PULAI MEWAH SDN BHD
v.
LEONG FOOK HENG

Industrial Court, Ipoh
Syed Ahmad Radzi Syed Omar
Award No. 84 Of 2002 [Case No: 9/4-170/99]
30 January 2002

AWARD

The dispute in this case is as a result of the dismissal of Leong Fook Heng (the claimant) by Pulai Mewah Sdn Bhd (the company).

Introduction

The company's contention is that the claimant was dismissed because of claimant's absence for too long without valid reason. As a result of that, claimant's performance has been badly affected; claimant was not able to complete his job function as a supervisor. Claimant's inability to function has affected the company's production capacity.

The claimant's contention is that he doesn't know why he was dismissed by the company. He was never given any warning or show cause letter about his performance. The termination letter didn't specify the reason. The claimant was not given any opportunity to defend himself. No domestic inquiry was held by the company to hear claimant's story.

Facts Of Case/Evidence

The claimant joined the company on 17 April 1995 as a supervisor. Claimant was terminated effective on 31 August 1998. Claimant's last basic salary was RM1,200 plus a fixed allowance of RM400 per month. The reason for dismissal as mentioned in the termination letter CL1 p. 1 as "unfit for the assigned job responsibilities". COW1 however gave three reasons for the dismissal namely: (1) absence from work (2) company work cannot run smoothly and (3) that the claimant had his own business. However in the company's pleadings it was stated that the reason for the claimant's dismissal was because he was absent without leave. From the evidence it is obvious that absenteeism is the main reason for the dismissal.

The evidence before the court shows that the claimant was a monthly paid employee. If the claimant was absent without leave he would not be paid for the day. If the claimant produced a medical certificate from a clinic not on the company's panel, he would not be paid for the day. The claimant is however paid for all Sundays, public holidays and medical certificates from clinics of company

panels.

Claimant's Job Functions

The claimant's main job is to supervise the company workers and production of the company. In addition to the above the claimant would also be required to handle problems caused by Bangladeshi workers eg, taking them to hospital, to police station whenever there was a fight between them. This extra job of handling Bangladeshi workers would sometimes involve odd hours of the day. The claimant was also asked to entertain some Taiwan businessmen. This would also entail odd hours of the day. Doing these extra jobs, the claimant was paid separately by COW1 in the form of pocket money and this is not reflected in the salary voucher.

Procedures For Application Of Leave

Company procedures stipulates that leave can be obtained by filing the application for leave. For emergency cases by calling and informing one of the three staff of the company ie, Foo, Wai and Aishah. However the next day the applicant has still to fill up the leave form. But for supervisors like the claimant, COW1 must still approve the leave. This was confirmed by COW1 and COW2.

Warning

The company contended that verbal warnings were given from time to time to the claimant by COW1 and other staff. COW1 stated about 60 verbal warnings were given to the claimant to improve himself and not to be absent without leave. The verbal warnings were given over a period of two to three years. The company produced one warning letter to claimant at CO4 which was not signed by the claimant. The claimant denied receiving this warning letter and that he didn't sign for it. COW2 had stated that the warning letter was prepared by one Lin, however Lin had since left the company. COW2 handed the warning letter to the claimant, but the claimant refused to sign it.

Show Cause Letter

It is not in dispute that no show cause letter was given to the claimant prior to his dismissal. The claimant further alleged that he was not given the opportunity to explain his case. The company's contention is that the shortcoming was pointed out to the claimant by COW1 and other staff of the company but the claimant failed to adhere to the verbal warnings.

Breach Of Natural Justice

Claimant testified that no charges of misconduct were ever formed or sent to him before he was terminated. The company would again rely on the evidence of COW1 that the claimant was given sufficient verbal warnings to improve.

The Law

In *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 2 MLRA 23; [1995] 3 MLJ 537;

[1995] 4 CLJ 449; [1996] 1 AMR 049 at pp. 454-455; [1995] 3 MLJ p. 537, Mohd. Azmi FCJ stated as follows:

As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance* [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145; the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.

