SEGARAN VENOO

v.

PPG COATINGS (MALAYSIA) SDN BHD

Industrial Court, Kuala Lumpur
Eddie Yeo Soon Chye
Award No: 1048 of 2012 [Case No: 13/4-326/2011]
1 August 2012

Civil Procedure: *Pleadings - Importance of - Claimant alleged that company had breached or failed to comply with Collective Agreement with regard to payment of retrenchment benefits - Failure to plead alleged shortfall and non-compliance - Parties bound by their pleadings*

Dismissal: *Retrenchment - Redundancy - Whether there was a redundancy situation that justified claimant's retrenchment - Whether retrenchment exercise clearly within managerial right and prerogative of company - Payment of retrenchment benefits by employer - Applicability of Collective Agreement to claimant's case - Failure to plead alleged shortfall and non-compliance with collective agreement -Whether dismissal with just cause or excuse*

The claimant was initially employed as a General Worker in the Maintenance Section in ICI Paints (Malaysia) Sdn Bhd ('ICI') in 1981. In 1999, ICI's business was transferred to the respondent company. The claimant's employment was also transferred vide a letter dated 27 October 1999 whereby the claimant worked as a Maintenance Worker (I) in the respondent. Subsequently, the respondent issued a "restructuring" letter dated 28 November 2008 to the claimant whereby his position was made redundant. The claimant's employment was effectively terminated from 25 December 2008 and redundancy benefits were paid to the claimant.The claimant brought a claim against the respondent, alleging that the respondent had breached or failed to comply with the Collective Agreement ('CA') with regard to the calculation of payment of redundancy benefits, owing the claimant a shortfall of RM85,240.08. The issues before the court were whether there was a redundancy situation afflicting the respondent which necessitated the respondent embarking on a retrenchment exercise, and whether the claimant's dismissal was with just cause or excuse.

Held (dismissing the claimant's claim):

(1) It is an established principle in industrial relations jurisprudence that the burden is on the employer to prove on a balance of probabilities his case against the claimant. In this instance, the respondent had discharged the burden of proving the existence of a redundancy situation on a balance of probabilities to justify the retrenchment of the claimant as a Maintenance Worker (I). There was substantive evidence adduced to show that the claimant was retrenched due to a restructuring of the PPG Group in order to reduce costs due to the Group's poor performance, and that the claimant was not the only employee

retrenched from the company. The respondent had legitimate reasons to reorganise its business and implement a headcount exercise. The decision to carry out the retrenchment exercise was clearly within its managerial right and prerogative, taking into account the severe difficulties faced by the respondent at that time. (paras 20, 23-27)

(2) The CA was effective from 1 February 2009 and would remain in force for three years. It was clear that the claimant's retrenchment date of 25 December 2008 preceded the effective date of the CA, thus rendering the CA inapplicable to the claimant's case. The issue relating to the alleged shortfall and non-compliance with the CA was never pleaded in the Amended Statement of Case, and parties are bound by their pleadings. (para 29)

(3) The managerial power to retrench the claimant by the respondent was exercised *bona fide*. The respondent had established, on a balance of probabilities, the reasons for the dismissal of the claimant for redundancy. Taking into consideration the totality of the evidence and bearing in mind s 30(5) of the Industrial Relations Act 1967 to act in equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the claimant's dismissal was with just cause or excuse. (paras 32-33)

Case Commentaries

- Where an employee's services are terminated and the employer provides a reason for the termination, it is the duty of the Industrial Court to examine whether the reason is proven and an acceptable labour practice. Employers may dismiss employees on the grounds of misconduct, poor performance or redundancy. The requirements that must be met to the satisfaction of the Industrial Court are different in each of these situations.

- Employers have the right to decide upon the appropriate size for their enterprise at any point of time. If there are workers who are surplus to the needs of the employer, redundancy is a valid reason for the termination of the services of the redundant employees. However, the employer is expected to comply with accepted industrial practices in the process of retrenching workers.

- An employer who retrenches workers is usually required by the Industrial Court to prove that a redundancy situation existed at the time of the retrenchment exercise. To be acceptable, retrenchment must be genuine or *bona fide* and not an attempt to victimise workers that the employer wishes to be rid of for one reason or another.

- When an employee is retrenched, he is entitled to a termination or retrenchment benefit if he falls within the scope of the Employment Act 1955 (Act) or if he is entitled to such a benefit under a Collective Agreement. Employees who are outside the scope of the Act or who are not protected by a Collective Agreement may not be entitled to any retrenchment benefit, unless there is a clause to that effect in their individual contract of employment.

