

A **Wong Choon Moey v Practimax Sdn Bhd**

INDUSTRIAL COURT (KUALA LUMPUR) — AWARD NO 53 OF 2013
(CASE NO 22(27)/4-759 OF 2007)

B MARY SHAKILA CH
7 JANUARY 2013

C *Labour Law — Employment — Probationer — Services of probationer terminated before expiry of probation period — Whether same principles used in terminating services of permanent workman applied — Whether dismissal for unsatisfactory work or incompetency required proof that prior warnings were given and appraisals done*

D The claimant, Wong Choon Moey, who was employed on a three-month probation period as Senior Sales Manager with Practimax Sdn Bhd ('the company'), was terminated from service two and a half months into her job. The letter of termination gave no reason why she had to quit but the company claimed she was not dismissed but rather not confirmed in her job because her work performance was unsatisfactory. The claimant contended she was terminated without just cause or excuse before her probationary period expired as it was done with immediate effect without the giving of any reason and without her being given advance warnings about, or appraisals done on, her work performance. Her dispute over the dismissal came before the Industrial Court on Ministerial reference under s 20(3) of the Industrial Relations Act 1967. Although her termination letter was silent about the reason for her dismissal, in Court the company pleaded, inter alia, that she had failed to achieve the sales target set for her, she did not adhere to its working hours, she had 'pinched' clients serviced by other sales personnel of the company and she had a bad work attitude, was insubordinate and reckless and acted against the interests of the company.

Held, allowing the claim and awarding the claimant RM60,000 as backwages:

- H** (1) Dismissal for unsatisfactory work or incompetency should invariably be preceded by warnings. In the event of poor performance being the reason for dismissal one should endeavor to show the work complained of was performed subsequent to warnings. In this case, the company was unable to show the claimant was served with any warnings about any of the complaints it alleged the claimant was guilty of. There was also no appraisal done on her performance throughout her probationary period (see paras 39-40).
- I** (2) The company's letter to the claimant gave no reason for her termination but instead thanked her for her efforts during her tenure

with the company. In court, the company pleaded five reasons for her termination. The company's actions were self-contradictory and the court was perplexed as to its contentions in court that the claimant was not a good workman during her probationary period and that she had not conducted herself properly and was therefore unsuitable to be confirmed. Although a probationer held no lien over a position in the company but, like a confirmed workman, there must be just cause or excuse for terminating a probationer (see para 40).

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(3) The company was unable to adduce cogent and convincing evidence to support any of the reasons it pleaded as being the basis for terminating the claimant (see para 36).

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(4) Although traditionally an employer had an inalienable right to dispense with a probationer's services at any time during the probation period without assigning any reason therefore and without notice or compensation in lieu of notice, it has evolved that without anything more, an employer had no right to terminate a probationer's services before the probationary period was over except on grounds of misconduct or other sufficient reason as would be the case in terminating the services of a permanent workman (see para 33).

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[Bahasa Malaysia summary

Penuntut, Wong Choon Moey, yang telah diambil bekerja untuk tempoh percubaan tiga bulan sebagai Pengurus Kanan Jualan dengan Practimax Sdn Bhd ('syarikat tersebut'), telah ditamatkan daripada perkhidmatan semasa dia telah bertugas selama dua bulan setengah. Surat penamatan tidak memberikan apa-apa sebab kenapa dia perlu berhenti tetapi syarikat tersebut mendakwa dia tidak dipecat tetapi tidak mengesahkan jawatannya kerana prestasi kerjanya tidak memuaskan. Penuntut berhujah dia telah diberhentikan tanpa sebab atau alasan yang adil sebelum tempoh percubaannya tamat kerana ia telah dilakukan dengan serta merta tanpa memberikan apa-apa sebab dan tanpa memberinya apa-apa amaran terdahulu tentang, atau penilaian yang dilakukan ke atas, prestasi kerjanya. Pertikaianya berhubung pemecatan itu dikemukakan di hadapan Mahkamah Perusahaan atas rujukan Menteri di bawah s 20(3) Akta Perhubungan Perusahaan 1967. Walaupun surat penamatannya tidak menyebut tentang sebab pemecatannya, dalam mahkamah syarikat tersebut telah mempli, antara lain, bahawa dia telah gagal mencapai sasaran jualan yang ditetapkan untuknya, dia tidak mematuhi waktu kerja, dia telah 'pinched' pelanggan-pelanggan yang mendapat khidmat penjawat jualan lain syarikat tersebut dan dia mempunyai sikap kerja yang tidak baik, ketidakpatuhan dan melulu dan bertindak bertentangan dengan kepentingan syarikat tersebut.

