

**AMERICAN INTERNATIONAL ASSURANCE CO.
LTD.
v.
SEAH CHEE TECK**

Industrial Court, Kuala Lumpur
Tan Kim Siong
[Case No: 4/4-77/95 (7 February 1995)]
21, 22 July & 5 September 1995

AWARD

The parties to the matter before this Court are American International Assurance Co. Ltd. ("the company") and Seah Chee Teck ("the claimant").

The issue before this Court is the dismissal of the claimant on 10 November 1993.

The claimant was employed by the company as an assistant manager (sales) on 25 May 1992.

The claimant was dismissed by a letter dated 10 November 1993 and at the time of his dismissal his last drawn salary was RM2,550 per month and contractual bonus.

The claimant contends that his dismissal is without any just cause or excuse and/or in breach of the principles of natural justice and/or an unfair labour practice and/or unlawful.

The claimant prays that he be reinstated in his former job as an assistant manager (sales) without any loss of wages, allowance, service, seniority, privileges or benefits or any kind and or any other or alternate relief as this Court deems fit and proper.

In the statement in reply the company contends that the claimant failed and/ or refused to carry out his functions properly, diligently and/or as required by his contract of employment which resulted in the poor performance by the claimant of his job.

To assist the claimant in improving his work performance and attitude, the company had provided the claimant with counselling.

Despite the attempts by the company to assist the claimant he was non-cooperative, and failed and/or refused to respond positively. Further, the claimant had, at a number of counselling sessions, challenged the management of the company to dismiss him and or take him to Court.

The company contends that the dismissal was lawful, with just cause or excuse and in accordance with the principles of natural justice and fair labour practice.



The company's case as averred in its statement in reply is that it dismissed the claimant because he failed or refused to carry out his functions properly, diligently as required by his contract of employment. He was guilty of poor performance.

The conduct and attitude of the claimant complained of by the company are tabulated in a company's memorandum dated 23 July 1993 which can be summarised as follows:

- (i) Punctuality;
- (ii) Failure to inform the company when leaving the office for official or personal appointment;
- (iii) Poor Performance:
 - a) Time-keeping
 - b) Failure to submit report on time;
 - c) Agency visit; and
 - d) Production;
- (iv) Non-cooperative & disrespectful attitude

The company's working hours were from 8.30 a.m. to 5.00 p.m. with lunch hours from 12.45 p.m. to 1.30 p.m.

COW4, the head of department to which the claimant was attached to, told the Court that the claimant was consistently late to work. Initially, the claimant was verbally counselled on his impunctuality on several occasions but he did not improve. For the months from March to May the claimant was late for work between 4 to 14 times a month. In the month of June the claimant had also failed to clock in and clock out regularly. Subsequently COW4 issued written reminders, first on 23 June 1993 followed by another show cause letter dated 5 July 1993 and he only replied the third show cause letter dated 13 July 1993. His reasons for coming to work late were:

- a. serving the company's clients in their respective offices in the morning; and
- b. meeting with agents and agency leaders before they leave for the field in the morning.

It is COW4's contention that the claimant's clients started work at 9.00 a.m. Therefore the claimant's reason for impunctuality was not acceptable. The claimant continued to be impunctual from July to October despite being given a warning letter dated 20 July 1993. He was late between these 4 months from 10 to 19 times each month. COW4 testified that unlike other late comers the claimant refused to heed to his advice to improve his punctuality and was habitually late. It was clearly reflected from his punch cards from March to October.

The claimant was notified his areas of weakness by COW4 at a counselling



session, the performance review was recorded and contained in a memorandum sent to the claimant as follows:

Memorandum

To : Siah Chee Teck

Subject : Performance Review

Date : 23 July 1993

This refers to our discussion dated 23 July 1993 in the presence of Susan Foo.

Appended below are the following:

A) Punctuality

You have requested me to clarify the meaning of tardiness. Please note, my letter to you dated 20 July 1993 is self explanatory.