It is a principle of industrial law that the burden lies on the employer to prove that he had just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. As stated succinctly by Raja Azlan Shah CJ in the case of *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129.

where representations are made and are referred to the Industrial Court for inquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

The issues here are:

(i)Claimant's absence without leave is the main reason for his dismissal by the company. Whether the claimant had just cause for such absence.

(ii)If proven he was absent without leave too many times, does that justify his dismissal.

(iii)Was the claimant given sufficient warning before he was dismissed from his service?

Principles of Dismissal

The general principles relevant to dismissal cases were reiterated in *Kama Morris S dn Bhd v. Lee Chwee Say* [1990] 1 MELR 499; [1990] 1 ILR 435 as follows:

It is a basic principle of industrial law that the court would be wrong to interfere with the *bona fide* exercise of powers which are given to the management by common law and by contacts of service or which are inherent in management. If there has been no abuse of discretion, no discrimination, no unfairness, no capricious or arbitrary action, if the management has acted in good faith and upon fair investigation, an arbitrator should not disturb the decision taken by the employer. However, as a court of equity and good conscience, it will interfere not only where there has been victimisation but also where it is of the opinion that

upon the substantial merits of the case, the action taken by the management was perverse, baseless and unnecessarily harsh or was not just or fair or where there has been a violation of natural justice or where there has been unfair labour practice or other *mala fide* action on the part of management in the exercise of its power... . It is also settled that the power to order reinstatement is not limited to cases where the worker has been dismissed summarily on the express ground of misconduct. Even where the dismissal has been effected upon the proper notice and the real ground for the employer's decision is misconduct suggested or alleged against the workers, the court will inquire into a complaint that the decision has been harshly or unfairly made. The absolute right of an employer under the common law to hire and fire is, however, no longer available to him completely under the industrial law and the court will apply the same principle here as in cases where the employer has exercised his right to dismiss the worker without any notice on the ground of misconduct.

His Lordship Steve LK Shim in the same case quoted above also stated that an employer would be entitled to dismiss a workman summarily where the conduct of the workman is inconsistent with the maintenance of the relationship created by the contract. Sometimes, this would be evident from a course of conduct and in other cases, a single act of disobedience would suffice but then it must have the quality of wilfulness and perhaps some degree of seriousness about it.

And in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd*[1981] 2 MLJ 129, Raja Azlan Shah CJ (Malaya) (as he then was) said:

We do not see any material difference between a termination of contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for inquiry, it is the duty of that court to determine whether the termination or dismissal was without just cause or excuse.

Decision

The company's termination letter at CL-p. 1 stated the reason that the claimant was "unfit for the assigned job responsibilities." COW1 explained that the claimant was not suitable to perform his job function because he was absent without leave too many times. Being a supervisor he should be more responsible towards his job. Although three reasons were given by COW1 but absenteeism was the real and main reason for claimant's dismissal.

The claimant's reason for his absence was that he had to work till late evening before he could go home. He was the supervisor for the Bangladeshi workers and any problems created by the foreign workers he had to attend to them. This is more so if the problem happened after office hours. Sometimes the workers got sick and he had to send them to hospital or clinic. Sometimes they would fight amongst themselves and get injured, then the claimant had to take them to the hospital and police station. Other than dealing with the problems of

Bangladeshi workers the claimant was also asked to entertain Taiwanese engineers. For all this extra work the claimant was paid between RM20 to RM30 by COW1. This payment is not reflected in the salary as it was given as pocket money to claimant.

COW1 had testified that at any one time there were more than ten Bangladeshi workers in the company. COW1 denies allowing the claimant the next day off if claimant work late the night before. COW1 further stated that other staff had also assisted in handling the Bangladeshi problems. COW1 also clarified that the sending of Bangladeshis to hospital or police station was very rare. About 90% of the incidents happened during office hours. After office hours was very rare. These rare occasions that the claimant sent Bangladeshis to hospital or police station maybe only once a year. If this happened COW1 agreed that the next day the claimant was given the day off. From 1994 to 1998 the claimant had sent Bangladeshi workers only twice to the hospital.

