PD Resort Sdn Bhd v Tengku Adlan Bin Tengku Zainal Rashid [2009] MLJU 1411

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

Datuk Lau Bee Lan, J

PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO RI-25-303-2006

7 November 2009

Suganthi Singam (M/s Shearn Delamore & Co.),

Mohan Singh (M/s David Gurupatham & Koay)

Datuk Lau Bee Lan, J

GROUNDS OF DECISION

1. Vide an application dated 20.9.2006 (Encl.1) read with Encl.6 (Form 111B) the Applicant has applied for an order of certiorari to quash the decision of the Industrial Court dated 24.8.2006 in Award No. 1492 of 2006;

(ii) or alternatively for an order of certiorari to quash a part of decision of the Industrial Court dated 24.8.2006 in Award No. 1492 of 2006 where the Industrial Court awarded compensation in the sum of RM299.237.34 to the Respondent.

2. The brief facts of the application are as follows. The Applicant commenced employment in the Applicant in the capacity as Assistant Sales Manager with effect from 2.8.1999 by a letter of appointment dated 8.7.1999 specifying the terms and conditions of employment (pp. 100-106 of the Affidavit in Support of Lum Wai Tuck (Encl.3)). He was paid a salary and commission and whether he was entitled to commission under Appendix 1 (pp.47-48 in Encl.3) to the letter of appointment (p.42 in Encl.3) is a bone of contention and thus he alleged he was constructively dismissed by the Applicant on 5.4.2004 as per paragraph 10 of his Statement of Case -

(a) " the company unilaterally deducted the sales commission earned by the claimant [Respondent] without prior consent and/or lawful excuse and thereby unlawfully deducted the remuneration/wages paid to the claimant [Respondent]; and

(b) the company unilaterally reduced the sales commission earned by the claimant without prior consent and/or lawful excuse and thereby unlawfully reduced the remuneration/ wages paid to the claimant [Respondent]". The Applicant's contention vide its Statement in Reply is basically that the Respondent's eligibility for commission was based on a commission structure which was subject to change at the discretion of the management.

Non-joinder of the Industrial Court and lack of locus standi of the Applicant

3. With respect to the 1st objection raised by the learned Counsel for the Respondent on the non-joinder of the Industrial Court, I find there is no merit. I agree with the learned Counsel for the Applicant that there is no necessity to join the Industrial Court as a party to the proceedings following the case of*Dunlop Industries Employees Union v. Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81 wherein Abdoolcader SCJ (speaking on behalf of the Supreme Court) stated-

> uWe would add that the Industrial Court was not a necessary party to have been joined as a second respondent to the application for certiorari and even less so as the second respondent in this appeal, and for the purposes of this judgment we will refer to Dunlop Malaysian Industries Berhad as the respondent'.

3.1 The 2nd objection is that the Applicant failed to satisfy the requirement of locus standi in that the application is brought in the name of the Applicant Company by a company known as GuocoLand (Malaysia) Bhd., who was not the original party to the dispute in the Industrial Court or substituted by any subsequent application. In the Industrial Court the Respondent (called "the Claimant") applied that PD Resort Sdn. Bhd. be substituted for Guoman Port Dickson Resort (see Exh.TA-1 in the Respondent's Affidavit (Encl.7)) and consented to by the Applicant. I find there is no merit in this objection as the Applicant in this judicial review application i.e. PD Resort Sdn. Bhd. was a party substituted vide Industrial Court Order dated 27.10.05 (Exh. LW-3) in the Affidavit in Support of Lum Wai Tuck). Further, there is a Corrective Affidavit and Affidavit in Reply of Lum Wai Tuck (End. 14) where there is evidence that the Applicant is not a wholly owned subsidiary of GuocoLand (Malaysia) Bhd but is a subsidiary of GuocoLand (Malaysia) Bhd in that Guoman Hotel & Resort Holdings Sdn. Bhd. holds 100% shares in the Applicant and GuocoLand (Malaysia) Bhd in turn owns 70% shareholding in GuocoLand (Malaysia) Bhd.

4. The Court has considered the Applicant's Written Submissions (Encl.22) and the Applicant's Written Reply (Encl.29) and Respondent's Written Submission (Encl.26) and Highlight of Respondent's Submission and Reply to the Applicant's Submission and the Court's findings include the following.