- The Industrial Court has stated that an employer, faced with a major economic recession in the worldwide economy which has a negative effect on the profitability of the company, has the right to restructure in order to save costs and ensure the continued survival of the company. Sales figures, operating costs and profit and loss accounts may need to be provided to the court as evidence of the financial problems facing the company.
- Parties at the Industrial Court are bound by their pleadings. If an issue is not included in the pleadings, it cannot be raised during the hearing at the court.

Case(s) referred to:

Arockyadassan a/l Sinnappan v. Fujitsu PC Asia Pte Ltd [2012] 3 MELR 450 [Award No 924 of 2012] Case No 15/4-1573/07 (refd)

Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 (refd)

Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 2 MLJ 129 (refd)

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 (refd)

Maxis Communications Bhd v. Harvinderjit Singh [2004] 3 ILR 1011 (refd)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2012] 1 MELR 129 (refd)

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ (refd)

Legislation referred to:

Industrial Relations Act 1967, ss 20(3), 30(5)

Other(s) referred to:

Dunston Ayudurai, *Industrial Relations in Malaysia, Law & Practice*, 3rd edn, pp 255, 256

Counsel:

For the claimant: Alicia Loh Yun Ping; M/s Sandosh Anandan

For the company: Donovan Cheah; PPG Coatings (Malaysia) Sdn Bhd

AWARD

Eddie Yeo Soon Chye:

Background

[1] This is a reference by the Honourable Minister of Human Resources under s 20(3) of the Industrial Relations Act 1967 on 29 December 2010 arising out of the dismissal of Segaran a/l Venoo (the "claimant") on 25 December 2008 by PPG Coatings (Malaysia) Sdn Bhd (the "respondent").

[2] The hearing of this case commenced 13 February 2012 and was duly concluded on 3 April 2012. The claimant's solicitors, Messrs Sandosh Anandan filed the written submissions on 24 April 2012 and submissions in reply on 22 June 2012. The respondent's counsel from South East Asia PPG Coatings

(Malaysia) Sdn Bhd filed their written submissions on 31 May 2012 and submissions in reply on 2 July 2012.

Brief Facts

[3] The claimant commenced employment in the ICI Paints (Malaysia) Sdn Berhd as Boilerman (Maintenance Worker II) on 11 November 1980 as reflected in the claimant's letter of appointment in COB2, p 1. Subsequently the claimant was offered an employment as General Worker in the maintenance section with effect from 1 October 1981 (COB 2, p 3).

[4] The respondent states that it is part of the PPG group of companies ("PPG Group"), headquartered in Pittsburgh, United States of America. The PPG Group is a manufacturer of *inter alia*, coatings and speciality products, and operates in more than 60 countries worldwide. In 1999, pursuant to the worldwide acquisition of the automotive refinish and industrial coatings business of the ICI Group by the PPG Group, ICI Malaysia transferred its automotive refinish and industrial coatings businesses in Malaysia to the respondent company. Pursuant to the transfer, the claimant's employment was transferred to the respondent company in letter dated 27 October 1999, which was accepted by the claimant.

[5] The claimant subsequently worked as a Maintenance Worker (I) repairing machines in the respondent company and drawing a basic salary of RM2,543.00 per month. The respondent issued the claimant a letter entitled 'Restructuring' dated 28 November 2008 (CLB1, p 1; COB1, p 4) signed by Gerard Joseph, Manufacturing Director, South-East Asia and Mar Azleena Omar, Director, Human Resources Coatings, South-East Asia & India whereby the claimant's position in the respondent company was made redundant and the claimant's employment was terminated effective from 25 December 2008 as follows:

"Private & Confidential
November 28th, 2008

SEGARAN A/L VENOO
Present

Dear Segaran,

RESTRUCTURING

The recent global economic slow down has affected our business resulting 35% reduction in production volume. Based on this, we are forced to look at reducing our operating costs, which includes employees, in order to maintain the profitability of the company and continue our presence in Malaysia.

With that, we wish to inform you that your position is no longer available and has been made redundant effective December 25th, 2008. Your last working day with the company will be on December 24th, 2008. Please find attached the details of your terminal payment for your reference.

Please return to us all the company' s properties which in one way or another have been in your possession during your employment.

We take this opportunity to thank you for your past contributions and at the same time to wish you good luck in your future endeavours.

