INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 13/4-946/18

BETWEEN

JASPAL KAUR A/P AJIT SINGH

AND

LEONFAST SDN. BHD.

AWARD NO.: 2346 OF 2018

BEFORE	:	**DATO' TAN GHEE PHAIK – CHAIRMAN**
VENUE	:	Industrial Court Malaysia, Kuala Lumpur
DATE OF REFERENCE	:	05.04.2018
DATES OF MENTION	:	21.05.2018; 25.06.2018; 16.08.2018; 03.09.2018
REPRESENTATION	:	Mr. Anthony Gomez M/s Gomez & Associates Counsel for the Claimant Ms. Low Ai Siew M/s Soo Thien Ming & Nashrah Counsel for the Respondent

REFERENCE:

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (Act 177) arising out of the dismissal of **Jaspal Kaur a/p Ajit Singh** (hereinafter referred to as "the Claimant") by **Leonfast Sdn. Bhd.** (hereinafter referred to as "the Respondent") on 29.05.2018.

AWARD

[1] On 15.04.2017, the Claimant filled up an Employment Application Form when she was applying for the post of Human Resource and Admin Manager in the Respondent Company. At p4 of the application form, she was asked the following questions and her reply is as follows:

> "f. Have you been discharged from employment for whatever reason?
>
> Claimant's answer: **No**
>
> j. Have you been involved in any trade dispute with previous employers or made reference to the Ministry of Labour or Industrial Relations Court for a Decision/Award? YES/NO (If yes, please specify).
>
> Claimant's answer: **No**

[2] On 09.05.2017, the Claimant was offered the position that she had applied for. The terms and conditions of her employment are shown in pp9-13 of the Company's Bundle of Documents. In Clause 18 of the letter as shown in p13, the Claimant had indicated her acceptance of the terms and conditions of her employment with the Respondent Company. Clause 18 of the terms and conditions is as follows:

"18 Reference and Background Check

Your employment is conditional upon the Company being satisfied with your references and background checks. In the event that you commence employment before the Company has completed your reference and background checks and, upon completing subsequent checks, the Company in its sole and absolute discretion is not satisfied with any aspect of your references or background checks, your employment will come to an immediate end."

[3] Subsequently, the Respondent came to know that the Claimant had in fact made a representation against one of her former employer regarding her dismissal in Case No. 19/4-724/11. By Award No. 928 of 2012, the Industrial Court handed down an Award in which both the Claimant and her previous employer had entered into by consent. A copy of the Award handed down on 09.07.2012 is exhibited by the Respondent at pp25-26 of the Company's Bundle of Documents. The Award is for a reference arising out of the dismissal of the Claimant by Malaysia Design and Innovation Centre @ Limkokwing University on 19.03.2010 for a sum of RM30,000.00.

[4] It is to be noted that at p3 of the Company's Bundle of Documents, where the Claimant is asked to list down her employment history stating the name of her employer and the period that she had worked with that particular employer, the Claimant had left out the name of the employer from whom she had received the sum of RM 30,000.00. It can clearly be seen the Claimant has clearly misled the Respondent by stating "No" as

her reply to Questions (f) and (j) in the application form and the Respondent has every right to terminate her with immediate effect by relying on Clause 18 of the terms and conditions of her employment, as set out above.

[5] On 29.05.2017, the Respondent terminated her employment contract with effect from 31.05.2017. She was given early release and her last working day was on 29.05.2017. She was also paid two weeks' notice salary in lieu of notice from 01.06.2017 until 14.06.2017 as provided in the first para of Clause 4 in the terms and conditions of service of her offer of employment even though she need not be paid in accordance with the provision in Claimant's as set out above.

[6] The Claimant then made a representation to the Industrial Relations Department ("IRD"). Both the Claimant and the Respondent were called for a meeting on 18.07.2017. As a result of the meeting, the Respondent agreed to reinstate the Claimant to her former position effective from 27.07.2017. The letter for her reinstatement is adduced by the Respondent at p17 of the Company's Bundle of Documents.

[7] When the Claimant failed to turn up for duty on 27.07.2017, the Respondent wrote to the Claimant to inform her that the offer of

reinstatement is null and void. On 29.07.2017, the Claimant wrote to the Respondent stating that she takes objection to the letter of reinstatement where the Respondent had purportedly changed one of the terms of conditions of her employment. In the letter of reinstatement, the Respondent had informed the Claimant that her performance will be assessed every two months and that she is required to report all her work to the Operation Manager. The Claimant viewed the reminder regarding the assessment of her performance once every two months during her probation period of six months as unjustifiable vide her letter dated 29.07.2017 which is adduced at p19 of the Company's Bundle Documents.

[8] By a letter dated 31.07.2017, the Company explained to the Claimant the reason why the Company has to assess her performance every two months during the period of her probation. At para 3 the Company states as follows:

> "3. As per the letter of offer for employment dated 09.05.2017 and as admitted by you in your aforesaid letter, you were under probation for six (6) months. The probation period is to enable the company to decide whether to confirm your appointment. This of course, necessitates the Company to carry out periodic assessments on your performance throughout the probation period. In the circumstances, we deny that the bimonthly assessment stated in our letter dated 24.07.2017 constitutes an additional term and condition of your employment as alleged by you."

