VICTOR ASIR JATHAM JUVAKIN

v.

UNITED SANOH INDUSTRIES SDN BHD

Industrial Court, Kuala Lumpur
Rajendran Nayagam
Award No: 3005 of 2018 [Case No: 23(13)-4-916-16]
23 November 2018

Dismissal: *Misconduct — Illegal Picketing — Dispute over company's decision to no longer recognise medical certificates issued by Government clinics/hospitals — National Union of Transport Equipment and Allied Industries Worker ('Union') took executive decision to picket for five days, after office hours — Claimant participated in picketing as directed by Union — Whether Union's direction to claimant to picket without first resorting to the grievance procedure in Article 24 of Collective agreement lawful — Whether there was justification for claimant not to comply with company's directive to stop picketing — Whether claimant's refusal to work overtime because he was involved in the picket was a reasonable excuse — Whether claimant was guilty of misconduct — Whether claimant was dismissed with just cause or excuse*

The claimant commenced employment with the company on 12 July 2002 as a Store Hand Grade 2. The claimant was a member of the National Union of Transport Equipment and Allied Industries Worker ('the Union') and Vice President of the Union's Worksite Committee. For 13 years, the claimant worked without problems with the company until 20 April 2015 when the company issued a memo stating that it would no longer recognise medical certificates issued by Government clinics/hospitals. This memo was communicated to the Worksite Committee and it was referred to the Union. Article 19 of the Collective Agreement ('CA') concluded by the Union and company provided for the recognition of medical certificate issued by any registered medical practitioner. The Union took issue with the company for the withdrawal of the said recognition and was of the view that it could picket as the dispute was not over the CA but the memo and that art 24 that provided the grievance procedure was not mandatory. The Union took the executive decision to picket from 25 May 2015 until 29 May 2015, after office hours. The general secretary of the Union then directed the Worksite Committee to picket. The claimant participated in the picket from 25 May 2015 until 28 May 2015. In a meeting held with the Worksite Committee on the second day of the picket, the Director of Strategic & Commercial Planning, Mr Michael Khoo told the committee to follow the grievance procedure if it had any grievance and directed it to stop picketing as it might smear the good name of the company and cause the company's customers to pull their contracts out. The claimant who was also in the meeting replied that he was bound by the executive decision made by the Union to picket. As such, he could not comply with directive of the company not to picket. Further, due to the claimant's involvement with the picket, he refused to do overtime work between 25 May 2015 and 28 May 2015

although it was as requested by the company, in accordance with his contract of employment and CA. Overtime work was necessary as the company had to keep a buffer stock of three days of Toyota Camry and Toyota Vios components, at any point of time, to fulfil the requirements of the customer. Consequently, on 5 August 2015, the company issued a show cause letter to the claimant containing nine charges. The claimant replied on 10 August 2015 denying the charges. On 18 August 2015, the company issued the notice of domestic inquiry ('DI'), containing the nine charges. The DI panel found the claimant guilty of all charges and he was dismissed effective from 5 September 2015. The court had proceeded on the charges not disputed which were participating in the picket, refusing to comply with the company's directive not to picket and failing to do overtime work at the material time. As such, the main issue to be addressed in the instant case was whether the union could resort to picketing without first going through the grievance procedure.

Held (dismissing the claimant's claim):

(1) Article 24 of the CA provided that any grievance should be settled equitably and quickly at the lowest possible level in order to maintain the good relations of the parties. Only when it failed after having gone through this procedure, then the Union might deal with matter in accordance with the Industrial Relations Act 1967. Since there was no evidence that the Union had undergone the grievance procedure in Article 24 and engaged the company in resolving the grievance, the court found that the Union was not entitled to resort to picketing, and as such, the picket was unlawful. (paras 18-19)

