

INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 3/4-656/18

BETWEEN

REUBEN ROZARIO A/L STANLEY

AND

RALCO PLASTIC SDN. BHD.

AWARD NO. : 583 OF 2019

Before : PUAN ANNA NG FUI CHOO - Chairman
(Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 19.2.2018

Dates of Mention : 13.4.2018, 27.4.2018, 25.5.2018, 27.6.2018,
20.8.2018

Date of Hearing : 3.9.2018

Company's Written Submission : 16.10.2018

Claimant's Written Submission : 30.10.2018

Written Submission : 15.11.2018
in Reply by the
Company

Written Submission in Reply by the Claimant : The Claimant's representative informed the Court through letter dated 28.11.2018 that there is no written submission in reply.

Representation : Mr. A. Sivananthan
From Malaysian Trades Union Congress
Representative for the Claimant

Miss San Peggy
From YC Pang, Chong & Gordon
Counsel for the Company

Reference

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **Reuben Rozario a/l Stanley** (hereinafter referred to as “the Claimant”) by **Ralco Plastic Sdn. Bhd.** (hereinafter referred to as “the Company”) on 2 August 2017.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 2 August 2017.

Facts

[2] The Claimant commenced employment with Ralco Plastic Sdn Bhd (the Company) and he was sent to be based in a plant in Telok Gong as the Plant Manager of a company called Ralco Respack Polybag Sdn Bhd. The Company is the holding company, holding 60%

shares in Ralco Respack Polybag Sdn Bhd. Ralco Respack Polybag Sdn Bhd is a joint venture between the Company and Respack Manufacturing Sdn. Bhd which is based in Sungai Petani, Kedah.

[3] The Claimant commenced employment with the Company on 17 October 2016 and he was given a letter of appointment containing the terms and conditions of employment. At the time of the termination of his service, the Claimant's salary was RM6,000.00 per month. The Claimant was a probationer and *vide* the Company's letter dated 25 July 2017, the Company informed the Claimant that he was not confirmed in his position, citing the reason that he was found to be not suitable. The Claimant was given one (1) week's notice, thus terminating his service with effect from 2 August 2017.

The Duty of the Industrial Court

[4] The Claimant was not confirmed in his employment so he remained a probationer. Nevertheless, the court would like to reiterate that industrial jurisprudence recognises any act which has the effect of bringing a contract of employment to an end as a 'dismissal' within section 20 of the Act. In the often cited case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd* [1988] 1 CLJ (Rep) 298 at page 302, the duty of the Industrial Court was stated by his Lordship Salleh Abbas LP:

“When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.”.

The Claimant's Status as a Probationer

[5] The Claimant was a probationer whose service with the Company was terminated because the Company found that he was not suitable for confirmation of employment. The Court of Appeal decided in the case in *Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd* [1997] 3 CLJ 827 that an employee on probation enjoys the same rights as a permanent or confirmed employee and the probationer's services cannot be terminated without just cause or excuse. His Lordship Shaik Daud Ismail JCA at page 831 expressed:

“It is our view that an employee on probation enjoys the same right as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of *bona fide* 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 as a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal.”.

The Hearing

[6] Only two witnesses gave their testimony before this court. The Claimant testified for his own case while the Company only called one witness, Mr. Lim Tuan Hoe (COW1) who was the Group Operation Manager of the Company with effect from February 2017. Before that, he was the Costing and Procurement Manager in Respack Polybag. The Claimant did not dispute that COW1 was the Claimant's immediate superior from the day he commenced employment with the Company

until his dismissal.

[7] COW1 was promoted to the position of Group Operation Manager in February 2017 to oversee, supervise and monitor the production of blow films, the only product produced and manufactured in the Teluk Gong Plant, Pandaraman, Selangor. The Claimant was at all material times responsible to report to COW1 in relation to production matters which included the arrival of raw materials, machine planning to run orders, checking and compliance of products' specifications, quality control, productivity and output.