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- A** **Diputuskan**, membenarkan tuntutan dan mengawardkan penuntut RM60,000 sebagai tunggakan gaji:
- (1) Pemecatan untuk kerja yang tidak memuaskan atau tidak kompeten patut sentiasa didahului dengan amaran. Sekiranya prestasi lemah merupakan sebab pemecatan seseorang itu patut berusaha untuk menunjukkan kerja yang diadukan itu telah dilakukan selepas amaran. Dalam kes ini, syarikat tersebut tidak dapat menunjukkan penuntut telah memberikan apa-apa amaran tentang apa-apa aduan yang dikatakan penuntut adalah bersalah. Tiada juga penilaian yang dibuat untuk prestasinya sepanjang tempoh percubaannya (lihat perenggan 39–40).
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- (2) Surat syarikat tersebut kepada penuntut tidak memberikan sebab untuk penamatan kerjanya tetapi sebaliknya berterima kasih untuk usahanya sepanjang pekerjaannya dengan syarikat tersebut. Di mahkamah, syarikat itu memplikan lima sebab untuk penamatan. Tindakan syarikat tersebut sendiri bercanggah dan mahkamah bingung dengan hujahnya di mahkamah bahawa penuntut bukan pekerja yang bagus sepanjang tempoh percubaannya dan bahawa dia tidak mengendalikan dirinya dengan betul dan oleh itu tidak sesuai untuk disahkan. Walaupun seorang dalam tempoh percubaan tiada lien ke atas kedudukan dalam syarikat tersebut tetapi, seperti pekerja yang disahkan, perlu ada sebab dan alasan yang adil untuk menamatkan seseorang yang dalam tempoh percubaan itu (lihat perenggan 40).
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- (3) Syarikat tersebut tidak dapat mengemukakan keterangan yang meyakinkan untuk menyokong apa-apa sebab yang diplinya sebagai yang menjadi asas untuk menamatkan penuntut (lihat perenggan 36).
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- (4) Walaupun secara tradisi seorang majikan mempunyai hak mutlak untuk mengetepikan perkhidmatan seseorang yang dalam tempoh percubaan pada bila-bila masa sepanjang tempoh percubaan itu tanpa memberikan apa-apa sebab dan tanpa notis atau pampasan menggantikan notis, ia telah berkembang bahawa tidak lebih daripada itu, seorang majikan tiada hak untuk menamatkan perkhidmatan seorang yang dalam tempoh percubaan sebelum tempoh percubaan berakhir kecuali atas alasan salah laku atau sebab mencukupi lain sebagaimana dalam kes menamatkan perkhidmatan pekerja tetap (lihat perenggan 33).]
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Notes

For cases on probationer, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1268–1278.

Awards referred to

- IE Project Sdn Bhd v Tan Lee Seng* (Award No 56/87), IC (refd) A
Ireka Construction Berhad v Chantiravathan Subramaniam James [1995] 2 ILR 11, IC (refd)
Pakir Jalil Pakir Mohamed and Shell Refinery Co Bhd (Award No 20 of 1974), IC (refd) B

Cases referred to

- B Braun Medical Industries Sdn Bhd v Puvaneswari Saravanamuthu* [2003] ILJU 17; [2004] 1 ILR 765, IC (refd) C
Goon Kwee Phoy v J&P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)
Intrakota Komposit Sdn Bhd v Hanim Hamid & Anor [1998] MLJU 413; [1998] 2 CLJ 187, HC (refd)
KC Mathews v Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320, FC (refd)
Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd [1997] 1 MLJ 376, CA (refd) D

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(3), 30(5)

- Muhendaran (Muhendaran Sri) for the claimant.*
K Ashok (T Rubini with him) (Kandiah Partnership) for the company. E

REFERENCE

This case is a reference under s 20(3) of the Industrial Relations Act 1967, arising from the dismissal of Puan Wong Choon Moey ('the claimant') by Practimax Sdn Bhd ('the company') on 26 August 2004. F

Mary Shakila Ch:

- [1] This reference stems from the dismissal of Puan Wong Choon Moey ('the claimant') by Practimax Sdn Bhd ('the company') on 26 August 2004. G

BRIEF FACTS

- [2] The claimant was employed by the company on 16 June 2004 as a sales manager. She was dismissed on 26 August 2004 by the company. The claimant contends that her said dismissal was without just cause or excuse. The company contends that the claimant who was serving her probationary period and owing to her failure to achieve the promised sales target and her poor sales record she was not confirmed in her position as a sales manager by the company. The company also contended that the claimant failed to report to work at 8am everyday despite that being one of the company's requirements. It is the contention of the company that the claimant failed to attend the daily meetings H
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A with her sales team as required and failed to report to work on time most mornings. The claimant was accused also of pinching customers belonging to other sales representatives of the company and her conduct was brazen and pernicious. The company averred that the claimant acted against the company's interest and projected a bad image of the company to the company's existing long serving customers. It is the company's contention that the claimant was not dismissed but was not confirmed upon expiry of her probationary period by the company.

ISSUES AND LAW

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[3] As gleaned from the facts the following issues falls to be considered and ruled upon by the court, that is whether the claimant was terminated with just cause or excuse?