(2) As an employee, the claimant owed a duty of fidelity to his employer and hence, there must be complete confidence and trust between the parties. As such, in common law, the claimant was to obey all lawful and reasonable orders given by his employer. In this regard, the company told him to stop picketing and follow the grievance procedure and the picketing might bring the company into disrepute with its customers. It was a lawful and reasonable order and it would have cost him nothing to stop picketing and to take up the company's offer to negotiate. However, the claimant did not do so at his own peril. (para 24)

(3) The claimant, by virtue of his employment contract and Article 11(a) of the CA, had agreed to do overtime work at the request of the company and that he would not unreasonably withhold consent. The claimant's refusal to work overtime because he was involved in a picket was not a reasonable excuse. Moreover, the picket was unlawful. (para 25)

(4) The court found that the claimant was guilty of serious misconduct and as such, the dismissal was with just cause or excuse. His long length of service could not assist him in view of the serious misconduct committed. (para 26)

Case(s) referred to:

Asrul Ismail & Ors v. Sinora Sdn Bhd [2009] 2 MELR 413 (refd)

Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 3 MELR 599; [2014] 6 MLRA 85 (refd)

HM Shah Enterprises Sdn Bhd v. National Union Of Hotel Bar & Restaurant Workers [1988] 1 MELR 440 (refd)

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 2 MLRA 23 (refd)

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 1 MELR 105; [2006] 1 MLRA 870 (refd)

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 1 MELR 4; [2002] 1 MLRA 188 (refd)

Yodoshi Malleable (M) Sdn Bhd v. Rajamohan S.P. Palanivel [1995] 2 MELR 467 (refd)

Legislation(s) referred to:

Industrial Relations Act 1967, ss 20(3), 40

Counsel:

For the union representative: K Gunaseelan; National Union of Transport Equipment & Allied Industrial Workers

For the company: Marcus Tan (Lee Kim Nie with him); M/s Ricky Tan & Co

AWARD

Rajendran Nayagam:

[1] This is a reference made by the Honourable Minister on 15 August 2016 under s 20(3) of the Industrial Relations Act 1967 ["the Act"] for an award, arising out of the dismissal of Victor Asir Jatham Juvakin ["the claimant"] by United Sanoh Industries Sdn Bhd ["the company"] on 5 September 2015.

The Substantial Merits Of The Case

[2] The claimant commenced employment with the company on 12 July 2002 as a Store Hand Gred 2. The claimant was a member of the National Union of Transport Equipment and Allied Industries Workers [the Union] and Vice President of the Union's Worksite Committee. For 13 years, the claimant worked without problems with the company until 20 April 2015 when the company issued a memo stating that it would no longer recognise medical certificates issued by Government clinics/hospitals. This memo was communicated to the Worksite Committee and they referred it to their national union.

[3] There was a Collective Agreement [CA] which had been concluded by the national union and company for the period 1 January 2011 to 31 December 2013. Although the CA had expired, art 33 stated that the CA shall continue until superseded by a new agreement. This meant that both parties were bound by the terms of the agreement. As such, the parties were bound by art 19 which provided for the recognition of medical certificate issued by any registered medical practitioner. The Union took issue with the company for unilaterally withdrawing recognition of medical certificates issued by Government clinics/ hospitals. The Union was of the view that they could picket as the dispute was not over the CA but the memo and that art 24 which provided for a grievance procedure was not mandatory.

[4] The Union took the executive decision to picket from 25 May 2015 until 29 May 2015, after office hours. The general secretary of the Union then directed the Worksite Committee to picket. The claimant participated in the picket from 25 May 2015 until 28 May 2015. According to the domestic inquiry notes and minutes recorded by the company, on the second day of the picket, the Director of Strategic & Commercial Planning, one Mr Michael Khoo held a meeting with the Worksite Committee between 3:30pm and 5:20pm. The claimant was present at the meeting. Mr Michael Khoo told the Committee to follow the grievance procedure, if they had any grievance and directed them to stop picketing as it may smear the good name of the company and cause the company's customers to pull their contracts out. The claimant replied that he was bound by the executive decision made by the Union to picket. As such, he could not comply with directive of the company not to picket.

