
ISMAIL NASARUDDIN ABDUL WAHAB
v.
MALAYSIAN AIRLINE SYSTEM BERHAD

Industrial Court, Kuala Lumpur
Noor Ruwena Mohd Nurdin
Award No: 789 Of 2020 [Case No: 12/4-1822/19]
9 June 2020

Case(s) referred to:

Ahmad Kamaruzzaman Azizan v. Continental Tyres Malaysia Sdn Bhd [2015] 3 MELR 773; [2015] 4 ILR 489 (refd)
Glaspec (M) Sdn Bhd v. Azman Ujang & Ors [2006] 7 MELR 54 (refd)
Ike Video Distributor Sdn Bhd v. Chan Chee Bin [2004] 2 MELR 278; [2004] 2 ILR 687 (refd)
Kandu Anak Sugang & Anor v. Trienekens (Sarawak) Sdn Bhd [2010] 2 MELR 492; [2010] 4 ILR 558 (refd)
Nur Rasidah Jamaludin v. Malayan Banking Bhd & Ors Appeals [2017] MLRAU 326; [2018] 3 MLJ 127; [2018] 1 CLJ 330; [2018] 3 AMR 306 (refd)
Pearce v. Foster [1886] 17 QBD 536 (refd)
Seltom Pacific Sdn Bhd v. Maren Subramaniam [2007] 2 MELR 71; [2007] 3 ILR 310 (refd)
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145 (refd)

Legislation referred to:

Industrial Relations Act 1967, ss 4(1), 5(1), 20(3)
Malaysian Airline System Berhad (Administration) Act 2015, s 5
Rules of Court 2012, O 53
Trade Unions Act 1959, s 22(1)

Counsel:

For the claimant: Lim Wei Jiet; M/s Sreenevasan
For the company: N Sivabalah (together with Jamie Goh Moon Hong); M/s Shearn Delamore & Co

[Company pays the claimant.]

Case Progression:

High Court: [2019] MLRHU 1776
Industrial Court: [2019] 2 MELR 206

AWARD

Noor Ruwena Mohd Nurdin:



[1] This is a reference made under subsection 20(3) of the Industrial Relations Act 1967 [Act 177] ("the 1967 Act") arising out of the dismissal of Ismail Nasaruddin Bin Abdul Wahab (hereinafter referred to as "the Claimant") by Malaysian Airline System Berhad (hereinafter referred to as "the Company") on 29 November 2013.

[2] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 29 November 2013 and was received by the Industrial Court on 18 August 2014. It was registered as Case No 7/4-617/14.

[3] Hearing commenced on 28 April 2014 with the Company producing three witnesses against the Claimant. Meanwhile, the Claimant called another witness apart from himself to testify on his behalf. There were oral submissions as well as written reply submissions at the end of the hearing. The learned Chairman of Court 7 then on 14 February 2019 handed down Award No 562 of 2019 [[2019] 2 MELR 206] ("the Award") and dismissed the Claimant's claim of unfair dismissal. The learned Chairman held that the Claimant's dismissal was with just cause or excuse due to the seriousness of the Claimant's misconducts, taking into account the fact that the Claimant was unremorseful and his poor disciplinary record.

[4] The Claimant applied for a judicial review to the High Court under O 53 of the Rules of Court 2012 to quash the Award in Case No WA-25-200-05/2019. The case was heard before the learned High Court Judge YA Nordin Bin Hassan on 4 September 2019 who allowed the application on that day. The Award was set aside by the High Court with a cost of RM5,000 subject to allocatur fee and the case was remitted to the Industrial Court for calculation of the compensation *in lieu* of reinstatement.

[5] The Claimant's claim was re-registered at the Industrial Court on 27 September 2019 before a different Chairman as Case No 12/4-1822/19 pursuant to the High Court order dated 4 September 2019. The hearing of the present case was conducted on 12 March 2020 and oral submissions made by both parties on the same day. The last written submissions were filed on 10 April 2020. Hence, this Award is only in respect of the calculations of compensation *in lieu* of reinstatement.

Facts Of The Case

[6] Before the Court proceeds with the facts of the Claimant's claim, it is useful to understand the status of the Company first. The Company was the former Malaysian Airline System Berhad (also known as "MAS"). A new entity was established and known as Malaysia Airlines Berhad ("MAB") after the enactment of the Malaysian Airline System Berhad (Administration) Act 2015 [Act 765] (hereinafter referred to as the "MAS Act") on 20 February 2015. An Administrator was appointed pursuant to s 5 of the MAS Act on 25 May 2015 to administer the Company. The Claimant was no longer working with the Company at the close of the Company's operations on 31 August 2015. The Company's operations were transferred to MAB on 1 September 2015 whereby



the Company ceased operations on the same date.

