Sena Diecasting Industries Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2023] MLJU 1419

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

WAN AHMAD FARID WAN SALLEH J

PERMOHONAN SEMAKAN KEHAKIMAN NO WA-25-292-07/2019

30 April 2023

Hussin bin Mohd Razak (Mohd Irwan Mohd Mubarak) for the applicant.
Rajindar Singh s/o Kaher Singh (with Clinton Nicholas Gomez) (Rajindar Singh Veriah & Co) for the respondents.

Wan Ahmad Farid Wan Salleh J:

JUDGMENT

[1]The applicant company is a die casting manufacturer.

[2]The 2nd respondent joined the applicant company on 1.7.2001 as General Manager with a starting salary of RM14,500. By a letter dated 23.6.2005, the applicant company appointed the 2nd respondent as the executive director with an increased salary of RM18,000.

[3]The 2nd respondent is also a shareholder of the applicant company.

[4]The 2nd respondent's last drawn salary was RM34,207.00.

[5]The dispute at the Industrial Court, which is the subject matter of this judicial review, is over the alleged constructive dismissal of the 2nd respondent by the applicant company.

[6]On 24.4.2019, the Industrial Court issued an award in the 2nd respondent's favour. The Industrial Court held that the dismissal of the 2nd respondent was without just cause or excuse. It then ordered the applicant company to pay the 2nd respondent compensation in lieu of reinstatement for the sum of RM1,026,210.00 ("the Award").

[7]Aggrieved by the Award, the applicant company commenced this judicial review proceedings seeking *inter alia* for an order of certiorari to quash the same.
At the Industrial Court

[8]The 2nd respondent's case at the Industrial Court is as follows.

[9]By an agreement dated 6.10.2015 ("the Loan Agreement") between the applicant and Optimax Healthcare Services Sdn Bhd ("Optimax"), the applicant agreed to advance RM2,500,000 to Optimax. The loan sum was disbursed on the same day. According to cl 4.1 of the Loan Agreement, the parties agreed that the interest on the loan sum was at 1% per month.

[10]On 20.4.2016, at the request of one Tan Boon Hock, the managing director of the applicant company, a sum of RM420,000 was further loaned by the applicant to Optimax. An additional sum of RM580,000 was subsequently advanced to Optimax on 25.4.2016, also at the request of Tan Boon Hock.

[11]Considering the amount loaned under the Loan Agreement and the two advances made in April 2016, the total amount loaned by the applicant to Optimax was RM3,500,000.

[12]The RM3,500,000 loaned to Optimax were monies borrowed by the applicant from Public Bank Berhad ("PBB Loan"). It is not in dispute that interest under the PBB Loan was borne by the applicant company.

[13]Tan Boon Hock and one Lim Sho Hoo are the directors and shareholders of Optimax.

[14]In addition to the amount advanced to Optimax, the applicant company also loaned money to Sena Letrik (M) Sdn Bhd ("Sena"). As of October 2016, the amount owed by Sena was RM2,000,000 (cumulatively referred to as "the said Loans"). It is the 2nd respondent's case that in applying for the advance, Sena represented to the applicant company that it would pay interest at 1% per month on the outstanding loan sum.

[15]The directors of Sena are *inter alia* Tan Boon Hock and Lim Sho Hoo. Both of them are also the controlling shareholders of Sena.

[16]The 2nd respondent asserted that he had persistently requested Tan Book Hock to cause Optimax and Sena to repay the said Loans together with interests to the applicant company.

[17]By an email dated 27.4.2017, Michelle Tan Sing Chia ("Michelle Tan"), who is Tan Boon Hock's daughter, had emailed the applicant informing him that no interests were to be charged on the said Loans. In response, the 2nd respondent emailed Tan Boon Hock, seeking confirmation that the applicant company would not be charging interest on the said Loans.

[18]On 8.6.2017, an argument broke out between the 2nd respondent and Tan Boon Hock on the alleged misconduct of the 2nd respondent over the use of outsourced workers by the applicant company. In explaining the situation, the 2nd respondent insisted that the use of outsourced workers by the applicant company was a joint decision that Tan Book Hock was fully aware of.

[19]By an email dated 21.6.2017, Michelle Tan informed the 2nd respondent that the applicant's Human Resources and Finance divisions were now under her joint supervision. Under the circumstances, Michelle Tan indicated to the 2nd respondent that she needed access to the related documents. The 2nd respondent sought Tan Boon Hock's response to the said request but did not receive any reply.

[20]In a further email dated 22.6.2017 to the 2nd respondent, Michelle Tan stated she would approve all the staff claims and insisted that all payment vouchers had to come to her office for approval.

[21]The 2nd respondent took umbrage at the sudden role of Michelle Tan in the applicant company. It is the 2nd respondent's position that Michelle Tan was never an employee of the applicant company. Hence, she had no executive role in the day-to-day running of the applicant company.