[5] Further, the company requested the claimant to do overtime work in accordance with his contract of employment and CA. Overtime work was necessary as the company had to keep a buffer stock of three days of Toyota Camry and Toyota Vios components, at any point of time, to fulfil the requirements of the customer. The claimant refused to do overtime work between 25 May 2015 and 28 May 2015 as he was involved in the picket.

[6] Subsequently, on 5 August 2015, the company issued a show cause letter to the claimant containing 9 charges. The claimant replied on 10 August 2015 denying the charges. On 18 August 2015, the company issued the notice of domestic inquiry, containing 9 charges. The domestic inquiry panel found the claimant guilty of all charges and he was dismissed effective from 5 September 2015.

[7] At the trial before the Industrial Court, the company produced only one witness. COW1 did not have personal knowledge of the facts relating to some of the charges. Hence, to be fair to the claimant, the court has disregarded the charges not based on the personal knowledge of COW1 and which has been disputed by the claimant. The court has proceeded on the charges not disputed by the claimant. The claimant has not disputed that he had participated in the

picket, refused to comply with the company's directive not to picket and that he failed to do overtime work.

[8] The main issue in the instant case is whether the union could resort to picketing without first going through the grievance procedure. This is an important issue as the decision made by the Union had serious consequences for livelihood of the claimant.

The Law

[9] The function of the Industrial Court in dismissal cases on a reference under s 20 is two-fold:

[i] To determine whether the misconduct complained of by the employer has been established;

[ii] Whether the proven misconduct constitutes just cause or excuse for the dismissal.

[See *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 2 MLRA 23]

[10] It is trite law that the company bears the burden to prove that the claimant had committed the alleged misconduct. The standard of proof is on the balance of probabilities. [See *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 1 MELR 4; [2002] 1 MLRA 188].

Whether The Claimant Is Guilty Of Misconduct?

[11] The main complaint by the company in the instant case is that the claimant should not have participated in the picket. On the other hand, the Union is contending that they had a right to picket when the company issued the memo not recognising the medical certificates issued by Government clinics/ hospitals. The issue is whether the issuance of the memo by the company, entitled the Union to picket. In the instant case, there was a CA governing the relationship between the parties, which had expired but the parties agree that the terms of the CA were still binding on them until superseded by a new agreement. Hence, the issue is as follows.

[i] Could The Union Direct The Claimant To Picket Without First Resorting To The Grievance Procedure In Article 24 Of The CA?

[12] Unfortunately, the General Secretary of the Union did not come to court to defend the Union's decision to picket. The court had to rely on the evidence of the claimant. However, what was gathered is that since the company had not withdrawn the memo, the Union had decided to picket. They were of the view that the dispute was not regarding the CA but the issuance of the memo and that art 24 was not mandatory. This is because art 24(d) empowered the Union to deal directly with the company. The question

is whether the Union could have gone down this path. In order to answer this question, we have to scrutinise the provisions of art 24 which is set as follows.

> "Article 24- Grievance Procedure
>
> a. Definition of Grievance
>
> A grievance shall be defined as a complaint by the employee concerned which he brings to the attention of his immediate superior of departmental head and which is subsequently not settled to the satisfaction of the employee.
>
> b. Purpose
>
> It is the desire of both parties to this Agreement that grievances arising between an employee and the company or between the Union and the company be settled as equitably and as quickly as possible. In pursuance of this, it is agreed that graveness should be processed according to the following procedure with the aim of reaching agreement at the lowest possible level and maintaining continues good relations between both parties.
>
> i) An employee can raise his grievance by himself or through the representative or representatives of the Union to the immediate Superior or Departmental Head within two (2) working days of the grievance arising
>
> ii) If no agreement or settlement is reached on such grievance within two (2) working days, the Union Works committee will meet the Personnel Manager, or any other officer designated with this responsibility
>
> ii) If no agreement or settlement is reached on such grievance within three (3) working days the matter shall be discussed between the General Manager and the Union Head Office
>
> iii) If the grievance is still not resolved, the matter may be dealt with an accordance with Industrial Relation Act, 1967
>
> iv) By mutual agreement the number of days may be extended
>
> d. Notwithstanding the above, nothing shall prohibit the Union/company to bring up matters with the company/Union direct."

