HSS INTERGRATED SDN.BHD v LEOW YEW ONN [2000] ILJU 68

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INDUSTRIAL COURT (KUALA LUMPUR)

DATIN SITI SALEHA ABU BAKAR

CASE NO 6/4-144/99 541 OF 2000

10 October 2000

Encik Krishna Kumar, En,D,Paramalingam (Messrs ***Krish Maniam*** & ***Co***);Encik Amarjeet Singh (Messrs Zubeda & Amarjeet (Messrs Kerk & ***Co***)

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **LEOW YEW ONN** (hereinafter referred to as "the Claimant") by **HSS INTEGRATED SDN. BHD.** (hereinafter referred to as "the Company").

AWARDIntroduction.

The dispute emanates over the alleged dismissal of the Claimant by the Company on 31.3.1998 vide letter of 19.12.1997.

The Claimant contends that he was dismissed without just cause and excuse. Therefore he prays for an award that :

(i) he be reinstated or in lieu of which the Company do pay him such amount of compensation as he may be entitled to; and

(ii) the Company do pay him his entitlement to backwages and/or such allowances or benefits as he may be entitled to at law beginning from 1.4.1998 until the date permitted by law or as may be awarded by this Court under its inherent jurisdiction.

The Facts.

The Claimant was appointed vide a letter of appointment dated 14.10.1988 (pages 1 & 2 of "A") and commenced employment with the Company on 1.12.1988. The Company was

aware that the Claimant was 53 years old at that time. The said letter appointment was silent on the retirement age of employees.

Subsequently in 1996 the Company obtained the MS ISO 9001 certification. Pursuant to the said ISO certification all the Company's procedures are governed by way of manuals/staff handbooks. Under clause 2.1.9 at page 21 of the Staff Handbook (exhibit CO.1) it is provided :

> *"Compulsory retirement age for all permanent employees is fifty-five (55) years. The management may at its sole discretion re-employ a retired employee on a year to year basis on mutually agreed terms at the discretion of the Management."*

Vide a memorandum dated 17.12.1997 (page 4 of Bundle "A") which was circulated, all the Company's staff was informed that the retirement age was being set at 55 years. The said memorandum reads as follows :

> ***"hssi** HSS INTEGRATED SDN. BHD. CONSULTING ENGINEERS.*
>
> ***MEMORANDUM***
>
> *TO : ALL STAFF FROM : MANAGEMENT*
>
> *DATE : 17 December 1997*
>
> *REF : HSSI/16/10/1/4401/RS/ssk*
>
> *SUBJECT : RETIREMENT AGE*
>
> *The Board of Directors have decided to implement a retirement policy for all permanent employees of HSS Integrated Sdn. Bhd. The compulsory retirement age shall be 55 years with immediate effect.*
>
> *The Company may at its absolute discretion reemploy, subject to medical fitness, retired employees on a mutually agreed terms and conditions of service.*
>
> *Accordingly, by virtue of this circular, the terms and conditions of employment of each employee shall be deemed to include provisions relating to the retirement age.*
>
> *Please acknowledge receipt of this circular by signing and returning the duplicate copy attached immediately.*
>
> *Regards,*
>
> *Signed..*
>
> *KUNA SITTAMPALAM*
>
> *Executive Director."*

There were 15 members of the staff including the Claimant who were affected by this retirement policy.

As a consequence the Claimant received his letter of retirement dated 19.12.1997 (page 5 of Bundle "A") which inter-alia stated :

> *"In view of the fact that you have exceeded the retirement age of 55 years as per our discussion and mutual agreement, we hereby give you three months notice effective 1st January, 1998 retiring you from the services of the Company on 31.3.1998."*

The Claimant's last drawn gross basic salary was RM6,800.00 per month.

The Law.

The duty of the Industrial Court upon a reference under section 20(3) of the Industrial Relations Act 1967 being made can be ascertained from an examination of the law in this area.

