

**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO. 13(23)(22)(11)/4 – 1246/2004**

***BETWEEN***

**NOR AINA BINTI KAMARUDDIN**

***AND***

**COMMERCE DOT COM SDN. BHD.**

**AWARD NO. 957 OF 2010**

**BEFORE : TUAN TEO SAY ENG - CHAIRMAN  
(AWARD HANDED DOWN BY TUAN EDDIE YEO SOON CHYE)**

**VENUE : Industrial Court Malaysia, Kuala Lumpur**

**DATE OF REFERENCE : 04.06.2004**

**DATES OF MENTION : 09.09.2004; 24.11.2004; 31.01.2005; 22.03.2005;  
05.08.2005; 15.08.2005; 15.09.2005; 08.12.2005;  
23.01.2006; 11.12.2006; 19.04.2007; 05.10.2007;  
22.04.2008; 27.05.2008; 30.06.2008; 09.09.2009**

**DATES OF HEARING : 30.03.2006; 19.05.2006; 04.11.2008; 25.02.2009;  
26.02.2009; 04.03.2009**

**DATE OF CLAIMANT'S  
SUBMISSIONS RECEIVED : 14.04.2009**

**DATE OF COMPANY'S  
SUBMISSIONS RECEIVED : 26.05.2009**

**DATE OF CLAIMANT'S  
REPLY RECEIVED : 10.07.2009**

**REPRESENTATION : Encik Teh Hong Jet of Messrs Tan Kim Siong  
& Teh Hong Jet,  
Counsel for the Claimant.**

Encik Mahadi Bin Muhammad of Messrs  
Mahadi Redzuan & Co.,  
Counsel for the Respondent.

**REFERENCE :** This is a reference by the Honourable Minister of Human Resource under section 20(3) of the Industrial Relations Act 1967 on 4 June 2004 arising out of the dismissal of **Nor Aina binti Kamaruddin (hereinafter referred to as the "Claimant")** on 7 May 2003 by **Commerce Dot Com Sdn. Bhd. (hereinafter referred to as the "Respondent")**.

## **A W A R D**

### **BACKGROUND**

1. This is a Ministerial reference to the Industrial Court under section 20(3) of the Industrial Relations Act 1967 (Act 177) made on 4 June 2004 for an award in respect of the dismissal of Nor Aina binti Kamaruddin ("the Claimant") by Commerce Dot Com Sdn. Bhd. ("the Respondent") on 7 May 2003.

2. This case was heard by the previous Chairman of Court 22 and hearing was completed on 4 March 2009. Claimant's solicitors, Messrs Tan Kim Siong & Teh Hong Jet filed the Claimant's Written Submissions on 14 April 2009 and Written Submissions In Reply on 10 July 2009. The Respondent's Written Submissions were filed by the Respondent's solicitors, Messrs Mahadi Redzuan & Co. on 26 May 2009.

3. The Chairman of Court 22, YA Tuan Teo Say Eng has been appointed as a Judicial Commissioner of the High Court of Malaya on 14 August 2009. Both counsel for the Claimant and Respondent consented to the award of this case to be handed down by another Chairman. As the status of the award of this case was pending, this matter was thereafter transferred to this division (Court 13). Accordingly, I shall now hand down the award for

this case. This Award is written based on the documents filed and Notes of Evidence taken verbatim pertaining to this case by the previous Chairman.

#### **STATEMENT OF AGREED FACTS**

4. The Claimant was appointed as Training Manager in the Respondent Company on 15 July 2002. *Vide* a letter dated 7 May 2003, the Claimant wrote to the Chief Executive of the Respondent Company, seeking clarification and/or confirmation about the status of her employment as she had not received any letter from the Respondent Company. The Claimant's last drawn basic salary at the material time was RM 6,500.00 per month. The Claimant also enjoyed fixed transport allowance of RM 500.00 and fixed hand phone allowance of RM 100.00 per month.

5. In the Claimant's Letter of Appointment dated 26 June 2002 (COB, page 1), the Probationary Period and Notice of Termination clauses state as follows:

#### **Probationary Period**

You will remain on probation for a period of **six (6) months** from the date of acceptance of this offer. Termination of employment during the probationary period can be effected by either party by giving seven (7) days wages in lieu of notice.

