

To Confirm or Not to Confirm?

by Tan Hooi Ping

It is common practice in Malaysia for an employer to put a new employee on probation for a period of three to six months before confirming him in permanent employment. There is no legislation which requires that this be done. However, the existence of such a practice is taken into account in employment-related legislation as follows:

- (a) The Minimum Retirement Age Act 2012 does not apply to “a person who works on a probationary term”.¹
- (b) The Industrial Relations Act 1967 provides a method of calculation of backwages in the case of an employee on probation who has been dismissed without just cause or excuse.²

Trial period

The new employee is put on probation to test his skill, competence, temperament, aptitude, attitude and suitability before permanent employment.³ He has to prove to the satisfaction of the employer that he is a fit and proper person to perform the duties for which he was offered employment.⁴

Non-confirmation

It has been held that the employer is in the best position to determine the suitability of the new employee for permanent employment.⁵

However, although there is no guarantee of permanent employment for the employee after the probationary period,⁶ confirmation of employment cannot simply be withheld by the employer. A decision not to confirm the employment must be made upon a reasonable and genuine dissatisfaction with his suitability, and after a fair process has been followed.⁷

Challenging non-confirmation

The court regards an employee who is on probation as a workman for the purposes of the Industrial Relations Act 1967.⁸ If the employee is not confirmed, he can consider that he has been dismissed without just cause or excuse and can challenge the employer’s decision under s 20 of the Industrial Relations Act. Consequently, if the court makes a finding that the non-confirmation was a dismissal without just cause or excuse, the court may grant the appropriate remedy to the employee.

Potential damage and interruption

The employer should not underestimate the potential damage and business interruption which a decision not to confirm the employee can bring.

It is not entirely clear whether the employer must justify non-confirmation in the same way and to the same extent as a dismissal of a permanent employee. Case law suggest that a less rigid test would be applicable in cases involving employees on probation,⁹ but the process of litigation that may ensue is just as arduous.

In the event of a finding against the employer, the court may direct the employer to pay the employee backwages

1 Minimum Retirement Age Act 2012, Schedule, Paragraph 1

2 Industrial Relations Act 1967, Second Schedule, Paragraph 2

3 *Dorsett Regency Hotel (M) Sdn Bhd v Andrew Jayadass James Ambrose* [2003] 2 ILR 740 (Industrial Court) (“*Dorsett*”), at 753; *Albert Marino Parlanti v Impiana Hotel Ipoh Sdn Bhd* [2013] 2 LNS 072 (Industrial Court) at 14

4 *Fakir Abdul Jalil Bin Pakir Mohamed v Shell Refinery Co Bhd* (Award No 20 of 1974, Industrial Court)

5 *Sitt Tatt Bhd v Ong Chee Meng* [2004] 2 ILR 388 (Industrial Court) at 393

6 *Equatorial Timber Moulding Sdn Bhd, Kuching v John Michael Crosskey* [1986] 2 ILR 1666 (Industrial Court) (“*Equatorial*”) at 1671

7 *Wong Choon Moey v Practimax Sdn Bhd* [2013] 1 ILR 501 (Industrial Court) (“*Wong Choon Moey*”) at 505-506; *Nada Pakar Sdn Bhd v Radja Aritonang* [2001] 3 ILR 58 (Labour Department) at 66

8 *Khaliyah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 (CA) at 379

9 *Hartalega Sdn Bhd v Shamsul Hisham Mohd Aini* [2004] 3 CLJ 257 (HC) (“*Hartalega*”) at 265

of up to 12 months.¹⁰ If the employee has been on probation for a year or more, he may even be awarded compensation in lieu of reinstatement.¹¹

Probation management

Some measures that the employer can take to ensure that any decision not to confirm is based on a reasonable and fair assessment include:

When hiring

1. Communicating clearly to the employee the job functions and standards of performance required or expected of the employee upon which the confirmation of employment is dependent;¹²
2. Imposing reasonable performance targets such as key performance indicators and key result areas, and timelines;¹³

During probation

3. Monitoring and giving reminders on the tasks to be carried out and the need to improve performance if any;¹⁴
4. Providing advice, guidance, counselling and occasional correction;¹⁵
5. Bringing to the attention of the employee any issues of poor performance;¹⁶

6. Especially for lower level employees, issuing oral or written warnings on the prospect of non-confirmation in case of bad performance;¹⁷