The company's procedure for staff taking leave was to fill a leave form three days before the leave. For emergency cases staff can call the office and inform Wai, Foo or Aishah. But the next day they'll have to fill the leave form. For annual leave and medical certificate the company would pay in full. However the medical certificate must be from the company panel or general hospital. The company does not pay for medical certificate other than those on company panel. For leave without approval or reason the company does not pay for the absent day. This procedure is also confirmed by the claimant as the practice of the company.

The claimant admitted under cross-examination that he had been absent without leave. For example claimant admitted he was absent in January 1997 for three days. For February 1997 he was absent for five days and it was because of Chinese New Year. On the whole the claimant admitted he exceeded his leave entitlement for the whole year. For the days the claimant was absent his salary was deducted at RM40 a day. The claimant did not protest to his salary deduction. The claimant further admitted that the company paid him overtime if he worked late.

The claimant stated that he was absent from work because of attending Bangladeshi problems. But when asked again "were you absent because of Bangladeshi problems" and his answer was "I was absent but can't remember the reasons." When asked again by the company's counsel why he was absent on 11 and 12 August 1997 and his reply was "I can't remember." When further asked why he was absent from 22 to 24 September 1997 his answer "I can't remember, maybe Bangladeshi problem."

From the above evidence, the court can only come to the conclusion that the claimant was indeed absent for his own reasons or benefits. He would have probably been absent because of Bangladeshi problems for only a few days. It is in evidence that the claimant was absent without leave for the year 1997 for 37

days and for the eight months of 1998 for 25 days. To be absent for more than a month without leave for one year would undoubtedly affect the smooth running of the company.

Whether The Claimant Was Warned Before He Was Dismissed

The claimants submission was that he was not given any show cause letter to explain why he was taking excessive leave as alleged. That the company only produced one warning letter, CO4, only after being challenged by the claimant. There were no verbal warnings given although company's witness COW1 claimed to have given about 60 times over a period of three years.

It is settled law that before an employee is dismissed, he must be given a warning to inform him of his conduct. He must be given sufficient time to improve himself before any action could be taken.

The written warning was only given once to the claimant at CO4. The company's reason for not producing the letter earlier was because it was not signed by the claimant. The unsigned letter by the claimant was considered by the company as of no value and as such it was not included in the bundle of documents. However during the cross-examination of COW1 the claimants counsel had challenged the witness to produce the said letter and resulting in the document being produced.

The other issue ot the warning letter by the claimant was that the maker of the letter was not called to testify in court. The maker in this case is one Lin Wai Hong who has since left the company. This court however agrees with the company's submission that the claimant has testified that he had tried to serve a subpoena on Lin but was informed by his landlord that Lin had moved out from the house a long time ago. This clearly shows that Lin can no longer be contacted. The question of invoking s. 114(g) of the Evidence Act 1950 does not arise here. It is also the evidence of COW2 that COW1 had asked her to prepare the letter and she instead asked Lin to prepare. The letter was actually on the instruction of COW1.

COW2 testified that she personally handed the warning letter, CO4, to the claimant but the claimant refused to sign to acknowledge receipt of the letter. The court would agree with the evidence of COW2 that the claimant had refused to sign the warning letter. From the evidence it is clear that the claimant is the type of employee who does not like to sign letters given by his employer. He had refused to sign the new contact of employment with the company but kept on working with the company despite not signing the new contract. The court does not see any good reason why he should refuse to sign the new contract. This is despite the fact that the claimant denies being given the new contract to sign. There is no reason why the company did not ask the claimant to sign when others were asked to sign. It is not something new when COW2 testified that the claimant had refused to sign the warning letter. The contract of employment is not something against the claimant and yet he had refused to sign. The warning letter is something against the claimant and naturally he would refuse to sign.