[8] According to COW1, the Claimant had represented himself to have substantial experience in production management during his job application. Hence, the Claimant was appointed as the Plant Manager to be responsible for the whole operation including the quality control and assurance of the products known as "3M", that is Machine, Manpower and Material planning. His duties and responsibilities were primarily to ensure that the products adhered to a defined set of quality criteria or met the requirements of customers in accordance with the Production Specification Sheet.

[9] COW1 testified that there were multiple complaints made of the Claimant's quality of work in the Non-Conformance Reports (NCR), whereby the Claimant was solely responsible for the Plant at all material times. Numerous complaints were also highlighted and made known to the Claimant via emails by the internal regulatory team for his urgent attention. However, despite the numerous oral reminders, emails and opportunities for the Claimant to attend to them and to make the

necessary corrective measures, the Claimant had failed and/or refused and/or neglected to improve his work performance.

[10] It was further alleged that it was the Claimant's disobedience of orders in carrying out the inspection of the goods for strict compliance and conformance that resulted in the unceasing complaints against the Company during his tenure of employment. Moreover, the Claimant's ineptitude and inefficiency in the production management as evident in his lackadaisical attitude in replying emails, answering phone calls and unchanging attitude at work had led the Company to believe that there was more than a sufficient basis that the Claimant was not fit to be confirmed. The Company took issue that the Claimant often delayed and had taken weeks to reply on the NCR and the same quality issues recurred without any improvements from the Claimant's side.

[11] COW1 further said it was the Claimant's responsibilities to ensure that the products' quality met the customer requirements. In addition, the Claimant was the sole and only responsible person to control, monitor and maintain the quality of the products. However, he had failed to test, inspect, examine the output against the specification resulting in various quality non-conformance and defects.

[12] COW1 also explained that when the previous General Manager left in January 2017, there was a transition from the previous management to the current management. The Executive Director of the Company, one Ms. Lim Chiew Yin (ED) and COW1 then interviewed the Claimant on his unsatisfactory performance. Nevertheless, they gave him a second chance after he had given the assurance that he would

make the necessary improvements. COW1 said warnings had also been given during the interview wherein the Claimant acknowledged that the complaints were due to his inefficiency and incompetence but the Claimant had promised to improve on his performance. The Company also sent the Claimant for a two-day training in Respack Manufacturing. The training was conducted by a Manager who has over 10 years of manufacturing experiences to brush up on quality regulations and operation procedures. Respack Manufacturing also sent their team including the trainer Mr. Thiagu to give a one day intensive training to the Claimant and his team in the Teluk Gong Plant.

[13] In the Claimant's testimony, he told the court that the probation period stated in his letter of appointment was six (6) months. However, he worked for almost 10 months without any extension of the probation period either verbally or in writing. He also denied that he was ever given a job description as Production Manager. The Claimant said he was employed by the Company after he had attended an interview conducted by the former General Manager, one Mr. Fernandez. The Claimant claimed that he had told Mr. Fernandez that the plastic industry was new to him as he had worked in a non plastic production industry before. The Claimant alleged that he was told that the technical know how and production machinery process training would be provided by Respack Manufacturing Sdn Bhd.

[14] The Claimant further testified that Respack Manufacturing Sdn Bhd based in Sungai Petani provided orders and raw materials for the Company in the Telok Gong Plant to run the production process and to deliver the product to Respack Manufacturing Sdn Bhd which conducted

the final quality check and then ship them to customers. Whenever there was a defect, an NCR would be raised for them to take remedial action. In short, the Claimant explained that they had to follow what was required by Respack Manufacturing Sdn Bhd. The Claimant also alleged that he was never given any training, which was the responsibility of Respack Manufacturing Sdn Bhd to provide.

Evaluation of Evidence and Findings

[15] The main complaint of the Claimant was that after serving the Company for six months, he was never informed that his probationary period was to be extended. The salient conditions of the Claimant's Letter of Appointment dated 8 October 2016 found at pages 120 and 121 of COB are as follows:

“2. You will be employed on probation basis for a period of six (6) months from the date of your assumption of duty, which may, at the discretion of the Company, be extended for not more than six (6) months by notice in writing.