Misconstruction of the law, taking irrelevant matters into consideration and arriving at an erroneous decision (1st Ground)

5. At p.244 of Applicant's Affidavit the learned Chairman held "The company, by paragraphs 3.3 and 10 (i) of its statement in reply has pleaded that the commission structure was subject to change at the discretion of its management. Sad to say, this qualification is not to be found in the Claimant's letter of appointment or Appendix 1 (CLB8-14). Appendix 1 is an integral part of the letter of appointment which by clause (a) refers to commissions "as clearly stated" in

Appendix 1, Nothing could be clearer. No doubt the sales commission is said to be an "incentive proposal" in Appendix 1, Nevertheless, without further words of elaboration, the contra preferentum rule of construction requires any ambiguity or vagueness of language to be resolved against the maker of the document i.e. the Company, and in favour of the Claimant". (Emphasis added)

5.1 Learned Counsel for the Respondent submitted that the issue whether the commission structure was a term and an integral part of the employment related to findings of facts which is not open to challenge. With due respect I cannot agree as based on the Supreme Court case of *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd Noh* [1997] 1 MLJ 789 at p.790, the Court is entitled to review the decision of the Industrial Court for substance and carry out an objective examination of the factual matrix to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like conclusion.

5.2 Under the 1st ground of challenge, the Applicant's contention is that the learned Chairman had concluded that the commission structure was an integral part of the letter of appointment and that the Respondent's consent was required for any changes to be implemented. I agreed with the Applicant's submission that in arriving at such a conclusion the learned Chairman has failed to give regard to the fact that the terms and conditions of the Respondent's letter of appointment did not provide for payment of commissions as part of the terms and conditions of employment as is evident from the wordings -

> "a) SALARY RM1,600.00 per month excluding commission and allowance as clearly stated under the sales commission incentive proposal (Attached Appendix 1). (Please note that confidentiality of your salary should be maintained at all times)".

From the express wordings quoted under the heading "SALARY" I also agreed with the Applicant's contention that the salary paid expressly excluded the payment of commissions and the commissions were never intended to and did not form part of the terms of employment is further borne out by the phrase "incentive proposal" appearing after the words "sales commission."

5.3 Support for the Applicant's stand is found in Selwyn's Law of Employment at p.53 where the learned author states there is a distinction between "terms" and "conditions"-

> "It is submitted that the terms of the employment are bilateral, i.e. they are part of the agreement of made between the employer and employee, whereas the conditions of employment are unilateral instructions which are laid down by the employer. The result is that a change in the terms can only be made by an express or implied agreement to that effect, whereas a condition can be changed by the employer unilaterally at any time".

5.4 Further the learned Chairman fell into error for failing to take into account the evidence of the Respondent under cross-examination which is testament of the true nature of a commission and thereby negates the requirement of consent of the Applicant as found in the Notes of Evidence (NOE)(Exh. LWT-1) in the Corrective Affidavit and the Affidavit in Reply of Lum Wai Tuck at - (a) pp.2-3 -

Q: Page 8, para (a) under salary.It says "excluding" commission?Therefore, based on this commission was excluded?

A: Agree.

Q: Also agree, you are bound by the terms and conditions of this employment, stipulated in this offer of employment?

A: Yes I agree.

Q: Only an incentive proposal. Pages 13 and 14.

A: Yes.

Q: Agree, nowhere in the letter of appointment or the appendix does it state that your commission structure was fixed?

A: Don't agree.

Q: Where does it provide?

A: No indication on this document. Yes, I do agree.

Q: This structure was revised on no fewer than 4 or 5 occasions - this is what you state in your witness statement?

A: Yes.

(b) p.8 -

Q: Also agree, the commission you could get in any particular month would depend on the revenue of the resort?

A: I agree.

Q: This amount could be fluctuating?

A: I agree.

Q: The commission is tied to sales?

A: I agree.

5.5 The Respondent contended that there was no evidence that the commission structure was subject to change found anywhere in the employment letter. I find there is no merit in this argument as it is contrary to the evidence and the evidence shows that consent is not required. Apart from the original commission structure in the employment letter of 8.7.1999, it is in the evidence of the Respondent that the sales commission structure was revised on several occasions during the tenure of his employment with the Applicant as is evident from the memos found in the Applicant's Affidavit in Support -

(a) 1st revision was by Memo dated 20.11.2001(pp.60-61) effective from 1.11.2001 but implementation was delayed to 1.12.2001 and communicated vide memo dated 27.11.2001 (p.62);

(b) 2nd revision was by memo of 11.6.2002 (p.64);

(c) 3rd revision was by memo of 27.3.2003 (p.65); and

(d) the final revision by memo of 31.12.2003 (p.66).