[7] According to the Company's records, the Claimant commenced employment with the Company as a Trainee Flight Steward on 6 March 1989. With effect from 12 May 1989 he was appointed as a Flight Steward, subject to probation. He was confirmed in his position after a four-months' probationary period. Subsequently, the Claimant was promoted as Leading Steward on 14 August 1995 and thereafter confirmed in his position on 14 November 1995. Sometime in 1996, the Claimant was re-assigned from a Leading Steward attached to a narrow body aircraft, to a Leading Steward attached to a wide body aircraft. It was a lateral reassignment with no changes to the Claimant's terms and conditions of appointment, save that the Claimant was entitled to a higher allowance.

[8] The Claimant was thereafter promoted to the position of Chief Steward on 8 December 1997. On 3 August 2003, the Claimant was demoted from Chief Steward to Leading Steward, for making statements pertaining the Company to the media. However, the Claimant was later reinstated to the position of Chief Steward on 7 June 2007. On 8 November 2013, it was brought to the Company's attention that The Sun newspaper had carried an article on the National Union of Flight Attendants Malaysia's (NUFAM) call for the resignation of the Company's then Chief Executive Officer, Ahmad Jauhari Yahya. The said published article referred to an interview of the Claimant conducted with Sunbiz; whereby the said article also made reference to a press statement issued by NUFAM. The article also raised various other allegations against the Company. At the material time, the Claimant was the President of NUFAM and a member of its Executive Committee.

[9] Pursuant thereto, the Company issued a letter of suspension dated 8 November 2013 to the Claimant, suspending his services pending further investigations. At that material time, the Company was also investigating press releases published in The Sun on 29 October 2013 and 4 November 2013. The Company, after due investigation, issued a show cause letter dated 12 November 2013 to the Claimant with the following allegations:

"Allegation 1

The Sun, in a report appearing on 8 November 2013, *inter alia* stated, "The National Union of Flight Attendants Malaysia (Nufam), which represents 3,500 cabin crew at Malaysia Airlines (MAS), has called on the national carrier's CEO Ahmad Jauhari Yahya to resign saying he had failed to resolve their plight since he took over the helm in September, 2011. In a statement yesterday, Nufam Secretariat said it is calling on the prime minister to review Jauhari's contract and remove him as the CEO of MAS, which is a government appointed position, unhappy that there has been no changes in resolving the cabin crew's problems and they are have become demoralized. "Three years is long enough to observe how a CEO of a GLC (government-linked company) takes seriousness and consideration into the cabin crew's issues, it said. "The management have cut costs drastically on the cabin



crew and did not bother to review their allowances and salaries," it further claimed" [sic].

Although you may be the President of NUFAM, you are first and foremost an employee of Company and owe a duty and responsibility to Company as such. The Company holds you responsible for the foregoing statement/press release by Nufam, of which you are its President. The contents of the foregoing statement/press release are baseless, insolent and publicly damaging and your conduct in allowing the release of the said statement - calling for, among others, the resignation of the Company's Chief Executive Officer and further making reference to employees' allowances and salaries which are strictly internal and confidential matters - to be tantamount to a serious act of misconduct.

Allegation 2

You had, vide the same report appearing in The Sun on 8 November 2013, been quoted following your interview with SunBiz, as *inter alia* stating:

- "They (MAS management) said they had discussed with Maseu before putting these changes into the CA, but the discussions are behind Nufam's back"... "It was not done in fairness and is a form of discrimination against employees. This is also the first time they are picking on this (weight control) issue", in relation to various terms and conditions which had been agreed to by all relevant parties and subsequently incorporated into Collective Agreement Cognizance No 001/2013, thereby creating disharmony amongst the cabin crew fraternity which would have had access to the aforesaid newspaper report.

- "The crew are overworked and Nufam has raised these concerns with MAS. These are fatigue issues concerning the safety and welfare of employees. we request that the DCA monitor the work schedules of cabin crew", in relation to the cabin crew work schedules which had been discussed by the Company with the Department of Civil Aviation (DCA) and approved by the DCA; thereby creating disharmony amongst the cabin crew fraternity and concerns on safety amongst the public, which would have had access to the aforesaid newspaper report.

- "Nufam wants the airline to straighten out its policies. All policies concerning cabin crew must be regulated. The welfare and safety of the cabin crew must be looked into by the government", giving rise to the inference in the view of the public - which would have had access to the aforesaid newspaper report - that the Company neglects and



compromises the welfare and well-being of its employees.