3. The period of probation or any extension thereof is solely for the purpose of enabling the Company to determine whether you are suitable in all or any aspect for confirmation in your appointment. If by the date of expiry of your period of probation or any extension thereof your appointment has still not been confirmed by the Company your employment shall then cease as of the date of expiry of the probationary period or extension thereof.

4. At any time during the probationary period or extension thereof if the Company is of the view that you were found not suitable for confirmation, may then terminate the appointment by giving you one week (1) notice in writing. Similarly, you may terminate the employment with us by giving one week (1) of written notice during the period of probation or extension thereof.”

[16] The Federal Court in the cases of *K C Mathews v. Kumpulan Guthrie Sdn Bhd* [1981] CLJ (Rep) 62 and *V. Subramaniam & Ors v. Craigielea Estate* [1982] 1 MLJ 317 accepted the position of a probationer as set out by the Indian Supreme Court in the case of *Express Newspaper Ltd v. Labour Court and Anor* AIR [1964] AIR SC 806 where Das Gupta J. held:

“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 grounds 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...”.

[17] It was not disputed that the Claimant was never given a notice in writing for the extension of his probation period. Nevertheless, the Claimant had remained in his employment as a probationer and there was no evidence adduced that he had made an issue that he was not given a written notice for the extension. It is clear from the decisions in the cases of *K C Mathews v. Kumpulan Guthrie Sdn Bhd* and *V. Subramaniam & Ors v. Craigielea Estate supra* that the Claimant remained a probationer as he was not confirmed in his employment. The requirement for the written notice to be given should there be any extension was merely procedural.

[18] In the case of *Equatorial Timber Moulding v. Michael Crosskey* [1986] 1 ILR 1666, the learned Chairman describes the legal character of probationary employment and the respective rights and obligations of the employee and employer. The learned Chairman propounded:

“Being a probationer, he has no substantive right to the post. He holds no lien on the post. He is on trial to prove his fitness for the post for which he offers his service. His character, suitability and capacity as an employee is to be tested during the probationary period and his employment on probation comes to an end if during or at the end of the probationary period he is found to be unsuitable and his employer can terminate his probation by virtue or otherwise as provided in the terms of the appointment ... Also there is an abundance of authorities to support the view that an employer has a contractual right to terminate the services of a probationer without notice and without assigning any reasons whatsoever. And no enquiry need to be held for such purpose, for

termination of service of the probationer during the probationary period is not punishment or dismissal but simply of termination. However, when the validity of such a termination is challenged, the court must be satisfied that such termination was a *bone fide* exercise of the power conferred by the contract. And when there is suspicion of unfair labour practice, then the court will not hesitate to interfere with the termination and the employee should be afforded proper relief.”.

[19] The Claimant confirmed during cross-examination that the description of his job functions included the handling of the daily operations of the plant on workers, machinery and planning of production runs and more specifically, on the qualitative and quantitative internal check and compliance of the products before and after the delivery of the products to Respack Manufacturing. COW1 earlier on had described the Claimant's responsibilities. Though the Claimant alleged that he was not given a job description, it is also clear to the court that he knew what his duties were as a Production Manager.

[20] COW1 during cross-examination explained to the court the usual procedure in dealing with the NCR raised. He confirmed that it was for the Claimant to act upon them and to resolve the complaints by preventing the re-occurrence of the NCR raised against Respack Manufacturing. Notwithstanding, the Claimant did raise some concerns on the material issues and had replied to some of NCRs raised. However, the sore point was that the complaints were not wholly resolved and that was evident in the drastic drop of the Company's sales arising from the rejection of the defective goods.

