

# Probationer's Rights: Some Legal Myths

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Upon embarking on their first career, the newly employed staff (or employee, as the term may be used interchangeably) will come across several legal terminologies in their letter of appointment, such as probation period, confirmation, termination notice etc. To most laymen, these terms are normally brushed aside on the assumption that they will not be affected by such terms. They will only become interested in understanding these terms when they are directly affected. Hence, this article seeks to briefly explain the rights of a probationer. It is hoped that some of the legal myths concerning probationers will be rectified. This article is useful to those who are about to embark on their first career.

Before the above myths are corrected, the definition of probation period is first explained. The staff is placed in a probation period so that the employer will be able to test the character and capabilities of the staff. The probation period in a contract of service can, therefore, be taken as a communication by the employer that in case the employee proves himself, within the period of probation, to the satisfaction of the employer, that he (the probationer) is a fit and proper person to perform the duties for which he has offered his services, the probationer would be entitled to be confirmed or taken in on a permanent basis. Thus the appointment of a person on probation is, therefore, tentative and dependent upon the employer's satisfaction as to his suitability. A probation period is usually stated in the letter of appointment. It is a period where the employer observes the employee's performance. The most common probation period is between 6-12 months, depending upon the nature of service and the size of the company. In short, a probation period is akin to the trial period.

**“an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse.”** Shaik Daud Ismail, JCA

However, there are some legal myths concerning the rights of a probationer. Firstly, it is common for the employers to assume that they can terminate the probationer at any time without waiting for the expiry of the probation period. Secondly, the first myth is exacerbated with common misunderstanding that the employers are not required to state any reason if they were to terminate any probationer. Thirdly, it is common misunderstanding among the probationers that they will be automatically confirmed at the end of the probation period if the employer neither terminates nor extends the probation period.

The employee must be given chances to prove that he has capabilities that suit the employer's needs. Thus the myth that an employer may terminate a probationer who is undergoing probationary period is unacceptable. A probationer must not be dismissed during the probationary period, unless misconduct could be proved against the probationer or on the grounds of redundancy. Most of the time, the employers assume that they are not required to state any reason if they were to terminate any probationer. Based on the case of Khaliah Abbas v Pesaka Capital Corporation Sdn. Bhd., a probationer was dismissed at the end of a probationary period on the grounds that she had not met the standard requirements for confirmation. She later claimed that such dismissal was without just cause or excuse. The employer refuted that she should be accorded similar rights as any other workman as she was a probationer.

The employer claimed that being a probationer, she could be summarily dismissed. However, as per Shaik Daud Ismail, JCA, “an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse.” Thus such a myth that the employer has the right to terminate any probationer without attaching any reason is baseless.

Any probationer who thinks that he is wrongfully dismissed may seek redress under wrongful dismissal and claim for reinstatement.

It is also a myth that the probationer can assume that he has been confirmed if the employer does not expressly inform him of the confirmation. A probationer will not be automatically confirmed at the end of the probation period if the employer neither terminates nor extends the probation period. The law is clear that, without an express confirmation from his employer, a probationer remains on probation even after his probationary period has expired (KC Mathews v Guthries Sdn. Bhd. and V. Subramaniam & Ors v Craigielea Estate). Unless and until he receives a letter of confirmation from his employer, thus he will remain a probationer until he is either confirmed or his services are terminated. Nevertheless, it is simply unfair or arbitrary employment practice to keep an employee in probation period for a long period without according to him the benefits of permanent establishment. However, in the case of Paari Perumal v Abdul Majid Hj Nazardin & Ors, the learned judge held that the employer was deemed confirmed despite the absence of a confirmation letter. Such a decision was on the grounds that he was given the benefits which were accorded to confirmed staff.

It must be reiterated that the newly employed staff must be aware of the terms and conditions of his appointment to avoid legal complications in future. In dealing with probationers, the employer has to decide at the end of the probation period whether or not to confirm the employment of the respective employee. If the employee is confirmed, the employee must be informed in writing by the employer stating the terms and conditions of the employment. On the other hand, if the employer is dissatisfied with the probationer's performance, he may either terminate the probationer's service or extend it if the employer deems it necessary. However, the probationer must be informed the reason(s) for such termination or extension. Thus, the legal myths concerning the probationers are to be rectified as per the above discussion.

## References;

- Ayadurai, D., (2001) Industrial Relations in Malaysia, Kuala Lumpur: MLJ
- Sulnayah bte Hj Mohd Isa v Sekolah Kanak-kanak Pekak Selangor [1999] 6 MLJ 249 [1997] 3 CLJ 827 (CA)
- Summary dismissal is defined as termination without any due notice given. Section 20, Industrial Relations Act 1967.
- [1981] 2 MLJ (FC)
- [1982] 1 MLJ 317 (FC)
- [2000] 4 CLJ 127 (HC), the appellant's claim of damages for breach of contract due to the respondents' failure to pay the increment of RM100 after the end of probationary period. The increment is given upon confirmation.