SITI HAJAR OTHMAN

v.

LEARNING PORT SDN BHD

Industrial Court, Kuala Lumpur
Syed Noh Said Nazir @ Syed Nadzir
Award No: 2412 of 2018 [Case No: 31(5)-4-622-17]
1 October 2018

Dismissal: *Performance — Unsatisfactory performance — Whether proven by company — Whether dismissal without just cause and excuse*

Evidence: *Documentary evidence — Computer generated documents — Admissibility of — On-production of s 90A certificate — Whether fatal — Non-compliance with requirements under s 90A Evidence Act 1950 — Whether computer generated evidence admissible*

The claimant commenced employment with the company on 19 September 2016. After working for about one month, while still being on probation, the claimant was dismissed on 21 October 2016 vide a Termination letter of some date based on the reason that the claimant had not "... shown her commitment and her attitude doesn't suit into the company's culture ..." as well as her lack of commitment and attitude. During the course of the trial, the company and the claimant referred to, *inter alia*, the Cardholders Attendance Report ('the said report'), a document printed out and produced from a computer. The claimant raised a preliminary objection that the said report was not admissible pursuant to s 90A of the Evidence Act 1950 as there was no certificate tendered in respect of the said report to prove that it was made in the course of the ordinary use of the computer. The claimant also submitted that her termination on the ground that she had not "... shown her commitment and her attitude doesn't suit into the company's culture ..." as stated in the termination letter, was flawed as this was a very open-ended and vague statement. The issue that arose for determination was whether the claimant's termination was without just cause and excuse.

Held (dismissing the claimant's claim):

(1) It was admitted during cross-examination the said report was a document printed out and produced from a computer. No certificates signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used pursuant to s 90A(2) of the Evidence Act 1950, was tendered by the company. By virtue of the company's own admission, the court agrees with the claimant's submission on the inadmissibility of the said report pursuant to s 90A (2) of the Evidence Act 1950. In the circumstances, the said report was to be disregarded and shall not be taken into account as evidence in the present case. (paras 27-28)

(2) COW1 during cross-examination testified that the claimant made a commitment to deliver 100 sales within a month. It was never disputed by the claimant that she had failed to deliver any sales. Further, the claimant failed to explain as to why there was a huge gap between her earlier commitments that she represented to the company during her interview and the total failure to deliver any sales at the time of her termination. In the circumstances, the company had successfully established the issue of poor performance on the part of the claimant and the company's averment of poor performance was not an afterthought. (paras 31-34)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 1 MLRA 546 (refd)

Equatorial Timber Moulding Sdn Bhd Kuching v. John Michael Crosskey Kuching [1986] 2 MELR 160 (refd)

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 1 MELR 42; [1996] 1 MLRA 665 (refd)

Sitt Tatt Bhd v. Ong Chee Meng [2004] 2 MELR 13 (refd)

Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1987] 1 MELR 32; [1987] 1 MLRA 346 (refd)

Legislation(s) referred to:

Evidence Act 1950, ss 90A(2), 90B

Industrial Relations Act 1967, s 20(3)

Counsel:

For the claimant: Andrew Pastors; M/s Melissa Lim & Associates

For the company: Savinderjeet Singh; M/s Sekhar Savin & Partners

AWARD

Syed Noh Said Nazir @ Syed Nadzir:

[1] The Ministerial reference in this case required the court to hear and determine the claimant's complaint of dismissal by the company on 21 October 2016.

Brief Facts Of The Case

[2] The claimant in this case commenced employment with the company on 19 September 2016 as a Senior Sales Manager to sell the company's products, namely interactive textbook products. She was also supposed to be managing a team of sales executives and sales personnel and build up the sales department of the company (Q&A4 of CLWS-1).

[3] Vide a Letter of Appointment dated 13 September 2016, the claimant was appointed to the above said post and was given a basic salary of RM9,500.00 plus RM500.00 as travelling allowance (pp 6-10 of COB). She was put on a probationary period for three months.

[4] After working for about one month with the company, the claimant was dismissed on 21 October 2016 vide a Termination letter dated 21 October 2016 based on the reason that the claimant had not "... shown her commitment and her attitude doesn't suit into the company's culture ..." as well as her lack of commitment and attitude (p 45 of COB1)

[5] The claimant filed two Witness Statements, marked as "CLWS-1" and "CLWS-1A" respectively and gave her evidence during the trial. She called no other witnesses. The Chairman of the company testified for the company.