The Company deems the foregoing conduct serious acts of misconduct.

Your foregoing actions are tantamount to a breach of your implied term of employment / fiduciary duty to serve the Company with good faith and fidelity and further a breach of your express terms of employment as stated in cl 12, Appendix I of the MAS Book of Discipline as well as the procedures governing grievance procedures pursuant to the Collective Agreement (Cognizance No 001/2013)."

[10] The Claimant replied to the show cause letter vide his letter dated 16 November 2013. In his reply, the Claimant did not deny the allegations which had been levelled against him and instead merely took the position that the press statements had been made by virtue of his position as the President of NUFAM and not in his capacity as a Chief Steward of the Company.

[11] Dissatisfied with the Claimant's explanation, the Company issued a letter of dismissal dated 29 November 2013 dismissing the Claimant with immediate effect as the Company could no longer repose the necessary trust and confidence to maintain the Claimant in its employment.

[12] Subsequently, the Claimant appealed against the Company's decision to dismiss him vide his letter dated 5 January 2014. The Company responded vide its letter dated 5 February 2014, informing the Claimant that his appeal was dismissed.

[13] The Claimant claimed that the Company failed to conduct a domestic inquiry before dismissing him from service contrary to the procedures established under the MAS Disciplinary Black Book (Revised 17 May 2013). It was the Claimant's case further that he did not breach express and/or implied terms and conditions of his employment under the circumstances, considering that he was an officer of a trade union. He alleged that the punishment of dismissal was done in bad faith and a colorable exercise to deny him of his constitutional right to freedom of association, freedom of speech and security of employment. He alleged further that he was a victim of an unfair labour practice by the Company for being an officer of a trade union (NUFAM).

[14] The learned Chairman hearing the Claimant's earlier case had found that the Claimant admitted in his defence that the interview and statements were made in his capacity as President and member of NUFAM and not as an employee of the Company. The Claimant also admitted that there were no provisions in NUFAM's constitution which stated that the Claimant's position as the President of NUFAM was independent of his employment with the Company. He further admitted that his membership of NUFAM was by virtue of the fact that he was a flight attendant employed by the Company. The learned Chairman then agreed with the Company's stance that the Claimant's role as a member and President of NUFAM was subject and secondary to his fiduciary duty to the Company who was his employer. The Court then relied



on various case laws pertaining to an employee's fiduciary duty to the employer and also to the often-cited English case of *Pearce v. Foster* [1886] 17 QBD 536 that if a servant conducted himself in a way inconsistent with the faithful discharge of his duty in the service, it was misconduct which justified the punishment of immediate dismissal.

[15] Regardless, the High Court has set aside the Award of the learned Chairman and, thereby upholding the Claimant's claim of unfair dismissal and that it was unlawful. The High Court's judgment is made available to this Court by the Claimant's Counsel. This Court is now tasked to calculate the amount of compensation *in lieu* of reinstatement to be paid by the Company to the Claimant. Since the Company is no longer in operation, the remedy of reinstating the Claimant to his former position is unsuitable; hence the only suitable remedy is monetary compensation. Whether or not the Claimant would be able to obtain the monetary compensation from the Company is not for this Court to speculate and it will now look at the evidence available in order to determine the amount of compensation to be paid to the Claimant.

Evaluation Of Evidence

[16] The Court will only consider the relevant facts for this purpose since the Award has been set aside and punishment of dismissal found to be unwarranted. The Court will also consider the facts that have been established during the hearing on 12 March 2020 in order to determine the Claimant's financial standing now, as the matter of his dismissal was in 2013 and many years had passed since then. The Claimant's witness statement was marked as CLWS1 and he was the only witness for his case. The Company did not call any witness to testify on its behalf.

[17] The Claimant stated in his witness statement that the parties did not wish to relitigate or reventilate the legality of his dismissal as it had been determined by the High Court in the Claimant's favour. Hence, it is only for the Court to determine the amount of his compensation *in lieu* of reinstatement. The Claimant's last drawn salary was RM3,948.00, with a fixed allowance for Laundry of RM80.00 and Fleet Cabin Crew Allowance of RM470.00 and mandatory salary deductions) to the various statutory bodies. During his service, the Claimant was entitled to monthly Flying Allowance / Incentive Allowance / Meal Allowance which averaged around RM2,375.00 per month and this formed a substantial part of his monthly remuneration from the Company for sustenance and living expenses. He exhibited his salary slips from July 2012 to May 2013 as proof of this average amount claimed.

