PREAM ANAND THARMALINGAM v. T-SYSTEM MALAYSIA SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
SYED NOH SAID NAZIR
AWARD NO. 1379 OF 2018 [CASE NO: 31(2)/4-572/16]
21 JUNE 2018

DISMISSAL: *Absenteeism – Whether the claimant had been habitually absent from work – Evidence adduced – Effect of – Whether the company had allowed him to work from home – Factors to consider – Whether proven by the claimant – Whether the misconduct had been proven against him – Whether it had constituted serious misconduct*

DISMISSAL: *Constructive dismissal – Salary – Claimant not paid his salary for August 2015 – Whether proven by him – Evidence adduced – Evaluation of – Effect of – Company's explanations – Whether acceptable – Whether the company's actions had amounted to a fundamental breach going to the root of the contract of employment – Whether the claimant had been constructively dismissed – Whether dismissal without just cause or excuse – Industrial Relations Act 1967, ss. 20(3) & 30(5)*

DISMISSAL: *Insubordination – Whether the claimant had been wilfully insubordinate by his refusal to attend training for his new position – Factors to consider – Evidence adduced – Effect of – Whether proven by the company against him – Effect of – Whether it had constituted serious misconduct*

INDUSTRIAL COURT: *Jurisdiction – Claimant seeking for damages instead of reinstatement – Whether the Industrial Court had the jurisdiction to hear the matter – Factors to consider – Effect of – Industrial Relations Act 1967, s. 20(1) & (3)*

WORDS & PHRASES: *Wages – What it meant – Whether the claimant had been entitled to his wages for August 2015 – Factors to consider – Effect of – Employment Act 1955, s. 2*

The claimant had initially been employed by the company as an Operation Management Consultant (Grade 5) wherein he was allowed to work from home. He then applied and successfully secured the position of SAP-De-Escalation Manager and continued working from home. In this new job, he alleged that he had been promised an increment to his salary and a raise in his allowance with a job grade improvement. However, his salary and allowance remained the same as before and he did not receive an upgrade on his job grade. His salary for August 2015 was then withheld by the company and the claimant wrote seeking an explanation and when he did not receive a response, he walked out claiming constructive dismissal. The company avers that the claimant had never been allowed to work from home, that he had failed to attend a refresher course for his new position and that he had been habitually absent from the office, which had

resulted in them issuing him a show cause letter and then eventually withholding his salary for August 2015. There were two main issues that arose for determination before this court. The first was whether the claimant had been constructively dismissed and if answered in the affirmative, whether his dismissal had been with just cause and excuse.

Held for the company: claimant's claim dismissed

(1) As the claimant had not sought for reinstatement but for damages instead, his claim had fallen outside the perimeters of s. 20(1) and (3) of the Industrial Relations Act 1967 ('IRA') and would have to fail (paras 34, 36 & 37).

(2) On the issue of whether he had been reasonably entitled to assume that he had been allowed to work from home, he had failed to prove this. His letter of appointment had clearly stated that he had to work from 9am to 6pm. Thus, it would have to be answered in the negative (paras 41 - 43).

(3) On the issue of whether he had been wilfully insubordinate by refusing to attend training for his new position, failing to attend training as instructed by the employer had constituted "wilful insubordination" and the Employees Handbook had stipulated that wilful insubordination and habitual absence without leave had constituted major misconduct. Further, the claimant had been issued warning letters for these digressions (paras 45, 46 & 48).

(4) The definition of wages can be found in s. 2 of the Employment Act 1955 and it basically means payment for work done. The claimant had failed to prove by evidence, that he had done any work for the month of August 2015 and as such had not been entitled to his wages. As such, the company had been right in withholding his salary as it had done. Thus, it had not been in breach of the terms and conditions which had gone to the root of the contract of employment (paras 50 - 52 & 54).

[Constructive dismissal claim dismissed.]

