Controls (M) Sdn Bhd** (hereinafter referred to as “the Respondent”) on 27.6.2002.

AWARD

This ministerial reference pursuant to Section 20(3) of the Industrial Relations Act (1967) concerns the dismissal of the claimant by the respondent on 27th June 2002.

By a letter of appointment dated 19th December 2001 the respondent employed the claimant as a Field Engineer, for a one-year period from 2nd January 2002 to 31st December 2002. This contract stipulated a 3-month probation, subject to extension at the respondent's discretion. Such probation was extended and subsequently by letter dated 24th June 2002 the respondent informed the claimant that it was unable to confirm him in his position and thus terminated his employment. This letter is reproduced:

**“JOHNSON
CONTROLS**

JOHNSON CONTROLS (M) SDN. BHD. (97392-P)

Delfeq Technoplex,
Suite 2.2, 2nd Floor,
No. 2A, Jalan 243, Sn 51 A,
46100 Petaling Jaya,
Selangor Darul Ehsan, Malaysia
Tel: 03-78738040 Fax: 03-78741180

Our Ref: G/GEN/HR/022.06.2002

Date: June 24, 2002

Mr. Hari Bala a/1 Parasuraman,
No. 6, Jalan Chui Chak,
Taman Megah,
36700 Langkap,
Perak.

Dear Hari,

Re: Termination Of Employment

We refer to your extension of probationary period letter dated May 3, 2002.

After reviewing your performance during the past one and half months, we have noted that your performance is still not up to expectation. The area of concerns relating to time management, computer skills and response time has yet to be improved. As such, it is with regret to inform you that we are unable to confirm you in the position and your employment with the company is therefore terminated.

We shall arrange to pay you one month salary-*in-lieu* of notice as per contract employment up to July 31, 2002.

Please arrange to submit all your claims to Human Resources Dept and to handover all assets belonging to the company on your last day of work.

We would like to thank you for your past contributions to the company and wish you all the best in your future undertakings.

Yours faithfully,
for **JOHNSON CONTROLS (M) SDN BHD**

Signed

.....

Sarah Tan
Human Resources Manager

Copy : Kris Yim”

It is the claimant’s contention that the actual term of the contract of employment was two years with an option to renew it for a further one year; that this had been communicated to him by one Mr. Manny Sagar, the respondent’s representative who interviewed him for the job. He further contends that he was induced by the respondent to change his car for a newer one in accordance with its requirement. He had

thereby committed himself to paying instalments on the newer car. He also challenges his termination and contends that there were no problems during the first few months of employment when he was reporting to one Mr. Padman, the Accounts Manager.

During the hearing the Court sought clarification from Mr. David Peter, the claimant's counsel, whether the claimant conceded that he was still a probationer at the time of his dismissal and, at his request adjourned hearing for him to take instructions. When hearing resumed Mr. David informed the Court that the claimant believed that, since the probation period had expired and because there had been no indication to the contrary by the respondent, he was therefore a confirmed employee. Much trial time was spent over whether the fixed-term contract of employment was for one year or two years despite the Court sounding out to the claimant's counsel that it made no difference if the claimant was still under probation. There was one letter in the respondent's bundle, dated 3rd May 2002 extending the claimant's probation by a further two months, bearing the claimant's acknowledgement of receipt but the claimant denies receiving it prior to his termination. In any event it is established law that if, after the expiry of the stipulated probation period, no action is taken by the employer either by way of confirmation or by way of termination, an employee continues to be in service as a probationer. See the Federal Court case of *K.C Mathews v. Kumpulan Guthrie Sdn Bhd* [1981]

CLJ (Rep) 62. The Court therefore holds that the claimant was a probationer at the time of his dismissal and now proceeds in its deliberations on this basis.

The Law

This Court's function is to determine whether the dismissal was for just cause or excuse. In this respect a probationer like the claimant enjoys the same rights as a permanent or confirmed employee ie, his services cannot be terminated without just cause or excuse (see *Khaliah Bte Abbas v. Pesaka Capital Corp Sdn. Bhd.* [1997] 1 MLJ 376. However, *Khaliah's* case does not go so far as to do away with the trial status of a probationer. He is still on trial and has to prove himself to the satisfaction of his employer. See *Azmi & Company Sdn. Bhd. v. Firdaus Musa* [2000] 2 ILR 510 and *KP Usahasama Sdn. Bhd. v. Abdul Razak Ibrahim* [2001] 1 ILR 481.