B) I take this opportunity to discuss with you, your performance todate, which is a concern to management.

1) Morning appointment - Reminder

Should you have a morning appointment, give 1 day notice with the following particulars to either Lim Cheng Hoe, Betty, Yean Cheng or me:

a) Time of appointment

b) Name of company

c) Person in charge

d) Purpose of visit eg presentation of proposal, service etc.

This appointment, should be recorded in the diary at Tan Yean Cheng's desk prior to the appointment. This ensure, management knows your whereabouts

2) Clock out - Reminder

If you have an appointment and you are unable to clock out, call back our office before 5 pm to inform the above personnel as in 1) above and provide the following information:

a) Name of company

b) Purpose of visit

3) Lunch hour - Reminder

Lunch hour for AIA staff is 12.45 pm to 1.30 pm (45 minutes). If you have an early lunch appointment or you will be back later than the stipulated time, kindly inform the relevant personnel and provide the same information as in item (1),

4) Production



Production for the period December 1992 to June 1993 (updated 7 months) as per list attached.

All the key result areas, i.e. production, proposals, field calls, workshops & CEB cases is far below pro-rata month to date target. You are advise to ensure for future months, all the key result areas meet or exceed target.

Note: Individual production & activity report was given to you every month. This is for you to update & monitor your key result areas.

5) Reports - Reminder

Again, we have the unpleasant task to remind you, all reports required must be submitted on time. This, you have not done. The following reports include:

- a) Weekly activity report and summary
- b) Prospect's listing
- c) Show cause letter for May's activity & production monthly report.

This was told to you and you agreed to reply within 12 July to 16 July 1993. As to date, we have not received your reply.

7) From the prospect list it was evident that you have lack to follow up on the proposals. As per Lim Cheng Hoe's discussion with you and his memo dated 23 July 1993. Please comply with immediate effect.

8) Agency visits

During the sales meeting on 1993 updated and 1994 budget held at 30 April 1993, you have given us 1993 updated budget of \$700,000 FYP. You have also submitted an action plan for agency visitation, twice a month to conduct workshop. Both your submission was accepted by management.

Note: In May you conducted zero workshop and June 1 workshop.

Again, you are advised to comply with the agreed number of workshop immediately.

Any workshop you conduct, must be reported in your weekly activity and summary report.

9) Daily appointments and activities

This memo serves to remind you that whenever you have an appointment with an agency, policyholder, broker or prospect you are required to record in the diary prior to going out of the office.

10) Meetings

In meetings you are required to contribute your ideas for the benefit of the department and all present.



11) Time Management

Your management of time needs improvement. Normally, it does not take a whole day to see two (2) prospects. Your reason for the delay is waiting for the prospect. The following suggestion are offered:

- a) Call up to the prospect to confirm the appointment before you visit them,
- b) Get the assistance of the service executive when the case has being closed to service your client.

After the discussion, I have asked you whether you have any questions, understand or is clear of our discussion. And, this is to reconfirm, you have no questions to ask and you acknowledge you understand and is clear of the issues discussed.

The company views your performance seriously. You are advised to comply with our department and company's requirement and improve your performance immediately.

Your sincerely,

signed ... Mr. Teh Kah Kin Asst. Vice President Group Insurance Division

The claimant ignored COW4's instruction and did not record his whereabouts whenever he left office for official or personal matters as stipulated in para. 9 of the memorandum.

It is the company's contention the claimant's poor performance was the result of his attitude in time-keeping, submission of reports and agency visiting. Hence his production was low. It was not due to the increase in the budget for production for assistant managers, The company admitted taking away 16 agencies from the claimant's portfolio but contended the claimant was given the Japanese Account which was a lucrative account. As to MBF Mass Marketing Plan which the claimant was initially involved in securing the account it was pointed out the claimant's wife was the officer in charge of the matter in MBF and she had to decide the approval of the deal. To avoid the allegations of conflict of interest, COW4 decided to transfer the account to another assistant manager. It is also the company's contention assistant managers were given credit for deal closed by them irrespective of allotment of agency. The company permitted encroachment into each other's agency.