The Bundle Of Documents And Witness Statements

[6] During the course of the Trial, the company and the claimant referred to the following documents which were filed earlier on:

(a) Company's Bundle of Documents hereinafter referred to as "COB-1".

(b) Claimant's Bundle of Documents No 1 hereinafter referred to as "CLB-1".

(c) Claimant's Bundle of Documents No 2 hereinafter referred to as "CLB-2".

(d) Company Additional Document No 1 (Certificate) hereinafter referred to as "COD-1".

(e) Company Additional Document No 2 (Cardholder Attendance Report) hereinafter referred to as "COD-2".

(f) Claimant Additional Document No 1 (Updated Calendar Invitation) hereinafter referred to as "CLD-1".

The Claimant's Case

Preliminary Objection

[7] The claimant contended that as admitted by COW1 during cross-examination, COD-2 ie Cardholders Attendance Report is a document printed out and produced from a computer. However, there was no certificate tendered in respect of the said document to prove that it was made in the course of the ordinary use of the said computer.

[8] As such, it was argued that the Card Holders Attendance Report is inadmissible pursuant to s 90A Evidence Act 1950 and that the contents of

this document and all evidence submitted thereon should be disregarded by this court.

[9] In the alternative, the claimant urged this court to give minimum weight to the said document (COD-2) and all evidence related to it based on the following reasons on s 90B of the Evidence Act 1950.

[10] The claimant also disputed the reliability of COD-2, which is allegedly an attendance time sheet extracted from the system, which was based on a thumbprint system, whereas, the document itself is entitled "Cardholders Attendance Report".

[11] The existence of any thumbprint machine and requirement for her to use her thumbprint to sign in during the course of her employment with the company was also challenged by the claimant.

[12] It was the claimant's case as well that the company never raised the issue of a thumbprint attendance system and that the pleading in of the company's Statement in Reply relating to the claimant's attendance only touched on the manual logs (para 5 of the company's Statement in Reply).

[13] The claimant went on to submit that there was indeed no thumbprint system and this is merely an afterthought by the company to try and justify that there were issues with the claimant's attendance.

[14] The claimant further contended that the marketing kits and promotional videos which were allegedly available for the view of the claimant were not given or shared with her (Q&A5-8 of CLWS-1) and that this evidence was not challenged by the company in cross-examination.

[15] The claimant went on to submit that her termination on the ground that she had not "... shown her commitment and her attitude doesn't suit into the company's culture ..." as stated in the termination letter, was flawed as this was a very open-ended and vague statement.

[16] It was also argued by the claimant that there was no explanation provided by the company to help the claimant understand the company's decision despite the same being asked by her (appendix J of CLB-2).

[17] The claimant concluded her submission that based on the surrounding facts and circumstances, her termination was without just cause and excuse.

The Company's Case

[18] The company raised a number of issues on the part of the claimant during her probationary period, in justifying the claimant's termination.

[19] It was raised *inter alia* that the claimant admitted she did not use the surau at the office and instead used the surau at a shopping centre near the company's office without permission.

[20] The company also raised that the claimant had issue with work attendance in that the claimant used to come into office and leave the office as she pleased with no explanation as to where she were.

[21] The claimant's explanation for her missing during office hours as she was allegedly at a client's place conducting a presentation was impugned by the company as the claimant produced no evidence of her being at any of those places that the company had sent her to.

[22] The company also challenged claimant's allegation of not being provided with the materials for presentation to clients. The company averred that the claimant was given a username and password and would have access to the company's products at all times. The email in which the username and password was communicated to the claimant, dated 20 September 2016 (p 14 of COB-1) was relied on by the company in support of this contention.

[23] Additionally, the company was of the position that the issue of the claimant's poor performance was raised during a sales meeting on 19 November 2016. It was highlighted that the claimant could not produce the status of the progress of the appointments she claims to have made and that her sales performance was very poor.

[24] The company further state that the claimant had raised her voice and disputed the company's policy in giving desktop instead of laptops to sales personal and labelled it as "stupid policy" (para 38, p 8 of Company's Submission).

The Role Of The Industrial Court

[25] The Role of the Industrial Court pertaining to a reference under s 20(3) of the Industrial Relations Act 1967 was succinctly explained by the Federal Court in the case *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346, wherein Tun Salleh Abas LP, (as he then was), held that:

> "When the Industrial Court was dealing with a reference under s 20 of the Industrial Relations Act, the first thing that the court has 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."

