In 1981, the Federal Court in *KC Matthews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320, agreed to and adopted an earlier 1964 Supreme Court judgment of Das Gupta J in *Express Newspaper Ltd v Labour Court & Anor AIR* (1964) SC 806 which stated:

"There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. At the end of the six month period, the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer."

The Federal Court in *KC Matthews' case* was dealing with the issue where the appellant (KC Matthews) had been appointed as a clerk on probation. As his work was not satisfactory, the probationary period was extended. Subsequently, a notice was given to the appellant that he would not be confirmed and he was given one month's notice of termination. Again, the issue of unsatisfactory work performance is highlighted. The judgment of the Federal Court would only make sense if it was dealing with an employee whose performance was not up to mark and his probationary period was extended. This was exactly what happened with KC Matthews who was given an extended probationary period because his work was not satisfactory. It is obvious that an employer cannot be forced to confirm an employee who has not met the company's criteria for long term employment when the probationary period has expired. The judgment however does not make mention on the position of an employee whose work is satisfactory but was neither confirmed nor shown the door. There was no necessity to do so.

A year later, the Federal Court in *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 again relied on the judgment in *Express Newspaper Ltd* and decided that employees who are on probation but had not been confirmed or
had their employment terminated at the end of their probationary period continued to be a probationer. Here, the court was dealing with employees who allegedly absented themselves without just cause or reason for a period of 9 days. Again, the judgment of the Federal Court does not make mention on the position of an employee whose work is satisfactory but was neither confirmed nor shown the door.

Twelve years down the road, a clerk in a legal firm faced the very same problem that the Federal Court thought did not warrant an answer. An experienced, diligent and hardworking clerk's probationary period had expired but he was neither confirmed nor told to go. He continued to work for a period of about nine months after his period of probation expired. The employer did not pay the employee the increment which he felt he was justly entitled to have despite having made several demands to the employer. The employee commenced an action for breach of contract.

Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in *Abdul Majid bin Haji Nazardin & 2 Ors v Paari Perumal* [2002] 2 AMR 2449 had this to say:

"... At the end of the probationary period, the plaintiff continued working and the defendants continued to pay him his salary. Additionally, they granted him annual leave on six occasions after the expiry of the probation period. As may be seen from the terms of his letter of appointment, the plaintiff would be entitled to such leave if he were a confirmed employee... By acting towards the plaintiff as if he were a confirmed employee, eg by giving him leave to which we referred to earlier the defendants were taking a position or must be deemed to have taken the position that the plaintiff was confirmed. That is an inference a reasonable tribunal will draw from the facts. It follows that the authorities strenuously advanced before us namely KC Matthews v Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320 and V Subramaniam & Ors v Craigielea Estate [1982]1 MLJ 317 do not apply to the facts and circumstances of the present instance. In those cases, there was not the kind of conduct that is to be found here. They are therefore readily distinguishable..."

Based on *Paari's* case, employees who are neither confirmed expressly nor shown the door but have been given annual leave after their probationary period has expired is deemed to be a confirmed employee. It can be inferred that any other benefits given by the employer, apart from giving annual leave, which only a confirmed employee is entitled to, would give rise to the implication that that employee is deemed confirmed.

What then is the position of an employee whose work is satisfactory, whose probationary period has expired and the employer remains silent and quite distinct from the facts of *Paari's* case, does not take any step to enable one to arrive at a conclusion that the employer has taken the position or deemed to have taken the position that the employee is confirmed?

This issue must be looked into while taking into account and keeping in mind of the fact that employees are almost always at the mercy of the employer as their livelihood depends, sometimes solely, on them. Contrary arguments to this issue would be that the employee is always at liberty to leave the existing company in which he or she is currently employed with. However, it is not as simple as it sounds. This is a situation where the employer exploits the manpower of the employee by intentionally remaining silent and it could take up to months or even years before the employee realizes that he is being taken for a ride and for him to finally react by leaving. A good example is the facts of *Paari's case*. Having to take care of six younger siblings, it took him up to 9 months to leave his place of employment albeit he knew at all material times that his manpower was being exploited.

The decision of *Paari's* case did not deal with this issue.
The right of an employee to earn a living has been placed on a constitutional footing and this has been settled by the Court of Appeal in *Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 AMR 1617 where Gopal Sri Ram JCA stated that deriving from Article 5(1) of the Federal Constitution, a person's right to life includes the right to livelihood. This decision was supported by two Indian Supreme Court decisions which were in fact used as the basis to this concept in *Tan Tek Seng*’s case.

In *Olga Tellis v Bombay Municipal Corporation* AIR(1986) SC 180, Chandrachud CJ held:
"If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to live would be to deprive him of his means of livelihood to the point of abrogation."

In *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* (1991) Supp SCC 600, Satwant J held:
"The right to life includes right to livelihood."

So, should there be a constitutional safeguard against the deprivation of the right of an employee to seek alternative employment in situations where the employer is silent ie they neither confirm nor terminate the services of the well deserving employee but leave them 'hanging in mid-air'?

If the employee's probationary period ends and notice is given by the employer to terminate the employee's services, then it can be said that the employer has not deprived the employee the opportunity to seek alternative employment.

On the other hand, if an employer does not confirm or terminate the services of a 'good' employee at the end of the probationary period and does not give notice and the employee remains in the same employment for a period of time, then it can be said that the employer has deprived the employee the opportunity to seek alternative employment. In situations like this, it is only fair and reasonable to say that the employer has, by clear implication, undertaken to further provide for the employee's livelihood based on the terms of employment which include increment for the period he stays on. There is no automatic confirmation. It must also be noted that employees in these times are hesitant to change places of employment without sound reasons, especially those who have families to provide for.

If A stays in the employment of B under the circumstances stated above and he was earning RM1000 during his probation period and was to receive an increment of RM300 should he be confirmed, B by remaining silent after the expiration of A's probationary period has deprived A the opportunity to seek alternative employment elsewhere where A could be earning RM1300. Therefore B should account for this loss of RM300 due to his indecisiveness and his attempt to exploit the manpower of A for so long as A stays in his employment. There is no automatic confirmation here.

In *Delhi Transport*’s case mentioned above, Satwant J went on further to hold:
"The right to livelihood therefore cannot hang on the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them."

To summarise, this can be said.

If an employer does not confirm or terminate the services of an employee at the expiration of the probationary period by giving notice and the employee continues to remain in the same employment for a period of time, the employer has derived the employee the opportunity to seek alternative employment based on terms of employment which include but not limited to increment for that period of time and in such circumstances has infringed the
employee's fundamental right to livelihood and consequently contravening Article 5 (1) of the Federal Constitution.

This approach would do away with the necessity of the employee of having to show that the employer has taken steps to confirm him/her, like in Paari's case, simply because situations like this only occur when the employer does not in fact take any step for a tribunal to infer that the employee was confirmed.

When efforts are made to enforce such a constitutional right, the employer, due to his indecisiveness (intentionally or otherwise) should be liable to compensate the employee with the difference between the amount of wages while he was on probation and the amount of wages that he could have obtained had he not been deprived of the opportunity to seek alternative employment after the expiration of the probationary period.

With this constitutional footing approach, one can hope that it will create awareness among employers and it would cure the disease of indecisiveness and exploitation among employers as they would then have to decide on the standing of the employee in their employment and the employee would also obtain a clearer picture of his position and role in the employment sector.