Award(s) referred to:

James Santhiran v. lndah Water Consortium Sdn Bhd [2015] 2 LNS 1419 (Award No. 1419 of 2015)

Case(s) referred to:

Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266

Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521

Unilever (M) Holdings Sdn Bhd v. So Lai & Anor [2015] 3 CLJ 900

Western Excavating (ECC) Ltd v. Sharp [1978] 1 All ER 713

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298

Legislation referred to:
Employment Act 1955, s. 2
Industrial Relations Act 1967, s. 20(1), (3)

For the claimant - Chang Kai Ping (Audrey Nelson (PDK with him)); M/s David Gurupatham & Koay
For the company - Pavalakodi Nadarajah (Sujata Selliah with him); M/s Dharmen Sivalingam & Parners

Reported by Sharmini Pillai

AWARD
(NO. 1379 of 2018)

Syed Noh Said Nazir:

[1] The Ministerial reference in this case required the court to hear and determine the claimant's complaint of dismissal by the company on 11 September 2016.

Brief Facts

The Claimant's Case

[2] The claimant was employed in the month of January 2012 in the role as Operation Management Consultant (Grade 5) with a monthly salary of RM5,700 and RM500 being fixed monthly allowance given by the employer that operates business in the field of global Information Technology ("IT") services and consultation.

[3] It has been the claimant's allegation that he was permitted to work from home and claimed to have been doing so from 16 January 2012 until 31 December 2014 (para. 3, Statement of Case) and continuously from 1 January 2015 (p. 97, COB1).

[4] Responding to a job availability which was sent *via* e-mail to the claimant by Mr. Mark Harinck, the GDM Head of Department, the claimant applied for a job as SAP De-Escalation Manager of another department of the company.

[5] The claimant attended two interviews, conducted by Mr. Nobert, the Head of GDU SAP Operations and Mr. Ruhaizam Bin Hussin the Head of SAP Operations respectively.

[6] The claimant further alleged that Mr. Ruhaizam Bin Hussin had informed him that he could continue working from home under the new position.

[7] It was also alleged by the claimant that he was promised an increment to his salary and an allowance raise with a job grade improvement (from Grade 5 to Grade 4), whereupon he accepted the new position and was transferred to GDU department.

[8] The claimant however, did not receive any of the benefits but was given RM6,200 as monthly salary (the same with his last drawn salary) and an allowance of RM500 per month with no improvement as to his job grade 5.

[9] The claimant meanwhile continued to work from home as his belief as what he was allowed to do.

[10] On 20 August 2015, the claimant's salary was withheld by the company.

[11] Subsequently, the claimant issued a letter dated 1 September 2015 to the company's Vice President of the Human Resource Department & Managing Director seeking for an explanation as to the reason why his salary was being withheld.

[12] The claimant went on to issue a reminder dated 9 September 2015 requesting that his salary for August 2015 be paid failing which he alleged a fundamental breach of contract and can be construed as the company constructively dismissing him.

[13] By a letter dated 11 September 2015 to the company, the claimant considered himself constructively dismissed with immediate effect.

The Company's Case

[14] The company vehemently denies any allegation having permitted the claimant to work from home.

[15] The company admitted that the claimant attended an interview with Mr. Ruhaizam Bin Hussin, the Head of Operations SAP. In the said interview Mr. Ruhaizam mentioned that the possibility of working from home exists as per the company's policy. However it is not an integral part of the job and each and every instance of working outside of the office require prior approval as per the company's policy and that such approval was never granted to the claimant.

[16] The company states that the claimant was never allowed to work from home and that the company kept reminding the claimant of his duty to observe working hours and to be present in the office during working hours.

[17] The company further states that the claimant has failed to attend a refresher training on his new role although he has accepted the instruction to attend the said training.

[18] As the claimant continued habitual absence from the office the company decided to give a show cause letter to the claimant dated 12 March 2015.

[19] The company further states that the claimant continued to breach his terms and condition of employment despite having apologised and informed the company that he would ensure to clock in the required hours and agreed to work on time *vide* his letter in reply dated 26 March 2015.

[20] As a result, the company decided to withhold the claimant's salary for the month of August 2015.

[21] On 14 August 2015, the company proceeded to issue a "Breach of Contract of Employment" letter to the claimant claiming for reimbursement of his absences and alleged inappropriate company mobile phone usage whilst absent from work, totalling RM22,527.20.

[22] The company received "Reply To Breach of Contract" dated 27 August 2015 from the claimant. Unsatisfied with the reply the company proceeded to issue a Notice of Domestic Inquiry dated 10 September 2015. A Domestic Inquiry was held on 21 September 2015 which went on *ex-parte* in the absence of the claimant despite his knowledge of the same.