5.6 An examination of the memos at pp. 60-61, 62-63 revealed the presence of the words "This commission structure is subject to Management review." and in the subsequent letters at pp.64 and 66 bore the express wordings "All other conditions remain unchanged."

In addition, in cross-examination (p. 10 of NOE (Exh. LWT-1)), the Respondent said-

Q: Page 20, CLB - under "review", agree you were aware that the management would be reviewing the structure?

A: I don't agree.

Q: Agree, it's reflected there?

A: Yes, in this memo."

6. The Applicant has contended that the learned Chairman has stated the law relating to constructive dismissal but failed to apply the correct test to the facts of the present case by being swayed by the reasonableness and/fairness of the Applicant's actions as reflected in the Award -

"This straw clutching does not move the Court does not see any sprit of mutual dialogue having been extended to the Claimant and his fellow workers; all it sees is unilateral decision making by the big guy..." 6.1 It is pertinent to note what the Respondent said in cross-examination -

Q: The reduction, agree, this were in respect of late payment deductions?

A: I agree.

Q: Basic salary untouched?

A: Untouched.

Q: Q/A 44, are you complaining about the fairness of the company?

A: Yes I am".

6.2 I agreed with the Applicant's submission that there is no necessity to have any mutual dialogue with the Respondent and it is an irrelevant consideration as there is no requirement to have a mutual dialogue under the terms of the Respondent's contract and this being a case of constructive dismissal, it is trite law that the reasonableness of the Applicant's actions cannot be called into question as the correct test is the contract test of whether "the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract (see *Anwar bin Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 (CA) and *Funai Electric (M) Sdn Bhd v. Saliah Ahmad* [2000] 2 CLJ 655 (High Court case but its decision was affirmed by the Court of Appeal).

7. The Respondent submitted that the Applicant is prohibited from unilaterally changing the terms of the contract and the introduction of the new deduction scheme was unlawful and the Applicant as employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract and cited the cases of *Formyarn Sdn Bhd v. Lim Siew Lay* [1996] 1 ILR 175 at p.178 where the Industrial Court referred to the case of *RF Hill Ltd (appellants) v. Holmey (respondents)* [1981] IRLR 258 and *Kejuruteraan Samudera Timur Sdn Bhd v. Seli a/k Mandoh & Anor* [2004] 5 MLJ at p. 186).

7.1 For the reasons which I have given above, I had found that the commission was excluded from the Respondent's salary and hence the Applicant is correct in submitting that there was never any deductions as to the Respondent's remuneration and the learned Chairman's finding that the commission incentive proposal formed a term of employment was erroneous.

Furthermore, I find the cases cited by the Respondent can be distinguished. As submitted by on behalf of the Applicant, the cases of Formyarn Sdn Bhd(supra) and in Kejuruteraan Samudera Timur (supra) relate to a reduction in one's pay but in this instant case the Respondent conceded there were no changes made to his basic salary but only to the commission structure.

8. For the reasons which I have stated, it is my finding on the 1st ground alone the application of the Applicant ought to succeed.

Failing to take relevant matters into consideration - acceptance and affirmation of breaches (2nd Ground).

9. Under this ground the Applicant contended that the Industrial Court has failed to have regard to affirmation of breaches by the Respondent; has equated "affirmation" to "waiver" and misconstrued the law relating to constructive dismissal and this affected the entire Award because the Industrial Court is said to have already concluded at the outset that concepts of affirmation of breaches have no place in industrial jurisprudence.

9.1 In this regard it is pertinent to reproduce the impugned portion of the Award at pp. 229-230 of the Applicant's Affidavit in Support relied on by the Applicant -

> "Conversely, if the contract gave the company no such right then any unilateral change would be a breach of contract. Interestingly, by paragraph 10 (iii) of its statement in reply, the company puts in what can only be described as an alternative plea, that is, that by staying on in the company despite several changes in the commission structure, the claimant had waived and affirmed any such breach (which was denied). Concepts like estoppel, or waiver (which is the same thing) have no place in industrial relations jurisprudence.However, the Court suspended judgment for the moment, and proceeded the hear the minister's reference".

9.2 For purposes of comparison it is material to refer to the passage on concept of affirmation of breaches in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92 whereby the Supreme Court held -

> "past cases of constructive dismissals dealt with by this Court... are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken discharged." (Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract, i.e. to treat himself as discharged.)
>
> We accept this passage to be the correct statement of the law. The question asked by the Industrial Court in fact are similar to that part of the judgment of Lord Denning M.R. in Western Excavation case where the learned Master of the Rolls set out the contract test. Only in these circumstances can an employee he held to be constructively dismissed and that is what constructive dismissal is". (Emphasis added).

9.3 Here I would like to point out that the learned Chairman has not quoted paragraph 10 (iii) of the Applicant's Statement in Reply accurately in the sense that whereas it reads as "The Claimant's conduct in remaining in the Company subsequent to the revisions in the commission structure and reductions from commissions thereof amounted to an acceptance and affirmation of any purported breach (if any which is denied)". (Emphasis added), the learned Chairman has stated "... the claimant had waived and affirmed any such breach (which is denied)". The usage of the word "waiver" in the context of this case, in my view did not cause the learned Chairman

to err because he made this reservation "However the Court suspended judgment for the moment, and proceeded the(sic) the minister's reference." Save for the usage of the word "waived the breach" (p.246 top), the learned Chairman at pp. 246-247 of Applicant's Affidavit in Support devoted his evaluation of the evidence on whether the Respondent delayed in claiming constructive dismissal.

9.4 It is not disputed that there were 5 revisions in the commission structure from the commencement of the Respondent's employment with the Applicant. The learned Chairman found that the 1st and subsequent revisions were "works in progress" by a"process of trial and error" which finalised on 31.12.2003 and found there was no undue delay on the part of the Respondent to claim constructive dismissal. It is not disputed the Respondent gave the Applicant notice of constructive dismissal effective from 26 February 2004 with 2 months' notice of resignation. On this score I am of the view there is merit in the Applicant's argument that taking this line of reasoning there is still a delay of 3 months' before the Respondent gave his letter treating himself as constructively dismissed. I find the learned Chairman has erred in not finding that by electing to remain in the employment of the Applicant after the Respondent has conceded during cross-examination that the first time he brought up the grievances was only in November 2003 was an affirmation that he was aware that the structure was not going to be revised to the original structure which he alleged was a fundamental breach of contract yet he elected to remain in the employment of the Applicant. In this regard the learned Chairman's finding that there was no undue delay and affirmation in the context of this case is illogical.

9.5 Learned Counsel for the Applicant submitted that the Respondent placed reliance on his protestations to the changes repeatedly through his Sales and Marketing Manager, Mr. Vincent Pillai when he was not produced as a witness in the Industrial Court and that the Respondent in cross-examination has admitted that the first time he raised his objection to the management on the changes to the commission structure was in 2003. On this the learned Chairman stated "While cross-examining the claimant, the company's counsel Ms Suganthi disclosed that the Sales and Marketing Manager, Mr. Vincent Pillai, also has a case pending in the Industrial Court in relation to a similar claim. The hope of the claimant and his fellow Sales Managers partly hinged on their superior, the said Mr. Vincent Pillai. He had been entrusted with the task of transmitting their pleas onward to the management. Hence it was only to be expected that they waited for him to revert with the management's response. In the event, Mr. Vincent Pillai himself became a party to a separate reference to the Industrial Court'.

In my opinion there is merit in the Applicant's argument in that the learned Chairman has gone against the weight of the evidence when the key witness, Mr. Vincent Pillai was not called as a witness to test the veracity of the Respondent's testimony.

Finding on an unpleaded case - 3rd Ground

10. Under this ground it is necessary to quote in extenso the learned Chairman's Award at p.247 of the Applicant's Affidavit in Support -

> "Furthermore, the company was guilty of not just one breach but a series of breaches. In this regard the Court calls to mind the words of Glidewell LJ in the English Court of Appeal case of *Lewis v Motorworld Garages Ltd.* (1986) ILR 107 (quoted by the Chairman, Y.A. Lim Heng Seng in Bayer (M) Sdn. Bhd. v. Rugayah Bte Parman, Award No. 267 of 1995):-
>
> > "This case raises another issue of principle which, so far as I can ascertain, has not yet been considered by this Court. If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee

> would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment, and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part - the start - of the series of actions which, taken together with the employer's other action, might cumulatively amount to a breach of the implied term? In my judgment the answer to this question is clearly "yes"."