Yours sincerely,

Sgd	Sgd
GERARD JOSEPH	MAR AZLEENA OMAR
Manufacturing Director	Director, Human Resources
South-East Asia	Coatings, South-East Asia & India"

[6] The details of the claimant's terminal payment amounting to RM143,349.82 exh in CLB1, p 2 and COB1, p 5 signed by Mar Azleena Omar, Director, Human Resources Coatings, South-East Asia & India dated 30 November 2008 attached to the restructuring letter are as follows:

PPG COATINGS (M) SDN BHD
TERMINAL PAYMENT: SEGARAN A/L VENOO (118299)
DATE JOINED: 1 October 1981
CALCULATION UP TO: 24 December 2008

		RM	RM
December Basic Salary	RM2,543 x 18/23	1,990.17	
Tea Allowance	RM17.60 x 18/24	13.77	
Notice *In-Lieu*	RM2,543.00 x 1	2,543.00	
Fixed Bonus	RM2,543 x 2 x 359/366 - RM2,543(paid in Sept)	2,445.73	
Leave Encashment	RM2,543.00/26 x 15 days	1,467.12	
Redundancy Benefit	RM2,543.00 x 27.23 months x 2	138,491.78	
Total Income			146,951.57
Less			
Outstanding Computer Loan		2,610.00	
NUPCIW		10.00	
AIA		25.00	
EPF		942.00	
Socso		14.75	
PCB		-	
		.....	
Total Deduction			3,601.75...
Net salary to pay upon tax clearance			**143,349.82**

[7] In total, the claimant was paid the sum of RM 146,951.57 consisting of the claimant's pro-rated salary for December 2008, the claimant's prorated tea allowance for December 2008, one month's salary *in lieu* of notice notwithstanding that the claimant was already given one month's notice of retrenchment, pro-rated fixed bonus, leave encashment and the redundancy benefits. The claimant received a sum of **RM143,349.82** upon tax clearance and a total deduction of RM3,601.75 comprising outstanding computer loan, NUPCIW, AIA, EPF, Socso and PCB.

The Law

[8] The function of the Industrial Court is explicitly stated in the case of *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 where the Federal Court decided *inter alia* as follows:

> "Where representations are made and are referred to the Industrial Court for enquiry, it is the duty to that court **to determine whether the termination or dismissal is with or without just cause or excuse**. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper inquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it".
>
> [emphasis added]

[9] The term "redundancy" has been defined by Dunston Ayudurai in *Industrial Relations in Malaysia, Law & Practice*, 3rd edn at pp 255 and 256 as follows:

> "Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer, and its usual consequence is retrenchment ie, the termination by the employer of those employees found to be surplus to his requirements after the reorganisation. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus".
>
> [emphasis added]

[10] In the case of *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235 at p 241, the Court of Appeal decided as follows:

> "Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a **question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case**. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. **However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide***".
>
> [emphasis added]

[11] The relevant questions for consideration and determination by this court are as follows:

(i) whether the redundancy situation and consequent retrenchment was a colourable exercise by the employer respondent to get rid of the employee claimant concerned - see *Food Specialities Bhd v. Esa bin Mohamed* (Award No 74 of 1989); and

(ii) whether the managerial power to retrench for redundancy was exercised *bona fide* or for collateral reasons by the employer Respondent - see *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747.

[12] The burden of proving redundancy on which the claimant's dismissal was grounded lies with the respondent company. See *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155.

The Respondent's Case And Submissions

[13] The respondent called the following witnesses to testify in this case:

COW1: Gopenathan K Madaven, 56 years old Manufacturing & Engineering Manager; and

COW2: Christopher Geoffrey Davis, 50 years old General Manager.

[14] The relevant evidence-in-chief of COW1 are as follows:

"Q7: Why was the claimant dismissed?

A: He was retrenched due to redundancy.

Q10: Do you know how many people were retrenched in Malaysia in 2008 and 2009?

A: I don't know the exact figure, but the claimant was not the only person retrenched during this period.

Q11: What was the claimant's designation at the time of his dismissal?

A: He was a "Maintenance Worker 1".

[15] The relevant evidence-in-chief of COW2 who testified in court are as follows:

Q12: How was the company doing financially during this period?

A: As with the rest of the entities in the PPG Group globally, the company faced many challenges as a result of the global financial recession which started in 2008. As I mentioned earlier, the demand for our product reduced significantly which had an impact on our production volume, costs and profitability.

Q13: What did the restructuring entail?

A: The company identified several positions of all levels which were in excess of the needs of the company and in line with the restructuring exercise undertaken by the PPG Group within the Asia Pacific Region, these positions were made redundant, which was the case in respect of the claimant.