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[4] It has been held that an employee on probation enjoys the same rights as a permanent or confirmed staff and that his or her services cannot be terminated without just cause or excuse. It is trite that the requirement of bona fide is essential in the dismissal of an employee on probation but if the dismissal or termination or termination is found to be a colourable exercise of the power to dismiss or as a result of discrimination or unfair labour practise the Industrial Court has the jurisdiction to interfere and to set aside such a dismissal (refer *Khaliyah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376). Employees may be required to undergo a period of probation by their employers. During this period the employer decides on the suitability of the employee for the position or job for which he has been hired. The employer in law is required to include in the letter of employment of the employee that he is required to undergo a period of probation for it is said that employees are not automatically of probation. An absence of the term may lead the employee to assume that he is a permanent employee from the very first day of his employment with the company. It is usual to find an employer extending the probationary period of an employee and an employee on probation not being confirmed if he is found to be not suitable for the job for which he has been recruited (refer *Termination of Employment, Understanding the Process* by Maimunah Aminuddin p 65).

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[5] As it has been held a proper procedure must be put in place by an employer to manage probationers. A probationer's performance must be evaluated. Appraisals must be done early so that the probationer has sufficient time to increase and enhance his work performance where necessary. The Industrial Court has insisted that a fair procedure must be followed before a probationer is dismissed on grounds of poor performance.

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[6] It has been held that a probationer remains a probationer until he has

been confirmed or dismissed by the company. A probationer must receive written notification from his employer if he is to consider himself as a confirmed staff. At times however the phrasing of the probationary clause in his contract of employment is important. The phraseology used in his letter of employment is crucial in order to understand the status of a probationer at the end of his probationary period. Having said that I reiterate that a probationer continues as a probationer even after his probationary period has ended and his services has not been terminated by the employer or he has not been confirmed (refer *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320). And, this is so even if no action has been taken by the employer either by way of confirmation or by way of termination the employee continues as a probationer.

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[7] In *Pakir Jalil Pakir Mohamed and Shell Refinery Co Bhd* (Award No 20 of 1974) it was held that a probationer holds no lien to his post. During his probationary period the probationer is on trial or in a state to prove that he has certain qualifications for a state or place. There is a testing of character and capabilities of him on the employer's side. The period of probation it was held is a period of communication by the employer that if the employee proves himself within the period of his probation to the satisfaction of the employer that he 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 is tentative and dependent on the employer's satisfaction as to his suitability. This satisfaction it is envisaged must be a reasonable satisfaction and not an arbitrary or capricious one.

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[8] As it was held by the learned chairman in *B Braun Medical Industries Sdn Bhd v Puvaneswari Saravanamuthu* [2003] ILJU 17; [2004] 1 ILR 765 a probationer is just as entitled to a fair process as any confirmed or a permanent employee and this court is entitled to look into whether the company had afforded the claimant this fair process in arriving at its decision not to confirm him.

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[9] KD Srivasta in his book, *Disciplinary Action Against Employees and its Remedies* says as follows on the rights of an employer in not confirming a probationer at the end of his probationary period:

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Probation: Discharge — It is within the absolute discretion of the employer to discharge a probationer at the end of the probation period if in his opinion the work is not satisfactory. The tribunal cannot sit in judgment over the decision of the management in the matter of confirmation of a probationer. The tribunal can, however examine the grounds on which the management refused to confirm as also other facts only for the purpose of seeing whether it was actuated with ulterior motive in not confirming him. Extension of the period of probation in the absence of anything to the contrary, and the ultimate order of discharge without assigning

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A any reasons in terms of appointment, would be proper. Whether the probationer had put in satisfactory service or not rests with the satisfaction of the employer.

EVIDENCE

B *The company's*

C [10] The company's first witness was the managing director of the company, CW1. He testified that the claimant was employed based on her representation to the company that she could generate a monthly minimum sales of RM200,000. It was his testimony that her position was not advertised at all and that she walked into the company and requested for a sales position. CW1 testified that the claimant was paid a salary of RM2,000 per month and was given a minimum commission of RM4,000 or 2% (whichever is higher) to be claimed upon issuance of invoice for the company's manufacturing products. D He testified that she was required to work from 8am–5pm from Mondays to Fridays and from 8am–12 noon on Saturdays. He testified that she was placed on three months probation. It was his testimony that she ceased to be an employee as she was not confirmed after three months. He testified that there were many reasons for her not being confirmed. It was his evidence that the claimant's did not meet her monthly sales target, she was not punctual to work failing to comply with the company's requirements, that she intruded with the customers accounts belonging to other sales representatives and had a bad working attitude. E

F [11] It was CW1's testimony that the claimant only managed sales of RM33,600 from one NRC Industries Sdn Bhd. He said that this issue was discussed with her at the meeting that was held on 6 July 2004. He said that she was told to increase her sales. It was his testimony that she was nevertheless paid her commission to encourage her. CW1 testified that in July 2004 there was absolutely no sales from the claimant. He testified that on 16 August 2004 he called for another meeting with the claimant and was told that as at 15 August 2004 her sales were only RM8,868.75. CW1 testified that he informed her that he was frustrated with her sales figures and warned her for the second time about her less than impressive sales track. It was his testimony that the claimant had represented that she had vast printing experience and that she was confident of generating minimum sales of RM200,000. He said that he had hired her on her representation. He testified that was why he had agreed to pay her a minimum commission of RM4,000 as that would work out to 2% of RM200,000. G H I

