

INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 28(15)/4-827/17

BETWEEN

CHOO YIK KIAN @ CHU YIK KIAN

AND

KITACON SENDIRIAN BERHAD

AWARD NO: 1918 OF 2019

**Before : Y.A. TUAN FRANKLIN GOONTING
-CHAIRMAN**

Venue : Industrial Court of Malaysia, Kuala Lumpur

Date of Reference : 28.07.2017

**Dates of Mention : 13.09.2017, 28.11.2017, 29.01.2018, 29.03.2018, 12.04.2018
26.04.2018, 27.09.2018, 06.05.2019, 11.06.2019**

Dates of Hearing : 19.09.2018, 26.11.2018, 30.11.2018, 04.01.2019, 25.03.2019

**Representation : Mr. Harjit Singh
From Malaysian Trades Union Congress (MTUC)
Representative for the Claimant**

**: Mr. Tan Chi Sian
From Messrs P.Y. Hoh & Tai
Counsel for the Company**

REFERENCE

[1] By this ministerial reference under Section 20(3) of the Industrial Relations Act 1967 (the IRA) the court was required to hear and determine the Claimant's complaint of his dismissal by the Company on 15.10.2016.

AWARD

[2] Hearing proceeded over several non-consecutive days after which the court gave directions for the filing of written submissions by counsel. These submissions having been filed the court now hands down its award.

Claimant not wanting reinstatement

[3] Can the court adjudicate a purely monetary claim?

Towards the tail-end of his cross-examination the Claimant confirmed that he was now gainfully employed elsewhere and therefore did not want reinstatement. The dialogue went as follows:

Q: You want to accept or not?

A: If they give me this, now I have one good company with me. Very sorry on it.

Q: So, you already decided not to go on already, lah?

A: Yes.

Court: One moment, your position is that you have already decided not to go back, is it?

A: Yes.

[4] The law is that if a Claimant no longer wants reinstatement (as in this case) the Industrial Court ceases to have jurisdiction. This position is supported by the High Court case of **Holiday Inn Kuching v Elizabeth Lee Chai Siok** (1992) 2 CLJ (Rep) 521 (the fact of which, incidentally, are on all fours with the present case) where Haidar Mohd Noor J (as he then was) stated as follows: -

“These grounds can be conveniently dealt with together. It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s.20 (1) of IRA but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages in lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provisions of s.20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction.”

[5] As far as I know the Holiday Inn, Kuching case is still good law. The Court of Appeal dealt with this case in the case of **Malayan Banking Bhd. V. Mohd Bahari Mohd Jamli** (2003) 3 CLJ 651. It distinguished Holiday Inn Kuching on facts but

stated:

"...We would however like to make it clear that we do not in this appeal give any view whether Holiday Inn, Kuching was rightly decided or not."

[6] The cases cited by the Claimant's representative in his written submissions, which express a contrary view, are Industrial Court cases. I incline towards the Holiday Inn Kuching decision since it emanates from a superior court and is therefore binding authority. The contrary view borders on conferring civil court jurisdiction on the Industrial Court to adjudicate monetary claims and this, to me, veers from the intention of the legislature. The Claimant might initially have wanted reinstatement but now clearly does not. He now wants only money but conceals this from the court, and only makes known his real motive for maintaining his pursuit against the Company upon being cornered by cross-examination. This is an abuse of this court's process.

[7] In these circumstances the court ceases to have any more jurisdiction over the matter. Accordingly, the case is struck off for want of jurisdiction.

[8] Nevertheless the court will proceed to give an overview of the salient facts leading up to the Claimant's dismissal.

[9] The Company's General Manager (COW-1) testified that as follows:

- (i) The Claimant was first taken into employment on 5.11.2009 as a Project Manager cum Site Manager. He (COW-1) had received negative feedback regarding the Claimant's performance and work attitude from the Claimant's immediate superior i.e. the Senior Project Manager. Based on the Claimant's Performance Appraisal Form for 2010 (COB pages 1-2) the Claimant's performance did not meet the criteria for the position of Project Manager cum Site Manager especially in writing and communication skills. The Company tried to arrange a more suitable position for him requiring less supervision and communication, so the Claimant was promoted as Quality Assurance Quality Control Manager. However, the Company continued to received criticism regarding his performance and attitude. The Claimant was counselled from time to time to improve his work performance.
- (ii) However, in 2016, the Claimant's failure to carry out his tasks as Quality Assurance Quality Control (QAQC) Manager caused serious problems to the Company. Numerous complaints in this regard were received from the Senior Manager of the TQM Department, M. Kumaran, and also from workers in that department. The Company had issued 7 warning letters (COB-1 pages 9-15) to the Claimant giving details of the complaints against him. He failed to give any proper explanation in regard to these complaints.
- (iii) Thereafter, pursuant to discussions with him, the Claimant was reassigned as a Senior Site Supervisor with his benefits unchanged except for the omission of his

transport allowance. The Claimant accepted this reassignment. The letter of reassignment of post is found in COB page 3.