Was The Claimant Verbally Warned For Excessive Leave Taken

The claimant's submission is that whether it is believable/reasonable that the company had verbally warned him about 60 times. As COW1 stated the 60 times was over a period of 2-3 years. The claimant further claims that the evidence of COW1 was not corroborated on the issue of verbal warnings. COW3 had testified during examination-in chief that the company had given the claimant warnings for the period of 1997 until August 1998. During cross-examination COW3 had testified that COW2 had given verbal warnings to the claimant in her office. He was not sure what time and who else were present that time. When asked further by the claimant's counsel COW3 said he could not remember how many times the verbal warnings were given.

The claimant himself when questioned during the cross-examination:

Q:Is it not true the boss and others in the company advised you many times not to be absent.

A:Yes.

During the re-examination of the claimant's testimony the claimant had answered the following question:

Q:Did your boss advise you not to be absent?

A:Although the company understands my problem but told me to try my best to come to work.

From the above evidence it is clear that verbal warnings were given to the claimant by the company. This is corroborated by the claimant himself and COW3. As to the number of times it was given, no one is sure whether it was 60 times or less. The fact remains that the warnings were given as acknowledged by the claimant.

Did The Company Condone The Claimant's Absenteeism

The claimant alleged that despite being absent excessively since 1997, the company did not take any action to terminate him. By the company's conduct in not taking action against the claimant, the company has waived/condoned its right to terminate the claimant. The company's witness COW1 had testified that in 1997 the company gave claimant increment. The increment was given because claimant was absent from work and COW1 thought that maybe claimant did not have enough money and so he gave claimant the increment. This evidence is corroborated by the claimant in his evidence as follows:

Q:Is it not true company even gave you increment as incentive for you to work hard.

A:Yes.

COW1 further testified as follows:

Q:Why not terminate the claimant that time (1997) instead of warning?

A:Because I can't find the right person to replace him and I hope claimant could improve and be punctual.

To another question, COW-I answered:

Q:You've given the claimant many verbal warnings why not sack the claimant earlier.

A:When claimant first joined he was good and later he was absent from work, I warned him and Miss Wai also talked to him and hoped the claimant would improve back to normal.

From the evidence/the company had not condoned/waved its right to terminate the claimant but has merely given the claimant the chance to improve his performance. The company had been very accommodating towards the claimant. Despite claimant's deteriorating performance due to his constant absence, the company was still hoping that the claimant would improve. However after a period of more than two years without any sign of improvement shown by the claimant, the company was left with no alternative but to take action.

The company has to consider and give priority to the general well-being and interests of the company over the interests of an individual employee.

The next question is whether the claimant came to work from 1 to 3 September 1998.

The claimant's evidence that he went to work from 1 to 3 September 1998, but found his punch card missing. He was told by a clerk to see COW1 but the claimant was not able to meet COW1. This continued until 3 September 1998. This evidence was supported by CLW2 Loke Chee Knon who was formerly working under the claimant's supervision. The witness has left the company on 8 February 2000. The claimant further avers that the letter of termination dated 28 August 1998 was only given to him on 3 September 1998.

The company's case is that the termination letter was handed to the claimant on the same day the letter was prepared that is on 28 August 1998 by COW2. The claimant did not turn up for work on 29 August 1998 and thereafter. 29 August 1998 was a working day but since the claimant was absent without leave he was not paid for the day. The claimant was paid for 30 August 1998 as it was a Sunday. The claimant produced a medical certificate for 29 August 1998 from a clinic which is not on the company's panel. The claimant is fully aware from his own testimony that the company would not pay for a medical certificate produced other then the company's panel of doctors. Despite this regulation by the company the claimant still produced a medical certificate which is not accepted by the company. That must have been the reason why the claimant did not protest for no payment of his salary on 29 August 1998.

Apparently there are two versions of what happened from 1 to 3 September 1998. The claimant's version he went to work whilst the company's version the claimant was absent from 29 August 1998 and thereafter. The company's story is supported by the evidence of COW1 who stated that on 1 and 2 September he did not tell any of his staff to tell the claimant to come again the next day. In fact COW1 said he is not sure whether the claimant came to office on 1, 2 and 3 September 1998 as he was seldom in the office.

COW2 avers that she gave the termination letter personally to the claimant on 28 August 1998. She doesn't know whether the claimant came to office from 1 to 3 September 1998 but she did not see him.

The claimant's story is supported by the evidence of CLW2. CLW2 testified that he met the claimant on the 1, 2 and 3 September 1998. The claimant told the witness that the claimant had received the termination letter on 3 September 1998. He remembers well because the claimant shook hands with him and the workers. However under cross-examination a question was posed to him.

Q:The incident happened in 1998, how can you be certain whether it was on 28 August 1998 or 3 September 1998.

A:When the problem happened the claimant did not inform me, actually I do not know when, whether it was 28 August 1998 or 3 September 1998 - Yes! I am not sure.

The witness later said he was sure the date was 3 September 1998 when re-examined by claimant's counsel.

From the court's observation as to the demeanour of CLW2, it is obvious that he is not sure of the date he met the claimant, whether it was on 28 August 1995 or 3 September 1998. COW2 did not see the claimant in office from 1 to 3 September 1998. The court would believe the company's story that the termination letter was given by COW2 to the claimant on 28 August 1998. The termination of the claimant was effective from 31 August 1998, why would the company wait until 3 September 1998 to give the termination letter to the claimant.

No Reason Stated For The Termination

The termination letter had stated "unfit for the assigned job responsibilities" as the reason for the claimant's termination. From the wording of the termination letter the claimant should be aware of why he was terminated. No one can perform his job functions well if he is missing from office too often. Being a supervisor the responsibility is more demanding as he has to show good example to those under his supervision. If a supervisor does not show commitment in his job, it would be difficult for his subordinates to do their jobs. In this situation it is obvious that the claimant is not able to perform all the jobs assigned to him due to his own doing. This the claimant should have known as the reason for his termination. Under the circumstances it is not necessary for the company to go into details of the cause of

termination.

The court agrees with the company's submission that it has been said that a reason for dismissal of an employee is a set of facts known to the employer or it may be beliefs held by him, which cause him to dismiss the employee. Per chairman Steve LK Shim in *Kama Morris Sdn Bhd v. Lee Chwee Say* [1990] 1 MELR 499; [1990] 1 ILR 435:

There may be a reason or principal reason for the dismissal. However, neither the Court nor the Company is required to dissect the reason or reasons in excessive analytical detail. Generally, it is not necessary for the Company to go into every sub-reason because in practice a reason and even a principal reason may be compounded of several elements which do not necessarily each in themselves constitute a separate reason. ... As Lord Cairns said in Abernethy:

If at the time of the dismissal the employer gives a reason for it, that is no doubt evidence, at any rate against him as to the real reason, but it does not necessarily constitute the real reason.

In a gist, the court must still look at the matter and determine what was the real reason.

Failure To Hold Domestic Inquiry

It has been held that failure to hold a domestic inquiry is not fatal to the case. In the case of *American International Assurance Co Ltd v. Seah Chee Teck*[1995] 2 MELR 76; [1996] 1 ILR 239 which states:

Our highest Court has 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 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 in accordance with the rules of natural justice.

The court agrees with the company's submission that s. 13 of Employment Act applies here, that is where the employer is exercising his contractual right to terminate the claimant. The claimant's termination was accompanied by payment of indemnity *in lieu* of notice.

After perusing all the evidence and testimonies of witnesses in court, the court is of the view that the company had proven its case on the balance of probabilities. The claimant was indeed absent for his own benefit instead of the alleged reasons of handling Bangladeshi problems. Claimant's absence is very serious in nature because of the number of days taken without leave is substantial. It would have been acceptable to the company if the claimant had only taken a few days in a year. Despite constant warnings by the company officials the claimant had not shown any improvement. In the circumstances the court is of the opinion that the disciplinary measures taken against the claimant is not excessive or unnecessarily harsh. Therefore the claimant's dismissal is with just cause and excuse. The

claimant's claim is hereby dismissed.