The said probationary period may be extended further at the discretion of the Company. Your confirmation of employment shall be at the discretion of the Company.

## **Notice of Termination**

Termination of employment can be effected by either party giving to the other party two (2) months notice in writing or paying to the other a sum equivalent to two (2) months salary in lieu of notice without assigning any reason there for.

However, in respect of termination of employment due to misconduct, no notice of termination or salary in lieu of notice is required to be given.

6. The Respondent *vide* letter dated 15 January 2003 (COB, page 5), has decided that the Claimant's probationary period will be extended by another period of three (3) months with effect from 15 January 2003. The extract of the said letter is as follows:

“With reference to the above matter, please be informed that the Management has decided that your probationary period will be extended by another period of three (3) months with effect from 15 January 2003. This is based on your performance appraisal during your initial probationary period and the subsequent discussion where the areas requiring change have been highlighted to you.

Please be aware that should you show significant improvement in the areas as highlighted, we would not hesitate to confirm you before the end of the extended probationary period.

Therefore, we are hoping that you will take this opportunity to strengthen your skills and knowledge for mutual benefit. The team is confident that you will continue to perform your duties effectively.”

7. The Respondent's Chief Operating Officer, Mr. Jasim Sura Puthuchery issued a Notice of Termination of Service dated 8 May 2003 to the Claimant. The said notice (COB, page 8 and Statement of Case, CL-3) is reproduced as follows:

**"Re: Notice of Termination of Service**

We refer to the above and regret to notify you that the Company, after much evaluation and consideration, has decided not to confirm you as Training Manager.

Please return all company property to the Human Resource Office by 31 May 2002 and your salary amounting to RM 7,360.25 in lieu of notice period will be paid to you."

8. The Claimant in the Statement of Case contended *inter alia* the following:

- (i) the dismissal is without any just cause or excuse and/or in breach of the principles of natural justice and/or unfair labour practice and/or unlawful; and
- (ii) the Claimant be reinstated in her former job without any loss of wages, allowance, service, seniority, privileges or benefits.

9. The Respondent in their Statement In Reply contended *inter alia* as follows:

- (i) the non confirmation and the dismissal of the Claimant was made by the Respondent *bona fide* after the Respondent had fairly assessed her suitability for permanent employment in accordance to the fair and accepted procedures of industrial law and practice and the Respondent found the Claimant was not suitable;

- (ii) the Claimant was given the fair opportunity for approximately 10 (ten) months to prove herself to be suitable for permanent employment but this she has failed to do; and
- (iii) despite all the opportunities given to the Claimant, she was still unsuitable for permanent employment due to her inefficiency and/or unsatisfactory work performance and/or her failure to reach the standard that the Respondent is expected of her.

### **THE ISSUE**

10. The issue in this case is whether the dismissal of the Claimant by the Respondent was with or without just cause or excuse.

### **THE LAW**

11. The function of the Industrial Court is clearly laid down in the case of **Goon Kwee Phoy v. J. & P. Coats (M) Bhd.** [1981] 2 MLJ 129 at page 136 where the Federal Court decided as follows:

“Where representations are made and are referred to the Industrial Court for enquiry, **it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse.** If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, the inevitable conclusion must be that the termination or dismissal was without just cause or

excuse. The proper inquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

[Emphasis added]

12. The probationer has no right of tenure to her job beyond the agreed contractual probationary period. A probationer has no substantive right to hold any post and she holds no lien on the post. The probationer is on trial to prove her fitness for the post which she offers her service. The character, suitability and capacity of the Claimant as an employee must be tested during her probationary period with the Company. see **Equatorial Timber Moulding Sdn. Bhd., Kuching v. John Michael Crosskey, Kuching** [1986] 2 ILR 1666.

13. The employer is at liberty at the end of the probationary period, to continue the employee in her service or otherwise at the employer’s discretion. However, when the validity of such a termination is challenged, the Industrial Court must be satisfied that such termination by the employer was a *bona fide* exercise of the power conferred by the contract of employment.