[16] The respondent 's in-house counsel, Donovan Cheah submitted as follows in the written submissions filed on 31 May 2012:

(i) the claimant did not dispute or challenge that his position became redundant following the restructuring of the PPG Group including the respondent company or that the restructuring was carried out for *bona fide* reasons (para 16 written submissions);

(ii) the claimant merely contends that there was a breach or non compliance of a Collective Agreement (which is denied) in relations to payment of the redundancy benefits and to order the respondent company to make payment of an alleged shortfall of RM85,240.08 under the Collective Agreement (para 18 written submissions);

(iii) the issue pertaining to the alleged shortfall and alleged noncompliance with the Collective Agreement was never pleaded in the Amended Statement of Case (para 31 written submissions); and

(iv) the court has to find that the claimant's dismissal was made with just cause or excuse (para 74 (d) written submissions).

[17] The company's written submissions in reply filed on 2 July 2012 was clearly in non-compliance of the court's directive given to parties on 3 April 2012 at the conclusion of the hearing of this case. The claimant's counsel in a letter to the registrar dated 2 July 2012 requested the court to completely disregard the said respondent's submissions in reply. In the circumstances, the court allows the claimant's request for the court to disregard the respondent's submissions in reply.

The Claimant's Case And Submissions

[18] The relevant evidence-in-chief of the claimant (CLW1), Segaran a/l Venoo, 53 years old who testified on 3 April 2012 are as follows:

Q39: Please refer to para 10, 10(a), 10(b) & 10(c) SIR, what is the basis of your claim of RM228,589.90 against the company when you have been paid retrenchment benefits of RM143,349.82. Please explain?

A: I am claiming 54.5 months of my wages, which is my last drawn salary of RM2,543.00 together with the average of allowances

> taken over a four year period of RM1,651.31 per month being a total of RM4,194.31. The sum claimed is 54.5 x RM4,194.31 = RM228,589.90. The company had paid the sum of RM143,349.82 based on 54.5 months of my last drawn salary, which is wrong. Therefore the sum of RM143,349.82 is incorrect as there is a shortfall of RM85,240.08 which the company still owes me. Therefore the basis of my claim against the company is in respect of the shortfall sum of RM85,240.08. The company was clearly wrong in their computation of what was legally and rightfully due to me based on their action as the governing clauses are provided for in the Collective Agreement which the company has chosen to interpret to lessen their exposure to pay me what is due.

[19] Learned counsel for the claimant, Alicia Loh Yun Ping submitted *inter alia* the following in the written submissions and submissions in reply:

(i) the respondent's computation of the redundancy benefits is incorrect and there is a shortfall due and owing to the claimant (para 15 written submissions);

(ii) this court has the power to consider the contents of the Collective Agreement with regards to the issue of redundancy for the respondent's company employees and the court is empowered to interpret and to give effect to the terms of the Collective Agreement (para 18 written submissions); and

(iii) the claimant is seeking the shortfall (RM85,240.08) of the retrenchment benefits which is based on an incorrect computation by the respondent. (paras 9 & 20 written submissions in reply).

Evaluation And Findings

[20] The court must now decide whether there was a redundancy situation afflicting the respondent necessitating the respondent to embark on a retrenchment exercise and whether the claimant's dismissal was for just cause or excuse. In the case of *Arockyadassan a/l Sinnappan v. Fujitsu PC Asia Pte Ltd* [2012] 3 MELR 450 [Award No 924 of 2012] Case No 15/4-1573/07 at p 11, the Industrial Court states as follows:

> "It is an established principle in industrial relations jurisprudence that the burden is on the employer to prove on a balance of probabilities his case against the claimant. In the instant case, the burden is on the company to justify on a balance of probabilities the retrenchment exercise".

[21] The Industrial Court in the case of *Maxis Communications Bhd v. Harvinderjit Singh* [2004] 3 ILR 1011 referred to the Court of Appeal case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 at p 767 where the Court of Appeal decided as follows:

> "An employer may re-organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose, for example, to victimise his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised *bona fide* or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case".

[22] Now the duty of the court is to determine whether the decision by the respondent that the position of the claimant has become redundant was capricious or without reason or was *mala fide* or was actuated by victimisation. It is an acceptable principle on retrenchment that an employer has the right to reorganise his business in any manner for the purpose of economy or convenience provided it was made *bona fide*.

