Prestar Marketing Sdn Bhd v Khor Say Teong [2010] ILJU 324

Industrial Law Journal Unreported (ILJU)

HIGH COURT (KUALA LUMPUR)

Soo Ai Lin

CASE NO 14/4-543/03 395 Of 2010

30 March 2010

David Gurupatham (***David Gurupatham*** & Koay), Sukhdev Singh Bassaen (A. Sivanesan & Co.)

Reference :

This is a reference under *subsection 20(3)* of the *Industrial Relations Act 1967* arising out of the dismissal of **Khor Say Teong** ("the Claimant") by **Prestar Marketing Sdn. Bhd.** ("the Company").

AWARD

The dispute in this case emanates from the alleged unjust constructive dismissal of the Claimant by the Company.

Introduction

The Claimant was employed as a Sales Manager (Grade A3) with effect from 17 April 2000 with a starting monthly salary of RM 4,600.00 and a monthly car allowance of RM 500.00. He was placed on probation for 6 months which, vide clause 12 of his letter of employment (CLB p.1 - 5), could be extended for a further period of 6 months at the discretion of the Company.

Approximately two months into his employment, the Claimant lost his job effective 10 June 2000. No reasons were given by the Company (then known as Y.K. Toh Marketing Sdn. Bhd.) for the Claimant's termination. Following his *section 20* representation under the *Industrial Relations Act 1967* and conciliation proceedings by the Industrial Relations Department, the Claimant, with the concurrence of the Company (henceforth known as Prestar Marketing Sdn. Bhd.), was reinstated to his former position on the same terms and conditions of employment and with full backwages. He recommenced work with the Company as a Sales Manager on 24 October 2000 and was placed on an extended probationary period of another 6 months from 17 October 2000 to 16 April 2001. Hence, as at the date of his alleged constructive dismissal on 1 February 2001, the Claimant remained a probationer.

The Claimant, vide his pleading and/or testimony in Court, raised the following main issues as a basis upon which he considers himself constructively dismissed :

(a) that he was required to produce technical drawings of a racking system which was not part of his job responsibility as a Sales Manager, nevertheless he did produce the required technical drawings;

(b) that the Company which had never queried his mileage claims before had since queried and failed to pay his mileage claims for the months of October and November 2000 although he had filled up the necesssary expenses claim forms accompanied by receipts; and

(c) that he was taken to task and "harassed" by the management for his not having received the memo dated 2 November 2000 (COB p.58) requiring him to hold weekly sales meeting.

On this premise it was contended by the Claimant that since his reinstatement effective 24 October 2000, the management had started to make his working life difficult with much fault-finding. He had considered the alleged repressive, bullying and intolerable behaviour of the senior management of the Company towards him as indicative

that the Company had no intention to be bound by its contract of employment with him. Hence, unable to bear the humiliation and harassment and victimization of him, he had pleaded constructive dismissal and left the Company employment. It is his contention that his constructive dismissal was mala fide and without just cause or excuse.

The Company denies that it had constructively dismissed the Claimant and contends that the Claimant's aforesaid claims are without any merits. It was also submitted that reference to the previous reinstatement is irrelevant as the matter was amicably settled.

The Issues

The issues before the Court are -

(1) whether the Claimant had been constructively dismissed or whether he had 'resigned'/voluntarily abandoned his employment when he walked out on the job; and

(2) if he was constructively dismissed, whether his dismissal was with just cause or excuse.

The Law On Constructive Dismissal

The law relating to constructive dismissal is firmly established in Malaysian industrial jurisprudence by the ruling of the Supreme Court in *Wong Chee Hong v. Cathay Organization (M) Sdn. Bhd.* [1998] 1 MLJ 92. In that case, Salleh Abas LP, citing with approval the decision of the Court of Appeal in the case of *Western Excavating (ECC) Ltd. v. Sharp* [1998] 2 MLR 344, held that the word "dismissal" in *subsection 20(1)* of the Act should be interpreted with reference to the common law principle. At p.95 of the case, His Lordship stated as follows :

> *"The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. ".*

The Court of Appeal in *Western Excavating (ECC) Ltd. v. Sharp* had rejected the test of unreasonableness, i.e. that an employee could terminate his contract of employment if his employer acted unreasonably, in favour of the contract test. The Rt. Hon. Lord Denning M.R. in explaining more fully the doctrine of constructive dismissal in that case stated as follows :

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which (his conduct) shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of : for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract. ".*

In *MPH Bookstores Sdn. Bhd. v. Lim Jit Seng* [1987] 1 ILR 585, it was held that for a claim for constructive dismissal to succeed both limbs of the common law contract test must be present, viz. -

1) did the employer's conduct amount to a breach of the contract of employment going to the root of the contract, or had he evinced an intention no longer to be bound by the contract thereby entitling the workman to resign?; and

2) did the workman make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.

Thus, in determining whether a workman is entitled to treat himself as having been constructively dismissed, the Court will have to scrutinise the conduct of the employer. It is trite law that where a workman's claim for reinstatement under *subsection 20(1)* of the Act is founded on constructive and not actual dismissal, the onus of proving on a balance of probabilities that he has been constructively dismissed by his employer lies on the workman himself. (See *DCB Bank Berhad v. Lim Siew Wai* [1998] 1 ILR 63 at p.69).

Hence, bearing in mind the foregoing principles, the Claimant in the present case must establish on a balance of

probabilities that the conduct of the Company as alleged in paragraphs (a), (b) and (c) above is a fundamental breach going to the root or foundation of his contract of employment or that by such conduct the Company had evinced an intention no longer to be bound by the contract, and that the said conduct was serious enough to warrant his action of terminating his employment.

Evidence, Evaluation and Findings

The essential facts of the case show that the Company was in the business of selling and marketing material handling equipment (MHE) which comprised hand trucks for transportation, forklifts for heavy transportation, and racking system which was basically a warehouse shelving system to store and retrieve products. The Claimant was the Sales Manager of the MHE Department in Kuala Lumpur. His scope of duties and responsibilities were as spelt out in clause 1 items (a) to (h) of his letter of employment (CLB p.l - 5). He was required to report to the Managing Director, Toh Yew Kar (COW 1).

(a) Technical drawings

It is the Claimant's case that producing a technical drawing of the racking system was not within his job scope and was outside the purview of a Manager dealing with Sales and Marketing. It is his contention that as he did not have "the technical know-how to produce a technically precise and appropriately apt racking design", to require him to produce one was an unreasonable expectation on the part of the Company. Nevertheless, despite his handicap, he claimed that he did produce the technical drawing as in COB p.1 - 15 [(exhibit "CO-1" in Statement in Reply (SIR)] because of his desire to give his best to serve his employer.

The Company through its Managing Director disagreed. It is COW 1's evidence that the Claimant was asked to study the racking system and come out with a report for the Company. He was not asked to produce a technical drawing of the racking system as claimed. It is the Company's contention that as a marketing company which sold and distributed racking (shelving) systems, it was crucial for the Company to have an accurate and detailed report of its products, the sales of the products, etcetera. As such it was a legitimate request and was within the Claimant's scope of duties as Sales Manager amongst which included the developing of new market for the company products and servicing the existing market and the timely preparation of sales and marketing report to the Managing Director.

It is trite that as he who assets must prove, the Claimant must therefore show that he was in fact instructed by COW 1 to produce technical drawings of the racking system. However, on the evidence as adduced, this Court finds on a balance of probabilities that the Claimant has failed to establish his claim.

Firstly, the documentary evidence filed in Court by both parties made no mention of the term "technical drawings". In his letter dated 1 February 2001 to the Company intimating his claim of constructive dismissal (CLB p.36), the Claimant vaguely referred to having had to carry out "duties such as racking" which he said was not his actual duty. The claim that he had to undertake technical drawings even though he had no technical experience was not pleaded. Instead, in paragraph 5(f) of the Statement of Claim, the Claimant pleaded as a ground for claiming constructive dismissal that since his reinstatement, the Company had picked on him and found fault with his work and that "this became obvious for every report, be it on storage racking system … … … (referring to exhibit "CO-1") or the "weekly meetings with the sales personnel". The Company, likewise, in its correspondence with the Claimant on the subject matter referred to exhibit "CO-1" as "your report on racking system dated 30/Oct" as evident in CLB p.7 and COB p. 16 (exhibit "CO-2"). It is therefore obvious that at the material time and to all intent and purpose the Company and the Claimant were in agreement about exhibit "CO-1", viz. that it was a report on the racking system.