14. In the case of **Khaliah Abbas v. Pesaka Capital Corporation Sdn. Bhd.** [1997] 3 CLJ 827 at page 831, the Court of Appeal succinctly explained the position of a probationer in a Company:

"It is our view that an employee on probation enjoys their same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of *bona fide* is essential in the dismissal of an employee on probation but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or as a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal."

15. In "**The Law of Industrial Disputes**" **Malhotra**, Volume 1, Sixth Edition where the term "**probationer**" has been defined as follows:

"... a probationer is an employee who has been provisionally employed to fill a permanent vacancy and whose probation, i.e. fitness for the post, has not been confirmed or declared. The concept of 'fitness for the post, includes three main ingredients *viz.* performance or productivity, discipline or conduct and attendance'"

## **THE RESPONDENT'S CASE**

16. The Respondent commenced their case on 30 March 2006 before Chairman YA Tuan Hariraman Palaya. According to the Court's notes of evidence, the parties has attempted negotiations for the purpose of settlement between 22 April 2008 and 30 June 2008. This case was thereafter heard before YA Tuan Teo Say Eng, the Chairman succeeding Court 22 on 25 and 26 February 2009 as the previous Chairman's tenure of service has expired on 31 August 2006. The Respondent's Chief Operating Officer, Mr. Jasim Sura Puthuchearry (COW-1) was called as a witness to

testify orally in Court. The relevant evidence-in-chief of COW-1 are as follows:

Q: Did you consult or warn the Claimant about her poor performance?

A: I did. I discuss this with the Claimant in my room. It was around lunch time on or around the end of April 2003.

Q: As a Chief Operating Officer, why did you think that the Claimant was not suitable for permanent employment with the Company?

A: We did not believe we will make her as our permanent staff. Her performance of the job responsibility left us with issues that had to be resolved by other people.

Q: How was the working relationship between the Claimant and her new immediate supervisor i.e. Ms. Tan Hooi Lay in 2003?

A: I believe that the relationship was not a good one as I received a number of complaint from Ms. Tan Hooi Lay about the Claimant.

Q: What were the complaints about?

A: The complaints were largely to do with non attendance of meetings and therefore inability to perform the duties assigned to her.

Q: What was the Claimant's involvement with the Company's *e-perolehan* training centre in Shah Alam?

A: She was charged with ensuring the training could be conducted in the training centre. This involved ensuring that the trainers training material and facilities would be available.

Q: Did the Claimant manage to discharge her duties and responsibilities in her involvement with the Company's *e-perolehan* Training Centre in Shah Alam?

A: No.

17. Learned counsel for the Respondent submitted *inter alia* the following:

(i) the need for warning is less apparent in view of the managerial post that the Claimant was holding. The Claimant as the Training Manager and a probationer for the Respondent Company should have known her duties and responsibilities with the Respondent Company;

- (ii) the Claimant in her own unilateral conduct personally took the view that she was dismissed on 7 May 2003. The Claimant's irresponsible and lackadaisical attitude had caused further difficulties and troubles to the Respondent Company when she failed and/or refused to come to office after 7 May 2003; and
- (iii) the Respondent had fairly assessed the Claimant's performance with opportunities to improve and had thus decided with a *bona fide* intent that she had failed to reach the standard that the Company is expected of her.

## **THE CLAIMANT'S CASE**

18. Claimant stated her evidence-in-chief *vide* Witness Statement in CLWS-1. The relevant evidence *inter alia* are as follows:

Q: What were your duties and responsibilities as a Training Manager?

A: My duties and responsibilities were as follows:

- i. to handle Government and Supplier's *e-perolehan* training;
- ii. to manage the transfer of technology between the company's vendor and the company's employees; and
- iii. to manage the *e-perolehan* centre.

Q: How was your work performance in the Company?

A: Good.

Q: Why did you say your performance was good?

A: I did manage the Government and Supplier Training well in which the Government and Supplier's Training needs and requirement had been fulfilled. Another achievement was that I managed to set up the *e-perolehan* centre on 23.10.2002 within a short date line. I did manage well on the Transfer of Technologies.