10.1 The Respondent submitted that the Applicant's submission is misconceived because the entire submission is based on the case of *Bayer (M) Sdn. Bhd. v. Rugayah bte Parman* [1995] 2 ILR 93 at 103 stating that the Respondent's pleaded case is not on breach of implied term of mutual trust and confidence and countered stating the facts giving rise to constructive dismissal of the Respondent are sufficiently pleaded in paragraphs 10-14 of the Statement of Case and there is no requirement to plead the words "breach of implied term of mutual trust and confidence" because it is merely the legal result that will follow the facts pleaded by the Respondent citing *Quah Swee Khoon v. Sime Darby Bhd.* [2000] 2 MLJ 600 at pp. 611 and 612.

10.2 I find that the Respondent's submission is without merit. Instead I find the Applicant is correct when they argued that the Respondent's pleaded case claiming constructive dismissal is founded on the assertion that the "Company's unilateral conduct in reducing and deducting the commission amounted to a fundamental repudiation of the contract of employment". It is to be noted that the case of Bayer (M) Sdn Bhd (supra) relied on by the learned Chairman to substantiate the finding that the Applicant was guilty of not one breach but a series of breaches in my judgment is misplaced.

10.3 I say so because in Bayer (M) Sdn Bhd (supra) which relies on *Lewis v. Motorworld Garages Ltd.* [1986] ILR 107 are cases pertaining to constructive dismissal where the pleaded case rested on breach of an implied obligation of trust and confidence and where the principle is as correctly quoted by the learned Chairman above but however that principle cannot apply to the facts of this instant case where the pleaded case differs. I am in agreement with the submission of the Applicant that the learned Chairman has erred affecting its jurisdiction when basing its decision on an unpleaded matter thus acting contrary to trite principles of law that a party is bound by its pleadings as propounded in *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (FC) and *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj. Mohd Noh* [1997] 1 MLJ 789 (SC).

Acting in excess of jurisdiction - 4th Ground

11. The Applicant contended that the Industrial Court fell into error when it ordered the payment of RM101,500.78 as compensation in lieu of reinstatement because this amount was in addition to the backwages and there was no contractual entitlement for the Respondent to be paid that amount as the commission structure has been superseded at the time when the Respondent claimed constructive dismissal.

11.1 The Respondent argued that the amount represented the difference in the Respondent's commission that was unlawfully deducted and reduced and was certified correct by the Applicant's witness and was consequential to the Industrial Court's finding that the Applicant did not have a right to make unilateral revisions to the original commission structure as it was part of the employment contract.

11.2 As submitted by the Applicant, under the various schemes that had been implemented the Respondent would not receive commissions for some months if he did not meet the targets set in the revised schemes as shown in p. 164 of the Affidavit in Support of the Applicant and which was relied on by the learned Chairman. The learned Chairman relied on the case of *Lim Seng Huat v. Fiamma Sdn. Bhd* [1996] 3 MLJ 604 in ordering commission for 24 months. In Fiamma Sdn. Bhd (supra) the Court of Appeal in affirming the award of backwages by the Industrial Court held u(4) The major part of the appellant's salary constituted of sales commission. On the grounds that: (i) the appellant's commission was more than his basic salary; (ii) there was no evidence to the effect that the appellant did not receive any commission in any particular month; and (Hi) the dismissal of the appellant was without just excuse, this court decided that pursuant to the provisions of section 30(1), section 30(4) and section 30(1) of the IRA and the existing authorities, the appellant should be paid his commission in addition to his basic salary. Therefore, this court affirmed the award for back wages which was made by the Industrial Court (see p 610E-F)". Hence it has to be noted that the material factors which the Court of Appeal took into account which were absent in the instant case are "the appellant's commission was more than his basic salary" and "there was no evidence to the effect that the appellant did not receive any commission in any particular month". In this case it has been shown that the Respondent would be receiving commissions for some months; hence I find in making the order of payment of commission at the average monthly rate of RM5.851.89 for 24 months is a misdirection. Further the matter is compounded when the learned Chairman also ordered payment of the differential in the commission not paid i.e RM101,500.78 and I agreed with the learned Counsel for the Applicant this is payment of double commissions. Since the learned Chairman has acted without basis, I find it has erred and acted in excess of jurisdiction.

12. For the foregoing reasons I find that the Minister has committed the errors of law as alluded to and accordingly, I granted O.I.T of the Applicant's application namely, an order of certiorari to quash the Industrial Court Award dated 24.8.2006 in Award No. 1492 of 2006 and costs.

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