

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 9/4-1289/06

BETWEEN

AZBEEL SINGH GILL

AND

EGL EAGLE FORWARDING (M) SDN BHD

AWARD NO: 1599 OF 2008

Before : **MOHD. AMIN FIRDAUS ABDULLAH**
CHAIRMAN

Venue : **INDUSTRIAL COURT OF MALAYSIA**
PENANG BRANCH

Date of Reference : **5TH OF MAY 2006**

Dates of Mention : **16TH OF AUGUST 2006, 29TH OF SEPTEMBER 2006, 3RD**
OF NOVEMBER 2006, 1ST OF DECEMBER 2006 & 15TH
OF DECEMBER 2006

Dates of Hearing : **2ND OF OCTOBER 2007 & 5TH OF FEBRUARY 2008**

Representation : **Mr. Darshan Singh Khaira, the learned counsel**
from Messrs Darshan Singh & Co. for the Claimant

Mr. Royhai'zam bin Bash, the learned counsel
from Messrs Tan Kim Soon & Co for the Respondent

Representation :

The reference under Section 20(3) of the Industrial Relations Act 1967 (Act 177) by the Honourable Minister of Human Resources, Malaysia is regarding the dismissal of Azbeel Singh Gill ("the Claimant") by EGL EAGLE FORWARDING (M) SDN. BHD. ("the Respondent").

AWARD

The reference under Section 20(3) of the Industrial Relations Act 1967 (Act 177) by the Honourable Minister of Human Resources Malaysia, is regarding the dismissal of Azbeel Singh Gill (“the Claimant”) by EGL EAGLE FORWARDING (M) SDN BHD (“the Respondent”). It was dated the 5th of May 2006 and received by the Court on the 14th of June 2006.

Background

By a letter dated the 6th of May 2004 (COB 1; pages 1 to 3) the claimant was offered employment with the Respondent Company (“Company”) as a probationary Executive, Security, Safety and Risk Management on a monthly salary of RM2,500.00 together with car maintenance allowance of RM300.00 per month; petrol expenses up to a maximum limit per month and handphone charges of RM150.00 per month. The 6 months probationary period expired on the 6th of November 2004. The new name of the Company is now called Ceva Freight Holdings (Malaysia) Sdn. Bhd. The Company was bought over by Ceva Holdings and both merged.

The Company stated that the job functions of the Claimant was subject to performance appraisal by his superior the Security Manager one

Kanagasabai Krishnan (COW 2) as a condition precedent to confirmation of employment.

Sometime in early July 2004 the Company appointed a lady Security Executive named Rajaspari a/p P Karunanidi. The Claimant received instructions from his superior that is COW 2 but according to him the lady Security Executive also gave instructions to him although both of them were of the same rank.

At a meeting with COW 2 and one Robin Ong Sheng Loong (COW 1) the Assistant Human Resource Manager the Claimant questioned the status, duties and functions of the said lady Security Executive. The Claimant viewed that although both were of equal status yet he was carrying out most of the duties. The Claimant said that the Company told him to give COW 1 and COW 2 some time to decide on their duties and responsibilities respectively.

The Claimant said that during that period there were no complaints by the Company regarding his work performance or discipline.

The Company replied that the job functions of the Claimant and the lady Security Executive were different.

The Company stated that eventually the non-confirmation and termination of the Claimant was due to his poor performance and disciplinary problem.

Issue

Was the termination of the Claimant made *mala fide* and without just cause or excuse?

Parties' Contentions

Respondent Company

Probationary Period

The Company's learned counsel argued that the Statement of Case, the whole testimony of the Claimant and the Written Submission by his learned counsel assumed that the Claimant was a confirmed employee and hence must be treated like one.

He said that it is trite law that should the employer keep silent at the end of the probationary period and neither confirms or terminates the service of the probationer, then he would continue to be in service as a probationer.

He cited the Federal Court case in *V Subramaniam & Ors v. Craigielea Estate* [1982] 1 MLJ 317 to support the principle of law laid down.

Status of the Claimant

It was contended that the service of the Claimant was not terminated during the probationary period which expired on the 6th of November 2004. His service was terminated on the 19th of November 2004 because it would be a fundamental breach of law and/or breach of contract for the Company to terminate the service of the Claimant before or within the 6 months which expired on the 6th of November 2004.

According to him this fundamental concept was stated in the Indian case of *Express Newspapers Ltd v. Labour Court & Anor* AIR 1964 SC 806 where Das Gupta J. held that:-

“It appears to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the grounds of misconduct or other sufficient reasons ...”

