

INDUSTRIAL COURT OF MALAYSIA

CASE NO : 3/4-52/06

**BETWEEN
PRAGASH A/L SUBRAMANIAM**

**AND
DIETHELM LOGISTICS SERVICES SDN. BHD.**

AWARD NO : 327 OF 2008

**Before : TUAN FRANKLIN GOONTING – Chairman
(Sitting Alone)**

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 14.9.2005

**Dates of Mention : 14.2.2006, 22.2.2006, 21.4.2006, 30.6.2006,
3.8.2006, 19.9.2006, 20.8.2007, 9.1.2008
and 13.2.2008**

Dates of Hearing : 19 & 20.9.2007

**Representation : Mr. Kula Suppiah,
From NUCW,
Representative for the claimant.**

Lt. Kol. (R) Hj. Mohd Akhir Bin Hj. Hamzah,
From MEF,
Representative for the respondent.

Reference :

This is a reference made under Section 20 (3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Pragash a/l Subramaniam** (hereinafter referred to as “the Claimant”) by **Diethelm Logistics Services Sdn Bhd** (hereinafter referred to as “the Respondent”) on 10.5.2004.

AWARD

This Ministerial reference under section 20(3) of the Industrial Relations Act 1967 required the Court to hear and determine the claimant's complaint of his dismissal by the respondent on 10th May 2004.

From the evidence the following facts have been established. On 20th April 2004 was driving a reach truck in the respondent's warehouse when it collided with the security cage of another reach truck which was stationary at the time. Another worker, Zamre Bin Ismail, who was in the cage, was thrown out of the cage and plunged some 15 feet onto the concrete floor and sustained severe injuries to his spine and left wrist.

On 28th April 2004 a domestic inquiry was held to hear two charges against the claimant:

- a) You have failed to adhere and observe the safety procedures and guidelines while using the reach truck on that particular day (refer attached "Maklumat Keselamatan").

- b) You have failed to observe the speed limit imposed by the company while driving the reach truck within the warehouse premises.

The inquiry panel found the claimant guilty on both charges and recommended that he be dismissed. His dismissal ensued on 10th May 2004.

In this Court the respondent called five witnesses among whom were Zamre (COW-4) and the inquiry panel member (COW-5). Since the fact that the accident had occurred is not in dispute it is not necessary to go into details of the testimonies of these witnesses. It is also not in dispute that the accident would not have happened if the claimant had lowered the mast of his reach truck at the material time. The claimant, who gave his testimony-in-chief vide a witness statement in Malay, but who could also understand and speak English, admitted as much:

Q : Why did you not lower the mast before moving?

A : My mistake (says this in English).

Q : So you did not follow the maklumat keselamatan?

Agree?

A : (Nods his head).

The claimant sought to embellish the story by alleging that the other reach truck was sticking out or encroaching his path. That this was an obvious afterthought is borne out by the cross-examination on this point:

Q : Q/A14 “it was sticking out”. What proof? Any proof?

A : No.

Q : Did you say this at the domestic inquiry?

A : No.

Put : So, your statement is an afterthought?

A : Ulang sekali.

Q : (Repeats).

A : (Hesitates).

Not sure (in English).

Evaluation and findings

Both parties filed lengthy submissions but the Court will confine itself to the essentials and keep in mind its function in a section 20(3) reference which is, firstly, to determine whether the misconduct complained of by the respondent as the ground for dismissal was in fact committed by the claimant and, if it was, secondly, to satisfy itself that such misconduct constituted just cause and excuse for the dismissal. (see ***Milan Auto Sdn Bhd v. Wong Seh Yen*** [1995] 4 CLJ 449).

Having considered the totality of the evidence including the notes of domestic inquiry, the testimonies of the respondent's witnesses and the claimant with particular regard to his admissions the Court finds that the misconduct he was charged with has been duly established. In fact the claimant's representative concedes this in his written submission which is in essence more of a plea in mitigation.

It now remains to be considered whether this proven misconduct merited the extreme penalty of dismissal. The claimant had attended briefings on safety measures conducted by the respondent so he knew what duties and standard of care was required of him in operating the respondent's reach trucks. He had been involved in a similar accident before in the respondent's warehouse after which he was given counselling and advice. He had been given a second chance and he squandered it. His representative puts forward three points in mitigation of the misconduct. Firstly, he submits that the accident was unintentional. This cannot be a mitigating factor; if it were intentional it would not be an accident. Secondly, he argues that the respondent's policy of rewarding employees with a Key Performance Indicator (KPI) rating tantamounted to "dangling a carrot" in front of them whilst still expecting them to follow rules. This is mitigation? Thirdly, he

submits that had the respondent ensured that workers such as COW-4 were properly secure in their cages while performing their duties, COW-4's injuries would have been considerably reduced. Again, this is a mitigation factor? The Court views it as warped and convoluted reasoning serving only to aggravate the case for the claimant. It will be a sad day for industrial relations when an employee, after accepting blame for a misconduct, can, by way of mitigation if you will, deflect and throw back to his employer the blame for the **consequences** brought about by that very misconduct. Equity and good conscience militate against this sort of thinking. No credit is given to the claimant's union representative for apparently encouraging the claimant with this perverse notion.

In the unmitigated circumstances of the case the Court is hard put to find reasons to interfere with the respondent's decision to dismiss the claimant. The dismissal was with just cause and excuse.

The claim is dismissed.

HANDED DOWN AND DATED THIS 26th DAY OF FEBRUARY 2008

Signed

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