[22]A meeting was eventually held on 4.7.2017 to resolve the issue.

According to the 2nd respondent's record, at the meeting:

(a) Tan Boon Hock directed the 2nd respondent to resign as the director of the applicant company.

(b) The 2nd respondent insisted that the direction be given in writing.

(c) Tan Boon Hock asserted that should the 2nd respondent refuse to resign, he would call a shareholders' meeting to remove the 2nd respondent from the directorship of the applicant company.

(d) The 2nd respondent was also directed to vacate his room and move elsewhere.

(e) Tan Boon Hock would take over the Finance and Human Resources divisions of the applicant company. The two divisions would have to report to him directly.

(f) The 2nd respondent was directed by Tan Boon Hock to be in charge of Operation and Business Development only.

[23]Dissatisfied with the new role of Michelle Tan and consequently, his reduced responsibility, the 2nd respondent, through an email, demanded Tan Boon Hock to rescind his instructions and the threat for the 2nd respondent to resign. In the email, the 2nd respondent indicated that he reserved the right to seek legal redress if he did not receive a written reply within 48 hours.

[24]In response to the ultimatum, Tan Boon Hock wrote an email dated 6.7.2017 to the 2nd respondent. However, instead of confirming or explaining the course of events for the past two days, Tan Boon Hock blamed the 2nd respondent on the management of the foreign workers by the applicant company. As a result, Tan Boon Hock intimated that:

(a) He would ask the applicant company to hold a domestic enquiry into the 2nd respondent's conduct.

(b) A shareholders' meeting would be called to discuss whether the 2nd respondent had carried out his duties as the director of the applicant company.

[25]An Extraordinary General Meeting was held on 14.7.2017 in the absence of the 2nd respondent since he was on medical leave. At the meeting, it was resolved that the 2nd respondent would take a 3-week leave and was to resume duty after that.

[26]However, on 18.7.2017, the 2nd respondent was informed by Tan Boon Hock that the applicant company would not issue any letter instructing the 2nd respondent to take leave. Instead, the 2nd respondent was tasked to take care of a customer who would be arriving on 22.7.2017 and would remain until 26.7.2017.

[27]The 2nd respondent complied with the instruction. Tan Boon Hock also indicated that he would not accept the 2nd respondent taking the 3-week leave and insisted that the 2nd respondent come to work as usual.

[28]After receiving conflicting messages from various parties, including one from Tan GH, a representative from Alliance Corpn Manufacturing Sdn Bhd, the 2nd respondent, vide his letter dated 1.8.2017, notified the applicant company that he was treating himself as having been constructively dismissed:

> As from (*sic*) 1st of August 2017 I shall treat your acts as a dismissal from my employment with you.

The findings of the Industrial Court

[29]Three issues were deliberated by the Industrial Court. They are as follows:

(a) Whether the 2nd respondent was a workman under s 2 of the Industrial Relations Act 1967 ("IRA");

(b) Whether the 2nd respondent had been constructively dismissed by the applicant company; and

(c) If the answer to (b) was in the affirmative, whether the dismissal was with just cause and excuse.

[30]The findings of the Industrial Court are as follows:

(a) The applicant company initially employed the 2nd respondent as General Manager.

(b) Although the 2nd respondent was later appointed as the executive director, he had no authority to make any final decision since he had to refer it to Tan Boon Hock. This modus operandi is the same as when the 2nd respondent was the General Manager.

(c) There is no evidence that the 2nd respondent's initial contract was nullified when he was appointed as the executive director of the applicant's company.

(d) The 2nd respondent had to come to work from 8.00 am to 5.00 pm, and he was paid a monthly salary like any other employees of the applicant company.

[31]For the aforesaid reasons, the learned Chairman of the Industrial Court held that the 2nd respondent was a workman under s 2 of the Industrial Relations Act 1967 ("IRA").

[32]As to the second issue, the learned Chairman of the Industrial Court held that on many occasions, the applicant company's conduct, in particular that of Tan Boon Hock, went against the root of the contract. According to the

learned Chairman, one instance of the fundamental breach could be seen in the removal the 2nd respondent's executive powers on issues relating to Finance and Human Resources. The role of the 2nd respondent was confined to business development and operation. There was also evidence that Tan Boon Hock had directed the 2nd respondent to resign.

[33]According to the learned Chairman, the most critical point was the confusion about the directions given to the 2nd respondent. Was he asked to take leave? Was the instruction to take leave withdrawn? In any event, the 2nd respondent was asked to vacate his room and was instructed to operate from the conference room.

[34]The Industrial Court also held that the alleged misconduct of the 2nd respondent on the foreign workers was unfounded. The foreign workers supplied by Agency Pekerjaan GN Worldwide Sdn Bhd had been approved by the applicant company since 2011. The Industrial Court further found that Tan Boon Hock was fully aware of the services rendered by the agency since he was the one who signed for payment to the same.