[21] The court does not doubt the fact that the Claimant was aware of what was required of him in the carrying out of his role as a plant manager. The Claimant had many years of experience as a production manager although it was not in the plastic industry. The frustration of the Company and expressed by COW1 was that the Claimant had performed below par when there were no reasonable efforts and/or due diligence were made in maintaining the product quality and rectifying the defects of the products. Consequently, that had resulted in repeated NCR against Ralco Manufacturing for the non-conformance in product quality. Subsequently, this had caused the loss of the Company's revenue and the Company had to shut down its operation and change its management company.

[22] It is apparent that the Company's expectations of the Claimant had gone far beyond than doing the minimal and the effort had to come from the Claimant in resolving the root cause of the complaints. What the Claimant was obviously doing was merely replying and/or attended to the NCRs after being pushed by COW1. The Claimant had a role to play whereby he was expected to maintain and regulate the quality control to ensure the smooth running of the production to meet customers' satisfaction. What the Claimant was seen to be doing was merely executing the tasks or requests, resulting in repeated NCR with no improvement.

[23] COW testified that he together with the Executive Director of the Company had initiated a second interview/review session with the Claimant to warn the Claimant on his unsatisfactory performance. This was after the other General Manager had left the Company. In view of

the multiple NCR and the meeting with them, the Claimant had been made aware of his unsatisfactory performance. There were also many emails sent to the Claimant on the products so it was the Claimant's afterthought to raise the issue that he had not been warned before the termination of his employment.

[24] The Company also insisted that the Claimant had been sent for training in the plant in Sungai Petani which had been conducted by a Manager in Respack Manufacturing, which was to go over the quality regulations and operation procedures. Notwithstanding, during cross-examination the Claimant disputed the fact that there was any training conducted. However, he admitted that he had visited the plant on two separate occasions. It is clear to the court that the purpose of the visits were not social visits but an educational tour or visit to Ralco Manufacturing in Sungai Petani as highlighted by the Company. AS COW1 had stressed, it was part of the Claimant's training on the production process and to equip the Claimant with the necessary knowledge and skills on the quality test, machine controls and productivity output. Therefore, this is consistent with COW1's statement that there was indeed a practical training carried out in the two "visits".

[25] The Claimant had at least six years experience as an Operation/Production Manager. The position he was holding was a senior post and he only reported to COW1. With his years of experience and the senior position he was holding, the need for warning and an opportunity for improvement is less apparent – *James v. Waltham* [1973] ICR 398. The fact that the Company had retained him for more than six

months as a probationer reinforces the Company's case that the Claimant was given the opportunity to improve on his performance.

Decision

[26] The Claimant did not file any documents in this case while the Company introduced a bundle of documents (COB) when it filed its Statement in Reply (SIR). The Claimant was a probationer and it was for him to prove to the Company that he was fit for the position for which he had offered his service. From the totality of the evidence adduced, the court finds that there was basis for the Company to terminate the Claimant's services as he was found not suitable for the confirmation of employment. This is despite the fact that the Company after filing its bundle of documents had not called the makers of the NCR and emails to substantiate the allegations against the Claimant. Nevertheless, the Claimant had not disputed the contents of those documents.

[27] The Court of Appeal in *Khaliah's case supra* does not expound the substantive law pertaining to a probationer but relates to the specific question that if a probationer is to be terminated, it should be within the general purview of section 20(3) of the Act in that it should not be without just cause or excuse. It was conditional for the probationer like the Claimant to perform his functions to the satisfaction of the Company. The failure to do so had rendered the probationer's non confirmation leading to the termination of his employment. Nevertheless, the Company's decision must not be capricious or arbitrary.

[28] The Claimant did not adduce any evidence to show that he had been victimised or that he had been subjected to any unfair labour

practice. The court holds the view that the Company was justified in terminating the Claimant's employment without confirming him. The non confirmation of the Claimant was therefore with just cause or excuse. Accordingly, the Claimant's claim is dismissed.

[29] In arriving at this decision, the court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under section 30 (5) of the Act.

HANDED DOWN AND DATED THIS 15 DAY OF FEBRUARY 2019



**(ANNA NG FUI CHOO)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**