[13] It is clear from the procedure set out in art 24 that it is both for an employee acting on his own or through a Union representative. It is only when the grievance is still not resolved after following the procedure that the matter may be dealt with in accordance with the Act and this means that it then becomes a trade dispute, which can be acted on only by the Union and not by an employee acting alone. Hence, the procedure binds the Union and with respect, following a procedure is a civilised way of resolving a dispute.

[14] In this regard, COW1 said that the company only knew on 26 May 2015 at the meeting with the claimant's Worksite Committee, the reason for the picket, being the issuance of the memo. This evidence was not challenged. In any event, the Union is not disputing that they did not comply with the procedure. Although the Union's contention is that their protest fell on deaf ears, this court was clueless as to why the Union decided to picket, as no evidence was led.

[15] "Grievance" in art 24 is defined as a complaint which has been brought to the attention of the company and which is not settled to the satisfaction of the employee. In the instant case, the Union had taken up the claimant's complaint regarding the memo directly with the company and they claimed that it fell on deaf ears. But the company claims that it was not aware of the complaint. Even if the complaint fell on deaf ears, it simply means that the complaint has now become a "grievance". It did not mean that Union could immediately proceed to picket. The next stage was for the Union to fill up the grievance form in Appendix No 6. The union claimed the art 24(d) entitled them to deal with the company directly and as such the filling up of the form was not mandatory. With respect, though the Union may deal with the company directly but it did not mean that they did not have to fill up the grievance form and follow the procedure. In other words, art 24(d) did not override the definition of "grievance". As such, since the matter had become a "grievance", the Union was required to fill up the grievance form in Appendix No 6 which is set out as follows:

APPENDIX NO. 6
GRIEVANCE FORM

NAME ....

SERVICE NO ....

GRADE : ....

DEPARTMENT : ....

Date of Lodgement to Grievances Sheet : ....

Date of Event from which grievance arises : ....

Nature of Grievance

Name of witnesses or others involved : ....

....

(Signature of Aggrieved Person)

....

(Signature of TEAIEU Office Representative)

Signature of Officer who received the grievance report:

....

Date of receipt of the grievance report : ....

Details of action taken and decision made :

Date: ....

Head of Department / Plan Manager

....

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[16] The format of the grievance form provides for the signature of the aggrieved person or the union representative. It certainly does not support the Union's contention that they did not need to fill up the form.

[17] The other contention of the union that the dispute was not over the CA is a non-starter. Their very complaint was that the company could not issue the said memo because the issue of medical certificates had already been provided for in art 19 of the CA and that they could not now unilaterally change it. In point of fact, the Union had complained to the Labour Office in Klang regarding the company's breach of art 19 of the CA. Hence, the grievance directly related to art 19 of the CA.

Objective Of The Act And The Grievance Procedure In Article 24

[18] One of the main objects of the Industrial Relations Act 1967 is to promote industrial harmony and this means that an award of the Industrial Court must attempt to achieve this objective. Hence, in order to achieve this objective, the Industrial Court would have to insist on the need of the parties to commence negotiations on their grievance in accordance with art 24. Article 24 provides that any grievance should be settled equitably and quickly at the lowest possible level in order to maintain the good relations of the parties. Only when they fail after having gone through this procedure, then the Union may deal with matter in accordance with the Industrial Relations Act 1967. Section 40 of the Act provides for picketing in very restricted circumstances.