[23] The Domestic Inquiry found the claimant guilty and thereafter by a letter dated 23 September 2015, the company terminated the claimant service citing seriousness, long term and grave nature of the misconduct.

The Law And Evidential Burdens On Constructive Dismissal

[24] In dealing with the claim of constructive dismissal, the court has to determine whether the burden of prove on the balance of probabilities, has been discharged by the claimant.

[25] Lord Denning M.R. in *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 All ER 713 at p. 719 defined the term constructive dismissal 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 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 the employee 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 or, alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; 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 (varied) contract.

[26] In a landmark case on constructive dismissal *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298, Lord President Salleh Abas (as he then was) held:

> The common law has always recognised the right of an employee to terminate his contract and therefore to consider himself as discharge from further obligations if the employers is guilty of such a breach as affects the foundation of the contract, or if the employer has evinced an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression 'constructive dismissal' was used.

[27] While in *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 10 CLJ 266, the court decided that:

> The test for constructive dismissal as it stands is a test on contractual breach rather than unreasonableness. Further, where the workman's claim for reinstatement is based on constructive and not actual dismissal, the onus of proving that he has been constructively dismissed lies on the workman himself.

The Court's Finding

Issues:

(A) Whether the claimant's claim for specific damages as prayed for in paragraph 16(a) of the Statement of Case falls under the jurisdiction of the court under s. 20(1) and (3) of the Industrial Relations Act 1967 ("IRA")

[28] Section 20(1) and (3) IRA provides:

> 20(1) : Where a workman irrespective of whether he is a member of a trade union or otherwise considers that he had been dismissed without just cause or excuse by this employer, **he may make representative in writing to the Director General to be reinstated in his former employment;** the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> 20(3) : Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representation to the court for an award.

[29] The High Court in its Judicial Review proceeding in the case of *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521, was posed with an issue where the claimant had initially wanted reinstatement, but subsequently during the hearing before the Industrial Court changed her stand and instead asked for damages *in lieu* of reinstatement. The question was whether can the Industrial Court consider this aspect of her claim.

[30] Justice Haidar Mohd Noor, having considered s. 20(1) and (3) of the IRA, held as follows: A

> It would appear clearly therefore that if a workman does not require reinstatement, there would not be reference to the Industrial Court under s. 20(3) of IRA.

[31] His Lordship went on to decide as follows: B

> In my view the respondent clearly could not come within the provision of s. 20(1) and (3) of IRA as the legislature intended that *recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceased to have any more jurisdiction.* C

[32] In *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900, the Federal Court held at para. 20 as follows:

> From the phrase 'compensation *in lieu* of reinstatement', it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s. 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be *in lieu* of his reinstatement. After all, reinstatement is a statutorily recognised form of specific performance. On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: *lex non cogit ad impossiblia, ie* the law does not compel the impossible. D E F

[33] In another case, *James Santhiran lwn. lndah Water Consortium Sdn Bhd* [2015] 2 LNS 1419 (Award No. 1419 of 2015), the Industrial Court decided that it has no jurisdiction to make an award for compensation *in lieu* of reinstatement in circumstances where claimants have refused reinstatement. G

[34] In the present case before the court, as rightly pointed out by the solicitors for the company, the claimant has in his pleadings *ie.* para. 15 of the Statement of Case dated 3 April 2017 and para. 14 of the Rejoinder dated 15 May 2017, and in his answers in cross-examination, consistently pleaded and/or prayed for damages; not reinstatement. H

[35] The Federal Court decision in *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* and *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* as aforesaid are binding upon this court. I

[36] As the claimant did not seek reinstatement, his claim for damages falls outside the perimeter of s. 20(1) and (3) of the IRA.

[37] Based on this ground alone, the claimant's claim must fail.