However, a year and four months later when the Claimant filed his witness statement (WS-CL) on 9 May 2005 in preparation for the trial, for the first time he talked about the Company instructing him to produce technical drawings of the racking system even though he had no technical experience. In view of the Company's denial, the foregoing discussion and the passage of time taken by the Claimant to raise the matter as an issue, this Court cannot help but wonder whether his claim was after all an afterthought!

The Claimant did not fair well too in his oral testimony in Court. Whilst vacillating in his evidence during cross-examination between affirming that he was instructed to produce technical drawings and then resiling from it, the Claimant appears to have clearly refuted his claim when in examination in chief and in re-examination he categorically stated that he was not asked to prepare technical drawings of the company products or a drawing of the racking system. His evidence in examination in chief and re-examination, respectively, is reproduced below :

"Q : *See Question 1 - You were employed by the Company on 17.4.2000. You were given letter of appointment in CLB p. 1. Then during that period of your employment, ie. after you were reinstated, were you asked to draw technical drawings of the Company's products?*

A : *No.".*

"Q : *During cross-examination, you were asked to indicate where instructions from your Company to do technical drawings. See CLB p. 7 - this refers to racking system and you were told that the Company had not received your report. My question : in relation to this report on racking system, when you were asked to prepare this report on the racking system, were you specifically told to prepare drawings on the racking system?*

A : *No.".*

Based on the evidence as adduced, the Claimant was also unable to produce any conclusive proof to show that he was asked to produce a technical drawing. When he failed to show during cross-examination proof of the Company's alleged instruction from the bundles of documents filed in Court, the Claimant lamely stated that the letter of instruction was with the Company as all relevant documents were in the Company's possession when he left its employment.

However, it is clear from the contents of CLB p.7 and COB p. 16, the Claimant was asked to put up a report on the racking system, not technical drawings, and that the report put up by him, ie. exhibit "CO-1", was not satisfactory to the Company. On the evidence, in so far as the Company had assisted the Claimant in preparing the report by giving him reference materials and catalogues, his superior COW 1 had highlighted areas of weakness in his report as guidelines for the Claimant to rectify and amend the report, and that an extension of time was given to him to come up with the revised report, this Court is unable to find a basis for the Claimant to feel victimised as claimed by him. The Claimant had admitted during cross-examination that it was his duty to put up reports and that in this case he had not put up a comprehensive report and that there were many omissions in his report as highlighted by COW 1. In the circumstances, there appears to be no justification for the Claimant to say that the Company had picked on him and was fault-finding over his work. Furthermore, there was no suggestion that he was penalized for putting up an incomplete and unsatisfactory report. As may be observed, COW 1's comments on the report in COB p. 16 was couched in polite terms and was not terse in nature. The Claimant's claim of being victimized in relation to the storage racking system, on the evidence before the Court, appears to unsubstantiated.

(b) Mileage claims

It was true on the evidence that until September 2000 before the termination and subsequent reinstatement, there was no issue over the Claimant's mileage claims. But for the months of October and November 2000 after the reinstatement, vide exhibit "CO-8" (COB p.65), the Claimant was asked to justify his mileage claims. The issue is whether the Company had victimized the Claimant by the non-payment of his October and November claims.

It is the Claimant's contention that in making mileage claims, the company procedure merely required him to fill up the company prescribed expenses claim forms accompanied by the relevant petrol receipts which he had satisfied. There was no requirement for him to state where he went so as to incur the expenses. COW 1, on the otherhand, whilst confirming the company prescribed procedure, testified that as the Claimant had merely stated in the prescribed forms the amounts claimed with no other details which amounts showed a surge of 300% within two months, he had asked the Claimant to justify his petrol claim. Vide exhibit "CO-10" (COB p.75), he had requested the Claimant to find out the approximate travel distance for his visits and to re-submit his claim. As the Managing Director and one of two signatories to company cheques, COW 1 said that he was obliged to verify in light of the surge in amount so as to ensure against irregular claims, this being a practice of the Company applicable to all employees.

In the Court's opinion, in light of the surge in the amount claimed which the Claimant did not deny but conceded to during cross-examination, COW 1 should not be faulted for the approach he had taken. What remains clear was that the Company had not outrightly rejected the claims but had requested the Claimant to re-submit by furnishing the required information. Vide exhibit "CO-8" (COB p.65), COW 1 had stated that the justification was required "so as to facilitate the processing of your claim at soonest possible.".