It is the company's contention the claimant's attitude towards his head of department, COW4 was disrespectful and non-cooperative. The claimant challenged COW4 to either transfer him out or to terminate his employment. This has prompted COW4, to put the following comments in his year-end appraisal:

Unwilling to accept suggestions & changes resulting in poor production performance, fields calls & proposal issued. Despite being told to be punctual, he is habitually late and often absent without informing the office.



The claimant demonstrated his disrespect of COW4 by refusing to sign or put any comments on the appraisal form. The company had communicated to the claimant that his indiscipline, in particular, with regard to his punctuality was unacceptable and in consequence disciplinary action had to be taken against him. It is the submission of the company the misconduct of the claimant viewed cumulatively made it impossible to continue to keep him in employment and his dismissal was justified.

The claimant has denied in his testimony before the Court the misconduct allegedly committed by him resulting in his dismissal. He told the Court he was unable to clock in on time and arrived late for work in the morning because while on his way to office he had to meet with his agents or brokers at the car park for discussions. He has to meet them before going to office to clock in as it would not be practical to ask his agents and brokers to wait for him to clock in first before meeting them. He contended he was not the only one who clocked in late, other assistant sales managers like himself also clocked in late. Moreover they were not served with show cause letter or warning letter but were given verbal counselling. It is the submission of the claimant he should not be blamed for having committed misconduct when, in the interest of the company and for the convenience of his agents and brokers he met them before clocking in. The punch cards should not be used as a yardstick to ascertain that the claimant was a habitual late comer.

The claimant refuted COW4's allegation that he failed to carry out instructions to keep office informed about his whereabouts by making an entry in his diary. He pointed out COW4 did not produce the note book or diary to show he did not make any entries as to his whereabouts. The claimant testified that he always wrote down in the diary and note book and followed up by phone calls to the office to inform the office about his whereabouts. He contended that there was no evidence that he was always missing during office hours. He disputed the evidence of COW2 and COW4.

On the failure to meet his budget allocated the claimant explained that the company increased his budget for the year 1993 from RM500,000 to RM700,000 and took away 16 agencies from him. Furthermore the company credited business closed by the claimant's agents to other assistant sales managers. It is the claimant's contention he was singled out for failing to meet the budget as other assistant sales managers were unable to achieve the monthly budget set for each of them.

The claimant averred that he did not challenge his head of department, COW4, to sack him during verbal counselling but it was COW4 who challenged him to resign if he was not happy. It is the claimant's contention that COW4 was a man capable of putting everything down in writing and would have issued a show cause letter for the claimant's challenge if he indeed had challenged COW4. He was obviously lying about the challenge.

Finally the claimant complained of the manner in which he was dismissed without being given an opportunity to clarify, explain or defend himself. No show cause



letter was issued and no charges preferred against the claimant before the company arrived at the decision to dismiss him. It is his contention that from the evidence there was a personal conflict between the claimant and his superior, COW4, who practised favouritism between the claimant and other assistant sales managers. COW4 was out to gun him down and to victimise him.

Before going into the substantial merits of the case it is perhaps convenient to dispose of the issue of natural justice in the context of the Industrial Relations Act 1967. Our highest Court has in a recent judgment held that the failure of natural justice by itself does not stop the Industrial Court from coming to a finding as to the justification for the dismissal. This is because the hearing before the Industrial Court itself provides a better and impartial forum for the employee than the domestic inquiry for the employee to be heard to satisfy natural justice.

On the question of the claimant's unsatisfactory performance in his production to meet his allotted budget, this Court finds that the removal of 16 agencies particularly with regard to MBF Mass Marketing Plan had affected the claimant's output of business. With the background fact of personal conflict between COW4 and the claimant the action of removing the claimant's agencies and the encroachment into the claimant's areas of business do not appear to be free from bias and prejudice.