(B) Whether the claimant reasonably entitled to assume to have been allowed to work from home

[38] In its Statement in Reply at para. 3, the company quoted s. 2.1 of its Employee Handbook

> "Work outside Office is at the absolute discretion of the employer and not an employee benefit or right. There is no automatic right for employees to be working outside office as there may be circumstances when the company may not be able to accommodate this, **such arrangements must have the expressed approvals from the Head of Department and Business Unit Head.**

[39] In the company's Witness Statement COW1, the company's sole witness, Ruhaizam Bin Husin testified as follows:

9.Q	:	What is the official working hours of the Company?
A	:	9.00am to 6.00pm daily for employees who are not on shifts. Ordinary hours of work are 39 hours per week spread over fives (5) working days which are from Mondays to Fridays.
10.Q	:	Was the Claimant aware of the terms incorporated in the Claimant's letter of employment?
A	:	Yes. The Claimant have read and signed the Letter of Employment dated 9.12.2011.

[40] The claimant's Letter of Employment can be found at pp. 2 to 9 of the company's Bundle of Documents (COB1) wherein cl. 9 states that "the official working hours are from 9AM - 6PM daily (and includes one hour break) for employees who are on shifts." The Letter of Employment was duly acknowledged by the claimant on 21 December 2011 of p. 5 of the COB1. It is thus abundantly clear that the claimant was bound by the terms and condition of his employment as contained in his Letter of Employment that he was obliged to work during office hours *ie.* 9am to 6pm from the office and not from house.

[41] The claimant failed to satisfy this court that he was expressly allowed to work from home outside the stipulated office hours.

[42] Nowhere in the Letter of Appointment states if the claimant works any shift other than from 9 am to 6 pm.

[43] In the aforesaid circumstances, this court finds that the claimant was not reasonably entitled to assume to have been allowed by the company to work from home.

(C) Whether the Claimant has committed wilful insubordination when failing to attend training as instructed by the Company

[44] The company's Witness Ruhaizam Bin Husin who was the Head of Department for Operation Management of the company, responsible for all the Operations Management Functions for TSMY SAP customers testified in his Witness Statement (COWS-1) as follows:

11 Q : Please refer to page 26 of the Company's Bundle of Documents. What document is this?

A : This is the claimant's Transfer letter whereby the Claimant was transferred to Shared Services, Business Operation Department ("SAP Business Unit") as a SAP De-Escalation Architect effective 1.1.2015).

12 Q : Why was the Claimant transferred to the SAP Business Unit?

A : The Claimant was transferred to SAP Business Unit as a result of him applying for several vacancies in the Company throughout 2014.

13 Q : What was the Claimant's new job function?

A : The Claimant was to serve in the SAP Business Unit Department as a SAP De-Escalation Architect however the terms and conditions of the Claimant's employment remained unchanged. The claimant is to be responsible for managing the end-to-end resolution of customer incidents. In this role, the incumbent has the responsibility to ensure timely resolution of incidents through coordination and collaboration with relevant service lines.

14 Q : Does the Claimant have any working experience in the SAP Business Unit prior to his transfer on January 2015?

A : The Claimant was new to the SAP Business Unit. That is why the Claimant was required and instructed to attend refresher trainings.

15 Q : What was the Company's action pertaining to the Claimant's failure to attend the training?

A : I send emails to the Claimant requesting him to explain his absence to which he did not reply. Refer page 30 of the Company's Bundle of Documents.

[45] It is to be noted that failing to attend trainings as instructed by the company tantamount to "wilful insubordination" which fall under the category of major misconduct as spelt out at p. 143 of the COB1:

MAJOR MISCONDUCT

(i) Breach of Contract
Willful insubordination
Sleeping on duty
Habitual absence without leave.

[46] I must say that I can't escape the finding of fact that the claimant has committed major misconduct as itemised in the Employees Handbook *ie.* wilful insubordination as well as habitual absence without leave.

[47] Further, in company's Witness Statement, COW testified as follows:

16 Q : What was the company's action pertaining to the claimant's failure to attend the training?

A : I sent emails to the Claimant requesting him to explain his absence to which he did not reply. Refer page 30 of the Company's Bundle of Documents.

17 Q : Please refer to page 43 to 49 of the Company's Bundle of Documents. What documents are these?

A : This is a Show Cause Letter dated 12.3.2015 issued to the Claimant for 3 charges as follows:

i) Absence from work without prior approval from Manager;

ii) Did not meet minimum working hours of 7.8 hours per work day; and

iii) Absent from training without prior approval from Manager.

The Claimant was required to give written explanation within 3 days from the receipt of the show cause.