Q: Please refer to page 14 of CLB?

A: *Vide* this e-mail, I recommended the solutions pertaining to the *e-perolehan* centre and the Chief Operating Officer had thanked me for the information.

Q: Did the Company conduct any performance appraisal evaluation on your job performance and suitability?

A: No.

Q: Were you being warned on your work performance?

A: No. In fact from the above e-mails, I was being complimented by the Company for my work and dedications to the Company.

19. Counsel for the Claimant asked the following supplementary questions:

Q: When was your last working day in the Company?

A: 7 May 2003.

Q: Was there any performance appraisal conducted upon you during your initial probationary period as stated in this letter?

A: There wasn't any.

Q: Did you receive any complaints from Mr. Jasim as well as Ms. Tan Hooi Lay or Salina pertaining to the issue of the training at COB, page 6?

A: No, I did not.

Q: Did you receive any show cause letter pertaining to the alleged non attendance of meetings by me?

A: No, I did not.

Q: Did COW-1 meet up with you on 25 April 2003 or at any time to counsel you pertaining to the alleged poor work performance of yours?

A: No.

20. Learned counsel for the Claimant submitted the following in a nutshell:

- (i) the Respondent bears the burden to produce convincing and compelling evidence that the Claimant was not suitable for permanent employment due to her inefficiency and or unsatisfactory performance;
- (ii) the Claimant's dismissal was without just cause or excuse as her work performance was good and that she had managed her duties and responsibilities well with regards to the work that were delegated to her as the Training Manager;
- (iii) the Respondent should call the Claimant's superior, Mr. Zahrul Zakaria and Ms. Tan Hooi Lay or Mr. Reza Ali to testify in Court as to the alleged poor work performance or unsuitability of the Claimant in the Respondent Company; and

- (iv) the Respondent has failed to prove that the Claimant was not suitable in her job and was a poor performer.

## **EVALUATION AND FINDINGS**

21. It is well established that the process by which the suitability for regular employment is assessed by the Company must be fair and not capricious, arbitrary or corrupted by unfair labour practice. The duty of the Company is to adduce sufficient evidence that a *bona fide* decision was made i.e. that the Claimant probationer was unsuitable for permanent employment. The burden lies on the Respondent Company to prove its case on a balance of probability that the dismissal was with just cause or excuse.

22. The Court will now assess the evidence adduced by both COW-1 and the Claimant in order to determine whether the Respondent's decision to dismiss the Claimant was with or without just cause or excuse.

## **WARNINGS AND APPRAISAL ON CLAIMANT'S NON-PERFORMANCE**

23. The Claimant's Notice of Termination of Service signed by the Respondent's Company Chief Operating Officer, Jasim Sura Puthuchery merely states that the Company after much evaluation and consideration has decided not to confirm the Claimant as the Training Manager.

24. COW-1 merely states that the complaints against the Claimant were largely to do with the non attendance of meetings and the Claimant's inabilities to perform the duties assigned to her. It was crystal clear that there were not an iota of evidence specifically mentioned by COW-1 pertaining to the Claimant's non-performance in the Notice of Termination of Service dated 8 May 2003. There was also no warnings, counselling or appraisals given to the Claimant for any alleged specific non-performance, if any of the Claimant which in the circumstances of this case, the Respondent ought to have done in determining the suitability or unsuitability of the Claimant as a probationer in the Respondent's Company.

25. Since there was not an iota of evidence on the warnings, counselling or appraisal of the Claimant's non-performance produced and proved by the Respondent on which the Respondent had acted to terminate the Claimant's services, this Court must necessarily make the irresistible conclusion that the dismissal of the Claimant was without just cause or excuse.

26. It must be noted that the Respondent opted not to call the Claimant's superior, Mr. Zahrul Zakaria, Ms. Tan Hooi Lay or Mr. Reza Ali to testify in Court as to the alleged non-performance or unsuitability of the Claimant in the Respondent Company.