[35]In the circumstances, the Industrial Court further held that the chronology of events clearly evinced the applicant's intention to take away the 2nd respondent's power and authority. According to the learned Chairman, the events constituted a fundamental breach of the contract as it substantially changed the 2nd respondent's duties and status; *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* [1996] 2 CLJ 49.

[36]Since there was a fundamental breach in the contract of employment, the learned Chairman of the Industrial Court found that the 2nd respondent was justified in treating the employment contract as having been lawfully breached.

[37]Taking into the totality of the evidence, the Industrial Court was of the view that the dismissal of the 2nd respondent was without just cause and excuse – hence the Award.
At the High Court

[38]There are various issues raised by the applicant company in challenging the decision of the learned Industrial Court. The challenge is mainly anchored on the finding of facts of the learned Chairman of the Industrial Court.

[39]The general proposition of law is that the finding of facts based on the credibility of the witnesses is immune from judicial review; see *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & Anor Appeal* [2001] 4 MLJ 97 **CA**. The same proposition can be seen in another judgment of the Court of Appeal in *Quah Swee Khoon v Sime Darby Bhd* [2001] 1 CLJ 9 **CA**. The Court of Appeal held that:

> If a judge to whom application is made for certiorari inquiries into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses.

[40]However, as I alluded to earlier, that is the general position. There are circumstances where a reviewing Court can intervene. The Court of Appeal in the recent case of *Ng Chang Seng v Technip Geoproduction (M) Sdn Bhd & Anor* [2021] 1 MLJ 447 **CA** outlined the following proposition:

> Based on the test laid down in *Petroliam National Bhd v Nik Ramli Nik Hassan* we must ask whether the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably have come to.

[41]The long and short of it is that a reviewing Court may only intervene if, and only if, having regard to the evidence before it, the Industrial Court have come to a decision that is so manifestly unreasonable that no reasonable tribunal, similarly circumstanced, would have arrived at.

[42]What is particularly revealing and glaring in the evidence before the Industrial Court is after having treated himself as having been constructively dismissed with the issuance of the 1.8.2017 letter, the 2nd respondent continued signing the applicant company's cheques. The 2nd respondent admitted this during cross-examination:

> A/C: I put it to you that even after the first of August 2017, when you claim[ed] that you have been constructively dismissed, you still continue to sign cheque[s] on behalf of the company.
>
> R2: Yes.

> A/C: I put it to you that your claim today is to be reinstated as [an] executive director of the company.
>
> R2: Yes.

[43]The evidence given by the 2nd respondent that he continued signing the cheques after having treated himself as being constructively dismissed had been ignored by the learned Chairman in her grounds of judgment. In fact, she did not touch on this part of the evidence at all.

[44]With respect, I find this failure to address the evidence to be wanting. This evidence is relevant because it denotes condonation. A workman cannot treat himself to be unfairly dismissed by his employer on the alleged fundamental breach of the employment contract but at the same time continue working as if there was no such breach.

[45]The reverse, I believe, is also true when it comes to an employer. In *MUI Bank Bhd Johor v Tee Puat Kay* [1993] 4 CLJ 69, it was held that misconduct is deemed condoned when an election is made to retain an employee guilty of alleged misconduct. In that case, the respondent was an officer at the applicant bank. He was accused of misappropriating the Bank's money. Having found that the respondent was guilty of misappropriation, the Bank allowed the respondent to continue working in the Segamat Branch. Subsequently, the respondent was transferred to the Bank's headquarters in Kuala Lumpur. He worked there for about five months before he was dismissed. For this reason, the Industrial Court found that the applicant had "condoned" the respondent's actions.

[46]Alauddin J (later PCA), in dismissing the Bank's application for judicial review, held:

> The question that arises here is whether the industrial court was correct in law in finding 'condonation' on the facts of the matter. To my mind, misconduct is deemed 'condoned' where an election is made to retain an employee guilty of misconduct.

[47]To my mind, the law of condonation is equally applicable to a workman. What is sauce for the goose is sauce for the gander.

[48]Unfortunately, this part of the evidence and its consequential legal implication escaped the attention of the learned Chairman of the Industrial Court. Had she addressed that part of the 2nd respondent's evidence and the legal proposition that entails, she would have arrived at a different conclusion. The decision is so manifestly unreasonable that no reasonable tribunal, similarly circumstanced, would have arrived at what the Industrial Court had within the meaning of the judgment of the Court of Appeal in *Ng Chang Seng*.
Findings

[49]For the reasons aforesaid, the Award of the Industrial Court is tainted with irrationality that makes it amenable to judicial review. As I alluded to earlier, the decision is said to be so outrageous in its defiance of logic that no sensible person who applied his mind to it could have arrived at it. It has failed the *Wednesbury* unreasonableness test.

[50]An order of certiorari is hereby issued to quash the Award. [51] Costs is fixed at RM3,000 subject to allocatur.

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