[12] CW1 testified further that it was his company's policy to give commissions based on monthly sales generated. He said that the claimant was the only one who was offered a minimum commission rate on the basis of her

representation made to him during the job interview. CW1 testified that at the meetings he had with the claimant he had told her that he was unhappy with her. He warned her at the said meetings which warnings were documented and minuted by his staff, Cik Ira. CW1 testified that the claimant did not pay heed to the warnings that she received. He testified that the claimant was aware of the reasons for her non-confirmation vide the company's letter dated 26 August 2004. He said that she was well aware of the complaints surrounding her work and workings habits which were communicated to her from time to time. It was his evidence that at the end of her probationary period it was decided by the company that the claimant was not a suitable employee for the company.

[13] It was his evidence during cross-examination that NRC Industries was a customer brought in by the claimant. He agreed when it was put to him that the deal that was negotiated initially between NRC Industries and Focus Label another company in which the claimant was alleged to have worked before she was employed by the company, was brought into the company by the claimant subsequently. He agreed that under the terms of the contract of employment which he agreed was drafted by the company, the claimant was to be paid commissions regardless of whether she brought in sales or not. He agreed that the sales target of RM200,000 which he testified was her target each month was not however stated in the contract of employment. CW1 agreed that during the meetings he had with the claimant he did not ask her about her failure to achieve the sales target of RM200,000. He said that he would normally not question his employees about their respective sales target until they were at least two months into their contract of employment. He further agreed that no written warning letters were issued to the claimant despite her not achieving her sales target. When it was put to him he agreed that no warning letters were issued to the claimant for not achieving her sales target because no target was set for her by the company.

[14] It was his evidence during cross-examination that no warning letters were issued to the claimant for not being punctual to work. He agreed that though the claimant refused to punch in and out during her working hours the company did not issue any warning letters to her on this matter. He however testified that she was issued with one memo by Cik Ira on her lateness to work. It was his testimony that the claimant came late to work as she would have to send her children school first as she was a single mother. When asked whether the claimant was allowed to go straight to meet customers before reporting for work he said that it was perfectly fine if the claimant did that as sometimes the customers want to have breakfast with the employee. It was his testimony that the employee could go straight from their home instead of coming to the office first.

[15] CW1 reiterated that the claimant intruded into the sales accounts of his

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A other sales representatives. He gave some names of the customers that allegedly the claimant had intruded into but agreed that he did not issue warning letters to her on this. CW1 agreed when it was put to him that intruding into other sales representative's accounts and customer lists was a serious issue and that she was issued with a warning letter by the company for interfering with the account of Follow Me but not for intruding into the account of Jeram Coconut that he said that claimant had also intruded into.

C [16] It was his testimony when asked that he had no evidence to support his contention that the claimant had bad working attitude. CW1 testified that the claimant was told about her weaknesses by him before her non-confirmation during the daily meetings that was held. He said that no minutes were however taken down at these said meetings because they were so frequent. When it was put to him CW1 agreed that he could have extended her probationary period if he wanted to.

E [17] The company's second witness, CW2 was the sales executive in the company at the material time. It was her testimony that she was paid a basic salary and a commission of 2% on the invoices that she issued out by the company. It was also her testimony that she and the other sales executives in the company did not receive any minimum commission and was given a sales target monthly that she was expected to achieve. CW2 testified that she knew the claimant and was working with the claimant at the material time in the company. She testified that the company barred the sales representatives in the company from servicing the customers that were already being serviced by one of its sales representatives. She said that the company had issued a memo on this policy and the said memo was hung up on the company's notice board for all to see and be aware off. It was her testimony that the claimant intruded into one of her own customers that she had already been servicing viz Alami Sdn Bhd. She said that she overheard the claimant speaking to the said company over the telephone and had made an appointment to see it despite being told by her that the said company was serviced by her for more than a year now. She said that she had informed CW1 about this.

H [18] It was CW2's testimony that it was the company's policy that all sales representatives had to report for work daily at 8am and were not allowed to visit their customers directly from their homes. She said that they were required every morning to attend a meeting. In fact she testified that the company did not tolerate any sales representative visiting their customers in the morning. CW2 testified that the claimant had problems complying with the company's policies and would not report for work at 8am most of the time.

[19] When cross-examined CW2 testified that every sales representative was able to view each other's customer's list as the names were keyed into the

system. As to Alami Sdn Bhd she agreed when it was put to her that the claimant could have called up Alami Sdn Bhd as she also knew them and did not proceed further to fix an appointment with them when she was told by her that it was her existing customer.