18 Q : What was the Claimant's action upon receiving the Show Cause Letter?

A : *Via* a letter dated 26 March 2015, the Claimant had replied to the Show Cause letter, denying all the 3 charges levelled against him. *Via* the same letter, the Claimant had also apologized and informed the company that he would ensure that he will clock in the required hours and attend work on time. Please refer to page 50 to 53 of the Company's Bundle of Documents.

19 Q : What was the Company's response upon receiving Claimant's explanation for the Show Cause?

A : The Company was not satisfied with the Claimant's explanation. However, since the Claimant had apologized and promised to dutifully attend work, hence the Company with good intention had accorded another chance to the Claimant.

20 Q : Was the claimant given any warnings with regards to his habitual absenteeism?

A : The Company had issued a warning letter dated 7.5.2015 to the Claimant. This final reminder and warning clearly states among others:

a) The Claimant must report to work on a daily basis from 9am to 6pm as per his contract on employment;

b) The Claimant is required to meet minimum working hours of 7.8 hours per work day;

c) The Claimant must complete and deliver all tasks assigned to him with quality and within the stipulated time frame;

d) All application for leave must be submitted in advance in accordance to the Company's policy, including of working from home.

This warning letter was a stern reminder to the Claimant to improve his work performance and attendance record. Refer page 54 to 55 of the Company's Bundle of Documents.

21 Q : *After receiving the stern warning, did the Claimant conform to the working hours of the company?*

A : *No, the Claimant still did not conform to the Company's working hours. The Claimant was also continuously absent to work without prior approval from the Line Manager. Refer page 59 to 60 and 63 to 68 of the Company's Bundle of Documents.*

[48] It is to be observed that the company had issued two (2) letters dated 12 March 2015 and 31 July 2015 and a warning letter dated 7 May 2015 as against the claimant as can be found at Q&A9, Q&A17, Q&A20 and Q&A22 of COWS.

[49] At Question No. 24, COW was asked the following question and he answered as follows:

24.Q : How long was the Claimant absent from work?

A : The number of days the Claimant were absent from work without prior approval from the Company are as follows:

Month	Total Days of Absence
January	10
February	11
March	9
April	16
May	8
June	19
July	20

31.Q : Did the Claimant ever attended work on the month of August 2015.

A : No, he was absent for the entire month of August 2015.

[50] The claimant did not seriously challenge the evidence of COW as in Question 24 in COWS as referred to above.

[51] Section 2 of the Employment Act 1955 defines wages as follows:

> Wages means basic wages and all other payments in cash payable to an employee for **work done** in respect of his contract of service.

[52] The court is satisfied that in the aforesaid premises, the claimant failed to prove having done any work for the whole month of August 2015 and applying s. 2 of the Employment Act 1955, it follows that he is not entitled for salary or wages for the month of August 2015.

[53] Finally, the company issued a Notice of Domestic Inquiry dated 10 September 2015 (p. 98 of COB) requiring the claimant to attend an Inquiry on 21 September 2015 which the claimant failed to attend **upon being advised not to do so** (the last question in Re-examination of the claimant) and that he considered himself constructively dismissed from the company by its action of non-payment of salary for August 2015 which is an unlawful and their general conducts over the months (Q&A23 CLWS, at para. 3).

[54] In as much as the claimant was absent for the whole month of August 2015 coupled with the fact that this piece of evidence went unchallenged, this court has no hesitation in finding that the company was right in withholding the claimant salary for the month of August 2015. It follows therefore that the company did not breach the terms and conditions of the employment which goes to the root of the contract. The claimant's assumed consent to work from home is without basis and unfounded.

[55] The claimant's allegation of constructive dismissal, in any circumstances is unjustifiable as the allegation was not proven on the balance of probabilities. The termination against the claimant *vide* the company's letter dated 23 September 2015 was made with just cause or excuse.

[56] Finally, in his own testimony, the claimant stated in Q&A No. 18 in his CLWS at the last sentence at p. 7:

> I had informed them that i am **willing to resign** if we are unable to reach an understanding pertaining to this matter.

[57] The claimant's claim must therefore fail and is hereby dismissed.

[58] The company's claim for reimbursement for the claimant absence from January 2015 to 31 July 2015 was not proven on the balance of probabilities and is also dismissed.