In the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ.94 the then Supreme Court held as follows :

> "When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will do is to ask itself a question whether there was a dismissal and if so whether it was with just cause and excuse."

In the landmark case of *Goon Kwee Phoy v. J&P Coats (M) Sdn. Bhd.* [1981] 2 MLJ.134 the Federal Court enunciated thus :

> *"Where representations are made and are referred to the Industrial Court for enquiry it is the duty of 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 has or has not been made out. If it finds as a fact that it has not been proved; then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry 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."*

In the instant case the Company avers in the Amended Statement-in-Reply that "the Company is certified under Sirim's MS-ISO 9001 and that the Claimant had notice pursuant to the guidelines in the handbook under this certification which clearly states that the retirement age is 55 years for all employees". This then is the Company's reason for the termination of the Claimant's services in that he had reached 55 years of age.

Now it is a principle of industrial jurisprudence that in a dismissal case the burden of proof lies on the employer. It is for him to adduce convincing and cogent evidence to prove the

facts and circumstances which he contends, constitutes just cause and excuse for dismissing the employee.

The Evidence.

The Company called 3 witnesses to prove its case.

The Chief Executive Officer of the Company (COW1) in his examination-in-chief testified that :

> *"Pursuant to ISO certification all procedures are governed by way of manuals. The Company has to comply with manuals with regards to employers, to govern relationship between Company and employees. Staff Handbook was made available at the Head of Department's office for reference and is available on request. Also in the library. All staff has access to handbook. The instruction is that the handbook forms part of the terms and conditions of employment."*

It is his further evidence that the handbook contains (1) general admin procedures (2) staff entitlements and benefits (3) rules and regulations (4) terms and conditions with regards to termination and (5) retirement and discipline. In re-examination he stated that all staff of the Company were made aware of the ISO certification.

In cross-examination COW1 stated that :

> *"I did not consult the Claimant for the drafting of the handbook. No need to refer to individuals concerning Company's policy. When the handbook was proposed the Claimant was not given a copy. When the handbook was published, copies were not given to employees."*

He agreed that he was not aware whether the Claimant had access to the handbook or not and he further agreed that there is no memorandum given to the employees from the Company to implement the handbook.

The Human Resource Manager of the Company (COW2) attested that the 15 staff members were individually consulted by the management concerning the retirement age and there were no objections raised by any of them including the Claimant during the discussions with him between 17 to 19.12.1997. According to COW2, besides COW1 and herself, Mr. Rikianathan the head of department was also present when they stressed that all those reaching and who had reached 55 were to retire after giving 3 months' notice. She said that at this meeting "*the Claimant was silent*".

The evidence of the Quality Manager (COW3) is that the heads of departments have control of the handbook and will brief the staff on its contents. He went on to say :

> *"The employees will have notice of the handbook. By referring to this handbook they will know their benefits. They get their claims and*

benefits under what is provided in the handbook."

The Claimant denied that he was ever informed that the retirement age is being set at 55 years old before receiving the memorandum of 17.12.1997. He also said that he was never shown a copy of the Staff Handbook and he was not aware of it. Neither did he accept the handbook and its contents as additional terms of his employment with the Company. However he admitted that he was aware that the Company was a MS-ISO 9001 company. He also agreed that he had made claims for travelling allowances and there were monthly deductions from his salary for sports club and insurance.

The Claimant further denied that the Company held discussions with him concerning the retirement age. He attested that :

"The briefing (with COW1, COW2 and Mr. Rikianathan) told me that they wanted to dismiss me from service as I had exceeded 55 years. I did not make comments. I received a copy of this letter (page 5 of "A"). I did not sign it because I disagree with this letter."

In re-examination the Claimant stated that he had not received any letter from the Company complaining of his health condition or any letter complaining of his performance during his tenure of service.

The Submission.