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[20] The evidence of CW3 that is that of the human resource manager at the material time, Ms Ira, was that she prepared the minutes of some of the meetings that was held with the claimant, CW1 and herself. She said that the minutes kept by her were never confirmed by the claimant because it was not the company's practice of doing so. She also testified that some of the memos in particular memos dated 10 February 2002 and 27 April 2004, were prepared by her at the directions of CW1 and given by her to the claimant personally and posted on the notice board for all concerned to see.

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[21] It was her evidence during cross-examination that the claimant did not use the punch card that was put in place in the office right from the first day she joined service and until her services were terminated by the company. She said that she warned the claimant verbally and reported this to CW1 but agreed that no warning letters or other actions were taken against her by the company. CW3 confirmed that the meeting on 6 July 2004 and 16 August 2004 did take place and that she attended the same. It was her testimony when asked that she took down everything that was said at these meetings by all parties. In reference to the said meeting held on 6 July 2004 it was her testimony when asked as to why the minutes did not reflect what the claimant had said at the said meeting that she must have overlooked that. She agreed when it was put to her that the said minutes that she kept was incomplete.

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The claimant's

[22] The claimant testified that when she joined the company on 16 June 2004 she was put on probation for three months by the company. It was her testimony that her probationary period would have ended on 20 September 2004. It was her testimony that as a senior sales manager she was to market the company's products, create new business accounts and to obtain sales order for the company. The claimant said that on 24 August 2004 and 27 August 2004 she had obtained the approval of CW1 to go outstation to Johore Bahru and Malacca in furtherance of the company's business. She said that accordingly she left for Johore Bahru and Malacca on the morning of 25 August 2004. She testified that on 27 August 2004 she reported to work as usual and was away from work only on 25–26 August 2004 as approved earlier by CW1. She said that upon her return to her workstation she found that her table was cleared. She testified that she was terminated with immediate effect vide the letter dated 26 August 2004 without providing any reasons for her termination. It was her

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A testimony that she did not receive any warnings oral or in writing from the company nor was her work appraised by the company.

[23] It was the claimant's testimony that she did not sight the memo dated 10 February 2002 before the hearing. She testified that she was not given the said memo by the company. Likewise she testified that the memos adduced by the company found at pp 14, 21, 26, 47, 66 and 67 were never seen or received by her before the hearing. It was her testimony that the said meetings on 6 July 2004 and 16 August 2004 never took place and she did not attend them. She denied having been given any memo by the company over her lateness to work or failure to reach her sales targets.

[24] It was the claimant's testimony when cross-examined that prior to joining the company she was employed by Focus Label a company that was in the same business as the company. She testified that focus label would sub-contract some of its printing work to the company. She testified that she was employed by the company because of her competency and because she had represented to CW1 that she could bring in business. She agreed that she could tap into the clientele of Focus Label for the company but denied when it was put to her that sales targets were set for her by the company nor did she give the list of Focus Label clientele to the company during her interview with them. The claimant agreed that she was paid a salary of RM2,000 a month and a minimum commission of RM4,000 which she agreed represented 2% of RM200,000. She denied that the company had agreed to pay her the minimum commission because she had represented that she could bring in sales of RM200,000 a month. She testified that CW1 employed her and agreed to pay her the commission of RM4,000 per month upon issuance of invoices irrespective of its value. It was her testimony that it was agreed that she would be paid the commission of RM4,000 per month irrespective of whether she generated sales or not. She disagreed that she did not generate any sales for the month of July 2004. She testified that she brought in the sales from two customers and they were billed by the company using cash bills as instructed by CW1. She testified that she could not however remember its value. She said that that is why these transactions were not recorded in the company's books.

D It was her testimony that because of these said sales she was paid the commission of RM4,000 for July. The claimant testified that this was done so that the company did not have to pay sales tax. When asked whether she had any documents to prove this she said that she had none as the company had cleared her table and taken away her documents the day she was terminated.

I [25] As regards the memos of the company it was her testimony that she did not receive any memos and that if she did she would have acknowledged receipt of it. She agreed that she received the letter of termination and did not acknowledge receipt of it.

[26] The claimant initially denied when it was put to her that she had given the company the list of the customers of her previous employer. Later she agreed that she took with her the customer list of her previous employer that is, General Labels & Labellings Malaysia when she left their employ and had given it to the company.

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[27] The claimant agreed that her working hours with the company was as stated in her letter of employment but denied when it was put to her that she was to leave from office to visit her customers. She agreed that she did not come to the office in the mornings on a daily basis but she had the approval of CW1. She denied when it was put to her that the company had rules that prevented her from calling up the customers serviced by the sales representatives in the company. When asked whether she knew the list of customers of her colleagues she said that she did not know them and only called up the customers that she dealt with before. She said that when she was told by her customers that she called up that they were already serviced by one of the company's sales representative she stopped contacting them.