- (iv) Thereafter the Claimant was excessively late for work, that is, he failed to report to the work-site on time. He was also absent from 10.3.2016 to 15.5.2016, giving his hospitalisation as a reason but for which he did not furnish any documentary evidence like medical certificates or even a letter from the hospital. By his letters dated 20.5.2016 and 3.6.201 (CLB pages 9-15) the Claimant requested a change of working hours giving the reason that he needed to send his child to a day care centre.
- (v) Effective 23.12.2013 the Company's working hours for site staff were from 8.00 a.m. to 6 p.m. Nevertheless, the Company considered the Claimant's request to change his working hours temporarily to 8.30 a.m. to 6.30 p.m. vide a memo (COB page 4). However, the Claimant continued coming late and warning letters (CLB pages 22-23) were issued to him.
- (vi) Again, the Company engaged in discussions with the Claimant who insisted that he could not adhere to the original working hours. With this stalemate both parties agreed that the Claimant's employment be terminated and the Company then issued a letter of termination (COB, page 6) which the Claimant willingly acknowledged.

[10] The said Kumaran (COW-2) testified as follows:

- (i) He had monitored the Claimant's work and had guided him on how to perform the works. However, he received negative feedbacks from the staff. Nevertheless, he gave the Claimant opportunity and time to improve his performance. However, he was forced to issue the Claimant with a warning letter on 5.3.2016 (COB page 9) when he failed to carry out his QAQC functional works at the constructive site for a period of 4 months and he failed to prepare proper site visit reports. Further, he (COW-2), issued 5 warning letters (COB pages 10-14) stating the misconduct committed by the Claimant and requiring him to provide written explanations to these complaints. However, he failed to do so within the stipulated time.
- (ii) The Claimant also failed to report to work at the Company's headquarters on 14.3.2016 and 15.3.2016 without any notice or explanation. COW-2 was again forced to issue another warning letter dated 15.3.2016 (COB page 18). Again the Claimant failed to provide his written explanations within the stipulated time.
- (iii) Additionally the Claimant excessively came late to work. In May 2016 he applied to change his working hours to 8.30 a.m. to 6.30 p.m. The Company had approved this on a month to month basis with the requirement to re-apply each month. However, in July and August, the Claimant came late to work excessively despite not applying to change his working hours, resulting in COW-2 issuing 2

warning letters (COB pages 5-17). Again, the Claimant failed to respond to these warning letters.

- (iv) COW-2 then discussed the Claimant's poor performance with COW-1 following which the Company decided to reassign the Claimant as Senior Site Supervisor which the Claimant accepted. However, complaints and feedback continued to be received concerning his work attitude and performance. Therefore, the Company had a discussion with the Claimant following which the Claimant's employment was terminated by mutual agreement and he was paid compensation in accordance with his letter of employment.

[11] It was the Claimant's contention that he had been discriminated against as other employees had also been late but no disciplinary action had been taken against them. The Company refuted this and called two of the Claimant's ex-colleagues, COW-4 and COW-5. COW-4 testified that he had informed COW-1 that he would be slightly late every morning because he and others stayed back, in August and September 2016, to work late to rush to complete a project at that time. His immediate superior made him sign a letter to record his reasons for being late in that period. COW-5, too, testified to similar effect, adding that he had explained his lateness to COW-1. His explanation was accepted and that was why no further action was taken against him.

[12] The Claimant is aggrieved that in the month in which his employment was terminated, that is, October 2016, he had not been late to work for even one day. This does not impress the court because it ignores the numerous other times he was late.

[13] In his written submissions the Company's counsel describes the Claimant as a "difficult" employee. He is being kind with such an understatement. What comes across from the foregoing overview of the salient facts of the case, is an employer overstretching its patience to accommodate the personal issues of one lone employee. To the court's mind the Company's final act of terminating the Claimant's employment was with just cause and excuse.

End Note

[14] As an end note the court must mention the recalcitrance demonstrated by the Claimant whilst under cross-examination, by his refusal to face up to the facts confronting him. He was disputatious and, at times, to the point of taking on himself the role of counsel, so much so that the court had to remind him several times of his place and role in the witness box.

HANDED DOWN AND DATED THIS 3rd DAY OF JULY 2019

-signed-

**(FRANKLIN GOONTING)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**