It is the submission of the Claimant that various issues have been taken up by the Company in opposing his case and these are as follows :

(i) At paragraph 5A of the Amended Statement-in-Reply the Company pleads that the Claimant had notice of the guidelines in the handbook which states that the retirement age is 55 for all employees.

In respect of this issue the Claimant submits firstly that the ISO certification does not concern the status of the employees but was adopted by the Company for its benefit in terms of quality service offered by the Company to its customers. Secondly the Claimant submits that the Company cannot incorporate the terms in the Staff Handbook as applicable to him unless he is notified of it and accepts it as additional terms and conditions of his employment;

(ii) At paragraph 7 of the Amended Statement-in-Reply the Company pleads that all staff affected by the retirement circular was individually consulted by the management and no objection was raised by the Claimant during the discussion with him.

In respect of this issue the Claimant submits firstly that the Company cannot vary his contract of employment without his consent and agreement. Secondly the Claimant contends that he was only consulted by the management of the Company after 17.12.1997 when it was too late as the retirement clause had already been imposed unilaterally prior to the discussion;

(iii) At paragraph 9 of the Amended Statement-in-Reply the Company pleads that prior to the Claimant's retirement he had health problems which affected his work productivity as shown by the medical bills and medical leave.

In regard to this issue the Claimant submits that it is not relevant. Further he contends that the issue seems to be a complaint of his performance but the Company has failed to meet the legal criteria to establish his termination on grounds of unsatisfactory performance;

(iv) At paragraph 11 of the Amended Statement-in-Reply the Company pleads that the termination was not unlawful and that the Company was justified in the exercise of discretion to retain younger and more productive staff.

The Claimant submits with regard to this issue that there is no evidence at all that all senior employees and/or all non-productive staff had been terminated to pave the way to younger and more productive staff and this justification is not consistent with the reason given for his termination which is that the Company's new policy is to retire all permanent employees at 55 years of age;

(v) At paragraph 12 of the Amended Statement-in-Reply the Company pleads that the termination was reasonable as sufficient notice of three months had been given as opposed to the contractual notice of one month stipulated in the letter of appointment.

With respect to this issue, the Claimant submits that the same is totally irrelevant as the length of a notice of termination cannot be a reason sufficient to justify a termination per se and termination must still be grounded on just cause and excuse.

It is the Company's submission that the Claimant's claim is unlawful, unfair and unreasonable and prays that his claim be dismissed.

The Company contends that the Claimant is fully aware of the Staff Handbook (exhibit CO.1) since he had made claims for travelling allowances, and made monthly deductions for sports club, insurance and health insurance premiums as provided for in clause 3.1. page 22, clause 3.20. at page 36 and clause 2.1.8. at page 16 of exhibit CO.1 respectively.

The Company also submits that the Claimant was a sickly man and had been on consistent medical leave. With regards to the Claimant's evidence that he expects to be employed until he is 100 years old if he is not retired, the Company contends that this is unreasonable.

Finally the Company contends that it had been fair to the Claimant because although the letter of appointment provides for one month's notice the letter of retirement had given him three months' notice instead.

Conclusion and Finding.

It is the Company's case that when it was certified under Sirim's MS-ISO 9001 the Claimant had notice pursuant to the guidelines in the Staff Handbook (exhibit CO.1) issued under this certification which clearly states that the retirement age is 55 years for all employees. Hence the Company has to prove the same i.e. that the Claimant had notice of this term relating to retirement age as contained in exhibit CO.1.

It is not disputed that the term of compulsory retirement at age 55 does not exist in the Claimant's contract of employment. It is therefore incumbent upon the Company to prove that the Claimant had agreed to the imposition of this new term since it is settled law that one party to the contract cannot vary or modify the terms of the contract without the agreement or consent of the other party.

It is abundantly clear that although the Claimant as he himself admitted was aware that the Company had obtained the MS-ISO 9001 certification there is no evidence that he had knowledge and had consented to the terms contained in the handbook in particular with regards to the retirement age, as being a new term of his contract. The Court is inclined to believe his story that only before the issuance of the memorandum was he informed that he would be dismissed. Furthermore although the Claimant had made claims for benefits there is no evidence that he made these pursuant to the handbook.