7. Giving an opportunity to the employee to improve performance and to measure up to the expectations of a permanent employee;¹⁸

At the end of probation

8. Taking into account and measuring the employee's performance according to his claims and representations of his experience and qualifications in his resume and during the interview;¹⁹
9. Taking the employee's input into account in appraising and assessing his performance prior to any decision to confirm or not;²⁰
10. Having the performance appraised and assessed²¹ by the immediate superior and other superiors of the employee who are the best persons to assess his performance;²²
11. Extending probation where it is reasonable to do so;²³
12. Providing reasons for non-confirmation if the employer is reasonably satisfied that the employee is not suitable for permanent employment.²⁴

¹⁰ Industrial Relations Act 1967, Second Schedule, Paragraph 2

¹¹ *Wong Choon Moey*, *supra* n 7, at 519

¹² *Angelina Ng Gek Choo v LDS International Asset Management Sdn Bhd* [2018] 2 LNS 0584 (Industrial Court) ("*Angelina*") at 9; *Arvintharajah Silvarajah v Miki Shared Service Centre Sdn Bhd* [2018] 2 LNS 0687 (Industrial Court) ("*Arvintharajah*") at 9

¹³ *Takaful Nasional Bhd v Nooraizan Mohd Tahir & Anor* [2013] 2 CLJ 134 (HC) at 133-134; *Wong Choon Moey*, *supra* n 7 at 514-515; *Liew Chooi Ling v Thorus Technology Sdn Bhd* [2016] 1 ILR 140 (Industrial Court) ("*Liew Chooi Ling*") at 155

¹⁴ *Dorsett*, *supra* n 3 at 755; *Liew Chooi Ling*, *ibid* at 154-155

¹⁵ *Inter Pacific Development Sdn Bhd v Mat Juhari Bin Hussein* [1995] 2 ILR 85 (Industrial Court) at 88; *Karen Liew Pui Leng v Lyl Capital Sdn Bhd* [2013] 4 ILR 569 ("*Karen Liew*") (Industrial Court) at 585; *Liew Chooi Ling*, *supra* n 13 at 153

¹⁶ *Dorsett*, *supra* n 3 at 754-755; *Liew Chooi Ling*, *supra* n 13 at 154

¹⁷ *Robert John Reeves v Menteri Sumber Manusia Malaysia & Anor* [2000] 1 CLJ 180 (HC) ("*Robert*") at 192; *Dorsett*, *supra* n 3 at 754-755

¹⁸ *Robert*, *ibid* at 192

¹⁹ *Wong Yat Meng v Pattcolube (M) Sdn Bhd* [2016] 4 ILR 293 (Industrial Court) at 297-298; *Angelina*, *supra* n 12 at 5; *Arvintharajah*, *supra* n 12 at 9

²⁰ *Wong Choon Moey*, *supra* n 7 at 518

²¹ *Hartalega*, *supra* n 9 at 265; *Wong Choon Moey*, *supra* n 7 at 505

²² *Karen Liew*, *supra* n 15 at 586

²³ *Dorsett*, *supra* n 3 at 757; *Sitt Tatt*, *supra* n 5 at 393; *Wong Choon Moey*, *supra* n 7 at 504-505

²⁴ *Equatorial*, *supra* n 6 at 1671; *Wong Choon Moey*, *supra* n 7 at 513

These measures are good industrial relations practices that have evolved over many years of adjudication before the Industrial Court. All steps taken should be recorded as they would be crucial evidence in the event of a challenge in court, especially where the employee's superior becomes unavailable to testify.²⁵

Taking these measures will go a long way to prevent unwanted litigation or, at the very least, to minimise the employer's risks:

- a. The lawyers or union officers who are consulted by the employee may be persuaded to advise him not to pursue the case for non-confirmation.
- b. The employer's record on measures taken will offer a stronger case when put before the Industrial Relations officer during the conciliatory process.
- c. If the case should end up in the Industrial Court, there will be evidence to sustain the employer's case that non-confirmation was justified.

The measure of compensation that may be awarded to employees on probation is considerably less than what is possible with permanent employees. However, employers cannot regard employees on probation with any less care than permanent employees where assessing their capability and suitability for employment is concerned. **LH-AG**

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25 *Sitt Tatt*, *supra* n 5 at 394-395; *Liew Chooi Ling*, *supra* n 13 at 150