[23] Based on the totality of the evidence adduced by the respondent company's witnesses (COW1 & COW2) and the claimant, it is the finding of this court that the respondent company has discharged the burden of proving the existence of a redundancy situation on a balance of probabilities to justify the retrenchment of the claimant as Maintenance Worker (I). The respondent in the restructuring letter states as follows: "The recent global economic slow down has affected our business resulting in a 35% reduction in production volume. Based on this, we are forced to look at reducing our operating costs, which includes employees, in order to maintain the profitability of the company and continue our presence in Malaysia." The claimant failed to challenge that the claimant's position became redundant following the restructuring of the PPG Group, including the respondent company or that the restructuring was carried out for *bona fide* reasons.

***Bona Fide* Restructuring And Genuine Redundancy**

[24] There was substantive evidence adduced by COW2 to show that the claimant was retrenched pursuant to a restructuring of the PPG Group (including the respondent company) in order to reduce costs due to the group's poor financial performance. COW2 states as follows in his evidence-in-chief:

> Q10: Could you provide the court with some background to the restructuring?
>
> A: In 2008, the PPG Group was affected by the global economic slow down which had a negative financial impact on the PPG Group's business in the Asia Pacific region, including the company's business in Malaysia, where the company suffered a reduction in production volume due to a significant decrease in demand for our products. We therefore had to balance its sales revenue against its overhead costs. To achieve this, the PPG Group was required to conduct restructuring exercise to reduce its operating costs in order to sustain its business and presence in the Asia Pacific Region.

[25] The evidence by COW2 was overwhelmingly clear to demonstrate in the respondent's company income statement for the financial year ended 31 December 2009 (COB1, p 49) that the respondent's revenue had declined from RM142,395,175 in the year 2008 to RM128,638,393 in the year 2009. The respondent encountered net losses for the financial year 2008 an amount of RM7,824,615 and for 2009 an amount of RM5,382,011.

[26] COW2 categorically states that the claimant was not the only employee who was retrenched from the company. To regurgitate, COW2 in Question 15, COWS2 states that from the respondent's company records, as at 31 July 2009, a total of 58 employees were retrenched in 2008 and 2009 pursuant to the restructuring. Apart from the claimant, the other maintenance staff who were retrenched based on COB, pp 32 & 33 are Abdul Aziz bin Ariffin and Mohamad bin Hassan.

[27] The court is inclined to agree with the submissions of the respondent that it was evident that the respondent had legitimate reasons to reorganise its business and implement headcount exercise and that the decision to carry out the retrenchment exercise was a decision clearly within its managerial rights and prerogatives taking into account the severe difficulties faced by the company at that time.

Collective Agreement 2009 – 2012 (CLB2)

[28] It was crystal clear from the evidence adduced by the claimant and the integral arguments of the claimant in the submissions before the court, the claimant was contending that there was a breach or non-compliance of a Collective Agreement on the part of the respondent (which is denied) with regard to the payment of the redundancy benefits to the claimant following his retrenchment and submits that the claimant is seeking the shortfall of RM85,240.08 when computing the retrenchment benefits.

[29] According to cl 4.1 of the Collective Agreement, this Agreement shall be effective from 1 February 2009 and shall remain in force for a period of three years, expiring on 31 January 2012. Hence, it was clear that the claimant's retrenchment date of 25 December 2008 precedes the effective date of the Collective Agreement thus rendering the Collective Agreement inapplicable to the claimant's case. Further, the issue relating to the alleged shortfall and non-compliance with the Collective Agreement was never pleaded in the Amended Statement of Case. Needless to say, parties are bound by their pleadings as illustrated in the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2012] 1 MELR 129 at p 138 where the Federal Court decided as follows:

> "[29] ... Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded".

[30] The claimant in his cross-examination, conceded that the Collective Agreement does not apply to the him as he was not an employee of the company in the year 2009 as follows:

Q24: Put: You were not an employee of the company on 1 February 2009?

A: Yes I agree.

Q25: Put: Based on art 4.1 of this Collective Agreement, this agreement does not apply to you because you are not an employee in 2009?

A: Yes, I agree.

[31] Based on the factual matrix and circumstances of this case, the irresistible conclusion for this court to make was that the claimant's termination of employment was made *bona fide* with just cause or excuse. The claimant's position was redundant as a result of the restructure of the respondent's company business thereby justifying the claimant's retrenchment.

Conclusion

[32] Having scrutinised and analysed the evidence of the claimant and respondent and having considered the written submissions of both parties, the court finds that the managerial power to retrench the claimant by the respondent was exercised *bona fide*. The respondent had established on a balance of probabilities, the reasons for the dismissal of the claimant for redundancy.

[33] In conclusion, taking into consideration the totality of the evidence adduced by the claimant and the respondent and bearing in mind s 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this court finds that the claimant's dismissal was with just cause or excuse. Accordingly, the claimant's case is hereby dismissed.