It is pertinent to note that the Company did not take any action to enforce the compulsory retirement age provision in the handbook after the implementation of ISO certification in 1996 when the Claimant was 60 years old but the decision to do so with all permanent employees was only made about two years later in 1998.

It would appear that the Company had chosen initially to ignore the requirement of the ISO certification in 1996 when the Claimant had already attained 60 years. It chose not to specifically notify the Claimant of the retirement age when ISO status was implemented. It only decided to retire the Claimant two years later at 62 years of age. A careful reading of the memorandum as has been correctly pointed out by the Claimant's counsel reveals that the decision to implement a retirement policy for all permanent employees was made by the Company upon the decision of the Board of Directors. There is no mention of the Company's reliance on the ISO certification or the handbook. The words of the memorandum implies that prior to its issuance there was no such compulsory retirement policy or otherwise existing in the Company. As such it is crystal clear that the Company's reasons for terminating the Claimant is not founded on the provision/stipulation in the handbook but is founded on the basis of the memorandum. Furthermore it would appear that the memorandum issued to the Claimant was made on the assumption that he had agreed or consented to the retirement which however he had not.

It is appropriate at this point to refer to the case of *Dr. Salwant Singh Gill v. Hospital Assunta* [1998] 4 CLJ.1947 where the High Court in allowing the application for certiorari held inter-alia that the Industrial Court should not have allowed the respondent to make an amendment to the applicant's contract of employment of 1970 to include a retirement clause without first obtaining the consent of the applicant. It further held that to permit the inclusion of the retirement policy into the applicant's contract is not justified and is an infringement of his rights which he had enjoyed all the while before his termination.

The Company also raised the issue of the Claimant's productivity at work since he had taken much medical leave due to his health problems. If this was an allegation of poor performance against the Claimant it has not been made clear to the Court. In any event the Company has failed to establish that (i) the Claimant was issued with a warning of poor performance, (ii) he was accorded sufficient opportunity to improve but (iii) notwithstanding the same he failed to improve his performance, in order to justify dismissal on the ground of unsatisfactory performance. See *Rootech Sdn. Bhd. v. Holiday Inn, Penang* Award No. 166 of 1986 and *I.E. Project Sdn. Bhd. v. Tan Lee Seng* Award No. 56 of 1987.

As for the Company's contention that sufficient notice had been given to the Claimant, the length of a notice of termination is irrelevant since a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workman's representations under the Industrial Relations Act 1967 the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

As stated above the duty of the Industrial Court is to enquire whether the reason given by

the employer for the action taken by him has or has not been made out and for the purpose of industrial adjudication the Court requires the employer to prove such by adducing cogent and convincing evidence.

After a careful deliberation of the evidence the Court finds that on a balance of probabilities the Company has failed to discharge the burden of proof cast upon it. The Court concludes that the reasons advanced by the Company for the Claimant's dismissal have not been made out, hence his dismissal was without just cause and excuse.

Remedy.

The normal rule is that in a case of wrongful or unfair dismissal an order of reinstatement will be in order. However in this instant case having taken all the relevant circumstances into consideration the Court is of the view that reinstatement is no longer appropriate and will award compensation in lieu instead.

The Court hereby orders the Company to pay the Claimant as follows :

(i) Backwages for twenty-four (24) months -

i.e. RM6,800.00 × 24 = RM163,200.00.

(ii) Compensation in lieu of reinstatement i.e. one (1) month's salary for every year of completed service from date of joining (14.10.1988) to last date of hearing (14.7.2000) -

i.e. RM6,800.00 × 11 = RM74,800.00.

(iii) The total sum of RM238,000.00 shall be paid to the Claimant's solicitor within four (4) weeks from the date of this award subject to deduction of income tax, EPF and other contributions, if any.
