

ARKITEK MZD

a

v.

KUAN YOK FOH

INDUSTRIAL COURT, KUALA LUMPUR
ZAINI ABD RAHMAN

b

AWARD NO. 499 OF 2004 [CASE NO: MP.1: 20(2)/4-16/00]
5 MAY 2004

*DISMISSAL: Redundancy - Claimant terminated from project work
- Company lost means of remunerating claimant - Whether redundancy
situation existed - Whether dismissal with just cause or excuse*

c

The claimant was holding the post of resident architect when he was allegedly terminated from his services without just cause or excuse. In rebuttal, the company submitted that the claimant's appointment was exclusively for a certain development project and that his termination was based on a termination notice received from the developer of the said project which stated that the services of the claimant was no longer required. Alternatively, the company submitted that the claimant's employment was terminated as a result of redundancy.

d

e

Held [for the company]:

[1] From the facts, the developer had terminated the services of the claimant whose salary was obtained from the company by way of reimbursement from the developer. Thus, the company could not further remunerate the claimant after receiving the termination notice from the developer. (p. 441 g-h)

f

[1a] The reasons relied on by the company, in that the services of the resident architect had been terminated by the developer and that the company was facing business downturn due to economic slowdown at that time, constituted just cause and excuse for the termination of the claimant's services. (p. 442 g)

g

[Just dismissal.]

Award(s) referred to:

h

Food Specialities (M) Sdn. Bhd. v. Esa bin Mohamad [1989] 1 ILR 502 (Award No. 74 of 1989)

Simpang Estate v. National Union of Plantation Workers (Award No. 2 of 1973)

For the claimant - Himself

For the employer - Yap Chi Wee; M/s Tan Kim Soon & Co

i

a

**AWARD
(NO. 499 OF 2004)**

b

The parties in this reference are Kuan Yok Foh (hereinafter referred as the claimant) and Arkitek MZD (hereinafter referred to as the employer). The dispute between the parties arises from the termination of the services of the claimant as an architect under the employment of the employer. The claimant claimed that the termination of his services on 31 March 1998 amounted to a dismissal without just cause and excuse.

c

For the record, this case was referred to the Industrial Court through a reference by the Honourable Minister of Human Resources dated 11 January 2000. The reference was received on 31 January 2000. This case was originally registered in Industrial Court No. 2. It was tried before the then Chairman Abu Bakar Awang. The hearing was completed on 21 April 2000. Thereafter the parties had filed their respective submissions. However Abu Bakar Awang did not hand down any award until the expiry of his contract as Chairman of Industrial Court in July 2003. The President of Industrial Court had directed this case to be transferred to this court to hand down an award.

d

e

This court had seen the parties on 4 September 2003. During this mention date the parties were given three options, ie, firstly to have this case to be tried *de novo*, or secondly to reopen the case with the parties given the opportunity to adduce further evidence and submission or thirdly to consent this court to hand down an award based on the records of proceedings previously adduced by the former Chairman.

f

On 3 December 2003, this court had obtained the written consent of both the claimant and the employer to have this court deliver an award based on the records only. Accordingly this court now hands down an award based on the records available in the file, ie, the notes of evidence, documents and written submission by both the parties.

g

In the Statement Of Case, the claimant pleaded that he commenced employment with the employer as resident architect with effect from 3 July 1995 *vide* a letter of appointment dated 28 June 1995. The claimant was holding the post of resident architect and drawing a monthly salary of RM5,250. The termination was based exclusively on contractual notice. However the claimant disputed the reasons offered by the employer for the termination of his employment and claimed that he was dismissed without just cause and excuse. Wherefore the claimant prays for an order of reinstatement to his former post without loss of seniority, wages and benefits.

h

i

The employer, in their Statement In Reply stated that the claimant was employed as a resident architect with effect from 3 July 1995. It is an implied

term in the employment that the claimant's appointment as resident architect is exclusively and solely for the development project called Damansara Uptown (hereinafter referred to as the project) and that the tenure of employment is for the duration of the said project. It is also an implied term in the claimant's employment that the usual and normal practices pertaining to the employment of a resident architect was applicable. a

In the Statement In Reply by the employer, it was contended that the termination of the services of the claimant by the employer was based on the termination notice dated 29 December 1997 received from Paramount Malaysia (1963) Sdn. Bhd, the developer of the project. In the said notice it was stated that the services of resident architect was no longer required by Paramount Malaysia Sdn. Bhd., the developer of the project. Alternatively the employer also stated that the claimant's employment was terminated as a result of redundancy in the employer's firm. b

To prove just causes, the employer through its sole witness COW1 testified that the claimant was employed for the sole purpose of overseeing the development of a project called Damansara Uptown. COW1 testified that the dispute was the non-mention of the specific post of resident architect in the appointment letter. He claimed that it was made known to the claimant that the claimant shall be the resident architect for the Damansara Uptown project during the interview between COW1 and the claimant. This is to the contrary as the claimant testified that he only knew about he being the resident architect for the Damansara Uptown project on his first day of work with the employer. c

COW1 also testified that the claimant was not issued with the employer's company call card. To this the claimant testified that he was never equated to with the others as other architects with the employer were issued with the employer's business call card. d

From the evidence adduced, it was shown through claimant's own evidence that throughout his employment with the employer, ie, from 3 July 1995 to 31 March 1998 – for a duration of 33 months, the claimant met COW1 at the most for about ten (10) times only. It showed that the claimant was stationed full time at the site of the project and not at the employer's office. e

All the evidence adduced above was to prove that the claimant was employed on fixed contract basis, ie, for managing the architectural aspects of Damansara Uptown project. f

This dispute arose when the owner of the project wrote and informed the employer that the developer do not require the services of the resident architect anymore at the project. *Vide* a letter dated 29 December 1997, the developer g

h

i

a had conveyed their intention to the employer. The content of the letter dated 29 December 1997 is shown below:

Damansara Uptown – Termination of Service and Demobilization of Resident Architect (Mr. Alfred Kuan Yok Foh).

b Further to telecommunication between the undersigned and your goodself, we write to confirm that the service of Mr. Alfred Kuan Yok Foh, the resident architect for the Damansara Uptown Project shall be terminated and demobilize immediately. As discussed, the notice period shall be (1) month effective from 01 Jan. 1988.

c In evidence, the claimant was appointed as resident architect to the project on 7 August 1995. In a letter dated 7 August 1995, the employer wrote to the developer advising the appointment of the claimant:

With effect from 15th July 1985, the salary for the Resident Architect shall be claimed accordingly as Remuneration scale below:

<i>d</i>	a. Resident Architect	-	Mr. Alfred Kuan Yok Foh
	Monthly salary	-	RM 4,500.00 x 1.5 m.factor
		-	RM 6,750.00
	Plus add 5% service tax	-	RM 337.50
<i>e</i>	Total	-	RM 7,087.50

The developer's letter to Arkitek MZD on 14 August 1995 stated that:

f Your recommendation to appoint Mr Kuan Yok Foh, Alfred as the Resident Architect is agreed. As recommended the reimbursement will be RM 7,087.50 per month based on the basic salary of RM 4,500.00 x 1.5 multiplication factor plus 5% service tax. The reimbursables for site staff as per our letter ref no. PM/DUTC/04/26 dated 24 August 1994 (copy attached) with the basic salary as stated in the salary voucher as the basis. Please note that our consent will be required for any adjustment to his basic salary.

g It is not disputed by the claimant in this trial that the salary he received till the termination while serving as resident architect for the Damansara Uptown project, was derived from the reimbursement secured by the employer from the developer.

h Having the services of the resident architect terminated, the employer now have no means of income to retain the services of an architect solely responsible to oversee the project at its site. The claimant did not serve the employer in other projects undertaken by the employer, except the Damansara Uptown project, from the beginning of his employment till his termination.

i The employer in establishing just causes also adduced evidence of its business hardship which the employer had faced during those years. In the testimony

of COW1, he informed the court about the economy downturn during the years of 1997 and 1998. It is a known fact that the construction industries were badly affected during this economy downturn. Many projects under construction were halted, stopped or abandoned. COW1 testified that his firm faced the slowdown as well. Some of the projects undertaken by the firm were proceeded with and completed. Some were put aside and left forgotten.

To show the firm's financial difficulty, COW1 informed the court about salary adjustments of its staff commencing from February 1998 for staff earning more than RM1,000. The letters exhibited at pp. 63, 64, 65, 66 and 67 of the employer's Bundle of Documents named all the staff who had their salaries adjusted. The salary cut was at about 10% to 33%. Even if the claimant were to stay with the employer, he himself will face salary cut around 30%. He would be paid about RM5,250 only per month.

The claimant in his cross examination stated clearly that he would not accept the 30% reduction from his salary.

The rest of the evidence adduced by both the employer and the claimant on the appointment of the claimant, the working aspect of the claimant's role as resident architect and the agreement of benefit for termination are not relevant in this case, save to show that the claimant, being an experienced architect, understood the nature of his employment with the employer, ie, to serve as resident architect to the project, and nothing else.

It is trite law in industrial dispute of dismissal of employee that the Industrial Court is to determine whether the dismissal was done with just cause and excuse. So as in this case, the employer has to prove on a balance of probabilities the evidences of just cause and excuse on the termination.

This case was a termination of service due to redundancy. The developer had terminated the services of the resident architect whose pay from the employer was by way of reimbursement from the developer. This fact was never disputed by the claimant.

It is the finding of this court that this case is a case of termination of service. Retrenchment exercise is part of termination of service. It is so, as though the claimant's services was terminated, the business of the employer continued but that a portion of the staff or labour force was discharged as redundant.

In this case, it is an issue as to whether the termination had taken place in the focus of genuine retrenchment or whether it was done with *mala fide*. In the case of Award No. 74 of 1989, *Food Specialities (M) Sdn. Bhd. v. Esa bin Mohamad* [1989] 1 ILR 502 the Industrial Court held that the right of an employer to reorganise his business must be limited by the rule that he must act bone fide and not capriciously or with notions of victimisation or unfair

a labour practice. He cannot be allowed under the cover of recession and reorganisation, to rid himself of an employee so as to replace him with a lower paid new recruit for example, or to dismiss one for some offences committed in the past which did justify dismissal at that time.

b As the burden of termination by the reason of redundancy is on the employer to prove, this court find that, from the evidence pleaded and adduced by the employer, the termination of service of the claimant was clearly a *bone fide* exercise. The services of the resident architect was terminated by the developer. It was the developer who reimbursed the remuneration of the claimant to the employer. It was very clear that the employer now has no means of further remunerating the claimant. The claimant was engaged solely for the purpose of being the resident architect to the project of the developer. As such, the services of the claimant with the employer had become redundant.

c Following the decision in Award No. 2 of 1973, *Simpang Estate v. National Union of Plantation Workers*, where it was stated that the decision of the management to retrench some of its workers cannot be disputed, unless it can be shown that it was done *mala fide* or without reason or was actuated by motives of victimisation or unfair labour practice, this court held that by the evidence adduced in this case, the decision of the employer in terminating the services of the claimant was a *bona fide* exercise. This court found no unfair labour practices were used.

d Although, from the evidence, the employer continued handling the project and eventually issued a certificate of completion of the buildings, the supervision by the employer was done on an *ad hoc* basis, and not by a resident architect anymore.

e Based on the reasons given by the employer's witness who was subject to cross-examination, this court found that the causes relied by the employer, ie, the services of the resident architect at the project was terminated by the developer, and the employer was facing business downturn due to the economic slowdown then are just cause and excuse rightly used in terminating the services of the claimant with the employer.

f Accordingly this court now dismiss the claimant's claim that he was dismissed without just cause and excuse. As to the termination benefits agreed between the parties, it is not within the jurisdiction of this court to deal with the matter. The claimant is at liberty to pursue the matter under other provisions of the law if such benefits have not been made to him.

g

h

i