Malhotra's *The Law of Industrial Disputes*" (11th edn) which has been cited with approval by the Industrial Court says, at p. 224 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 employees is satisfactory, it does not confer any right on them to be confirmed.”.

In *Vikay Technology Sdn. Bhd. v. Ang Eng Sew* [1993] 1 ILR 90 the Chairman, Dato’ Sabarudin (as he then was) quoted the above passage from Malhotra’s book and said:

“The above statement of law clearly states the need for a distinction between probationary employment and permanent employment and for this reason an employee on probation cannot expect to be accorded 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 and attitudes in relation to the job he is employed.”.

In *Equatorial Timber Moulding Sdn. Bhd. Kuching v. John Michael Crosskey* [1986] 2 ILR 1666 the Industrial Court said at p. 1671:

“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 probation period he is found to be unsuitable.”.

In determining whether the claimant’s dismissal was with just cause or excuse the Court will bear in mind, and be guided by, the law as outlined above.

The respondent’s evidence

Sarah Tan (COW4) the respondent’s former Human Resource Manager, who had signed the termination letter, testified that prior to its issuance there had been a meeting between herself, the claimant and his superior, Line Manager Mr. Mohan Kumar to discuss his extended probation. It was not a friendly meeting and it was a hostile environment between the claimant and Mr. Mohan, principally because the claimant did not agree with Mr. Mohan’s assessment of his performance. Mr. Mohan had pointed out to the claimant his shortcomings, and highlighted the three areas requiring improvement as stated in the relevant Progress Review Report (COB pages 3-4). He also communicated to the claimant that these three areas were critical to his job scope and that he was still not satisfied with the claimant’s performance.

In cross-examination it was put to COW4 that the first time the claimant had seen the Progress Review Report was at this meeting. She denied that it was the first time, adding that the claimant, had signed on

the review form and had therefore seen Mr. Mohan's comments thereon plus he had also acknowledged the letter dated 3^d May 2002 extending his probation. She also clarified that the first review which had been documented *vide* COB pages 3 - 4, on 6^h May 2002 was conducted by Mr. Mohan, while the second review was not documented and was conducted *vide* the said meeting where she was present with the claimant and Mr. Mohan.

Under re-examination COW4 recalled that at the said meeting the claimant had said that Mr. Mohan was not being fair to him and had insisted that he was doing his job well. He kept referring to his previous superior Mr. Padman who had had no issue whatsoever regarding his performance. However there was no indication at this meeting that he had taken steps to improve in the highlighted areas; he kept saying that these requirements were not part of his job. COW4 also confirmed having asked the claimant if he had seen the comments on the Progress Review form and he said yes. She had asked him this because she wanted to be sure herself that he knew what he was signing. At the end of the meeting she and Mr. Mohan told the claimant that they would revert to him but that the chances of his continuing in employment were slim.

The claimant's evidence

The claimant's testimony-in-chief is as follows:

Around December 2001 he attended an interview for the job, which was conducted by one Mr. Manny: Sagar, at the respondent's premises. Mr. Manny told him that his position was a two-year posting, with the possibility of a further one year extension (ie, 2 plus 1), the reason being that his position was tied into a back-to-back contract that the respondent had secured with ExxonMobil. That contract with ExxonMobil was a two-year contract, with the added possibility of ExxonMobil extending it by another year. That explained why his contract post offered to him was similarly on a 2 plus 1 basis. At the conclusion of this interview, Mr. Manny said that he would be offering the claimant the job. However he made it clear that he had to change his present car (which he had told him was a Datsun 120Y) to a newer one ie, one that was less than five years old, and at least 1500cc. The claimant was surprised at such an unusual condition. He told Mr. Manny that although he needed the job, meeting that condition meant he had to purchase another car. Doing so would be quite a strain on his finances because he didn't have much money to spare. He had not been working for about one year at the time. However, Mr. Manny was very clear on this. If the claimant wanted the job, he said, he must get a car of less than five years old because this was the respondent's policy, and this also applied to other Field Engineers like him. He said money should not be a problem anymore because the respondent would be giving him a monthly car allowance of RM1,600.00 for the next two years to help with his instalment payments and for maintenance of the

vehicle, and if the respondent's contract with ExxonMobil was extended, then he would be receiving the monthly allowance for a total of 36 months altogether. He needed the job badly, so based on his representation, he told Mr. Manny that he would work something out.