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[28] It was her testimony that she would receive the sample of the labels to be printed from the customers together with the specifications. She agreed that if the labels printed did not adhere to the specifications the customer will reject them. She denied however that the sales representative would be responsible for the said error. She was referred to Lam Soon Edible Oils and confirmed that it was one of her customers. She disagreed that she was responsible for the order that Lam Soon Edible Oils rejected. She testified that she did not direct the printing of the labels. She denied that she had given wrong specifications to the production department. When she was referred to the memo dated 19 August 2004 she denied having received it before the court case. She further disagreed with its contents. It was her evidence when it was put to her that she did not know the reasons nor was she told the reasons as to why she was not being confirmed. She testified that her letter of termination did not state the reasons for her dismissal.

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[29] The claimant maintained in cross-examination that she did not receive the memos of the company and that she had not even acknowledged receipt of the said memos. She did agree however that she received the letter of termination notwithstanding that she did not also acknowledge the same. She testified that she had the approval of CW1 to visit her customers first on some days before reporting to the office. She testified that she would call CW1 and get his verbal approval. She agreed that she did not come into the office at 8am as required on a daily basis.

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[30] The claimant was asked about a settlement that was initially concluded and allegedly signed by her the claimant testified that it was not her signature

A and that she did not sign the said document. She testified that she had withdrawn from the alleged settlement.

B [31] And in so far as the printing of the labels for Lam Soon Edible Oils was concerned the claimant testified that she had secured the order but because of bad production by the production unit the labels were rejected by the customer. She testified that she had asked CW1 and his production team to reply to the customer. She denied when it was put to her that she had given wrong specifications to the production unit.

C EVALUATION AND FINDINGS

D [32] Referring to the case of *Ireka Construction Berhad v Chantiravathan Subramaniam James* [1995] 2 ILR 11 it was stated that the burden of proof lies on the employer to prove that he has just cause or excuse to dismiss his workman. In *Goon Kwee Phoy v J&P Coats (M) Bhd* [1981] 2 MLJ 129 it was held that if the employer chooses to give a reason for the action taken by him the duty of the court is inquire whether that reason or excuse has or has not been made out. If it finds as a fact that it has not been proved then the inevitable conclusion must be that the dismissal is without just cause or excuse. Hence it is trite that the proper inquiry of the court is the reason advanced by the employer and the Industrial Court or the High Court cannot go into another reason not relied upon by the employer or find one for the employer. It is the duty of the employer to prove to the court that on a balance of probabilities that the workman was terminated with just cause or excuse. This should not be difficult for the employer to prove as it is the best person to know in the circumstances as to the reasons for dismissing the employee as he is in possession of the facts and documents pertaining to the case.

G [33] Where probationers are concerned as per traditional views an employer had an inalienable right to dispense with the services of a probationer at any time during the period of probation without assigning any reason and without notice or compensation in lieu of notice. This right of the employer was considered absolute throughout the period of probation but in has been evolved that without anything more an appointment on probation gives the employer no right to terminate the services of the employee before the probationary period is over except on the grounds of misconduct or other sufficient reasons in which case even the services of a permanent workman could be terminated. In the case of *Intrakota Komposit Sdn Bhd v Hanim Hamid & Anor* [1998] MLJU 413; [1998] 2 CLJ 187 it was held that a dismissal of a probationer must be done in accordance with the law viz without just cause or excuse and in accordance with the rules of natural justice. It was further held that looking at the definition of the word 'workman' in s 20 of the Industrial Relations Act 1967 there seems to be no distinction between an employee on

probation and a confirmed employee. This view was also taken in the case of *Khaliah bt Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 where it was held that a probationer would enjoy the same rights as a permanent or confirmed employee and therefore his or her services could not be terminated without just cause or excuse. In the same way it was further held that the requirement of bona fides was essential in the dismissal of an employee on probation.

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[34] Fortified with these principles I now analyse the facts and evidence before me as I arrive at a conclusion of the case at hand. The company pleads that the claimant was not terminated but not confirmed in her position. The company's letter of termination as rightly pointed out by the claimant's counsel during his submission does not state the reason for the company terminating her services. However in its statement in reply the company pleads that there were five reasons as to why the claimant was not confirmed and asked to leave the company before the expiry of her probationary period of three months.

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[35] The claimant's counsel submitted that the company failed to adduce cogent and convincing evidence to substantiate their case and reasons for the dismissal of the claimant. The thrust of the claimant's counsel's submission centered on the letter of dismissal not reflecting any of the reasons enumerated in the said statement in reply as reasons for the termination of the claimant's services by the company. The company's counsel submitted that the claimant could not be trusted in her evidence in court and that the court must accept the company's witness's testimony on the five matters as the claimant's credibility is in question. Having gleaned the facts and evidence of the company the court is of the view that the documents do not support the company's contention in this case in particular that of the letters of employment and termination. The company contends that the claimant did not achieve her sales target set for her by the company on the onset of her employment. The evidence does not show clearly what this figure was — was it RM200,000 per month? CW1 did not emphatically say that this was her sales target. The letter of employment of the claimant dated 16 June 2004 did not stipulate that the claimant was required to achieve a minimum sales target per month save that she was to be paid RM2,000 per month and was to be paid a minimum commission of RM4,000 or 2% (whichever is higher) to be claimed upon issuance of invoice for the company's manufactured products. There is no figure or minimum value attached to these invoices against which the commissions payable were attached to. In fact when CW1 was cross-examined he agreed that he did not issue any warning letters to the claimant on her failure to achieve her monthly sales target because no sales target was set for her. Moreover it was his evidence when cross-examined that he would not normally intrude in the affairs of his employees in so far as they achieving their respective sales target until they were 12 months with the company. If this was so and assuming there was a sales