[18] The Claimant is also seeking compensation and/or aggravated compensation and/or exemplary compensation, as the Company's actions were:

- (i) an unlawful punishment against a trade union leader for carrying out a legitimate trade union activity;
- (ii) an act of "union busting";



(iii) an act of victimization against the Claimant as a trade union leader; and

(iv) a breach of arts 5 and 8 of the Federal Constitution.

[19] It was also the Claimant's testimony under cross-examination that since his dismissal, he had been doing a lot of union activities (expenses were claimable) and a correspondent for the International Transport Federation (ITF). He received about RM2,000 from claims for the union activities done. He would also receive reimbursements from ITF for meetings which he attended there roughly in the amount of RM2,000 per month. He has not been able to secure employment with any other company to-date. He was in the Company's employment for about 24 years. In his submissions, the Claimant submitted that he was entitled to the aggravated damages which he has claimed due to the Company's actions done in bad faith.

[20] The Company submitted that the Court is bound by its powers as stated in Second Schedule of the 1967 Act. He was dismissed on 29 November 2013 and the hearing concluded on 30 May 2018. Hence, backwages awarded should be limited to 24 months only as provided in the 1967 Act. It was also the Company's contention that there was contributory conduct of the Claimant which the Court should consider and that he had breached the provisions of the Collective Agreement signed between the Company and the union; *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd* [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145 (Federal Court). In the case of *Ahmad Kamaruzzaman Azizan v. Continental Tyres Malaysia Sdn Bhd* [2015] 3 MELR 773; [2015] 4 ILR 489, the Industrial Court rescaled downwards the award of backwages at 40% due to the claimant's contributory conduct. It was submitted that in the present case, the Claimant was well aware of the Company's position on his actions of speaking to the media without its prior consent. As he did not deny that he spoke to the media, but merely took the position that he did it in his capacity as a union official and member rather than as an employee, it was contended by the Company that he also breached the Company's express regulations on raising grievances etc, hence the dismissal.

The Company prayed that the Claimant's quantum of compensation to be scaled down substantially by the Court, at the rate of 70%.

[21] On another matter in respect of the Company's status and that it has gone into insolvency, that it has no funds, the Company submitted that the Claimant's award of any compensation will rank as an unsecured claim against the Company since it is insolvent; *Glaspec (M) Sdn Bhd v. Azman Ujang & Ors* [2006] 7 MELR 54 and *Seltom Pacific Sdn Bhd v. Maren Subramaniam* [2007] 2 MELR 71; [2007] 3 ILR 310. It was submitted that as at 14 February 2020, an Interim Liquidator had been appointed (refer to Notice of Appointment (Annexure to Company's Written Submission)).

Remedy



I. Compensation *In Lieu* Of Reinstatement

[22] The order of the High Court is that the Industrial Court to ascertain the appropriate remedies in accordance with the law. The Claimant had been in the continuous employment of the Company since 6 March 1989, a period of slightly more than 24 years and he was a confirmed employee. At present the Claimant is 54 years old. He has not been gainfully employed but is carrying out activities for the union and ITF and being reimbursed his expenses for those activities. It appears that he has an income from the claims made, although many not be as much as what he used to be paid when working with the Company. Based on the number of years in service, the Court will order compensation *in lieu* of reinstatement at a multiplier of 24 months, that is, one month for each completed year of service.

II. Backwages

[23] The Claimant had admitted during cross-examination that irrespective of any position held outside, he cannot make any press statement as an employee of the Company. The Claimant had further admitted that under art 27 of the MASEU's Collective Agreement 2011 (COB3), employees are not allowed to give press statement. The Claimant also admitted that in 2013 though NUFAM had obtained recognition, the Collective Agreement between MAS and MASEU was the Collective Agreement applicable and enforced to all employees under the scope. The Claimant also agreed that he was aware under cl 12 of the Company's 'Book of Discipline (Black Book)' (COB p 31), employees are not allowed to make any statement to the press or media without the prior consent of the Company. The Company submitted that in the case of *Kandu Anak Sugang & Anor v. Trienekens (Sarawak) Sdn Bhd* [2010] 2 MELR 492; [2010] 4 ILR 558, the employees in this case were dismissed as they were found guilty of the misconduct in instigating other employees to boycott a company event. Their main defence was that they were acting in the capacity as President and Secretary of the union. The Industrial Court upheld the employer's decision of dismissal.