The learned counsel also cited the High Court case of *Sulnayah bte Hj Mohd Isa v. Sekolah Kanak Kanak Pekak Selangor* [1999] 6 MLJ 249 to support his contention that it is unfair and improper for the employer to prejudge the performance of the probationer before the expiry of his or her probationary period.

He submitted thus the termination of the Claimant made after the expiration of the probationary period and not prior to it was justified. The argument of the Claimant’s learned counsel that his client was not a probationer because the Company did not terminate his service within the six months is baseless. He did not adduce evidence to support his contention. At all material times the Company did not confirm the Claimant.

Poor Performance

It was contended that the Claimant did not perform up to expectations. Robin Ong Sheng Loong (COW 1) the Company's Manager for Human Resource, Training and Quality had given evidence that there was no such thing as automatic confirmation upon the expiration of the probationary period of the Claimant. He said that following the procedure of the Company before the Claimant could be confirmed it must evaluate his overall performance based on the performance appraisal made by his superior. The superior officer of the Claimant during his probation was Kanagasabai Krishnan (COW 2) the Manager of Security, Safety and Risk Management.

The Claimant had not performed his job functions to the satisfaction of the employer. This can be seen from the performance appraisal done by COW 2. (COB 1; pages 6-14) dated the 2nd of November 2004.

COW 2 reported that the Claimant had failed to finish or to ensure all the tasks assigned to him were carried out. There were instances where the Claimant did not do his work as instructed by COW 2. COW 2 said that

he had reminded the Claimant many times to ascertain all the tasks given were done but the Claimant ignored his instructions.

COW 2 in his report and testimony opined that the overall performance of the Claimant was marginal and poor. He did not possess the quality required by the Company. The Claimant lacked the skill to improve the Company's system and procedure for effective operations and he also had a disciplinary problem by failing to comply with the Company's rules. He showed poor attendance and punctuality.

COW 2 had reminded the Claimant on his record of bad attendance as reflected from his August and September 2004 punch cards (COB 1 pages 27 to 28). He often came late to work. It shows that the Claimant had no discipline because the nature of his job requires a committed and disciplined worker.

At a meeting on the 19th of November 2004, the Claimant was shown a copy of his said performance appraisal (COB 1; pages 6 to 14) and COW 2 said that he gave it to the Claimant to sign it but he refused to do so.

Thus the learned counsel submitted that there should be no issue of the report of the performance appraisal being not given to the Claimant.

COW 2 was the best person to evaluate the performance of the Claimant for the Company. The fact that the Claimant was not satisfied with the report on his performance is immaterial. The material issue is whether the Company had evaluated his performance.

It was also argued that the production of the two Certificates of Achievement (CLB 1; pages 8 to 9) for a mere two day training session by the Claimant does not reflect the overall performance during the tenure of his probation.

The learned counsel referred to the High Court case of *Robert John Reeves v. Menteri Sumber Manusia, Malaysia and Anor* [2001] 1 MLJ 107 as well as *Hartalega Sdn Bhd v. Shamsul Hisham Mohd Aini* [2004] 3 CLJ 257 to justify the termination of the Claimant.

He further maintained that throughout the trial COW 2 repeated many times that he had reminded the Claimant to improve his performance and was given enough opportunities to change his attitude towards his work but the Claimant ignored it.

The assertion by the Claimant that the Company had acted *mala fide* towards him is not supported by any proof. The decision to terminate him was done *bona fide* and not capriciously.

Moreover he pointed out that the Claimant had accepted the Letter of Non-Confirmation and Termination together with two weeks salary in lieu of notice without any protest or objection. His conduct mirrors that at all material times he had accepted the termination voluntarily and his case before the Court is an afterthought and an abuse of the process of the Court.

Summing up the learned counsel said that the absence of Rajaspari the lady Security Executive does not affect the case for the Company because her evidence is not relevant. Hence the question of adverse presumption does not arise.

Therefore the Claimant's case ought to be dismissed.

Claimant

The learned counsel for the Claimant contended that no Show-Cause or Warning Letters were issued to the Claimant before the Company terminated his service.

He further argued that the performance evaluation of the Claimant was not discussed or shown to him. The performance appraisal report was never signed by the Claimant.

The lady Security Executive Rajapasri and other witnesses involved in the case were not produced by the Company meaning the Court should draw an adverse inference against such failure.

It was asserted that the Claimant was not a probationer because the Company did not terminate his service within six months but only after six months.

All the e-mails produced by the Company are hearsay and not proven by the Company that they had been received by the Claimant. If the Claimant had received them surely at least he would respond to one.

He further argued that the Claimant was dismissed summarily without adherence to the rules of natural justice. The action of the Company was high-handed.

The Claimant accepted the notice of termination and the two week salary as he had no choice. This does not mean waiver of his rights.

The evidence of the Claimant was not contradicted.

The learned counsel prays that the claim of the Claimant be allowed.

The Law

Khaliah bte Abbas v. Pesaka Capital Corp Sdn Bhd [1997] 3 CLJ 827;
the Court of Appeal held that:-

“The requirement of bona fides is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has jurisdiction to interfere and to set aside such dismissal.”

Robert John Reeves v. Menteri Sumber Manusia, Malaysia and Anor
[2004] 3 CLJ 266

“At the end of the applicant’s probationary period, it was open to the second respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the second respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily.”

In Hartalega Sdn Bhd v. Shamsul Hisham Mohd Aini [2004] 3 CLJ
257, it was held that:-

“... the rigid test as expounded in the said case should not be applied to employees on probation, especially with regard to requiring a written warning. To me, the monthly appraisal report produced by the applicant and which was communicated and discussed with the respondent was sufficient for reason of dismissal.”

Findings

Status of the Claimant

At the outset finds that the Claimant was still a probationer at the time that his service was terminated. The Federal Court in *KC Mathews v. Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 321 held that:-

“There can, in our opinion, be no doubt the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired - except on the ground of misconduct or other

sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.”

This Court applies the principle of law laid down by the apex Court in the country. There was no evidence adduced to show that the Claimant was confirmed in his post.

Poor Performance

Kanagasabai Krishnan (COW 2) the immediate superior of the Claimant had done performance appraisal on the Claimant (COB 1; pages 6 to 14) and found that overall he was performing below par. COW 2 was the best person to assess his performance. COW 2 had testified that he had reminded the Claimant concerning his poor performance many times. Some reminders were written and some verbal. He had discussed the

performance appraisal with the Claimant but the latter refused to acknowledge it by putting down his signature on the document in question.

For example Spot Check Reports were published on and off. The Claimant unlike his colleague Sandra did not follow up the reports. He did not take heed of the instructions given by COW 2.

The content of the Letter of Justification dated the 2nd of November 2004 addressed to the Human Resource Manager (COB 1; pages 6 to 7) from COW 2 was known by the Claimant even though it was not addressed to him. COW 2 testified that there was an oral briefing regarding it. He further testified that the poor performance of the Claimant was relayed to COW 1 *via* e-mails. The Court finds that the e-mails are not hearsay as contended by the Claimant's learned counsel as the maker himself that is COW 2 gave evidence at the trial.

The Court agrees that the job functions of the Claimant and the Lady Security Executive varied and that she did not give instructions to him. He was in charge of security operational matters whereas she was in charge of

documentation and administrative matters. Her evidence will have no bearing regarding the question of his poor performance. The same applies to other witnesses not called for the trial as the Claimant's learned counsel argued that their absence resulted in an adverse inference against them.

Furthermore COW 2 in his testimony said that all the discussions and briefings concerning the poor performance of the Claimant were minuted and he had informed the Claimant about the accusations.

There was no necessity for a Written Warning to a probationer. Please see *Hartalega Sdn. Bhd. v. Shamsul Hisham Mohd. Aini* case and neither it is required by law to issue a Show Cause Letter. Please see *The Law of Industrial Disputes Volume 2* on page 1013 by O.P. Malhotra.

COW 2 said that after the Claimant left the Company one Hari Risin was employed but before the six months of probationary period, the Company did not make such a decision. The Court finds that the termination of the Claimant was not to make way for Hari but it was actually due to the poor performance and his disciplinary problem.

After analyzing and evaluating the total evidence in relation to the facts and circumstances of the case, the Court finds that the Claimant had underperformed and had no discipline as proven by the Company. It had produced convincing evidence to support its case against the Claimant. The termination was made *bona fide* and without any ulterior motive. The decision was based on just cause or excuse.

In the light of the findings, the Court now dismisses the case of the Claimant.

HANDED DOWN AND DATED THIS 11TH OF SEPTEMBER 2008.

**(MOHD AMIN FIRDAUS ABDULLAH)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PENANG BRANCH**