However, on the evidence and as admitted by the Claimant, he did not furnish the Company the required information nor did he re-submit his claim. Obviously therefore, it was his omission that accounted for the non-payment of his October and November claims. The Claimant's reliance on the issue of the Company's non-payment of his mileage claims as a ground for claiming constructive dismissal is clearly misconceived and misplaced.

(c) Non-receipt of memo

In his Statement of Case vide paragraph 5(h), the Claimant contended that he was “harassed” by the Management for his not having received the memo, ie. COB p.58 (exhibit “CO-5”), purportedly sent to him on 2 November 2000 to hold weekly sales meetings with his sales team. Vide Question and Answer 25 in his witness statement, the Claimant said that he only came to know about the said memo and the weekly meetings on 6 December 2000 when the Managing director, vide CLB p.9, queried his failure to submit the weekly sales report. To that query, he had put in writing vide COB p.60 (exhibit “CO-6’) that he did not receive and was not aware of COB p.58. The Company through COW 1 had responded by issuing COB p.61 (exhibit “CO-7”) dated 11 December 2000. It is the Claimant’s contention that he felt harassed and victimized by the contents of COW 1’s letter. In light of Claimant’s contention, COB p.61 is reproduced below for ease of reference. The relevant portion reads :

> *“It is not convincing to read the comment that “you did not receive the memo” and “you are not aware of it”.*
>
> *Firstly, I have confirmed with Ms. Florence Saw that the memo was prepared and circulated to respective parties concerned on 02/Nov/2000. Mr. Raymond Lee confirmed receipt the c.c. copy of the memo.*
>
> *Secondly, you know and aware it is Sale Manager’s responsibility to submit report periodically on timely basis. You have submitted same type of weekly report in the past. Enclosed, your own report dated 6th April 2000 which is self-explanatory.*
>
> *In order to facilitate you to submit the said reports before 13/Dec/2000, I am postponing the Management Meeting to Mid-Dec.*
>
> *Look forward to see your report. ”.*

However, as may be seen from the evidence, the Claimant’s response in cross-examination to questions asked of him respecting the aforesaid belies his contention that he was harassed and victimized. Firstly, the Claimant conceded that it was his duty as Sales Manager to hold sales meetings with his sales personnel and that there was nothing wrong with the instruction for him to hold sales meetings. He admitted that, prior to November 2000, he had conducted 5 to 6 sales meetings with his subordinates. In other words, contrary to his assertion, he was aware of the weekly sales meeting being a practice of the Company. Secondly, the Claimant admitted that it was also his duty to prepare sales reports. Thus, despite him not having received COB p.58, it is clear that the Claimant was aware of his responsibilities which renders COB p.61 fair comment and a legitimate request of the Company.

Thirdly, the Claimant had also agreed during cross-examination that the Company had accommodated him by allowing him to submit his sales reports before 13 December 2000 and postponing the management meeting to mid December.

As may be seen, apart from the fact that COW 1 was not convinced that the Claimant had not received the memo which such doubt may have hurt the Claimant’s feelings, COB p.61 was generally polite in its tone with no reproach or even a reprimand of the Claimant. Instead, the Company had given the Claimant another opportunity to improve in the discharge of his duties as Sales Manager. In the Court’s opinion, the evidence as adduced does not go to support a claim of harassment and victimization as claimed.

Conclusion

Upon a consideration of the pleadings, the evidence adduced both oral and documentary, the submissions of the respective parties, and the foregoing as discussed, this Court finds on a balance of probabilities that the Claimant was unable to discharge his burden of proving any fundamental breach of the employment contract or that the Company by its conduct had evinced an intention no longer to be bound by such contract. The conduct of the Company was not serious enough nor repudiatory in nature to warrant the Claimant’s action in terminating his own employment.

Hence applying equity and good conscience and on the substantial merits of the case without regard to technicalities or legal form, the Claimant having failed to discharge his burden of proof, this Court holds that there was no constructive dismissal of the Claimant and that he was deemed to have abandoned his employment when he walked out on the job.

The Claimants' claim is hereby dismissed.

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