

Fam Fee Lin v Hewlett-Packard (M) Sdn Bhd [2018] ILJU 91

Industrial Law Journal Unreported (ILJU)

INDUSTRIAL COURT (KUALA LUMPUR)

BERNARD JOHN KANNY, C

AWARD NO.: 1227 OF 2018

31 May 2018

*Chang Kai Ping and Ng Tan (Chambering Student) From (**David Gurupatham** & Koay) for the claimant.
T. Thavalingam and Sebastian Tay From (Lee Hishamuddin Allen & Gledhill) for the company.*

Bernard John Kanny C:

AWARD(A) Reference

[1]The reference of the Honourable Minister of Human Resources is regarding the dismissal of Fam Fee Lin (hereinafter referred to as “the Claimant”) by Hewlett- Packard (M) Sdn Bhd (hereinafter referred to as “the Company”) on 5.7.2016. The reference was dated 2.11.2016 and received by the Court on 14.11.2016.

[2]The ministerial reference in this case required the Court to hear and determine the Claimant’s complaint of dismissal by the Company on 5.7.2016.

(B) Proceedings In The Industrial Court

[3]The matter was heard on the 23.4.2018 and 24.4.2018 during which the following witnesses were called by the Company to testify in Court:

- i) Gerard Alvin **David** who is South East Asia Labour Relations Lead & Country AR Leader (“COW-1”).
- ii) Abitha Nair Ganapathy who was then HR Operation Adviser of the Company (“COW-2”).
- iii) Vannie Au Poe Ling who was then the Country Human Resource Generalist (“COW-3”).
- iv) Natalia Binti Ahmed Shukri Navin who was then Country Human Resource Manager (“COW-4”).

[4]The Claimant testified herself (“CLW-1”). The documents filed and marked before this Court are as follows:

- a) Company’s Bundle of Documents (“COB-1”).
- b) Claimant’s Bundle of Documents (“CLB-1”).
- c) Claimant’s Additional Bundle of Documents (“CLB-2”).
- d) Company’s Witness Statement - Gerard Alvin **David** (“COWS-1”).
- e) Company’s Witness Statement - Abitha Nair Genapathy (“COWS-2”).
- f) Company’s Witness Statement - Vannie Au Pee Ling (“COWS-3”).
- g) Company’s Witness Statement - Natalia Binti Ahmed Shukri Navin (“COWS-4”).
- h) Claimant’s Witness Statement - Fam Fee Lin (“CLWS-1”).

(C) Background Facts

[5]The Claimant commenced employment with Digital Equipment Sdn Bhd on the 29.7.1997. Digital Equipment Sdn

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Bhd was later acquired by Compaq. In January 2003 Compaq was acquired by Hewlett-Packard Sales (M) Sdn Bhd.

[6]By a letter dated 1.12.2002 the Claimant was offered employment with Hewlett-Packard Sales (M) Sdn Bhd as Financial Assistant III. The Claimant accepted the terms and conditions of employment and commenced employment on 1.1.2003. Hewlett Packard Sales (Malaysia) Sdn Bhd was eventually renamed Hewlett-Packard (M) Sdn Bhd.

[7]Sometime in May 2016 the Claimant applied for a personal loan from Malaysia Building Society Berhad (hereinafter referred to as MBSB). The Claimant was required to submit several supporting documents for her application of personal loan from MBSB. One of the documents required by MBSB was a letter of verification of the Claimant's earnings. The letter regarding verification of earnings from the Company is only obtainable from Ms. Abitha Nair Ganapathy ("COW-2") who was Human Resource Operation Advisor.

[8]The Claimant claimed that she was hard pressed for time due to her heavy workload hence the Claimant had personally signed the Employment Verification Letter dated 29.5.2016 and forwarded the same to MBSB.

[9]The Claimant then went off to India twice from the 12.6.2016 - 17.6.2016 and 26.6.2016 - 1.7.2016 to conduct a process and testing workshop for payroll changing from peoplesoft to SAP payroll system on behalf of the Company.

[10]On the 10.6.2016 Ms. Abitha Nair Ganapathy, the Human Resources Operation Advisor received an email from Cik Siti Farah Niza Yusof of MBSB wanting verification of the Claimant's employment details with the Company.