The claimant was later asked to report to the respondent again on 19.12.2001. He was to meet Mr. Ng, the General Manager, to sign his letter of appointment. Mr. Ng welcomed him as the new Field Engineer. In the course of their conversation, he repeated the condition that the claimant must secure a 1500cc vehicle, less than five years old because the respondent had to maintain its image with ExxonMobil. On that same day one Mr. Selvam from Administration gave the claimant the contract of appointment ie, CLB pages 1 - 2 to sign. He was not given much time to read it carefully there and then. Mr. Selvam instructed the claimant to sign it and give it back to him straightaway and said that he would give the claimant a copy when he reported for work on 2.1.2002, and when he showed him proof of his 1500cc car which was less than five years old. As, he badly wanted the job he approached his father in Penang and borrowed some money from him. He used that money as down payment for a Nissan Sentra 1600cc. When he reported for work on 2.1.2002 he showed the receipt to Selvam who made a copy of the receipt for his file.

About one week later Selvam gave him his copy of the contract of appointment which he had signed on 19.12.2001. He was now able to read his contract carefully. That was when he realised that the contract was only for one year and not two years and on top of that the RM1,600.00 car allowance was not even mentioned therein at all. He was stunned. Very important terms were missing from the contract. He asked Selvam what was going on. Selvam replied that his appointment was for a two-year period with a possible one year extension, but it was respondent's procedure to only state one year in the appointment letter. After that, it would renew his contract automatically for the second year following the respondent's procedure. As for the RM1,600.00 car allowance, Selvam said it was not put in the contract but it was based on mutual understanding between both parties. He also pointed out that in the first place, the requirement of the 1500cc car was not even mentioned in the contract, but it was mutually understood between the parties. The claimant also checked with Manny Sagar and made known to him his concerns, especially since he had bought a new car on the understanding that he would be getting a car allowance for at least a two-year period. He assured the claimant that his contract was for two years, and it could be extended since it was premised on a back-to-back contract with ExxonMobil, but for the purpose of the respondent's procedure it could only state one year in the letter of appointment. As for the car allowance, he (Manny Sagar) said that it was mutually understood and he ought to trust the respondent. He also checked

this with Mr. Padman his immediate boss, and some of his other colleagues. They also told him that this was indeed the respondent's procedure and that they were in the same situation as well. The respondent paid him his mutually agreed car allowance of RM1,600.00 in the period that he was working there and also paid his contractual mileage claims as per clause 13 of the contract of appointment.

Continuing his testimony the claimant stated that his immediate superior Mr. Padman had been happy with his performance. He had also conveyed to the claimant how Encik Nazaruddin, the Manager of ExxonMobil had reported to him that he was pleased with his efforts. However after Mr. Mohan Kumar became his new superior things changed. Mr. Mohan made things quite difficult for him. His work style was a far cry from that of Mr. Padman, but the claimant tried his best to accommodate all his demands.

Referring to the letter dated 3.5.2002 extending his probation the claimant stated that although this letter was signed by him on 6.5.2002 he only received this letter a few days after he was terminated on 24.6.2002. He agreed that he had signed this letter but this would have been one of the many documents that he had been made to sign during his appraisal conducted by Mr. Kumar on the evening of 6.5.2002. The appraisal was badly conducted. He had filled up page 3 and page 4 and sent it to Mr. Mohan some weeks earlier but only on 6.5.2002, just as

he was leaving for Johor Bahru late in the evening, Mr. Mohan called him into his office to conduct this appraisal. He had written many negative comments about the claimant who disagreed and voiced his unhappiness about signing something he did not agree with. Mr. Mohan became very defensive and said he had to sign, otherwise he would make things difficult for him. That made the claimant very upset but since he had a long journey ahead of him and he just wanted to get out of the office and leave for Johor Bahru, he signed whatever Mr. Mohan asked him to sign, and left straightaway for Johor Bahru. One of the documents he must have signed that evening date was this letter extending his probation. He definitely was not aware of it when he signed it because the situation had been very tense at that time.