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- A** target set for the claimant why was she then terminated even before the expiry of her probationary period by him? CW1's evidence that it was the company's policy to set targets for its sales personnel was not to be found in any letters or documents however. The court therefore rejects his bare averments to this effect and finds that the company has not adduced any evidence in support of
- B** their contention that the claimant had failed to achieve her monthly sales target thus accounting for her dismissal. In fact it was the evidence and testimony of CW2 when cross-examined that she did not know for a fact whether the company had set sales target for the claimant.
- C** [36] The company's second reason for dismissing the claimant as pleaded was based on her daily work attendance. The court notes that the company through its witnesses say that the claimant was late most times to work and did not adhere to the working hours and the need for her to report to work first before visiting her customers. However CW1 did testify that he was aware and
- D** approved the claimant some days going straight from her home to visit her customers before she came to the office. He said that he was aware and appreciated that sometimes the customers would want to have breakfast with the sales personnel. This being his testimony and in the light of the claimant's
- E** testimony on this issue the court can only hold that the company had been unreasonable and wrong altogether to use those instances when the claimant reported for work late as a reasons to terminate her services. The claimant testified that she had obtained CW1's permission to visit some customers in the morning before she reported for work. She referred to her trip to Johore when she sought CW1's approval to go straight from her home for the appointment.
- F** The company could not give dates when it is alleged the claimant was late for work. The company agreed that all staff had to use their punch cards when they came in in the morning for work and to punch out when they left for home but the company did not produce in court the claimant's punch card in support of its allegation that the claimant attendance record was poor in the two months
- G** she was with the company. The claimant denies receiving the memo dated 9 July 2004 the company allegedly had issued to her on this subject. There is no acknowledgment of receipt for the same to show that the claimant did indeed receive the same and although it was strenuously argued by the company's counsel that the claimant's word and testimony should not be relied upon by
- H** the court because she lies the court finds that she is a credible witness and really cannot accept the company's counsel's argument that her testimony ought to be rejected whole scale by the court. This view the court holds based on the documents and evidence and testimonies that is before the court. The court had the opportunity to look at the demenour of all witnesses during the hearing and this then is the court's view. On the matter of her daily attendance to work
- I** and meetings being poor it would have helped the court if there were dates given to the court when she did not attend the meetings in the mornings or was late to work especially if dates that showed that she disregarded the company's policies on attendance and the warning if the memo dated 9 July 2004 was

given to the claimant. It would be wrong then if the claimant despite being warned and advised of the company's policies on this matter repeatedly failed to adhere to the same. This then would certainly cause the court to raise its brow and perhaps find that the claimant was a delinquent workman. Unfortunately owing to the dearth of evidence the court can only agree with the claimant's counsel's submission that there is cogent and convincing evidence in support of this reason for which the claimant was dismissed by the company.

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[37] The claimant was accused of pinching or intruding into the customers belonging to other sales representatives of the company. Again on the facts and evidence before the court except for the testimony of CW1 and CW2 there is no other evidentiary proof to support this contention of the company. CW2 did agree when it was put to her that the claimant could have called one of her customers that was also known to the claimant and did not pursue the customer further when she (the claimant) learnt that that customer was already being serviced by her (CW2). This corroborates the claimant's testimony on this issue. The company gave names of some customers that the claimant pinched allegedly from the other sales representatives. However there was no documentary proof to show that she did in fact service them or clinch sales with them. It is the court's view that the company's averments are bare and unconvincing to cause the court to say that she indeed pinched or intruded. Again apart from the memo dated 6 August 2004 on this issue from the company which the claimant denies receiving the company has nothing else to support its contention. The dilemma that the court faces is also caused by the fact that the claimant, a fact to which the testimony of CW1 alludes to, had been in this industry for awhile before joining the company. The claimant seems to have known the usual customers in this industries beforehand. The list of customers that the company refers to visited by the claimant shows visits but no evidence that sales were concluded with the customers serviced by the other sales personnels of the company. The claimant testified that she did not know which was the company's existing customers and she called those that she knew and that she would stop dealing with them when she found out that they were already being serviced by the company. The evidence of 'no sales' with the customers allegedly pinched from other sales representatives supports her contention here. In the light of the evidence the court disagrees with the company that the claimant in fact did pinch or intrude into the customers serviced by the other sales representatives of the company.