The Court's Observation And Decision

[26] Section 90A of the Evidence Act 1950 provides as follows:

> "90A Admissibility of documents produced by computers, and of statements contained therein
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the

course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the Court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used."

[27] It was admitted during cross-examination of COW1 that COD-2 which is Card Holder Attendance Report is a document printed out and produced from a computer. No certificates signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used pursuant to s 90A(2) of the Evidence Act 1950, was tendered by the company.

[28] By virtue of the company's witness' own admission as aforesaid above, I agree with the claimant's submission on the inadmissibility of the Card Holder Attendance Report tendered by the company in COD-2 pursuant to s 90A(2) of the Evidence Act 1950. COD-2 is to be disregarded and therefore shall not be taken into account as evidence in the present case.

[29] Be that as it is, the company's manual attendance record now stands alone and remained disputed by the claimant (pp 16-32 of COB-1).

[30] However, upon careful analysis of the facts of the case, I am of the opinion that only two issues merit consideration by this court. These issues are poor performance and insubordination.

Poor Performance

[31] COW1 during cross-examination testified that the claimant made a commitment to deliver 100 sales within a month. COW1 however, agreed that this was not specifically stated in the claimant's Letter of Offer.

[32] Nevertheless, it was never disputed by the claimant that she has failed to deliver any sales. She delivered zero sales (Q&A9 of COWS-1).

[33] The claimant failed to explain as to why there is a huge gap between her earlier commitments that she represented to the company during her interview (Q&A8 of COWS) to be able to achieve 100 sales and the total failure to deliver any sales at all at the time of her termination. I am convinced that the company has successfully established the issue of poor performance on the part of the claimant. Sales is undoubtedly the life line of any participant in the business sector which is expected to be driven by its sales people, let alone engineered by a Sales Senior Manager tasked with the role to develop the sales department of the company which the claimant, in her role has failed to perform.

[34] The company's averment of poor performance is therefore not an afterthought.

[35] Further, the claimant contended that no such marketing strategies or policies were given or shared with her. Nevertheless it is to be noted that it was the claimant's statement that she was suggested to be managing a team of sales executives and sales personnel and build up the sales department of the company (para C, p 7 of Claimant's Written Submission).

[36] In this respect, I only need to refer to an email dated 20 September 2016 in considering the claimant's submission above. By this email to the claimant, the company has established that the claimant was given the password and username to access the company's products (p 14 of COB-1). No evidence was led by the claimant as to whether and to what extent she had utilised the access to the company's product and therefore benefited from it in the course of performing her role in building the sales department of the company and managing the sales personnel.

[37] The claimant's contention that no such marketing strategies or policies were given or shared with her is without merit.

Insubordination

[38] The company alleged insubordination on the part of the claimant as pleaded at para 9 of the Statement of Case, followed by the testimony by COW (Q&A24 of COWS, second paragraph) wherein COW testified that the claimant, during a sales meeting on 19 October 2016 raised her voice and said that it was a stupid policy of the company in giving desktops to sales personnel and having the shared pool of laptops.

[39] This piece of evidence by the company's witness was however, challenged by the claimant during cross-examination:

> "Q: Refer to Q&A31. Your answer is that she was terminated for insubordination. Agree?
>
> A: Agree.
>
> Q: Did you issue a show cause letter to the claimant for insubordination?
>
> A: No.
>
> Q: Agree that the termination letter does not make any reference to insubordination?
>
> A: Agree."

[40] Although the claimant contended that the company did not call any of the people who were present during the said meeting on 19 October 2016 to corroborate the evidence of COW1 in Q&A24 of COWS, it is my considered

opinion that the line of question and answer in the cross-examination above failed to rebut the issue of insubordination on the part of the claimant.

[41] I am of further opinion that the claimant's position that a usual discussion took place during the meeting and she merely provided her feedback to COW-1 but did not at any time raise her voice and was not rude, was a bare denial (para 11.4, p 7 of claimant's Written Submission). It is highly probable that the claimant did alter the word "stupid policy of the company" in giving desktop to sales persons, which had offended the chairman of the company (the COW himself), so much so that two days later, the claimant was issued a Termination letter.