Concerning his termination the claimant stated that he had heard rumours that he was about to be terminated so he went to speak with Human Resources Officer Sarah Tan (COW4). When he first saw her she immediately confirmed yes, the respondent was thinking of terminating him based on reasons given by Mr. Mohan. He (the claimant) told her to please pull out his Confirmation Review from his file (ie, COB pages 3 and 4) because he wanted to explain to her why it was unfair to him. She took out his file and they discussed it. She told him that Mr. Mohan had already made up his mind and it was just a question of time before the letter of termination was issued. He immediately returned home and sent a lengthy e-mail attachment to

COW4 explaining to her why the observations by Mr. Mohan were very unfair. He did not hear anything for the next few days. He thought that perhaps the respondent had changed its mind. But that was not the case. A few days later he received the letter of termination dated 24.6.2002 and a few days after that he received the letter extending his probation and he wondered what kind of game respondent was playing with him.

Under cross examination the claimant conceded that he had never been confirmed into his employment by the respondent. He agreed that he had signed the Progress Review Report (COB pages 3-4), “Yes, I was asked to sign, I just signed and gave it off.

Evaluation and Findings

As stated earlier, a lot of trial time was spent by the claimant trying to establish that he had a two-year and not a one-year fixed term contract, despite the clear words of the letter of appointment (COB1). Section 92 of the Evidence Act 1950 excludes evidence of any oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written contract. See, further, *Lee Soh Hua v. Kow Lup Piow & Ors* [1984] 1 CLJ 191 (Rep) [1984] 2 CLJ 85. Having signed COB1 the claimant now cannot come to this Court and say that the terms were other than what is stated therein.

The claimant contends that his position in the respondent was tied to a “back-to-back contract” (his words) that the respondent had secured with ExxonMobil; that this contract with ExxonMobil was a two-year contract, with the possibility of an extension by another year, and that explained why the contract of employment was similarly on a 2 plus 1 basis. The short answer to this, as the Court had already pointed out to his counsel in the early stages of the hearing, is that it made no difference whether his contract was for one year or two years, in view of the overriding probation clause. This clause is not there for window-dressing; it must be accorded legal effect. As also earlier indicated to the claimant and his counsel, the Court finds that the claimant was still on probation at the time of his termination in as much as there had been no confirmation of his employment by the respondent after the expiry of the probation period prescribed in his letter of appointment. He continued to be on probation thereafter.

The issue before the Court is this: Was there just cause and excuse for the claimant’s dismissal, or, more specifically, for the non-confirmation of his employment? Probationers, just as much as confirmed employees, cannot be dismissed without just cause and excuse. That said, however, the just cause and excuse required in a probation situation cannot be said to be the same as that in a permanent employment situation. It has been said time and again (see the authorities reviewed above) that a probationer holds no lien to his

post. He is on trial. More than just performance, his character, conduct, behaviour and attitude are also on trial.

The claimant's superior Mr. Mohan had conducted a review of his performance on 6th May 2002 as evidenced by the Progress Review Report (COB pages 3-4). In addition to the three areas requiring improvement identified by Mr. Mohan, the Court notes that for seven items of evaluation he gave the claimant a "below expectation" rating, while only three such items were given a "meets expectation" rating. In Section 4 of the report Mr. Mohan had penned in the remarks "Extend Probationary Period" and immediately thereafter follows the signatures of both Mr. Mohan and the claimant. A second review, though this was not documented, was via a meeting involving Mr. Mohan, the claimant and COW4. COW4 testified that at this meeting the claimant's attention was drawn to the three points highlighted in COB pages 3-4, and to the fact that there had been no improvement on his part since the first review. She recalled that he actually did not want to improve in these areas and was adamant that they were not part of his job. The claimant denies that there had been such a meeting. The Court has observed COW4's demeanour in the witness stand and finds her to be unfaltering and steadfast. She was consistent throughout cross-examination at the end of which her testimony concerning the second review remained intact. The Court therefore accepts her testimony.

The claimant may have had his reasons to feel that Mr. Mohan was overbearing. However Mr. Mohan being his immediate superior was in the best position to gauge the claimant's performance. But instead of yielding to Mr. Mohan's authority the claimant had questioned it. In his e-mail to COW4 (CLB2 pages 2 - 4) he had described Mr. Mohan as "no better than a hyena". His insubordination aside it gives away his attitude which is one of his personal attributes on trial during his probation.

For the reasons given above the Court finds that the respondent had reasonable grounds to decide for itself that the claimant was not suitable for confirmed employment. The dismissal was for just cause and excuse.

The claim is dismissed.

HANDED DOWN AND DATED THIS 26 NOVEMBER 2009

FRANKLIN GOONTING
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR