INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 3(6)/4-2370/19

BETWEEN

WONG WAI CHE

AND

QUEST BPO SDN BHD

AWARD NO. : 201 OF 2021

Before	:	**PUAN ANNA NG FUI CHOO - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	4.12.2019
Dates of Mention	:	23.1.2020, 9.7.2020
Date of Hearing	:	8.10.2020
Claimant's Written Submission	:	6.11.2020
Company's Written Submission	:	9.11.2020
Claimant's Written Submission in Reply	:	19.11.2020
Company's Written Submission in Reply	:	20.11.2020

Representation : Mr. Alfred Vun Yun Fui
From Messrs Davis & Low
Counsel for the Claimant

Lt Kol (B) Hj Mohd Akhir bin Hj Hamzah
From Malaysian Employers Federation
Representative for the Company

Reference :

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the alleged dismissal of **Wong Wai Che** (hereinafter referred to as "the Claimant") by **Quest BPO Sdn Bhd** (hereinafter referred to as "the Company") on 15 May 2019.

AWARD

[1] The Ministerial reference in this case required the court to hear and determine the Claimant's complaint of alleged dismissal by the Company on 15 May 2019.

Background

[2] This case was first registered in Court 6, another division of the Industrial Court Malaysia. It was fixed for hearing on 8 and 9 October 2020 but there was no presiding Chairman in Court 6 to hear the case after the learned Chairman of the said Court was transferred. Subsequently on 23 September 2020, the learned President of the Industrial Court transferred the case to this court for the hearing to proceed on the scheduled hearing dates.

Facts

[3] The Claimant alleged he was dismissed by the Company from his position as a Territory Sales Manager (Asia Pacific). He averred he was appointed to the said position with effect from 27 August 2018. The Claimant's last drawn gross salary was RM13,600.00 which were inclusive of RM1,200.00 car allowance and RM450.00 of healthcare allowance. The Claimant averred that by a letter of employment dated 26 July 2018 exhibited at pages 18 to 20 of the Claimant's Bundle of Documents (CLB) (the first letter of offer of appointment) issued by the Company, had offered him the said position with effect from 27 August 2018. The said letter stated,

> "Wong Wai Che
> -Present-
>
> Dear Sir,
>
> **PEO EMPLOYMENT LETTER FOR THE POSITION OF TERRITORY SALES MANAGER (ASIA PACIFIC)**
>
> Quest BPO Sdn. Bhd. (QBPO) is pleased to offer you (Employee) the position of Territory Sales Manager (Asia Pacific) with effect from 27th August 2018. Your employment with QBPO shall be governed by and is subject to the Professional Employment Service Agreement, by and between QBPO and CorDEX Instruments Ltd (CorDEX), effective 20th July 2018 (the "PES Agreement"). In accordance with the PES Agreement, you have been hired by QBPO as a leased employee, and QBPO, as the legal employer on record, will be responsible to submit payroll taxes, pension funds, social security and secure worker health/compensation insurance on your behalf.".

[4] Among the terms stated in the letter of offer of appointment were the following:

(a) Post Offered : Territory Sales Manager (Asia Pacific)

(b) Probationary Period : 9 months

(c) Basic Monthly Salary : RM 13, 600.00 per month

(d) Car Allowance : RM 1,200.00

(e) Healthcare Allowance : RM 450.00 per month.

[5] The Claimant also averred that by a letter of employment dated 20 July 2018 (the second letter of offer of appointment) issued by a company named CorDEX Instrument Limited had offered him the position as Territory Sales Manager (Asia Pacific) based in Malaysia with effect from 20 July 2018. The second letter of appointment (pages 21 to 37 of CLB) also contained the terms of employment as the first letter of offer of appointment. The Claimant averred that the first letter of appointment was the supplement of the second letter of appointment.

[6] The second letter of appointment dated 20 July 2018 was an agreement made between the Claimant with his address in SS2, Petaling Jaya, Selangor, Malaysia and CorDEX Instruments Limited (the UK Company), a company incorporated and registered in England and Wales. Under clause 2 of the agreement (page 23 of CLB) titled "Term of Appointment", it is expressed:

(a) The Company shall employ WCW and WCW shall serve the Company on the terms of this agreement.

(b) The Appointment shall commence on the Commencement Date and shall continue, subject to the remaining terms of this agreement, until terminated by either party giving the other not less the following written notice...

[7] The Company is registered with the Companies Commission Malaysia with its address at Upper Penthouse, Wisma RKT, off Sultan Ismail, Kuala Lumpur. The Company pleaded in its Statement in Reply (SIR) that it acted as a payroll agent for the payment of the Claimant's monthly remuneration. The engagement of the Company by the UK Company (CorDEX) was via a Professional Employer Service Agreement (referred to as the PES Agreement) dated 20 July 2018 (pages 123 to 130 of the Company's Bundle of Documents 1 (COB1)). The Company's business profile covers the provision of outsourced payroll and accounting services in Malaysia only. The Company pleaded that it issued a PES agreement letter dated 26 July 2018 to the Claimant as a leased employee on similar designation of Territory Sales Manager (Asia Pacific) as per the Claimant's designation with CorDEX. Therefore, the Claimant's employment with the Company was to be governed by the PES agreement as pleaded.

[8] CorDEX Instruments Limited was incorporated and registered in England and Wales with its registered office at Unit 1 Owens Road, Skippers Lane Industrial Estate Middlesbrough, TS6 6HE, United Kingdom (UK). The UK Company has no entity in Malaysia to

administer the monthly remuneration for the Claimant whose job role was to source business for CorDEX from the Asia Pacific region. Consequently, CorDEX engaged the Company as a payroll agent.

[9] It was the Company's case that CorDEX had employed the Claimant (abbreviated as “WWC” in the contract). The said employment of the Claimant was vide the agreement dated 20 July 2018 signed by the Claimant and the director, Marcus Halliday (page 37 of CLB). The Claimant's employment commenced from 27 August 2018 and it was with an annual salary of RM163,200.00 and a probation period of nine (9) months.

[10] The substantive facts of the Claimant's employment with the UK Company *vide* the said agreement above are as follows:

(a) The Claimant was sourced, interviewed and selected by CorDEX;

(b) The Claimant was engaged by CorDEX to carry out its business operation with payment of the Claimant's monthly salary deposited to the bank account of the Company acting as a payroll agent as per the PBS Agreement;

(c) The Claimant was employed under the direction and control of CorDEX; and

(d) The Claimant held himself as an employee of Cordex in the discharge of his duties as the Territory Sales Manager (Asia Pacific).

[11] CorDEX terminated the Claimant's employment with immediate effect *vide* an email (page 17 of CLB) on 15 May 2019 at 12:16pm from Tony Holliday to Karolyn Scott (finance staff of CorDEX) and Julie (Payroll Manager of the Company) copied for information to the Company and the Claimant. The brief email reads,

> "Hi Julie,
>
> I have taken the decision to terminate Alex's employment, effective immediately.
>
> Please let me know what you need from us in order to close down this operation.
>
> Kind regards,
>
> Tony".

The Function of the Industrial Court

[12] The Industrial Court's function was stated by his Lordship Salleh Abbas LP in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd* [1988] 1 CLJ (Rep) 298 at page 302:

> "When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.".

[13] The burden is on the Claimant to prove that there existed a contract of employment between him and the Company, making the Company his employer (the "master and servant relationship") before the court can pursue further to hear this ministerial reference on his alleged dismissal by the Company. The burden of proof was highlighted in the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 1 LNS 258, a decision of his Lordship Dato' Haji Abdul Kadir Bin Sulaiman J (as he then was) when he stated:

> "The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the Court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise. ...".

The Hearing

[14] Two witnesses testified in the hearing, one each for the Claimant and for the Company. The Claimant testified for his own case and acknowledged that he reported to Mr. Marcus Halliday and Mr Tony Holliday from the UK Company (page 48 of CLB). The Claimant also said Tony Holliday is the owner of CorDEX and a director of the

Company. The Claimant told the court that he mainly worked from home in Malaysia and prepared all the reports from home.

[15] The Claimant testified that he knew about his dismissal from CorDEX *vide* an email dated 15 May 2019 from Tony Holliday found at page 17 of CLB. The Claimant said it was the second email from Tony Holliday, six (6) hours after he had sent the first email above to the Claimant. The Claimant said he had asked Tony Holliday about the reason for his dismissal and the Claimant was told that Tony Holliday was unhappy with his poor performance. The Claimant said he only received the email termination letter from CorDEX whilst the Company did not issue him any formal termination letter.

[16] The Claimant gave several reasons in his witness statement as to why he alleged that the Company had victimised him and this had then led to his dismissal. First of all, he highlighted the fact that he was hired by the Company as a leased employee and the Company was the legal employer on record in Malaysia. Secondly, the Company was responsible to submit payroll taxes, pension funds, social security and secure worker health/compensation insurance on his behalf although he was hired by the UK Company. Thirdly, he is a Malaysian citizen and a Malaysian-based drawing salary in local Malaysian currency and contributing to Malaysia's income tax as a Malaysian employee. Fourthly, the Claimant strongly denied that his poor performance had led the UK Company to suffer any monetary loss. Fifthly, he was also paying his personal income tax as a Malaysian employee. Sixth, the Company had frequently delayed in making payment for his monthly salary. Seventh, the Claimant was dissatisfied that not only the UK

Company had terminated him by email but the Company in Malaysia had stopped paying him salary without issuing him any termination letter nor abiding Malaysia's Employment Law. Eighthly, the Claimant was angry that the Company did not advise Tony Holliday on the compliance needed to terminate a local employee. Instead, they just executed the direction from their client without first conducting investigation and standing up on his behalf. Ninth, the Claimant was mentally and financially stressed by the frequent late payment of his monthly wages.

[17] The sole witness from the Company was Mr. Lee Wee Tak (COW1), the Head of Outsourcing Services for the Company. COW1 explained that his involvement with this case started when the Company was engaged by CorDEX Instrument Ltd as its payroll agent to host the Claimant in their payroll records. As the Head of Outsourcing Services, COW1 oversees employee hosting services and also the outsourced payroll team that provided outsourced payroll services to CorDEX, the UK Company which had recruited the Claimant as its employee to work for them.

[18] There was a Professional Employer Service Agreement (PES Agreement) dated 20 July 2018 which was signed between the Company and CorDEX. COW1 also testified on the obligations of the Company under the PES Agreement relating to the Claimant's employment with CorDEX. He explained that in interpreting the PES Agreement and to carry out their administrative process, it required the Company to issue an employment letter to inform the Claimant that he had been hired by the Company as a leased employee to perform the duties of CorDEX with reference to the employment contract between

the Claimant and CorDEX dated 20 July 2018. The Company was required to calculate the monthly payroll which included the gross and net salaries, all applicable statutory deductions and contributions as well as approved staff claim amount. Once the calculations were approved by CorDEX, CorDEX would transfer the required amount of funds and the Company had to pay the Claimant, and complete all applicable statutory filings and remittances in fulfilling its function as the payroll agent of the UK Company.

[19] COW1 also attempted to explain the definition of the term “leased employee” and clarified that “leased employee” is a business model that is widely practised in the United States (making a reference to https://www.benefit-resources.com/blog/leased-employees). In short, a leased employee is a person who receives a pay check from one employer, a “staffing firm” but is performing services for another company, a “recipient company”.

[20] COW1 stated that the email from CorDEX on 15 May 2019 at 12:16pm was the first time the Company received notification of the Claimant's termination as the email was copied to Julie Goh, the Company's payroll outsourcing manager. COW1 testified that he then communicated with Tony Holliday to obtain more information about the termination of the Claimant. Tony Holliday had confirmed that the Claimant was dismissed by him. The five (5) salient points of the discussion between Tony Holliday and COW1 were as recorded in the confirmatory email at page 131 of COB1.

[21] After the Company was notified of the Claimant's termination, Julie Goh replied to Tony Holliday acknowledging receipt of the email on his decision and instruction. The Company then advised Tony Holliday that the termination needed to proceed in accordance with the employment letter signed by the Claimant and CorDEX. Julie also forwarded a copy of the Malaysian termination regulations for his reference and reminded Tony Holliday that the Company was still chasing for the previous month's salary. It was also mentioned that as a payroll agent, the Company would proceed to calculate the Claimant's pro-rated May 2019 salary up to 15 May, any balance of paid holidays due to him and notice in lieu payment for Tony Holliday's approval and advice.

[22] COW1 testified that there was a provision on dispute settlement in the contract of employment of the Claimant with CorDEX. According to clause 28 (“Governing Law and Jurisdiction”) of the contract, both parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the agreement or its subject matter or formation.

Evaluation of Evidence and Findings

[23] Before the court embarks to decide if there was a dismissal of the Claimant by the Company, the court has to examine the more crucial issue of whether the Claimant is a 'workman' under the Act *vis a vis* the Company. Section 2 of the Act provides that 'workman' means “any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such

person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute".

[24] Section 2 of the Act also provides for the definition of 'contract of employment': "contract of employment" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman. In this case, the Company had issued the Claimant a PES agreement letter. The Company also agreed that the Claimant was a leased employee and the Company was his legal employer on record.

[25] In the case of *Dr. A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at pages 310 – 311, his Lordship Chang Ming Tat FJ said:

> "As for the determination whether Dr. Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital v. Dr. A Dutt* [1981] 1 MLJ 115, said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or of service...".

[26] The court observes that there were two (2) employment contracts signed by the Claimant, first with CorDEX on 20 July 2018 and the

second agreement with the Company on 26 July 2018. From the chronology of the dates and the events, it is clear to the court that the Claimant's letter of appointment from CorDEX had came before the Company's letter of appointment.

[27] The Claimant agreed under cross examination that he had signed an employment agreement with CorDEX and that the said UK employment agreement specified in detail his terms and conditions of employment with CorDEX. The Claimant also admitted under cross examination that one of the terms and conditions he unequivocally acknowledged was the clause stating that any dispute or claim in respect of the UK employment agreement shall be governed by and construed in accordance with English law and the parties to the agreement irrevocably agreed that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claims.

[28] The Claimant also confirmed under cross examination that he sent Weekly Sales Report to CorDEX as part of his responsibility and duty. The submission of the Weekly Sales Report was among the other nine (9) listed duties (pages 23 and 24 of CLB) that made up of the Claimant's duties with CorDEX. However, the Claimant did not have to report to the Company for any work done. For the services rendered to CorDEX, the Claimant was paid a salary of RM163,200 per annum for the period of nine (9) months probation period as stipulated under clause 6 of the agreement (page 25 in CLB). That payment was paid to the Claimant through the Company being the appointed payroll agent.

[29] The court also found that the nature of the Claimant's employment with CorDEX was dealt with at length by COW1 in his witness statement but the evidence was not challenged by the Claimant. In fact, the Claimant acknowledged the fact that the Company was merely a payroll agent as reflected from his responses to the questions posed to him under cross examination as follows:

> "Q : Look at page 36 COB1. You knew that your monthly salary was paid through an Outsourcing Payroll Company, not direct to you from the UK Company.
>
> A : Yes, I agree.
>
> Q : Look at page 43 in COB1. I refer you to your statement "I read Hi Julie, our payroll in UK is last Fri of the month". Agree that was your tacit acknowledgement that the UK Company was at all material times your employer?
>
> A : Yes.
>
> Q : PUT: The documents at pages 36 and 43 in COB1 clearly reflect that your salaries were paid by the UK Company through the Malaysian Company?
>
> A : Yes.
>
> Q : Put: "the Summarized Terms which are Summary of Remuneration and Benefits listed in your employment letter with the Malaysian Company at page 20 in CLB were solely for the purpose of fulfilling its very function as a payroll agent to its client; your employer the UK Company".

A : Yes, this is my remuneration package. Given by Quest BPO.".

[30] The testimony above reinforces the Company's case that it was not the Claimant's employer**.** COW1 had been asked what role the Company could do as a legal employer for the Claimant since the Company had provided the letter of employment to the Claimant. COW1 referred to the text at page 18 CLB which reads as follows:

> "In accordance with the PES Agreement, you have been hired by QBPO as a leased employee, and QBPO, as the legal employer on record, will be responsible to submit payroll taxes, pension funds, social security and secure worker health/compensation insurance on your behalf.".

[31] Thus, COW1 testified that the above were the responsibilities of the Company. When questioned about "leased employee", COW1 answered it was already explained in his witness statement (restating his answers to Q&A No. 12 to 14 of his witness statement COWS1). In respect of the medical insurance given to the Claimant which appears at page 20 of CLB, COW1 testified that the Claimant was registered on the Company's payroll to enable the Company to be a payroll agent. The Company also hired its own employees to carry out payroll and accounting services and they are entitled for personal accident and hospital surgical coverage. Administratively, it was thought rather inconvenient to exclude and include certain people for the coverage. The Company therefore thought it was a good thing to accord the additional protection and facility to the Claimant too.

[32] The Claimant was asked under cross examination who had dismissed him that he claimed as wrongful and was an unfair dismissal. The Claimant replied that he was terminated by Tony Holliday to whom he had reported to at that time as Tony Holiday was the director of CorDEX after his predecessor Marcus Halliday. From the evidence adduced and in particular from the Claimant's testimony, it is lucid to the court that the Company as the hosting and payroll agent was only responsible for ensuring that all statutory submissions and returns not confined only to EPF but SOCSO and EIS too, were complied with and duly paid to Malaysian authorities. That was the core business of the Company from which it earned its fee as a payroll agent. The court cannot agree that via this platform there existed an employee and employer relationship between the Claimant and the Company.

Decision

[33] The employment contract in CorDEX's letter head dated 20 July 2018 signed by the Claimant and Mr. Marcus Halliday set out the Claimant's terms of employment as Territory Sales Manager (Asia Pacific) for CorDEX and this was acknowledged by the Claimant himself. All the Claimant's monthly claims were made using the staff reimbursement from CorDEX and not the Company. An email dated 22 July 2019 from Tony Holliday confirmed that the Claimant was a staff of CorDEX. The Claimant was also reporting to CorDEX and never to the Company as an employee. Clearly, there never existed an employer employee relationship despite the Company using vague terms that the Claimant was a “leased employee” and it was the Claimant's legal employer. It is the court's considered opinion that the Claimant was not

a workman as the contract of employment he signed with the Company did not employ him under the contract for hire or reward.

[34] The court is satisfied that the Claimant's employer was CorDEX which is a foreign entity as it was a company incorporated in the UK. The Claimant also testified to the effect that he was reporting to Tony Holliday, his superior at CorDEX while the Company was only a payroll agent. The Claimant had also signed a contract of employment with CorDEX.

[35] It is established law that the Industrial Court is not vested with extra territorial jurisdiction. The court has decided that the Claimant's employer was CorDEX, a foreign company registered in the UK. The Industrial Court is a creature of statute and the Act is clear in that it is intended by the Legislature to regulate relations between a workman and an employer within Malaysia.

[36] Since the Company was not the appointing or the dismissing authority, the issue of whether the Claimant's dismissal was with just cause or excuse does not arise. The Court of Appeal decided in the case of *Multicore Solders (M) Sdn Bhd v. Yeo Kuei Chwan Donny* [2012] 3 MELR 767 and was stated by his Lordship Anantham Kasinather JCA at page 772:

> "With respect, in our judgement, the Industrial Court ought not to have ruled on the second issue once it had determined that the proper employer was not before the court. Once the Industrial Court ruled that MSS was the employer of the respondent, in our judgement, it had no

jurisdiction to go on and ask the question 'was there a dismissal'.".

[37] The burden of proof was on the Claimant to prove that a contract of employment had existed between him and the Company. Having considered the law, the facts and the evidence adduced by the Company and the Claimant, the court finds that the Claimant has failed to prove that the Company was his employer and that it had dismissed him. Accordingly, the Claimant's claim against the Company is dismissed.

[38] In arriving at this decision, the court has acted in equity, good conscience and considered the substantial merits of the case without regard to legal technicalities and legal form.

HANDED DOWN AND DATED THIS 9 DAY OF FEBRUARY 2021

Signed

(ANNA NG FUI CHOO)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR