LEE PEI SZE

v.

SWIFTLET GARDEN SDN BHD

Industrial Court, Johor
Duncan Sikodol
Award No: 167 of 2017 [Case No: 16/4-664/16]
23 January 2017

Dismissal: *Probationer — Pleadings — Allegations of misconduct and poor performance not particularised in pleadings — Whether company's pleadings defective and bad in law for non-disclosure of material particulars — Whether prejudicial to claimant's defence — Whether dismissal with just cause or excuse*

The claimant joined the company as a probationer holding the position of Accounts Executive. Subsequently, the claimant received a termination letter from the company terminating her services, without giving any reasons. The claimant contended that her dismissal was without just cause or excuse. The company pleaded that the claimant was terminated from service due to her poor discipline and work performance. Further, despite various reminders and verbal warnings provided to her, the claimant persistently failed to come to work on time.

Held:

(1) It is an entrenched rule of Industrial Jurisprudence that 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. (para 12)

(2) The company's pleadings were defective and bad in law for non-disclosure of material particulars as complained by the company. It was also highly prejudicial to the claimant's defence. Since the complaint against the claimant was that she lacked discipline as well as her poor work performance, it was only right that the company particularised those allegations. The non-disclosures of those allegations were certain to hamper the adequacy of the claimant's defence for she would be left in limbo to conjecture which poor performance or lack of discipline was meant by the company. On this ground alone, the claimant's dismissal was without just cause or excuse. (paras 16-17)

[Dismissal not justified.]

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1997] 1 MELR 50; *[1997] 2 MLRA 327 (refd)*

Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal [2001] 1 MLRA 472 (refd)

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Sdn Bhd (Sabah) & Anor [2001] 1 MELR 17; *[2001] 1 MLRA 305 (refd)*

Galift (M) Sdn Bhd v. Tay Keng Lock [1993] 1 MELR 477 (refd)

Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 1 MELR 373 (refd)

Intrakota Komposit Sdn Bhd v. Hanim Hamid & Anor [1998] 3 MELR 96 (refd)

Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd [1996] 1 MELR 315; [1996] 2 MLRA 654 (refd)

Milan Auto Sdn Bhd v. Wong Seh Yen [1994] 2 MLRH 592 (refd)

R Rama Chandran v. Industrial Court of Malaysia & Anor [1996] 1 MELR 71; *[1996] 1 MLRA 725 (refd)*

Rohimi Yussoff v. Alfa Meli Marketing Sdn Bhd & Anor [2000] 3 MELR 96; *[2000] 4 MLRH 586 (refd)*

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni & Anor [2002] 1 MELR 4; *[2002] 1 MLRA 188 (refd)*

Legislation referred to:

Industrial Relations Act 1967, s 20(3)

Other(s) referred to:

CP Mills, "*Industrial Disputes Law in Malaysia*", Malayan Law Journal Sdn Bhd, 2nd edn, 1984, p 11

Counsel:

For the claimant: Ang Boon Heng; M/s Ang & Co

For the respondent: Nurul Hidayah Basiran (Suraya Hani Abdul Halim with her); M/s Hazza Khalid Suraya & Partners

AWARD

Duncan Sikodol:

Brief Background Facts

[1] The claimant joined the company as a probationer on 9 March 2015 holding the position of Accounts Executive. On 16 October 2015, the claimant received a termination letter from the company terminating her service, without giving any reasons. At the time of dismissal, her last drawn salary was RM3,000.00.

[2] The claimant now contends that her dismissal by the company was without just cause or excuse. She therefore seeks to be reinstated to her former position or be given compensation *in lieu* of reinstatement.

[3] The company in its reply however states that the company has the right to terminate the claimant's employment and that the claimant has acknowledged receipt of RM4,500.00 being payment *in lieu* of one month notice.

The Law

[4] In the often cited case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1994] 2 MLRH 592, the duty of the Industrial Court in dismissal cases on a reference under s 20 was stated by His Lordship Mohd Azmi FCJ as follows:

> "As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance* [1995] 1 MLRA 412, the function of the Industrial Court in dismissal cases on a reference under s 20 is two fold: first, to determine whether the misconduct complained by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal."