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[38] The company's reason for terminating her services was further fortified by their contention that the claimant had bad working attitude or was insubordinate or reckless. However the company's scarcity of evidence especially warnings does not help in their case that the claimant was not dismissed but not confirmed in her position for this reason as well. It is pleaded that the claimant proceeded with jobs that the senior management have

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A instructed her not to continue with as the jobs have a negative margin inevitably subjecting the company to loss. The company attempted to rely on one customer viz Technographic Sdn Bhd in support of its averment. The claimant was however not cross-examined on this matter by the company's counsel save for the Lam Soon Edible Oils matter where the customer rejected the sample cards and labels because of defects. The claimant explained that this was production mistakes and that she should not be blamed for it. The company on this matter did not show how that claimant was faulted infact it was she that gave wrong specifications to the production department. The matter was not dealt with in detail to show that the claimant was solely to be blamed for the rejection by Lam Soon. The court can only agree with the claimant in the light of the facts and evidence that the claimant should not be faulted for production inefficiency. Hence there is no evidence in support of the company's other contention that the claimant acted against the best interest of the company.

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[39] The court stresses that dismissal for unsatisfactory work or incompetency should be invariably have been preceded by warnings. In the event of poor performance being the reason for the dismissal one should endeavour to show that the work complained of was performed subsequent to warnings. This was the ratio decidendi of the case of *IE Project Sdn Bhd v Tan Lee Seng*, (Award No 56/87) where it was further held that an employer must be slow to dismiss on grounds that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed for without first telling him of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving an opportunity of improving his performance. It is for the employer, it was held, to find out from the employee why he is performing unsatisfactorily, to warn him that if he persists in doing so he may have to go.

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G Here in this case there is no such warnings. As stated in the proceedings paragraphs hitherto the claimant denies having received any such memos or warnings from the company having denied in particular the minutes of meetings held on 6 July 2004 and 16 August 2004 wherein allegedly she was warned about her deficiencies in her performance and failure to achieve sales targets and the memos dated 9 July 2004 allegedly on her lateness to work, the memo dated 6 August 2004 allegedly on her intrusion into the customer list of the other sales representatives of the company and the memo dated 19 August 2004 wherein allegedly the company had warned her that she was required to get the approval of the managing director before proceeding to issue job sheet especially in terms of payment term, prices (if the job is low or negative margin) and so on. The company was unable to show that the claimant received these documents, the claimant having not acknowledged receipt of them.

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[40] The court agrees with the claimant's counsel that the company's letter

dated 26 August 2004 is pertinent. This is the letter terminating the services of the claimant by the company. It will be noted from the said letter that the company makes no reference to the alleged reasons for terminating the claimant, if at all, the claimant was guilty of the five reasons given by the company in their statement in reply for terminating her services. Vide the said letter of termination the company thanks the claimant for her efforts during her tenure with it. The company's actions seem self-contradictory. The court is therefore perplexed at its contention now in court that the claimant was not a good workman during her probationary period having not conducted herself properly and was therefore not much to be desired and retained as a staff of the company. Yes it is trite that a probationer holds no lien over her position in the company but just like a confirmed workman there must be just cause or excuse for her termination by the employer. The employer dismissing a probationer from service is required to discharge its burden of proving that the claimant or employee did commit the allegations that it throws at him in court or that the workman was so deficient and inefficient in his performance that he did not deserve to be confirmed. It is also pertinent to note that no appraisal was done by the company on the claimant's performance throughout the probationary period.

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[41] In the final analysis and having regards to the prevailing facts and evidence the court finds that the company having failed to discharge its burden of prove, the dismissal of the claimant was without just cause or excuse, a conclusion that the court also arrives at having regards to s 30(5) of the Industrial Relations Act 1967.

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RELIEF

[42] It would not be in the interest of either party for the court to order reinstatement of the claimant in this case. An order for backwages and compensation would be a better remedy. Hence the court makes the following orders:

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(a) Compensation

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Owing to the fact that the claimant was a probationer and had not completed one year of service with the company the Court refrains from making any order for compensation in lieu of reinstatement; and

(b) Backwages

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The court orders the company to pay the claimant backwages amounting to ten months on her last drawn salary as the claimant being a probationer was dismissed by the company without just cause or excuse before the completion of her probationary period. The company is ordered to pay the claimant the

A following sum calculated based on her last drawn salary of RM2,000 plus her commission of RM4,000 as this sum was paid to as per the contract of employment dated 16 June 2004:
RM6,000 x 10 months = RM60,000

B [43] The court has considered the post dismissal earnings of the claimant and taking into account the facts and evidence in this case the court does not think it appropriate to make any deductions for post-dismissal earnings and contributory conduct.

C [44] Hence the company is ordered to pay the claimant the sum of RM60,000 less any statutory deductions, if any, to the claimant vide her solicitors Messrs Muhendaran Sri within 30 days from the date hereof.

D *Claimant's allowed and claimed awarded RM 60,000 as backwages.*

Reported by Ashok Kumar

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