There is no dispute that the working hours for the company were within the claimant's knowledge. There is also no dispute that the claimant was consistently late to work. The claimant's justification was that it was done in the best interest of the company and on a balance of interests, he chose to act in a single, solitary act of indiscipline. But the facts of the present case show that after verbal and written warnings the claimant persisted in coming late without regard to his superior's instructions. There is evidence of repetition of the same offence soon after written warning. In some months of the material period the claimant was almost late everyday. When a show cause letter to him requesting a reply the claimant did not reply the letter. He continued to flout the discipline by coming late. A fresh show cause was issued to him and he again ignored the letter and continued his impunctuality. The claimant failed to reply the show cause letters despite repeated reminders. The claimant only gave his explanation of lateness after the third show cause letter. This Court, however, did not find any reasonable or valid excuse in his reply to the show cause letter.

In *Yee Lee Corporation Bhd. V. Mallika A/p Paul* [1994] 3 MELR 77 [1995] 1 ILR 432 at p. 434, it is stated that:

Lateness is absence without leave for the period between the time the employee is required to arrive and the time he actually does arrive, and as a species of unauthorised absence, it too, is misconduct. It is the excuse that though she was late she had always accomplished her work on time. It is the Court's view that the company has the right to demand the claimant to be present at the starting time in the morning. It is irrelevant that the claimant was late to work only for a few



minutes. It is still misconduct, especially when she had been warned to be punctual. The misconduct aggravates when the lateness is persistent.

Before considering the merits and demerits of the respective contentions of the parties concerning the occurrence of the events which led to the claimant's dismissal this Court must make it absolutely clear that wilful disobedience to a lawful order is a serious misconduct which may justify instant dismissal. This is because such disobedience strikes at the root of employer-employee relationship and is detrimental to discipline. In my view, it is an implied condition of contract of employment that an employee shall obey lawful orders of the employer and any wilful or deliberate and intentional disobedience of the orders is tantamount to a repudiation of the terms of contract.

The facts in the present case as regards the lateness to office and the refusal to abide to the instructions of a superior are substantially not in dispute. It would appear from the submission of the learned Counsel of the claimant this Court is urged, on the ground of the undisputed fact that there was a personal conflict between the claimant and his superior there should be a finding of victimisation. In the light of the conduct and attitude of the claimant involving the series of incidents with his superior and his continued behaviour to ignore written warnings it is evidentially impossible to come to a finding of victimisation. Victimisation means one of two things. The first is where the workman concerned is innocent and yet he is punished because he has in some way displeased the employer, for example, by being an active member of a union on workmen who were acting prejudicially to the employer's interest. The second case is where an employee has committed an offence but he is given punishment quite out of proportion to the gravity of the offence, simply because he has incurred the displeasure of the employer (See Dismissal, Discharge, Termination of Service and Punishment by L.C. Malhotra).

There is no evidence in this case of victimisation but the conduct of the claimant viewed cumulatively showed his disrespectful attitude in rejecting his superior's instructions and challenging the company's policy. The claimant entertained no criticisms and heeded no warnings. Such behaviour, undermined the whole fabric of the hierarchy of superior and subordinate and effectively destroyed the trust which must subsist in any employer and employee relationship.

This Court is mindful there was personal problem between the claimant and his immediate superior, COW4 and personal conflict had been reported to the general manager (GM), the head of the company in Malaysia. The G.M. had counselled the parties to resolve their dispute. When this had failed the G.M. sought the human resources department to look into the matter and advise him. It would appear all senior personnel concurred with the G.M. that the claimant should be dismissed for the problem he had with his immediate superior in maintaining company's policy and discipline.

For the reasons above it is the finding of this Court the claimant's repeated defiance



of order undermining the authority of his immediate superior in wilful and deliberate circumstances justifies his dismissal. This Court holds that his dismissal was with just cause or excuse.