[11]Cik Siti Farah was requested by Ms. Abitha Nair to forward Employment Verification Letter dated 29.5.2016 to her for verification as the Company had no longer conducted active employee verifications in compliance with the Personal Data Protection Act 2010.

[12]Upon receipt of the Employment Verification Letter dated 29.5.2016 from MBSB, Ms. Abitha discovered that her signature had been forged and informed MBSB that she did not sign the said letter.

[13]Subsequently on the 10.6.2016 Ms. Abitha informed Mr. Gerard Alvin **David** the South East Asia Labour Relations Lead of the Company regarding the incident. The Company then commenced investigations.

[14]On the 13.6.2016 Ms. Abitha received an email from Mr. Eric Lee Heng Chan of MBSB requiring verification of Claimant's employment details. Once again Ms. Abitha informed Mr. Eric Lee that she had not signed the Employment Verification Letter dated 29.5.2016.

[15]On the 14.6.2016 while the Claimant was in India, the Claimant wrote an email to Ms. Abitha requesting a fresh Employment Verification Letter from the Company. Ms. Abitha then issues Employment Verification Letter dated 13.6.2016 confirming the Claimant's employment details.

[16]Subsequently on the 20.6.2016 the Company issued a Show Cause Notice to the Claimant. The Company required the Claimant to provide an explanation in response to the following allegation:

"

- (a) you had submitted a copy of the Employment Certification with signature.
- (b) In an email to Human Resources on 10.6.2016 at 2.36pm, Abitha Nair Ganapathy, the HR Operations Advisor for HR Global Services had confirmed that she did not sign the above mentioned Employment Certification and that her signature was forged. Pursuant to the above, you are hereby alleged to have committed the following act of serious misconduct: That you, with the intention to defraud, had forged the signature of Abitha Nair Ganapathy, the HR Operations Advisor for HR Global Services on your Employment Certification. By the above act, you have breached the standards of Business Conduct and/or your expressed and/or implied duties as an employee of the Company."

[17]On the 23.6.2016 the Claimant submitted her response to the Show Cause Notice by email wherein she had admitted to forging Ms. Abitha's signature in the Employment Verification Letter dated 29.5.2016.

[18] Subsequently on the 5.7.2016, the Claimant was required to be present at Company HQ at Cyberjaya wherein the Claimant was informed that her employment with the Company was terminated. The Claimant was served Letter of Termination dated 5.7.2016.

[19] At the time of dismissal the Claimant was Financial Analyst III and her last drawn salary was RM6,808.62.

[20] The Claimant contended that the termination was without just cause or excuse. She therefore prayed for reinstatement with full backwages.

(D) Issues

(a) Whether the failure to hold a Domestic Inquiry made the dismissal void?

(b) Was the Misconduct proven?

(c) Whether the proven misconduct warranted the punishment of dismissal?

(E) Whether the failure to hold a Domestic Inquiry made the dismissal void?

[21] The Claimant claimed that the Company had not held a Domestic Inquiry to inquire into the facts of the incident thereby depriving her the opportunity of being heard.

[22] The Company in its statement of Reply confirmed that "due inquiry" was undertaken by the Company. The Company had sent a notice of show cause dated 20.6.2016 to the Claimant. The Claimant had replied vide her letter dated 23.6.2016 wherein the Claimant admitted guilt in the said letter. The Company had provided the Claimant an opportunity to provide an explanation.

[23] The Claimant in her reply dated 23.6.2016 stated:

"I would like to apologize and express my deepest regret for the employment certification with forged signature. It was unintentional and inappropriate after what has transpired."

[24] In **Petroleum Nasional Berhad v. Mohd Redzuan Bin Ramli Award 47 of 1993**:

"The Indian Supreme Court has established that "where a workman in answer to a charge levelled against him admits his guilt, there will be nothing more for the management to inquire into, and in such a case the holding of an inquiry would be an empty formality"; *Central Bank of India v. Karunamoy Bannerjee* [1967] 1 LLJ SC."

[25] Further the law on this issue i.e absence of Domestic Inquiry has been made clear by the Federal Court in *Dreamland Corp Sdn Bhd v. Chong Chin Sooi* [1988] 1 MLJ 111 where Wan Suleiman FJ held that:

"the absence of a Domestic Inquiry or the presence of a defective inquiry is not a fatality but merely an irregularity; it is open to the employer to justify his action before the Industrial Court by leading all relevant evidence before it, and by having the entire matter open before the court."

[26] Dr. Dunston Ayadurai in his book **Industrial Relations in Malaysia: Law & Practice** at pages 325 & 326:

"The Industrial Court has confirmed that it is for the employer to determine initially whether or not an employee has committed a misconduct, but that in doing so the employer must act fairly and reasonably, after appropriate investigation, and on the basis of fact rather than assumption. In **Shell Malaysia Trading Co Sdn Bhd v. National Union of Petroleum & Chemical Industry Works (Award 134 of 1986)**:

The Company cited various authorities from Soonavala's *The Supreme Court on Industrial Law* ... But one authority relied on by the Company goes on to add:

It is for the management to determine whether the act of the workman constitutes misconduct, and whether it merits an order of dismissal. However, in determining whether there has been such misconduct, it must have facts upon

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which to base its conclusions, and without any motive of victimization or intimidation or resorting to unfair labour practice, and there must be no infraction of the accepted rules of natural justice. When the management does have facts from which it can conclude misconduct, its judgment cannot be questioned, provided the aforementioned principles are not violated.”.

[27]This Court finds that the Company has acted fairly and reasonably when it issued the notice of show cause dated 20.6.2016 to the Claimant. The Company has subsequently based its decision to terminate the Claimant’s services in reliance of the Claimant’s show cause and reply although it did not hold a domestic inquiry. Failure to hold a domestic inquiry in this case was not fatal. In any event, the Court is empowered to hear the case a fresh with all the relevant evidence and witnesses being called to testify, which the parties had proceeded to do before me.

[28]Further, the Court is of the opinion that as the Claimant had admitted to the charge of forging the letter it would not be necessary for the Company to hold a Domestic Inquiry.

(F) The Law

[29]The function of the Industrial Court has been propounded by Mohd Azmi FCJ in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 as:

“The function of the Industrial Court in dismissal causes on a reference under S20 is twofold: first, to determine whether the misconduct complained of by the employer has been established and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.”.

[30]In *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129 Raja Azlan Shah CJ ruled:

“Where representation 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.”.

[31]The burden of proof lies on the Company, as employer, to prove on a balance of probabilities that it had just cause or excuse for dismissing the Claimant (see *Telekom Malaysia v. Krishnan Kutty Sanguni Nair* [2002] 3 CLJ 314 and *Sinnaiyah & Son Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584).

Evaluation of Evidence and Findings of Court(G) Allegation of Forgery of Employment Certification Letter dated 29.5.2016. Was it proven?

[32]The Claimant in her reply dated 23.6.2016 to the notice of show cause dated 20.6.2016 admitted forging Employment Certification Letter dated 29.5.2016 by signing the signature of Abitha Nair Ganapathy who was HR Operations Adviser of the Company.

[33]Further, the Claimant apologized and expressed regret over the incident. The Claimant claimed that it was unintentional and inappropriate.

[34]The Claimant both in her statement of case and witness statement admit to signing the Employment Certification Letter dated 29.5.2016.

[35]COW-2 in evidence confirmed that she did not sign the Employment Certification Letter dated 29.5.2016. Her signature on the said letter was forged.

[36]Based on the oral testimony of the Claimant, her reply dated 23.6.2016 to the notice of show cause, her statement of case (pleadings) and the oral testimony of COW-2, the Court is of the conclusion that there is an

admission by the Claimant that she had forged the signature of Abitha Nair Ganapathy on Employment Certification Letter dated 29.5.2016.

[37]Therefore, it is this Court's finding that the alleged misconduct has been established by the Company on the balance of probability hence there is only one issue to be considered in this case, i.e whether the punishment of dismissal is appropriate or proportionate with the misconduct in the circumstances of this case.

(H) Condonation

[38]The Claimant had submitted that the Company had condoned her misconduct when it continued to allow her to perform her daily duties, sent for two business trips to India and when the Company issued Employment Certification Letter dated 13.6.2016 to MBSB.

[39]In **United Traction Co. Sdn Bhd v. Transport Workers Union (Award 282 of 1986)** the Industrial Court held:

"Condonation is generally described as permission granted to an employee retroactively to cover a prior misconduct or breach of duty. And uniform rule is that an employer who continues to keep an employee in employment with full knowledge that the latter had committed a breach of duty condones the breach, and such waiver or retroactive permission prevents the employer from later punishing the employee for it."

[40]In this regard, the Court finds that the Company had taken necessary action within reasonable time when the misconduct was brought to the Company's attention.

[41]The Company had promptly taken action when it was informed of the Claimant's act of forgery on 10.6.2016.

[42]COW-2 had informed COW-1 of the misconduct on the 10.6.2016. COW-1 commenced investigations and on the 20.6.2016 issued a show cause notice to the Claimant. The Claimant submitted her response to the show cause notice on the 23.6.2016. The Company waited for the Claimant to return from her business trips from India on the 1.7.2016 and subsequently on the 5.7.2016 met with the Claimant and informed her that her employment with the Company was terminated.

[43]The Court is of the view that COW-2 was not aware of the progress of the investigations when she issued Employment Certification Letter dated 13.6.2016 (Employment Certification Letter No.2) as she was not part of the investigations. In addition it was COW-2 duty and responsibility to issue the said letter upon request by an employee.

[44]The Claimant is under obligation to carry out her duties and responsibilities whilst she was an employee of the Company hence the Company's act of allowing the Claimant to travel to India on business trips and carrying out work duties cannot be said to be a condonation of her misconduct.

[45]It is the Court's finding that there was no undue delay on the part of the Company to take disciplinary action or to exercise its right to punish the Claimant, and as such hold that the Company had not condoned the misconduct.

(I) Purported Forced Resignation

[46]It is trite that the Claimant has the burden to prove her assertion of forced resignation.

[47]Both COW-1 and COW-3 testified that it was the Claimant who expressed her intention to resign immediately but subsequently changed her mind. The Court finds both COW-1 and COW-3 to be credible witnesses.

[48]Having examined the facts of the case, it is the Court's finding that the Claimant's allegation of forced resignation remains an unproven allegation.

(J) Whether the Claimant was dismissed by the Company without just cause or excuse?

[49]The Court of Appeal in the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 clearly stated the standard of proof required to be met even where criminal related misconducts are concerned. The Court of Appeal held as follows:

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“Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including „theft“, is not required to be satisfied beyond reasonable doubt that the employee has „committed the offence“, as in a criminal prosecution

In our view the passage quoted from Administrative Law by H.W.R Wade & C.F Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on a balance of probabilities, which is flexible, so that the degree or probability required is proportionate to the nature of gravity of the issue. But, again, if we may add these are not „password“ that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.”.

[50]In *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Anor* [2018] 2 CLJ 513 the Federal Court held:

“that misconduct in employment need not amount to a crime to justify dismissal.”.

[51]It must be emphasized that the standard of proof required is based on a balance of probabilities which is flexible so that the degree or probability required is proportionate to the nature of gravity of the issue.

(K) Whether it was reasonable to dismiss the Claimant?

[52]The fairness or unfairness of the dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved (Refer *NC Watling & Co Ltd v. Richardson* [1978] ICR 1049,; [1978] IRLR 255).

[53]In *Hariato Effendy Bin Zakaria & Others v. Mahkamah Perusahaan Malaysia and Bumiputra Commerce Bank Berhad* [2014] 8 CLJ 840 the Federal Court held:

“there is no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. It depends on the nature of the misconduct.”.

[54]The Federal Court in **Hariato Effendy Bin Zakaria & Others v. Mahkamah Perusahaan and Bumiputra Commerce Bank Berhad** referred to the case of *Laws v. London Chronicle* [1959] 2 AER 285 at pages 287 and 288 where Lord Evershed M.R opined:

“I think that it is not right to say that one act of disobedience, to justify dismissal, must be grave and serious character. I do, however, think that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is wilful: it does connote a deliberate flouting of the essential contractual conditions.”.

[55]In *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 the Federal Court held:

“that the Industrial Court had the jurisdiction to decide whether the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstance when ascertaining the award under [S20\(3\)](#) of the [Industrial Relations Act 1967](#).”.

[56]In *Mohd Yusof Bin Jaafar v. Nibong Tebal Paper Mill Sdn Bhd* [2012] 2 ILJ pg 45, the Industrial Court had referred to the case of *Taylor v. Parsons Peebles Ltd* [1981] IRLR 119 where the Court held:

“In determining the reasonableness of an employer’s decision to dismiss, the proper test is not what the policy of the employer was, but what the reaction of a reasonable employer would be in the circumstances.”

[57]In *Dahaman Huri Bin Azidin v. MISC Integrated Logistic Sdn Bhd*, Award No 129 of 2014, the Industrial Court following "*Pearce v Foster* [1889] 17 QBD 536, Lord Esher MR observed:

"The rule of law is that where a person has entered into the position of servant, if does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant shall be in a position to perform his duty and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him."

[58]And Lopes LJ in the same case held:

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service it is misconduct which justified immediate dismissal."

[59]In *HK Ananda Travel (Malaysia) Sdn Bhd v. Khor Seng Kear* [2003] 3 ILR 1280 the Industrial Court held:

"Hence he should at all times be trustworthy and always mindful of the need to maintain the relationship of mutual trust and confidence reposed upon him by the company. He also needs to be reliable."

[60]At the time of dismissal the Claimant was a Financial Analyst III. Her job functions were as follows:

- i) To do the payroll of Company's employees for about 7,000 employees from 8 entities.
- ii) To prepare year end tax returns of employees and Expatriates leaving the country.
- iii) Reconciliation of payroll related information, costs.
- iv) To prepare General Ledger on a monthly basis.
- v) Involved in financial transactions of the Company.
- vi) To submit statutory returns to Employee Provident Fund (EPF), Sosco and LHDN on a monthly basis.

[61]In the instant case it would appear from the evidence that the Claimant was actively involved in financial transactions involving the Company. Therefore it is reasonable for the Company to expect a high standard of care and conduct from the Claimant.

[62]Further the Court is of the opinion that good faith and loyalty towards the employer are essential qualities of a workman. From the evidence led it is apparent there is loss of trust by the Company in the Claimant's holding the position as a Financial Analyst following the discovery of the Claimant's misconduct.

[63]The Company in their submission submitted as the Claimant was actively involved in financial transactions on behalf of the Company and as a result of the breach of good faith by the Claimant, the Company could no longer repose the necessary trust and confidence in the Claimant and could not allow the Claimant to continue in her position.

[64]The Claimant could have made a request for the verification of earning letter via the HR Portal which was available on her note book, however the Claimant chose not to do so because she did not wish to wait out the 2 day reply period. The Court therefore find that the Claimant had deliberately forged the signature of COW-2 as she wanted to save time. Clearly her conduct was intentional and not a mistake as claimed.

[65]Further the Court is of the view that the Claimant held an important position in the Financial Department of the Company and was actively involved in daily financial transactions on behalf of the Company, it was reasonable for the Company to doubt the Claimant's integrity and honesty hence losing trust and confidence in the Claimant. The Claimant's act of forging the signature was carried out for her personal benefit. The Court is aware of the Claimant's achievements and the fact that she had no past records of misconduct. However based on the authorities cited in the submissions it was not unreasonable to dismiss an employee with an unblemished record for a single act of insolence, if the misconduct is sufficiently grave.

[66]In **Kartar & Sundra Singh Omnibus Co v. Transport Workers Union (Award no 7 of 1970)** the Industrial Court held:

“A single act of misconduct may justify dismissal only where the misconduct is such that it goes to the root of the contractual relationship of master and servant so as to indicate an unwillingness on the part of the servant to be bound by the terms of his contract.”

[67]Based on the facts and circumstances of this case the dismissal of the Claimant by the Company was fair and was proportionate to the misconduct committed by her.

(L) Conclusion

[68]Based on the totality of the evidence as adduced both oral and documentary and upon a consideration of the written submission of parties, this Court acting in equity and good conscience and on a balance of probabilities, finds that the Company had discharged its burden of proving that the Claimant was dismissed with just cause and excuse. The Claimant’s claim is accordingly dismissed and her dismissal is upheld by this Court.

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