[42] Assuming that I was wrong in deciding that the claimant had failed to contradict the company's averment that the claimant did raise her voice to the Chairman during the meeting on 19 November 2016, it is to be noted as well that the claimant had never addressed the company's allegation as contained in Q&A24 of COWS1 when COW1 testified that the claimant said that it was a stupid policy of the company in giving desktop to sales personnel and having the shared pool of laptops instead.

[43] No where in the claimant's Written Submission was this remark which is derogatory in nature, ever impugned by the claimant. In the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 1 MLRA 546, it was held that:

> "...The law is clear on the subject. Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all... if he asks no question with regard to this, then he must be taken to accept the plaintiffs account in its entirety ..."

[44] Guided by the above case law, it must be found by this court that the company's allegation that the claimant had uttered the "Stupid Policy" remark during the meeting on 19 October 2016 in the presence of the company Chairman must be taken to have been accepted by the claimant in its entirety. Once again, the issue of insubordination is not an afterthought.

The Law On Probationer

[45] It is undisputed that the claimant was a probationer. She was put on a probationary period of three months.

[46] The law on probation is clear. In *Equatorial Timber Moulding Sdn Bhd Kuching v. John Michael Crosskey Kuching* [1986] 2 MELR 160, it was held that:

> "The general law is that a probationer has no substantive right to his post. He holds no lien on the post. He is on trial to prove his fitness for the post for which he offers his services. His character, suitability and capacity as an employee is to be tested during the probationary period and his employment

> comes to an end if, during or at the end of the probationary period, he is found to be unsuitable and his employer terminates his probation according to the contract ...
>
> ... an employer has a contractual right to terminate the services of a probationer without notice and without assigning any reason whatsoever. And no enquiry need to be held for such a purpose, for termination of service of the probationer during the probation period is not a punishment or dismissal but simply that of termination ..."

[47] I am also guided by the case *Sitt Tatt Bhd v. Ong Chee Meng* [2004] 2 MELR 13 wherein it was held in the following words:

> "In my view the company was fully entitled to terminate the claimant's service if upon their evaluation, he was found to have been unable to perform his job functions satisfactorily. The yardstick used to gauge the claimant's performance was left to the company's prerogative as long as it was not tainted by *mala fide* intentions. It could well be based on performance *per se* or upon a combination of other variables and values such as suitability, aptitude, conduct, behaviour, mannerism, and so forth. Its categories are never exhaustive. After all it is well settled that the company is entitled to organize its business in the manner it considers best. It is the duty of the claimant to measure up to the company's expectation. All the more so as the claimant was still under probation."

[48] The court in *Equatorial Timber Moulding Sdn Bhd Kuching v. John Michael Crosskey Kuching (supra)*, however held that when the validity of such termination is challenged, the court must be satisfied that such termination was a *bona fide* exercise of power conferred by the contract. And where there is a suspicion of unfair labour practice, then the court will not hesitate to interfere with the termination and the employee should be afforded proper relief.

[49] In the present case before the court, I am satisfied that the termination against the claimant was a *bona fide* exercise of power conferred by the letter of offer at cl 5.1 (CLB-1, unpaginated) to the company. The claimant failed to establish the issue of *mala fide* in her termination, victimisation or unfair labour practice on the part of the company.

[50] The company is entitled to organise its business in the manner it considers best. On the contrary, it is the duty of the claimant, who represented to have with her 31 years of experience in sales, marketing and business development from various organisation which include Multi-National Corporation and GLC in solution selling (para 3 of SOC) and also qualification in Business Management with a Bachelor in Business Administration (BBA) from UiTM and a Master's in Business Administration (MBA) (para 3 of SOC) to measure up to the company's expectation in particular in delivering fairly good sales for the company. All the more as the claimant was still under probation (as per *Sitt Tatt Bhd v. Ong Chee Meng (supra)* at p 389).

The Decision

[51] In the case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 1 MELR 42; [1996] 1 MLRA 665, Gopal Sri Ram JCA held that as follows:

> "Section 30 of the Industrial Relation Act 1967 imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience."

[52] Therefore, based on the totality of the evidence as adduced both oral as well as documentary and upon consideration of the Written Submission of both parties, having regards to the substantial merits rather than to technicalities of the case together with equity and good conscience, I am satisfied on the balance and probabilities that the company has discharged its burden of proof that the claimant's termination was made with just reason or excuse.

[53] The claimant's termination is upheld by this court and her claim is accordingly dismissed.