[5] It is trite law that the company bears the burden to prove that the claimant had committed the alleged misconduct and the conduct warrants the claimant's dismissal. See *Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James* [1995] 1 MELR 373.

[6] The company needs only to prove misconduct justifying the dismissal or termination on the balance of probabilities. See *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni & Anor* [2002] 1 MELR 4; [2002] 1 MLRA 188.

Witnesses

[7] The following witnesses testified at the hearing of this case:

> COW1 – Chong Chooi Leng and his witness statement was marked as COWS1
>
> COW2 – Ramli bin Md Arif and his witness statement was marked as COWS2
>
> COW3 – Jong Chee Yung and his witness statement was marked as COWS3
>
> COW4 – Kong Foo Keong and his witness statement was marked as COWS4
>
> CLW1 – Lee Pei Sze – and her witness statement was marked as CLWS1

[8] The following bundle of documents were also used in court and marked as follows:

> Claimant's Bundle of Documents – CLB – Claimant's additional Bundles of Documents, Company's Bundle of Documents – COB

Issues For Determination

[9] In this case, it is an undisputed fact from the evidence that the claimant's employment with the respondent's company was terminated vide a letter dated 16 October 2015. Based on *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal* [2001] 1 MLRA 472, it now remains to be considered whether the termination was with just cause or excuse.

Whether The Termination Of The Claimant's Employment With The Company Was With Just Cause Or Excuse?

The Company's Contention

[10] It is the company's pleaded case that the company was justified in terminating the claimant's service due to her poor discipline and work performance. Despite the various reminders and verbal warnings provided to her, the claimant persistently failed to come to work on time. The company also stated that the claimant has acknowledged receipt of RM4,500.00 being payment *in lieu* of one-month notice.

The Claimant's Contention

[11] It is the claimant's case that her termination of employment was without just cause or excuse. In summary, she alleged that the respondent company in terminating her employment was in breach of the principles of natural justice in that the respondent company failed, prior to her termination, to conduct an evaluation on her performance or give feedback on her weakness, state any reason for the termination, issue any warning letter or conduct a DI such that the action by the company is baseless, harsh, unwarranted and an unfair labour practice.

The Law

[12] It is an entrenched rule of Industrial Jurisprudence that 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. See *Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd* [1996] 1 MELR 315; [1996] 2 MLRA 654. If the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the IC has the jurisdiction to interfere and to set aside such a dismissal.

CP Mills in "*Industrial Disputes Law in Malaysia*" 2nd edn Malayan Law Journal Sdn Bhd 1984 at p 11 states as follows:

> "The IC has held that employment of a person on probation does not give the employer a right to terminate the contract at his absolute discretion. Even at common law, the employer's right to determine the contract during the probationary period depended on the employer being reasonably satisfied as to the unsuitability of the employee. That is to say, the employer's decision should be made *bona fide*, not arbitrarily or capriciously."

[13] In this instant case, it is clear from the termination letter that the claimant was dismissed without giving any reasons for her dismissal. It is also clear that during the hearing before this court, the company did not tender any documentary evidence as to the reason for her dismissal nor did the company tender any written warning to the claimant. From the Statement in Reply, the company admitted that the claimant was terminated vide a letter dated 16 October 2015, wherein such letter contained no reason for her termination. Since no reason was given for terminating the claimant's service with the company, the claimant's counsel therefore submitted that an award for reinstatement or damages *in lieu* there of should be ordered without hearing the merits of the case. In support, the learned counsel cited the case of *Rohimi Yussoff v. Alfa Meli Marketing Sdn Bhd & Anor* [2000] 3 MELR 96; [2000] 4 MLRH 586, where in that case the learned judge held that the IC had erred in law when it arrisved at a decision based on a matter that was not pleaded by the company.

[14] Whilst it is true that the IC cannot arrive at a decision based on grounds not pleaded, it is not so in a case where other grounds or no grounds at all were mentioned in the termination letter but were subsequently raised by the employer in the pleadings, to justify the dismissal. See *Galift (M) Sdn Bhd v. Tay Keng Lock* [1993] 1 MELR 477, where the Supreme Court reversed the decision of the High Court who held that the court is confined to the reasons enumerated in the Letter of Termination and may not inquire into other grounds subsequently raised by the employer in justifying a dismissal.

Paragraph 5 of the Statement in Reply stated as follows:

> "Syarikat telah menyerahkan surat penamatan kerja bertarikh 16 Oktober 2015 dan di serahkan sendiri kepada yang menuntut yang menerangkan maksudnya. Sebagai majikan kepada yang menuntut, syarikat berhak untuk menamatkan jawatan yang menuntut di mana syarikat telah tidak berpuas hati dengan prestasi dan discipline kerja yang menuntut walaupun beberapa teguran dan amaran telah diberikan kepada yang menuntut."

No other reasons other than the above was pleaded by the company in its reply.

The Law On Pleadings

[15] In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, His Lordship Eusoff Chin CJ said as follows:

> "It is trite law that a party is bound by its pleadings. The IC must scrutinise the pleadings and identify the issues, take the evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the IC is not bound by all the technicalities of a Civil Court (s 30 IRA 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The IC cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant

> to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The IC must at all times keep itself alert to the issues and attend to matters it is bound to consider."

And in *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1997] 1 MELR 50; [1997] 2 MLRA 327, His Lordship Mahadev Shenker JCA have this to say:

> "The rule that parties should be confined to the issues raised in their pleadings applies equally in the IC. This rule is based on justice and equity because it is unfair and unjust to permit a party to raise other points of complaint at the trial of which no formal notice has been given."

[16] Adverting to the case before me, I am of the view that the pleadings above are defective and bad in law for non-disclosure of material particulars as complained by the company. On the same account, it is also highly prejudicial to the claimant's defence. Since the complaint against the claimant is that she lacks discipline as well as her work performance was poor, it is only right that the company particularised those allegations. The non-disclosures of those allegations are certain to hamper the adequacy of the claimant's defence for she would be left in limbo to conjecture which poor performance or lack of discipline was meant by the company. It may well also be within the personal knowledge of the claimant but it is not for the claimant to fill in the gaps. It is for the company to lay all the bare facts in the pleadings as the burden is always upon the company to show by evidence that the excuses or reasons given to terminate the claimant's employment has been made out or proven. See *Intrakota Komposit Sdn Bhd v. Hanim Hamid & Anor* [1998] 3 MELR 96.

[17] Thus, based on the court's findings that the pleadings are defective for want of material particulars, the dismissal of the claimant therefore in the view of this court could not stand. On this ground alone, this court finds that the claimant's dismissal was without just cause or excuse. Accordingly, the claimant's claim is hereby allowed. Hence, I shall now examine the remedy.

Remedy

[18] Under the Second Schedule of the Industrial Relations Act 1967, a probationer is only entitled to back wages. He or she is not entitled to reinstatement.

Back Wages

[19] As noted, back wages is calculated based on the claimant's last drawn salary but limited to 12 months only. See Second Schedule of the Industrial Relations Act 1967. From the back wages, the court is required to make a deduction for any contributory conduct; post dismissal earnings and delay in the hearing of the case but such a deduction need not involve a mathematical calculation. See *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Sdn Bhd (Sabah) & Anor* [2001] 1 MELR 17; [2001] 1 MLRA 305.

a. Contributory Factor

The claimant's act of misconduct against her has not been proven. Hence, under this item, I make no deduction.

b. Delay

From an examination of the notes of proceedings, I noticed that the claimant did not occasion any delay in connection with the hearing of this ministerial reference. Hence, there is also no deduction down under this head.

c. Gainful employment

At the time of dismissal, the claimant's last drawn salary was RM3,000.00. On the facts of this case, there is no evidence adduced before me that she was in gainful employment after she was dismissed by the company. Hence, I make no deduction under this head. Since the claimant was only working for eight months, I hereby hand down to the claimant a monetary award in the total sum of RM19,500.00 (RM24,000.00 minus compensation already paid to her in the sum of RM4,500.00).

[20] It is further ordered that the company shall pay the total amount of RM19,500.00 through the office of Messrs Ang & Co, Advocates and Solicitors within 30 days from the date of this award subject to statutory deductions if any and the said Messrs Ang & Co shall accordingly undertake to pay the same to the claimant.