27. The duty of the Respondent is to produce cogent and sufficient evidence that a *bona fide* decision was made i.e. that the Claimant as probationer was unsuitable for permanent employment. On the totality of the evidence adduced by COW-1 and the Claimant and having considered all the written submissions of both parties, it is the finding of this Court based on the facts and circumstances of this case that the Respondent failed to prove evidence of non-performance on the part of the Claimant during the probationary period of 6 months from 15 July 2002 to 15 January 2003 and the extended probationary period of 3 months from 15 January 2003 to 15 April 2003. On the balance of probabilities and in the absence of any evidence by the Respondent proving the non-performance of the Claimant, it is the finding of this Court that the Respondent's decision on the Claimant's dismissal was not made *bona fide*. The status of the Claimant after 15 April 2003 was uncertain. It was the Claimant *vide* her letter dated 7 May 2003 (CL-2 in the Statement of Case) to the Chief Executive of the Respondent who inquired about the status of her employment in the Company. The relevant portion of the said letter is reproduced hereinbelow:

“With much regrets, I wish to confirm that the company as of to date, I did not received any letter of confirmation of employment from the company. As such, I am writing to seek clarification and/or confirmation as to the status of my employment.”

28. The Respondent issued a Notice of Termination of Service in a letter dated 8 May 2003 without giving any specific reasons as to why the

Respondent Company has decided not to confirm the Claimant as a Training Manager. The Respondent in the said notice failed to highlight specifically the Claimant's employment status in the Company after the extended 3 months probationary period ended on 15 April 2003.

29. The Claimant in her evidence-in-chief stated that her last day with the Respondent Company was on 7 May 2003. It was the Respondent's contention that based on the Notice of Termination (COB, page 8) the last day of the Claimant's service with the Respondent Company was on 31 May 2003. This was categorically denied by Claimant when she was cross-examined by learned counsel for the Respondent. The relevant extract of the questions and answers are as follows:

Q: Do you agree with me that your last day of service with the company was on 31 May 2003?

A: I disagree.

Q: Please look at 2<sup>nd</sup> paragraph of the letter (CL-3, Statement of Case), why did the company ask you to return all the company's property only on 31 May 2003 if on the other hand you are saying your last day was on 7 May 2003?

A: As far as I understand and am aware that the statement says all company property to be returned by 31 May 2003 and

according to my letter of appointment (CL-1, Clause 5, Statement of Case), my last working day was on 7 May 2003.

30. COW-1 *vide* letter dated 13 May 2003 (COB, page 9) stated about the Claimant's inaction in failing to attend a meeting called for the handover of all the tasks as a Training Manager on 13 May 2003 at 2.30 p.m and that the Claimant was absent. The receipt of this letter was categorically denied by the Claimant in the cross-examination by counsel for the Respondent, the relevant extract of the cross-examination is reproduced as follows:

Q: Please look at page 9, COB. Do you agree with me that you had asked Encik Muhd. Khairy Yubib to collect and accept this letter at page 9, COB on your behalf on 19 May 2003?

A: I disagree. I do not know who is Muhd. Khairy Yubib.

## **CONCLUSION**

31. In conclusion, taking into account the totality of the evidence adduced by both parties and bearing in mind section 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this Court holds that the dismissal of the Claimant was not made *bona fide*. Thus, the Claimant's dismissal was without just cause or excuse.

## **REMEDIES**

32. The Claimant had worked for the Respondent as a probationer Training Manager for approximately more than nine (9) months from 15 July 2002 till 7 May 2003. The Claimant seeks reinstatement in the instant case. The Court decides that reinstatement would be inappropriate in the factual matrix and circumstances of this case and would instead make an award in the form of monetary compensation. The Claimant was on probation to establish her suitability in the Respondent Company and the Respondent soon after the extended probationary period on 15 April 2003 ended the Claimant's services on 7 May 2003. Mindful of the principles of good conscience and equity, this Court awards a sum of RM 20,000.00 to the Claimant. The monetary award made herein is within the discretion of the Court and that the award so made is fair and just in the circumstances of this case.

**HANDED DOWN AND DATED THIS 21<sup>ST</sup> JULY 2010.**

**( EDDIE YEO SOON CHYE )**  
CHAIRMAN  
INDUSTRIAL COURT MALAYSIA  
KUALA LUMPUR