[24] The Company's Counsel then had submitted that s 22 TUA 1959 clearly provided that the provision governs "Liability in Tort". He submitted that a tort is a civil wrong, as enunciated by the Court of Appeal in *Bank Bumiputra Malaysia Bhd v. Emas Bestari Sdn Bhd & Anor And Another Appeal* [2014] 2 MLRA 249; [2014] 2 MLJ 49; [2014] 1 CLJ 316. Therefore, the provisions of s 22 TUA 1959 and its purported immunity extended only to encompass civil claims against trade unions or its members for tortious liability. He stated that the action against the Claimant was not an action for tort but was an action for misconduct committed by the Claimant. The learned Chairman had agreed with the Company's submissions that ss 4(1) and 5(1) of the IRA 1967 were inapplicable in this particular instance as the Claimant was found to be guilty of the allegations of misconduct levelled against him.

[25] Nevertheless, the High Court in the judicial review application filed by the Claimant was of the view that the learned Chairman fell into error by holding



that view. Hence, it stated that the law which endorsed the rights of union members to participate in the union lawful activities and ss 4(1) and 5(1) of the 1967 Act were put in place to ensure that this rights can be exercised without impediment including from the employer. The High Court cited the Court of Appeal case in *Nur Rasidah Jamaludin v. Malayan Banking Bhd & Ors Appeals* [2017] MLRAU 326; [2018] 3 MLJ 127; [2018] 1 CLJ 330; [2018] 3 AMR 306 where it was held that trade unions and its members or officers have absolute immunity from actions that are premised upon the tort of libel pursuant to s 22(1) of the TUA 1959 when the tortious acts complained of were "committed by or on behalf of the trade union".

[26] At para 40 of the High Court's grounds of judgment on the judicial review application stated that:

"Viewed in totality and the fact that the statements was made in the applicant's capacity as the President of NUFAM for the interest of the members without involving any illegal act, the applicant's conduct cannot be labeled as a misconduct which warrants his dismissal."

[27] Based on the above, it is clear that the High Court viewed that the Claimant had not committed any misconduct that warranted his dismissal from the Company. Therefore, this Court being by bound by the High Court decision, will order backwages of 24 months from the date of dismissal which is the maximum that can be awarded under the law. His last drawn salary was RM3,948.00 plus RM80.00 (Laundry Allowance), RM470.00 (Fleet Cabin Crew Allowance) and Incentive Allowance which averaged around RM396.55 per month. The Court rules that the Claimant's total salary for the purpose of the compensation calculation is RM4,894.55.00. The Court has included the Incentive Allowance only to determine his salary and not the Meal Allowance because the Incentive Allowance is calculated as part of his salary for the purposes of EPF contribution (refer to pp 1-10 of the Claimant's Bundle of Documents, CLB).

[28] In regard to the Claimant's claims for aggravated and/or exemplary compensation, after considering the facts of the case, the COURT does not view that such compensation is warranted. As President of NUFAM, the Claimant could also have brought his grievances on the plight of the employees using other channel(s) available within the Company.?

Rescaling Compensation

[29] In respect of the fact that he is unable to secure permanent employment, the Court views that his income from carrying out the union activities and attending meetings at ITF to a certain extent can be considered as his post-dismissal earnings. In accordance with Item 3 of the Second Schedule, a deduction of 20% will be made from the backwages ordered and it is a fair rate considering the Claimant's testimony. In this regard, the Court draws guidance from the case of *Ike Video Distributor Sdn Bhd v. Chan Chee Bin* [2004] 2 MELR 278; [2004] 2 ILR 687 that, among others, the quantum of scaling down need not be based on a mathematical exercise.



[30] Further, from the High Court's judgment, it would be inappropriate for the Court to make a deduction for contributory conduct despite the Company urging the Court to make that deduction. The Claimant admitted he made those statements which he was charged with but mitigated it that he made them not as an employee of the Company. Although the Court is urged to award aggravated and/or exemplary compensation to the Claimant, the Court is of the view that such aggravated and/or exemplary compensation is also not warranted based on the totality of the evidence in the present case.

[31] Therefore, the total amount of backwages and compensation *in lieu* of reinstatement payable to the Claimant is:

Backwages

RM4,894.55 x 24 months = RM117,469.20

Less 20% (RM23,493.84) = **RM 93,975.36**

Add

Compensation in lieu of reinstatement

RM4,894.55 x 24 months = **RM117,469.20**

TOTAL = RM211,444.56

Final Award

[32] The Court now orders that the Company pays the Claimant the total sum of Ringgit Malaysia Two Hundred Eleven Thousand, Four Hundred Forty-Four and Fifty-Six Cents less any statutory deductions through the Claimant's solicitors within 30 days from the date of this Award.