[19] In this regard, in the absence of any evidence that the Union had undergone the procedure in art 24 and engaged the company, in resolving the grievance, it is the finding of this court that the Union was not entitled to resort to picketing and as such, the picket was unlawful. [See *Asrul Ismail & Ors v. Sinora Sdn Bhd* [2009] 2 MELR 413], [*HM Shah Enterprises Sdn Bhd v. National Union Of Hotel Bar & Restaurant Workers* [1988] 1 MELR 440].

Picketing

[20] Picketing is a weapon in the armory of the Union. The use of the weapon has serious consequences for both parties. For the company, it tarnishes the good name of the company and disrupts the daily operations, which could make the company's customers nervous if delivery of daily supply is an important consideration for the customer, as in the present case. The company was an auto parts supplier to motor assembler Toyota. For the Union, the members like the claimant who participate in the picket will pay a heavy price if they were dismissed and the picket is found to be unlawful as in the present case.

[21] Hence, there is good reason as to why the law only allows picketing in very limited circumstances. Section 40 of the Act allows the union to picket in furtherance of trade dispute for the limited purpose of peacefully [i] obtaining or communicating information; or [ii] persuading or inducing any workman to work or abstain from working. But a picket can easily became unlawful as the Union members learned the hard way in the Federal Court case of [see *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 3 MELR 599; [2014] 6 MLRA 85]. In that case, the Union members picketing *inter alia* entered the lobby and banking hall of employer's building with their

picketing materials. The Union members were dismissed for participating in an unlawful picket. They lost their case at every level from the Industrial Court right up to the Federal Court.

[22] Hence, Unions would do well to learn from this episode, that picketing should be a weapon of last resort. This is because it has very serious consequences for its members, especially the older members, who have a few years left to retire and have contributed toward their retirement fund. If they were to be dismissed for participating in an unlawful picket, they would have nothing to fall back on. Hence, it would be wise for Unions to think long and hard, before they decide to picket. They should also obtain good legal advice on the matter and their members must be made fully aware of the consequences as they depend on the Union for guidance.

[23] In the instant case, the grievance was concerning the company's non-recognition of medical certificates issued by Government clinics/hospitals. It was a simple and uncomplicated matter, which was eventually settled amicably by the parties. These facts show that the use of the weapon of picketing was unwarranted in the circumstances. All that was needed to resolve matter was more goodwill, tact and diplomacy.

[ii] Was There Any Justification For The Claimant Not To Comply With The Directive To Stop Picketing?

[24] The claimant was an employee of the company and a member of the Union. But did being a Union member give him immunity for not complying with the directive from the company. There is authority for saying that the claimant should not have lost sight that he was an employee first and Union official second. [See *Yodoshi Malleable (M) Sdn Bhd v. Rajamohan S.P. Palanivel* [1995] 2 MELR 467]. As an employee, he owed a duty of fidelity to his employer. What this means is that he is in a "close personal relationship" and there must be complete confidence and trust between the parties. As such, at common law, the claimant is to obey all lawful and reasonable orders given by his employer. [See *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 1 MELR 105; [2006] 1 MLRA 870]. In this regard, the company told him to stop picketing and follow the grievance procedure and further that the picketing may bring the company into disrepute with its customers. It was a lawful and reasonable order and it would have cost him nothing to stop picketing and to take up the company's offer to negotiate. But he did not do so at his own peril.

[iii] Was There Any Justification For Refusing To Do Overtime Work?

[25] The claimant by virtue of his employment contract and art 11(a) of the CA, had agreed to do overtime work at the request of the company and that he will not unreasonably withhold consent. The claimant's refusal to work overtime because he was involved in a picket was not a reasonable excuse. Moreover, the picket was unlawful.

Finding

[26] For the reasons stated, it is the finding of this court that the claimant is guilty of serious misconduct and as such the dismissal is with just cause or excuse. His long length of service could not assist him in view of the serious misconduct committed. (See *Harianto Effendy Zakaria* case *supra*).

Order

[27] Accordingly, the claim is hereby dismissed.