[9] Having perused the documents and applying the law as it stands, it is trite that every employer is bound to assess his employees during the probation period and it is the duty of the employer to inform the employee of the areas of his work that is found to be wanting or poor, and to give the employee sufficient time to improve. This has been made clear by the Industrial Court time and again through the Awards made by the Court. In the case of **Aznalisa Yaacob v Malayan Banking Berhad** [Award No. 987 Of 2015] [2015] 2 LNS 0987, the Industrial Court held as follows:

> *"It is trite law that in the case of poor performance the employer has to establish the following before the dismissal of the workman:*
>
> *i. That the workman was warned about her poor performance;*
>
> *ii. That the workman was accorded sufficient opportunity to improve;*
>
> *iii. That notwithstanding the above, the workman failed to sufficiently improve her performance".*

[10] Inherent in the above pronouncement is the right and in fact duty of the employer, to continually monitor the performance of the worker in order to be able to supply feedback to the employee about her performance and to provide sufficient opportunity to the employee to improve her performance. In **IE Project Sdn. Bhd. vs Tan Lee Seng** [1987] 1 ILR 165 (Award No. 56 of 1987), the Court is of the view that –

> *"Dismissal for unsatisfactory work or non competency should most invariably have been **preceded by warning.** In the event of poor performance being the reason for the dismissal one should endeavour to **show that the work***

complained of was performed subsequent to warning". [Emphasis added].

[11] Thus, the Company is correct to state that carrying out periodic or bimonthly assessments on the Claimants performance during her probation is not an additional term to her contract of employment. It is the inherent duty of the Company to do so. That being the case, the rejection by the Claimant of the offer of reinstatement made by the Respondent to the Claimant is wrong in law.

[12] However, notwithstanding that the Claimant had committed gross misconduct by giving false answers in the Employment Application Form and in rejecting the Respondent's offer of reinstatement, her case has been referred to the Industrial Court. The Court views such references to the Industrial Court as an abuse of process and such cases ought to be dismissed *in limine* as the Claimant cannot fulfil the threshold test that the dismissal had been unjust or inequitable or that he had come to a court of equity with clean hands.

[13] In order to ensure a world class workforce, where there is integrity and honesty, in all cases where there is clear evidence of fraudulent answers having been given during the job interviews or in the job application forms, regarding the Claimant's qualifications or past employment record,

such dishonesty must be met with swift justice and the employee must be terminated forthwith, unless the employer is willing to condone such acts. By terminating the Claimant with immediate effect, the Respondent has indicated clearly in no uncertain terms that it does not condone such actions. Faced with the lies or false statements in the job application forms, the employer will lose the trust and confidence he has reposed in the employee. Without that trust and confidence, the employer will definitely find it difficult to work with the employee.

[14] Under Section 20(2) of the IRA, when the Director General of Industrial Relations (DGIR) receive any representations from the workman that he has been dismissed without just cause or excuse, the DGIR is under a statutory obligation to take steps to settle the matter expeditiously. Thus, he ought to take cognisance of the fraudulent statements made by the Claimant and inform the Claimant of the wrong doing of the Claimant. No employer will want to take back or reinstate an employee who has not been honest in his job application form and his CV if he can no longer repose any trust or confidence in the employee. Thus there is no likelihood of the representations being settled unless at this stage, the Claimant informs the DGIR that in view of the clear transgressions on her part, she wishes to withdraw her representation to the DGIR.

[15] If the Claimant does not withdraw her representations, the duty of the DGIR is then to inform the Minister of Human Resources of the dishonesty perpetrated by the Claimant. The IRA does not give the DGIR the power to dismiss the Claimant's case at that point. However, the IRA requires the DGIR to inform the Honourable Minister the representations made by the Claimant cannot be settled. The Honourable Minister has to be notified pursuant to section 20(3) of the IRA. At this stage, upon being notified of the representations made by the workman, the Honourable Minister must refer those representations that **prima facie** or on the face of the records shows that the Claimant has been unfairly dismissed to the Industrial Court.

[16] In a clear case such as the present one is, where the Claimant has fraudulently answered questions posed to her in the Employment Application Form and where she has given a Declaration that all her answers are true and correct, and has agreed that she can be dismissed instantaneously if the particulars made by her in the Employment Application Form are found to be untrue or incorrect, the Honourable Minister must know on the face of the record that it is not fit or just to refer such a case to the Industrial Court. Therefore, in such an instance, the case by the workman must fall in the Honourable Minister's Office and not be referred to the Industrial Court. The IRA is designed to not let in frivolous and vexatious cases or to allow Claimants to abuse the Court

process and cause hardship to the employers who had carried out the termination process fairly.

[17] On top of that, the paramount consideration must be the speed in which such cases are settled. Every business enterprise will want to continue with its task of production and making profits and not be burdened with frivolous claims from its ex-employees. Thus, the procedure of reconciliation has been enshrined in the IRA to promote quick and speedy settlement of cases instead of having a long drawn case in the Industrial Court. Referring clear cases such as the present case to the Industrial Court in order not to be seen as hindering workers' rights does not promote workers' rights or a harmonious working environment. Instead, it gives rise to many other problems such as not engendering a workforce with integrity and creating a false sense of entitlement amongst workers. Employment rights should certainly be improved, but not by referring fraudulent cases to the Industrial Court particularly as many courts worldwide recognise the rule that an employee may be discharged for dishonest behaviour.

[18] The Declaration made by the Claimant is as follows:

Declaration
"I, hereby declare that all particulars and documents given by me on this application form are to the best of my knowledge and belief, true and correct. I understand that if or at anytime after my employment, the information given on this form are found to be false, incorrect or incomplete, the Company reserves the right to dismiss my service without notice or compensation. **(signed by Claimant)** **15.04.2017** **Date** _____ **Signature of Applicant**

[19] In this case, notwithstanding that there is such a declaration made by the Claimant in her Employment Application Form, the Claimant has been paid two weeks' salary *in lieu* of notice when in actual fact, she should have been terminated forthwith without any compensation. And she would have been fairly and justly dismissed. Nevertheless, the Honourable Minister has thought it fit to refer the Claimant's representations to the Industrial Court when it should not have been referred. Even though this is clearly a wrong exercise of the Honourable Minister's power of reference, the Court has to hear the reference and hand down an Award.

[20] The Honourable Minister must not lend his hand to assist the Claimant in making a fraudulent or frivolous claim against his employer. Neither must any assistance be accorded to any Claimant who does not come to the Industrial Court with clean hands as it is a Court of equity. In order to ensure a workforce that has high standards of integrity and that is honest, the DGIR should play its role in ferreting out dishonest Claimants who ought not to be shielded by the law or who abuses the court process. The number of serial claimants in the Industrial Court has risen and all employers are well advised to make the necessary searches in the Industrial Court website which is provided free of charge.

[21] Employers on whom the fraud has been perpetrated will suffer a double jeopardy when they have to defend frivolous or fraudulent claims from dishonest employees. Not only do they have to spend time away from their business enterprises but they also have to expend money on legal fees. This is clearly unfair to them and employees should not be allowed to exploit the system at will.

[22] In this case, the Claimant worked for barely two weeks as stated in para 3(4) of her SOC. The Respondent decided of its own accord to pay the Claimant two months' salary as compensation for the so-called unfair dismissal and this was accepted by the Claimant who then withdrew her case after accepting the RM20,000.00. The reason the employer did that

is because it wanted to move on and not waste any more time on an unpleasant and non-fruitful matter.

[23] The Court is reminded of the majority decision in the case of **La Kaffa International Co. Ltd. v. Loob Holding Sdn. Bhd.** (Civil Appeal No. W-02(IM) (IPCV)-1261-07/2017). In dismissing the Respondent's application for stay on the Court Appeal decision, the Court of Appeal held as follows:

> **"[7]** For reasons stated above, the application is dismissed with costs and *en passant* state as follows:
>
> a) Courts should not lend its hand to persons who on the face of record are seen to be cheats.
>
> b) In India, such category of persons are called 420's. The terminology originates from the Indian Penal Code section 418, 420 and many other sections. Our provisions are similar. For example, our section 418 states:
>
> > "418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment for a term which may extend to seven years or with fine with both."
>
> c) 420's flourish well in compromised governments with assistance of compromised Judiciary. The 420's existence in actual fact will compromise the rule of law as well as the concept of accountability, transparency and good governance. The lack of these virtues promote corrupt practices which ultimately affects the nation and its wealth. A judge by His Oath of Office ought to take cognizance of 420's *at limine.*

d) Perceived 420's in all sectors inclusive of the Government as well as the judiciary, has brought supreme shame to the rule of law in many countries.

e) In this time and era, the court must arise to ensure perceived 420's are not provided with discretionary order even in civil cases of this nature, that too at the Court of Appeal stage".

[24] To allow the Industrial Court and its processes to be used by dishonest workmen will surely bring discredit to a well-functioning system. Thus, the DGIR must be vigilant in ensuring that such cases are weeded out and the exercise of the Minister's power to refer representations to the Court for an Award is not abused. The Industrial Court must guard against being used as a tool to extort money from employers. This Court views such references with great dismay and it is clear that the Industrial Relations Department has failed in its duty in promoting a fair and just working environment in order to achieve developed nation status. The Honourable Minister must not abdicate from his duty in ensuring that such cases are not referred to the Industrial Court. As the Claimant has withdrawn her case after receiving the payment from the Respondent, the case is hereby dismissed.

HANDED DOWN AND DATED THIS 26th DAY OF SEPTEMBER 2018

(DATO' TAN GHEE PHAIK)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR