

INDUSTRIAL COURT MALAYSIA

CASE NO : 24/4-2197/06

BETWEEN

PUAN SARASWATHY A/P RAMASAMY

AND

FSL LOGISTICS (M) SDN. BHD.

AWARD NO : 974 OF 2010

BEFORE : **Y. A PUAN YAMUNA MENON**
CHAIRMAN - (Sitting Alone)

VENUE : Industrial Court, Kuala Lumpur

DATE OF REFERENCE : 04.10.2006

DATES OF MENTION : 10.11.2006, 09.01.2007, 07.03.2007,
23.04.2007, 27.06.2007, 23.07.2007,
05.11.2007, 21.01.2008, 18.02.2008,
03.04.2008, 05.06.2008, 21.07.2008,
10.09.2008.

DATES OF HEARING : 21.10.2008, 22.10.2008, 17.11.2008.

DATE OF LAST
SUBMISSION : 16.07.2009

REPRESENTATION : Mr. Dev Anand from Messrs Anand Associates
representing the Claimant.

Mr. Selvarajah from Messrs Fernandez &
Selvarajah representing the Company.

REFERENCE

:

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 pertaining to the dismissal of **Puan Saraswathy a/p Ramasamy** (the Claimant) by **FSL Logistics (M) Sdn. Bhd.** (the Respondent).

AWARD

The Claimant was appointed as a Business Development Executive of the Company effective 3rd May 2005. She was subsequently confirmed effective 1st November 2005. Her last drawn salary was RM2,700.00. The Claimant was dismissed vide letter dated 1 March 2006. The effective date of dismissal was 3 March 2006.

The Law

The role of the Industrial Court in a reference under s20(3) of the Industrial Relations Act was described by the Federal Court, in the classic case of **Milan Auto Sdn. Bhd. v Wong Sen Yen** [1995] 4 CLJ 449 in the following words:-

“the functions of the Industrial Court in dismissal cases on a reference under Section 20 is two fold; **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.”

In the case of **Goon Kwee Phoy v J & P Coats (M) (Bhd)** [1981] 2 MLJ, Raja Azlan Shah, CJ (as HRH then was) sitting in the Federal Court at that time stated the principles as follows:-

“Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the 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 or reason 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”.

The burden of proof obviously is on the Company to prove that the dismissal of the employee is with just cause and excuse.

In the Court of Appeal decision of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair** [2002] 3 CLJ 314 at p. 315, Justice Abdul Hamid, (later Chief Justice and since retired), made the following pertinent observations:-

“.....In hearing a claim of unjust dismissal where the employee was dismissed on the basis of

an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, i.e proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue”.

The learned judge went on to say:-

“the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a ‘court of arbitration’, and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience”.

At the same time the learned author, **CP Mills** in “**Industrial Dispute Laws In Malaysia**” (2nd edn.) at p. 78 cautions that:

“Unless there is clear evidence to support the charge of misconduct, the employer's decision against the workman will not be upheld by the Court. Mere suspicion is not enough. Even where there were reasonable grounds before the employer for concluding that the workman was guilty of the misconduct alleged against him, but in the proceedings before the Court the evidence does not permit any firm conclusion that the workman did commit the acts in question, the dismissal will not be sustained”.

Misconduct

Dunston Ayadurai in “**Industrial Relations in Malaysia, Law and Practice**”, 3rd edition, at p324 stated the following principles:-

“In theory, misconduct has two possible sources. One source has its basis in the rights of the employer, while the other source had its basis in the responsibilities of the employee. It is generally accepted that every employer has as such the right to establish rules and regulations governing the conduct of his employees at the workplace and during the worktime”.

The learned author went on to say:

“However, it is also generally accepted that every employee owes certain duties to his employer. These obligations arise from the employer-employee relationship. In other words, some of these duties and obligations may be express while others can be implied. Any conduct which is inconsistent with the fulfillment of these duties or obligations, unless it is of a trifling nature, would constitute misconduct.”

In **Plant Rubber Sdn. Bhd. v Goh Chok Guan** (Award 30 of 1995), “misconduct” was defined as :

“An employee is vested with certain obligations towards his employer. These obligations arise from the express or the implied terms of the employment contract. Any breach of an express or an implied duty on the part of the employee, unless it be of a trifling nature, would amount to misconduct”.

In **Holiday Inn v Elizabeth Lee** (Award No. 255 of 1990), the Industrial Court described “misconduct” in the following words :

“Now, the dictionary meanings of the word 'misconduct' are 'improper behaviour, intentional wrongdoing, or deliberate violation of a rule or standard of behaviour'. Insofar as the employment relationship is concerned, an employee has certain express or implied obligations towards his employer. Any conduct inconsistent with the faithful discharge of his duties, or any breach of the express or implied duties of an employee towards his employer, unless it be of a trifling nature, would constitute an act of misconduct : see **Liew Ken & Others v Malayan Thung Pau Berhad** (Award 37 of 1974)”.

The Grounds of Dismissal

The reasons for dismissal stated in the letter of dismissal are as follows:

“We regret to inform you that effective from 2nd March 2006, we will terminate your employment with FSL Logistics (M) Sdn. Bhd., because of the following reasons:-

- 1) We found that one of your immediate family members is holding a directorship with SGV LOGISTIK SDN. BHD. We strongly feel that this will lead to conflict of interest and hence, can effect your work commitment to us, FSL Logistics (M) Sdn. Bhd.

- 2) On 13th February 2006, you received a rate request from All Ports Logistics Sdn. Bhd. which was sent via e-mail direct to your official FSL e-mail, saras.mypkl@freightsystems.com. However, you visited the customer with one of the

sales person from SGV LOGISTIK SDN. BHD., who then faxed the rates to All Port Logistics Sdn. Bhd. on 14th February 2006. This was done without prior consent from your superior from FSL Logistics (M) Sdn. Bhd.

We have no alternative but to relieve you from your official duties immediately. We will bank in 1 month salary in lieu of 1 month notice on 30/3/2006 and lastly, we would like to thank you for your past services”.

The Pleadings

1. It is pertinent to note that Para 6 of the Statement of Case, (or “SOC”) refers to the Letter of Dismissal , and states the following:

“As to the 1st charge, the Claimant contends that her son is only a sleeping Director in another Company and his Directorship has nothing to do with the Claimant's work and she has always been loyal and earning income for FSL Logistics (M) Sdn. Bhd. (the Company). The Management of FSL Logistics (M) Sdn. Bhd. (the Company) is fully aware about the Claimant's son's involvement in SGV Logistics Sdn. Bhd.”

So in the Statement of Case or SOC, the Claimant's contention is that the Company was fully aware of the fact that the Claimant's son was involved in SGV.

Para 7 of the SOC went on to state:

“As for the 2nd charge, the Claimant denied that allegation that has been preferred against her by the Company and would challenge the same by putting the Company to strict proof to justify of its grounds for preferring the allegation of the misconduct”.

2. The Company in response to Para 6 of SOC stated the following in **Para 3 of Statement of Reply** (to be referred to as SIR) :

“(i) At all material times the Claimant had failed to disclose either verbally or in writing to the Company that her son Mr. Jayprakash a/l Manian@Maniam was a director and shareholder in SGV Logistik Sdn. Bhd. and as such the Company was never aware of the Claimant's son's involvement in SGV Logistik Sdn. Bhd.”

The Statement in Reply (SIR) has clearly stated the Company's stand that the Claimant had failed to disclose the fact that her son was involved in SGV and hence that the Company was not aware of this fact. This would entail that even if there was any transaction between the Company and SGV, (which in this case there was some evidence of earlier transaction), the Company's stand has to be borne in mind, that the Claimant had failed to disclose her connection with SGV, through her son.

3. As stated earlier, the SOC states that the Company was aware of this fact. Despite the fact that this was clearly pleaded, and an important issue, it will be seen further in this award, that Company witness COW1, who was the General Manager, was never questioned on this or challenged on this. It was never put to COW1 under cross-examination that as General Manager, he was aware that the Claimant's son was involved in SGV or that the Company's management was aware of this. This is a glaring omission.

In the Rejoinder filed on behalf of the Claimant, it was merely stated:

“In relation to paragraph 3(i) of the Statement in Reply, the Claimant avers that her son's business involvement should be of no concern to the Company. If the Company had considered this factor to be important, the Company should have asked for a declaration to that effect not only from the Claimant, but from all other employees as well.”

4. In response to paragraph 4 of SIR, the Claimant's Rejoinder at Para 5 states as follows:

- “(i) It is true that one Kayal Vily of All Ports Logistics Sdn. Bhd. requested for certain quotations on 13 February 2006 at 2.29 pm by email.
- (ii) The Claimant responded via email at 6.05 pm on the same day. The Company's insinuation that the Claimant did not respond to their request and that SGVLogistik Sdn. Bhd. had submitted a quotation is a blatant lie. A copy of the email correspondence between the Claimant and the said Kayal Vily is annexed hereto and marked as CL-6
- (iii) The communication between Kayal Vily and one Rajoo of SGV Logistik is not within the knowledge of the Claimant.
- (iv) The Claimant denies having visited the office of All Ports Logistics Sdn. Bhd. or having informed Kayal Vily to direct all sales inquires to SGV Logistik.

- (v) The Claimant only visited All Ports Logistics after her dismissal to question Kayal Vily on why she had made a fake and malicious allegation against her”.

So in the Rejoinder, the Claimant refers to an e-mail dated 13th February 2.29 pm from All Port to FSL, which she responded to at 6.05 pm on the same day. The Claimant in her Rejoinder did not specifically dispute the other e-mails in the Company's Bundle. It is to be noted that the Company's Bundle had already been filed prior to the Rejoinder, and the Claimant (through her Counsel) would have had the benefit of perusing all the documents and e-mails in Company's Bundle (to be referred to as “COB”).

The Company's case

The Company called 3 witnesses, namely:

- 1) Mr. Philip a/l Sinnappan (COW1)
- 2) Ms. Kayal Vily (COW2)
- 3) Mr. Ramanjan a/l Kuppoo Naidn (COW3)

COW1

COW1 was the General Manager of the Respondent Company (to be referred to as “the Company” or “FSL”) at the material time. He testified that the Claimant had failed to disclose to the Company the fact that her son was involved in SGV Logistik Sdn Bhd (to be referred to as “SGV”) as a shareholder and director. SGV was engaged in a similar business as the Company. He later found out that the Claimant's son was indeed involved in the said

business. The Court noted that under cross examination it was never put to COW1, that he or the management of the Company, was aware (as stated in the Statement of Case) that the Claimant's son was involved in SGV.

COW1 testified that on 16 February 2006, he received a telephone call from Kayal Vily (COW2) of All Port Logistics Sdn Bhd (to be referred to as "All Port"), a Company which had been dealing with FSL. COW2 told him in effect that the Claimant had diverted business meant for FSL to SGV. COW2 also informed COW1 that on 15 February 2006, the Claimant, together with one Mr. Kumar from SGV (since deceased), had gone to her office.

COW1 also testified that he had a discussion with the Claimant on 21 February 2006, during which she admitted that she had committed misconduct.

COW2

The Company's second witness Kayal Vily (COW2), was referred to several e-mails in Company's Bundle ie COB, which are relevant to this case and confirmed them. In this case it is important to look at these e-mails in respect of rate quotations, in order to appreciate fully the facts of this case.

Tab 1 of COB

1. The first e-mail to be referred to is a request for rates from All Port ,that is an e-mail dated February 13th 2006, time 10.44 am, (See Tab 1 of Company's Bundle or COB).

In her witness statement COW2 was asked:-

"Q3 : On 13.2.2006, did you request the Claimant to send you a freight quotation from Port Klang to Kolomoong via Chittagong?",to which question she answered in the affirmative.

She was then shown the document appearing at Tab 1 of COB, i.e the e-mail dated February 13th 2006 at 10.44 am, and was asked:

"Q4 : Is this a copy of the request by e-mail sent by you to FSL Logistics (M) Sdn. Bhd.?", to which she answered "Yes."

This e-mail (which is referred to in the Dismissal letter) reads:

"From : All Port

To : FSL-Saras

Sent : Monday, February 13 2006 10.44 AM

Subject : REQUEST FOR FREIGHT QUOTATION – CONVENTIONAL CARGO

Dear Madam Saras,

Gd morning to you, as per our tele-conversation moment ago, kindly quote us with yr best rates for following services:-

Port of Loading : Port Klang

Port of Discharge : Chittagong

Final Destination : Kolomoong

Commodity : Power Cables in Drums

Vol : 40 drums x 5.65 m3 / Weight : 2,068 kgs
20 drums x 9.25 m3 / Weight : 4,086 kgs

Awaiting for yr soonest reply

Rgds
Kayal Vily
All Port Logistics Sdn. Bhd.
H/P : 016 275 5732

It is to be noted that this e-mail from All Port was sent to the Claimant at FSL on 13th February 2006 at 10.44 am by Kayal Vily (COW2) of All Port . The e-mail pertains to a request for freight quotation for conventional cargo. The details were that the port of loading was Port Klang, and port of discharge was Chittagong. The final destination was Kolomoong.

The request ended with the words "Awaiting for your soonest reply"

The Claimant under cross-examination was referred to the said e-mail at COB Tab1 and asked the following:

"Q : Was this sent to you?"

Her reply was:"Yes, the e-mail was sent to me.

Q : At FSL?

A : Yes.

Q : Did you reply to this e-mail?

A : For this I did not reply.

Q : Why?

A : The rates were not obtained at that time to give the concluded final destination."

So the Claimant eventually acknowledged under cross-examination the fact that she had received this e-mail, although she gave the excuse that she did not reply because the rates

were not obtained at that time.

In this respect it has to be borne in mind that in her witness statement, at Q and A12, she had denied knowledge of this e-mail, as evident below:

“In relation to the 2nd allegation, my explanation is that I responded to all requests for quotations. **If All Port Logistics Sdn. Bhd. had requested for a quotation, I would definitely have provided it.** In this respect, I would refer to 'CL-6' which is a request from All Port Logistics dated 13 February 2006 at 2.29 pm. I responded at 6.05 pm on the same day with my quotation, I would definitely have provided it. In this respect, I would refer to 'CL-6' which is a request from All Port Logistics dated 13 February 2006 at 2.29 pm. I responded at 6.05 pm on the same day with my quotation and Ms. Kayal from All Port Logistics thanked me for the response. **If as the Company states there was another request, as reflected in 'Company Document 1' and if I had not responded to that request, definitely Ms. Kayal would have mentioned it in her response to me on 14 February 2006”.**

Hence the Claimant is not being honest when she said under cross-examination that she did not reply because the rates were not obtained in time. Her earlier answer in her witness statement contradicts this.

In fact COW2 was accused of having concocted this very same e-mail. COW2 was asked under cross-examination :

“Q : I suggest to you that this document Tab1 has been falsely made by you and All Port?

A : No”

The Claimant's case has been inconsistent. The Claimant after first denying knowledge of the said e-mail, later acknowledged receipt of the e-mail. In the meantime COW2 had been accused of falsifying the said e-mail and also the document at Tab 2 of COB. It is evident from all this, that these allegations against COW2 are without any basis.

Tab 2 of COB

COW2 proceeded to confirm receipt of SGV's Quotation to All Port in Tab2 of COB, which All Port had not requested for.

She gave evidence as follows:

“Q5 : Did you receive any feedback from FSL Logistics (M) Sdn. Bhd.?”

To which her answer was:-

“A5 : No. However on 14.2.2006, I received from SGV Logistik Sdn. Bhd.”

COW2 was then shown the document appearing at Tab 2 of COB i.e the unsigned letter or note from SGV. She was then asked:-

“Q6 : Is this the quotation received from SGV Logistik Sdn. Bhd.?”

To which her answer was in the affirmative. She was then asked:-

Q7 : What was your reaction?”, to which her answer was:-

"A7 : I was surprised to receive a quotation from SGV Logistik Sdn. Bhd. As we did not request for a quotation from SGV Logistik Sdn. Bhd. I then called SGV Logistik Sdn. Bhd. And spoke to one Mr. Rajoo and asked for an explanation as to why SGV Logistik Sdn. Bhd. Sent a quotation to All Ports Logistics Sdn. Bhd. Mr Rajoo explained that the Claimant had instructed SGV Logistik Sdn. Bhd. to send a quotation to All Ports Logistics Sdn. Bhd."

The quotation from SGV referred to above was as follows:

"SGV LOGISTIK SDN. BHD

No. 36A, Lorong Cempeng, Off Jalan Berangan
42000 Port Klang. Email : svgl@streamyx.com
Tel : 603-3166 0825 Fax : 603-3167 0825

Date : 14/2/06
To : All Port Logistics Sdn. Bhd.
Attn : Miss Kayel
From : Kumar / Rajoo
Re : Freight Quotations – Conventional Cargo

Reference to above, pleased to quote you for the same.

Freight USD 85.00 per F/Ton whichever is the higher.

EDI Fee MYR 30.00

Documentation Fee MYR 80.00 per B/L

Hope the above meets yr kind requirement and please do not hesitate to contact us if you need any further clarification.

Thank You & Warm Regards"

At the top of the above document were 2 dates that this document was faxed i.e 14/2/06 at 18.24 (6.24 pm)and at 4.46 pm on 17/2/06,with the fax numbers.

The faxes read :-

"17 Feb 2006 4:46 PM ALL PORT LOGISTICS SDN. BHD. 0331662595 P.2
14 FEB 2006 18:24 03-3166 2595 033167 0825 P. 01"

The document had been faxed to All Port by SGV on 14 February. COW2 testified that the document showed the incoming fax number of SGV and the receiving fax number of All Port. Furthermore the document was faxed from All Port on 17 February and she went on to testify that she had faxed it to FSL on 17 February.

This Quotation from SGV was followed by a visit by Kumar(the late)from SGV accompanied by the Claimant.

COW2 testified:

"A8 : On 15.2.2006, the very next day, the Claimant and one Mr. Kumar from SGV Logistik Sdn. Bhd. came to the office of All Ports Logistics Sdn. Bhd. and had further discussions on the quotation sent by SGV Logistik Sdn. Bhd. to All Ports Logistics Sdn. Bhd. At the end of the discussion the Claimant informed me to send all future rate enquiry to SGV Logistik Sdn. Bhd. instead of FSL Logistics (M) Sdn. Bhd."

As regards the quotation from SGV, COW2 was asked under cross-examination:-

“How do you know that this is a true quotation when it was not signed or when it says it is from Kumar/Rajoo?”

COW2's answer was:-

“A : I called SGV Logistik and spoke to Mr. Rajoo asking him why are you sending me this quotation.”

She was then asked:-

Q : How did you know this was a quotation in response to what you required from FSL Logistics (the Respondent Company)?

A : First I found out from the quotation reference. Then I called SGV Logistik and reconfirmed with Mr Rajoo from SGV.”

It was submitted on behalf of the Company that when COW-2's credibility was attacked under cross-examination she was able to withstand the cross examination. The crux of the attack on COW-2 was that she was not telling the truth in respect of the e-mails in COB-Tab 1 and Tab 2. It was alleged that the documents were concocted by All Ports. The Claimant later conceded that she had received the e-mail at Tab1. COW2 when challenged that Tab 2 is a false document, pointed to the fact that there was evidence of the Company fax number of SGV and receiving fax from All Ports in the said document.

It was also put to COW2 that the Claimant and the late Mr. Kumar did not pay her any visit at her office in All Ports Logistics Sdn. Bhd. on 15/2/06 but rather that the Claimant had visited

her in March 2006, to confront COW2 as to why she had complained to FSL.

COW2 responded as follows:

"First when I received the quotation from SGV which I never requested for, I called up SGV Logistik and found out from whom SGV Logistik got the information on my request. I found out Madame Saras was the one who instructed Mr. Rajoo to send the quotation to me."

"And I brought this issue to my boss i.e All Port Logistics and as per my boss's advice they asked us not to bring up this issue as a serious issue. Until Madame Saras and Mr. Kumar showed up at my office at All Port Logistic on 15/2/06. After 2 days I did call up Mr. Philip and Mr. Prem of FSL Logistics and informed Mr. Philip the whole scenario, meaning from the day when I sent the quotation to Madame Saras, until she showed up at my office in All Port." COW2 then faxed Tab 2 to FSL.

This Court finds COW2 has given clear and consistent testimony. She is indeed a credible witness. There is clearly no reason for her to lie and concoct documents. Although it is in evidence that COW2 had worked for FSL earlier, there is nothing to indicate that she had any wrong motives. She obviously knew both the Claimant and COW1. Furthermore the Claimant acknowledged receiving the very document that COW2 was accused to have concocted. Serious allegations have been made against her which are clearly untrue.

The Claimant was unable to show why COW-2 would want to lie and give evidence against her. There was no evidence of any ill feeling or animosity between the Claimant and COW-2.

that would provide any justification for COW-2 to distort the facts in respect of the e-mails.

On 16th February 2006 a letter was sent from All Port to the Company. In this letter it was put on record that the coordinator of All Port, Ms Kayal had telephoned Madam Saras, i.e the Claimant, on 13th February 2006, followed up with e-mail requesting from the Respondent Company rates for Sea Freight quotation from Port Klang to Kolomoong via Chittagong. The sender of the letter, Mohd Saidy Abdullah, the Operation Manager of All Port, expressed surprise that the response in the form of quotations for the Sea freight had come from SGV and not from FSL. Counsel for the Claimant objected to this letter as the maker, Mohd Said, was not called as a witness.

The Court is of the view that the evidence of COW2 concerning the matters related to in the said letter is sufficient, and there is no need to rely on this letter, as COW2 has given evidence based on her first hand knowledge of these matters, which is even better.

COW2 was also referred to another email i.e at 2.29 am sent on 13 February.

At first when COW2 was asked whether she had received 2 e-mails on this date she recalled only one e-mail that is the one in Tab1. She was then referred under cross-examination to CL6 and the e-mail of 2.29 pm, and she confirmed receipt of this.

Counsel for the Claimant referred to this e-mail as "the second request" and the earlier one as "the first request".

She was then asked: "If you had not received a response to the first request how is it that

you did not state this in your second request?"

She answered as follows:

"The first request and second request are not related."

In her defence the Claimant has pointed to this e-mail on 13th February at 2.29 pm, to be found in CL6, from All Port to FSL at 2.29 pm as follows:-

"From : AllPorts

To : FSL - Saras

Sent : Monday, February 13, 2006 2.29 pm

Subject : Re: REQUEST FOR FREIGHT QUOTATION – FCL SERVICES

Dear Mdm Saras,

Gd day to you, kindly quote us with yr best best 20' & 40' rates for following services:-

Port of Loading : East Malaysia"

It is to be noted that this e-mail was requesting freight quotations – FCL services, where the port of loading was East Malaysia and not Port Klang this time. Hence the Port of Loading and the Port of Discharge was different from the earlier e-mail of 10.44 am.

COW2 when questioned about the 2 e-mails answered as follows: "The first request and second request are not related at all."

The Court noted that the e-mail on 13 February 2006 at 10.44 am was in reference to a request for freight quotation conventional cargo, Port of loading, Port Klang and Port of

Discharge, Chittagong, whereas the e-mail at 2.29 was for FCL Service Port of loading : East Malaysia.

The Claimant in her e-mail at 6.05 pm responded to the request for freight quotation for best rates to Kuching, Kota Kinabalu and Sandakan in response to the request at 2.29 pm from All Ports i.e of loading East Malaysia. However the e-mail at 10.44 am was referring to something else, namely request for freight quotation – conventional cargo, port loading, Port Klang, Port of Discharge, Chittagong.

The response from Saras (the Claimant) at FSL was at 6.05 pm of the same day as follows:-

“From : saras
To : AllPorts
Sent : Monday, February 13, 2006 6.05 pm
Subject : Re: REQUEST FOR FREIGHT QUOTATION – FCL SERVICES”

Dear Kayal,

My best rate for you as follows:-

- a) Kuching @ RM850/-per 20 Baf @ RM395 - for 40' double rate
- b) Kota Kinabalu @ RM1280/--per 20' Baf @ RM395/- per 20' for 40' double
- c) Sandakan @ RM2000/-per 20' Baf @ RM395/- per 20'/Double for 40'

Hyderabad @ USD1100/-per 20' Inland on consignee's account for 40' double the rate
Mumbai @ USD750/- per 20' & double for 40' Base port only.

Await your reply soon to serve you.

Brgds

SARAS

BUSS FEV EXEC
FSL LOGISTICS (M) SDN. BHD.
TEL : 603-3166 8122
FAX : 603-3165 9341

MOBILE : 6012-223 9305
E-MAIL : saras.mypkl@freightsystems.com
URL : www.mypkl@freightsystems.com "

There was a response from All Ports to this e-mail the following day i.e February 14th 2006 at 9.25 am as follows:-

"From : "All Ports" <allports@streamyx.com>
To : "saras" <saras.mypkl@freightsystems.com>
Sent : Tuesday, February 14, 2006 9.25 am
Subject : Re: REQUEST FOR FREIGHT QUOTATION – FCL SERVICES

dear saras

thks for the below reply.

will come back to you asap.

rgds

kayal "

COW3

COW3 sublet the office space for SGV. COW3 told COW1 that the Claimant was spending much time at her son's office.

COW1 under cross examination was asked and answered as follows:-

"Q : Do you believe Mr. Ramanjan when he said that the Claimant had given her son \$10,000 to pay as Share Capital in SGV?

A : No. I don't believe".

In view of this answer, COW3 cannot be taken as a reliable witness.

Nevertheless it is in evidence before this Court that the Claimant visited SGV once a month.

The Claimant herself has said this.

The Claimant's Case

1) The Claimant denied the allegations by the Company that she had diverted business due to the Company, to her son's company, SGV Logistik.

As regards the allegation that she had diverted the request of All Port Logistics she answered as follows in her witness statement CLWS1 in Q and A14:

"14. Q : The Company states that you diverted this request from All Port Logistics to SGV Logistik and that SGV Logistik sent a quotation by fax to All Port Logistics, as attached in 'Company Document 2'. Is this true?

A : No, this is not true because I did not divert any request away from the Company. Further, 'Company Document 2' is unsigned. I find it strange that a quotation is not signed. Further, I believe that a Company like All Port Logistics would have attempted to obtains quotations from more than one Company to secure the best rate."

2) The Claimant's son was called as her witness to give evidence. He testified that Company's Document 2, could not have been from SGV Logistik because it had not been signed. He then also presented CL-7 which is a quotation submitted by his Company to All Port Logistics.

It was also submitted that a perusal of Company Document 1 and CL-6 would indicate that the Company's document could not have been correct.

COW2 has given clear evidence that she had received this document and she has pointed to the fax numbers appearing on the document .

The Court, as stated earlier, found COW2 to be a credible witness, and there was no reason for her to lie about this.

It was suggested that All Port Logistics as a business organisation, could have requested more than 1 supplier for quotations.

Counsel for the Claimant pointed to the fact COW-2 agreed that it is normal for companies to request quotations from more than 1 supplier .

But in this case the Court noted that COW2 was very clear that All Port did not request any quotation from SGV.

It must be also be borne in mind that CLW2 is the Claimant's own son .He is not a neutral or independent witness.

3) The Claimant denied the visit to SGV with the late Kumar.

She answered as follows in her witness statement :

“9. Q : In the Company's Statement in Reply, the Company states that on 15 February 2006, at about 11.30 am, you went to the office of All Port Logistics with one Mr. Kumar of SGV Logistik for a discussion with Ms. Kayal during which you informed her that they should direct all further inquiries on rates to SGV Logistik instead of the Company. Is this true?

A : No, this is not true. I never went to All Port Logistics with the late Mr. Kumar, who was very well known to Ms. Kayal”.

4) In relation to paragraph 7 of the Statement in Reply, the Claimant contends that her dismissal was the result of a conspiracy by the top management and not for any misconduct committed by her and therefore, her dismissal was without just cause and excuse, but was arbitrary, capricious and carried out mala fide.

The Court finds that these were bare allegations made without any basis.

The Claimant was unable to prove anything of this sort.

The Claimant in her witness statement Q and A36 merely states: “ I guess there was a conspiracy..”.

5) The Claimant asserted that from the time she started work in the Company (in May 2005) until 28 Feb 2006, she had contributed to the Company by bringing in profits.

She said that she was responsible for bringing net profits of \$85,198 for the Company. In support of this she referred to 2 documents i.e CL5 A and CL5B. She testified that these were statements prepared by the Company indicating the amount of income and profits that she had brought in for the Company.

In this respect, COW1 , when shown CL5A and CL5B, said that there were 3 entries under the column "cost" where the entry is zero. Therefore the total amount of profits as stated in the documents, according to COW1, is wrong. Also under the "Profit" column the entry is "minus 3612" which means a lost job.

6) The Claimant in her witness statement(CLWS1) testified as follows:-

"The fact that my son is a Director of another Company did not distract me from my commitment to the Company. In fact, I even managed to secure business from SGV Logistik Sdn. Bhd. for the Company. According of the Claimant she had no control over the manner in which her son or any other member of her family sought a living, and that at no time did she hand over the Company's business to her son's Company. The Claimant pointed out that it was on record supported by CL-8 and not disputed by the Company, that her son's company had given business to the Company.

As regards the above it has to be noted that her son started the business of SGV in May 2005 around the time she started work in the Company. Both companies were doing similar business. The Claimant did not disclose her son's involvement in SGV to the Company.

7) As regards the allegation that she was absent from work at the Respondent Company and that she was instead spending time at SGV, she answered in her witness statement as follows:

“Q : The Company also states in its Statement in Reply, that from January 2006, you were frequently absent from the office and spent most of your time at the premises of SGV Logistik Sdn. Bhd. is this true?

A : No, this is a blatant lie. There was no reason for me to be at SGV Logistik because I was heavily involved in promoting my employer's business and the results I produced would indicate so”.

According to the Claimant in May or June 2005, she had visited her son's company only to procure business for the Company. She has also acknowledged visiting SGV once a month.

In the Statement in Reply and COW-1's Witness Statement, it is stated that since January 2006, the Claimant was not in the office most of the time. It was submitted that there was no evidence that her superior COW-1, ever questioned her on her absence. The Claimant contends that as a sales person, she could not have acquired business sitting in the office, and therefore from the time she commenced employment, she had to be out looking for business and servicing clients at the port.

- 8) As regards the assertion by the Company that she had made admissions of her misconduct, this was denied.

The Claimant answered as follows:

"21. Q : In the Company's Statement in Reply, the Company states that at a meeting it had with you on 21 February 2006, you admitted that you had committed misconduct and had breached Company's standards on integrity, ethics, honesty, sincerity, confidence and loyalty by working for and procuring business for SGV Logistik. Is this true?

A : No, this is not true. I do not remember the date of any meeting, but I do remember that the Managing Director of the Company, Philip Sinnappan, once casually asked me whether my son was a director of SGV Logistik."

- 9) It was submitted on behalf of the Claimant that if the Company had actually considered that the Claimant had committed misconduct, it should have at the least given her a show cause letter for her to have explained the allegations.

It was submitted that the Company's attempt through COW-1 to establish that she had been given a chance to explain on 21 February 2006, was not true.

MATTERS NOT PLEADED

The Claimant has raised the issue of the authenticity of the e-mails in COB ,for the first time during the proceedings .It was submitted on behalf of the Claimant that the e-mails in the Company's Bundle were not authentic documents.

The Company's response was that this had not been pleaded in the Statement of Case. Neither was it mentioned in the Rejoinder filed on her behalf.

Furthermore the Rejoinder was filed after the Claimant through her Counsel had the benefit of seeing the Company's Bundle, containing the various e-mails and other documents crucial to this case.

As regards the issue of pleadings, in **Gold Coin Specialities Sdn. Bhd. v Maheswaran a/l Paspanathan** [2004] 3 MLJ 378 at p387 the Court observed that parties are bound by their pleadings and that the Industrial Court can only decide on issues raised in the pleadings ,as follows:

"Most appropriately I am drawn to the authorities of the Federal Court case of **R Rama Chandran v The Industrial Court of Malaysia & Anor** [1997] 1 MLJ 145 which states as follows, at p 178:

"The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgement having strict regard to the issues...The object of pleadings is to determine what are the issues and to narrow the area of conflict...The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider."

The Rejoinder filed by the Claimant on 19th July 2008 makes no mention at all that the e-mails (which are in the Company's Bundle filed in 2007), were not authentic.

It is to be noted that the allegations of concoction of e-mails or documents is not specifically mentioned in the pleadings. These are indeed serious allegations. Yet the Pleadings were silent on this. Hence it came as a surprise during the trial, clearly showing that it was an afterthought.

In any case the Claimant later acknowledged receiving the e-mail dated 13th February, time 10.44 am, which was earlier alleged to be concocted .The Claimant has not been consistent. In her Witness Statement she seems to say that she did not receive the e-mail of 10.44am.Then in cross examination she acknowledged that she had received it but tried to give some excuse as to why she did not respond.

The Issue of Conflict of Interest

1) The Claimant testified that her son started the business of SGV Logistik sometime in May 2005. It has to be noted that she herself started work in the Company effective May 2005.

The Claimant acknowledged that her son was a director of SGV Logistik at the material time. She denied however that this would mean a conflict of interest. She also denied that she had diverted a request for rates from All Port to SGV.

It is not disputed that SGV and the Company were in the same business.

The Court noted that the Claimant had also joined the Respondent Company in May 2005. Hence it appears that her son started the said business around about the time the Claimant joined the Respondent Company.

The Company in its Statement of Reply (SIR) asserted that the Claimant had failed to disclose that her son was a Director and shareholder of SGV.

The Claimant acknowledged that she did not inform the Company of this. (See however the stand taken by the Claimant in the Statement of Case, where it was asserted that the Company was aware of it).

Her explanation for non-disclosure was as follows:

- a) Firstly that there was no necessity for her to inform the Company of this.
- b) Secondly that the Company had never asked what business her family members were involved in.

In this respect it is pertinent to note that there is an express clause in the Letter of Appointment dated 30th April 2005 containing the following provision:-

- "1. **Clause 4 – During the term of employment with FSL, you are not allowed to be employed by any other Company or offer your services with or without pay to any person, legal entity or public authority or to be occupied in your business without the prior written permission of FSL. Additionally, you may not act in any way that either conflicts with your duties and obligations to FSL or is contrary to the policies or the interest of FSL.**

2. Notwithstanding the foregoing, you will not be entitled to notice or termination compensation if your employment is terminated on the grounds of willful neglect, breach of trust, or any other serious dereliction of duty which are prejudiced to the interests of FSL, or if any declaration given or information provided to FSL proves to be false or you are found to have wilfully suppressed any information from FSL.”

It is clear from the above that there was an express term in her contract of employment covering this area. It was submitted therefore on behalf of the Company that the Claimant would clearly be aware that she was acting in conflict of interest of the Company.

THE LAW ON CONFLICT OF INTEREST

The Company referred to the express term in the contract of employment i.e Clause 4. In addition to this express term in the Claimant's letter of employment, it was submitted that it is also an implied term in a contract of employment that an employee will serve the employer with fidelity and in good faith and that there is just cause or excuse to dismiss an employee for breach of these terms.

The following cases were submitted in support of this principle:

- (i) Syarikat Nam Lee Sdn. Bhd v Kok Kiow (Award 237 of 1985)
- (ii) Penging Tex Sdn. Bhd. V Textile & Garment Industry Employees Union Penang & Prai (Award 240 of 1982)

- (iii) Yong Koeh v Warner – Lambert Sdn. Bhd. (Award 240 of 1982).
- (iv) Schmidt Scientific Sdn. Bhd. V Ong Han Suan [1997] 5 MLJ 632.
- (v) Malayan Banking Berhad v Basarudin Ahmad Khan [2005] 1 MLJ 210.

In **Syarikat Nam Lee Sdn. Bhd. Kelang v Kok Kiow** [1985] ILR December p827:

“The Counsel for the Company submitted that the Company had just cause or excuse to dismiss the Claimant because of the Claimant's breach of fidelity and good faith. To support his view he cited “Chitty on Contracts” 25th Edition, Volume II. At page 663 under the heading 'Duty of fidelity' it reads:

“It is another implied term in contract of employment that the employee will serve the employer with fidelity and in good faith. Thus an employee, during his period of employment, may not solicit the customers of his employer to transfer their custom to him after he has left the employment; nor may he solicit orders from the employer's customers or suppliers, or otherwise deal with them, on his own behalf rather than his employer's behalf.....”

The Court went on to observe:

“While on this subject, he quoted another case: “Thomas Marshall (exports) Ltd v Guinle and Others (1978) ICR 905.” This was a judgement of the Chancery Division. The relevant passage is at page 922 and it reads:

“.....It is impossible to deny that the defendant has been guilty of gross and repeated breaches of his implied obligation to be faithful to the Company. While still in office as

managing director of the Company he travelled abroad, ostensibly on the Company's business, and without the Company's business and without the Company's knowledge placed orders for the benefit of himself and his companies with the Company's suppliers. He also, while still managing director and without the Company's knowledge, sold goods for the benefit of himself and his companies to customers of the Company. In the Boston case 39 Ch.D.339, the receipt by the managing director of what may have been a single secret commission was said in the Court of Appeal to be dishonest and a fraud. I can apply no milder description to the defendant's prolonged duplicity....."

And further:

"Is there no remedy for this type of situation, in which there is clear evidence that the Claimant had carried out business in competition of the Claimant's employer and if there is no remedy then it will be contrary to Section 30(5) of the Industrial Relations Act, 1967 and it reads:

"The Court shall act according to equity, good conscience and the merits of the case....."

The Court went on to conclude:-

"There is ample evidence against the Claimant that he had transacted in business in competition of his employer in that same nature of goods and to the same customer of the employer".

In **Schmidt Scientific Sdn. Bhd. v Ong Han Suan** [1997] 5 MLJ 644 the High Court dealing with the issue of Breach of duty of fidelity and good faith, observed:

“The plaintiff contended that the defendants had breached their duty of fidelity and good faith while in the employment of the plaintiff by taking away and making copies of the confidential information and/or trade secrets of the plaintiff. I find that this duty of good faith or fidelity does not just require that the employee refrains from misuse or from disclosing information whilst still in the employment of the plaintiff. To my mind, there is also an implied duty that prohibits the employee from using any confidential information obtained during his employment without the employer's consent for his own or someone else's use after the employment contract ends. Thus, it is a breach of the fidelity clause and the implied duty to remove a customer list or to deliberately set out to memorize the said list with the intention of using it later, even though any use or disclosure is confined to the post-employment period. In such a case, the eventual exploitation of the information is considered to be no more than an extension of the original breach of good faith and fidelity. In **Rabb v Green** [1895] 2 QB 315, the Court of Appeal held that the employee was in breach of an implied term of the contract of service in making copies of his employer's list of customers named and address, with the intention of using it for the purpose of soliciting orders from them after he had left his employers' service and set up a similar business on his own account.

Lord Esher MR said at pp 316 and 317:

“The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which

the defendant owed to his employer to act towards him with good faith. I think the judge was perfectly justified in holding that such conduct was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the Court can imply a stipulation that the servant will act with good faith towards his master. In this case, it is said that the contract of service was in writing; but there is nothing in the express terms of the contract that contradicts such an implication. I think that in a contract service the Court must imply such a stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract".

Applying these principles to our case, the contract of employment at Clause 4 of the Letter of Appointment makes it an express term. It is also to be implied.

B.R Ghaiye in his text **Misconduct in Employment** Chapter XIX at pages 650 & 651 states:-

"1. The servant stands in a fiduciary relation

The relation between an employer and an employee is of fiduciary character. The word "fiduciary" means belonging to trust or trusteeship. It means that whenever an employee engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer. A fiduciary relationship exists between employer and employed: (a) whenever the former entrusts the latter with property, tangible or intangible, e.g, confidential information and relies upon the

other to deal with such property for the benefit of the employer, or for purposes authorized by him, and not otherwise, (b) whenever the employer entrusts the employee with a task to be performed e.g, the negotiation of a contract, and relies on the servant or agent to procure the best terms available. If the employee does an act which is inconsistent with the fiduciary relationship, then that will be an act of bad faith for which his services can be terminated. The said obligation is an implied obligation, i.e an obligation attached to every contract of service even when there is no express mention in the contract. The obligation to serve his master with good faith and fidelity arises out of necessary implication which is deemed to be engrafted on each and every contract of service. This implied condition is recognized on account of realization of the need of full confidence between the employee and the employer and this implied condition continues even after an employee has left the service. If an employee continues in service, then one of the obvious remedies for breach of faith is to dismiss him.

2. **What is meant by the words "implied conditions of fidelity"?**

The implied condition of fidelity may involve a number of requirements on the employee. It requires him to act in a faithful manner and not to place himself in a position where his interest conflicts with his duties. He is also prohibited from making any secret profit or derive any advantage from the employment or from customers or constituents of his employer. He is also required to render full accounts for the moneys and articles entrusted to him by the employer. He is further required not to do anything which may injure the interest of his master. **He is debarred from being**

associated with competitive business or putting up any title which is adverse to the title of the employer. If he does any of the above acts that will be inconsistent with the contract of employment and as such will be an **act of misconduct.**”

In **Soil Dynamics (M) Sdn. Bhd. v Yong Fui Kiew** [2005] 2 ILR 817 the learned Chairman, Datin Siti Saleha Abu Bakar (now Dato'), drew reference to B.R. Ghaiye's passage above and found at page 830:-

'...the relationship between an employer and an employee is of a fiduciary character and if the employee does an act which is inconsistent with the fiduciary relationship then it will be an act of bad faith for which his services can be terminated. In the case of **Stamford College v Loi Fook Seng** [1994] 2 ILR 679 (Award No. 357 of 1994), the Court succinctly stated as follows:

“It is well established that a contract of employment is a contract of confidence and trust. Sometimes it is called a contract of fidelity. What it means is that the employee must not place himself in a position where his interest conflicts with the interest of his employer. Some contracts make such provisions. However it is equally established in law that such term is implied in a contract of employment.”

The law and authorities are clear in that placing oneself in a conflict of interest situation is a serious misconduct which warrants nothing less than the punishment of dismissal.'

Decision

The Court has carefully and meticulously considered and evaluated the totality of the evidence before it on a balance of probabilities, bearing in mind s30(5) of the IRA 1967. Having considered and evaluated all the facts, the totality of the evidence both oral and documentary and the submissions, being guided by the principles of equity and good conscience and the substantial merits of the case, without regard to technicalities and legal form, this Court comes to the conclusion that the employer had reasonable grounds for believing that the Claimant had acted in conflict of interest.

The employer had acted reasonably in thinking that the employee had committed the said misconduct. The Court is satisfied that the Company has proven its case on a balance of probabilities.

Whether There Was Sufficient Cause Or Excuse For Dismissal

This brings us to the second limb of the **Milan Auto** case i.e. whether the proven misconduct constitutes just cause or excuse for dismissal. In other words having considered the facts and circumstances of our case and the proven misconduct, whether dismissal was appropriate or was it too harsh a punishment. The Court finds that dismissal was appropriate in this case.

The law and authorities are clear that placing oneself in a conflict of interest situation is a serious misconduct which warrants nothing less than the punishment of dismissal.

In our case on the facts, the Company was clearly justified in dismissing the Claimant.

This Court finds that the Company dismissed the Claimant with just cause and excuse.

As such this claim is dismissed.

HANDED DOWN AND DATED 23RD JULY THIS 2010

**(YAMUNA MENON)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**